

PREFACE

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The work behind producing this fifth edition spans decades. In 1983, the American Bar Association published *Section 1983: Sword & Shield*, an anthology that explored the expanding scope of 42 U.S.C. § 1983 liability. In a series of articles, the authors analyzed the history of § 1983 litigation, the scope of potential liability, available defenses, remedies, and policy implications, after the bellwether case of *Monell v. Department of Social Services*.¹ After more than 15 years had elapsed since that effort, in 1998, a second edition was published, entitled *Sword & Shield Revisited: A Practical Approach to Section 1983*. *Sword & Shield Revisited* recognized the reality that practicing lawyers, academics, and judges were hard-pressed to keep up with the twists and turns in this changing area of law. With each passing decade, courts issued literally hundreds of decisions analyzing and deciding § 1983 claims. Whether tracing the lines of authority that set forth the parameters for an illegal search and seizure claim, or examining retaliation theories brought by public employees, § 1983 claims were as legally and factually complex as ever. Grounded in the U.S. Constitution, this area of law affects every aspect of life in our constitutional democracy, from birth to death.²

The growth of § 1983 litigation over the years only confirms the reality that every official policy or conduct of a state or local government is potentially subject to suit on some constitutional or statutory theory of liability. In 2006, therefore, *Sword & Shield: A Practical Approach to Section 1983, Third Edition*, was published to update practitioners with the latest cases and analysis that had developed as we started the new millennium. The third edition examined the scope of potential liability, and the courts' refinement of available defenses, all of which had developed and matured over the years.

In an updated fourth edition of *Sword & Shield*, issued in 2015, the authors again examined § 1983 litigation as it continued to develop. Procedural and substantive aspects of this litigation were discussed in depth, with many chapters devoted to areas of litigation, such as claims arising in public employment or schools.

Since that time, courts have altered the decisional framework in some areas and new areas of litigation (such as suits challenging regulation of guns) have emerged. Thus, it became evident that a new edition was warranted.

This fifth edition of *Sword & Shield: A Practical Approach to Section 1983 Litigation* is substantially reorganized to provide practitioners with easier access to the information they need as they are handling civil rights claims. Some terrific writers from the earlier editions have again written chapters. And some terrific new authors have contributed important chapters as well. As in prior editions, the authors provide a timely analysis of practical considerations necessary to practice effectively in this technically difficult and ever-evolving area of law. The chapters are now more tightly focused to provide a roadmap for handling civil rights litigation under § 1983.

Professor Emeritus Martin A. Schwartz provides a comprehensive discussion of the fundamental principles of § 1983 litigation in the opening chapter. His discussion offers insight into the procedural intricacies under § 1983, including the jurisdiction of state and federal courts to hear such suits, the basic elements of claims, an overview of substantive defenses, the potential damages that may be sought, and a discussion of the availability of attorney fees for prevailing parties under 42 U.S.C. § 1988. His chapter provides a welcome overview of all aspects of this litigation and provides a starting point for evaluation of any lawsuit.

Chapters 2 and 3 examine special considerations for the plaintiffs and the defendants. Anna Benvenuti Hoffmann, Alexandra Lampert, and Ranjana Natarajan provide advice for those representing plaintiffs in 42 U.S.C. § 1983 litigation. They offer insight into initiating a case, including pre-filing inquiries, justiciability, exhaustion, forum selection, and pleading considerations. Jeffrey Lowe guides those defending claims. He outlines key steps to take including investigating the facts alleged in a complaint, removing the case if appropriate, evaluating the defenses to raise, and whether to file an

answer or an early motion to dismiss. Lowe also describes considerations such as whether to bifurcate a case and conducting discovery.

In Chapter 4, Michael S. Bogren provides a procedural guide to 42 U.S.C. § 1983 litigation with an emphasis on immunity. He also discusses evidentiary privileges that can be important to defending litigation, including legislative privilege, attorney-client privilege, the privilege against self-incrimination, the deliberative process privilege, and an informer's privilege, all of which have implications for discovery and for any subsequent trial. His discussion of expert witnesses and when their testimony is properly considered is extremely useful. And he reviews motion practice and the various kinds of absolute and qualified immunities that courts recognize.

The remaining chapters are organized around the constitutional amendments that form the basis for most 42 U.S.C. § 1983 lawsuits. This is a change from prior editions, which organized the information topically. Your editors determined that since most claims are framed as violations of a specific amendment—and since the elements of a claim under those amendments remain the same whether they are analyzed in a school or prison setting—this new structure would be easier for readers and would avoid some redundancies in past editions.

Chapter 5, by Steven C. Stern and Chelsea Weisbord, lays out the substantive law that governs First Amendment claims. Given the complexities of these claims, Stern and Weisbord have done an admirable job of distilling the foundational principles and then describing how they have been applied in various settings. In Chapter 6, John Parker Sweeney and Marc Nardone address a relatively new area of § 1983 litigation, the question of gun regulation and its constitutionality under the Second Amendment. They address litigation over who can possess arms, where those arms can be possessed, and what types of arms can be possessed. They lay out various analytical frameworks that have been employed to decide cases arising under the Second Amendment. And they offer practical advice for litigators on either side of the issues.

In Chapter 7, Kathleen Wieneke and Christina Retts discuss the Fourth Amendment, which is one of the most frequently litigated constitutional amendments. They describe the foundational elements for a Fourth Amendment claim, including those arising from a purportedly illegal seizure or a

purportedly excessive use of force. The authors discuss the use of Tasers, deadly force, placing someone in a prone position, and other circumstances that may give rise to a claim. Chapter 8, written by Dwight Merriam, offers valuable advice about claims arising under the Fifth Amendment. He provides a useful taxonomy of takings claims, discusses the analytical framework under which the claims will be considered, and includes practical pointers for handling such litigation.

In Chapter 9, Rhonda R. Stowers explains key aspects of claims arising under the Eighth Amendment. She discusses the Excessive Fines Clause as well as the voluminous law governing cruel and unusual punishment. The chapter offers helpful information about the many claims that prisoners bring challenging their conditions of confinement and how the courts have addressed them. Phillip Friduss, Russell Britt, and Pearson Cunningham set forth the law governing claims under the Fourteenth Amendment in Chapter 10. They describe the interests protected under the amendment, set forth the culpability requirements, discuss affirmative duties and state-created dangers, and explain other aspects of the law.

The authors of each chapter focus on the procedural and substantive issues that practitioners face and provide a practical approach to handling this litigation. The law is ever-evolving as societal issues and concerns change, as technology changes, and as the courts address new situations that give rise to lawsuits. The law also evolves as constitutional law always has in accord with changing societal views and conditions. This new edition offers a timely analysis of that evolving law and the real-world considerations that are required to effectively handle litigation in this technically difficult area of the law.

ENDNOTES

1. 436 U.S. 658 (1978).
2. *See* *Vacco v. Quill*, 521 U.S. 793 (1997); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).