

Chapter 1

CONSTITUTIONAL TORTS: A FIRST LOOK

V. CONSTITUTIONAL TORTS AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

Page 23: Insert the following as a new paragraph at the end of Part V:

Note that in *Jones v. Bock*, 127 S. Ct. 910 (2007), the Supreme Court answered both the of the following questions dealing with exhaustion and the Prison Litigation Reform Act (PLRA) in the negative: (1) Must the plaintiff inmate allege and prove exhaustion of administrative remedies, or is non-exhaustion an affirmative defense that must be pleaded and proved by the defendant? (2) Does the PLRA require “total exhaustion” so that where there is a single unexhausted claim, the plaintiff inmate’s complaint must be dismissed even though there are also exhausted claims set out in the complaint?

Page 44: Insert the following as a new paragraph at the end of Note 3:

The Supreme Court, in *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. ___ (2009), a unanimous decision written by Justice Alito, resolved the foregoing split in the circuits about Title IX and § 1983 equal protection sex discrimination claims and held that Title IX does not preempt such claims. The plaintiffs alleged that the defendant school committee and its superintendent inadequately responded to their allegations of sexual harassment of their daughter by an older student. This, according to plaintiffs, was actionable under both Title IX and the Equal Protection Clause pursuant to § 1983. The First Circuit dismissed the § 1983 claim on the ground that Title IX’s implied private remedy was sufficiently comprehensive to preempt § 1983 equal protection peer-on-peer sexual harassment claims. However, the Supreme Court reversed.

According to the Court, there was no congressional intent to preempt: the absence of a comprehensive remedial scheme under Title IX and the divergent coverage of Title IX and the Equal Protection Clause so demonstrated. Title IX’s only enforcement mechanism was an administrative procedure that could result in the withdrawal of federal funds. In addition, Title IX was narrower than the Equal Protection Clause insofar as Title IX did not authorize suits against school officials. But it was also broader insofar as Title IX covered even nonpublic institutions that receive federal funds. Congress thus did not see Title IX as the sole means of remedying sex discrimination in schools. Finally, this conclusion was consistent with Title IX’s context and history, including the modeling of Title IX on Title VII, which lower courts regularly interpreted to allow for Title VII and parallel § 1983 claims.

Page 46: Add the following after Note 7:

8. The Supreme Court handed down *Ashcroft v. Iqbal*, 129 S. Ct. ___ (2009), which reversed a Second Circuit case involving *Bivens* claims against various federal officials (including John Ashcroft, the former United States Attorney General, and Robert Mueller, Director of the F.B.I.) in the aftermath of 9/11. The plaintiff, a Muslim Pakistani, alleged that the defendants acted unconstitution-

ally in connection with his confinement under harsh conditions at a detention center after his separation from the general prison population. Specifically, he alleged that, as supervisors, they adopted and implemented an unconstitutional policy subjecting him to those harsh conditions because of his race, religion or national origin. Extensively discussing the possible effect of *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), on constitutional tort pleading requirements, the Second Circuit rejected the defendants' assertion of qualified immunity as to the supervisory liability claims against Ashcroft and Mueller and ruled that the plaintiff stated supervisory liability causes of action under *Bivens* against them. Thereafter, the Supreme Court granted certiorari to address the following Questions Presented:

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.
2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

The Supreme Court reversed in a 5-4 opinion by Justice Kennedy. He observed at the outset that the defendants' motion to dismiss was made in connection with their qualified immunity defense. This defense was in large measure designed to protect them and defendants in general from the costs of defending, including the costs of discovery, and not just from liability — see Chapter 8. Accordingly, the plausibility standard of *Twombly* was fully applicable to *Bivens* and § 1983 claims, and was not limited to antitrust.

Next, the Court went on to declare that because respondeat superior liability was unavailable under *Bivens* and § 1983 — see Chapter 5 — it was not sufficient for supervisory liability purposes that the defendants might have acted with deliberate indifference to known violations by their subordinates of the plaintiff's constitutional rights. Rather, the plaintiff had to allege and ultimately prove that the defendants themselves actually had the impermissible purposes required for these alleged Due Process Clause (and its equal protection component) and Free Exercise Clause violations. Here, the plaintiff's allegations as to these purposes were conclusory and were thus not entitled to the presumption that they were true. As to the plaintiff's factual allegations, they were insufficient to render the plaintiff's allegations of purposeful and unlawful discrimination against these defendants plausible under F.R.C.P. 8(a)(2): they did not show that the defendants adopted and implemented the challenged policies because of race, religion or national origin rather than for neutral, investigative reasons. For all these reasons, the Court reversed the Second Circuit but remanded for that court to consider whether to allow the plaintiff to seek leave to amend the complaint against Ashcroft and Mueller.

Justice Souter, the author of *Twombly*, dissented in an opinion joined by Justices Stevens, Breyer and Ginsburg. He strongly disagreed with what he called the Court's rejection of the concession by the defendants that they could be held liable as supervisors for their deliberate indifference when they had actual knowledge of their subordinates' constitutional violations and criticized

V. EXHAUSTION OF ADMINISTRATIVE REMEDIES 3

the Court for reaching out to declare that such deliberate indifference was insufficient for supervisory liability. Justice Souter contended that the Court had thereby effectively eliminated supervisory liability in *Bivens* (and § 1983) cases. He also accused the Court of misapplying *Twombly* to conclude that the plaintiff failed to state a claim. In his view, the factual allegations in the complaint as to the defendants' impermissible purposes sufficed to state a *Bivens* claim against them because he had alleged that at the very least they were aware of the discriminatory detention policy and condoned it. "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are *probably* true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be." He concluded that there was no principled basis for the Court's disregard of plaintiff's allegations linking the defendants to their subordinates' racial, ethnic and religious discrimination.

0004

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Sat Jul 25 01:10:35 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3525 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Master:17 Jul 09 02:10][MX-SECNDARY: 18 Jul 09 08:51][TT-: 25 Jun 09 10:01 loc=usa unit=03525-sup01]

0

Chapter 3

“SECURED BY THE CONSTITUTION AND LAWS”

I. THE DUE PROCESS CLAUSE IN CONSTITUTIONAL TORT LAW

A. “Property”

Page 111: Add the following after the Note:

NOTE ON *TOWN OF CASTLE ROCK v. GONZALES*

Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005), considered the scope of constitutionally-protected “property.” The plaintiff had obtained a restraining order against her estranged husband, ordering him to stay away from the children except at specified times. It also directed the police to “use every reasonable means to enforce this restraining order,” including arresting the husband if they had probable cause to believe he had violated the order. In violation of the order, the husband came one afternoon and took the children from the wife’s home. According to her complaint, efforts to get the police to find him and enforce the order were unavailing. Later the same evening, he killed the children. Mrs. Gonzales sued the town and police officers, claiming that the restraining order gave her a property right in protection from her husband, and that by doing nothing in response to her pleas the police deprived her of property without due process of law.

In an opinion by Justice Scalia the Court ruled that Mrs. Gonzales had no property right in enforcement of the restraining order, reversing a 10th circuit holding to the contrary:

In the context of the present case, the central state law question is whether Colorado law gave respondent a right to police enforcement of the restraining order.

After examining Colorado law, the Court said:

We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes. [It] is hard to imagine that a Colorado peace officer would not have some discretion to determine that — despite probable cause to believe a restraining order has been violated — the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.

[Mrs. Gonzales] does not specify the precise means of enforcement that the Colorado restraining-order statute assertedly mandated — whether her interest lay in having police arrest her husband, having them seek a warrant for his arrest, or having them use “every reasonable means, up to and including arrest, to enforce the order’s terms.” Brief for Respondent 29–30. Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone safely be deemed “entitled” to something when the identity of the alleged entitlement is vague.

[Mrs. Gonzales’s] alleged interest stems only from a State’s *statutory* scheme — from a restraining order that was authorized by and tracked precisely the statute on which the Court of Appeals relied. She does not assert that she has any common-law or contractual entitlement to enforcement. If she was given a statutory entitlement, we would expect to see some indication of that in the statute itself. Although Colorado’s statute spoke of “protected person[s]” such as [Mrs. Gonzales,] it did so in connection with matters other than a right to enforcement [such as being provided with a copy of the order and notice of arrest of the restrained person]. The protected person’s express power to “initiate” civil contempt proceedings contrasts tellingly with the mere ability to “request” initiation of criminal contempt proceedings — and even more dramatically with the complete silence about any power to “request” (much less demand) that an arrest be made.

[Even] if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a “property” interest for purposes of the Due Process Clause. Such a right would not, of course, resemble any traditional conception of property. Although this alone does not disqualify it from due process protection, as *Roth* and its progeny show, the right to have a restraining order enforced does not “have some ascertainable monetary value,” as even our “*Roth*-type property-as-entitlement” cases have implicitly required. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000). Perhaps most radically, the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed — to wit, arresting people who they have probable cause to believe have committed a criminal offense.

[In] light of today’s decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor its “substantive” dimensions.

Justice Stevens dissented. In an opinion joined by Justice Ginsburg, he read the state law differently:

Regardless of whether the enforcement called for in this case was arrest or the seeking of an arrest warrant, [the] crucial point is that,

I. THE DUE PROCESS CLAUSE IN CONSTITUTIONAL TORT LAW 7

under the statute, the police were *required* to provide enforcement; *they lacked the discretion to do nothing*.

He took issue with the proposition that the plaintiff's interest was too vague to amount to an entitlement:

Our cases have never required the object of an entitlement to be some mechanistic, unitary thing. Suppose a State entitled every citizen whose income was under a certain level to receive health care at a state clinic. The provision of health care is not a unitary thing — doctors and administrators must decide what tests are called for and what procedures are required, and these decisions often involve difficult applications of judgment. But it could not credibly be said that a citizen lacks an entitlement to health care simply because the content of that entitlement is not the same in every given situation. Similarly, the enforcement of a restraining order is not some amorphous, indeterminate thing. Under the statute, if the police have probable cause that a violation has occurred, enforcement consists of either making an immediate arrest or seeking a warrant and then executing an arrest — traditional, well-defined tasks that law enforcement officers perform every day.

B. Liberty

Page 122: Add the following after the Note 2:

NOTE ON *WILKINSON v. AUSTIN*

In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Court revisited the “state-created liberty” issue, ruling that an inmate was deprived of “liberty” (and thus entitled to the procedural protections of the due process clause) when he was placed in a Supermax prison, the Ohio State Penitentiary (OSP):

Conditions at OSP are more restrictive than any other form of incarceration in Ohio, including conditions on its death row or in its administrative control units. [In] the OSP almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 feet by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further [discipline].

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate’s sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there. Inmates otherwise eligible for parole lose their eligibility while incarcerated at [OSP].

After *Sandin* it is clear that the touchstone of the inquiry into the existence of a protected state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves “in relation to the ordinary incidents of prison [life.]”

The *Sandin* standard requires us to determine if assignment to OSP “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” In *Sandin*’s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. This divergence indicates the difficulty of locating the appropriate baseline, an issue that was not explored in the briefs. We need not resolve the issue here, however, for we are satisfied that assignment to OSP imposes an atypical and significant hardship under any plausible baseline.

For an inmate placed in OSP, almost all human contact is prohibited, even to the point that communication is not permitted from cell to cell, the light, though it may be dimmed, is on for 24 hours, exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. While any of these considerations standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that [inmates] have a liberty interest in avoiding assignment to OSP.

C. Procedural Due Process

Page 128: Add to the end of Note 1:

Having ruled that inmates have a liberty interest in avoiding assignment to Supermax prisons, the Court in *Wilkinson*, supra, turned to the issue of whether Ohio’s procedure for sending inmates to OSP satisfied the due process clause. The state did not provide an adversary hearing before putting inmates in the facility, e.g., it did not permit inmates to call witnesses. Nonetheless, the Court upheld Ohio’s “New Policy.”

Applying the three factors set forth in *Mathews* we find Ohio’s New Policy provides a sufficient level of process. We first consider the significance of the inmate’s interest in avoiding erroneous placement at

I. THE DUE PROCESS CLAUSE IN CONSTITUTIONAL TORT LAW 9

OSP. Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all. The private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the context of the prison system and its attendant curtailment of liberties.

The second factor addresses the risk of an erroneous placement under the procedures in place, and the probable value, if any, of additional or alternative procedural safeguards. The New Policy provides that an inmate must receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal. Our procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason. In addition to having the opportunity to be heard at the Classification Committee state, Ohio also invites the inmate to submit objections prior to the final level of review. This second opportunity further reduces the possibility of an erroneous deprivation.

Although a subsequent reviewer may overturn an affirmative recommendation for OSP placement, the reverse is not true; if one reviewer declines to recommend OSP placement, the process terminates. This avoids one of the problems apparently present under the Old Policy, where, even if two levels of reviewers recommended against placement, a later reviewer could overturn their recommendation without explanation.

If the recommendation is OSP placement, Ohio requires that the decisionmaker provide a short statement of reasons. This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior. As we have noted, Ohio provides multiple levels of review of any decision recommending OSP placement, with power to overturn the recommendation at each level. In addition to these safeguards, Ohio further reduces the risk of erroneous placement by providing for a placement review within 30 days of an inmate's initial assignment to OSP.

The third *Mathews* factor addresses the State's interest. In the context of prison management, and in the specific circumstances of this case, this interest is a dominant consideration. Ohio has responsibility for imprisoning nearly 44,000 inmates. The State's first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.

Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State's interest. Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison [walls].

The problem of scarce resources is another component of the State's interest. The cost of keeping a single prisoner in one of Ohio's ordinary maximum-security prisons is \$34,167 per year, and the cost to maintain each inmate at OSP is \$49,007 per year. We can assume that Ohio, or any other penal system, faced with costs like these will find it difficult to fund more effective education and vocational assistance programs to improve the lives of the prisoners. It follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.

The State's interest must be understood against this background. Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be [defeated].

II. OTHER CONSTITUTIONAL CLAIMS

A. Fourth Amendment Rights

In *Scott v. Harris* the Court addressed the Fourth Amendment excessive force issue in the context of high speed police chases.

SCOTT v. HARRIS
127 S. Ct. 1769 (2007)

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most

II.

OTHER CONSTITUTIONAL CLAIMS

11

portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Having radioed his supervisor for permission, Scott was told to "go ahead and take him out." Instead, Scott applied his push bumper to the rear of respondent's vehicle.^[1] As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under 42 U.S.C. § 1983, alleging, *inter alia*, a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. [The District Court denied Scott's motion for summary judgment and the Eleventh circuit affirmed]. We granted certiorari, and now [reverse].

III

A

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion."

* * *

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by

^[1] Scott says he decided not to employ the PIT maneuver because he was "concerned that the vehicles were moving too quickly to safely execute the maneuver." Brief for Petitioner 4. Respondent agrees that the PIT maneuver could not have been safely employed. See Brief for Respondent 9. It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.

the Court of Appeals.^[5] For example, the Court of Appeals adopted respondent’s assertions that, during the chase, “there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle.” Indeed, reading the lower court’s opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test:

“Taking the facts from the non-movant’s viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.”

The videotape tells quite a different story. There we see respondent’s vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.^[6] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a “genuine” dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, “when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’ ” “The

^[5] Justice Stevens suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. See dissenting opinion: (“In sum, the factual statements by the Court of Appeals quoted by the Court . . . were entirely accurate”). We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb and in Clerk of Court’s case file.

^[6] Justice Stevens hypothesizes that these cars “had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights,” so that “[a] jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance.” It is not our experience that ambulances and fire engines careen down two-lane roads at 85-plus miles per hour, with an unmarked scout car out in front of them. The risk they pose to the public is vastly less than what respondent created here. But even if that were not so, it would in no way lead to the conclusion that it was unreasonable to eliminate the threat to life that respondent posed. Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.

II.

OTHER CONSTITUTIONAL CLAIMS

13

mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent’s version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

B

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment. Scott does not contest that his decision to terminate the car chase by ramming his bumper into respondent’s vehicle constituted a “seizure.” [It] is also conceded, by both sides, that a claim of “excessive force in the course of making [a] . . . ‘seizure’ of [the] person . . . [is] properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard.” *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The question we need to answer is whether Scott’s actions were objectively reasonable.^[8]

1

Respondent urges us to analyze this case as we analyzed *Garner*. We must first decide, he says, whether the actions Scott took constituted “deadly force.” (He defines “deadly force” as “any use of force which creates a substantial likelihood of causing death or serious bodily injury.”) If so, respondent claims that *Garner* prescribes certain preconditions that must be met before Scott’s actions can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape;^[9] and (3) where

^[8] Justice Stevens incorrectly declares this to be “a question of fact best reserved for a jury,” and complains we are “usurping the jury’s factfinding function.” At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, see Part III-A, *supra*, the reasonableness of Scott’s actions — or, in Justice Stevens’ parlance, “whether [respondent’s] actions have risen to a level warranting deadly force,” — is a pure question of law.

^[9] Respondent, like the Court of Appeals, defines this second precondition as “‘necessary to prevent escape.’” But that quote from *Garner* is taken out of context. The necessity described in *Garner* was, in fact, the need to prevent “serious physical harm, either to the officer or to others.” By way of example only, *Garner* hypothesized that deadly force may be used “if necessary to prevent escape” when the suspect is known to have “committed a crime involving the infliction or threatened infliction of serious physical harm,” so that his mere being at large poses an inherent danger to society. Respondent did not pose that type of inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in *Garner*, it was respondent’s flight itself (by means of a

feasible, the officer must have given the suspect some warning. Since these *Garner* preconditions for using deadly force were not met in this case, Scott's actions were *per se* unreasonable.

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham, supra*, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, by shooting him "in the back of the head" while he was running away on foot, and when the officer "could not reasonably have believed that [the suspect] . . . posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape." Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general. . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case. Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

2

In determining the reasonableness of the manner in which a seizure is effected, "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating Scott's behavior. Thus, in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. See Part III-A, *supra*. It is equally clear that Scott's actions posed a high likelihood of serious injury or death to respondent — though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, see *Garner*, or pulling alongside a fleeing motorist's car and shooting the motorist. So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this

speeding automobile) that posed the threat of "serious physical harm . . . to others."

II.

OTHER CONSTITUTIONAL CLAIMS

15

process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.^[10]

But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action — ramming respondent off the road — was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rear-view mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Cf. *Brower*. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.

Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

* * *

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could

^[10] The Court of Appeals cites *Brower v. County of Inyo*, 489 U.S. 593, 595, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989), for its refusal to “countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase.” The only question in *Brower* was whether a police roadblock constituted a *seizure* under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant; a seizure occurs whenever the police are “responsible for the termination of [a person's] movement,” regardless of the reason for the termination. Culpability *is* relevant, however, to the *reasonableness* of the seizure — to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.

conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' decision to the contrary is reversed.

It is so ordered.

JUSTICE GINSBURG, concurring.

I join the Court's [opinion]. I do not read today's decision as articulating a mechanical, *per se* rule. The inquiry described by the Court is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle? "Admirable" as "[an] attempt to craft an easy-to-apply legal test in the Fourth Amendment context [may be]," the Court explains, "in the end we must still sloop our way through the factbound morass of 'reasonableness.'"

JUSTICE BREYER, concurring.

I join the Court's [opinion]. Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion, and watch it. Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution. [The] video makes clear the highly fact-dependent nature of this constitutional [determination].

I disagree with the Court insofar as it articulates a *per se* rule. The majority states: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." This statement is too absolute. As Justice Ginsburg points out, whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects. With these qualifications, I join the Court's opinion.

JUSTICE STEVENS, dissenting.

Today, the Court asks whether an officer may "take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders." Depending on the circumstances, the answer may be an obvious "yes," an obvious "no," or sufficiently doubtful that the question of the reasonableness of the officer's actions should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer. A high speed chase in a desert in Nevada is, after all, quite different from one that travels through the heart of Las Vegas.

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders"

II.

OTHER CONSTITUTIONAL CLAIMS

17

were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him."

Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort,"^[1] the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue. More important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

Omitted from the Court's description of the initial speeding violation is the fact that respondent was on a four-lane portion of Highway 34 when the officer clocked his speed at 73 miles per hour and initiated the chase. More significant — and contrary to the Court's assumption that respondent's vehicle "forced cars traveling in both directions to their respective shoulders to avoid being hit" — a fact unmentioned in the text of the opinion explains why those cars pulled over prior to being passed by respondent. The sirens and flashing lights on the police cars following respondent gave the same warning that a speeding ambulance or fire engine would have provided. The 13 cars that respondent passed on his side of the road before entering the shopping center, and both of the cars that he passed on the right after leaving the center, no doubt had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights before respondent or the police cruisers approached. A jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance, and that their reactions were fully consistent with the evidence that respondent, though speeding, retained full control of his vehicle.

The police sirens also minimized any risk that may have arisen from running "multiple red lights." In fact, respondent and his pursuers went through only two intersections with stop lights and in both cases all other vehicles in sight were stationary, presumably because they had been warned of the approaching speeders. Incidentally, the videos do show that the lights were red when the police cars passed through them but, because the cameras were farther away

^[1] I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways — when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine — they might well have reacted to the videotape more dispassionately.

when respondent did so and it is difficult to discern the color of the signal at that point, it is not entirely clear that he ran either or both of the red lights. In any event, the risk of harm to the stationary vehicles was minimized by the sirens, and there is no reason to believe that respondent would have disobeyed the signals if he were not being pursued.

My colleagues on the jury saw respondent "swerve around more than a dozen other cars," and "force cars traveling in both directions to their respective shoulders," but they apparently discounted the possibility that those cars were already out of the pursuit's path as a result of hearing the sirens. Even if that were not so, passing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction. In fact, at one point, when respondent found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction to pass before overtaking the car in front of him while using his turn signal to do so. This is hardly the stuff of Hollywood. To the contrary, the video does not reveal any incidents that could even be remotely characterized as "close calls."

In sum, the factual statements by the Court of Appeals quoted by the Court were entirely accurate. That court did not describe respondent as a "cautious" driver as my colleagues imply, but it did correctly conclude that there is no evidence that he ever lost control of his vehicle. That court also correctly pointed out that the incident in the shopping center parking lot did not create any risk to pedestrians or other vehicles because the chase occurred just before 11 p.m. on a weekday night and the center was closed. It is apparent from the record (including the videotape) that local police had blocked off intersections to keep respondent from entering residential neighborhoods and possibly endangering other motorists. I would add that the videos also show that no pedestrians, parked cars, sidewalks, or residences were visible at any time during the chase. The only "innocent bystanders" who were placed "at great risk of serious injury," were the drivers who either pulled off the road in response to the sirens or passed respondent in the opposite direction when he was driving on his side of the road.

I recognize, of course, that even though respondent's original speeding violation on a four-lane highway was rather ordinary, his refusal to stop and subsequent flight was a serious offense that merited severe punishment. It was not, however, a capital offense, or even an offense that justified the use of deadly force rather than an abandonment of the chase. The Court's concern about the "imminent threat to the lives of any pedestrians who might have been present," while surely valid in an appropriate case, should be discounted in a case involving a nighttime chase in an area where no pedestrians were present.

What would have happened if the police had decided to abandon the chase? We now know that they could have apprehended respondent later because they had his license plate number. Even if that were not true, and even if he would

II.

OTHER CONSTITUTIONAL CLAIMS

19

have escaped any punishment at all, the use of deadly force in this case was no more appropriate than the use of a deadly weapon against a fleeing felon in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). In any event, any uncertainty about the result of abandoning the pursuit has not prevented the Court from basing its conclusions on its own factual assumptions.^[5] The Court attempts to avoid the conclusion that deadly force was unnecessary by speculating that if the officers had let him go, respondent might have been “just as likely” to continue to drive recklessly as to slow down and wipe his brow. That speculation is unconvincing as a matter of common sense and improper as a matter of law. Our duty to view the evidence in the light most favorable to the nonmoving party would foreclose such speculation if the Court had not used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment. There is no evidentiary basis for an assumption that dangers caused by flight from a police pursuit will continue after the pursuit ends. Indeed, rules adopted by countless police departments throughout the country are based on a judgment that differs from the Court’s. See, e.g., App. to Brief for Georgia Association of Chiefs of Police, Inc., as *Amicus Curiae* A-52 (“During a pursuit, the need to apprehend the suspect should always outweigh the level of danger created by the pursuit. When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated. . . . Pursuits should usually be discontinued when the violator’s identity has been established to the point that later apprehension can be accomplished without danger to the public”).

Although *Garner* may not, as the Court suggests, “establish a magical on/off switch that triggers rigid preconditions” for the use of deadly force, it did set a threshold under which the use of deadly force would be considered constitutionally unreasonable:

“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

^[5] In noting that Scott’s action “was *certain* to eliminate the risk that respondent posed to the public” while “ceasing pursuit was not,” the Court prioritizes total elimination of the risk of harm to the public over the risk that respondent may be seriously injured or even killed. (emphasis in original). The Court is only able to make such a statement by assuming, based on its interpretation of events on the videotape, that the risk of harm posed in this case, and the type of harm involved, rose to a level warranting deadly force. These are the same types of questions that, when disputed, are typically resolved by a jury; this is why both the District Court and the Court of Appeals saw fit to have them be so decided. Although the Court claims only to have drawn factual inferences in respondent’s favor “to the extent supportable by the record,” (emphasis in original), its own view of the record has clearly precluded it from doing so to the same extent as the two courts through which this case has already traveled.

Whether a person’s actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. Here, the Court has usurped the jury’s factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. It chastises the Court of Appeals for failing to “view the facts in the light depicted by the videotape” and implies that no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified. However, the three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence and described a very different version of events:

“At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, . . . Scott’s path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force.”

If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events. Moreover, under the standard set forth in *Garner*, it is certainly possible that “a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road under the instant circumstances.”

The Court today sets forth a *per se* rule that presumes its own version of the facts: “A police officer’s attempt to terminate a dangerous high-speed car chase *that threatens the lives of innocent bystanders* does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”(emphasis added). Not only does that rule fly in the face of the flexible and case-by-case “reasonableness” approach applied in *Garner* and *Graham v. Connor*, but it is also arguably inapplicable to the case at hand, given that it is not clear that this chase threatened the life of any “innocent bystander.” In my view, the risks inherent in justifying unwarranted police conduct on the basis of unfounded assumptions are unacceptable, particularly when less drastic measures — in this case, the use of stop sticks^[9] or a simple warning issued from a loudspeaker — could have avoided such a tragic result. In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent’s speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.

I respectfully dissent.

^[9] “Stop sticks” are a device which can be placed across the roadway and used to flatten a vehicle’s tires slowly to safely terminate a pursuit.

Page 185: Add the following note before B.

NOTE ON EXCESSIVE FORCE CLAIMS AFTER *SCOTT*

Does *Scott* bar all suits arising out of injuries caused by high speed chases? In *Abney v. Coe*, 493 F.3d 412 (4th Cir. 2007), Abney, a motorcyclist, died in a collision with a sheriff deputy's car following an eight-mile pursuit. The officer, Rodney Coe, had "observed a motorcycle driven by Gerald Abney (who was later determined to be driving under the influence of methamphetamine) crossing double yellow lines while passing a vehicle on a curve. Deputy Coe turned around his patrol car and activated his blue flashing lights and siren in an attempt to pull Abney over. Abney did not stop, however." Coe gave chase. Eventually, under the plaintiff's version of the facts, "Coe intentionally rammed the rear of Abney's motorcycle," resulting in Abney's death at the scene. The Fourth Circuit relied on *Scott* in affirming summary judgment for Coe. Possible distinctions between the two cases were unimportant:

The fact that unlike *Scott*, Abney did not accelerate to 85 miles per hour is not dispositive; indeed, the narrow, winding, two-lane roads in this case all but prohibited such speeds. The fact that Abney was driving during the day and Harris in the dead of night means only that Abney had the opportunity to scare more motorists to death. Similarly, the fact that Abney was driving a motorcycle, rather than a car, does not require a different result since the probability that a motorist will be harmed by a Precision Intervention Technique is high in either circumstance.

What result if the chase ends in a collision, the driver survives, and the officer then shoots the driver? See *Adams v. Speers*, 473 F.3d 989 (9th Cir. 2007) (holding that on these facts the officer would be liable.) *Adams* was decided shortly before the Supreme Court ruled in *Scott*. Is it still good law after *Scott*?

Suppose the police chase a motorcyclist and run him off the road without touching the vehicle. One recent case holds that no Fourth Amendment suit can be brought because no "seizure" has taken place absent a touching. See *Steen v. Myers*, 486 F.3d 1017 (7th Cir. 2007) Do the Supreme Court's cases support the proposition that no seizure occurs absent a touching?

Long v. Slaton, 508 F.3d 576 (11th Cir. 2007), presents an interesting excessive force issue. Brian Long suffered from psychosis. According to the complaint, his father called the sheriff's department and requested assistance:

Deputy Slaton responded to the call and arrived at the Long residence shortly thereafter. Slaton, who was alone, got out of his marked sheriff's cruiser, leaving the keys in the ignition and the driver's door open, Slaton then spoke to Long's father, who explained his desire that Long be detained due to Long's psychosis. When Deputy Slaton asked Long's father if Long had been physically violent with him, the father responded, "no."

Deputy Slaton then approached Long, who was at the end of the driveway, close to the house. Slaton pulled out handcuffs and told Long that Slaton would take Long to jail. Long voiced his disagreement and

then ran over to and got inside Slaton’s cruiser and closed the door. Slaton then ran to the driver’s side of the cruiser, pointed his pistol at Long, and ordered Long to get out of the cruiser. Deputy Slaton threatened to shoot Long if Long did not comply. Long then shifted the cruiser into reverse and began backing away and down the driveway toward the road. Slaton stepped into the middle of the driveway and fired three shots at Long as the sheriff’s cruiser moved away. One shot went through the windshield and struck Long in the chest. The cruiser stopped as it rolled into an embankment and Long died after about a minute. At the time, backup law enforcement was en route.

The Eleventh Circuit ruled that the complaint should be dismissed because

Deputy Slaton’s force was objectively reasonable under the Fourth Amendment. Although Slaton’s decision to fire his weapon risked Long’s death, that decision was not outside the range of reasonableness in the light of the potential danger posed to officers and to the public if Long was allowed to flee in a stolen police cruiser. [Even] if we accept that the threat posed by Long to Deputy Slaton was not immediate in that the cruiser was not moving toward Slaton when shots were fired, the law does not require officers in a tense and dangerous situation to wait until the moment a suspect used a deadly weapon to act to stop the suspect. [Although] at the point of the shooting Long had not yet used the police cruiser as a deadly weapon, Long’s unstable frame of mind, energetic evasion of the deputy’s physical control, Long’s criminal act of stealing a police cruiser, and Long’s starting to drive — even after being warned of deadly force — to a public road gave the deputy reason to believe that Long was dangerous.

Does *Long* fall within the rule announced in *Scott*? The Eleventh Circuit panel cited *Scott*, but did not rely heavily on that case. Are there legally significant differences between the two fact patterns? Does it matter that Long was mentally ill and, before his encounter with Slaton, had not committed a crime? Did Slaton’s actions (leaving his key in the ignition of an unlocked police cruiser in the vicinity of a person in the midst of a psychotic episode) contributed to the danger? If so, should this have legal significance? Notice that the court ruled that the complaint should be dismissed. Would factual development be useful in resolving this case?

B. Equal Protection

Page 187: Add the following Notes 3, 4, 5, and 6, before C.

3. In *Engquist v. Oregon Dep’t of Agriculture*, 128 S. Ct. 2146 (2008), the Court limited the scope of the “class of one” equal protection suit, holding that it “has no place in the public employment context.” Engquist and another employee had quarreled for some years. When a new supervisor promoted her antagonist and eliminated Engquist’s position, she sued on several grounds, including a “class of one” claim that she was fired for “arbitrary, vindictive, and malicious reasons.” At trial the jury found in her favor on that claim. On appeal the Ninth Circuit reversed and the Supreme Court affirmed the Ninth Circuit ruling.

Relying on earlier public employment cases, including public employee speech cases, see *infra* section C, the Court said:

Our precedent in the public-employee context . . . establishes two main principles: First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as [employer.]

Our equal protection jurisprudence has typically been concerned with governmental classifications that affect some groups differently than [others.] Plaintiffs in such cases generally allege that they have been arbitrarily classified as members of an identifiable group. [Recognition] of the class-of-one theory of equal protection on the facts in *Olech* was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle. [When] those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and [conditions.]

What seems to have been significant in *Olech* [was] the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determination — at least not with regard to easement length, however typical such determinations may be as a general zoning matter. Rather, the complaint alleged that the board consistently require only a 15-foot easement, but subjected *Olech* to a 33-foot [easement.]

There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be “treated alike, under like circumstances and conditions” is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular persons would undermine the very discretion that such state officials are entrusted to exercise.

Suppose, for example, that a traffic officer is stationed on a busy freeway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a “class of one” that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke

the fear of improper government classification. [Allowing] an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

This principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. [Thus,] the class-of-one theory of equal protection — which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review — is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship.

[Even] if we accepted Enquist’s claim, it would be difficult for a plaintiff to show that an employment decision is arbitrary. [The] practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack. The Equal Protection Clause does not require “this displacement of managerial discretion by judicial supervision.” *Garcetti v. Ceballos*, [*infra*.]

JUSTICE STEVENS, joined by Justices Souter and Ginsburg, dissented:

The majority asserts that public-employment decisions should be carved out of our equal protection jurisprudence because employment decisions (as opposed to, for example, zoning decisions) are inherently discretionary, I agree that employers must be free to exercise discretionary authority. But there is a clear distinction between an exercise of discretion and an arbitrary decision. A discretionary decision represents a choice of one among two or more rational alternatives. [The] choice may be mistaken or unwise without being irrational. [The] hypothetical traffic officer described in the Court’s opinion had a rational basis for giving a ticket to *every* speeder passing him on the highway. His inability to arrest every driver on sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible [violators.]

A comparable hypothetical decision in the employment context (e.g., a supervisor who is required to eliminate one position due to an involuntary reduction-in-force and who chooses to terminate one of several equally culpable employees) also differs from the instant case insofar as it assumes the existence of a rational basis for the individual decision. The fact that a supervisor might not be able to explain why he

II.

OTHER CONSTITUTIONAL CLAIMS

25

terminated one employee rather than another will not give rise to an equal protection claim so long as there was a rational basis for the termination itself and for the decision to terminate just one, rather than all, of the culpable employees.

4. The Court in *Engquist* states that “all we decide” is that “the class-of-one theory of equal protection has no application in the public employment context.” Is the reasoning of the opinion so limited? What result if state law grants local zoning authorities broad discretion over variances and the plaintiff challenges denial of a zoning variance on the ground that the variance was denied for “arbitrary, vindictive, and malicious reasons?” Would plaintiffs in cases like *Engquist* and this hypothetical have better luck suing on the substantive due process theory discussed in the casebook at p. 146, Note 8?

5. The Court does not respond directly to the distinction drawn by the dissent between “an exercise of discretion and an arbitrary decision.” Why not? Is the Court’s traffic officer hypothetical an apt analogy to *Engquist*’s case? Note that, at the end of the opinion, the Court discussed the “practical problem with allowing class-of-one claims to go forward in this context” (i.e., “that governments will be forced to defend a multitude of such claims in the first place.”) Is this just another way of expressing the earlier concern with protecting discretionary authority? Does the Court’s holding amount to a judgment that, in order to obtain that protection, it is necessary to shield officials who in fact act for “arbitrary, vindictive, and malicious” reasons?

6. Justice Breyer joined the majority in *Engquist*. Is his vote consistent with his concurring opinion in *Olech*?

C. Public Employee Speech

Page 194: Add to the end of Note 4:

In *Garcetti v. Ceballos*, 126 U.S. 1951 (2006), the Supreme Court ruled that public employees’ speech made in the course of official duties is not protected by the first amendment. Ceballos, a deputy district attorney, found fault with an affidavit that had been used to obtain a search warrant in a criminal case. In a memo and a meeting, he recommended to his superiors that the case be dismissed, but his advice was rejected. “The meeting allegedly became heated, with one [police] lieutenant sharply criticizing Ceballos for his handling of the case.” Calling Ceballos as a witness, the defense moved to challenge the warrant, but the trial judge rejected the challenge:

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.

Ceballos brought a § 1983 suit charging retaliation in violation of his first amendment rights. Finding that Ceballos’s speech met the “public concern” requirement, and that the value of the speech outweighed disruption concerns, the 9th circuit ruled in his favor. The Supreme Court reversed:

The controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration — the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to

advise his supervisor about how best to proceed with a pending case — distinguishes Ceballos’ case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

* * *

Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

* * *

This result is consistent with our precedents’ attention to the potential societal value of employee speech. Refusing to recognize First Amendment claims based on government employees’ work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission. Ceballos’ memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff’s department. If Ceballos’ superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Because none of the parties disputed “that Ceballos wrote his disposition memo pursuant to his employment duties,” the Court had

no occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions.

Justice Stevens, Souter, Breyer, and Ginsburg dissented, arguing, for a variety of reasons, that the majority’s absolute bar gave too much weight to the government employer’s interests and too little to the value of free speech.

NOTE ON *GARCETTI*

In *Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007), the plaintiff had been the athletic director and head football coach at a public high school. He had sent memoranda to the school's office manager and principal questioning the handling of school athletic funds and had, according to his complaint, been fired for doing so. Relying on *Garcetti*, the 5th circuit affirmed the district court's grant of summary judgment for the defendants:

In *Garcetti*, Ceballos was acting pursuant to his official duties because he was performing activities *required* to fulfill his duties as a prosecutor and calendar deputy that were not protected by the First Amendment. . . . In the instant case, DISD concedes that an Athletic Director is not required to write memoranda to his principal regarding athletic accounts.

Nonetheless, the court found *Garcetti* controlling. Earlier public employee speech cases, "distinguish between speech that is 'the kind of activity engaged in by citizens who do not work for the government,' *Garcetti*, and activities undertaken in the course of performing one's job. Activities undertaken in the course of performing one's job are activities pursuant to official duties. . . ." The court concluded that "Williams's speech was made in the course of performing his employment."

Would the outcome be different if Williams had written identical letters and sent them to the local newspaper instead of to the office manager and the principal?

For a general discussion of *Garcetti*, see Sheldon Nahmod, *Public Employee Speech, Categorical Balancing and Section 1983: A Critique of Garcetti v. Ceballos*, U. RICH. L. REV. 561 (2008).

Page 195: Add to the end of Note 5:

Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 1405 (2006), was not a § 1983 case, but a Title VII case brought against a private employer. Nonetheless the holding as to what counts as an "adverse employment action" (thereby triggering a good claim for retaliation) may influence the resolution of similar issues that arise in constitutional litigation as well. See casebook, note 5, p. 195.

In the Title VII context the issue arises when a worker complains to supervisors of discrimination and the employer reacts by taking steps that disadvantage the employee. Some lower courts had ruled that retaliation claims could be brought only when the employer's actions affect the terms and conditions of employment, e.g., by firing, demoting, or cutting the employee's salary. Taking a broader view, the court ruled that a worker who has complained of discrimination may sue for retaliation whenever the employer's actions are "materially adverse," i.e., when the harm they inflict "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."

This test resembles the 9th Circuit's rule for § 1983 cases, illustrated by *Coszalter*, casebook, note 5, p. 195. Are there grounds on which § 1983 retaliation

cases might be convincingly distinguished from Title VII cases? If so, do those grounds support a harder or an easier test for the § 1983 plaintiff?

Page 196: Add to the end of Note 6 and add new Note 7:

In *Hartman v. Moore*, 126 U.S. 1695 (2006), the Court addressed a threshold issue that arises when someone claims that he was prosecuted in retaliation for protected speech. After a dispute with the U.S. Postal Service, postal inspectors investigated Moore's activities. As a result, a federal prosecutor charged him with federal crimes. After his acquittal, Moore filed a constitutional tort claim against the inspectors. The inspectors argued (and the Court agreed) that, no matter what their motives may have been, the plaintiff could not win the constitutional tort suit unless he could show an absence of probable cause for the prosecution:

[T]he issue before us is straightforward: whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges. [It] is [the] need to prove a chain of causation from animus to injury, with details specific to retaliatory prosecution cases, that provides the strongest justification for the no-probable-cause requirement espoused by the inspectors.

The Court identified two special features of retaliatory prosecution cases. First,

Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive.

Second,

[T]he requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven. A *Bivens* (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a non-prosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute. The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's injurious action, but between the retaliatory animus of one person and the action of [another].

Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise. Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking.

[A] retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the charging decision, and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the [charge].

In sum, the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort. Probable cause or its absence will be at least an evidentiary issue in practically all such cases. Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.

Justice Ginsburg, in a dissenting opinion joined by Justice Breyer, argued that the burden of proof should be on the postal inspectors to show that "had there been no retaliatory motive and importuning, the U.S. Attorney's Office nonetheless would have pursued the case."

The Court left open the question of "[w]hether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation."

NOTE ON *HARTMAN*

While *Hartman* was a *Bivens* suit brought against federal officers (see chapter one), the principle is equally applicable in § 1983 litigation against state officers.

Does *Hartman* apply where no intervening decision by a prosecutor is present in the case? For an affirmative answer, see *Williams v. City of Carl Junction*, 480 F.3d 871 (8th Cir. 2007). Williams, a "self-described 'vigorous critic' of the City . . . frequently attended City Council meetings and complained about numerous civic issues. . . . In addition, Williams often expressed his displeasure with the City's administration by yelling profanities and making obscene gestures to employees and officials of the City, including the individual defendants. . . . Beginning in July 2002 and continuing for roughly two years, Williams was issued a total of twenty six municipal citations: twelve citations for failing to obtain a business license, five citations for parking offenses, two citations for solid-waste infractions, one citation for failing to post house numbers, one citation for failing to yield to an emergency vehicle, one citation for disturbing the peace, one citation for telephone harassment, one

citation for overgrown grass and weeds, one citation for violating set-back regulations, and one citation for improperly storing construction materials. . . . With respect to all but one of the twenty-six municipal citations, Williams either admitted that he engaged in the unlawful conduct that triggered issuance of the citation or admitted that a police or code-enforcement officer conducted an investigation prior to issuing the citation."

Williams sued under § 1983, "claiming that the individual defendants conspired to issue and issued the citations described above in retaliation for Williams's exercise of his First Amendment rights, thereby causing him to refrain from expressing his opinions or criticizing the City's policies and administration." His theory was that the Mayor sought to retaliate against him. The court recognized that this case was not on all fours with *Hartman*, because of the lack of a decision by a prosecutor to pursue the case. Nonetheless, "*Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present, and we conclude that the *Hartman* rule applies in this case. . . . As explained in *Hartman*, the absence of probable cause would serve to 'bridge the gap' in these circumstances between the Mayor's retaliatory animus and the officers' 'prosecution.' Conversely, the presence of probable cause would necessarily eliminate the possibility that a causal link between the Mayor's retaliatory animus and the officers' 'prosecution' could be established."

As to the one citation for which Williams may meet the requirement that he show no probable cause — a citation for failure to yield to an emergency vehicle — the court noted that "Williams has presented no evidence that the officer who issued this citation harbored any retaliatory animus against him," and had not "established that receipt of this citation would 'chill a person of ordinary firmness' from continuing to exercise his First Amendment rights to criticize the City."

In relying on *Hartman* the court draws an analogy between the discretion exercised by a prosecutor and the discretion exercised by a police officer. If you were representing someone in Williams's position, could you plausibly distinguish between the two officers?

7. Two recent Supreme Court cases recognize a cause of action on the part of someone who has earlier asserted a putative statutory right and now claims retaliation. In *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), a U.S. Postal Service employee had filed an administrative complaint under the Age Discrimination in Employment Act (ADEA). She now claimed that, after filing the age discrimination complaint, she was subjected to various forms of retaliation, e.g., "that her supervisor called her into meetings during which groundless complaints were leveled at her, that her name was written on antisexual harassment posters, [and] that she was false accused of sexual harassment." The relevant ADEA provision, 29 U.S.C. § 633a(a), forbids "discrimination based on age," but says nothing about retaliation. The Court ruled, nonetheless, that this phrase "includes retaliation based on the filing of an age discrimination complaint."

CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008), concerned a claim by Humphries that CBOCS West had fired him because he complained about

II.

OTHER CONSTITUTIONAL CLAIMS

31

dismissal of a black co-employee. Among other claims he sued under 42 U.S.C. § 1981, which provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts . . . as is enjoyed by white citizens.” The Court held that this provision “encompasses a complaint of retaliation against a person who has complained about a violation of another person’s contract-related ‘right.’” In both *Gomez-Perez* and *CBOCS West*, the argument against recognizing a retaliation theory boiled down to the absence of textual support for one. But the majorities in these cases took the view that precedent and statutory structure may override the lack of text.

0032

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Sat Jul 25 01:10:38 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3525 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Master:17 Jul 09 02:10][MX-SECNDARY: 18 Jul 09 08:51][TT-: 25 Jun 09 10:01 loc=usa unit=03525-sup01]

0

Chapter 4

“SECURED BY THE CONSTITUTION AND LAWS” AFFIRMATIVE CONSTITUTIONAL DUTIES AND RIGHTS SECURED BY FEDERAL LAWS

I. AFFIRMATIVE DUTIES

A. The Supreme Court’s Framework

Page 211: Add the New Note 8:

8. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) resolved an issue explicitly left open in *DeShaney*: does a state law requiring police to enforce a protective order establish a species of constitutional “property” which would enjoy due process protection against state deprivation? The Supreme Court held that Jessica Gonzales did not have a constitutionally protected property interest in having the police enforce a restraining order despite the mandatory language used in the Colorado statute and despite the police having probable cause to believe the order had been violated. Lacking a constitutional property interest, Ms. Gonzales could not prevail in her § 1983 claim that she was deprived of property without due process when the police failed to respond properly to her repeated reports that her estranged husband was violating the terms of the restraining order. Together, *DeShaney* and *Castle Rock* reject the general theory that the state deprives a person of liberty or property when it fails to protect him from harm at the hands of a third party. As illustrated in section B, however, there are a number of circumstances in which such a claim has been recognized. For a more detailed exposition of *Castle Rock* see the comments to Chapter 3, Part I, section A.

B. Affirmative Duties, State Created Dangers, and Special Relationships

Page 219: Add to the end of Note 2:

The Third Circuit subsequently reformulated the fourth *Kneiper* factor to require evidence that “a state actor *affirmatively* used his or her authority in a way that created a danger to the citizen that rendered the citizen more vulnerable to danger than had the state not acted at all.” *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. 2006) (emphasis supplied).

Page 220: Add to the end of Note 3:

In *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007) workers performing search, rescue, and clean-up work at the World Trade Center site in the aftermath of the September 11, 2001 terrorist attacks sued federal officials for allegedly making knowingly false statements about the air quality in lower Manhattan. The plaintiffs alleged that they relied on these statements by working without needed respiratory equipment. The complaint was dismissed because these allegations “did not shock the conscience even if the defendants

acted with deliberate indifference: when agency officials decide how to reconcile competing governmental obligations in the face of disaster, only an intent to cause harm arbitrarily can shock the conscience in a way that justifies constitutional liability.”

Page 220: Add to the end of Note 5:

Ye v. United States, 484 F.3d 364 (3d Cir. 2007) (county physician assuring patient complaining about chest pains that “there is nothing to worry about and that he is fine” is “not an affirmative act sufficient to trigger constitutional obligations”). The *Ye* court cited other cases in which alleged detrimental reliance on governmental assurances of help were not deemed sufficient to trigger a constitutional affirmative duty. *See Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005) (promise to protect witness testifying in a murder trial); *Wyke v. Polk County Bd. of Edu.*, 129 F.3d 560 (11th Cir 1997) (mother assured by Dean of Students that “he would take care of” child’s suicide attempt). Collectively, *Ye*, *Rivera*, and *Wyke* indicate that detrimental reliance on a governmental promise to intervene is not a sufficient affirmative act to support a constitutional obligation. But see *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) (a complaint adequately alleged state created danger where plaintiff reported to police that her neighbor was a child molester and the police violated promises to patrol the neighborhood and to warn her before they talked to the neighbor).

II. SECTION 1983 AND FEDERAL “LAWS”

Page 238: Add the New Note 7:

7. The Supreme Court will address the “laws” issue in its upcoming term. It recently granted certiorari in *Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), cert. granted, 2008 LEXIS 4737 (June 9, 2008) (holding that Title IX’s remedial scheme, including judicially implied remedies, was sufficiently comprehensive to preclude § 1983 suits, even though that remedial scheme did not provide a private right of action against every potential wrongdoer).

Chapter 5

“EVERY PERSON”: GOVERNMENTAL LIABILITY

III. HOW DOES ONE SUE A GOVERNMENTAL BODY?

A. Pleading Requirements: *Leatherman*

Page 272: Add the following after Note 4:

5. As noted in Chapter 1, the Supreme Court handed down *Ashcroft v. Iqbal*, 129 S. Ct. ___ (2009), which appears to impose a heightened pleading requirement for *Bivens* and section 1983 supervisory liability claims made against individuals who may be protected by qualified immunity. Should *Iqbal* apply to local governments as well, or is *Leatherman* still good law because local governments are not protected by qualified immunity?

V. THE SECOND ROUTE TO GOVERNMENTAL LIABILITY: ATTRIBUTION THROUGH POLICYMAKERS

D. Application of Attribution Rules

Page 300: Add the following new Notes:

6. The plaintiff sued a city, a police captain and others for her unconstitutional arrest arising out of a mass arrest sting intended to capture persons with outstanding arrest warrants. Ruling against the plaintiff, the First Circuit found that the city was not liable for plaintiff's Fourth Amendment deprivation even though she argued that the operation was a city policy because it was a large operation involving arrest warrants from all over Boston, it was commanded by a high-ranking officer — the defendant captain — and that it was videotaped for national distribution. The court noted that the captain was assigned to a particular station and was subject to the supervision of the deputy superintendent, the superintendent and the police commissioner, thereby indicating clearly that he was not a policymaker for the city. *Wilson v. City of Boston*, 421 F.3d 45 (1st Cir. 2005).

7. The plaintiff, a school nurse, sued various defendants, including a school district and its superintendent, alleging that she was given a grossly unsatisfactory employment rating in retaliation for her advocacy for two disabled students and her reports to state officials about compliance with state requirements, and hence in violation the First Amendment. Reversing the district court on the policymaker issue, the Third Circuit held that under Pennsylvania law it was clear that a school superintendent is the final policymaker over ratings determinations. That school boards were the final policymakers with regard to dismissal of employees was not inconsistent. As a result, if the superintendent

retaliated against the plaintiff in violation of the First Amendment, this would constitute school district policy. *McGreevy v. Stroup*, 413 F.3d 359 (3d Cir. 2005).

8. Where the plaintiff sued a housing authority alleging that he was terminated by his superior in violation of the First Amendment because of his report of a purported bribe, the Fifth Circuit ruled that his superior was not a policymaker. *Gelin v. Housing Authority of New Orleans*, 456 F.3d 525 (5th Cir. 2006). Although the housing authority’s board of commissioners presumably had policymaking authority, there was an insufficient showing by the plaintiff that his superior, the administrative receiver responsible for the day to day operations of the housing authority who was also the appointing authority with the power to terminate employees, had been delegated policymaking authority by the board. Reasoning from; *Jett* and *Praprotnik*, the Fifth Circuit rejected the plaintiff’s contention that the superior was the executive director by default, since there was no evidence either of such an appointment by the board or that she exercised the full scope of those powers. Moreover, and in any event, changes in personnel policies required the board’s approval. Decision-making authority was not sufficient to render the superior a policymaker.

9. In *Barrow v. Greenville Independent School District*, 480 F.3d 377, 381 (5th Cir. 2007), the plaintiff teacher sued the district superintendent for allegedly refusing to recommend her for promotion because she did not agree to move her children from a private religious school to public school. The Fifth Circuit affirmed the district court and found that the superintendent was not a policymaker for the district even though the district’s board of trustees could hire or promote only persons whom the superintendent recommended. Under Texas law, the board retained the ultimate hiring and promotion policymaking authority. “Texas’s system of bifurcating recommendation and approval authority over hiring and promotion neither gives the superintendent policymaking authority nor abrogates the board’s general policymaking authority.”

E. *McMillian*: Policymaker for Which Entity, the Local Government or the State?

Page 309: Add the following new Notes:

4. Where the plaintiff dance hall owner sued a county and alleged that a Florida county sheriff enforced an unconstitutional dance hall ordinance against him, thereby shutting down his dance hall, the Eleventh Circuit held that the sheriff was not an arm of the state in this situation. Thus, the county was not protected by the Eleventh Amendment from § 1983 damages liability. The court relied for its approach on its decision in *Manders*, noted above. Specifically, it observed that both its precedents and Florida law indicated that a county sheriff is not an arm of the state when enforcing a county ordinance. *Abusaid v. Hillsborough County Bd.*, 405 F.3d 1298 (11th Cir. 2005).

Relying on *Manders*, the Eleventh Circuit in another case held “that the Eleventh Amendment precludes suit against [a Georgia county Sheriff], in his official capacity, for establishing the jail policies and other jail practices pertinent to [plaintiff’s] claims.” *Purcell ex rel Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1316 (11th Cir. 2005). In the case before it, the court dealt with the plaintiff mother’s failure-to-prevent claim arising out of the beating death of her son, an arrestee, at the hands of several inmates. The Eleventh Circuit agreed with the county sheriff’s argument that he was entitled to Eleventh Amendment

VI. THE THIRD ROUTE TO GOVERNMENTAL LIABILITY

37

immunity in his official capacity because, in establishing and administering jail polices and practices, he functioned as an arm of the State of Georgia, and not of a county.

5. In a Fourth Circuit case, the district attorney for the Twenty-Sixth Prosecutorial District of North Carolina was sued by plaintiffs (defendants in pending narcotics trafficking prosecutions) for damages in his official capacity. The court found that under North Carolina law, the district attorney was an officer of the state in his prosecutorial role: the district attorney was responsible for prosecutions on behalf of the state, these prosecutions were brought in the state's name, and the state had to pay any final judgment awarded against the district attorney. Thus, the district attorney was protected by the Eleventh Amendment. *Nivens v. Gilchrist*, 444 F.3d 237 (4th Cir. 2006).

6. The Second Circuit ruled in *Woods v. Rondout Valley Central School District*, 466 F.3d 232 (2d Cir. 2006), that the Rondout Valley Central School District, sued by a former teacher in connection with the alleged violation of his First Amendment rights, was not an arm of the State of New York and thus could be sued under § 1983. After pointing out that the burden of proof with respect to Eleventh Amendment immunity is on the entity claiming it, the court found that the defendant did not carry it. The Second Circuit applied the six-factor test of *Mancuso v. New York State Thruway Authority*, 86 F.3d 289 (2d Cir. 1996), which looked at the following: (1) how the entity is identified in the relevant documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally a local function; (5) whether the state has veto power over the entity's acts; and (6) whether the entity's financial obligations bind the state. The first three factors cut against Eleventh Amendment immunity, the fourth and fifth were neutral at most, and the sixth factor also weighed against such immunity.

VI. THE THIRD ROUTE TO GOVERNMENTAL LIABILITY: FAILURE TO TRAIN

D. Supervisory Liability and Deliberate Indifference After *City of Canton and Farmer*

Page 331: Add the following new Note 6:

6. A post-*Bryan County* First Circuit case, *Young v. City of Providence ex rel Napolitano*, 404 F.3d 4 (1st Cir. 2005). involved a Fourth Amendment excessive force claim against a white police officer who fatally shot a black off-duty police officer, as well as a failure to train claim against a city based on this incident. First upholding a jury verdict against the officer, the First Circuit explained:

[T]here was evidence presented at the phase one trial that Cornel was identifying himself as a police officer, was holding his gun with two hands as a police officer would, and was immediately recognized by bystanders as an off-duty officer. We think that a jury could find that an objectively reasonable officer would have recognized Cornel as an officer, and thus would have recognized that he was not a threat and would not have shot him There was also evidence that Cornel's gun was pointing downwards, and not at [a suspect] or anyone else, and that the officers shot him

extraordinarily quickly, almost immediately after he left the restaurant, and without giving him adequate warning.

More important for present purposes, the First Circuit addressed the failure to train claim and reversed the district court's grant of summary judgment to the city. It determined that a jury could find that the police officer made such mistakes because of the police department's lack of training in "on-duty/off-duty interactions, avoiding misidentifications of off-duty officers, and other issues relating to the City's always armed/always on-duty policy. . . . [and] that this training deficiency constituted deliberate indifference to Cornel's rights." The First Circuit observed that the plaintiff did not necessarily have to demonstrate a pattern of prior constitutional violations to show deliberate indifference. There was testimony that it was common knowledge within the police community of the substantial risk of "friendly fire" stemming from the always armed/always on-duty policy. Also, there was evidence that the city knew its training program was deficient.

In the same case, the First Circuit addressed the plaintiff's deficient hiring claim against the city and affirmed summary judgment for the city. After noting, in reliance on the Supreme Court's decision in *Bryan County* that hiring claims based on a single incident can seldom if ever serve as the basis for liability because the "plainly obvious consequence" standard was so stringent, the court pointed out that the procedures used in the hiring process for the officer were not so inadequate as to raise a jury question regarding the city's deliberate indifference. There was a background check, the officer's prior supervisors were spoken to and provided good reviews, and a questionable incident came to light and was discussed before the officer was hired. The First Circuit concluded: "The recent trend of Supreme Court cases, which use very particularized notions of causation and fault, make it unlikely that the training claim and the hiring claim could be combined into one mishmash, despite the hiring claim's inability to survive on its own, and given to the jury."

Chapter 6

“[S]UBJECTS OR CAUSES: TO BE SUBJECTED . . . ”: CAUSATION

I. CAUSE IN FACT

B. Governmental and Supervisory Liability

Page 371: Add the following new Note 12:

12. *Hartman v. Moore*, 126 U.S. 1695 (2006), discussed in detail in the comments to Chapter 3, Part II, section C above, illustrates the complexity of the cause in fact issue when one defendant is alleged to have caused another person to violate the plaintiff's constitutional rights. In *Hartman*, the defendant postal inspectors presented a prosecutor with evidence that Moore had committed a crime. Moore was charged and subsequently acquitted of the crime. Moore then filed a constitutional tort claim against the postal inspectors alleging that they initiated the criminal proceedings in retaliation against Moore's exercise of free speech. The issue in *Hartman* was whether the plaintiff had to prove the absence of probable cause in addition to a retaliatory motive in order to recover from the defendants. In the course of the opinion, the Court stated:

[T]he requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven. A *Bivens* (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a non-prosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute. The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's injurious action, but between the retaliatory animus of one person and the action of [another].

Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise. Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking.

[A] retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the charging decision, and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the [charge].

In sum, the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort. Probable cause or its absence will be at least an evidentiary issue in practically all such cases. Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.

This discourse appears to be consistent with the principles announced in the governmental and supervisory liability cases. Specifically, recall that *Monell* (Chapter 5, Part I, section B) requires that the official policy or custom of a local government must be "the moving force" behind its employee's unconstitutional action. *City of Canton* (Chapter 5, Part VI, section B) and *Board of Commissioners of Bryan County* (Chapter 5, Part VI, Section C) also emphasize that the plaintiff must prove not only that a local government's training and hiring policies are deliberately indifferent to risk of violating the plaintiff's constitutional rights, but also that these deficient policies "actually caused" and were the "moving force" behind the individual officials' unconstitutional conduct. See also Notes 9 and 10 following *Allen v. City of Muskogee* addressing causation in supervisory liability cases. In all these cases the defendant (city/supervisor/person initiating criminal proceedings) is alleged to have done something that *causes* someone else to violate the plaintiff's constitutional rights. The common thread here is that it is not enough for a plaintiff to prove that a defendant engaged in culpable conduct and a constitutional violation occurred; the plaintiff must also prove that the culpable conduct *caused* someone else (an employee/subordinate/prosecutor) to violate the plaintiff's constitutional rights.

II. PROXIMATE OR LEGAL CAUSE

B. Intervening Acts

Page 382: Add to the end of Note 2:

Murray v. Earle, 405 F.3d 278 (5th Cir. 2005) (officer coerced a confession used to convict plaintiff; conviction was subsequently overturned on the grounds that the confession should not have been admitted into evidence; § 1983 claim against the officer who coerced the confession was dismissed on proximate cause grounds because of the intervening act of the trial judge in erroneously admitting the confession into evidence); *Wray v. City of New York*, 2007 U.S. App. Lexis 14302 (2d Cir. 2007) (defendant officers conducted what was later determined to be an "unduly suggestive" identification procedure; the identification was admitted into evidence at the criminal trial in which the plaintiff was convicted; the plaintiff secured a writ of habeas corpus on the grounds that the suggestive identification violated his constitutional right to due process and a fair

II.

PROXIMATE OR LEGAL CAUSE

41

trial; plaintiff's § 1983 claim against the officers who conducted the "show up" was dismissed on proximate cause grounds reasoning that the decision of the trial judge to admit the evidence was a superceding cause of his conviction).

Page 383: Add to the end of Note 3:

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2006) (officer whose conduct led to the violation of the plaintiff's Fifth Amendment rights at trial cannot escape § 1983 liability by pointing to the intervening acts of a prosecutor or a judge; the use at trial of incriminating statements the plaintiff was compelled to make was a 'natural consequence' of the defendant's conduct).

Page 382: Add to the end of Note 4:

For a criticism of the *Townes* and the formalistic application of superceding cause doctrine in § 1983 claims, see Joel Flaxman, *Note, Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial*, 105 MICH. L. REV. 1551 (2007).

0042

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Sat Jul 25 01:10:39 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3525 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Master:17 Jul 09 02:10][MX-SECNDARY: 18 Jul 09 08:51][TT-: 25 Jun 09 10:01 loc=usa unit=03525-sup01]

0

Chapter 7

“EVERY PERSON”: ABSOLUTE IMMUNITY

I. ABSOLUTE LEGISLATIVE IMMUNITY

C. *Bogan v. Scott-Harris*: The Broad Scope of Local Legislator Immunity

Page 399: Add the following new Notes:

4. With respect to high-level executives who act legislatively, the First Circuit applied *Bogan* and held that the Governor of Puerto Rico, sued under § 1983 for damages for signing allegedly unconstitutional legislation into law, was protected by absolute legislative immunity because the challenged conduct was clearly legislative in nature. The court rejected the plaintiffs’ argument that legislative immunity is abrogated where legislation is motivated by impermissible intent, pointing out that this very argument was rejected by the Supreme Court in *Bogan. Torres Rivera v. Calderon Serra*, 412 F.3d 205 (1st Cir. 2005).

5. Compare *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163 (9th Cir. 2005), where the plaintiffs, owners of an automobile wrecking yard, sued a city and various officials, including the city’s manager and planner, for allegedly unlawfully conditioning the approval of their application for renewal of their wrecker’s certificate on compliance with certain land use regulations. The Ninth Circuit ruled that the city manager and city planner were not entitled to legislative immunity. For one thing, their jobs were administrative in nature. For another, the challenged conduct — “[p]rocessing an individual application pursuant to an established policy” — was not a legislative function but was rather administrative in nature.

6. Where the former executive director of a police and fire retirement board, an at-will employee, sued an Arkansas state legislator, co-chair of the legislature’s Joint Committee on Public Retirement and Social Security Programs, for violating her First Amendment rights through the defendant’s participation in introducing a bill to reduce the number of members of the board (which plaintiff opposed), the Eighth Circuit had little difficulty in concluding that the defendant was protected by legislative immunity. *Hinshaw v. Smith*, 436 F.3d 997 (8th Cir. 2006). All actions taken by the defendant in connection with the bill (which passed) were quintessentially legislative in nature. In addition, the defendant was responsible for submitting names to the governor for filling vacant board positions, so his discussions with the governor about plaintiff’s representations about what the board wanted fell within his legislative duties. Finally, defendant’s communications with the board about plaintiff’s responsiveness also fell within his legislative duties, regardless of his motive to take plaintiff’s position as executive director when his legislative term expired.

7. The plaintiffs who engaged in sand and gravel removal operations on their property sued various defendants, including individual members of a town’s city council, for enacting a zoning ordinance that effectively prevented plaintiffs from extending their operations. They alleged violations of substantive due process and equal protection under § 1983, among other things. Ruling against the

plaintiffs in this regard, the Third Circuit determined that the council members were protected by legislative immunity. First, the ordinance, even if it turned out to apply only to plaintiffs' land, was legislative in nature, and did not constitute the enforcement of an already existing zoning law. Second, the challenged conduct, enacting the ordinance, followed established legislative procedures. *County Concrete Corporation v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006).

II. ABSOLUTE JUDICIAL IMMUNITY

C. The Broad Scope of Absolute Judicial Immunity: *Stump*

Page 411: Add the following new Notes:

8. As yet another example of the broad scope of absolute judicial immunity, see *In Ballard v. Wall*, 413 F.3d 510 (5th Cir. 2005), where the plaintiff sued a judge and private attorneys (and their firm) alleging that they conspired to keep him in jail until he paid his debt to the firm's client, in effect operating a debtor's prison. Reversing the district court's dismissal of the complaint against the attorneys, the Fifth Circuit determined that the plaintiff's allegations that the judge exceeded her jurisdiction and abused her authority by imprisoning him until he paid his debt, that she called the law firm but it would not release a bond, that he would have to pay \$10,000 in cash or he would go to jail, that he or his wife would have to pay the money directly to one of the attorneys and that the attorneys were involved in these acts of the judge, were sufficient to allege § 1983 joint participation and a conspiracy. However, as to the judge, the Fifth Circuit, affirming the district court in this respect, found that absolute judicial immunity applied to her challenged acts in ordering officers to arrest the plaintiff and incarcerate him. The judge did not act outside the scope of her judicial authority: the challenged acts were acts normally performed by a judge; the judge had subject matter jurisdiction over the case; plaintiff's allegations of bad faith and malice were insufficient to overcome judicial immunity; and the order to arrest the plaintiff and incarcerate was prompted by plaintiff's failure to appear as required.

9. In *Sibley v. Lasco*, 437 F.3d 1067 (11th Cir. 2005), the plaintiff alleged that the state court judge who ordered his incarceration for failure to pay child support acted in the complete absence of all jurisdiction because he had filed seven affidavits seeking her recusal, with the result that her subsequent incarceration of him should not be protected by judicial immunity. Rejecting the argument, the Eleventh Circuit pointed out that under Florida law, an affidavit of this kind did not automatically oust the judge of jurisdiction. Also, under Florida law, a trial judge was not automatically disqualified even if he or she failed to act on a disqualification motion within 30 days. Further, even after the first affidavit was filed seeking her disqualification, the judge retained the jurisdiction to perform ministerial acts and had some subject matter jurisdiction. Thus, at most she acted only in excess of jurisdiction when she issued the incarceration order, and not in the clear absence of all jurisdiction.

10. A state court judge was protected by judicial immunity even though, after sentencing the plaintiff to a twelve-month term of incarceration for attempted theft and after she began serving it, he unlawfully resentenced her to a term between twelve and thirty-two months. The judge did so because he discovered

that his original sentence was based on mistaken assumptions about the plaintiff's criminal record that worked to the plaintiff's detriment. According to the Ninth Circuit, under Nevada law the court could only modify a sentence if the mistaken assumptions worked to the state's detriment, not a criminal defendant's. Still, the judge was protected by judicial immunity because he acted only in excess of jurisdiction, not in the clear absence of it. *Sadoski v. Mosley*, 435 F.3d 1076 (9th Cir. 2006). Judge Gould concurred, discussing at different issue. *Id.* at 1080.

III. ABSOLUTE PROSECUTORIAL IMMUNITY

B. The Prosecutor as Legal Advisor

Page 429: Add the following after Note 6:

7. What of the prosecutor as *supervisor*? Under the functional approach, prosecutors who act in a supervisory, and thus administrative, capacity should not be protected by absolute immunity. Consider, though, the Supreme Court's decision in *Van De Kamp v. Goldstein*, 129 S. Ct. ___ (2009), that expanded the scope of prosecutorial immunity to cover supervisory prosecutors in certain circumstances. *Van De Kamp* dealt with the applicability of prosecutorial immunity to a former district attorney and a former deputy district attorney who were sued for allegedly failing to develop policies and procedures, and failing to adequately train and supervise their subordinates, as to their constitutional obligation to ensure that information on jailhouse informants was shared among prosecutors. The plaintiff, after imprisonment for twenty-four years for murder, succeeded in obtaining habeas corpus relief and was released. Thereafter, he claimed that a jailhouse informant testified falsely at his murder trial regarding (1) the plaintiff's supposed confession to the murder and (2) the informant's not having received benefits in exchange for his testimony against plaintiff. He further alleged that the fact that this witness was an informant who received benefits in exchange for his testimony was never shared with the deputy district attorneys prosecuting the plaintiff. The Ninth Circuit ruled that the challenged conduct was administrative in nature and not intimately associated with the judicial phase of the criminal process. Rather, it was related only to the management of the district attorney's office. Hence, it was not protected by prosecutorial immunity.

The Supreme Court, in an opinion by Justice Breyer, reversed unanimously, holding that absolute immunity protected the defendants' failure properly to train and supervise prosecutors and their failure to establish an information system containing potential impeachment material about informants, all of which allegedly led to the failure to disclose impeachment material at plaintiff's criminal trial. After discussing the policy considerations underlying prosecutorial immunity and noting that *Imbler* had expressly left open the scope of immunity with regard to the prosecutor's administrative role, the Court conceded that the challenged acts here were administrative in nature. Nevertheless, absolute immunity applied because the administrative obligation involved here was of

a kind that itself is directly connected to the conduct of a trial. Here . . . an individual prosecutor's error in the plaintiff's specific trial constitutes an essential element of the plaintiff's claim. The administra-

tive obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which [plaintiff’s] claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management.

Id. at ____.

The Court then went on to address the anomaly of holding supervisors liable in situations in which trial prosecutors themselves would be absolutely immune for their advocative conduct. This would not make sense for several reasons. First, decisions about indictments and trial prosecutions were often made by more than one prosecutor in an office. Second, a major policy consideration underlying prosecutorial immunity was protecting the proper functioning of the office itself. It was not significant for these purposes that the defendants’ *general* methods of supervision were at issue here: there was still “an intimate connection between prosecutorial activity and the trial process.” Moreover, it would be difficult in many cases to distinguish between general office supervision and training and specific supervision and training for a particular case. Finally, the Court separately addressed the plaintiff’s claim that the defendants should have created an information management system, which plaintiff argued was even more purely administrative in nature and could be done by non-lawyers. The Court responded that creating such a system still involved legal expertise because of the criteria necessary for inclusion and exclusion of information. The Court concluded: “Consequently, where a § 1983 plaintiff claims that a prosecutor’s management of a trial-related information system is responsible for an error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself.”

Does *Van De Kamp* represent an unjustified departure from the Court’s functional approach? What role, if any, did the common law immunity background appear to play in the Court’s analysis? Was policy the sole consideration? Finally, how broad is *Van De Kamp*?

D. Circuit Court Cases

Page 437: Add the following new Notes:

7. The Ninth Circuit emphasized that prosecutors cannot obtain absolute immunity simply by characterizing their challenged conduct as within a prosecutorial function such as a decision not to prosecute, which is how the district court incorrectly approached these matters in *Botello v. Gammick*, 413 F.3d 971 (9th Cir. 2005). Here, the plaintiff, formerly employed as a child sexual assault investigator in a county sheriff’s office, discovered abuses in the county district attorney’s sexual assault response program and brought them to light to county prosecutors, including the two defendants here who became very angry at him and threatened retaliation. Plaintiff left his position and secured another position with a county school district police department. He thereafter sued the defendants, alleging three kinds of acts. First, that the defendants telephoned his new employer and attempted to dissuade it from hiring him. These defamatory communications, according to the Ninth Circuit, were simply an attempt to

III.

ABSOLUTE PROSECUTORIAL IMMUNITY

47

disrupt an employment decision and were thus administrative and not protected by prosecutorial immunity. Second, and in contrast, the acts of the defendants in announcing their refusal to prosecute any cases in which the plaintiff participated as an investigator, in order to get him fired from his new job, were intimately connected to the judicial process and hence protected by prosecutorial immunity, although this result gave the court “pause” since the defendants made no attempt to explain their refusal to prosecute plaintiff’s cases. Finally, the defendants’ demands that the plaintiff be barred from participating in any aspect of any investigation whatever were administrative in nature and thus not protected by prosecutorial immunity.

8. The Second Circuit held that prosecutorial immunity protected a state’s attorney general who was charged with violating the plaintiff’s constitutional rights in refusing to represent the plaintiff, a correctional officer, who was sued in a prior § 1983 suit brought by a prisoner. *Mangiafico v. Blumenthal*, 471 F.3d 391, 396 (2d Cir. 2006). In this case, the Connecticut Attorney General, who had the statutory discretion to represent state officials or employees in civil litigation, refused to represent the plaintiff, one of several correctional officers sued by a prisoner who alleged excessive force. The plaintiff then sued the Attorney General, alleging due process and equal protection violations. The Second Circuit found prosecutorial immunity applicable, reasoning that “we can find no meaningful difference between the Attorney General’s decision in this case not to defend a state employee and the decisions of prosecutors and government attorneys to initiate (or not to initiate) civil or administrative proceedings. In both instances, the government attorney is serving as advocate of the state. . . .” In addition, vexatious litigation posed a risk to the defendant’s functions, and there were alternative means of redress available to the plaintiff with regard to the initial excessive force suit against him.

9. What of prosecutors accused of destroying exculpatory DNA evidence and of withholding exculpatory DNA evidence after the plaintiff was convicted and sentenced to death? In *Yarris v. County of Delaware*, 465 F.3d 129, 136 (3d Cir. 2006), the plaintiff, who was convicted of kidnaping, murder, and rape and served twenty-two year before DNA evidence clearly indicated that he did not commit these crimes, sued various law enforcement officers, including assistant district attorneys, alleging that they had deliberately destroyed exculpatory DNA evidence years earlier. The Third Circuit, rejecting prosecutorial immunity, stated: “Unlike decisions on whether to withhold evidence from the defense, decisions to destroy evidence are not related to a prosecutor’s prosecutorial function.” As to withholding exculpatory DNA evidence, the court emphasized that in order for the prosecutors to successfully rely on absolute immunity in this regard, they would have to show that their response to plaintiff’s DNA requests was “part of their advocacy for the state in post-conviction proceedings in which they were personally involved.” But if they acted merely as custodians of the DNA evidence, then this was a non-adversarial function unprotected by prosecutorial immunity.

0048

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Sat Jul 25 01:10:40 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3525 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Master:17 Jul 09 02:10][MX-SECNDARY: 18 Jul 09 08:51][TT-: 25 Jun 09 10:01 loc=usa unit=03525-supp01]

0

Chapter 8

“EVERY PERSON”: QUALIFIED IMMUNITY

II. THE TRANSFORMATION OF QUALIFIED IMMUNITY

A. *Harlow*

Page 452: Add the following new Note:

9. With regard to extraordinary circumstances, see also *Silberstein v. City of Dayton*, 440 F.3d 306 (6th Cir. 2006), where the Sixth Circuit found that it was clearly established in July 2005 that a former employee of a city’s civil service board who had a property interest in her employment (because she was a classified employee under the plain language of the city charter) was entitled to an opportunity to be heard prior to her termination. The Sixth Circuit also rejected the argument of the defendants, civil service board members, that they were entitled to qualified immunity because they relied on the advice of their legal department that the plaintiff was an unclassified, rather than a classified, employee. It reasoned that this was not an extraordinary circumstance justifying qualified immunity in light of the collective experience of the board, the city charter’s language and the evidence of how positions such as the plaintiff’s had been dealt with in the past. More generally, the Sixth Circuit commented that the defendants could not “cloak themselves in immunity simply by delegating their termination procedure decisions to their legal department. . . .”

E. *Siegert* and Its Progeny: The Qualified Immunity Inquiry into the Merits of the Prima Facie Case

Page 463: Add the following new Notes 7 and 8:

7. Consider the Supreme Court’s 2004 per curiam decision in *Brosseau v. Haugen*, 125 S. Ct. 596 (2004) (per curiam), which involved an excessive force claim against a police officer who shot the plaintiff in attempting to arrest him. The Ninth Circuit had found that the defendant violated the plaintiff’s Fourth Amendment rights and that the defendant was not protected by qualified immunity because he violated clearly established law. The Supreme Court reversed. *It expressed no view on the Fourth Amendment merits* but instead held that at the time of the shooting, in February 1999, there was no clearly established law on the question “whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.” What is particularly noteworthy is that the Court pointed out in a footnote that its approach here — deciding qualified immunity but not the merits — did not mean that it was reconsidering its “instruction” in *Saucier* “that lower courts must decide the constitutional question prior to deciding the qualified immunity question.” 125 S. Ct. at 598 n 3. Rather, its purpose was to correct what it called a “clear misapprehension of the qualified immunity standard.” However, Justice Breyer, concurring and joined by Justices Scalia and Ginsburg, argued that “when courts’ dockets are crowded, a rigid ‘order of battle’ makes little administrative sense and can sometimes lead to a

constitutional decision that is effectively insulated from review.” On the latter point, Justice Breyer cited Justice Scalia’s dissent from denial of certiorari in *Bunting v. Mellen*, 541 U.S. 1019 (2004). Justice Stevens was the sole dissenter. *See also* Justice Breyer’s opinion in *Morse v. Frederick*, 127 S. Ct. 2618, (2007), concurring in the judgment and dissenting in part, a student free speech case in which he argues that the Court should have decided the case for the defendant principal on qualified immunity grounds rather than reaching the First Amendment merits.

This “order of battle” issue has attracted the attention of judges and scholars. *See, e.g.*, Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006).

8. The Supreme Court finally resolved the matter in *Pearson v. Callahan*, 129 S. Ct. ___ (2009), a case involving the Fourth Amendment and “consent once removed.” In this case, where the defendant police officers conducted a raid in March 2002 on the plaintiff’s home without a warrant on the basis of a confidential informant’s invitation to the defendants to enter, the Tenth Circuit found that they had violated plaintiff’s Fourth Amendment rights and were not entitled to qualified immunity. The court reasoned that the Supreme Court and its circuit had clearly established that there were only two exceptions to the warrant requirement for entry into a home, consent and exigent circumstances, neither of which was present here. “The creation of an additional exception [i.e., “consent once removed”] by another circuit would not make the right defined by our holdings any less clear. . . . The precedent of one circuit cannot rebut that the ‘clearly established weight of authority’ is as the Tenth Circuit and the Supreme Court have addressed it.” *Callahan v. Millard County*, 494 F.3d 891, 899 (10th Cir. 2007). More to the present point, the Supreme Court asked the parties to argue the question of whether the “order of battle” aspect of *Saucier* should be overruled.

In a unanimous opinion by Justice Alito, the Supreme Court reversed and, not deciding the Fourth Amendment issue, ruled that the defendants were protected by qualified immunity. It pointed out that when the challenged conduct occurred in 2002, the “consent-once-removed” doctrine had been accepted by three circuit courts and two State Supreme Courts beginning in the early 1980s. “The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on ‘consent-once-removed’ entries.” Qualified immunity was particularly appropriate in a case such as this where the difference in circuit courts’ views on the “consent-once-removed” doctrine was created by the very court that had ruled against the defendants and subjected them to personal damages liability.

As to the mandatory *Saucier* procedure, the Court initially determined that *stare decisis* did not preclude revisiting and revising that procedure. It then proceeded to articulate the benefits of a mandatory procedure, which included the development of constitutional doctrine, especially in situations where the issues did not frequently arise in cases in which a qualified immunity defense was unavailable. However, the Court next found that those benefits were all too often significantly outweighed by the following costs: (1) where it was plain that a constitutional right was not clearly established but difficult to decide whether there was such a right, scarce judicial resources as well as the parties’ resources were unnecessarily expended; (2) often constitutional rights issues were so fact-bound that judicial decisions provided little future guidance; (3) those

constitutional decisions based on uncertain interpretations of state law were not very useful; (4) the precise factual basis of a claim was frequently difficult to discern where qualified immunity was raised at the pleading stage; (5) there was a risk of bad decisionmaking because briefing on the constitutional merits was often inadequate and also because where there was obviously no clearly established law accompanied by a difficult constitutional issue on the merits, a judge might not devote enough attention to the merits as would be the case in other circumstances; (6) strictly adhering to the mandatory *Saucier* procedure might make it hard for affected parties to obtain appellate review of constitutional decisions in cases where the defendant was found to have committed a constitutional violation but did not violate clearly settled law and was thus the “winning party”; and (7) the *Saucier* procedure was inconsistent with the general principle of constitutional avoidance.

For all of these reasons, the Court rejected the mandatory *Saucier* procedure. However, it went on to emphasize that a non-mandatory procedure of this kind was often valuable, depending on the case: “Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.”

III. THE CLEARLY SETTLED LAW INQUIRY

A. *Hope v. Pelzer*: What is Clearly Settled Law?

Page 465: Add the following new Note:

NOTE ON *GROH v. RAMIREZ*

Note that there may be situations where the very constitutional provision at issue provides much, if not all, of the requisite fair notice to defendants. In *Groh v. Ramirez*, 124 S. Ct. 1284 (2004), the Supreme Court confronted a case in which a federal law enforcement officer conducted a search of the plaintiff’s home pursuant to a warrant that failed to describe the “person or things to be seized” as required by the Fourth Amendment, even though the application for the warrant described the place to be searched and the contraband the defendant expected to find there. In an opinion by Justice Stevens, the Court first concluded that the warrant was plainly invalid and violative of the Fourth Amendment, despite the adequate description in the application. It rejected the arguments that this was a mere technical mistake and that the magistrate’s authorization to issue the warrant validated the search: the defendant himself had prepared the invalid warrant. The Court went on to reject the defendant’s qualified immunity contention as well. The language of the Fourth Amendment and Supreme Court case law were clear as to the basic rule that, absent consent or exigent circumstances, a warrantless search of the home is presumptively unconstitutional. “[E]ven a cursory reading of the warrant in this case — perhaps just a simple glance — would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal.”

Justice Kennedy, joined by Chief Justice Rehnquist, dissented, arguing that while there was a Fourth Amendment violation, the defendant was entitled to

qualified immunity. They maintained that the defendant had made a reasonable mistake of fact — a clerical error, in essence — rather than, as the majority found, a mistake of law. Justice Thomas, joined by Justice Scalia and in part by Chief Justice Rehnquist, also dissented, and argued that the search was reasonable and thus not violative of the Fourth Amendment. They also contended that the defendant’s failure to notice a defect in the warrant was not objectively unreasonable and that he was therefore protected by qualified immunity.

Page 468: Add the following new Notes:

8. In *Sample v. Bailey*, 409 F.3d 689, 698 (6th Cir. 2005), a Sixth Circuit case involving the use in January 2003 of deadly force that was allegedly excessive, the court rejected the defendant police officer’s argument “that the absence of a factually similar precedent case requires this court to find that the constitutional right is not clearly established.” Relying on *Robinson v. Bibb*, 840 F.2d 349 (6th Cir. 1988), for the general proposition that a criminal suspect has a right not to be shot unless he is perceived to be a threat to pursuing officers or to others during flight, the Sixth Circuit affirmed the district court’s denial of the defendant’s qualified immunity summary judgment motion. It declared:

Thus, regardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect posed a perceived threat of serious physical harm to the officer or others.

9. The First Circuit declared in *Wilson v. City of Boston*, 421 F.3d 45, 57 (1st Cir. 2005): “We conclude that pre-1999 case law gave police officers ample warning that arresting and detaining someone incorrectly swept up in a mass arrest sting aimed at individuals with outstanding arrest warrants would violate her Fourth Amendment rights.” The court referred to pre-existing case law that established two important principles — an arrest based on a request by another officer is lawful only if the first officer has probable cause, and an arrest based on a facially valid but actually recalled warrant violates the Fourth Amendment. Here there was an arrest based solely on a nonexistent warrant.

10. Where a deputy sheriff instructed officers, pursuant to an indicia warrant for the seizure of items with Hells Angels affiliation at plaintiffs’ residence and at the Hells Angels clubhouse, to seize all evidence of indicia in January 1998, the Ninth Circuit found that he violated clearly established Fourth Amendment law. *San Jose Charter of Hells Angels v. San Jose*, 402 F.3d 962 (9th Cir. 2005) The defendant instructed officer to seize “truckloads” of Hells Angels indicia, even if it meant removing a refrigerator door. Defendant “knew that the search for indicia evidence was for the limited purpose of establishing that the Hells Angels was a gang [for penalty enhancement purposes at a trial. Nevertheless] he instructed officers to seize numerous expensive motorcycles, a piece of concrete, and a refrigerator door . . . [none of which] were presented at the trial.” Even though there was no case precisely on point factually, this was not necessary because the state of the law when the warrants were served provided fair notice to the defendant that his conduct was unlawful. Judge Bea concurred in part and dissented in part, arguing that the defendant was entitled to qualified immunity

IV. PROCEDURAL ASPECTS OF QUALIFIED IMMUNITY

53

because the warrant commanded the officers to seize a very broad range of evidence in search of various crimes.

11. An Eleventh Circuit case, *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1307 (11th Cir. 2006), held that the defendant deputy sheriff, acting as a school resource officer, violated clearly settled Fourth Amendment law when he detained and handcuffed a nine-year-old girl during a physical education class. Although there were no factually similar preexisting cases, in this case the constitutional violation was obvious: the girl, who had “mouthed-off” to her physical education teacher, had complied with her teachers’ and the deputies’ instructions, and the defendant’s purpose in handcuffing the girl was not investigative but simply to punish her and teach her a lesson. “Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable.”

12. In a District of Columbia Circuit case, an assistant police chief cordoned off an area of a park where demonstrators were protesting a meeting of the World Bank in September 2002 and ordered that all of the persons in that area be arrested. He did not order any persons to leave the park before directing his officers to conduct the mass arrest and he did not warn the persons in the park that arrest was imminent. The District of Columbia Circuit had “no trouble” in concluding that the defendant violated clearly settled Fourth Amendment law: no reasonable officer could have believed that probable cause existed to suddenly arrest everyone in the park, even if there was probable cause to believe that some of the people had committee arrestable offenses. The Fourth Amendment required particularized probable cause in these circumstances. *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006).

13. The Sixth Circuit commented: “We have held repeatedly that the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.” *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006). In the case before it, the court concluded that a jury could find that the defendant police officer used excessive force against the plaintiff after he had surrendered and been neutralized by the officer: the strike to plaintiff’s knee was gratuitous and unjustified, and was for the purpose of punishing the plaintiff. It did not matter that plaintiff was not handcuffed, that he received “only” one strike to the head and one to the knee and that he attempted to evade arrest. The Sixth Circuit went on to conclude that the plaintiff’s right to be free from such strikes was clearly established in October 2003 for qualified immunity purposes. Indeed, circuit case law established in April 2002 that a police officer had no governmental interest in repeatedly striking a criminal defendant after the defendant was neutralized.

IV. PROCEDURAL ASPECTS OF QUALIFIED IMMUNITY

A. A Note on Pleading

Page 484: Add to the end of Section A:

The following Third Circuit discussion of qualified immunity and pleading is worth noting:

We continue to stand by established precedent that recognizes that a plaintiff has no pleading burden to anticipate or overcome a qualified immunity defense, and the mere absence of detailed factual allegations supporting a plaintiff's claim for relief under § 1983 does not warrant dismissal of the complaint or establish defendants' immunity. Nevertheless . . . the appropriate remedy [for a lack of factual specificity in a complaint] is the granting of a defense motion for a more definite statement under Federal Rule 12(e). . . . [T]he district court has the discretion to demand more specific allegations in order to protect the substance of the qualified immunity defense. . . .

Thomas v. Independence Township, 463 F.3d 285 (3d Cir. 2006).

Consider, however, the Supreme Court's 5-4 decision in *Ashcroft v. Iqbal*, 129 S. Ct. ___ (2009), set out earlier in Chapter 1, where the Court appeared to apply a heightened pleading requirement to the plaintiff's *Bivens* supervisory liability claims against John Ashcroft, the former United States Attorney General, and Robert Mueller, Director of the F.B.I. Plaintiff alleged that they had developed and implemented an unconstitutional policy of imposing harsh conditions of confinement because of the plaintiff's race, religion or national origin. *Iqbal*, which will almost surely apply to section 1983 claims as well, was grounded in large part on the policy considerations underlying qualified immunity, particularly the concern with minimizing the costs of defending against constitutional tort claims. In the course of its decision, the Court also changed the doctrine of supervisory liability.

Is it appropriate to consider qualified immunity policy when determining pleading requirements in constitutional tort individual liability cases? After all, qualified immunity is an affirmative defense. On the other hand, has not the Court already changed discovery and interlocutory appeal procedures in order to take account of qualified immunity policy?

C. The Roles of Court and Jury in the Qualified Immunity Determination

Page 493: Add the following after Note 6:

7. In *Curley v. Klem*, 499 F.3d 199, 211 (3d Cir. 2007), an excessive force case involving the defendant police officer's mistakenly shooting the plaintiff, another police officer, the Third Circuit affirmed the jury's verdict for the defendant. The jury had answered three questions as to the objective reasonableness of the defendant's conduct. In an extensive discussion of qualified immunity and the roles of judge and jury in its circuit and others, the Third Circuit observed that its recent precedents had “evolved” such that the district court, not the jury, should decide qualified immunity: “[W]hether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury.” In the case before the Third Circuit, there was some confusion as to what issue the jury was deciding when it answered in the affirmative the following question (one of several dealing with “objective reasonableness”): “Was [defendant's] mistake in firing weapon objectively reasonable.” However, the Third Circuit determined that even though this question was apparently intended to reach qualified immunity, “it properly presented an essentially factual question regarding the constitutional violation [and] it was not error for the jury to consider it.” The court also suggested that

V. WHO IS PROTECTED BY QUALIFIED IMMUNITY?

55

it was helpful analytically to consider the excessive force constitutional violation issue as “whether the officer made a reasonable mistake of fact,” in contrast to the qualified immunity issue as “whether the officer was reasonably mistaken about the state of the law.” *Curley*, 499 F.3d at 214.

Judge Roth dissented, 499 F.3d at 216, arguing that in light of the jury’s answers to other questions, the jury had not in fact returned a verdict for the defendant. Rather, the question relied on by the majority dealt with qualified immunity and should not have been submitted to the jury in the first place. A remand was accordingly required so that the district court could address qualified immunity.

V. WHO IS PROTECTED BY QUALIFIED IMMUNITY?

C. Tension with Functional Approach?

Page 524: Add the following new Note:

5. Consider *Rosewood Services v. Sunflower Diversified*, 413 F.3d 1163, 1169 (10th Cir. 2005), where a service provider, using § 1983, sued a community development disability organization (CDDO) and its president, alleging violations of its constitutional rights. Affirming the district court, the Tenth Circuit, relying on *Richardson*, determined that neither the CDDO nor its president was entitled to qualified immunity. The court went through the various purposes of qualified immunity discussed in *Richardson*, with emphasis on the prevention of unwarranted timidity, and concluded that even though the CDDO was a non-profit corporation that did not face competitive market pressures similar to those faced by for-profit corporations, it still faced the threat of replacement. Because the “competitive pressures associated with the threat of being replaced exist in this case, we hold that the policy considerations concerning unwarranted timidity do not favor extending qualified immunity to these Defendants.” Judge Henry concurred in the result, arguing that the defendants were entitled to claim qualified immunity but that in this case, they were not entitled to it.

The Tenth Circuit apparently did not address the question of whether a *corporation* acting under color of law, unlike an *individual* acting under color of law, could ever claim qualified immunity, or whether it should be treated like a local government body which is not entitled to qualified immunity and can only be held liable for an official policy or custom. *See* Chapter 5 on local government liability.

0056

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Sat Jul 25 01:10:40 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3525 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Master:17 Jul 09 02:10][MX-SECNDARY: 18 Jul 09 08:51][TT-: 25 Jun 09 10:01 loc=usa unit=03525-sup01]

0

Chapter 10

PROCEDURAL DEFENSES

I. STATUTES OF LIMITATIONS

Page 609: Add the following to the end of Note 5:

In *Wallace v. Kato*, 127 S. Ct. 1091 (2007) the Court resolved an interesting limitations issue that had split the lower courts. For reasons that will become apparent, some professors may choose to postpone a discussion of *Wallace* until after they cover *Heck v. Humphrey* (Chapter 10, Part IV).

The issue in *Wallace* is when does a cause of action accrue for a claim alleging the plaintiff was arrested without probable cause in violation of his rights under the Fourth Amendment? Wallace was arrested and subsequently confessed to his participation in a murder. An Illinois appellate court ultimately ruled that Wallace was arrested without probable cause and his confession was inadmissible evidence because it was not sufficiently attenuated from his unlawful arrest. The prosecution decided not to retry Wallace and he was released from prison *eight years* after his arrest. Wallace then filed suit under § 1983 asserting the arresting officers and the city violated his Fourth Amendment rights. The defendants moved for summary judgment on the grounds that the Fourth Amendment claim accrued at the time of the illegal arrest and therefore was barred by *two year* Illinois statute of limitations. Wallace asserted that his suit was not time-barred because the cause of action did not accrue until after his conviction had been invalidated.

The accrual issue in *Wallace* is complicated by two factors. First, recall from *Townes v. City of New York* (Chapter 6, Part II, section B) that many courts limit the scope of an illegal arrest claim to the time between the arrest and arraignment. That is, the actionable injury is limited from the time of the illegal arrest until there has been a judicial determination of probable cause. This principle could support the position that a Fourth Amendment injury is complete and the cause of action accrues at the time of the illegal arrest. On the other hand, *Heck v. Humphrey* (Chapter 10, Part IV) holds that a § 1983 claim that, if successful, would imply the invalidity of a conviction, cannot be brought until the conviction has already been invalidated. Since the violation of Wallace's Fourth Amendment rights led to the exclusion of his confession, Wallace argued that the *Heck* principle applied so that *his* Fourth Amendment claim could not be brought (and, hence, his cause of action did not accrue) until after his conviction had been reversed by the appellate court and the prosecutor decided not to re-try him.

A majority of the Court held (1) the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law; (2) a false imprisonment ends once the victim becomes held pursuant to legal process as, for example, when he is bound over by a magistrate or arraigned on charges; and (3) "the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process." Since Wallace did not file his § 1983 claim until after

his release from prison, which was more than two years after legal process was initiated against him, his false arrest claim was barred by the two year statute of limitations.

Justices Stevens and Souter concurred in the judgment reasoning that since Wallace was afforded a full and fair opportunity to litigate his Fourth Amendment challenges in state court, under *Stone v. Powell*, 428 U.S. 465 (1976), a federal habeas remedy was never available to him and, therefore, *Heck* did not postpone the accrual of his § 1983 claim. Justices Breyer and Ginsburg dissented, arguing that the Court should adopt a principle of “equitable tolling” to allow inmates who successfully challenge their conviction on Fourth Amendment grounds to file their § 1983 claims after they are released from custody. The application of equitable tolling would avoid requiring inmates to file their § 1983 claims while the underlying substantive constitutional challenges are being litigated in state criminal or habeas proceedings.

The practical import of *Wallace* is that the statute of limitations for an allegedly illegal arrest begins to run from the date legal process is initiated. As in Wallace’s case, that may be several years before a successful challenge to the arrest is completed. Thus, a person who believes his conviction was brought about by an illegal search or seizure may well have to file his § 1983 claim while challenges to the arrest are being litigated in state criminal or habeas proceedings. The § 1983 claim likely will be stayed pending completion of the state proceedings. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

IV. EXHAUSTION OF REMEDIES

Page 648: Add the following new Note:

6. In *Woodford v. Ngo*, 126 S. Ct. 2378, (2006), the Court adopted the “proper exhaustion” rule in suits litigated under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997a(e). Under a “proper exhaustion” rule, the statutory obligation to exhaust all available administrative remedies before challenging prison conditions in federal court is not satisfied by an inmate’s filing of an untimely or otherwise procedurally defective prison administrative grievance or appeal. Consequently, an inmate who failed to timely file his grievance with prison officials could not bring an action under § 1983 to challenge a punishment barring him from attending religious services. The majority opinion emphasized traditional administrative law principles that exhaustion is important because (1) it protects agency (here the prison) authority by allowing them to correct their own mistakes before being haled into federal court; and (2) it promotes efficiency by allowing claims to be resolved quickly and economically in administrative proceedings. The majority also drew upon the exhaustion-like consequences of the “procedural default” rule applied in federal habeas corpus litigation. Under the procedural default rule, an inmate who fails to comply with a deadline for seeking state-court review or for taking an appeal may be barred from litigating his claims in federal court. *See e.g., Gray v. Netherland*, 518 U.S. 152, 162 (1996). The majority opinion left open the question of whether a prisoner’s § 1983 claim would be barred by his failure to comply properly with administrative procedural requirements that do not provide a “meaningful opportunity” to raise meritorious grievances.

Justice Breyer concurred in the judgment, but noted that traditional administrative law recognizes various exceptions to proper exhaustion, including

hardship, inadequacy of available remedies, cause, and prejudice. He would instruct the lower court on remand to consider whether Ngo's case fell within any of the traditional exceptions to the proper exhaustion rule.

Justices Stevens, Souter, and Ginsburg dissented arguing that the proper exhaustion rule was not required by the "plain text" of the statute. Justice Stevens noted that the procedural default sanction created by the majority "bars litigation at random, irrespective of whether a claim is meritorious or frivolous." In the view of the dissenters, both "common sense" and the fundamental right of access to the courts dictate against construing the PLRA to require proper exhaustion.

In *Jones v. Bock*, 127 S. Ct. 910 (2007), the Court addressed yet additional facets of the exhaustion requirement under the PLRA. The Court held that (1) the failure to exhaust administrative remedies is an affirmative defense, so that prisoners were not required to specially plead or demonstrate exhaustion in their complaint; (2) compliance with prison grievance procedures is all that is required by the PLRA to properly exhaust. Thus, it was error to hold that prisoner did not exhaust his administrative remedies because he did not specifically identify the § 1983 defendant in his prison grievance when those procedures did not require such specificity; and (3) a court should not dismiss an entire complaint in which the prisoner has failed to exhaust some, but not all, of the claims asserted in the complaint. The court should proceed with the exhausted claims and dismiss only the claims for which administrative remedies have not been exhausted.

Page 659: Add the following to the end of Note 6:

The Court in *Wallace v. Kato*, 127 S. Ct. 1091 (2007) held that a § 1983 claim based on an arrest made without probable cause covers *only* the period between the allegedly constitutional seizure and the time the arrestee becomes detained pursuant to legal process (i.e., an arraignment or bound over by a magistrate). *Heck* poses no impediment to this type of false arrest claim since, by definition, it does not challenge any criminal conviction. For a more detailed discussion of *Wallace* and its impact on statute of limitations issues, see note 5 following *Wilson v. Garcia* in this Supplement.

Page 659: Add the following new Note:

7. After *Heck v. Humphrey*, the line separating § 1983 and habeas corpus remains an issue of some importance. In *Hill v. McDonough*, 126 S. Ct. 2096 (2006) a death row inmate filed an action under § 1983 alleging that Florida's lethal injection protocol constituted cruel and unusual punishment under the Eighth Amendment. Hill sought injunctive relief. The defendant argued that Hill's claim was the functional equivalent of a habeas corpus petition which was barred because he had raised the issue in a prior habeas petition. A unanimous Court held that Hill's claim could proceed under 42 U.S.C. § 1983. The protocol for lethal injection in Florida called for the administration of an anesthetic (sodium pentothal) followed by the administration of two drugs (pancuronium bromide and potassium chloride) that would bring about the death of the inmate. Hill alleged that the anesthetic would not be sufficient to render painless the administration of the second and third drugs. He alleged that "he could remain conscious and suffer severe pain as the pancuronium paralyzed his lungs and body and the potassium chloride caused muscle cramping and a fatal heart attack." The Court held that this challenge should not be characterized as the functional equivalent of a habeas petition because "the injunction Hill seeks

would not necessarily foreclose the State from implementing the lethal injection sentence under present law. . . . Any incidental delay cause by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action.” *Hill v. McDonough* relies upon another recent decision, *Nelson v. Campbell*, 541 U.S. 637 (2004) which allowed an Alabama inmate to challenge Alabama’s lethal injection procedure under § 1983.

Chapter 11

LITIGATING SECTION 1983 CLAIMS IN STATE COURTS

II. THE CHOICE BETWEEN STATE AND FEDERAL LAW

Page 689: Add the following to the end of the Note:

The Supreme Court will revisit the distinctive issues that arise in state court section 1983 suits in its upcoming term. It has granted certiorari in *Haywood v. Drown*, 9 N.Y.3d 481 (2007), cert. granted, 2008 U.S. LEXIS 5012 (June 16, 2008), to consider the question “whether a state’s withdrawal of jurisdiction over certain damages claims against state corrections employees — from state courts of general jurisdiction — may be constitutionally applied to exclude federal claims under Section 1983, especially where, as here, the state legislature withdraws jurisdiction because it concludes that permitting such lawsuits is bad policy.”

0062

[ST: 1] [ED: 10000] [REL: 2009S]

Composed: Sat Jul 25 01:10:41 EDT 2009

XPP 8.1C.1 Patch #5 LS000000 nllp 3525 [PW=468pt PD=684pt TW=348pt TD=588pt]

VER: [LS000000-Master:17 Jul 09 02:10][MX-SECNDARY: 18 Jul 09 08:51][TT-: 25 Jun 09 10:01 loc=usa unit=03525-sup01]

0

Chapter 12

ATTORNEY'S FEES

II. WHEN IS A PARTY ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C. § 1988?

Page 719: Add the following case before Part III:

SOLE v. WYNER
127 S. Ct. 2188 (2007)

JUSTICE GINSBURG delivered the opinion of the Court.

* * *

I

In mid-January 2003, plaintiff-respondent T. A. Wyner notified the Florida Department of Environmental Protection (DEP) of her intention to create on Valentine's Day, February 14, 2003, within John D. MacArthur Beach State Park, an antiwar artwork. The work would consist of nude individuals assembled into a peace sign. By letter dated February 6, DEP informed Wyner that her peace sign display would be lawful only if the participants complied with the "Bathing Suit Rule" set out in Florida Administrative Code § 62D-2.014(7)(b) (2005). That rule required patrons, in all areas of Florida's state parks, to wear, at a minimum, a thong and, if female, a bikini top.

To safeguard the Valentine's Day display, and future expressive activities of the same order, against police interference, Wyner filed suit in the United States District Court for the Southern District of Florida on February 12, 2003. She invoked the *First Amendment's* protection of expressive conduct, and named as defendants the Secretary of DEP and the Manager of MacArthur Beach Park. Her complaint requested immediate injunctive relief against interference with the peace sign display, and permanent injunctive relief against interference with "future expressive activities that may include non-erotic displays of nude human bodies." An exhibit attached to the complaint set out a May 12, 1995 Stipulation for Settlement with DEP. That settlement had facilitated a February 19, 1996 play Wyner coordinated at MacArthur Beach, a production involving nude performers. A term of the settlement provided that Wyner would "arrange for placement of a bolt of cloth in a semi-circle around the area where the play [would] be performed," so that beachgoers who did not wish to see the play would be shielded from the nude performers.

The day after the complaint was filed, on February 13, 2003, the District Court heard Wyner's emergency motion for a preliminary injunction. Although disconcerted by the hurried character of the proceeding, the court granted the

preliminary injunction. * * * Pointing to the May 1995 settlement laying out “agreed-upon manner restrictions,” the court determined that “[p]laintiff[s] desired expression and the interests of the state may both be satisfied simultaneously.” In this regard, the court had inquired of DEP’s counsel at the preliminary injunction hearing: “Why wouldn’t the curtain or screen solve the problem of somebody [who] doesn’t want to see . . . nudity? Seems like that would solve [the] problem, wouldn’t it?” Counsel for DEP responded: “That’s an option. I don’t think necessarily [defendants] would be opposed to that. . . .”

The peace symbol display took place at MacArthur Beach the next day. A screen was put up, apparently by the State, as the District Court anticipated. But the display was set up outside the barrier, and participants, once disassembled from the peace symbol formation, went into the water in the nude.

Thereafter, Wyner pursued her demand for a permanent injunction. Her counsel represented that on February 14, 2004, Wyner intended to put on another production at MacArthur Beach, again involving nudity. After discovery, both sides moved for summary judgment. At the hearing on the motions, the District Court asked Wyner’s counsel about the screen put up around the preceding year’s peace symbol display. Counsel acknowledged that the participants in that display ignored the barrier and set up in front of the screen.

A week later . . . the court denied plaintiff’s motion for summary judgment and granted defendants’ motion for summary final judgment. The deliberate failure of Wyner and her coparticipants to remain behind the screen at the 2003 Valentine’s Day display, the court concluded, demonstrated that the Bathing Suit Rule’s prohibition of nudity was “no greater than is essential . . . to protect the experiences of the visiting public.” While Wyner ultimately failed to prevail on the merits, the court added, she did obtain a preliminary injunction prohibiting police interference with the Valentine’s Day 2003 temporary art installation, and therefore qualified as a prevailing party to that extent. The preliminary injunction could not be revisited at the second stage of the litigation, the court noted, for it had “expired on its own terms.” So reasoning, the court awarded plaintiff counsel fees covering the first phase of the litigation.

The Florida officials appealed, challenging both the order granting a preliminary injunction and the award of counsel fees. . . . The Court of Appeals for the Eleventh Circuit held first that defendants’ challenges to the preliminary injunction were moot because they addressed “a finite event that occurred and ended on a specific, past date.” The court then affirmed the counsel fees award, reasoning that plaintiff had gained through the preliminary injunction “the primary relief [she] sought,” *i.e.*, the preliminary order allowed her to present the peace symbol display unimpeded by adverse state action.

* * *

II

The petitioning state officials maintain that plaintiff here does not satisfy that standard for, as a consequence of the final summary judgment, “[t]he state law

whose constitutionality [Wyner] attacked [*i.e.*, the Bathing Suit Rule,] remains valid and enforceable today.”

Wyner, on the other hand, urges that despite the denial of a permanent injunction, she got precisely what she wanted when she commenced this litigation: permission to create the nude peace symbol without state interference. That fleeting success, however, did not establish that she prevailed on the gravamen of her plea for injunctive relief, *i.e.*, her charge that the state officials had denied her and other participants in the peace symbol display “the right to engage in constitutionally protected expressive activities.” Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.

At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff’s ultimate success on the merits. The foundation for that assessment will be more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court. In some cases, the proceedings prior to a grant of temporary relief are searching; in others, little time and resources are spent on the threshold contest.

In this case, the preliminary injunction hearing was necessarily hasty and abbreviated. Held one day after the complaint was filed and one day before the event, the timing afforded the state officer defendants little opportunity to oppose Wyner’s emergency motion. Counsel for the state defendants appeared only by telephone. The emergency proceeding allowed no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses. The provisional relief immediately granted expired before appellate review could be gained, and the court’s threshold ruling would have no preclusive effect in the continuing litigation. Both the District Court and the Court of Appeals considered the preliminary injunction a moot issue, not fit for reexamination or review, once the display took place. In short, the provisional relief granted terminated only the parties’ opening engagement. Its tentative character, in view of the continuation of the litigation to definitively resolve the controversy, would have made a fee request at the initial stage premature.

Of controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling. Wyner’s temporary success rested on a premise the District Court ultimately rejected. That court granted preliminary relief on the understanding that a curtain or screen would adequately serve Florida’s interest in shielding the public from nudity that recreational beach users did not wish to see. At the summary judgment stage, with the benefit of a fuller record, the District Court recognized that its initial assessment was incorrect. Participants in the peace symbol display were in fact unwilling to stay behind a screen that separated them from other park visitors. In light of the demonstrated inadequacy of the screen to contain the nude display, the District Court determined that enforcement of the Bathing Suit Rule was necessary to “preserv[e] park aesthetics” and “protect the experiences of the visiting public.”

Wyner contends that the preliminary injunction was not undermined by the subsequent adjudication on the merits because the decision to grant preliminary

relief was an “as applied” ruling. In developing this argument, she asserts that the officials engaged in impermissible content-based administration of the Bathing Suit Rule. But the District Court assumed, “for the purposes of [its initial] order,” the content neutrality of the state officials’ conduct. That specification is controlling.

The final decision in Wyner’s case rejected the same claim she advanced in her preliminary injunction motion: that the state law banning nudity in parks was unconstitutional as applied to expressive, nonerotic nudity. At the end of the fray, Florida’s Bathing Suit Rule remained intact, and Wyner had gained no enduring “chang[e] [in] the legal relationship” between herself and the state officials she sued.

III

Wyner is not a prevailing party, we conclude, for her initial victory was ephemeral. A plaintiff who “secur[es] a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against [her],” has “[won] a battle but los[t] the war.” We are presented with, and therefore decide, no broader issue in this case.

We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees. We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) if the merits of the case are ultimately decided against her.

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

NOTES FOLLOWING *SOLE*

1. Would it have made any difference if the preliminary injunction had been issued in a less hurried fashion, with both sides able to present any evidence they might have?

2. Suppose the evidence indicated that Florida officials enforced the “Bathing Suit Rule” against political protesters but routinely permitted the performance of plays containing nudity. Would such evidence support the conclusion that the regulation was unconstitutional “as applied?” If so, should the plaintiffs be entitled to an award of attorneys’ fees for securing a preliminary injunction even if the Rule was not stuck down on its face?

3. Consider the last paragraph in Justice Ginsburg’s opinion. (A) Suppose the plaintiffs had dismissed their complaint thereby abandoning their claim for a permanent injunction after securing the preliminary injunction and conducting the protest. Would they then have been entitled to an award of attorneys’ fees? (B) Suppose the defendants repealed the Bathing Suit Rule after the preliminary injunction had been issued but before there had been a ruling on the plaintiffs’ request for a permanent injunction. Under *Buckhannon*, could the

II.

ATTORNEY'S FEES UNDER 42 U.S.C. § 1988

67

plaintiffs be considered prevailing parties?

The lower courts are wrestling with the issue of when, if ever, can an award of attorneys' fees be based on securing a preliminary, but not a permanent, injunction. As stated in one recent opinion, "nearly every Court of Appeals to have addressed the issue has held that relief obtained via a preliminary injunction can, *under appropriate circumstances*, render a party 'prevailing.'" *People Against Police Violence v. City of Pittsburgh*, 520 F. 3d 226, 232–33 (3d Cir. 2008) (emphasis supplied). The critical question, of course, is what are the "appropriate circumstances"? Consider two cases.

In *People Against Police Violence v. City of Pittsburgh*, 520 F. 3d 226 (3d Cir. 2008), the plaintiffs secured a preliminary injunction enjoining the enforcement of the city's ordinance which regulated expressive activities in public forums. After entry of the preliminary injunction, the parties, at the strong encouragement of the court, entered into a lengthy series of meetings designed to produce a new ordinance that would rectify the constitutional objections to the current law. The court-encouraged "meet-and-confer" sessions lasted for several years and ultimately resulted in a new ordinance that satisfied all of the plaintiffs' concerns. At that point, the district court lifted the preliminary injunction and the plaintiffs' moved for an award of attorneys' fees. The city opposed the award of fees arguing that the plaintiffs were not "prevailing parties" under *Sole* and *Buckhannon*. The district court disagreed and awarded over \$100,000 in attorneys fees to the plaintiffs. The court of appeals affirmed, emphasizing that (1) the issuance of the preliminary injunction was based on a finding of likelihood of success on the merits; (2) the city chose not to appeal that order; and (3) the city ultimately avoided final resolution of the merits of plaintiffs' case by giving the plaintiffs virtually all of the relief sought in the complaint. Under these circumstances, the court concluded, "[t]here was nothing voluntary about the City's . . . [changing the ordinance]. And the preliminary injunction was not 'dissolved for lack of entitlement.' Rather it was terminated only when the new statute was enacted 'after the preliminary injunction had done its job.' The ultimate mootng of the plaintiffs' claims resulted not solely from the filing of the lawsuit but from the results of the legal process." 520 F.3d at 234.

In *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833 (8th Cir. 2008), the plaintiff secured a preliminary injunction enjoining the enforcement of a municipal ordinance regulating billboards. The city then enacted a new ordinance that cured the constitutional infirmities that formed the basis for the preliminary injunction. The case proceeded to trial on the issue of damages. The jury found that the city had denied the plaintiff's application on a content neutral basis and therefore the plaintiff was not entitled to actual or even nominal damages. The plaintiff then sought an award of attorneys' fees and costs related to procuring the preliminary injunction. The district court denied the application for fees and the court of appeals affirmed. According to the court of appeals, the jury's finding that the city's denial of the plaintiff's applications was based on content neutral considerations meant that "the unconstitutional provisions of the [city's] sign code had no impact [on the plaintiff]." 511 F.3d at 838. In other words, the plaintiff failed to prove that "the ordinance was

unconstitutional as applied to it, and the issuance of the preliminary injunction had no impact on the relationship between [the plaintiff] and the city.” *Id.* The fact that the ordinance was revised was of no legal importance, according to the court, since *Buckhannon* had expressly repudiated the “catalyst” rule. *Id.*

Are the outcomes in *People Against Police Violence* and *Advantage Media* consistent with one another? In both cases the challenged ordinances were revised when their enforcement was enjoined by a preliminary injunction. Why were the changes made to the challenged ordinance in *People Against Police Violence* considered to be involuntary and the “results of the legal process,” but the revision of the ordinance in *Advantage Media* was legally irrelevant to the fees issue? Is the jury’s finding of a content neutral reason for denying Advantage Media’s applications the legal equivalent the denial of a permanent injunction in *Sole*? If so, can you articulate how they are equivalent? Would Advantage Media have had a better chance of securing an award of attorneys’ fees if it had not pursued the damages claims, but had been satisfied with the modification of the sign ordinance?

III. WHAT IS A “REASONABLE” FEE?

Page 725: Add to the end of Note 1:

The Third Circuit Court of Appeals recently issued an opinion in a voting rights case in which it criticizes then “abandons” the traditional lodestar approach to awarding attorney’s fees. Instead, it instructed

the district court in exercising its considerable discretion, to bear in mind *all* of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney’s fees in setting a reasonable hourly rate. The reasonable hourly rate is the rate a paying client would be willing to pay. In determining what rate a paying client would be willing to pay, the district court should consider, among others, the *Johnson* [*Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974)] factors; it should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case. The district court should then use that reasonable hourly rate to calculate what can properly be termed the “presumptive reasonable fee.”

Arbor Hills Concerned Citizens Neighborhood Ass’n. v. County of Albany, 484 F.3d 162, 169 (2d Cir. 2007).

How does the method of setting fees advocated by the Third Circuit differ from a traditional lodestar approach? Would it result in different fee awards? Would an attorney representing the victim of police misconduct receive more or less compensation under one approach or the other?

Page 729: Add New Note 7:

7. The Court in *Hensley* indicated that "in some cases of exceptional success an enhanced [fee] award may be justified." A host of circuit court opinions have indicated that an enhancement of a fee award may be appropriate when the results achieved and the quality of the representation are deemed "exceptional." See, e.g., *Geier v. Sundquist*, 372 F.3d 784 (6th Cir. 2004); *Hyatt v. Apfel*, 195 F.3d 188 (4th Cir. 1999); *Quarantino v. Tiffany & Co.*, 166 F.3d 422 (2d Cir. 1999); *NAACP v. City of Evergreen*, 812 F.2d 1332 (11th Cir. 1987).

This proposition has come under sharp attack in a recent court of appeals decision. In *Kenny A. v. Perdue*, 2008 U.S. App. Lexis 14204 (11th Cir. July 3, 2008), the plaintiffs prevailed in a class action challenging various aspects of the foster care systems of two Georgia counties. The district court awarded \$6 million in attorneys' fees under a lodestar calculation. It then increased the award by \$4.5 million citing "the superb quality" of the representation and the "exceptional" results achieved.

On appeal, Judge Carnes authored a vigorous attack on the proposition that fees can be enhanced because of exceptional results or quality of representation. His lengthy and detailed review of Supreme Court decisions led Judge Carnes to conclude that there is "very little room" for fee enhancements under any circumstances, and certainly not because an attorney provided high quality services or achieved excellent results. Judge Carnes questioned whether the representation in this case could be labeled properly as 'superb' in light of the district court having reduced the number of hours included in the lodestar calculation due to vague records and excessive billing. "[B]ad and excessive billing is inconsistent with superb lawyering." More fundamental, Carnes argued that the quality of representation is already reflected in the hourly rate in a lodestar calculation so any enhancement of the fee on that basis amounts to "double counting." Judge Carnes also took issue with "exceptional results" as a basis for enhancing a fee award. "[S]uperb results are either what a fair application of the law produces, which means that they are not truly 'superb,' or they are results that exceed what the law allows and for that reason are beyond the purpose of the fee shifting statute." In Judge Carnes' view, enhancement of a fee award could be justified only in more limited circumstances. For example, enhancing a fee award might be justified if an attorney vindicates the rights of an unpopular client (e.g, a pedophile) "and as a result that attorney suffers a loss of standing in the community which damages his practice and income."

Despite his scathing attack on fee enhancements in general and this award in particular, Judge Carnes felt constrained to uphold the district court's award under prior Eleventh Circuit decisions.

Judge Wilson concurred in affirming the district court's award, but wrote separately to express his view that the enhancement of the fee award in this case was supported by Supreme Court as well as circuit court precedent. His independent review of the Supreme Court decisions led Judge Wilson to conclude that the Court "has allowed for the possibility of an enhancement based on [the quality of representation and exceptional results] where, as here, specific record evidence indicates that the lodestar amount is insufficient to provide a reasonable fee."

The length, detail, and charged rhetoric of Judge Carnes' opinion can only be viewed as an invitation for the circuit to reconsider this issue en banc or to have the Supreme Court consider it anew.

Page 746: Add to the end of Note 6:

Cf. Arbor Hills Concerned Citizens Neighborhood Ass'n. v. County of Albany, 484 F.3d 162, 170 (2d Cir. 2007) (“a district court may use an out-of-district hourly rate — or some rate in between the out-of-district rate sought and the rates charged by local attorneys — in calculating the presumptive reasonable fee if it is clear that a reasonable, paying client would have paid those higher rates.”) (voting rights case).

Page 748: Add to the end of Note 10:

In a case brought under Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(3)(B), the Court held that a prevailing party cannot be awarded “fees rendered by experts” as part of “reasonable attorneys’ fees.” *Arlington Central School District Bd. of Ed. v. Murphy*, 126 S. Ct. 2455. This ruling is consistent with *West Virginia University Hospitals, Inc. v. Casey* cited in Note 9, which was decided under 42 U.S.C. § 1988. The majority noted that “the relevant wording [of the two statutes] . . . was virtually identical.” Statutory authorization of an award of expert witness fees must be expressed “unambiguously.”

Page 749: Add New Note 12:

12. In cases involving multiple defendants, should responsibility for a fee award run jointly and severally or should it be apportioned between the defendants. If it is to be apportioned, what would be the basis for the division of responsibility? In *Torres-Rivera v. O’Neill-Cancel*, 524 F.3d 331 (1st Cir. 2008), two teenage boys were beaten by a Puerto Rican police officer (Espada-Cruz) while an agent of the Puerto Rico Treasury Department (O’Neill-Cancel) stood by without intervening and trained his gun on the mother of one of the boys as she witnessed the beating. A default judgment was entered against Espada-Cruz. O’Neill-Cancel mounted what was described by the court as a “ferocious defense.” 524 F.3d at 335. The jury ultimately found O’Neill-Cancel liable to both plaintiffs for failing to intervene. The jury also awarded the plaintiffs a total of \$220,000 in damages against Espada-Cruz and \$120,000 in damages against O’Neill-Cancel. The district court ruled that the responsibility for attorneys’ fees should not run jointly and severally, but should be apportioned between the defendants. This aspect of the lower court’s ruling was not challenged and was characterized by the court of appeals as “eminently reasonable.” 524 F.3d at 338. What was disputed was the method of apportionment. O’Neill-Cancel urged the court to adopt a “relative liability” method of apportionment whereby responsibility for attorneys’ fees would approximate the percentage liability for damages. Under this approach, 65% of the fee award would be apportioned to Espada-Cruz and 35% to O’Neill-Cancel. The plaintiffs argued that fees should be apportioned according to the “time expended” method whereby responsibility for fees would be based on the amount of time spent litigating against each defendant. Since a default judgment was entered against Espada-Cruz and he did not participate in the trial, the “time expended” method would result in apportioning responsibility for almost all the fees to O’Neill-Cancel. The district court adopted the “relative liability” method of apportionment. The court of appeals held that this ruling was an abuse of discretion. “Where apportionment is indicated, the choice among available options generally lies within the district court’s sound discretion. But when the time required to litigate against on defendant is grossly disproportion-

IV. STRATEGIC & ETHICAL ASPECTS OF ATTORNEY'S FEE AWARDS 71

ate to the time required to litigate another defendant and the two defendants are not in privity, then the time expended method of apportionment should be used.” 524 F.3d at 339.

As a matter of policy, should responsibility for attorneys' fees run jointly and severally or be apportioned? If some sort of apportionment is desirable, when, if ever, would the relative liability method be appropriate?

IV. STRATEGIC AND ETHICAL ASPECTS OF ATTORNEY'S FEE AWARDS

Page 759: Add to the end of Note 5:

Can a plaintiff's attorney avoid the risks of lump sum (i.e., fee waiver) settlements by having his client assign to the attorney the right to statutory attorneys' fees in the retainer agreement? The theory here would be that once the right to statutory attorneys' fees has been assigned to the lawyer, the client would not have the authority to waive recovery of attorney's fees. The Ninth Circuit recently rejected this creative effort to circumvent lump sum settlements. In *Poney v. County of Los Angeles*, 433 F.3d 1138 (9th Cir. 2006), the § 1983 plaintiff case signed a retainer agreement with her lawyer that purported to “irrevocably assign and transfer” to the lawyer all “rights and powers . . . to waive apply for, obtain judgment upon, collect and/or receive any statutory attorney's fee award. . . .” The County offered to settle the plaintiff's claim for a “lump sum, including all attorney's fees.” The settlement was acceptable to the plaintiff. Plaintiff's counsel (Mitchell) advised the County that under California law, he was “legally and ethically powerless to resist” the settlement. He also advised the County that despite the lump sum offer, he intended to seek statutory attorney's fees pursuant to his rights under the retainer agreement. The case settled and Mitchell sought to recover fees under the assignment contained in the retainer agreement. The Ninth Circuit held that “[j]ust as plaintiff cannot assign her § 1983 action, she cannot assign an action, such as *Section 1988*, that is derivative of it.” Consequently, “the “assignments to Mitchell under the retainer agreement are invalid as a matter of law.”

Page 761: Add to the end of Note 8:

A recent study confirms observations of Professor Davies in Note 8 that Rule 68 offers of judgment do not appear to be a major factor in § 1983 litigation. Professors Lewis and Eaton interviewed 64 experienced lawyers who practice in the areas of employment discrimination and civil rights. (4 lawyers in 16 cities; each cohort of 4 contained plaintiff and defense lawyers; the 16 cities were selected to include at least one city in each of the federal circuits and more than one city in those circuits which have the greatest volume of employment discrimination and civil rights litigation). While there were a few places where Rule 68 offers are routinely considered and made in § 1983 cases (New York, Minneapolis, Seattle, Oakland), the prevailing pattern was one of non-use. Some § 1983 defense lawyers reported never having made a Rule 68 offer in decades of practice. A variety of reasons were suggested to explain why Rule 68 is not more frequently invoked. Among the more frequent suggestions were: some defendants do not want a formal “judgment” entered against them; some defendants adopt a “millions for defense, not a penny for tribute” litigation strategy; some attorneys believed they were ultimately going to win the case on the merits (citing the breadth of qualified immunity and the difficulty of proving official

policy or custom), so there was not much point in offering the plaintiff any money; and a suspicion that defense lawyers paid on an hourly fee basis were not especially interested in early disposition of cases. For a discussion of this project, see Harold S. Lewis, Jr. & Thomas A. Eaton, *Foreword: Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68*, 57 MERCER L. REV. 723 (2006) (the Symposium proceedings, including comments of practicing lawyers, judges, and other academics, are included in this issue of the law review); Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332 (2007).