INTRICACIES OF FEDERAL SECTION 1983 CIVIL RIGHTS CLAIMS

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1. ELEMENTS OF A §1983 ACTION

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable*. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[1]

The elements of a §1983 claim are:

a) a "person;"

b) acting under "color of law;"

c) deprived another person of a right, privilege, or immunity secured either by the Constitution or federal law.[2]

2. WHO ARE PERSONS ENTITLED TO SUE UNDER § 1983?

Aliens,[3] even those who are here illegally,[4] corporations,[5] and labor unions[6] are considered "persons" entitled to bring a § 1983 action. However, a voluntary

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[1] The italicized portion of § 1983's text above reflects an amendment made through Section 309 of the Federal Courts Improvement Act of 1996, which was intended to overrule in part the Supreme Court's decision inn *Pulliam v. Allen*, 466 U.S. 522 (1984), where the Court held that prospective injunctive relief against the judiciary was not barred by the defense of absolute immunity.

[2] *Gomez v. Toldeo*, 446 U.S. 635, 640 (1980); *Askiew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1971).

[3] *Graham v. Richardson*, 409 U.S. 365 (1971).

[4] *Plyer v. Doe*, 457 U.S.202, 210 (1982).

[5] *Levy v. Pappas*, 510 F.3d 755, 762 (7th Cir. 2007).

[6] *Allee v. Medrano*, 416 U.S. 802 (1974).

unincorporated association[7] and the shareholders of a corporation[8] are not permitted to pursue a § 1983 claim.

A state, county or local unit of government sued under 42 U.S.C. §1983 can be a "person" if certain additional requirements (outlined in Section 4) are met.[9]

3. INDIVIDUAL VS. OFFICIAL CAPACITY

A key step in analyzing any § 1983 claim is to determine whether a defendant is being sued in his or her individual capacity, official capacity, or both. The capacity in which a "person" is sued affects not only the damages and defenses available, but also the elements a plaintiff must plead and prove.[10]

Courts will initially look to the designation made in the complaint. Referencing the defendant's office in a complaint suggests the plaintiff is suing the defendant in his official capacity. If the plaintiff intends to sue a defendant in both capacities or in his individual capacity, he must say so in his pleading.[11]

In the absence of a designation, courts take a sensible approach, looking to see whether injunctive relief (which suggests it is an official capacity claim) or punitive damages are sought (which suggests an individual capacity claim is being pursued).

Official capacity — Official claims are considered an action against the "office" which employs the defendant, not the individual defendant himself. It is simply another way of suing a municipality. Therefore, the pleading elements of an official capacity claim against an individual defendant are the same as the elements of a claim against the municipality itself.[12] *See* Section 4 for requirements of establishing a *Monell* claim against a municipality.

Individual capacity — With an individual capacity claim, a defendant can only be held liable for his or her own personal wrongdoing.[13] A defendant sued in his individual capacity cannot be held vicariously liable for the acts of another or for

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[7] *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006).

[8] *Gregory v. Mitchell*, 634 F.2d 199 (5th Cir. 1981); *Potthof v. Morin*, 245 F.3d 710, 717 (8th Cir. 2001) (explaining the shareholder's standing rule applies to § 1983 claims brought on behalf of the corporation).

[9] *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658 (1978).

[10] *McCurdy v. Sheriff*, 128 F.3d 1144, 1145 (7th Cir. 1997).

[11] *Kolar v. County of Sangamon*, 756 F.2d 564, 568-69 (7th Cir. 1985).

[12] *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658 (1978); *Kentucky v. Graham*, 473 U.S. 159 (1985).

[13] *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), *cert. denied*, 479 U.D. 876 (1986).

failing to detect another's alleged misconduct.[14] See Section 15 for further discussion of this issue.

a) Punitive damages are *not* recoverable — under §1983 — against a municipality or when a defendant is sued under an official capacity theory.[15]

b) Qualified immunity is available to a defendant as a defense only when sued in his "individual" capacity. It is not available to a local unit of government or to an individual sued in his official capacity.[16]

c) If a municipality or a local unit of government is a named defendant in a lawsuit, an official capacity claim against the employee may be redundant since the official capacity claim is deemed to be an action against the office employing the person and not the individual.[17]

d) Eleventh Amendment immunity is only available to a State employee when sued in his official capacity.[18]

e) Injunctive relief is normally sought through an official capacity suit.[19]

4. IF A MUNICIPALITY IS SUED, WHAT IS THE THEORY OF LIABILITY?

Respondeat superior liability or vicarious liability is not recognized under §1983.[20]

Municipal liability — following the Supreme Court's *Monell* decision, to establish municipal liability under §1983 requires a party to plead and prove the existence of a constitutional violation plus either:

(i) a written policy;

(ii) a long-standing custom or practice *e.g.*, other similar violations, or

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[14] *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1182 (7th Cir. 1994); *Whitford v. Boglino*, 63 F.3d 527, 530-31 (7th Cir. 1995).

[15] *Busby v. City of Orland*, 931 F.2d 764, 772 (11th Cir. 1991); *Holly v City of Naperville*, 571 F. Supp. 668 (N.D. Ill. 1983).

[16] *Knox v. McGinnis*, 998 F.2d 1405 (7th Cir. 1993); *Hernandez v. Sheahan*, 455 F.3d 772, 776 (7th Cir. 2006); *Barge v. Parrish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999).

[17] *Chandler v. Board of Educ.*, 92 F. Supp.2d 760, 764 (N.D. Ill. 2000).

[18] *Hafer v. Melo*, 502 U.S. 21, 27 (1991).

[19] *See, e.g., Akins v. Board of Governors*, 840 F.2d 1371 (7th Cir. 1988); *Knox v. McGinnis*, 998 F.2d 1405, 1413 (7th Cir. 1993).

[20] *Monell v. NewYork Dep't of Social Servs.*, 436 U.S. 658, 690 (1978); *Phelan v. Cook County*, 463 F.3d 773, 789 (7th Cir. 2006).

(iii) the act of a "final policymaker," that caused the constitutional violation.[21]

Proximate Cause — The written policy, custom or practice, or the act of a final policy maker must be the "moving force" behind or the alleged cause of the constitutional violation.[22]

A *Monell* claim is simply another way of holding a municipality or governmental entity responsible for a constitutional violation committed by one of its employees. No more damages or no additional elements of damage can be recovered for a constitutional violation when the §1983 claim is brought under *Monell* than when it is brought against a governmental employee when sued in his or her individual capacity.[23]

a) **Custom or Practice** - One or two prior acts or similar incidents do not suffice to establish a custom or practice. Rather, what is required is a widespread action by various municipal employees that is long-standing and well-settled in nature.[24]

b) **Final Policy Makers** - State law determines which officials are the "final policymakers."[25] A final decision-maker is not necessarily a final policymaker for §1983 purposes, *i.e.*, police chief not necessarily final policymaker when it comes to hiring and firing decisions, rather, the city counsel is the policymaker.[26] If an individual's decisions are reviewed by others, then that person is not a final policymaker.[27] Final authority to establish policy specifically related to the challenged action is required.[28] Bear in mind that an individual can be a final policymaker for one issue and not for other issues.

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[21] *Monell*, 436 U.S. at 690. *See also Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734-35 (7th Cir. 1994).

[22] *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997).

[23] *See, e.g., Spanish Action Committee of Chicago v. City of Chicago*, 766 F.2d 315, 321 (7th Cir. 1985) (holding in a claim against several police officers and the city "compensatory damages can only be collected once").

[24] *Jett v. Dallas Indep. Schl. Dist.*, 491 U.S. 701, 737 (1989). *See also Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997); *Latuszkin v City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001).

[25] *See, e.g., Campion, Barrow & Associates, Inc. v. City of Springfield*, 559 F.3d 765, 769 (7th Cir. 2009) (citing *Kujawski v. Bd. of Comm'rs*, 183 F.3d 734, 737 (7th Cir. 1999); *Vela v. Village of Sauk Village*, 218 F.3d 661, 666 (7th Cir. 2000) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986)).

[26] *Pembaur*, 475 U.S. at 483. *See also Carver v. Sheriff of LaSalle County, Illinois*, 243 F.3d 379, 381 (7th Cir. 2001); *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989); *Guzman v. Sheahan*, 495 F.3d 852, 859 (7th Cir. 2007); *Limes-Miller v City of Chicago*, 773 F. Supp. 1130, 1136 (N.D. Ill. 1991); *Auriemma v. City of Chicago*, 957 F.2d 397, 401 (7th Cir. 1992).

[27] *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

[28] *Chortek v. City of Milwaukee*, 356 F.3d 740, 749 (7th Cir. 2004).

c) **No Constitutional Violation** - If there is no underlying constitutional violation, *i.e.*, plaintiff's rights were not violated, then a municipality cannot be found liable even if its policies or practices are deficient or improper.[29]

d) **Hiring, Training and Discipline Claims** - Municipal liability can be based on an alleged failure to properly hire,[30] train,[31] or discipline[32] its employees. However, liability will attach only where the alleged failure amounts to a deliberate indifference to a citizen's rights.[33] With § 1983 municipal hiring claims, plaintiff must establish that the alleged constitutional violation was a "plainly obvious consequence of the hiring decision."[34] In other words, there must be a direct link between the objectionable aspect of the employee's background and the type of constitutional violation committed by that employee. There are two scenarios where municipal liability for a failure to train has been recognized:

i) Where a local unit of government fails to train its employees with respect to a clear constitutional duty that will arise in situations that its employees are certain to face, *i.e.*, police officer's use of deadly force;[35]

ii) Where the need for training is not obvious at the outset, but a pattern of violations put the defendant on notice of the need to train.[36]

e) **No Heightened Pleading Requirement** - There is no "heightened" pleading standard in federal court for §1983 municipal liability claims.[37] However, the Supreme Court recently explained that to properly plead

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[29] *Abbott v. City of Crocker*, 30 F.3d 994, 998 (8th Cir. 1994); *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995). *See also Treece v. Hochstetler*, 213 F.3d 360, 364 (7th Cir. 200).

[30] *Board of County Comm'rs v. Brown*, 520 U.S. 397, 405-07 (1997).

[31] *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

[32] *Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir. 2001) (explaining a failure to discipline claim should be evaluated like a failure to train claim).

[33] *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

[34] *Brown*, 520 U.S. at 411.

[35] *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). *See also City of Canton v. Harris*, 489 U.S. 378, 390 (1989); *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007).

[36] *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

[37] *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

any claim in federal court, the plaintiff's factual allegations must demonstrate a plausible entitlement to relief.[38]

f) **Bifurcate at Trial** - If a *Monell* claim, based on a custom or practice of constitutional violations, is combined with a claim against one or more individual defendants, at trial, move to sever or bifurcate the *Monell* claim to avoid prejudice to the individual defendants. If there is a clear constitutional violation, consider a "sever and stay."

5. DAMAGES

Damages are not "presumed" in a §1983 claim.[39] That means that no compensatory damages can be awarded for a constitutional violation absent proof of an "actual injury."[40] There are three forms of damages (in addition to attorney fees) available in a §1983 civil rights claim:

Nominal Damages: Where a constitutional violation is proven without any accompanying personal injury, compensable "actual" damages, or out-of-pocket loss, the plaintiff is only entitled to recover "nominal" damages.[41] Typically, "$1 is the norm" when nominal damages are awarded.[42] Nominal damages are available because the law recognizes the importance to organized society that constitutional rights be scrupulously observed while still recognizing that the recovery of substantial damages requires proof of an actual injury.[43] Compensatory damages are not awarded merely for the "abstract value" or the "importance" of a constitutional right.[44] That is the purpose of nominal damages.

Compensatory Damages: To recover compensatory damages, plaintiff must prove a "demonstrable" physical or emotional injury or some other recognized compensable harm.[45] While proof of a "significant" injury is not required, the injury or harm claimed must be more than "*de minimis* or trivial" to trigger an award of compensatory damages.[46]

Punitive Damages: To obtain punitive damages, the plaintiff must establish that a defendant acted with a "callous or reckless indifference" to the his or her

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[38] *Bell Atlantic*, 550 U.S. at 561, 556.
[39] *Carey v. Piphus*, 435 U.S. 247, 253 (1978).
[40] *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986).
[41] *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986); *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Horina v. City of Granite City*, 538 F.3d 624, 638 (7th Cir. 2008).
[42] *Kyle v. Patterson*, 196 F.3d 695, 697 (7th Cir. 1999).
[43] *Stachura*, 477 U.S. at 308, 309.
[44] *Id*. at 308-10.
[45] *Carey v. Piphus*, 435 U.S. 247 (1978).
[46] *Carey*, 435 U.S. at 255; *Horina*, 538 F.3d at 638.

constitutional rights.[47] The standard to recover punitive damages is essentially the same standard to establish § 1983 liability.[48] This means that punitive damages can be recovered in the absence of any compensatory damages.[49] However, punitive damages cannot be recovered from a municipality (or an individual sued in his official capacity).[50]

6. ATTORNEY FEES

When evaluating the potential exposure of a §1983 claim, don't overlook the issue of attorney fees. Under 42 U.S.C. § 1988, attorney fees can be recovered by a "prevailing party" in a §1983 claim, and frequently those fees can exceed the value of plaintiff's claim. *See* Section 20 below for a strategy for possibly limiting the recovery of fees.

Be aware that settling a claim for anything other than pure nuisance value will convey prevailing party status on the plaintiff entitling plaintiff's counsel to the recovery of attorney fees and costs. Be certain when negotiating a settlement of any §1983 claim that attorney fees is encompassed by the settlement, otherwise the plaintiff could present a fee petition and seek fees after the settlement is finalized.

Note also that the rule is slightly different when the defendant is the prevailing party. A prevailing defendant is entitled to recover fees where the lawsuit was "groundless or without foundation."[51] Also be aware that even though a defendant enjoys qualified immunity against a §1983 damages claim, that immunity may not bar a claim for attorneys fees when injunctive relief is awarded.[52] Similarly, the Eleventh Amendment does not bar an award of fees.[53]

7. WHAT AMENDMENT/CONSTITUTIONAL RIGHT VIOLATED?

42 U.S.C. §1983 does not confer any substantive rights, it simply provides a statutory cause of action to vindicate rights conferred elsewhere.[54] Section 1983 itself also "contains no state-of-mind requirement independent of that necessary

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[47] *Smith v. Wade*, 461 U.S. 30, 51 (1983).
[48] *Woodward v. Correctional Medical Services, Inc.*, 368 F.3d 917, 930 (7th Cir. 2004).
[49] *Endicott v. Huddleston*, 644 F.2d 1208 (7th Cir. 1980).
[50] *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 271 (1981); *Holly v. City of Naperville*, 571 F. Suppl. 668 (N.D. Ill. 1983).
[51] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).
[52] *Tonya K. V. Board of Educ.*, 847 F.2d 1243, 1246 (7th Cir. 1988) (holding a fee award does not violate qualified immunity).
[53] *Hutto v. Finney*, 437 U.S. 678, 694 (1978).
[54] *Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1978).

to state a violation" of the underlying constitutional right.[55] Accordingly, one of the first steps to take when analyzing any §1983 claim is to determine what constitutional right is allegedly implicated by the plaintiff's claim. Once the proper constitutional right is identified, you can then determine the statutory elements and the "state of mind" that must be pled and proved.

a) **First Amendment** — applies to claims involving speech, association or religion.

b) **Second Amendment** — protects an individual's "right to bear arms," subject to the government's right to prohibit "dangerous or unusual weapons," to "bar possession of firearms by felons or the mentally ill," to forbid "the carrying of firearms in sensitive places such as schools and governmental building" or "imposing conditions and qualifications on the commercial sale of arms."[56]

The Supreme Court's decision in *District of Columbia v. Heller* only applies to the federal government. However, the Supreme Court subsequently held in *McDonald v. City of Chicago*, that the Second Amendment was applicable to the States and followed *Heller's* rationale as to the enforceability of the Second Amendment and its protections.[57]

c) **Fourth Amendment** — prohibits unreasonable searches and seizures.

d) **Fourth v. Fourteenth** — which amendment applies depends upon the stage of the criminal process when the constitutional violation occurred. Also depends on whether a "search or seizure" occurred. Both amendments are potentially applicable to civil seizures of property.

e) **Fifth Amendment** — its "Due Process Clause" only applies to federal officials or agents. The Fifth Amendment also protects against "takings" without just compensation (*e.g.*, eminent domain) and against self-incrimination.

f) **Eighth Amendment** — "Cruel and Unusual Punishment" — Applies only to convicted prisoners.

g) **Fourteenth Amendment** — "Equal Protection Clause" — protects against race and gender discrimination. Its Due Process Clause

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[55] *Daniels v. Williams*, 474 U.S. 327, 330 (1986).
[56] *District of Columbia v. Heller*, 128 S. Ct 2783 (2008).
[57] *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

requires some form of hearing before or after a party's liability or property rights are taken. In limited circumstances, a duty to protect has been recognized under the due process clause.

h) **State Constitutional Rights/State Laws —** Section 1983 provides a cause of action for a violation of the federal Constitution or, in some instances, federal laws, not for a violation of state law or a state constitutional provision.

i) **Common-law torts —** Section 1983 does not provide a remedy for the commission of torts that do not violate a person's constitutional rights, *e.g.*, defamation is not actionable.[58] Similarly negligent conduct does not violate the Constitution.[59] Note, however, that a state court claim can be brought in a separate count of claim asserting a § 1983 pursuant to a district court's supplemental jurisdiction so long as they are "related" to the 1983 claim.[60]

Not all of the provisions of the Bill of Rights have been applied the states via the Fourteenth Amendment.[61] Rather the Supreme Court has adopted a "selective incorporation" approach to determining what rights will apply to the states under the Fourteenth Amendment.[62] Neither the Third nor the Seventh Amendment has been applied to the States. Additionally, neither the Grand Jury clause of the Fifth Amendment nor the excessive bail clause of the Eight Amendment has been applied.[63]

8. FOURTH v. FOURTEENTH v. EIGHTH

The Seventh Circuit has set up three bright lines to follow in "police misconduct" cases. The Fourth Amendment applies from the time of an arrest or seizure until the arrestee is brought before a judge or magistrate for a *Gernstein* (bond or probable cause) hearing.[64] The arrestee then becomes a "pretrial detainee" and

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[58] *Paul v. Davis*, 424 U.S. 693 (1976). However, where a defamatory statement accompanies a person's discharge from a job and makes it virtually impossible to obtain employment in that same field, the plaintiff may then have a cognizable claim. *Spiegel v. Rabinowitz*, 121 F.3d 251, 255 (7th Cir. 1997).

[59] *Daniels v. Williams*, 474 U.S. 327 (1986); *Archie v City of Racine*, 847 F.2d 1211, 1219-20 (7th Cir. 1988) *en banc* (holding grossly negligent conduct does not violate the constitution).

[60] 28 U.S.C. § 1367(a).

[61] *Adamson v. California*, 332 U.S. 46 (1937); *Slaughter –House Cases*, 21 L.Ed. 394 (1873).

[62] *Wolf v. Colorado*, 338 U.S. 25, 26 (1949).

[63] *Nat'l Rifle Assn. of America, Inc. v. City of Chicago*, 567 F.3d 856, 858 (7th Cir. 2009).

[64] *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir. 2006).

the Fourteenth Amendment applies.[65] Once the "detainee" has been convicted, the Eighth Amendment applies.[66]

If a seizure under the Fourth Amendment has not occurred, a court may fall back to the Fourteenth Amendment.

9. FOURTH AMENDMENT SEIZURE

Seizure defined - A seizure under the Fourth Amendment occurs when the plaintiff's freedom of movement has been restrained through the use of force intentionally applied or when the plaintiff voluntarily submits to the defendant's authority[67] – *i.e.*, when a suspect runs from an officer before the officer can even question him, no Fourth Amendment seizure has occurred;[68] in a police chase, where the plaintiff loses control of his car and hits a light pole, no Fourth Amendment seizure occurred because there was no intentional application of force, but if he drives into a roadblock, a seizure has occurred,[69] or in a police shooting, if the officer mistakenly shoots the wrong person, no Fourth Amendment seizure has occurred.[70] So, a police officer walking up to a person to ask a question does not constitute a Fourth Amendment seizure.[71]

Probable cause – probable cause to make an arrest provides an absolute defense to §1983 claims of false arrest or illegal seizure under the Fourth Amendment.[72] Law-enforcement officials have probable cause to make an arrest when "the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has been or is being committed.[73]

When addressing the question of probable cause, a "totality-of-the-circumstances" approach is followed.[74] When a court evaluates whether probable cause existed for an arrest or search, "it does not do so as an omniscient

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[65] *Armstrong v. Squadrito*, 152 F.3d 564, 569-70, 581 (7th Cir. 1998).
[66] *Whitley v. Alberts*, 475 U.S. 312 (1986).
[67] *Kernats v. O'Sullvan*, 35 F.3d 1171, 1178 (7th Cir. 1994); *California v. Hodari D.*, 499 U.S. 621, 626 (1991).
[68] *Jones by Jones v. Webb*, 45 F.3d 178, 182 (7th Cir. 1995).
[69] *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Mays v. City of East St. Louis*, 123 F.3d 999, 1001 (7th Cir. 1997).
[70] *Schaefer v. Goch*, 153 F.3d 793, 796 (7th Cir. 1998).
[71] *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir. 1999) (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983).
[72] *Friedman v. Village of Skokie*, 763 F.2d 236 (7th Cir. 1985).
[73] *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Carroll v. United States*, 267 U.S. 132, 162 (1925) *accord*, *Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 679 (7th Cir. 2007); *Wagner v. Washington County*, 493 F.3d 833, 836 (7th Cir. 2007) (*per curiam*).
[74] *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

observer ... but on the facts as they would have appeared to a reasonable person in the position of the arresting officer — seeing what he saw, hearing what he heard."[75] Whether probable cause exists depends on the information known to the officer at the time of the arrest, not on later developed information.[76]

The proper focus of an inquiry is whether the officer "acted reasonably under... the circumstances, not whether another reasonable, or more reasonable interpretation of the events can be constructed several years after the fact."[77] If a reasonable officer in the same or similar circumstances would have believed that a particular party committed a crime, the arrest is lawful even if the officer's belief was mistaken.[78]

Investigatory or Terry Stops — The Supreme Court in *Terry v. Ohio*, has recognized that events can rapidly unfold and police need the flexibility to investigate whether a crime has or is in the process of being committed.[79] A "Terry stop" is considered a "seizure" under the Fourth Amendment but probable cause is not required to make a "Terry stop."[80] Rather an officer may proceed if he is aware of "specific and articulable facts" suggesting criminal activity is afoot.[81] An officer is permitted to make a protective frisk or pat down of the detainee to search for weapons to insure the officer's safety.[82]

Note that when the Fourth Amendment does not apply, the law enforcement official's conduct is judged under the Fourteenth Amendment's substantive due process principles.

10. FIRST AMENDMENT — TYPICAL CLAIMS

First Amendment has been applied to claims involving:

a) Municipal employees being fired for speaking out as private citizens on matters of public concern.[83] However, where a public

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[75] *Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998) (quoting *Mahoney v. Kersery*, 976 F.2d 1054, 1057 (7th Cir. 1992)); *Chelios v. Heavener*, 520 F.3d 678, 686 (7th Cir. 2008); *Mustafa v. City of Chicago*, 442 F.3d 544, 547 (7th Cir. 2006).

[76] *Smith v. Lamz*, 321 F.3d 680, 685-86 (7th Cir. 2003); *Haywood v. City of Chicago*, 378 F.3d 714, 717 (7th Cir. 2004).

[77] *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 1999).

[78] *Kelley v. Myler*, 149 F.3d at 641, 646 (7th Cir. 1998).

[79] *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

[80] *Michigan v. Summers*, 452 U.S. 692, 699 (1981).

[81] *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 7, 30 (1953).

[82] *United States v. Hensley*, 469 U.S. 221, 235 (1985).

[83] *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968).

employee makes a statement pursuant to his official duties, he is not speaking as a private citizen and his speech is not protected under the First Amendment;[84]

b) Politically motivated firings, demotions or adverse employment decisions taken against most employees.[85] There is an exception as for those employees who are in "government's top level of management" — policymakers.[86] Note that the so-called policymaker exception does apply to claims of "petty harassment."[87]

c) Barring or unreasonably restricting a person or group's speech or expressive activities.[88] A municipality can employ "content neutral" regulations that limit the time, place, and manner its property is used for First Amendment activities.[89] However, it must treat all expressions equally without regard to the ideas or messages conveyed. The standards applicable to the regulation of First Amendment activities vary depending on the nature of the forum involved. [90]

For "public forums" or "designated public forums," reasonable time, place, and manner restrictions will be upheld so long as they are content neutral, are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication."[91] With limited public forums, a governmental entity may impose restrictions on speech "that are reasonable and viewpoint neutra1.[92] As to non-public forums, the restriction only needs to be reasonable and not discriminate on the basis of the content, viewpoint or identity of the speaker.[93]

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[84] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
[85] *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Meeks v. Grimes*, 779 F.2d 417, 418-19 (7th Cir. 1985).
[86] *Branti v. Finkel*, 445 U.S. 507, 517 (1980).
[87] *Wallace v. Benware*, 67 F.3d 655, 663 (7th Cir. 1995).
[88] *United States v. O'Brien*, 391 U.S. 367, 376-77 (1974); *Texas v. Johnson*, 491 U.S. 397, 406 (1989).
[89] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[90] *Schultz v. City of Cumberland*, 228 F.3d 831, 841 (7th Cir. 2000).
[91] *Jacobsen v. Ill. Dept. of Transp.*, 419 F.3d 642, 647 (7th Cir. 2005) (quoting *Perry Ed. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983)).
[92] *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1132 (2009).
[93] *Perry Educ. Ass'n.*, 460 U.S. at 46.

11. FOURTEENTH AMENDMENT - EQUAL PROTECTION

Elements of Equal Protection Claim - To state a violation of the equal protection clause, plaintiff must allege:

i) he or she is a member of a "protected class,"

ii) who was treated differently than another similarly situated person who was not a member of that class, and

iii) the difference in treatment was due to his or her race, gender or membership in that protected class.[94]

Plaintiff must show that defendant acted with a discriminatory purpose and treated the plaintiff differently because of, not merely in spite of, his or her race, sex, national origin, etc.[95]

Class of One Equal Protection - Several years ago, the Supreme Court recognized the so-called "class of one" theory of equal protection.[96] Plaintiff does not have to be a member of a protected class under this theory. Rather, a defendant must single-out the plaintiff for discriminatory treatment on an irrational and wholly arbitrary basis and prove that the defendant's conduct was motivated by a "spiteful effort to get the plaintiff for reasons wholly unrelated to any legitimate state objective."[97]

12. FOURTEENTH AMENDMENT — DUTY TO PROTECT

No Duty - Generally, there is no duty under §1983 to protect a private citizen from the acts of another private citizen.[98] The Seventh Circuit has explained that our constitution is a "charter of negative liabilities."[99] However, there are two exceptions where a duty is recognized:

a) **State Created Dangers Exception —** Where the State creates the dangerous situation, then it has a duty to protect the plaintiff;[100] *i.e.*,

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[94] *McPhaul v. Board of Comm'rs*, 226 F.3d 558, 564 (7th Cir. 2000).
[95] *Id*.
[96] *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995).
[97] *Id*.
[98] *DeShaney v. Winnebago County Dep't of Social Servs*., 489 U.S. 189, 195-96 (1989).
[99] *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).
[100] *Gibson v. City of Chicago*, 910 F.2d 1510, 1522 (7th Cir. 1990) (citing *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

police officer arrests a driver for DUI and leaves minor children or intoxicated passengers in car with access to the keys.[101]

b) **Restraint of Personal Liberty Exception —** Where the State takes a person into its custody through "incarceration, institutionalization or other similar restraint of personal liberty," a duty to protect under the Fourteenth Amendment is triggered.[102] Note that compulsory education does not fall within this exception.[103] However, the involuntary removal of children from their family home and placement into foster homes will trigger a duty under this exception.[104]

13. FOURTEENTH AMENDMENT — DUE PROCESS

There are two types of due process rights that can trigger §1983 claims - procedural and substantive.

Procedural Due Process — Procedural due process involves a o part analysis. Plaintiff must establish that he has a recognized property or liberty interest that was seized or impaired by the defendant.[105] If the plaintiff can establish a liberty of property right under state law, then the court goes to the second step and determines whether the plaintiff was afforded appropriate process. Procedural due process is a flexible concept, the timing and the nature of the hearing required can vary depending on the nature of the right being protected and the context in which it arises.[106]

a) **Property and Liberty Interests** - State law determines whether plaintiff has a right or interest protectable under the due process clause,[107] *e.g.*, most employees are "terminable at will," and thus,

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[101] *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993).
[102] *Youngberg v. Romeo*, 457 U.S. 307 (1982)
[103] *J.O. v Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990).
[104] *Berman v. Young*, 291 F.3d 976, 982 (7th Cir. 2002).
[105] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1971); *Larsen v. City of Beloit*, 130 F.3d 1278, 1282 (7th Cir. 1997).
[106] *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).
[107] *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972).

have no right to continued employment,[108] *e.g.*, a student generally has no right to participate in extracurricular activities.[109]

b) ***Parratt* Defense —** One issue that a court will examine is whether the plaintiff's claim involves "random and unauthorized" conduct by the defendant. When the conduct was random and unauthorized, a "pre- seizure hearing" is not considered feasible and so long as a prompt post-deprivation hearing is provided, due process is met.[110] Under this defense, the availability of a state tort remedy can provide adequate due process and provide a basis to seek dismissal of a due process claim.[111] To avoid this defense, plaintiff must show that the state tort remedy was "meaningless or nonexistent."[112] This defense has been extended to intentional deprivations of property,[113] and to deprivations of liberty interests.[114]

c) **Nature of Hearing Required** - When a pre-deprivation hearing is required, because it feasibly can be provided, it need not be elaborate in most instances.[115] The less onerous the nature of the penalty imposed or the resulting consequences, the less process is constitutionally required. With employment terminations, a simple meeting with a supervisor, during which the employee is advised of the charges, provided with an explanation of the information or evidence gathered, and given an opportunity to present his or her side of the story is constitutionally sufficient when the employee is entitled to a full post—deprivation hearing.[116] Students suspended for 10 days or less are only required to be given notice of the charges and an opportunity to present his or her side of the story.[117]

Substantive Due Process — There a certain fundamental rights that the Supreme Court has protected under the rubric of substantive due process. However, the

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[108] *Bishop v. Wood*, 426 U.S. 341 (1976); *Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 624 (7th Cir. 2002); *Montgomery v. Stafaniak*, 410 F.3d 933, 939 (7th Cir. 2005).

[109] *Davenport v. Randolph Co. Bd. of Educ.*, 730 F.2d 1395, 1397 (11th Cir. 1984); *Walsh v. Louisiana High Sch. Athletic Ass'n.*, 616 F.2d 152 (5th Cir. 1980); *Albach v. Odle*, 531 F.2d 983, 984 (10th Cir. 1976); *Hamilton v. Tennessee Secondary Sch. Athletic Ass'n.*, 552 F.2d 681, 682 (6th Cir. 1976).

[110] *Parratt v. Taylor*, 451 U.S. 527 (1981).

[111] *Doherty v. City of Chicago*, 75 F.3d 318, 323-25 (7th Cir. 1996).

[112] *Belcher v. Norton*, 497 F.3d 742, 751-53 (7th Cir. 2007).

[113] *Hudson v. Palmer*, 468 U.S. 517 (1984).

[114] *Ingraham v. Wright*, 430 U.S. 651 (1977).

[115] *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

[116] *Loudermill*, 470 U.S. at 546.

[117] *Goss v. Lopez*, 419 U.S. 568 (1975).

Court has expressed reluctance to expand the concept of substantive due process beyond "matters relating to marriage, family, procreation, and the right to bodily integrity."[118] As noted above, substantive due process has also been applied when evaluating a police officer's conduct when the Fourth Amendment is inapplicable.

The "state of mind" needed to establish a violation of substantive due process depends on the context in which it arises. When a rapid spur of the moment decision must be made, *e.g.*, during a police chase, the defendant's conduct must shock the conscience.[119] When the defendant has time to make a considered choice among alternative courses of action, then "deliberate indifference" to a person's rights is the standard to be applied.[120]

14. STANDING - WHOSE RIGHTS WERE VIOLATED?

Plaintiff's or someone else's? Constitutional rights are personal in nature and cannot be vicariously asserted,[121] *e.g.*, decedent was shot and killed, his wife, mother, sister and children generally have no standing to bring a §1983 claim for their loss of his love and support stemming from his death.[122]

Challenge plaintiff's standing if a third party's rights are involved, there may be no "Article III case or controversy."

15. IF A SUPERVISOR OR MANAGER IS SUED — WHAT IS THE THEORY OF LIABILITY?

a) **Personal Responsibility Required** - Section 1983 liability is based upon personal responsibility and predicated upon fault, there is no *respondeat superior* liability.[123]

b) **No Liability for Failing to Detect** - A supervisor must have knowledge of the "potential" for a constitutional violation and either authorize, condone, or approve it, or assist the violation before liability can attach.[124] There is

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[118] *Spiegel v. Rabinowitz*, 121 F.3d 251, 254 (7th Cir. 1997) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 847-49 (1992)).
[119] *County of Sacramento v. Lewis*, 523 U.S. 833, 851-52 (1998).
[120] *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992).
[121] *See Rakas v. Illinois*, 439 U.S. 128 (1978).
[122] *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).
[123] *Kernats v. O'Sullivan*, 35 F.3d 1171, 1182 (7th Cir. 1994). *See also Morfin v. City of East Chicago*, 349 F.3d 989, 1001 (7th Cir. 2003).
[124] *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984), *cert. denied*, *Reed v. Slakan*, 470 U.S. 1035 (1985). *See also Starzenski v. City of Elkhart*, 87 F.3d 872, 880 (7th Cir. 1996); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1183 (7th Cir. 1994).

no liability for failing to discover the constitutional violation of a lower level employee. Neither negligence nor even gross negligence will sustain a §1983 cause of action.[125]

c) **Realistic Opportunity to Intervene** - There is a duty imposed on a governmental employee (*e.g.*, police officer) to prevent another employee from violating the Constitution.[126] For those who are present when a constitutional violation occurred, in order for liability to attach to them, they must have an adequate opportunity to intervene and prevent the violation from occurring.[127] Accordingly, a §1983 claim against a fellow officer or supervisory-level officer on the scene will turn on where the defendant was located, how quickly the incident occurred, whether there were any circumstances that should have made those present expect a constitutional violation might occur.[128]

16. STATUTE OF LIMITATIONS

a) **Forum State's General Personal Injury Limitations Period** - 42 U.S.C. §1983 applies the *general* personal injury statute of limitations from the state where the constitutional violation occurred, which in Illinois is 2 years.[129] In other states, it can be longer.

b) **John Doe defendants** — The plaintiff has 120 days to identify and serve "John Does" under FRCP 4(m). Claims against unknown defendants do not "relate back" under FRCP 15. Accordingly, if the statute of limitations expires before the John Doe defendants are identified and served, the claims against them should be dismissed.[130]

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[125] *Whitford v. Boglino*, 63 F.3d 527, 530-31 (7th Cir. 1995); *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988).

[126] *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). *See also Windle v. City of Marion*, 321 F.3d 658, 663 (7th Cir. 2003).

[127] *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). *See also Windle v. City of Marion*, 321 F.3d 658, 663 (7th Cir. 2003).

[128] *See, e.g., Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 477-78 (7th Cir.), *aff'd in part, rev'd in part on other grounds*, 110 F.3d 467 (7th Cir. 1997).

[129] *Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *Owens v. Okure*, 488 U.S. 235 (1989); *Brooks v. City of Chicago*, 564 F.3d 830, 832 (7th Cir. 2009); *Farrell v. McDonough*, 966 F.2d 279 (7th Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993); *Garlington v. O'Leary*, 879 F.2d 277 (7th Cir. 1989); *Kalimara v. Illinois Dep't of Corrections*, 879 F.2d 276 (7th Cir. 1989).

[130] *Williams v. Lampe*, 399 F.3d 867, 870 (7th Cir. 2005).

c) **Conspiracy Claims —** The statute of limitations for a civil rights conspiracy claim runs from the last overt act in furtherance of the conspiracy.[131]

d) **False Arrest/Excessive Force/"Malicious Prosecution**" (a *Brady* violation in the Seventh Circuit). The statute of limitations for a §1983 false arrest or excessive force claim runs from the date of the arrest or when the excessive force was allegedly used.[132] However, for a §1983 "malicious prosecution" claim (*Brady* violation), the statute does not begin to run until the underlying criminal or civil proceeding was dismissed or a conviction is overturned.[133]

17. IMMUNITIES AVAILABLE -- §1983 CLAIMS

Immunities under state laws such as Illinois' Local Governmental Tort Immunity Act are only applicable to "state-law" claims, not to §1983 actions by virtue of the Supremacy Clause of the federal constitution.

a) **Absolute Immunity** - defendant has the burden to prove.

i) **Prosecutorial** - applies to a prosecutor's conduct in any type of judicial proceeding as well as to the decision to indict or approve charges; the evaluation of evidence assembled by the police or for its presentation at trial or before a grand jury after the decision to indict was made.[134] It does not apply where a prosecutor provides erroneous legal advice to the police or becomes involved in the investigation of charges prior to the indictment or where a prosecutor makes sworn statements in an affidavit supporting a warrant.[135]

ii) **Legislative** - applies to legislative activities such as introducing, debating and voting on laws or ordinances.[136]

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[131] *Bell v. Fowler*, 99 F.3d 262, 270 (8th Cir. 1996).

[132] *Wallace v. Kato*, 549 U.S. 384, 397 (2007); *Brooks v. City of Chicago*, 564 F.3d 830, 832 (7th Cir. 2009); *Wilson v Giesen*, 956 F.2d 738, 741 (7th Cir. 1992) (citing *Rinehart v. Locke*, 454 F.2d 313 (7th Cir. 1971)). *See also Perry v. Sullivan*, 207 F.3d 379, 381 (7th Cir. 2000).

[133] *Albright v. Oliver*, 510 U.S. 266 (1994); *Smart v. Board of Trustees*, 34 F.3d 432, 434 (7th Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995).

[134] *Buckley v. Fitzsimmons*, 509 U.S. 259, 270-71, 272 (1993); *Levy v. Pappas*, 510 F.3d 755, 764 (7th Cir. 2007); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

[135] *Buckley*, 509 U.S. at 269; *Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997); *Johnson v. Dossey*, 515 F.3d 778, 783 (7th Cir. 2008); *Burns v. Reed*, 500 U.S. 478, 496 (1991).

[136] *Tenney v. Brandhove*, 341 U.S. 367 (1951).

iii) **Judicial** - applies to a judge's conduct in any type of fact finding proceeding or ruling and is lost only when the court acts in the complete absence of any jurisdiction.[137] Parties who execute judicial orders may also be entitled to raise "quasi-judicial" immunity.[138]

iv) **Witnesses** - applies to testimony in any type of judicial proceeding.[139] The Seventh Circuit appears to now recognize a possible exception for complaining witnesses.[140] There is a circuit split on this issue, seven circuits apply a complaining witness exception and three do not.

Functional approach - A functional approach is taken when absolute immunity is raised.[141] So long as a defendant "functioned" in a capacity similar to a judge, prosecutor or legislator, he is entitled to absolute immunity for that function;[142] *i.e.*, a liquor control commissioner in ruling on liquor license application is entitled to judicial immunity.[143] When judges enact rules for lawyers to follow, they are not entitled to judicial immunity since they are not acting in their traditional fact-finding mode, but since they are functioning in a manner similar to legislators — passing rules for others to follow, they are entitled to legislative immunity.[144] However, where a judge, legislator, or prosecutor is acting in an administrative function; *i.e.*, firing a staff member, the defendant would not be entitled to absolute immunity for that function.[145]

i) **Immunity Against Injunctive Relief** - Legislators, and now judges, enjoy absolute immunity against claims of injunctive relief.[146]

ii) **Qualified Immunity if Absolute Immunity is Unavailable** - If a defendant is not entitled to absolute immunity because that

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[137] *Mireles v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

[138] *Henry v. Farmer City State Bank*, 808 F2d 1228, 1238 (7th Cir. 1986) (citing *Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir. 1980)); *Snyder v. Nolen*, 380 F.3d 279, 287 (7th Cir. 2004).

[139] *Briscoe, v. LaHue*, 460 U.S. 325 (1983). *See also Leavell v. Kieffer*, 189 F.3d 492, 494 (7th Cir. 1999).

[140] *Curtis v. Bembenek*, 480 F. 3d 282, 286 (7th Cir. 1995); *Cervantes v. Jones*, 188 f.3d 805 (7th Cir. 1999), *cert. denied*, 528 U.S. 1154, 120 S.Ct. 1159 (200); *Ineco v. City of Chicago*, 286 F.3d 994, 1000 n.9 (7th Cir. 2002).

[141] *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

[142] *Id*. at 269.

[143] *Reed v .Village of Shorewood*, 704 F.2d 943, 951-52 (7th Cir. 1993). *See also Killinger v. Johnson*, 389 F.3d 765, 770-71 (7th Cir. 2004).

[144] *Supreme Court v. Consumers Union*, 446 U.S. 719 (1980).

[145] *Forrester v. White*, 484 U.S. 219 (1988); *Kurkowski v. Krajewski*, 848 F.2d 767, 773-74 (7th Cir. 1988); *Chicago Miracle Temple Church v. Fox*, 901 F. Supp. 1333, 1342-43 (N.D. Ill. 1995); *Baird v. Board of Educ. for Warren Community Unit School Dist. No. 205*, 389 F.3d 685, 696 (7th Cir. 2004). *But see Van de Kamp v. Goldstein*, 129 S. Ct. 855, 861-62 (2009).

[146] Pub. L. No. 104-317, § 309(c), 110 Stat. 3847 (1996).

immunity was not historically recognized for the function the party was performing, the defendant can raise qualified immunity.[147]

b) **Qualified Immunity** — Qualified immunity is available to any governmental employee so long as a defendant did not violate a clearly established constitutional right that a reasonable person should have known.[148]

Two Part Test - Qualified immunity involves a two-part test addressing whether the defendant violated the plaintiff's constitutional rights and if so, whether the law was clearly established at the time of the constitutional violation.[149] If the answer to either part is no, then the defendant is entitled to qualified immunity.[150]

Plaintiff's Burden — Unlike absolute immunity, once qualified immunity has been properly raised by a defendant, the plaintiff has the burden to overcome that immunity and generally is required to show the law on the area was clearly established — by pointing to a "closely analogous" case.[151]

c) **Eleventh Amendment** — Neither the state nor a state official (when sued in his official capacity) can be sued for monetary damages in federal court.[152] Some county officials may be considered state officials for purposes of the 11th Amendment;[153] *i.e.*, county sheriffs, county judges, county state's attorneys -- (in the Seventh Circuit, county sheriffs may be considered state officials when serving state court orders).[154]

i) ***Ex parte Young*** **Exception** -A §1983 claim can be brought against a State official when the suit merely seeks the entry of prospective injunctive relief to remedy an ongoing constitutional violation, and

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[147] *Forrester v. White*, 484 U.S. 219 (1988). *See also Wilson v. Kelkhoff*, 86 F.3d 1438, 1446 (7th Cir. 1996); *Dawson v. Newman*, 419 F.3d 656, 662 (7th Cir. 2005).

[148] *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009); *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994) (same).

[149] *Denius v. Dunlap*, 209 F.3d 944, 950 (7th Cir. 2000).

[150] *Eversole v. Steele*, 59 F.3d 710, 717 (7th Cir. 1995); *Zorzi v. City of Putnam*, 30 F.3d 885, 892 (7th Cir. 1994).

[151] *Denius v. Dunlap*, 209 F.3d 944, 950 (7th Cir. 2000). *See also Omdahl v. Lindholm*, 170 F.3d 730, 733 (7th Cir. 1999) (citing *Clash v. Beaty*, 77 F.3d 1045, 1047 (7th Cir. 1996)); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988); *Azeez v. Fairman*, 795 F.2d 1296 (7th Cir. 1986); *Kompare v. Stein*, 80 F.2d 883 (7th Cir. 1986).

[152] *Pennhurst Sate Schs. & Hosps. v. Halderman*, 465 U.S. 89, 100, 106-07 (1984).

[153] *Garcia v. City of Chicago*, 24 F.3d 966. 969 (7th Cir. 1994), *cert. denied*, 514 U.S. 1003 (1995).

[154] *McMillian v. Monroe County*, 520 U.S. 781, 783-84 (1997).

not damages for a past wrong. This is the so-called *Ex parte Young* exception to Eleventh Amendment immunity.[155]

ii) **State Employee/Person —** When state employees are sued in their "official capacities," they are not "persons" amenable to suit under §1983.[156] Unlike the Eleventh Amendment, this defense can be raised when a §1983 claim is brought in state court.[157]

d) **Interlocutory Appeals** - The denial of a motion to dismiss or a motion for summary judgment based upon either qualified, absolute, or Eleventh Amendment immunity is immediately appealable in federal court so long as the basis of the district court's denial involves a question of law.[158]

When there are disputed issues of material fact, you cannot bring an interlocutory appeal for the denial of that immunity.[159] However, the Seventh Circuit has held that it has jurisdiction to determine whether the disputed factual issue was materia1.[160] A careful analysis of the issue(s) must be made — federal appellate courts can and will sanction parties if it deems an appeal to be frivolous.[161] Denials of qualified immunity are not necessarily immediately appealable in state courts.[162] That depends on the particular state's appellate rules.

18. DEFENDANT ACT UNDER COLOR OF LAW?

a) **Color of Law v. Course and Scope of Employment** - Liability under §1983 does not turn on whether a defendant acted in the course and scope of employment but rather, whether the defendant acted "under color of state law."[163]

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[155] *Marie O. v. Edgar*, 131 F.3d 610, 615 (7th Cir. 1997). *See Ex parte Young*, 209 U.S. 123 (1980).
[156] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).
[157] *Id*.
[158] *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139 (1993); *Varner v. Illinois State Univ*., 226 F.3d 927, 929 (7th Cir. 2000); *Goshtasby v. Board of Trustees*, 123 F.3d 427, 429 (7th Cir. 1997); *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *limited by Johnson v. Jones*, 515 U.S. 304 (1995); *Mitchell v. Forsythe*, 472 U.S. 511, 525 (1985); *Cody v. Steil*, 187 F.3d 727, 730 (7th Cir. 1999); *Hammond v. Kunnard*, 148 F.3d 692, 695 (7th Cir. 1998); *Khuans v. Sch. Dist. 110*, 123 F.3d 1010, 1031 (7th Cir. 1997).
[159] *Montaño v. City of Chicago*, 375 F.3d 593, 598 (7th Cir. 2004).
[160] *Tangwall v. Stuckey*, 135 F.3d 510, 516 (7th Cir. 1998).
[161] FED. R. APP. P. 38.
[162] *Pizzato's, Inc. v. City of Berwyn*, 168 Ill.App.3d 796, 798, 523 N.E.2d 51, 53 (1st Dist. 1988), *cert. denied*, 489 U.S. 1054 (1989); *Johnson v. Fankell*, 520 U.S. 911 (1997).
[163] *Coleman v. Smith*, 814 F.3d 1142, 1148-49 (7th Cir. 1987); *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991), *cert. denied*, 504 U.S. 917 (1992); *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1093 (7th Cir. 1990).

b) **Factors to Consider** - The analysis of whether a defendant acted under color of law is based on the totality of the circumstances.[164] Factors a court will consider include: whether the defendant was on duty/off duty;[165] in uniform or out of uniform;[166] whether departmental issued or approved equipment was involved, *i.e.*, police gun, badge, etc.;[167] whether the defendant identified himself as a municipal official or invoked the authority of his office, *i.e.*, stop, I'm a cop;[168] whether the departmental rules or regulations permitted or prohibited the defendant's actions or required that the defendant act while off duty;[169] if the incident occurred while on an "off-duty job," whether the department approved it or whether departmental approval was even required;[170] how close was the defendant's conduct to type he or she routinely performed while on duty;[171] and whether the defendant's motivation was employment related or involved a purely personal or private pursuit.[172]

19. CONSPIRACY CLAIMS

a) **Constitutional Injury Required –** A conspiracy itself is not actionable, there must be some underlying constitutional violation.[173] If none is alleged, move to dismiss. If the constitutional violation which was the subject of the conspiracy is dismissed by the court, then the alleged conspiracy to violate that right should also be dismissed.[174]

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[164] *Montano v. Hedgepeth*, 120 F.3d 844, 851 (8th Cir. 1997).

[165] *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995); *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980); *Greco v. Guss*, 775 F.2d 161, 168 (7th Cir. 1985); *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989).

[166] *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989).

[167] *Id*.

[168] *Davis v. Murphy*, 559 F.2d 1098 (7th Cir. 1977); *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991) *cert. denied*, 504 U.S.917 (1992); *Brzozowski v. Randall*, 281 F. Supp. 306, 311 (E.D. Pa 1968).

[169] *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975).

[170] *Traver v. Meshiry*, 627 F.2d 934, 937-38 (9th Cir. 1980).

[171] *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968); *Murphy v. Chicago Transit Auth.*, 638 F. Supp. 464, 468 (N.D. Ill. 1986); *Burrell v. City of Mattoon*, 378 F.3d 642, 649 (7th Cir. 2004).

[172] *Deering v. Reich*, 183 F.3d 645, 649 (7th Cir. 1999); *Screws v. United States*, 325 U.S. 91, 111 (1945); *Gibson v. City of Chicago*, 910 F.2d 1510, 1518 (7th Cir. 1990); *Estate of Sims v. County of Bureau*, 506 F.3d 509, 515-16 (7th Cir. 2007).

[173] *Hostrop v. Board of Jr. College Dist. No. 515*, 523 F.2d 569, 576 (7th Cir. 1975); *Goldschmidt v. Patchett*, 686 F.2d 582, 586 (7th Cir. 1982).

[174] *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 423 (7th Cir. 2000) (citing *Hill v. Shobe*, 93 F.3d 418, 422 (7th Cir. 1996)).

b) **Agreement Required —** A §1983 conspiracy requires a "meeting of the minds."[175] Check if an agreement is alleged. Vague allegations of conspiracy are still generally found to be insufficient to state a claim even under traditional federal notice pleading rules.[176]

c) **Intra-Corporate Conspiracy Defense —** This defense is available in the Seventh Circuit if all defendants are employed by the same local unit of government.[177] If so, motion to dismiss may be available.

d) **When All Members of the Conspiracy are Defendants** - Conspiracy is simply a "string to tie" all defendants to an alleged violation.[178] If all parties involved in the alleged conspiracy are named defendants, a conspiracy claim is redundant and move to dismiss.

e) **Right of Access to the Courts** - If the plaintiff's conspiracy claim is based upon allegations that the defendant's actions violated his right of access to the courts, the fact the plaintiff was able to file his or her §1983 lawsuit before the statute of limitations expired establishes that plaintiff's right of access was not prohibited and the conspiracy claim should be dismissed.[179]

20. OFFERS OF JUDGMENT

a) 42 U.S.C. §1988 - Attorney fee shifting statute a lies where the plaintiff is a prevailing party. However, there is a *de minimis* recovery exception.[180]

b) If a Rule 68 offer of judgment is made and the verdict is less favorable than the offer, then no attorney fees are recoverable after the date the offer was rejected.[181]

c) Be careful how you draft it - do you include attorney fees in offer or not? This will impact the determination of whether the outcome is more favorable. It must be in writing and made more than ten (10) days prior to trial under FRCP 68.

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[175] *Scherer v. Balkema*, 840 F.2d 437, 441 (7th Cir. 1988), *cert. denied*, 486 U.S. 1043 (1988) (quoting *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979).

[176] *Bell Atlantic v. Twombly*, 550 U.S. 544, 545, 561 (2007).

[177] *Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 623, 632-33 (7th Cir. 1999); *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492, 1508 (7th Cir. 1994).

[178] *Niehus v. Liberio*, 973 F.2d 526, 532 (7th Cir. 1992).

[179] *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995).

[180] FED. R. CIV. P. 68; *Fisher v. Kelly*, 105 F.3d 350, 352 (7th Cir. 1977). *See also Briggs v. Marshall*, 93 F.3d 355 (7th Cir. 1996).

[181] *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1118 (8th Cir. 1989).

21. REMOVAL ISSUES IF §1983 CLAIM FILED IN STATE COURT – CONSIDER REMOVAL TO FEDERAL

a) All defendants must agree.[182]

b) 30 day window of opportunity.[183]

c) May not be able to appeal denial of qualified immunity in state court.[184]

d) While federal judges are more knowledgeable on §1983 issues, notice pleading rules apply in federal court.[185]

e) Consider the respective jury pools in your state and federal courts. For example, we typically will have a more conservative potential jury pool in federal district court in Chicago than in Cook County, but not DuPage County.

f) Payment of filing fee in federal court, if removed.

g) A state official may waive the right to assert Eleventh Amendment immunity by removing a case to federal court and thereby invoking the court's jurisdiction.[186]

22. INJUNCTIVE RELIEF

a) **Past Exposure to Illegal Conduct** – If the plaintiff has merely alleged past exposure to illegal conduct and not an ongoing constitutional violation; *i.e.*, plaintiff was placed in a choke hold when arrested – he lacks standing to obtain injunctive relief because there exists no "Article III case or controversy."[187] In the Seventh Circuit, this limitation on the court's jurisdiction to enter injunctive relief cannot be overcome by allegations that the plaintiff might be arrested again in the future or that some third-party's right may be violated.[188]

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[182] *Phoenix Container, L. P. v. Sokoloff*, 235 F.3d 352, 353-54 (7th Cir. 2000); *Roe v. O'Donohue*, 38 F.3d 298, 301 (7th Cir. 1994).

[183] 28 U.S.C. §1446(b).

[184] *Pizzato's Inc. v. City of Berwyn*, 168 Ill.App.3d 796, 798, 523 N.E.2d 51, 53 (1st Dist. 1988), *cert. denied*, 489 U.S. 1054 (1989); *Johnson v. Fankell*, 520 U.S. 911 (1997).

[185] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[186] *Lapides v. Board of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 619 (2002).

[187] *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *See also Gates v. Towery*, 430 F.3d 429, 432 (7th Cir. 2005).

[188] *Robinson v. City of Chicago*, 868 F.3d 959, 966 (7th Cir. 1989); *Perry v. Village of Arlington Heights*, 180 F.3d 826, 830 (7th Cir. 1999); *Schmidling v. City of Chiago*, 1 F.3d 494, 499-500 (7th Cir. 1993).

b) **Mootness** — Injunctive relief will not be issued if the matter has been rendered moot by subsequent events;[189] *i.e.*, conditions of confinement in county jail rendered moot by transfer to state prison following conviction.[190] There is an exception to "mootness" for claims that are "capable of repetition" but will "evade review."[191]

23. IMPACT OF STATE COURT PROCEEDINGS — POSSIBLE DEFENSES

a) ***Res judicata*/collateral estoppel** — Under 28 U.S.C. §1738, federal courts must afford full faith and credit to state judicial proceedings. This means that findings from state court proceedings must be applied in §1983 actions where the elements of issue or claim preclusion are met.[192] The State-law rules on issue and claim preclusion apply to §1983 claims.[193] These doctrines apply not only to claims or issues that were actually litigated, but also to any claims that could have been raised in the earlier litigation.[194] *Res judicata* generally requires a final judgment on the merits;[195] that the two claims arise from the same core of operative facts;[196] that the party against whom the defense is raised had a full and fair opportunity to litigate the issue in the original proceeding as well as the opportunity for appellate review.[197]

b) ***Heck* Doctrine** - A §1983 claim cannot be used to collaterally attack a criminal conviction.[198] Where a plaintiff's success in a §1983 claim would "suggest" the plaintiff's underlying conviction is invalid, the *Heck* doctrine is potentially implicated.[199] However, the Seventh Circuit has severely limited the defense when plaintiff's claim involves a Fourth Amendment

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[189] *Airline Pilots Ass'n Int'l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990).
[190] *Martin v. Davies*, 917 F.2d 336, 339 (7th Cir. 1990).
[191] *Martin v. Davies*, 917 F.2d 336, 339 (7th Cir. 1990) (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)); *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 748 (7th Cir. 1999) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).
[192] *Best v. City of Portland*, 554 F.3d 698, 701 (7th Cir. 2008); *Allen v. McCurry*, 449 U.S. 90 (1980).
[193] *Haring v. Prosise*, 462 U.S. 306 (1983); *Donald v. Polk County*, 836 F.2d 376 (7th Cir. 1988).
[194] *D & K Properties Crystal Lake v. Mutual Life Ins.*, 112 F.3d 257, 259 (7th Cir. 1997); *Migra v. Warren City Sch. Dist. Bd. of Educ.* 465 U.S. 75, 77 (1984); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 863 (7th Cir. 1996); *Hudson v. City of Chicago*, 228 Ill.2d 462 (2008).
[195] *Long v. Shorebank Dev. Corp.*, 182 F.2d 548, 560 (7th Cir. 1999) (quoting *Zabel v. Cohn*, 283 Ill.App.3d 1043, 670 N.E.2d 877, 880 (1996)).
[196] *River Park v. City of Highland Park*, 184 Ill.2d 290, 307, 703 N.E.2d 883, 891 (1998).
[197] *Majeske v. Fraternal Order of Police, Lodge No. 7*, 94 F.3d 307 (7th Cir. 1996); *Charles Koen & Assoc. v. City of Cairo*, 909 F.2d 992, 1000 (7th Cir. 1990); *Rooding v. Peters*, 92 F.3d 578, 580 (7th Cir. 1996); *Wozniak v. County of DuPage*, 845 F.2d 677 (7th Cir. 1988).
[198] *Rooding v. Peters*, 92 F.3d 578, 580 (7th Cir. 1996).
[199] *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

search, seizure, or excessive force issue due to concepts like attenuation, inevitable discovery, etc.[200]

c) ***Rooker/Feldman* Doctrine** - Is based on the notion that only the United States Supreme Court has appellate jurisdiction over state court civil judgments, and thus, § 1983 cannot be used to invalidate a state court judgment.[201] This defense is potentially implicated where the §1983 plaintiff was the defendant in prior state court action and is challenging the judgment entered in state court. The issue may turn on whether the constitutional violation is "inextricably intertwined" with the state-court judgment and whether the district court is being asked to review that judgment.[202] This is a jurisdictional defense and can be raised at anytime.[203]

24. 1983 PROTECTS CONSTITUTIONAL RIGHTS, NOT EVIDENTIARY RULES

The Seventh Circuit has held that §1983 is intended to protect constitutional rights, not evidentiary rules designed to protect those rights.[204] When a defendant's conduct violates an evidentiary rule designed to protect a fundamental constitutional right, but not the right itself, the Seventh Circuit has refused to recognize a §1983 claim.[205] Historically, this doctrine has been applied to §1983 claims involving:

a) *Miranda* violations.[206]

b) Unduly suggestive line-ups or show-ups.[207]

The mere failure to give *Miranda* warnings to an arrestee is not actionable.[208] However, where *Miranda* warnings were not provided and the arrestee gives a confession, which is later used at a preliminary hearing or trial, such a claim may be actionable.[209]

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[200] *Copus v. City of Edgerton*, 151 F.3d 646 (7th Cir. 1998); *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996).
[201] *Exxon Mobil v. Saudi Basic Indus. Corp*., 544 U.S. 280, 284 (2005).
[202] *Garry v. Geils*, 82 F.3d 1362, 1369 (7th Cir. 1996).
[203] *Levin v. ARDC*, 74 F.3d 763, 766 (7th Cir. 1996).
[204] *Hensley v. Carey*, 818 F.2d 646, 650 (7th Cir. 1987).
[205] *Id*.
[206] *United States. v. Pantane*, 542 U.S. 630, 641 (2004); *Thornton v. Buchmann*, 392 F.2d 870 (7th Cir. 1968): *Hensley v. Carey*, 818 F.2d 646, 650 (7th Cir. 1987) (quoting *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).
[207] *Hensley v. Carey*, 818 F.2d 646, 649-50 (7th Cir. 1987).
[208] *United States v. Patane*, 542 U.S. 630, 641 (2004).
[209] *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1023-27 (7th Cir. 2006).

25. WHAT MATERIALS SHOULD AN INVESTIGATOR INITIALLY OBTAIN

a) Police Reports - full set;

b) Mug Shots - (if an excessive force claim)/jail or lock-up records;

c) Any applicable department policies;

d) Any medical or hospital reports;

e) Employee's employment records, and disciplinary history -ask if he or she has any;

f) Any citizen's complaint against the officers;

g) Any investigative reports about incident;

h) Any other similar claims for *Monell* violation;

i) Any police/fire commission hearing - obtain result and transcript;

j) If there was an underlying criminal proceeding, what was outcome, if dismissal why and if conviction obtained, get a copy - "*Heck* doctrine." If hearing and testimony taken, obtain copy of plaintiff's testimony and court's finding.

k) Plaintiff's criminal history.