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Enforcing Federal Rights: The Law of Section 1983

(Part 2)

by Robert P. Capistrano

[Editor's note: This is a two-part article on Section 1983. The first part, published in the preceding issue of CLEARINGHOUSE REVIEW, examined the principal U.S. Supreme Court decisions construing 42 U.S.C. § 1983 and described the basic elements of the claim. The second part, below, continues to examine the relevant U.S. Supreme Court decisions in its review of claims brought under the due process clause of the Fourteenth Amendment, procedural issues in bringing a Section 1983 claim, and available remedies and defenses.]

In this part 2 I continue to give the legal services lawyer an overview of the principal U.S. Supreme Court decisions construing 42 U.S.C. § 1983—one of the most important tools to help an individual client enforce federal rights against state and local governments.¹

I. Due Process Claims and Section 1983

The Fourteenth Amendment in relevant part prohibits any state from depriving "any person of life, liberty, or property, without due process of law." Due process has two aspects: "procedural" and "substantive." The former is self-evident, addressing the right to notice and hearing before (or after) particular deprivations can take place. Substantive due process doctrine is, on the other hand, more abstruse, probing the reasons and methods of a governmental deprivation of life, liberty, or property and seeking to redress particularly outrageous governmental invasions of these interests. The use of Section 1983 as the workhorse of federal civil rights litigation has prompted the Supreme Court to develop limitations on the use of this remedy to advance claims founded on an alleged deprivation of rights protected by the due process clause.

A. Procedural Due Process

Challenges to the failure of government agencies to provide procedural due process to recipients of government benefits have been a staple of Section 1983 legal services practice. Much of this litigation has assumed the existence of property or liberty interests. For this reason, recapitulating the parameters of each of these terms under the Supreme Court's due process decisions may be useful.

¹I would like to thank Gill Deford, Deborah Perluss, Brian Lawlor, and Gary Smith for reading and critiquing this article, and Julie Balovich for researching particular issues and editing the final draft. While the Supreme Court has set the overall framework for Section 1983 litigation, the circuit courts of appeals primarily have fine-tuned the doctrine. Space considerations preclude any in-depth exploration in this article of the decisions of the appellate courts.

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1. Establishing a "Property" Interest

Rejecting the old "rights/privileges" dichotomy often used to justify not affording due process to persons denied or terminated from government jobs or benefits, the Court in Board of Regents v. Roth defined the property interest protected by the Fourteenth Amendment as a "legitimate claim of entitlement" to the item or benefit in question. Such "entitlements" are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Plaintiff Roth, a teacher who had lost his job, was held not to have been terminated without due process because, lacking tenure, he "surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require . . . giving him a hearing . . . ." In Perry v. Sindermann, the companion case to Roth, the Court stated that an untenured teacher might nevertheless have a property interest if he could show "such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at the hearing." Although due process does not protect "a mere 'expectancy,'" the aggrieved party "must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of the 'policies and practices of the institution.'"

Given Congress' reluctance to grant federal entitlements evidenced by the increasing use of "block grant" distribution of federal largesse, advocates seeking to establish a property interest in certain federally funded benefits such as Temporary Assistance for Needy Families must look for "rules or mutual understandings" in state or local statutes or ordinances under which the client may claim an entitlement protected from deprivation by the federal due process clause. For example, many state welfare statutes were amended to conform to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Yet, despite the addition of time limits or a "welfare to work" requirement, the state statute may still mandate that an applicant receive a given amount of benefits so long as basic eligibility is met, thereby creating a "legitimate claim of entitlement" protected by the due process clause.

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2 Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
3 Id. at 577.
4 Id. at 578.
6 Id. at 602-3 (citation omitted). Some cases hold that the expectation of receiving a benefit can be a property interest which justifies a due process claim when the state deprives the potential plaintiff of a procedure to vindicate that expectation. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court found a property interest in the expectation that the state would provide a procedure to determine a plaintiff's disability discrimination claim. Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982) (Clearghouse No. 25,595), held that applicants on a Section 8 waiting list had a property interest in the fair operation of a subsidized housing project's application and tenant selection procedures. (But see, e.g., Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984) (Clearghouse No. 32,097). Eidson does not seem consistent with Logan.) Note, however, that in American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (Clearghouse No. 51,920), the Court found that workers' compensation recipients would not have a property interest in medical expense payments until the reasonableness and necessity of the expense had been established.
7 See my Enforcing Federal Rights: the Law of Section 1983 (Part 1), 33 CLAERINGHOUSE REV. 217, 222 n.22 (Sept.–Oct. 1999). Ironically the refusal to grant "entitlement" status to these benefits recalls the supposedly dead "rights/privileges" dichotomy under which the receipt of a particular benefit is a privilege which government can revoke at any time. However, this means only that the property right must be anchored in the state law creating eligibility, and not in the federal statute creating the block grant program. See also Nancy Morawetz, A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era, 30 CLEARGHOUSE REV. 97 (June 1996).
2. Establishing a “Liberty” Interest

The liberty interest protected by the due process clause was described in Board of Regents v. Roth as follows:

Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.9

Fundamental liberty interests, however, are limited to those which are “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if [they] were sacrificed” or are “deeply rooted in this Nation’s history and tradition.”10 Legal services advocates should not neglect assertions of the liberty interest.

For example, many housing authorities assert a right to approve the family composition of a public housing or Section 8 unit. Yet a housing authority’s arbitrary denial of the right of family members to live with close relatives can result in the deprivation—in violation of due process—of a liberty interest: “family values.”11 Consider, for example, a Section 8 certificate holder family that has taken in a grandmother who has just suffered a stroke. The housing authority’s attempt to evict the family for permitting an “unauthorized occupant” to live in the unit without the agency’s prior consent squarely presents the deprivation of a liberty interest without substantive due process since the family members’ recourse is either to abandon their grandmother or to give up their government benefit.

3. Gauging the Adequacy of Procedures Used

Procedural due process generally requires that governmental deprivations of life, liberty, or property be accompanied by notice and hearing. Pretermination hearings are required where the threatened property right consists of need-based benefits conferred because the recipient or applicant “may be deprived[d] of the very means by which to live ....”12 The test for determining the extent of the procedures, including the right to a pre-deprivation hearing, required in a given case is to balance three factors:

9 Board of Regents, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
11 See Moore, 431 U.S. at 494.
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{13}

Procedural due process continues to play a key role, as legal services clients continue to bring in notices of action which fail to explain adequately the basis for a benefit denial, termination, or suspension or the imposition of sanctions. Clients on the administrative agency treadmill often face hearing officers who fail to take evidence or gather evidence outside of a hearing through ex parte phone calls or who do not adequately explain their reasoning when rendering a decision. In the brave new world of devolution, health maintenance organizations with Medicaid enrollees may not offer the opportunity for a fair hearing, for example, to contest the denial of a request for a particular procedure or treatment whose only rationale is the financial bottom line.

Deprivations of procedural due process such as the ones described are often systemic. However, the plaintiff may be unable to obtain programwide relief in federal court because Legal Services Corporation-funded programs are prohibited from filing class actions and because the threat of a subsequent loss of these rights is not so immediate as to warrant an injunction. Nevertheless, the plaintiff is entitled to at least nominal damages, permitting a federal court litigant to survive a mootness challenge to a parallel claim for injunctive relief and to attempt to seek a declaratory judgment.\textsuperscript{14}

At minimum, raising a nominal damage claim in conjunction with seeking declaratory relief can serve to open negotiations over systemic relief.

4. Random versus Systemic Deprivation of Life, Liberty, or Property Interest

Given the breadth of the due process clause, any government action which deprives a party of life, liberty, or property is conceivably actionable under Section 1983. The Supreme Court, however, has narrowed the availability of this vehicle. \textit{Parratt v. Taylor} held that a Section 1983 remedy was not available to an inmate who sued a prison for its negligent loss of a hobby kit mailed to the plaintiff.\textsuperscript{15}

The Supreme Court barred the prisoner from suing for the deprivation of procedural due process if an alternative post-deprivation state damages remedy sounding in tort was available. The tort suit would be an adequate remedy under the due process clause since the state could

\textsuperscript{13} Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (Clearinghouse No. 11,466). Applying this test in the social security context, the court ruled that a pretermination hearing was not necessary. First, the Court said that the private interest in receiving insurance-based benefits (social security disability insurance) was not as great as the interest in receiving need-based benefits (such as Supplemental Security Income or Aid to Families with Dependent Children). Second, social security's reliance on objective medical reports and records in determining whether one was no longer disabled allayed the risk of an erroneous deprivation, a risk that delaying the termination of benefits until after an administrative hearing had been conducted would not significantly affect. Given the government's interest in not paying those who are no longer disabled and the Social Security Administration's reliance on medical documentation rather than testimony, the Court found that this interest outweighed the benefits of requiring pretermination hearings. Note that under \textit{Cleveland Board of Education v. Loudermill}, 470 U.S. 532, 541 (1985), \textit{Mathews} is still the standard for judging an ordinance or statute setting forth a given procedure for weighing government's justification for interfering with a property or liberty interest. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.


not be expected to anticipate a random and unpredictable loss of property.\textsuperscript{16}

In contrast, in \textit{Zinermon v. Burch}, involving a plaintiff who had voluntarily committed himself to a state mental institution but later sued arguing that he lacked the capacity to have consented to his commitment, the Court ruled that government’s failure to provide a precommitment hearing required by state law was actionable under Section 1983.\textsuperscript{17} The court found that, unlike the unpredictable and random loss in \textit{Parratt}, deprivation of liberty of a person facing commitment was “predictable and systemic” in the sense that the danger of an unwarranted loss of liberty was evident in all cases which posed the potential for commitment. Hence the possibility of postcommitment relief—a tort suit for damages or habeas corpus—was not an adequate postdeprivation remedy that could substitute for the failure to hold a precommitment hearing.\textsuperscript{18}

These principles can be applied to a legal services practice. Assume that a tenant has sought your help after having been evicted from her apartment following a nuisance abatement proceeding, notice of which was given only to the building owner and not to the tenants. In response to your due process claim, the city relies on \textit{Parratt} to argue that your client’s only remedy is damages, and that since no administrative claim was made to the city, the suit should be dismissed. \textit{Zinermon} would come to your rescue since the deprivation of a tenancy without due process is the inevitable and systemic result of a nuisance abatement proceeding in which notice is never given affected tenants. And since the exhaustion of state remedies is not required for Section 1983 claims, this suit should survive despite the failure to file an administrative claim, even if the action were brought in state court.

\textbf{B. Substantive Due Process Claims}

The typical substantive due process claim brought under Section 1983 seeks redress for government acts which violate “fundamental”—that is, “implicit in the concept of ordered liberty”—“personal immunities.”\textsuperscript{19} Rights protected at least in part by the due process clause include liberty interests, such as the right to privacy, not explicitly set forth in the

\textsuperscript{16} The Court later ruled that Section 1983 was unavailable to redress an intentional property loss framed as a deprivation of due process. Hudson v. Palmer, 468 U.S. 517 (1984) (intentional but random destruction of property during prison cell search). Still later it held that there could never be a negligent random deprivation of due process, even if state law provided no postdeprivation remedy. Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986). In these cases, reflecting the Court's antipathy to prisoner suits, the Court denied injured prisoners a federal remedy even though state law barred them from suing the prison for negligence.

\textsuperscript{17} Zinermon v. Burch, 494 U.S. 113 (1990). \textit{Zinermon} also held that the \textit{Parratt v. Taylor} rule (that Section 1983 is unavailable to redress random unauthorized deprivations of due process) applied to deprivations of liberty as well as property interests but could not be used to bar claims based on the deprivation of other substantive constitutional rights.

\textsuperscript{18} The Court revisited the \textit{Parratt} doctrine, albeit in passing, in \textit{College Savings Bank v. Florida Prepaid}, 119 S. Ct. 2219 (1999), holding that the Eleventh Amendment was a bar to a suit in federal court seeking damages for the state's alleged infringement of a property—property right protected by due process. Noting that recent amendments to the patent statute permitting suits against states had been adopted pursuant to Congress' power to enforce the Fourteenth Amendment's due process clause, the federal government urged the Court to find these amendments constitutional. The Supreme Court declined to do so, holding in essence that, because patent infringement was not predictable or systemic, damages resulting from such infringement were not the result of a violation of due process, and hence the patent statute amendments could not have been enacted pursuant to section 5 of the Fourteenth Amendment. Although an across-the-board denial of redress appears rather “systemic,” the Supreme Court opined that, under the new rule, availability of a remedy for patent holders was now merely “less convenient”.

\textsuperscript{19} See Rochin v. California, 342 U.S. 165, 169, 175 (1952), the prototypical “police brutality” case in which the Court said that the violations “shock[ed] the conscience.”
Constitution. I have already mentioned one such interest—the right to live with one's family.

A substantive due process claim can also be based on deprivations caused by the government's failure to train, supervise, or adequately hire its employees. As previously discussed, such claims require a showing that the government's inaction was a custom, policy, or practice, and that the government's inaction or inadequate action caused the injuries. Since City of

A substantive due process claim can also be based on deprivations caused by the government's failure to train, supervise, or adequately hire its employees. Canton v. Harris, involving failure to identify and adequately treat a prisoner's medical condition, the Court has basically required a plaintiff to demonstrate that the type of incident which resulted in plaintiff's injury was so recurring as to tend to show that the government's inaction was conscious or deliberate, amounting to "deliberate indifference" to the consequences of its inaction. Substantive due process claims involving incarcerated prisoners are often hybrid claims based on both the Fourteenth Amendment and another substantive constitutional right. While City of Canton v. Harris was based solely on due process, other cases, particularly those involving injuries to prisoners caused by other prisoners, have been couched as a deprivation of the Eighth Amendment bar on cruel and unusual punishment. In both cases, the Supreme Court has applied the "deliberate indifference" standard, although the requisite showing of government knowledge of the danger appears somewhat higher when third-party-caused injuries are involved. Moreover, since the Supreme Court recently also applied the "deliberate indifference" standard to cases involving a public school's failure to do anything to curb student-on-student sexual harassment, to apply the same standard is hardly far-fetched where social service or housing benefits are denied or terminated as a result of government's deliberate indifference to the consequences of its failure to train or supervise its staff adequately.

II. Procedural Hurdles to Litigating a Section 1983 Action

Even if substantive objections are not raised to a newly filed Section 1983 claim, an advocate must consider some potential procedural problems beforehand. These include the scope and extent of the nonexhaustion rule, the applicability of issue and claim preclusion to bar the claim, and the ramifications of importing particular procedures from state law where federal law is silent.

A. Exhaustion of State Remedies

Under Monroe v. Pape the exhaustion of any available state remedies before invoking Section 1983 is not required.

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20 See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (access to contraception); Roe v. Wade, 410 U.S. 113 (1973) (right to choose to have or not have an abortion); Moore v. City of East Cleveland, 431 U.S. at 494 (right to live with family members); Cruzan v. Director of Miss. Dept. of Health, 497 U.S. 261 (1990) (Clearinghouse No. 44,045) (right to refuse medical treatment). This survey by no means exhausts the scope of the interests protected by substantive due process.


since the purpose of the statute is to open federal courts to claims that federal rights were violated. For the same reason, a plaintiff is not required first to file an administrative claim for government reimbursement of damages even though such a submission would normally be required under state law before filing suit.

Some exceptions to the nonexhaustion rule exist; some of them have only passing relevance to a civil legal services practice. Under *Parratt v. Taylor* a Section 1983 remedy is not available to address random tort claims based on the deprivation of due process if adequate state postdeprivation remedies are available. Although the *Parratt* rule generally does not apply to suits based on the deprivation of substantive constitutional rights not involving due process, the Supreme Court has nevertheless ruled that Fifth and Fourteenth Amendment “taking” claims are not ripe in federal court until the local government agency has refused just compensation.

Moreover, for reasons of “comity,” federal statutes require that challenges to state and local tax schemes be first brought in state courts, and federal courts rely on the same basic principle to “abstain” from ruling on a claim which raises issues more appropriately addressed by a state court.

B. Exhaustion of Administrative Remedies and the Ripeness Doctrine

The availability of state or local administrative procedures to resolve the underlying federal dispute poses other issues. Exhaustion of administrative remedies is not a prerequisite to filing a Section 1983 lawsuit. Thus in *Patsy v. Florida Board of Regents* the Court excused plaintiff's failure to raise an employment discrimination claim in a state administrative proceeding. Pointing to Section 1983's purpose of opening the federal courts to plaintiffs seeking the vindication of federal rights, the Court ruled that Congress had not intended that plaintiffs first exhaust any available state administrative remedies. Because of the nonexhaustion rule, a Section 1983 plaintiff who sues directly in federal court can avoid the pitfall of an adverse state ruling which would preclude subsequent litigation of the federal issue under the doctrines of issue or claim preclusion. Moreover, under general administrative law principles, failure to

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25 *Felder v. Casey*, 487 U.S. 131 (1988) (Clearinghouse No. 42,957) (a plaintiff who files a Section 1983 action in state court is not required to comply with state pre-litigation “notice of claim” requirements). *Felder*, however, does not bar a state court from requiring that a Section 1983 plaintiff comply with neutral state court procedural rules, but rather only those which would “frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court.” *Id.* at 141. Thus, in *Johnson v. Fankell*, 520 U.S. 911 (1997), the Supreme Court validated a state court's application of a procedural rule which prohibited interlocutory appeals, even though in this case, contrary to the practice in federal court, application of the rule forbade a government employee from immediately appealing the denial of summary judgment based on qualified immunity. The Supreme Court reasoned that the state rule was not “outcome determinative” in that “postponement of the appeal until after final judgment will not affect the final outcome of the case;” *Id.* at 921.
29 *Patsy*, 457 U.S. at 496.
exhaust would be excused if the administrative tribunal lacked the authority to decide the federal constitutional or preemption claim, for example, by holding a challenged statute or regulation invalid. 30

However, if the issue could have been raised and resolved at the administrative agency level, a defendant could argue for the dismissal of the Section 1983 action—not for failure to exhaust but because the claim is not ripe for review under the federal system’s restrictive view of its article III jurisdiction. 31 While a plaintiff can respond that a ripeness argument is actually only a disguised exhaustion claim, which should be rejected, resolution of the issue will turn on whether the challenged agency action is “final” in its effect on the plaintiff.

The rule requiring exhaustion of administrative remedies stems from the commonsense proposition that only “final” administrative actions should be ripe for court review. In Abbott Laboratories v. Gardner, involving a challenge to an administrative agency rule before it had been actually enforced, the Court held that, to determine whether judicial review should occur, a trial court must decide whether the issue presented is “fit for review” and whether withholding court review would cause substantial hardship to the plaintiff. 32 In a case where an administrative proceeding could have resolved the claim in plaintiff’s favor with or without consideration of the federal issue, the administrative agency can with some justification argue that the case is not “fit” for review since the agency has not had an opportunity to decide, on further reflection, that its initial position was wrong. Absent a final hearing decision, the agency, it is argued, has not conclusively taken a position adverse to the plaintiff. 33 In the Section 1983 context, however, an agency action is nevertheless “final” for ripeness purposes when the agency’s action is so definitive as to have resulted in a deprivation of federal rights, even if administrative remedies have not been exhausted.

Williamson County Regional Planning Commission v. Hamilton Bank addressed the interplay between the “finality” principle and the Section 1983 nonexhaustion rule. 34 In that case the court dismissed a challenge to a zoning rule on the ground that a lawsuit was not ripe because the plaintiff bank, when faced with a rule which could have stripped its property of economic value, sued the zoning agency instead of asking for a variance. Had the variance been granted, the property loss would have been avoided or curtailed; if the variance had been denied resulting in a deprivation of economic value in violation of the Fourteenth Amendment, the case would then have become ripe for review. In response to the argument that Section 1983 does not require exhaustion, the Court wrote:

The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. . . . While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judi-

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30 Administrative tribunals rarely have such broad power. See McKart v. United States, 395 U.S. 185 (1969), for a discussion of why exhaustion is preferred, and when failure to do so—as where exhaustion would be futile—is excusable.
31 I discuss the ripeness doctrine, in relation to claims for equitable relief, in sec. III.A.2 also.
33 See Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (applying the Abbott Laboratories test to deny preemergence judicial review of a labor regulation because of the availability of administrative review).
34 Williamson County Regional Planning Comm’n, 473 U.S. at 192–93.
cial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy v. Board of Regents* concerned the latter, not the former.35

These principles apply in the legal services context. For instance, if a food stamp agency or public housing authority issues a notice of action which affects an individual and, on its face, violates federal law, an aggrieved plaintiff may sue without first invoking any available administrative agency appeals. The agency's action has "inflicted an actual, concrete injury." While an administrative proceeding could remedy the injury, so could a lawsuit. And because *Section 1983* does not require exhaustion, a plaintiff can go directly to court.36

C. Issue and Claim Preclusion

Because "judicial economy" frowns on a litigant having "two bites of the apple," a plaintiff with a potential *Section 1983* claim should consider whether to utilize the available state remedies or procedures. On the one hand, a state court or administrative agency may be more familiar with the subject matter of the case and may grant effective relief. If the plaintiff wins at the administrative agency or in the state court, all is fine. On the other hand, if she loses the state court action or administrative appeal, plaintiff faces a number of potential hurdles because of the rules that a federal court hearing a *Section 1983* claim (1) must give a state court judgment the same preclusive effect in federal court as it would have in state court and (2) must give the factual findings of an administrative agency the same preclusive effect in federal court as they would have in state court.37

Hence the first hurdle. In order even to reach the federal issue, a plaintiff may have to vacate findings of fact made by the agency or the court, findings which will otherwise be binding on a federal court hearing the *Section 1983* claim under the doctrine of issue preclusion. For example, in *University of Tennessee v. Elliott* a state administrative law judge's finding that plaintiff's firing was not racially motivated fatally undercut her *Section 1983* discrimination claim. Since racial discrimination was the factual key to finding a violation of federal law in the *Elliott* case, the federal issue could not be litigated until the finding that no discrimination had taken place was set aside.38 An attack on a state court factual finding is even more difficult since state court judgments are given preclusive effect, and

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35 *Id.*

36 Advocates who are in the Ninth Circuit and are considering filing a *Section 1983* action following an administrative agency decision should be aware of appellate opinions holding that a *Section 1983* action will be dismissed unless a state court review proceeding overturned the agency decision. *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032–33 (9th Cir. 1994) (holding the "no exhaustion" rule to be inapplicable since the plaintiff chose to use the state or local administrative remedy rather than go directly to federal court). See also *Olson v. Miller*, 1999 WL 651946 (9th Cir. 1999).


38 *University of Tenn.*, 478 U.S. at 798. For agency fact findings to have preclusive effect, the agency must (1) have acted in a judicial capacity, (2) have resolved disputed issues properly before it, and (3) have afforded the parties the opportunity to litigate the issues. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966). Interestingly the *University of Tennessee* Court also ruled that while unreviewed agency fact findings would be given preclusive effect with respect to the *Section 1983* claim, this did not apply to the plaintiff's parallel *Title VII* claim because, in enacting the latter statute, Congress had not intended administrative agency decisions to bind federal courts. *University of Tenn.*, 478 U.S. at 796.
only the U.S. Supreme Court has the authority to review such decisions.\(^39\)

In the typical Section 1983 case brought by legal services advocates and involving an administrative decision, there usually is no need to vacate the agency’s factual findings. In most instances the alleged violation of federal rights consists of an agency policy, often codified in a regulation or statute and applied across the board. In a case subject to such a blanket policy, the particular facts in the client’s case usually do not prevent the policy’s application to the client. For this reason the policy can be attacked without disturbing the factual findings made by the administrative agency. A small number of legal services cases also raise due process issues arising out of the court of the hearing. In these cases the factual findings made by the administrative agency usually have no bearing on the fairness of the procedures used, and they need not be set aside.\(^40\)

A second hurdle exists where the state court finds that no federal right was violated. Assuming that the requirements for claim preclusion are otherwise met, that ruling will be res judicata in a subsequent Section 1983 lawsuit. Thus in *Allen v. McCurry*, involving a claim for violation of the Fourth Amendment right to be secure from unreasonable searches and seizures, suit was dismissed because the issue of whether a police search was unreasonable had already been litigated against this plaintiff in an unsuccessful pretrial motion for suppression of evidence.\(^41\) As a practical matter, however, a litigant often has no choice but to proceed in the state forum. A criminal defendant can rarely afford not to utilize pretrial hearings or motions to suppress the evidence supporting the charges against the defendant. Yet, as illustrated by *Allen*, losing in court forecloses a Section 1983 lawsuit if the federal issue was actually litigated.\(^42\)

Third, where state law frowns on claim splitting, a state judgment bars plaintiff from raising a subsequent federal claim arising out of the same transaction on which the state law claim was based.\(^43\) This was the result in *Migra v. Warren City School District Board of Education*, where a plaintiff who had won her state law wrongful discharge suit was precluded from later filing a Section 1983


\(^{40}\) A related pitfall exists in the Ninth Circuit. Several cases imply that an unappealed administrative agency decision will foreclose a subsequent Section 1983 federal lawsuit unless the administrative decision has been set aside as provided by state law. Although some of these decisions can be explained by the fact that plaintiff did not seek state review within the statute of limitations (Misischia v. Pirie, 60 F.3d 626, 629 (9th Cir. 1995); Etlrich v. Remas, 839 F.2d 630, 631 (9th Cir. 1988)), other decisions are more categorical (see Miller, 39 F.3d at 1032–33), reasoning that since state law considers the administrative agency decision to have preclusive effect until set aside, a federal court must give it similar respect after *University of Tenn. v. Elliott*. Advocates considering filing a Section 1983 action following an administrative agency proceeding in the Ninth Circuit should consider filing in state court and joining the Section 1983 claim with one seeking review of the agency decision.

\(^{41}\) *Allen*, 449 U.S. at 90. Only appeal or habeas corpus, not through a 1983 action whose success depends on a finding that the judgment of conviction was, in some manner, invalid, can challenge criminal convictions. For plaintiff to proceed with the Section 1983 claim, the conviction would first have to be overturned. Heck v. Humphrey, 512 U.S. 477, 489 (1994).

\(^{42}\) There is some question as to whether an unreviewed administrative agency’s finding on a legal issue (e.g., that there was no constitutional violation) should preclude litigating the issue in a subsequent Section 1983 suit. While *University of Tennessee* extended issue preclusion to factual findings, the Supreme Court has rendered no opinion with respect to legal findings. The courts of appeal are split on this issue. *Compare* Edmundson v. Borough of Kennet Square, 4 F.3d 186 (3d Cir. 1993) (no preclusion), *with* Guild Wineries & Distilleries v. Whitehall Co., 853 F.2d 755, 758 (9th Cir. 1988) (precluding relitigation of legal issue).

claim alleging that her termination had also violated her free-speech rights.\footnote{44} Having had the opportunity to raise her federal claim in the state proceeding, plaintiff’s failure to do so merged the federal claim into the judgment and barred its litigation. On the other hand, if the state court could not have ruled on the federal claim, for example, where exclusive jurisdiction is vested in the federal courts, the state judgment does not bar a subsequent federal suit.\footnote{45} Several circuits have used similar and other reasons to deny claim preclusion to administrative agency decisions that a state court has not reviewed.\footnote{46}

D. Borrowing State Law in Section 1983 Action in Federal Court

Where the applicable federal law is deficient in the provisions necessary to furnish suitable remedies, and state law is not inconsistent with federal law, 42 U.S.C. § 1988(a) requires that a federal court hearing a Section 1983 claim apply state law. The court must decide (1) whether federal law is silent on an issue necessary for the adjudication of rights; (2) if so, whether there is a controlling state statute or common-law rule; and (3) whether the rule of state law is inconsistent with the Constitution or federal law.\footnote{47} If the controlling state law is inconsistent with federal law, then the court applies federal common law.\footnote{48}

There is some dispute among the circuits as to what constitutes a “deficiency” in federal law and thus when borrowing state law is necessary.\footnote{49} The only reliable rule seems to be that a deficiency exists where the Supreme Court has determined one to exist. Thus the Court has borrowed state law to determine the survivability of Section 1983 claims.\footnote{50} More important, the Court has held that state tort statutes of limitations govern Section 1983 actions.\footnote{51} Because of this latter ruling, a Section 1983 suit filed in reliance on the usually longer statutes of limitation for liabilities created by statutory violations is potentially barred, absent a continuing injury to the plaintiff which chronologically extends into the limitations period for filing a tort suit.\footnote{52}

\footnote{45} Marrese, 470 U.S. at 381. Note, however, that while claim preclusion may not apply, issue preclusion will prevent a plaintiff in the subsequent action from relitigating other issues already decided by the state court. \textit{See generally} Montana v. United States, 440 U.S. 147 (1979).
\footnote{46} \textit{See}, e.g., Dionne v. Mayor of Baltimore, 40 F.3d 677, 683–84 (4th Cir. 1994); \textit{Edmundson}, 4 F.3d 186, at 193; \textit{Gjellum} v. City of Birmingham, 829 F.2d 1056, 1064–65 (11th Cir. 1987); Mack v. South Bay Beer Distributors., 798 F.2d 1279, 1283–84 (9th Cir. 1986).
\footnote{48} \textit{See} Dobson v. Camden, 705 F.2d 759, 766 (5th Cir. 1983) ("At this point we have climbed through the rabbit hole of section 1988 and are in the Wonderland of federal common law.").
\footnote{49} \textit{Compare} Botefur v. City of Eagle Point, Ore., 7 F.3d 152, 1546 (9th Cir. 1993) (rejecting the absence of a tender requirement in Section 1983 as a deficiency of federal statutory law), \textit{with} Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994) (finding that a tender requirement for release of settlement is a protection for defendants, not a remedy, and therefore should be applied to a Title VII action).
\footnote{50} Robertson, 436 U.S. at 584 (involving survivability of the late Clay Shaw’s malicious prosecution suit against former New Orleans district attorney Jim Garrison; Shaw had been tried and acquitted of involvement in the assassination of President Kennedy).
\footnote{51} Wilson v. Garcia, 471 U.S. 261, 276 (1985); \textit{see also} Felder, 487 U.S. at 140 ("Because statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity"). However, while state law determines the limitations period, federal law determines when a 1983 action accrues. \textit{See} Chardon v. Fernandez, 454 U.S. 6 (1981) (holding that the claim accrued when plaintiff learned he was to be fired, not when plaintiff was actually terminated.)
\footnote{52} \textit{See}, e.g., \textit{CAL. CODE CIV. PROC.} § 338(a), providing three years to file suit based on violation of statute. By comparison, the limitations period for filing a tort suit is only one year. \textit{Id.} § 340(3).
The circuit courts have also applied state law to determine the effect of settlement on the liability of a nonsettling tortfeasor and whether attorneys for successful civil rights plaintiffs have a lien on a fee award.\textsuperscript{53} In contrast, circuit courts have found that federal common law supplies an adequate rule in determining the burden of proof for establishing punitive damages and the substantive liability of unincorporated associations.\textsuperscript{54}

Because the purpose of borrowing state law is solely to effect the adjudication of rights under federal law, courts have rejected the application in federal civil rights actions of state laws that confer rights not protected by federal law.\textsuperscript{55} As a practical matter, these applications of state law fail the third prong of the borrowing test because they are inconsistent with existing federal protections.\textsuperscript{56} While the courts do not apply state law that enlarges or expands the protection of federal law, however, they also reject the application of state laws that burden or are otherwise inconsistent with the broad remedial purposes of federal civil rights law.\textsuperscript{57}

E. Pleading Section 1983 Claim in Federal Court

On at least this topic, the basic rule is the same as that in other types of federal cases. The usual, more liberal, "notice pleading" rules—requiring simply a "statement of the claim" rather than a recital of the "facts constituting the cause of action"—apply to suits filed in federal court alleging a Section 1983 claim.\textsuperscript{58} So-called heightened pleading rules, under which plaintiff's complaint must, for example, anticipate and plead the unavailability of "immunity" defenses, may not be imposed.\textsuperscript{59}

As a practical matter, however, the types of legal services programs' Section 1983 claims—often involving the construction of abstruse federal statutes—mean that the complaint must be seen as a tool for educating the judge about the plaintiff's theory of the case and as a road map for the factual and legal issues which will be confronted in a motion for full or partial summary judgment. For this reason,

\textsuperscript{53} See \textit{Dobson}, 705 F.2d at 763, on effect of settlement on liability of nonsettling tortfeasor. Regarding lien on a fee award, see \textit{Valley Disposal v. Central Vt. Solid Waste}, 113 F.3d 357, 362 (2d Cir. 1997).

\textsuperscript{54} See \textit{Karnes v. SCI Colorado Funeral Servs. Inc.}, 162 F.3d 1077, 1081–93 (10th Cir. 1998), regarding punitive damages. See \textit{Jund v. Town of Hempstead}, 941 F.2d 1271, 1278 (2d Cir. 1991), on substantive liability of unincorporated associations.

\textsuperscript{55} See \textit{Cog v. County of Cooke}, 162 F.3d 491, 495 (7th Cir. 1998) (rejecting the enforceability of state law rights conferred on fetuses in a Section 1983 action); \textit{Palmer v. Sanderson}, 9 F.3d 1433, 1438 (9th Cir. 1993) (finding that a state law allowing for vicarious liability against government actors is precluded by Supreme Court precedent in \textit{Monell v. New York City Dept of Soc. Servs.}, 436 U.S. 658 (1978) (Clearinghouse No. 17,739), rejecting respondent superior liability in Section 1983 actions).

\textsuperscript{56} Thus a mandamus civil rights claim which a legal services organization barred by federal regulations from bringing a class action brings in state court could be successfully removed to federal court, and the argument that the state law provides a greater remedy, i.e., class relief in the guise of a suit for mandamus brought by individual defendants (see \textit{infra} note 70), presumably would not defeat removal because the state law would be inconsistent with the Federal Rules of Civil Procedure general requirement of a class action to obtain class relief.

\textsuperscript{57} See \textit{Feller}, 487 U.S. at 140 (rejecting a state law requirement that plaintiffs give notice of a claim against the government).


\textsuperscript{59} \textit{Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit}, 507 U.S. 163 (1993).
the advocate would be wise to plead fully each element, including plaintiff’s interpretation of the statute to be construed, of the claim for relief.

III. Equitable and Legal Remedies

Section 1983 provides that a defendant may be found “liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

A. Injunctive and Declaratory Relief

If recurring violations of federal rights are due to an agency custom, policy, or practice, broad injunctive relief is available in a Section 1983 action prospectively to conform an agency’s practice to federal standards or mandates.60 Indeed, given the purpose of protecting federal rights threatened by local and state government, the Anti-Injunction Act—which bars a federal court from enjoining a pending state court proceeding unless permitted under a federal statute or where an injunction is needed in order to permit a federal court to exercise jurisdiction or enforce its judgments—does not apply to actions filed under Section 1983.61

The standard for granting injunctive relief in a Section 1983 action generally is the same as that governing requests for equitable relief in non-Section 1983 cases.62 In federal court, the law of the circuit in which the action is filed sets the standard a plaintiff is required to meet. In deciding whether a preliminary injunction is warranted, a court’s usual formula is to weigh the possibility of irreparable injury, the probability of success on merits, and the balance of interim harm faced by both parties.63 Given that courts issue preliminary injunctions by weighing relative hardships during the pendency of a lawsuit, courts usually issue such orders, labeled “prohibitory injunctions,” to preserve the status quo.64

Before seeking injunctive relief, the advocate should keep in mind not only what the judge hearing the case is likely to grant but also the scope of the relief necessary to accomplish what is needed in the circumstances. Otherwise an overly broad order can be attacked as an abuse of discretion. Missouri v. Jenkins, involving an injunction ordering the imposition of a tax to fund the costs of desegregation, was an extreme example.65 Modification of a federal court injunction over the objections of the party that won the order can occur only if there has been a significant change in the facts or law.66

60 This is true even where the state is sued in the guise of a state official in his or her official capacity. The Eleventh Amendment bar on using this device applies only to official-capacity suits for damages. Will v. Michigan Dep’t of State Police, 491 U.S. at 71 n.10. If appropriate, of course, injunctive relief is available against a state official sued in his or her personal capacity.

61 Anti-Injunction Act, 28 U.S.C. § 2283; Mitchum v. Foster, 407 U.S. 225 (1972). However, unless the state court prosecution was brought in bad faith or to enforce an invalid statute, a federal court might nevertheless abstain from hearing the suit. See Younger v. Harris, 401 U.S. at 55–56 & n.27.

62 Note, however, that state law equitable defenses may not be available in state court actions under the general principle of nonexhaustion previously discussed if such defenses would hinder the prosecution of claims based on the deprivation of federal rights.

63 See, e.g., Atari Games Corp. v. Nintendo, 897 F.2d 1572, 1575 (Fed. Cir. 1990) (requiring plaintiff to show a fair chance of success on the merits, a significant threat of irreparable injury, a tipping of the balance of hardships in plaintiff’s favor, and whether the public interest favors granting the injunction); First Brands Corp. v. Fred Meyer Inc., 809 F.2d 1378, 1381 (9th Cir., 1987) (requiring plaintiff to show a combination of probable success on the merits and the possibility of irreparable harm, or serious questions as to these issues and the balance of hardships tipping heavily in plaintiff’s favor).

64 See, e.g., Chalk v. U.S. Dist. Court, 840 F.2d 701 (9th Cir., 1988) (Clearinghouse No. 43,121).


Relief under the Declaratory Judgment Act—or its state law analog—is a discretionary equitable remedy also available under Section 1983.67 By declaring the rights of the parties to the action, a declaratory judgment on behalf of an individual can effectively benefit all other persons similarly situated even if class relief has not been expressly sought.68

In seeking injunctive relief in the federal system, a crucial issue is whether the court has jurisdiction to hear the plaintiff’s case and grant relief. Article III of the U.S. Constitution permits a federal court to hear only cases posing an “actual case or controversy.” In the ordinary Section 1983 action for damages, this is rarely an issue. The problem arises when a plaintiff seeks equitable relief, posing the issues of whether the plaintiff has standing to sue, whether the case is ripe for review, and whether the suit should be dismissed as moot.

1. Standing to Raise the Claim

Federal court standing is too complex an issue to be addressed here in a more than cursory fashion. Suffice to say that a plaintiff must show that he or she suffered an “injury in fact,” which is “distinct and palpable” and not merely an abstract, generalized, or undifferentiated grievance and that the injury is “fairly traceable” to the defendant’s actions and is “redressable” by a court order or judgment benefiting plaintiff.69 Consider a housing authority tenant challenging the agency’s failure—in violation of a federal statute—to implement an income disregard program for participants in a welfare-to-work program. Even if the practice were widespread and affected hundreds of other tenants, a tenant who is exempted from the welfare-to-work program would not have standing to sue since the tenant has only an abstract interest in the issue and has suffered no injury.

A group or organization has standing to sue on behalf of its members if (1) individual members of the group would have standing, (2) the interests to be protected are relevant to the purpose of the organization, and (3) the relief sought (e.g., an injunction or declaratory judgment rather than damages) is such that individual plaintiffs are not required.70 Thus in Hunt v. Washington State Advertising Committee a state agency whose officers were selected by the apple industry and which was established to promote the fruit nationwide had standing to enjoin a North Carolina statute that, in violation of the Interstate Commerce Clause, interfered with the distribution of apples.71 Under this standard a tenant group or a union of welfare participants should have standing to seek injunctive relief against practices (e.g., violations of the McKinney Act) which deprived group members of federal rights relevant to the organization’s mission.

A third party has standing to sue to enforce the rights of others if the third party is directly affected by the challenged

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68 See generally Gary F. Smith & Nu Usha, Dusting Off the Declaratory Judgment Act: A Broad Remedy for Classwide Violation of Federal Law, 32 CLEARRINGHOUSE REV. 112 (July–Aug. 1998); Green v. Mansour, 474 U.S. 64, 72–74 (1985), summarizes the discretionary nature of federal declaratory relief and notes that it is available only if based on a viable, and not moot, federal claim. In some states, including California, mandamus can also lead to classwide relief without need to file a class action. See CAL. CODE CIV. PROC. § 1085; Green v. Obledo, 29 Cal. 5d 126, 141 (1961) (Clearghouse No. 16,715).
policy. For example, a physician may assert a patient’s right to secure an abortion if the physician may be prosecuted for performing the abortion.72

A plaintiff may have “standing” to sue yet be thrown out of court because the timing of the action is not right. On the one hand, the action is not “ripe” if the plaintiff’s claim is prematurely filed. On the other hand, the action is “moot” if filed too late for the court to grant effective relief.

2. Ripeness Doctrine

In the context of equitable relief, the “ripeness” doctrine holds that a court will hear a case only when there is a sufficiently genuine threat that the enforcement of a challenged statute or practice will injure the plaintiff. In Steffel v. Thompson, for example, anti-Vietnam War pamphleteers had been told by the authorities that they would be arrested if they distributed their leaflets.73 Although they themselves were never detained, plaintiffs sought a judicial declaration that such an arrest would violate their First Amendment rights. Holding that actual arrest was not necessary to be entitled to challenge the statute, the Supreme Court upheld plaintiffs’ right to pursue the action.

In Poe v. Ullman, by contrast, a plaintiff with a history of having children with congenital deformities sought a judicial declaration that a state law forbidding contraception violated her federal constitutional rights.74 The Supreme Court dismissed the case as having not raised an actual case and controversy since there was no history of the challenged statute ever having been enforced in recent memory. “[F]ederal judicial power is to be exercised to strike down legislation . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.”75

3. Mootness Doctrine

The mootness doctrine wreaks particular havoc on federal court claims for injunctive relief. In general, the doctrine requires the dismissal of a claim for an injunction if the plaintiff is not under a pending threat of recurring harm. In City of Los Angeles v. Lyons the Supreme Court dismissed as moot the plaintiff’s attempt to enjoin the Los Angeles Police Department’s practice of using “chokeholds.”76 Although subjected to this practice in the past, plaintiff could not show a reasonable likelihood of being “chokeheld” in the future.77

A defendant can easily moot out individual plaintiffs seeking injunctive relief. For example, an agency can withdraw a notice or schedule a new hearing in the case of a client complaining that defective notice or an unfair hearing caused the termination—in violation of due process—of a government benefit. For this reason, the advocate who seeks systemic relief using Section 1983 but who may not file a class action should consider coupling a claim for injunctive relief with claims for a declaratory judgment as

75 Id. at 504.
77 Lyons also merged the doctrines of standing and mootness; he held that plaintiff—who had suffered an “injury in fact”—lacked “standing” to seek an injunction. 461 U.S. at 105. Honig v. Doe, 484 U.S. 305, 318–21 & n.6 (1988) (Clearinghouse No. 42,583), explored the concept of “reasonable likelihood.” In that case, involving the expulsion, in violation of the Education for the Handicapped Act, of an emotionally disturbed child from a public school, a “reasonable expectation” that the statute would continue to be violated with respect to plaintiff flowed from the conjunction of plaintiff’s disability (this “very inability to conform his conduct to socially acceptable norms”) with the statutory requirement that disabled students be placed in “the least restrictive environment.”
well as damages. These claims can create some space for negotiating broader relief or convincing the judge to use the judge’s discretion to grant declaratory relief binding the agency’s future actions.

**B. Damages**

Most Section 1983 actions, of course, seek damages for constitutional violations which have a common-law tort analog. While legal services advocates rarely bring such actions because of the Legal Services Corporation regulation restricting the taking of fee-generating cases, some knowledge of the rules governing this area may be useful in order that the damages option not be overlooked as possible leverage against a government agency to force other concessions.

As a rule, liability for damages requires evidence of actual injury to obtain an award for more than a nominal amount. This is usually not the problem in most damages actions. Rather, since such cases often seek to establish the individual or personal-capacity liability of the government employee and not the official-capacity liability of the employer, the key to winning or losing is to defeat the employee’s or agent’s claims of immunity.

While personal liability can be established against state or local governmental employees whose actions have deprived the plaintiff of federal constitutional or statutory rights, a judgment against a relatively impeccuous employee would be of little value, except that many government agencies indemnify employees for damage awards. While plaintiffs can plead and try to prove that an employee’s actions and the consequent injury were the result of a governmental custom, policy, or practice—the usual case where the damages consist of public benefits lost as a result of an agency rule—this is not a universal solution. Many suits based on the violation of constitutional or statutory rights involve the offending employee’s conduct which may be beyond the pale of officially condoned custom, policy, or practice.

Hence the employee—or the government agency that will ultimately be on the hook as the “deep pocket”—seeks to avoid liability by arguing that the employer

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78 The filing of a class action and the timing of class certification significantly affect the operation of the mootness doctrine. After a class has been certified, a named plaintiff whose claim becomes moot may nevertheless continue the action. Sosna v. Iowa, 439 U.S. 395 (1975) (Clearinghouse No. 10,200). And if a class has not yet been certified, the mooted plaintiff must have an opportunity to find and substitute another person as class representative. U.S. Parole Comm’n v. Geraghty, 445 U.S. 388 (1980). In any event, attorneys funded by the Legal Services Corporation are forbidden from participating in class actions. 45 C.F.R. § 1617.3. Recall that since nominal damages are available without proof of actual injury under Carey, 445 U.S. at 247, and Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986), the action is not moot even if injunctive relief can no longer be granted.

79 "The § 1983 remedy encompasses a broad range of potential tort analogies . . . ." Wilson, 471 U.S. at 277.

80 45 C.F.R. § 1609.3. Note, however, that the regulations permit the taking of fee-generating cases where the recovery of damages is not the principal aim of the lawsuit and where the recovery of substantial statutory fees is unlikely.

81 Memphis Community Sch. Dist., 477 U.S. at 299. See also Carey, 435 U.S. at 247 (permitting an award of nominal damages for the deprivation of procedural due process in a school suspension proceeding).

82 See my part 1, supra note 7, sec. II.D.1, for a discussion of the distinction between suits brought against defendants in their personal and official capacities.

83 Monroe, 365 U.S. at 167 (personal liability against state or local governmental employees).

84 See Hafer v. Melo, 502 U.S. 21 (1991), for an example of a defendant sued in both her official and personal capacity. When official capacity liability was denied under the Eleventh Amendment because damages could not be awarded against a state, the suit was allowed to go forward on a personal-capacity basis, the court holding that defendant’s official position, even as head of the agency, did not preclude personal-capacity liability.
ee is entitled to claim “absolute” or “qualified” immunity from an award of damages for his or her actions. In most cases “qualified immunity” is sought; it requires a showing that the scope of the constitutional or statutory right allegedly violated was not so well established as to render it reasonable for the employee, in acting in the manner charged, to assume that his or her actions did not violate the law.85

1. Purpose of Immunity Defenses

If damages can be awarded under Section 1983 against individual government employees based on their personal liability for their actions, immunity from personal liability can also be granted in some cases. The importance of immunity to those faced with personal liability, particularly from an award of damages, flows from the fact that decisions of officials will often have adverse effects on other persons. When officials are threatened with personal liability for official acts . . . , they may well be induced to act with an excess of caution or otherwise skew their decisions in ways that result in less than full fidelity to objective and independent criteria that ought to guide their conduct.86

Immunities are granted to ensure that public officials will not be intimidated or inhibited from actively discharging their duties and exercising their discretion. On the other hand, given that Section 1983 exists to remedy the deprivation of federal rights, state law immunities are not available to individual defendants sued in state courts under Section 1983.87

As I will show, some officials have “absolute immunity” from suits for damages or injunctive or declaratory relief because they exercise particular legislative functions in the structure of government. Others have “limited absolute immunity” stemming from their role in law enforcement or the judicial system—permitting injunctive or declaratory relief to prevent or stop the deprivation of federal rights but barring an award of damages. All other government agents may be able to claim “qualified immunity,” which requires a showing that the agent had a “good faith” belief that his or her actions did not violate clearly established federal rights.

In determining the degree of immunity a government agent may claim, the courts balance the inhibiting effects of exposure to suit against the possibility that such exposure will encourage compliance with federal law and use the contrast “to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of [government] functions.”88 Because of the “functional” focus of this inquiry, a defendant may claim varying degrees of immunity based on the particular role he or she played in the sequence of events. Thus in Supreme Court of Virginia v. Consumers Union the Virginia court could claim “absolute immunity” while acting in a legislative capacity in adopting disciplinary rules for attorneys but only “limited absolute immunity” in enforcing those rules in their judicial capacity.89 Hence, while the justices could not be enjoined from enacting rules which barred attorneys from advertising their services—rules invalid under the First Amendment—they could be enjoined from disciplining attorneys based on a breach of those rules.90

87 Martinez v. California, 444 U.S. 277, at 284 n.8.
88 Forrester, 484 U.S. at 224.
89 Supreme Court of Va. v. Consumers Union, 446 U.S. 919 (1980).
90 Similarly a legislator—absolutely immune while performing legislative functions—can claim only qualified immunity when sued for nonjudicial acts such as sexual harassment. Davis v. Passman, 442 U.S. 228 (1979).
2. Unavailability of Immunity
Defenses to Government
Entities

The Supreme Court has ruled that the
danger of intimidation or inhibition is not
present when a municipality or govern-
ment agency is sued because such entity
may act only through its employees or
agents. Hence granting immunities to gov-
ernment, or to government agents sued
in their official capacity for actions result-
ing from the agency’s custom, policy, or
practice, would only undercut govern-
ment’s incentive to conform these cus-
toms, policies, and practices to federal
law or to control its employees.91 For this
reason, in an official-capacity suit, dam-
ages can be awarded against a govern-
ment agency for actions which caused the
deprivation of plaintiff’s rights even if
these actions were “objectively reason-
able.” This is true even though “qualified
immunity” would have insulated the
employee who performed the act if the
employee is sued in his or her personal
capacity.92

In short, if the employee is sued in his
or her official capacity and the actions at
issue are the result of a custom, policy,
or practice, this rule effectively creates a
“strict liability” standard for the govern-
mental employer. Since government may
not invoke immunities, it also follows that
immunity from liability for a damage
award under Section 1983 can be claimed
only by a governmental employee who
has been sued as an individual, and not
by those sued in their official capacity.

3. Degrees of Immunity

Because of the need to ensure that
legislative functions—the drafting and
passage of laws—be performed without
fear of outside interference, “absolute
immunity” from liability for both damages
and injunctive or declaratory relief is
granted to legislators and those acting in
a legislative capacity.93

“Limited absolute immunity”—per-
mitting a suit for injunctive and declara-
tory relief only—covers those performing
judicial and quasi-judicial functions. It is
extended to judges acting within their
jurisdiction or while performing judicial
acts, prosecutors while prosecuting a case,
and police officers while testifying in
court.94 On the other hand, public de-
defenders, court reporters, and witnesses
are not entitled to absolute or limited
absolute immunity.95

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92 Thus, in Owen, 445 U.S. at 622, the city’s termination of a police chief without due
process raised a claim for damages against the city, even though the applicability of due
process in these circumstances was still “unclear” at the time, and thus any government
employee defendants sued in their personal capacity would have been entitled to claim
93 Tenney v. Brandhove, 341 U.S. 367 (1951); Spallone, 493 U.S. at 265; Supreme Court of
Va., 446 U.S. at 919. This protection applies to local officials acting in a legislative capa-
city (Boggs v. Scott-Harris, 523 U.S. 44 (1998)), as well as to legislative aides similarly act-
94 Pierson v. Ray, 386 U.S. 547 (1967) (limited absolute immunity extended to judges);
Stump v. Sparkman, 435 U.S. 349 (1978) (Clearinghouse No. 23,273) (judges); Forester,
from damages is granted even though the facts presented in these cases are mind-bog-
gling studies in arrogance and even maliciousness. Imbler v. Pachtman, 424 U.S. 409
(1976) (Clearinghouse No. 17,645) (prosecutor). However, absolute immunity does not
lie for actions that occur while a prosecutor is investigating a case, Mitchell v. Forsyth,
472 U.S. 511 (1985); Burns v. Reed, 500 U.S. 478 (1991); Buckley v. Fitzsimmons, 509
(police officer testifying in court).
95 Tower v. Glover, 467 U.S. 914 (1984) (public defender); Antoine v. Byars & Anderson,
4. “Qualified” or “Good Faith” Immunity

Because the scope of absolute immunity is fairly narrow, many Section 1983 damages actions stand or fall based on whether the tortfeasor-employee is granted “qualified” or “good faith” immunity. For this reason, the immunity issue must be decided early in the proceeding by way of a summary judgment motion heard, if possible, before discovery commences.\(^{96}\) To avoid government having to pay unnecessarily for the cost of litigation, an order denying absolute or qualified immunity is also immediately appealable.\(^{97}\)

As noted, the purpose of qualified immunity is to protect government employees from personal liability for actions taken in exercising the discretion conferred on them by their office or position. This immunity is “qualified” because, as explained in Harlow v. Fitzgerald, an employee is immune from personal liability only if the employee performed his or her action under an objectively reasonable, “good faith” belief that his or her action “did[d] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\(^{98}\) A right is clearly established if its “contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”\(^{99}\)

Qualified immunity is not available to private actors who are acting “under color of law” and who, for example, invoke state court procedures resulting in the deprivation of federal rights or who deprive such rights while jointly acting with government officials.\(^{100}\) Most recently the Supreme Court knocked down what could have been a major stumbling block to damage suits in the age of privatization; it held in Richardson v. McKnight that private subcontractors taking over traditional governmental functions—in that case, private prison guards—did not have qualified immunity.\(^{101}\)

5. Punitive Damages

Punitive damages are available in a Section 1983 action against an individual defendant on a showing of objective ill will or malice.\(^{102}\) However, since government—already lacking immunity from awards of actual damages—should not be punished for the actions of rogue employees, punitive damages may not be awarded against a government agency or municipality.\(^{103}\)

C. Attorney Fees Under 42 U.S.C. § 1988(b)

Under 42 U.S.C. § 1988(b), attorney fees can be awarded to a “prevailing party” who has succeeded on any signif-

\(^{96}\) Anderson, 483 U.S. at 635.

\(^{97}\) Mitchell, 472 U.S. at 511.

\(^{98}\) Harlow, 457 U.S. at 818–19. The “good faith” or “clearly established” standard is also used where damages are sought for statutory, regulatory, or treaty violations. See, e.g., Del A. v. Edwards, 855 F.2d 1148 (5th Cir. 1988) (statute); Cronen v. Texas Dep’t of Human Servs., 977 F.2d 934 (5th Cir. 1992) (regulation); Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991) (treaty).

\(^{99}\) Anderson, 483 U.S. at 640. The appellate court decisions construing the “objective reasonableness” of employees’ beliefs are legion, and advocates concerned about this issue must study the major cases decided by the relevant circuit. For this article, it is enough to note that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1986).


\(^{101}\) Richardson v. McKnight, 521 U.S. 399 (1997). The court noted that in the private sector “market place pressures” and insurance played the role served by immunity in the government sector. Id. 521 U.S. at 410.


icant issue. However, they are available only to a prevailing party who hired a lawyer, not to an attorney who filed suit in pro se. In setting the amount of fees, a federal court first establishes a "lodestar" by multiplying the number of hours expended times a reasonable hourly rate and then adjusts this sum up or down depending on the results. There is no requirement that the award be "proportional" to results obtained in the lawsuit. Fees may be awarded to a defendant in a Section 1983 action but only if the claim was frivolous, unreasonable, or without foundation, even though it was not brought in "bad faith." Filing a Section 1983 action in bad faith almost always results in fees for a defendant who seeks them.

IV. Conclusion

Even in the present age of "devolution" and "privatization," the defense and enforcement of rights and the distribution of benefits bestowed on low-income clients by the U.S. Constitution and federal statutes are crucially important. In most cases involving health, welfare, and housing assistance, where government still remains the central figure, the deprivation of federal rights necessarily involves "state action," the catalyst for invoking Section 1983. For this reason the conscientious legal services advocate must be familiar with this statute, potentially the most potent litigation tool for asserting and defending those rights.

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104 Farrar v. Hobby, 506 U.S. 103 (1992). However, attorneys employed by programs funded by the Legal Services Corporation may not claim, collect, or retain statutorily based fees unless ordered by a court as sanctions. 45 C.F.R. § 1642.3. For this reason I do not discuss the attorney-fee issue in detail in this article.


