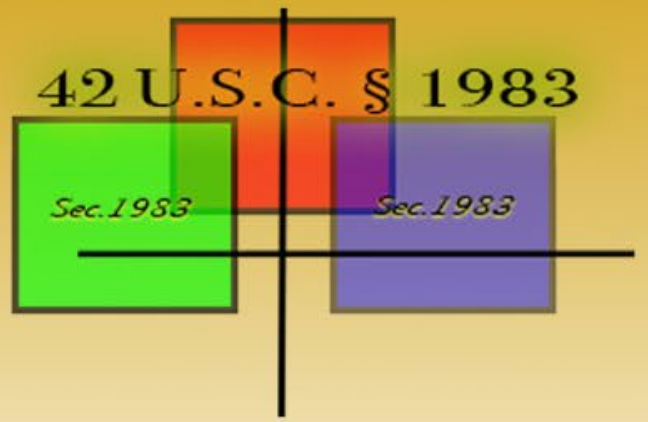
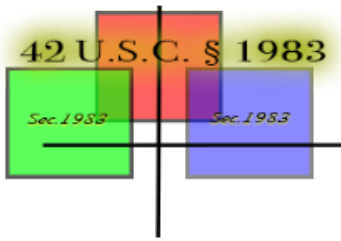


Section 1983

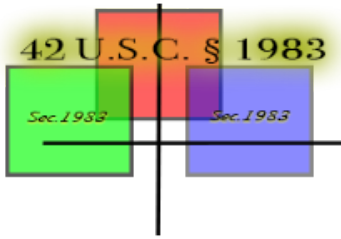
Professor Emerita Karen Blum

Suffolk University
Law School



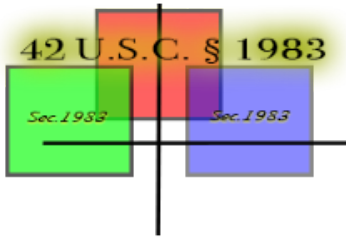
42 U.S.C. § 1983

- Every Person who
- Under Color of State Law
- Subjects or Causes to be Subjected
- Any Citizen or Other Person Within the Jurisdiction thereof to the
- Deprivation of Any Rights, Privileges, or Immunities Secured by the
- Constitution and laws [of the United States]
- Shall be liable to the Party Injured in
- Action at Law, Suit in Equity, etc….



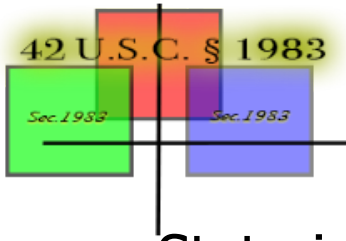
Some Basic Principles

- Statute creates no substantive rights; merely creates remedy
- Concurrent jurisdiction in state & federal courts
- Challenged conduct must effect deprivation of right secured by **Federal** Constitution or Laws. *Virginia v. Moore* (U.S. 2008)
- Challenged conduct must be committed under color of **State** law.
- § 1983 imposes no "state of mind" requirement.
- No respondeat superior (applies to private corporations as well)
- State personal injury s/l applies (*Wilson v. Garcia* (1985))
- federal law controls accrual of cause of action (*Wallace v. Kato* (2007))



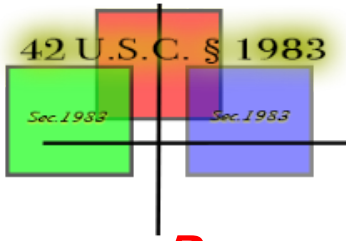
Under Color of State Law

- "Under color of law" includes "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape* (1961)
- Officers employed by City or State may act under color of *federal law* if engaged in an operation controlled and operated by federal law enforcement agency.
- A private entity that contracts to operate a prison or provide medical services at a jail can be sued under § 1983 because it is carrying out a traditional state function.
- Employees of such corporations may be sued under Section 1983, but may not be able to invoke QI defense. *Richardson v. McKnight* (U.S. 1997)



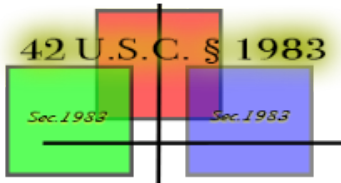
No Exhaustion Requirement

- State judicial or administrative remedies need not be exhausted before seeking relief under section 1983.
- BUT: If representing a person confined in jail, prison, or any other correctional facility, the PLRA will apply and exhaustion of administrative remedies that are available will be required.
- "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."
- This requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).



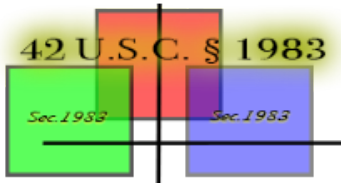
No Exhaustion Requirement

- *Ross v. Blake* (2016) (An inmate must exhaust available remedies, but need not exhaust unavailable ones.)
- Court identifies three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief.
    1. An administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end.
    2. An administrative scheme might be so opaque that it becomes, practically speaking, incapable of use.
    3. When prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation, such interference with an inmate's pursuit of relief renders the administrative process unavailable.



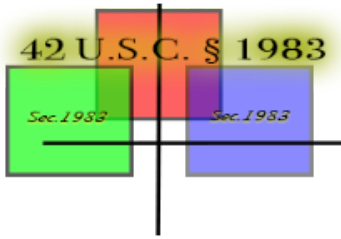
Heck v. Humphrey (1994), *Wallace v. Kato* (2007), *McDonough v. Smith* (2019): Cases that Affect the Accrual of Certain Claims

- When a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of any outstanding conviction or sentence.
- If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated or called into question by issuance of a writ of habeas corpus. The claim does not accrue until there has been a such favorable termination. *Heck v. Humphrey*
- *Wallace* held that some claims (e.g., false arrest) fall outside the ambit of *Heck* when a conviction is merely "anticipated" and such claims may be filed while the criminal proceedings are ongoing. (**Note**: a court may stay such claims until termination of the criminal proceedings)
- The Court's recent decision in *McDonough v. Smith* (2019) finds concerns underlying *Heck* applicable to certain fabrication-of-evidence claims and concludes that such claims, like common law malicious prosecution claims, do not accrue until there has been a favorable termination.
- Thus, *McDonough* extended *Heck*'s rationale to section 1983 fabrication-of-evidence claims brought during pending criminal prosecutions.
- *See* "Overview" Outline for collection of Post-*McDonough* cases by Circuit.



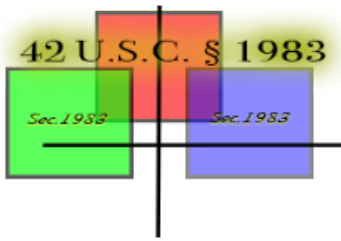
Heck v. Humphrey (1994), *Wallace v. Kato* (2007), *McDonough v. Smith* (2019): Cases that Affect the Accrual of Certain Claims

- *Manansingh v. United States* (D. Nev. 2021) (note: *Bivens* claim)
- Noting that S. Ct. in *Wallace* held that *Heck* applies only when there is an extant conviction.
- Here there was no conviction, so claims not *Heck*-barred.
- Resolution of case turned on when claims accrued.
- While unlawful search & seizure claim accrued at time of search (2016), fabrication-of-evidence claim accrued when criminal case against Manansingh was dismissed (2018).
- "Favorable termination" in this context is not necessarily concomitant with the "favorable termination" element of malicious prosecution. *See Roberts v. City of Fairbanks*, 947 F.3d 1191, 1202 n.12 (9th Cir. 2020) (malicious prosecution claim may require termination 'dispositive of the defendant's innocence').



Watch for *Thompson v. Clark*, 794 F. App'x 140 (2d Cir. 2020), *cert. granted* (argued Nov. 2, 2021)

- What Constitutes Favorable Termination? (e.g., charges are dismissed "in the interest of justice")
- Question Presented: Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence," as the U.S. Court of Appeals for the 11th Circuit decided in *Laskar v. Hurd*, or that the proceeding "ended in a manner that affirmatively indicates his innocence," as the U.S. Court of Appeals for the 2nd Circuit decided in *Lanning v. City of Glens Falls.*



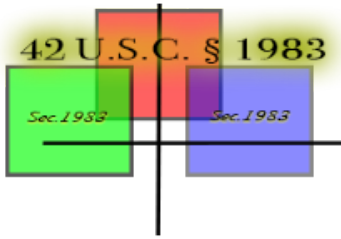
Individual vs. Official Capacity

Individual capacity

- $$ out of official's pocket
- qualified immunity
- punitive damages available

Official Capacity

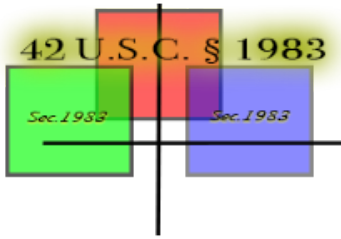
- suit against entity
- no qualified immunity
- no punitive damages



Suing Local Government Entities Under Section 1983
Monell v. Dep't of Social Services (U.S. 1978)

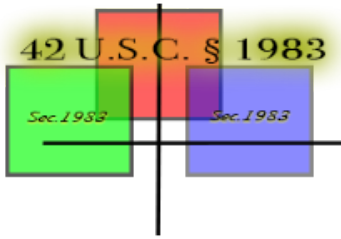
1. Officially adopted policy (*Monell*)
2. Widespread custom or practice that has the force of law
3. Failure to _____ that is *deliberately indifferent* to the violation of citizens' constitutional rights by non-policymakers (*City of Canton, Bryan County v. Brown, Connick v. Thompson*)
4. Attribution of unconstitutional decision or act of final policymaker to entity (*Pembaur*)

- In all cases, Plaintiff must show that policy or custom or failure to _____ was the "moving force" behind or proximate cause of the constitutional injury.
- No respondeat superior liability



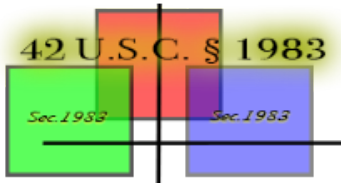
States: 11th Amendment & Section 1983

- States/ state agencies/ state officials in official capacity will have 11th Amdt. immunity absent consent, waiver or valid abrogation.
- Congress did not abrogate states' 11th Amdt. immunity through §1983. *Quern v. Jordan* (1979)
- States/ state agencies/ state officials in official capacity are not "persons" under § 1983. *Will v. Mich. Dep't of State Police* (1989)
- State official may be sued in individual capacity for damages. *Hafer v. Melo* (1991)
- State official may be sued in official capacity to enjoin ongoing violation of federal right. *Ex Parte Young* (1908)



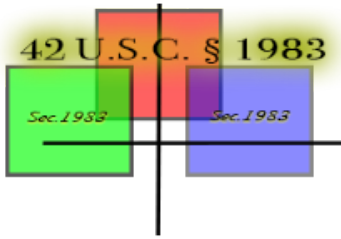
To Succeed on Any § 1983 Claim, Plaintiff Must Make Out a Constitutional Violation

- Remember, Section 1983 is a remedial statute.
- It does not create substantive rights.
- Plaintiff must look to the Constitution (or federal statutes) for the substantive claim and the elements of such a claim, including the level of culpability that must be asserted.
- Claims asserted under Section 1983 commonly arise under the Fourth, Eighth, or Fourteenth Amendment.
- It's important to understand in what context each of these Amendments might apply and how the standards may differ.



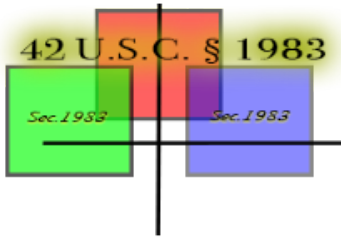
Fourth Amendment Claims

- Arise in context of arrest, investigatory stop or other "seizure" of free citizen
- *Tennessee v. Garner* (1985)
- *Graham v. Connor* (1989)
  - severity of the crime
  - level of threat presented by suspect to safety of officer(s) or others
  - whether suspect resists or attempts to flee
- *Scott v. Harris* (2007)
- Standard is one of objective reasonableness.
- For Fourth Amendment purposes, ulterior motives cannot invalidate police conduct justified on the basis of probable cause. *Whren v. U.S.* (1996)
- Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.



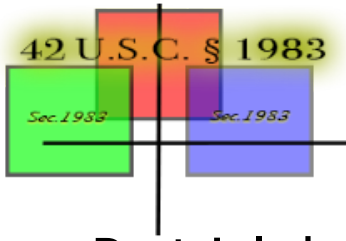
When is Someone "Seized" for Purposes of the Fourth Amendment?

- Various tests have been articulated by the Supreme Court:
  - Whether officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." (*Terry v. Ohio*)
  - Whether a "reasonable person would have believed that he was not free to leave," and the person in fact *submitted* to the assertion of authority. (*U.S. v. Mendenhall* ; *California v. Hodari D.*)
  - Whether there was "governmental termination of freedom of movement by means intentionally applied." (*Brower v. County of Inyo*)
  - The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person. (*Torres v. Madrid*)



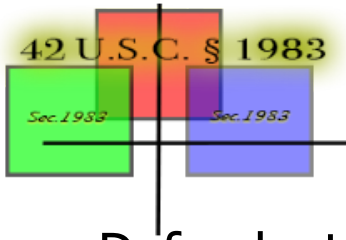
When is Someone "Seized" for Purposes of the Fourth Amendment?

- *See also* *Downes-Covington v. Las Vegas Metro. PD* (D. Nev. 2020)
  - Even though the Plaintiffs were not directly hit by pepperballs or tear gas, Plaintiffs were still "seized" for purposes of the Fourth Amendment.
  - It does not appear that Metro hit any of the Plaintiffs or protestors present at the June 13, 2020.
  - Nevertheless, the Metro's formation at the incident—with two officers and a tank corralling the protestors away from the on-ramp and two or more officers blocking the street—suggests that protestors were seized when Metro pushed the protestors away from the Interstate-15 on-ramp.



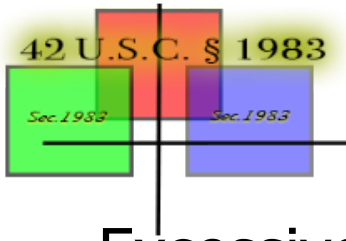
Manuel v. City of Joliet (U.S. 2017)

- Pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case.
- The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause.
- That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements.
- If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.
- **Note**: The S. Ct. left it to the Seventh Circuit, on remand, to decide when the claim accrued in *Manuel* and what would be the specific elements of such a Fourth Amendment claim.



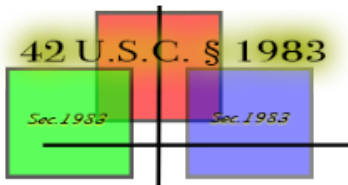
Manuel v. City of Joliet (7th Cir. 2018), cert. denied

- Defendants contend that Manuel's claim accrued on March 18, when the judge ordered him held pending trial. If that's right, then Manuel sued too late.
- Manuel maintains that the clock started on May 4, when his position was vindicated by dismissal of the prosecution.
- We do not accept either approach. We hold that Manuel's claim accrued on May 5, when he was released from custody. That makes this suit timely.
- After *Manuel*, 'Fourth Amendment malicious prosecution' is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention.
- The problem is the wrongful custody.
- The wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends.
- See Post-*Manuel* cases in "Overview" Outline



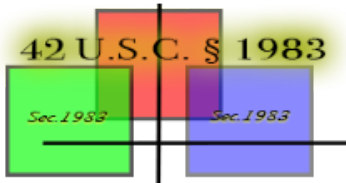
Eighth Amendment Claims: Convicted Prisoners

- Excessive Force Claims:
  - *Whitley v. Albers* (1986)
  - *Hudson v. McMillian* (1992)
  - "malicious and sadistic" use of force to cause harm; no legitimate purpose
- *Hoard v. Hartman* (9th Cir. 2018)
  - Rather than create additional elements for plaintiffs to satisfy, the use of the terms "malicious and sadistic" emphasizes the cruelty inherent in harming an inmate for no other reason than to cause harm.
  - Proof of *sadism* is not required.



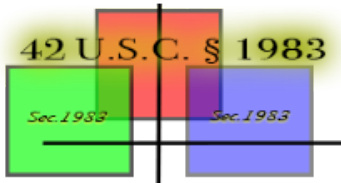
Eighth Amendment Claims: Convicted Prisoners

- Medical Care Claims/Failure to Protect/Conditions Claims
  - *Estelle v. Gamble* (1976)
  - *Farmer v. Brennan* (1994)
  - *Wilson v. Seiter* (1991)
  - *Helling v. McKinney* (1993)
  - subjective deliberate indifference (actual knowledge of serious medical need, condition or risk and failure to take reasonable measures to abate the harm)



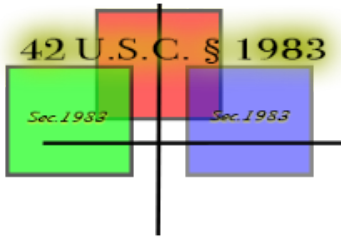
Deliberate Indifference under Eighth Amendment

- In, *Farmer v. Brennan* (1994), the Supreme Court distinguished the test for "deliberate indifference" established in *City of Canton* from the test required for culpability under the Eighth Amendment in prison conditions cases.
- *Canton's* objective standard, premised on obviousness or constructive notice, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment.
- A prison official may be held liable under the Eighth Amendment only if he has actual subjective knowledge that an inmates faces a substantial risk of serious harm or has a serious medical need and disregards that risk or need by failing to take reasonable measures to abate or address it.
- Note that circumstantial evidence may be used to prove the "actual subjective knowledge."



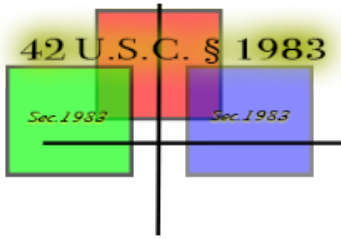
Farmer Deliberate Indifference under Eighth Amendment vs. *City of Canton* Deliberate Indifference under § 1983

- *Mendiola-Martinez v. Arpaio* (9th Cir. 2016)
  - While a claim of deliberate indifference against a prison *official* employs a subjective standard, [citing *Farmer*], we recently held that an objective standard applies to municipalities.
- *Castro v. County of Los Angeles* (9th Cir. 2016) (en banc)
  - The Supreme Court has strongly suggested that the deliberate indifference standard for municipalities is always an objective inquiry. [discussing *City of Canton* and comparing with *Farmer*]
- *See generally* the lengthy discussion of the "deliberate indifference" standard in *Paiva v. City of Reno* (D.Nev. 1996)



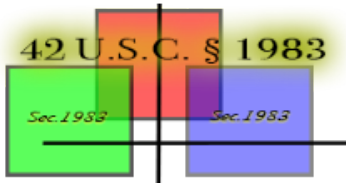
Fourteenth Amendment Claims by Persons in Custody: Pretrial Detainees

- Until 2015, virtually every circuit applied to claims brought by pretrial detainees under the Fourteenth Amendment the same standard applied to convicted prisoners under the Eighth Amendment.
- Thus, excessive force claims by pretrial detainees were governed by the "malicious and sadistic" standard.
- Medical needs, conditions and failure to protect claims were governed by the "subjective deliberate indifference" standard.



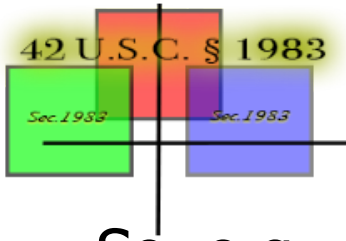
Kingsley v. Hendrickson (2015)

- To prove an excessive force claim, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.
- The Court relied on *Bell v. Wolfish* (1979), which the majority said established that "in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'"
- Note that *Bell* was a case challenging conditions of confinement (double bunking) and various practices (e.g., strip searches after contact visits) in a short-term custodial facility.



Post-*Kingsley* Developments

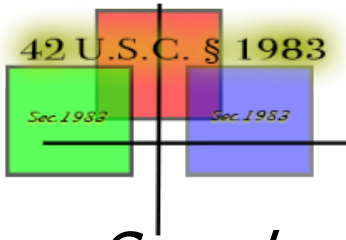
- *Kingsley* applied to "**conditions**" claims of pretrial detainees.
  - *Darnell v. Pineiro* (2d Cir. 2017); *Hardeman v. Curran* (7th Cir. 2019); *Karjens v. Lourey* (8th Cir. 2021); *Martinez v. City of North Richland Hills* (5th Cir. 2021) (not reported)
- *Kingsley* applied to "**failure-to-protect**" claims
  - *Castro v. County of Los Angeles* (9th Cir. 2016) (en banc)
  - *Kemp v. Fulton County* (7th Cir. 2022)
- *Kingsley* applied to "**medical needs"** claims
  - *Charles v. Orange County* (2d Cir. 2019); *Miranda v. County of Lake* (7th Cir. 2018); *Gordon v. County of Orange* (9th Cir. 2018), *cert. denied* ; *Brawner v. Scott County, Tennessee* (6th Cir. 2021) (We agree with the Second, Seventh, and Ninth Circuits that *Kingsley* requires modification of the subjective prong of the deliberate-indifference test for pretrial detainees); *Greene v. Crawford County, Michigan* (6th Cir. 2022) (noting that the *Brawner* majority expressly considered and rejected the suggestion that its extension of *Kingsley* was dictum).
- Bottom line: *Kingsley* applied to all claims by pre-trial detainees in Second, Sixth, Seventh, and Ninth Circuits.



Post-*Kingsley* Developments

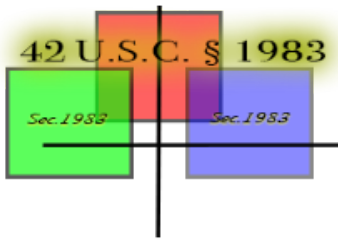
- So, e.g., analysis on a failure to protect claim for pretrial detainee is set out by Ninth Circuit in *Castro* as follows:

(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
(2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
(3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
(4) By not taking such measures, the defendant caused the plaintiff's injuries.

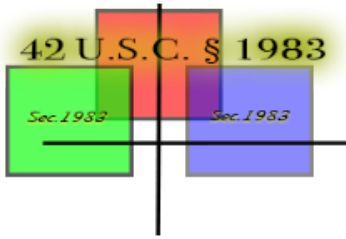


Post-*Kingsley* Developments

- *See also* *Gardner v. Las Vegas Metropolitan Police Dept.* (D. Nev. 2019)
- The Ninth Circuit recently addressed *Gordon*'s applicability to municipal entities in *Crowell v. Cowlitz County*, 726 F. App'x. 593 (9th Cir. 2018) (unpublished).
- *Crowell* noted that *Gordon*'s new standard for deliberate indifference claims against individual defendants bears on a municipal liability claim 'because, under its newly-announced standard for individual liability, [plaintiffs] may be able to show that one or more individuals violated their rights by exhibiting "reckless disregard" for their well-being, and that those violations are attributable to Defendants.'

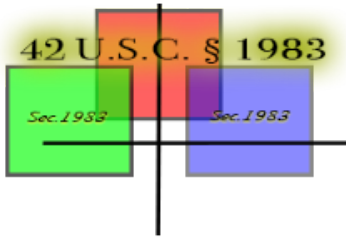


Qualified Immunity



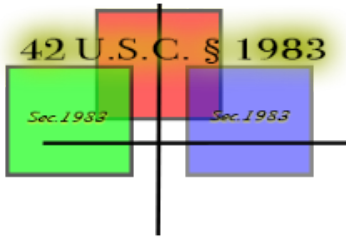
Qualified Immunity: Basic Principles

- Defense only for individuals sued in individual capacity
- Defense only to damages actions
- Immunity not just from liability, but from suit and burdensome discovery; thus, availability of interlocutory appeals at both 12(b)(6) and summary judgment
- The QI analysis has two steps:
    1. Has P asserted the violation a federal constitutional (or statutory) right under current law?
    2. If so, was that right clearly established at the time of the challenged conduct?
- Modern QI doctrine is the product of the S. Ct. decision in *Harlow v. Fitzgerald* (1982).



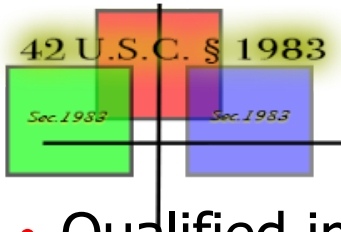
Current Landscape of Qualified Immunity

- Since *Harlow* (1982) the S. Ct. has confronted the qualified immunity issue in over 30 cases.
- Plaintiffs have prevailed three times. *Hope* (2002); *Groh* (2004); *Taylor v. Riojas* (2020) (per curiam) (clearly unconstitutional to house prisoner in cell under horrific conditions for six days)
- *See also McCoy v. Alamu, cert. granted, vacated and remanded in light of Taylor v. Riojas* (unprovoked use of pepper spray on prisoner)
- Since June 2020, the Supreme Court has denied cert. in 35 cases (by my count) where qualified immunity was in issue.
- So, the Supreme Court appears to have little to no interest in modifying or eliminating the doctrine, but does seem to be signaling that *Hope* still exists, at least in some contexts.



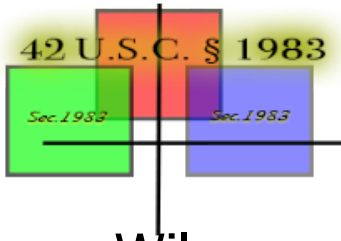
Current Landscape of Qualified Immunity

- *See Ramirez v. Guadarrama* (5th Cir. 2021) (Willett, J., joined by Graves and Higginson, JJ., dissenting from the denial of rehearing en banc)
- In recent months, the Court has signaled a subtle, perhaps significant, shift regarding qualified immunity, pruning the doctrine's worst excesses.
- The Justices delivered that message in back-to-back cases, both from this circuit and both involving obvious, conscience-shocking constitutional violations. (*Taylor* and *McCoy*)
- While these quiet, 'shadow docket' actions may not portend a fundamental rethinking of qualified immunity, the Court seems determined to dial back the doctrine's harshest excesses.
- If not reconsidering, the Court is certainly recalibrating.
- (My comment: Note that *Hope, Taylor, and McCoy* all involve claims under 8th Amendment, not 4th or 14th Amendments.)



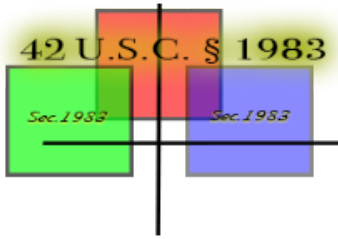
Who Has the Burden of Proof?

- Qualified immunity is an affirmative defense. *Gomez v. Toledo* (1980)
- But, once raised, some courts hold that the burden then shifts to the **Plaintiff** to show that the right allegedly violated was clearly established. *See, e.g., Lachance v. Town of Charlton* (1st Cir. 2021); *Joseph v. Bartlett* (5th Cir. 2020); *Corbitt v. Vickers* (11th Cir. 2019); *Daugherty v. Sheer* (D.C. Cir. 2018); *Felarca v. Birgeneau* (9th Cir. 2018); *Becker v. Bateman* (10th Cir. 2013); *Mannoia v. Farrow* (7th Cir. 2007); *Gardenhire v. Schubert* (6th Cir. 2000).
- Other courts place burden on **Defendant**. *See, e.g., Mays v. Sprinkle* (4th Cir. 2021); *Slater v. Deasey* (9th Cir. 2019); *Outlaw v. City of Hartford* (2d Cir. 2018); *Halsey v. Pfeiffer* (3d Cir. 2014); *Henry v. Purnell* (4th Cir. 2007); *DiMarco-Zappa v. Cabanillas* (1st Cir. 2001).
- But note that the ultimate QI question presents a question of law. Thus, a court should "use its 'full knowledge of its own [and other relevant] precedents.'" *Elder v. Holloway* (U.S. 1994)
- *See also Williams v. Hanson* (10th Cir. 2021) (Our review is not limited to the opinions cited by [plaintiff]. . . . [W]e are conducting de novo review of a legal issue, which requires consideration of all relevant case law.)



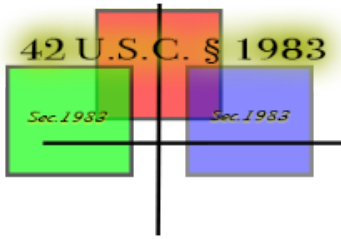
Clearly Established Law: What Law Controls ?

- Wilson v. Layne (1999) suggests:
  - Decisions of Supreme Court
  - Controlling authority from jurisdiction: Court of Appeals/highest court of state
  - Law of other jurisdictions: consensus of persuasive authority
- But, the Supreme Court recently has reserved judgment on the question whether decisions of a federal court of appeals are a source of clearly established law for purposes of qualified immunity analysis. *See Rivas-Villegas v. Cortesluna, City of Escondido v. Emmons, Kisela v. Hughes, D.C. v Wesby, Taylor v. Barkes, City & Cnty. of San Francisco, Cal. v. Sheehan, Carroll v. Carman, Reichle v. Howards*
- "Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals, …."
- *DC v. Wesby* (2018) (We have not yet decided what precedents--other than our own-- qualify as controlling authority for purposes of qualified immunity.)



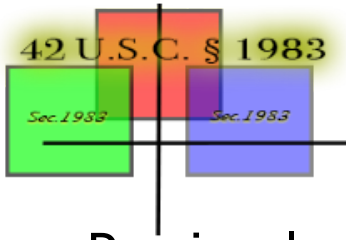
Clearly Established Law: What Law Controls ?

- *Gordon v. County of Orange (Gordon II)* (9th Cir. 2021)
- The plaintiff 'bears the burden of showing that the rights allegedly violated were clearly established.'
- However, because resolving whether the asserted federal right was clearly established presents a pure question of law, we draw on our 'full knowledge' of relevant precedent rather than restricting our review to cases identified by the plaintiff.
- Ultimately, the prior precedent must be "controlling"—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a "consensus" of courts outside the relevant jurisdiction.



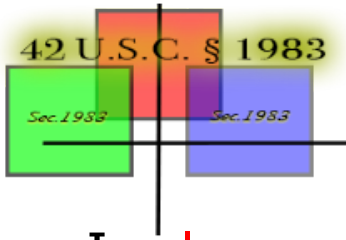
Clearly Established Law: What Law Controls ?

- *See also Ballentine v. Tucker* (9th Cir. 2022)
  - Tucker argues that the law was not clearly established at the time of his conduct in 2013 because the Supreme Court's decision in *Nieves* did not clarify the appropriate standard for First Amendment retaliation claims until 2019.
  - But a right can also be clearly established by this circuit's precedent.
  - A reasonable officer in Detective Tucker's position had fair notice that the First Amendment prohibited arresting Plaintiffs for the content of their speech, notwithstanding probable cause.



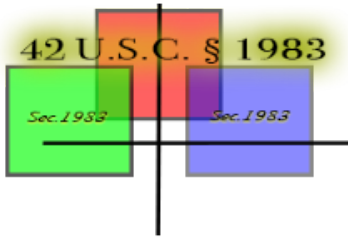
Pearson v. Callahan (2009) (unanimous Court)

- Previously, *Wilson-Saucier* sequencing:
  - Required courts to (1) decide whether P asserted the violation of a constitutional right, and (2) determine whether the identified right was clearly established at time of challenged conduct.
  - Pros: rights were articulated, constitutional standards established
  - Cons: resulted in "unnecessary" constitutional "holdings" (dicta?)
- *Pearson v. Callahan* (2009)
  - Rejects the "rigid order of battle"
  - Allows courts to jump to second prong without deciding "merits" question
- *D.C. v. Wesby* (2018): We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim.



Jumping to the Second Prong (or Not)

- In eleven of the cases between 2012-2018, the Court exercised its discretion to jump to the second prong of the qualified immunity analysis, granting qualified immunity because the law was not clearly established and leaving unresolved the "merits" question of prong one.
- And, in two recent per curiam decisions, the Court also disposed of cases on second prong:
  - *Rivas-Villegas v. Cortesluna* (2021) (per curiam)
    - To show a violation of clearly established law, Cortesluna must identify a case that put Rivas-Villegas on notice that his specific conduct was unlawful. Cortesluna has not done so.
  - *City of Tahlequah, Oklahoma v. Bond* (2021) (per curiam)
    - We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment.
    - On this record, the officers plainly did not violate any clearly established law.

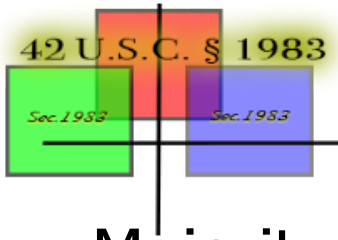


How Clear must Clearly Established Law Be?

- **Clearly Established Law**: Defining the Contours of the Right?
  - *Hope v. Pelzer* (2002), *Taylor v. Riojas* (2020)
    - Cases with fundamentally or materially similar facts not required so long as officer had "fair warning" that conduct was unconstitutional.
  - *Saucier, Brosseau, al-Kidd, Mullenix, Pauly, Wesby, Kisela, Escondido, City of Tahlequah v. Bond, Rivas-Villegas v. Cortesluna*
    - Emphasis on specific context of case, situation officer confronted, law that "squarely governed" and placed the statutory or constitutional question beyond debate for every reasonable officer.

Post-*Kingsley* Cases Addressing QI

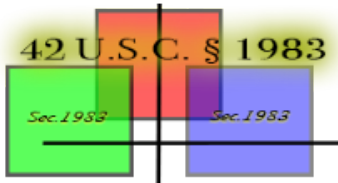
- *Sandoval v. County of San Diego* (9th Cir. 2021) (detainee's medical needs claim)
- The focus is on the standards governing the defendant's conduct, not legal arcana.
- Consistent with this purpose, the qualified immunity analysis remains objective even when the constitutional claim at issue involves subjective elements.
- We are not aware of a single case in which we have examined the defendant's mental state in assessing the clearly established law prong of QI.
- In sum, . . . when the governing law has changed since the time of the incident, we apply the current law to determine if a constitutional violation took place under the first prong of qualified immunity analysis, and the second prong remains what it has always been: an objective examination of whether established case law would make clear to every reasonable official that the defendant's conduct was unlawful in the situation he confronted.



Post-*Kingsley* Cases Addressing QI

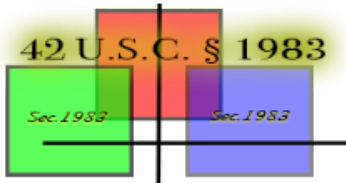
- Majority notes that several other circuits have concluded that because the clearly established law prong focuses objectively on whether it would be clear that the defendant's conduct violated the Constitution, lack of notice regarding the mental state required to establish liability has no bearing on the analysis.
- *Miranda-Rivera v. Toledo-Davila* (1st Cir. 2016)
- *Kingsley v. Hendrickson* (7th Cir. 2015) (on remand from the Supreme Court)
- *Hopper v. Plummer* (6th Cir. 2018)

❖But, as dissent in *Sandoval* notes, references to these 3 cases involved excessive force claims not claims of deliberate indifference to serious medical needs.



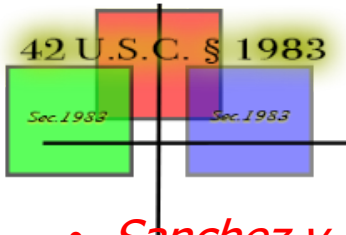
Post-*Kingsley* Cases Addressing QI

- But see *Sandoval* (Collins, J., dissenting in part)
- The majority errs—and expressly creates a circuit split—in reaching the oxymoronic conclusion that a county employee who did not even violate the law at the time he or she acted can nonetheless be said to have violated *clearly established* law at that time.
- Because then-existing law required subjective awareness of a serious medical need, it follows that a nurse who, at the time, did not *subjectively* apprehend Sandoval's serious medical needs is entitled to qualified immunity.
- Put simply, a nurse who did not violate then-existing law cannot possibly be said to have violated clearly established law, and such a nurse is therefore entitled to qualified immunity.
- The majority's position is directly contrary to that of the Third, Eighth, and Tenth Circuits. (*Kedra v. Schroeter* (3d Cir. 2017); *Hall v. Ramsey County* (8th Cir. 2015); *Quintana v. Sante Fe County Bd. of Commr's* (10th Cir. 2020)
- *See also Monaco v. Sullivan* (2d Cir. 2018) (not reported)
  - *Darnell* was decided in 2017 and thus could not have clearly established that reckless medical treatment amounts to deliberate indifference at the time Packard treated Monaco.
  - Because Packard did not violate clearly established law when he treated Monaco in 1998, the district court did not err in granting summary judgment on this claim.



Are Private Actors Entitled to Assert Qualified Immunity?

- *Richardson v. McKnight* (1997)
  - Employees of private prison management corporation not entitled to QI
- *Filarsky v. Delia* (2012)
  - Private attorney retained by the City to assist in conducting an official investigation into potential wrongdoing entitled to QI
- *Estate of Clark v. Walker* (7th Cir. 2017)
  - Privately employed nurse working at County Jail not entitled to QI. (same for doctors)
- *McCullum v. Tepe* (6th Cir. 2012)
  - Privately employed doctor working for state prison not entitled to QI.
- *Estate of Lockett v. Fallin* (10th Cir. 2016)
  - Private doctor hired to assist in execution of prisoner entitled to QI.



Are Private Actors Entitled to Assert Qualified Immunity?

- *Sanchez v. Oliver* (5th Cir. 2021)
  - We agree with our sister circuits that Oliver—as an employee of a large firm systematically organized to perform the major administrative task of providing mental healthcare at state facilities—is categorically ineligible for qualified immunity.
- *Perniciaro v. Lea* (5th Cir. 2018)
  - Here, as in *Filarsky*, the doctors are private individuals who work in a public institution and alongside government employees. Their direct employer, Tulane University, is not 'systematically organized' to perform the 'major administrative task' of providing mental-health care at state facilities.
  - Psychiatrists are entitled to assert qualified immunity.
- *Tanner v. McMurray* (10th Cir. 2021)
  - Qualified immunity not available to private medical professionals employed full-time by a multi-state, for-profit corporation systematically organized to provide medical care in correctional facilities.
- *Estate of Madison Jody Jensen v. Clyde* (10th Cir. 2021), *cert. denied*
  - Qualified immunity could be asserted by a sole practitioner doctor engaged part time by a county jail.
- *Davis v. Buchanan County, Missouri* (8th Cir. 2021)
  - Medical defendant employees of ACH and Corizon not entitled to assert QI.