Section 1983: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person ... 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.
Using Section 1983 to Raise Constitutional Claims in Garden-Variety Cases

By Robert Capistrano

Having lost her Section 8 voucher for supposedly threatening housing authority employees, a young woman sought our help. The facts were these: After finding a landowner willing to take her voucher, the client and her prospective landlady met the Section 8 housing inspector at the apartment. The unit failed the inspection, and a shouting match ensued between the inspector and the irate landlady, with our client interjecting her own two cents. After the incident, the client marched to the housing authority to file a complaint against the inspector. She grew upset again when she learned that no complaint procedure existed. A few days later she received a voucher termination notice based on alleged threats of violent or abusive behavior toward housing authority employees.1 Her advocate failed to convince the hearing officer that the termination was unwarranted, and the expulsion from the program was sustained.

Ordinarily the most the office would do in a situation like this would be to file a request for administrative review on grounds that the hearing officer’s findings were not supported by the weight of the evidence. Our staff attorney coupled the petition for review with a claim alleging, under 42 U.S.C. § 1983, that the termination deprived the client of the First Amendment right to petition for redress. To emphasize the point, we filed suit not in the bucolic county seat but in federal district court. The federal court ordered the case to mediation, and shortly thereafter a homeless client once facing expulsion from one of the few sources of low-income housing in the county found herself with a new voucher-assisted apartment, a guarantee of three years participation in the housing authority’s supported work program, and a tidy sum in damages sitting in a special-needs trust. She and other voucher recipients also benefited from a negotiated redraft of the policies governing Section 8 terminations and the institution of a procedure for filing complaints against housing authority employees.

Some Advantages of Raising a Section 1983 Constitutional Claim

The moral of this tale is not simply that a federal claim can lurk in the garden-variety legal aid case but also that filing a constitutional suit can radically change the other side’s perception of the case, alter the apparent power relations between the parties, widen the client’s options, shorten the time frame for a solution, and even open up avenues for possible systemic change. Thus:

- Otherwise mandatory procedural steps can be bypassed. Because the purpose of Section 1983 is to vindicate federal rights, a plaintiff need not exhaust state remedies before suing on the federal claim.² Aside from saving time, this advantage allows the plaintiff to present the claim directly to a court without fear that important factual or legal issues would be precluded because they had been decided in a state administrative proceeding.

- The claim immediately raises eyebrows (“She made a federal case out of it?”) and can help focus the defaulting agency’s attention beyond the client’s case to whether these facts evidence more systemic glitches.

- Plaintiff now has a choice of federal or state forums and procedures.³ While filing in your state court may have advantages, you can often put the other side at a disadvantage by filing in a federal court in which the agency attorney may feel less comfortable. The more ordered procedures of the federal court can also lead to a quicker resolution of the case.

- Invoking Section 1983 raises the specter of attorney fees (at least for cocounsel, if not for an LSC funded program), which should not be under-


³A Section 1983 claim may be filed in state court, although federal substantive rules will govern. Martínez v. California, 444 U.S. 277, 283 n.7 (1980).
estimated as a lever in favorably settling the case.\textsuperscript{4}

Clearly the decision to pursue a Section 1983 action should not be taken lightly. You must identify what the client wants and the possible benefits to the client community of a success; you must determine whether the client’s goals and the community benefits are attainable in a suit of this kind; and you must weigh the costs of pursuing the claim, particularly in terms of program resources and other work that you will have to put aside to focus on this case. These are largely case-by-case and program-specific decisions. If you have the green light, assess potential procedural bumps in the road stemming from both the case law governing Section 1983 and the limits on the jurisdiction of the federal courts.

The Components of a Section 1983 Claim

Rights in the Bill of Rights and other U.S. Constitutional provisions can be asserted against government. Section 1983 provides for a means to address violations of these rights by state and local officials and local government. While actions under Section 1983 most often evoke the image of a police brutality case or prisoner suit for damages, the statute has a wider scope and can be a remedy in a variety of poverty law contexts.

The elements of a Section 1983 cause of action are fairly straightforward: the law allows an award of damages or equitable relief based on (1) the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States (2) by any “person” acting “under color” of state law.\textsuperscript{5}

If these two elements are met, the focus moves to (3) who is liable for the deprivation: the government, the individual employee, or both? A government agency may be held responsible only if the deprivation resulted from a “custom, policy, or practice” of the agency itself.\textsuperscript{6} Otherwise only the individual government actor is “personally liable.” One looks finally at (4) whether the defendants may have an affirmative defense by claiming immunity from suit.

“Under Color of State Law”

The “under color of state law” or “state action” element of the Section 1983 cause of action is usually the least controversial of the elements of a Section 1983 claim. Typical defendants are public housing authorities, health departments, or social service agencies whose governmental identities are self-evident, or employees of such agencies. Even though an employee of such agencies violates federal law, the employee’s government employment gives such acts the “color” of state authority.\textsuperscript{7}

Less obvious are private defendants with ties to the government—private landlords receiving a Section 8 subsidy or a private contractor administering a private prison, for example. In such cases the alleged deprivation constitutes “state action” only if there exists “a sufficiently close nexus between the State and the challenged action … so that the action of the [private party] may be fairly treated as that of the State itself.”\textsuperscript{8} The particular facts of the case must be closely scrutinized to determine the extent to which government was the moving force that caused or significantly influenced the deprivation.

The principle can be illustrated by comparing the situation of a private landlord who locks out his Section 8 tenant to that of a warden of a private prison who mis-


\textsuperscript{5}Id. § 1983.

\textsuperscript{6}Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). An action against an agency head or employee based on that person’s execution of the “custom, policy, or practice” is one brought against defendants in their “official capacity.”

\textsuperscript{7}Public defenders are an exception to this rule: their fundamental loyalties are owed to the client, not the state. Hence a deprivation of a federal right by a public defender in the course of defending a client is not state action. Polk County v. Dodson, 454 U.S. 312 (1981).

treats a prisoner. Both rely primarily on state funding to operate. State action likely would not be found in the landlord’s case because the lockout was neither required nor authorized by government regulations and hence was a purely private act.9 By contrast, state action more likely would be found on the part of the private warden because the warden is performing a traditional state function: the delegation of that function to a private entity includes the delegation of the state’s constitutional duties owed to prisoners.10

The U.S. Supreme Court found private parties to be acting under color of law when they

- performed a traditional public function delegated by the government, 11
- jointly participated in an activity with the government, depending on the degree of government involvement,12
- invoked procedures available only in a government-sponsored framework,13 or
- were compelled or significantly encouraged to act in a particular way by government.14

State action also may be found where the government has particular responsibility for the injured plaintiff under a “special relationship” and placed the plaintiff in so vulnerable a position as to be liable when a third party harms the plaintiff.15

**Deprivations of Federal Rights**

A “federal right” can be based on either a constitutional or statutory provision.16 Attempts to enforce federal statutory obligations often lead to Talmudic debates over whether Congress conferred a “right.”17 Identifying a constitutional right enforceable under Section 1983 is more straightforward since the text of the relevant constitutional provisions are written with the intention of protecting individuals from government encroachment. Enforceable federal constitutional rights are those that have been imposed on state or local governments by operation of the due process clause of the Fourteenth Amendment. These include most of the Bill of Rights and the Reconstruction and later amendments.18

The case of the irate voucher holder illustrates a claim arising under the First Amendment:

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9See, e.g., Jackson v. Metropolitan Edison, 419 U.S. 345, 351 (1974) (concerning utility shutoff by private entity motivated by private economic decision); Blum v. Yarborough, 457 U.S. 991 (1982) (finding that eviction without hearing by Medicaid-funded nursing home was not state action absent government coercion or significant encouragement to act in the manner objected to); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (finding that primarily government-funded entity’s firing of a teacher who protested school policies is not state action since the government did not compel the termination).


11Id.


14Jackson, 419 U.S. at 351 (holding that government regulation of activities, unlike government compulsion to act in a certain way, does not give rise to state action); Blum, 457 U.S. at 991.


16The U.S. Supreme Court established the right to enforce federal statutes in Maine v. Thiboutot, 448 U.S. 1 (1980).

17See, e.g., Gonzaga University v. Doe, 536 U.S. 273, 289 (2002) (Clearinghouse No. 54,643) (requiring one to look at whether the statutory focus is “on the [agency] regulated rather than the individuals protected . . . .”); In the former case, no “right” exists) See also Jane Perkins, Using Section 1983 to Enforce Federal Laws, in this ISSUE; FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS, supra note 15, at 90–97. For a favorable recent application of the Gonzaga test in a legal services case, see Price v. City of Stockton, 390 F.3d 1105 (9th Cir. 2004) (Clearinghouse No. 54,800).

18A list of these rights is found in Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968).
Amendment. One can anticipate legal aid caseloads also producing, for example, Fourth Amendment claims out of a warrantless search by police of a tenant’s apartment or the seizure of a homeless person’s property, or an Eighth Amendment claim based on the harassment of homeless people who have no alternative but to live on the streets.19

The Anatomy of Due Process

Perhaps the most common constitutional right violated by government agencies in the legal aid context is the Fourteenth Amendment’s guarantee of due process of law. This amendment, in part, forbids the deprivation of a life, liberty, or property interest without due process of law. Particularly outrageous governmental deprivations violate “substantive” due process.20 “Procedural” due process claims revolve around the procedures used by the government in affecting life, liberty, or property.

“Life, Liberty, or Property”

Deprivation of an interest in life is rarely seen in legal aid cases but can appear in domestic violence situations. For example, in a case currently before the U.S. Supreme Court, a plaintiff mother sued police officers and their city employee for depriving her and her children of procedural due process when the officers’ failure to enforce a domestic violence protective order resulted in the murder of two children.21

Liberty interests are those said to be “fundamental” and “inherent in the concept of ordered liberty.”22 Due process accordingly is required, for example, before government may civilly commit someone, take someone’s children away, or substantially interfere in child rearing.23 The Supreme Court said:

[Liberty] 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 at common law as essential to the orderly pursuit of happiness by free men.24

The broad category of “liberty” also includes the right to live with one’s family.25 The deprivation of this interest presented itself in a Bay Area Legal Aid case in which a client’s Section 8 voucher was yanked because she failed to obtain prior authorization to allow her aged mother to move into her subsidized apartment after the mother suffered a stroke. The trial judge ruled that the housing authority’s refusal to consider this factor constituted a deprivation of a liberty interest without due process.

The due process interest most often affected in legal aid cases is, of course, property. Courts establish property interests on the basis of existing norms or on understandings that stem from an independent source such as state law and that support a legiti-

19See, e.g., King v. Massanweh, 782 F. 2d 825 (9th Cir. 1986) and Howerton v. Gabica, 708 F. 2d 380 (9th Cir. 1983) (addressing police-assisted “self-help evictions” initiated by landlords); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (finding police sweeps of homeless people impermissible as punishment based on status, not conduct).

20A substantive due process violation usually occurs as the result of “government power arbitrarily and oppressively exercised.” County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998).


24Meyer v. Nebraska, 262 U.S. 390, 399 (1923)

mate claim of entitlement. For low-income clients, important property interests include public education, drivers' licenses, and continued receiving of public assistance. Moreover, to protect the integrity of the process for ensuring against a wrongful deprivation, the U.S. Supreme Court finds a property interest in the expectation that government will have a procedure to determine whether an applicant possesses a property interest.

**What Process Is Due**

Established in *Mathews v. Eldridge*, the basic framework for judging what process is due is to balance three factors: the plaintiff’s interest at stake; the government’s countervailing concerns, including the administrative or fiscal costs of providing a particular procedure; and the probable benefit of requiring that procedure.

In the context of public benefits, the Supreme Court ruled that a hearing was required by the Constitution before welfare benefits could be terminated, but the same procedural safeguard was not necessary prior to termination of social security disability benefits. The Court’s justification was that needs-based programs such as public assistance were granted to those who had no other resources, whereas insurance-based programs such as social security were granted regardless of financial resources. Hence greater procedural safeguards were necessary to ensure that the sole means of meeting the survival needs of the public assistance recipient was not wrongly terminated, and the recipient’s interest outweighed the fiscal or administrative burdens borne by a welfare department required to hold a pretermination hearing. Because social security recipients are not necessarily poor, the recipient’s interest in having a pretermination hearing does not override the government’s interest in the public fisc, according to the Supreme Court. The Court thought that the terminated social security recipient had an adequate remedy in a posttermination hearing.

**Applying the Mathews Test to Protect Clients in Administrative Hearings**

The *Mathews* test can be used to attack a number of procedural defects in the administrative appeal process. For example, a common refrain is that, because formal rules of evidence do not apply in such proceedings, hearsay evidence should be admissible. This bald conclusion may or may not be true depending on the context and the role played by a particular piece of evidence in establishing a critical element of the case. Consider, for example, the termination of a Section 8 voucher recipient for off-premises drug-related activity—an allegation all too commonly based solely on the statement of a police officer in a non-drug-related arrest report. The report states that the arrestee appeared to be high on crack. Should this evidence alone be sufficient to bar the recipient from the Section 8 program if the officer is not called to testify at the administrative hearing?

Using the *Mathews* balancing test, one can argue that, given the property interest at stake (housing at a rent affordable to a poor person) and the risk of an erroneous deprivation, the housing authority should be required to either bring in live testimony or use hearsay only to corroborate other evidence. The policy behind the formal hearsay rule in trial courts is to keep out untrustworthy evidence. That evidentiary rules are relaxed in administrative proceedings should not mean that untrustworthy evidence is welcome in the latter venue. Thus hearsay medical

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30 Compare *Goldberg*, 397 U.S. at 254 (welfare), and *Mathews*, 424 U.S. at 319 (social security disability).
Using Section 1983 to Raise Constitutional Claims in Garden-Variety Cases

reports are allowed in social security disability cases because the circumstances in which they are created suggest that the finder of fact can rely on them as trustworthy reflections of the practitioner’s observations and opinions based on the patient’s signs and symptoms.31

If the only evidence supporting a voucher termination for drug activity is a police officer’s off-the-cuff statement in the report of an arrest unrelated to drug activity, the voucher holder can argue under Mathews that a termination based on uncorroborated hearsay is constitutionally defective. First, because the interest involved is very significant—the voucher holder’s ability to afford housing in a high-rent jurisdiction—the cost of an erroneous deprivation is high. Second, the burden on a housing authority to call the police officer as a witness (or find other evidence to corroborate the hearsay statement) is relatively slight, and the fiscal burden is limited to witness fees and extending the rent subsidy until a hearing decision is issued. The third inquiry concerns the value of the proposed procedure to minimize the chances of an erroneous deprivation. Only live testimony can offer an opportunity for both the hearing officer to judge the credibility of the witness and the opponent to probe through cross-examination the officer’s memory, motives, and diagnostic expertise. In this case the voucher holder can make a strong case that, in the absence of this procedural safeguard, the reviewing court should vacate the voucher termination decision.

Potential procedural due process violations also result from inadequate notice or from a hearing officer’s failure to require the agency to meet its burden of proof, to take evidence outside of the hearing, or to explain adequately the basis for a hearing decision. Many state and federal cases hold these and similar practices to be due process violations.32 Legal aid advocates should keep a sharp eye out for practices such as these which can so drastically affect clients’ lives. Section 1983 can be used in appropriate cases to address these problems on both the individual and systemic levels.

Procedural Due Process and “Systemic” Governmental Deprivations

Because of government’s pervasive effect on society, the potential for the deprivation of life, liberty, or property without procedural due process exists outside of normal court or administrative agency appeal processes. The Supreme Court strongly opposes any transformation of procedural due process into an umbrella for ordinary tort claims, particularly where state law provides for an alternative damages remedy.33 The basic rule of thumb for determining whether a claim sounds in tort or presents a procedural due process violation is that the latter exists only where the potential for “systemic” or repeated deprivations exists, that is, deprivations that could potentially be avoided if proper procedures were in place.34

Nonsystemic losses of life, liberty, or property—such as death or property destruction caused by a rotting tree falling in a state park or a negligently driven highway patrol cruiser—are “random” and

31Richardson v. Perales, 402 U.S. 389, 402–4 (1971). Note, however, that the Supreme Court partly based its conclusion on the social security applicant having the right to subpoena the practitioner for cross-examination.

32See, e.g., Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) (holding that the losing party must be advised of appeal rights); Bell, 402 U.S. at 535 (finding that hearing parties must be allowed to present evidence on disputed issues). In California see Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal. 2d 259, 265 (1959), and La Prade v. Department of Water and Power, 27 Cal. 2d 47, 51 (1945) (requiring the moving party to present a prima facie case). In California see also La Prade, 27 Cal. 2d at 51–52; English v. City of Long Beach, 35 Cal. 2d 155, 159 (1950); and Boreta Enterprises v. Department of Alcoholic Beverage Control, 2 Cal. 3d 85, 104 (1970) (requiring that administrative hearing decision be based only on evidence presented at the hearing), and Topanga Association for Scenic Community v. County of Los Angeles, 11 Cal. 3d 506 (1974) (requiring administrative hearing decision to explain the nexus between the evidence presented and the conclusions drawn).

33Parratt v. Taylor, 451 U.S. 527 (1981), held that the loss of a hobby kit in the prison mail system—a deprivation of property—could not give rise to a due process claim since the plaintiff had an alternative state remedy in a suit for negligence.

do not raise constitutional claims; they are rightly addressed under applicable state tort laws. By contrast, if the threat of possible loss of a protected interest is fairly evident (“systemic”) from the factual context, the government can be expected to have procedures in place to weigh the justification for depriving one of life, liberty, or property. The absence of such procedures can be addressed by using Section 1983. In the case that established this principle, the Supreme Court found that even one who voluntarily submitted to a civil commitment was entitled to a procedure to ensure that a protracted stay in the state hospital was warranted.\(^{35}\)

An example of how the “random versus systemic” distinction may arise in a legal aid context occurred years ago in my hometown when the local health department invoked an ordinance governing nuisance abatement to condemn a residential hotel and evict the tenants on a few days’ notice. Although the ordinance required that the building’s owner be notified of the abatement hearing, it did not require notice to hotel tenants. When the ousted residents filed a Section 1983 action in state court, the health department argued that the only available remedy was a wrongful eviction tort suit, and since the tenants had not submitted the required prior administrative notice of tort claims against the government, the tenants were out of luck. The court found otherwise, holding that, because the eviction of tenants was inherent in nuisance abatement proceedings applied to residential buildings, procedures were required to minimize the chances of an erroneous deprivation of the tenants’ property rights. The failure to file a tort claim was irrelevant since Section 1983 plaintiffs were not required to exhaust state remedies. As a consequence, the tenants received damages and a new ordinance mandating notice of a nuisance abatement hearing to all residents and posting of the notice on the building. Ultimately this notice requirement was enacted into state law.\(^{36}\)

**Where the Buck Stops:**

**Official and Personal Liability**

If you find deprivation of a federal right resulting from state action, your focus shifts to whom you should sue, and what the remedy would be. Should you seek damages or an injunction against the government agency, the individual government actor, or both?

In the case of the irate voucher holder, suing the Section 8 inspector would serve little purpose since (1) the real problem was the housing authority’s failure to offer a complaint procedure for voucher holders; (2) even a successful suit against the inspector would not restore the client’s voucher; and (3) the chances of obtaining damages from the inspector would be slim since the latter likely would have “qualified immunity” and thereby escape liability (more on this point later).

Hence plaintiffs usually seek to establish “official” liability not only because governments have deeper pockets than individual employees but also because prospective injunctive relief in such cases can be enforced against the entire agency, not just against an individual employee. While a city, county, or other local agency is a “person” for purposes of Section 1983, it may be held liable only for deprivations caused by the entity’s “custom, policy, or practice.”\(^{37}\) The doctrine of *respondeat superior* does not apply in a Section 1983 case.\(^{38}\) Thus, while an individual food stamp worker who terminates a recipient’s benefits without the opportunity of a hearing might be personally sued for depriving property without due process, the food stamp agency is liable if the termination was a result of departmental policy applied across the

\(^{35}\)Id.

\(^{36}\)CAL. HEALTH & SAFETY CODE § 17980.6 (2004).

\(^{37}\)Monell, 436 U.S. at 658.

\(^{38}\)Id. at 690.
board to all food stamp recipients in a particular category.

Establishing Custom, Policy, or Practice

The best proof of a custom, policy, or practice would be a written regulation or rule formally adopted by the agency. But what if a formal guideline does not exist in your case?

For purposes of establishing agency liability, a custom, policy, or practice exists only if carried out with the approval or acquiescence of the head of the agency. This means that a rights-depriving “policy” set by a midlevel supervisor probably would not give rise to liability on behalf of the agency, although the individual supervisor and the supervisor’s subordinates could be found personally liable.

Moreover, in order to establish a “custom, policy, or practice,” the plaintiff ordinarily must show a pattern or practice of multiple violations of the particular federal right in order to avoid the counterargument that the particular incident was merely a rare aberration from the otherwise faultless operation of the machinery of government. Nevertheless, a single decision or incident can constitute proof of a policy for purposes of Section 1983 if the decision or incident was made or caused by the “final policy-making authority” of the agency, such as the governing body or chief executive of the agency. Courts look to state law to determine who or what the “final policy-making authority” is.

Even if a formal agency rule forbids the particular constitutional violation, a custom, policy, or practice by default can be established by showing “deliberate indifference” on the part of agency management to the potential for a constitutional deprivation. Although this is a high standard to meet, you should consider such a claim where the agency failed to train its employees adequately to minimize the probability of a constitutional violation. Consider, for example, a public assistance agency that—thirty-five years after Goldberg v. Kelly—has an inordinately high rate of terminated recipients who, although they timely request a hearing, are not afforded aid paid pending an administrative hearing. Advocates should consider whether this record is the result of “deliberate indifference” and if the depth of the practice warrants the filing of a lawsuit.

Personal Liability Claims and the Qualified Immunity Defense

Occasionally you run across the rogue government employee whose actions are so clearly beyond the pale that agency responsibility simply cannot be established. Suing a governmental employee rarely makes sense not only because the amount of damages is generally low and the target for an injunction so narrow but also because such suits tend to divert resources away from the central mission of the legal aid program. However, your clients’ experience with a particular employee over time may be so outrageous that suing the employee in the employee’s personal capacity makes sense to set an example for coworkers and the employer.

In the appropriate case, perhaps you could bring a personal liability claim against an employee in conjunction with a “deliberate indifference” claim, seeking to establish agency liability on the

41 City of Saint Louis v. Praprotnik, 485 U.S. 112 (1988). Note, however, that inaction on the part of the “final policy-making authority” is often insufficient to show a policy. Gillette v. Delmore, 979 F.2d 1342, 1348 (9th Cir. 1992).
42 Praprotnik, 485 U.S. at 112.
43 City of Canton v. Harris, 489 U.S. 378, 390 (1989) (regarding failure to train police officers adequately to identify injured or seriously ill prisoners). See also Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) (Clearinghouse No. 51,028) (regarding school’s failure to address ongoing student-on-student sexual harassment despite notice of the problem).
basis of the entity’s failure to train its employees adequately. With a little luck, you could use the official liability claim to negotiate standards and guidelines to minimize the chronic abuse seen by clients.

A personal liability claim against an individual employee likely would lead the employee to defend by claiming a “qualified” or “good-faith immunity.”44 A degree of immunity was necessary, said the Supreme Court, “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.”

The immunity is said to be “qualified” (and not absolute) because a governmental employee is immune from a suit for damages only if the employee’s actions were performed under an objectively reasonable, good-faith belief that these actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”46 The qualified immunity doctrine protects “all but the plainly incompetent or those who knowingly violate the law.”47

Take, for example, the housing inspector in the case of the irate voucher holder. The facts surrounding the interchange among the inspector, landlord, and voucher holder may not amount to a clear deprivation of the plaintiff’s First Amendment right. In the absence of case law addressing a similar fact pattern, the inspector’s duty to avoid depriving this right was not “clearly established.” Unless the inspector was either “plainly incompetent” or a “knowing violator,” he would have a good shot at qualified immunity.

**Damages and Injunctive Relief**

Courts may award both damages and equitable relief in a Section 1983 action.48 Supreme Court precedent bars Section 1983 actions against a state or a state agency, and the Eleventh Amendment bars suit by private parties for damages against a state or state agency.49 Consequently in a Section 1983 case damages may be awarded against a state employee only if the employee is sued in her personal capacity. Courts may award damages against local agencies or their employees in their personal or official capacities.50 However, recall that no relief is available from a governmental agency unless the plaintiff can prove liability founded on a “custom, policy, or practice.”51 Damages may not be awarded against a state or local employee sued in a personal capacity where the employee can show entitlement to a “qualified immunity.”52


48Attorneys rarely seek damages in the typical legal aid practice. But keep the availability of damages in mind as a tool for chastening government employees whose repeated actions are particularly egregious.


50Local governmental entities may be sued directly under Section 1983. Monell, 436 U.S. at 658.

51Id.

52Harlow v. Fitzgerald, 457 U.S. at 800.
A claim for injunctive relief in federal court raises other issues. As in damages actions, a private party may not sue for equitable relief in federal court against the state or state entities. Under the doctrine of Ex parte Young, a plaintiff may obtain injunctive relief against a state official, even an official sued in his official capacity. However, unless the particular deprivation is likely to affect the plaintiff in the future, a claim for an injunction is moot since no Article III “case or controversy” warranting equitable relief would exist.

Further Procedural Considerations

Because a cause of action under Section 1983 is most analogous to a tort action, the applicable statute of limitations for bringing a Section 1983 case is that governing tort actions in the applicable state.

While Section 1983 plaintiffs are not required to exhaust otherwise mandatory state remedies before filing a Section 1983 claim, if state administrative remedies have been invoked, relitigation of an issue in a subsequent Section 1983 case is precluded if the state agency actually resolved the particular issue while acting in a judicial capacity, and the plaintiff had the opportunity to contest. If the issue was previously litigated in state court, the U.S. Supreme Court is the only federal court with authority to review the state-court judgment. If state law frowns on claim splitting, a state judgment bars a subsequent federal claim arising out of the same transaction on which the state-law claim was based.

We can be thankful that preclusion is not relevant in many legal aid cases since many of the constitutional deprivations we see either cannot be adjudicated at the administrative agency level or arise out of the procedures used or not used in the hearing process itself. These constitutional or procedural issues can be presented for resolution in a Section 1983 claim without concern.

Section 1983 is not a remedy reserved for personal injury lawyers or advocates seeking broad systemic impact. The basic elements of this cause of action are not that complex, particularly when constitutional violations are its target. Even in programs with limited resources, advocates can use this tool to focus on discrete, manageable problems faced by legal aid clients on an everyday basis. When that government agency crosses one too many clients, enlarge your arsenal of remedies and consider “making it a federal case.”

[Editor’s Note: This article is loosely based on a presentation made to the National Legal Aid and Defender Association Substantive Law Conference, Los Angeles, California, July 2004, and borrows liberally from the author’s Enforcing Federal Rights: The Law of Section 1983, 33 CLEARINGHOUSE REVIEW 217 (Part 1), 393 (Part 2) (Sept.–Oct., Nov.–Dec. 1999).]

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56See, e.g., University of Tennessee v. Elliott, 478 U.S. 788, 798 (1986) (holding that factual findings of an administrative hearing decision are preclusive).


59In the case of the irate voucher holder, the housing authority hearing officer had no power to rule on a constitutional claim or to decide whether the agency’s failure to have a complaint procedure had a constitutional dimension in this factual context.