MEMORANDUM

TO: American Bar Association, Center for Human Rights
FROM: King & Spalding LLP
DATE: May 16, 2013
RE: Overview of Section 1983 and Bivens Actions in the United States as a Deterrent Against Law Enforcement Misconduct

I. INTRODUCTION

This Memorandum provides a summary of Section 1983 and Bivens actions in the United States as a mechanism for deterring and remedying law enforcement misconduct. It begins with a brief overview of law enforcement oversight bodies, which operate independently from the judicial system. Although it is difficult to provide an exact assessment of the effectiveness of these remedies in deterring police brutality, it is certainly the case that there are a multitude of examples where victims of police brutality were successful in recovering a monetary judgment or settlement using either Section 1983 or a Bivens action. In fact, it would be difficult to overstate the importance of Section 1983 in the advancement of civil rights in the United States, particularly during the last fifty years.

II. POLICE OVERSIGHT BODIES

Although not widespread, police oversight in the United States is comprised of external and internal mechanisms. In addition to these mechanisms, there is federal statutory authority...
that grants the U.S. Department of Justice (and in certain cases, private litigants) the right to pursue claims to redress police misconduct, which is discussed below.¹

Internally, most police departments contain Internal Affairs (IA) units.² IA will receive tips from citizens and from within the police department about possible misconduct. After investigating these tips and upon finding probable cause that a crime occurred, IA will refer the matter to a local prosecutor who will take over the case.³ As a practical matter, it is relatively uncommon for prosecutors to pursue prosecutions of police officers.⁴

Externally, there are a few types of civilian monitoring mechanisms used to monitor police agencies. For example, some jurisdictions have civilian review boards. After a law enforcement agency has completed its investigation, the review boards will review the file and make a recommendation to the police chief as to whether further investigation is necessary. They usually do not have further authority beyond this.⁵ In other jurisdictions, such as Seattle, Washington, civilians have the authority to directly oversee and guide police IA investigations. In Seattle, a civilian lawyer appointed by the Mayor heads the IA unit and in serious cases, she or he makes a final decision.⁶

³ Id. at 19.
⁴ Id. at 20-21.
⁵ Id. at 7-8.
⁶ Id. at 9.
In Los Angeles, California, the IA unit, Police Commission and Inspector General share investigatory authority. The Commission consists of civilians and is appointed by the Mayor. The Commission’s role is to determine whether police uses of force comport with the Los Angeles Police Department’s policies and standards. In the instance that the Commission determines a use of force is improper, the police officer will be subject to discipline or retraining. The Inspector General independently investigates incidents and provides the Commission with his or her conclusions.

In San Francisco, California the Police Department does not retain investigatory power regarding civilian complaints. Instead, there is an Office of Citizen Complaints (OCC) that is comprised of a staff that includes a director, investigators, attorneys, and a policy specialist. Ultimately, the OCC reports to a Police Commission consisting of Mayor-appointed members. The Commission has disciplinary authority for the SFPD, while the OCC issues policy reports.

For a number of reasons, however, external police oversight boards do not provide a complete solution to the issue of police brutality in the United States. First, the large majority of police departments are not regulated by such boards. By one estimate, in 2000 there were 15,736 local law enforcement agencies in the United States, and only about 100 were subject to external

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7 Id. at 10.
8 Id.
9 Id.
10 Id. at 10-11.
11 Id.
12 Id. at 11.
oversight by a monitoring board.\textsuperscript{13} Second, even when such boards do exist, their powers are limited and they can only review specific cases as opposed to identifying patterns and recurring practices of police misconduct.

III. \textit{BIVENS OVERVIEW}

Despite the absence of a federal statutory basis holding individual law enforcement officers personally responsible, U.S. courts have also recognized a constitutional cause of action for misconduct by federal agents against an ordinary citizen. In \textit{Bivens v. Six Unknown Federal Narcotics Agents},\textsuperscript{14} the United States Supreme Court held federal agents responsible in their individual capacity for unconstitutional conduct, notwithstanding the fact that they were agents of a federal entity entitled to sovereign immunity and there was no statutory basis for waiving sovereign immunity.\textsuperscript{15}

In November 1965, federal narcotics agents entered into and searched Mr. Webster Bivens’s apartment and without a warrant, arrested him for alleged narcotics violations. Mr. Bivens filed a complaint in federal court alleging that unreasonable force was employed in making the arrest and that the arrest was done without probable cause. He sought damages from the agents, claiming that he had suffered great humiliation, embarrassment, and mental suffering. The trial and appellate court both agreed that the complaint should be dismissed insofar as they

\textsuperscript{13} \textit{See} Bobb, \textit{supra} note 2 at 1.


\textsuperscript{15} While this Memorandum focuses on causes of action directly against law enforcement wrongdoers to hold them personally responsible, it is worth noting that at the federal level, the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-2680 may provide a cause of action against the federal government for the intentional tort of a federal law enforcement officer in certain circumstances. \textit{See, e.g., Ignacio v. United States}, 674 F.3d 252 (4th Cir. 2012).
found that the complaint failed to state a cause of action. The Supreme Court undertook review and specifically considered whether a federal agent may be liable for damages where he has been found to violate the Fourth Amendment’s right to be free from unreasonable searches and seizures.

The agents argued before the Supreme Court that money damages were only available in tort actions in state courts. Under the agents’ view, the Fourth Amendment was to serve only as a limitation on federal defenses to a state law claim, not as an independent limitation upon the exercise of federal power. The Supreme Court disagreed and found that damages were an appropriate remedy upon a violation of the Fourth Amendment by federal agents.

The Court noted in particular that a federal agent acting unconstitutionally has a much greater potential for harm than a private citizen acting alone: “power, once granted, does not disappear like a magic gift when it is wrongfully used.” The Court made comparisons to decisions regarding electronic surveillance cases, which made clear that the Fourth Amendment was not tied to local trespass laws. The Court also noted the historical recognition of damages as a remedy for invasion of personal interests in liberty. For example, the Court found that it was well settled that in cases where a federal statute provides for a right to sue for the invasion of a legal right, the federal courts were authorized to use any available means to remedy the wrong. Here, the Court found that there were no “special factors counseling hesitation in the absence of affirmative action by Congress.” Thus, the Court rejected the agents’ argument that the Fourth Amendment may only limit federal defenses to a state law claim, and not independently limit the exercise of federal power. The Court concluded that Mr. Bivens was entitled to receive money

16 Id. at 391-392.
damages for injuries he suffered as a result of the agents’ violation of the Fourth Amendment rights.\textsuperscript{17}

\section*{IV. \hspace{.5em}EXCESSIVE FORCE AND SUBSEQUENT RULINGS}

\textit{Bivens} has been invoked as grounds to recover damages from officers who have engaged in police brutality. However, the reach of \textit{Bivens} has been significantly limited by a subsequent Supreme Court ruling that made it more difficult to defeat a defense of qualified immunity by federal officials. These issues are discussed in turn below.

\subsection*{A. What Constitutes Excessive Force?}

The test that United States federal courts will use for determining whether force was excessive varies on the constitutional right at issue.\textsuperscript{18} In determining whether the force used was reasonable or excessive under the Fourth Amendment – the right at issue in \textit{Bivens} – courts engage in a balancing test, weighing “‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”\textsuperscript{19}

Factors in determining whether the force used was excessive include the severity of the force applied and the need for the force.\textsuperscript{20} Courts will apply an objective standard and inquire as to “whether the officers’ actions [were] ‘objectively reasonable’ in light of the facts and

\textsuperscript{17} \textit{Id.} at 397.


\textsuperscript{19} \textit{Graham v. Connor}, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (quoting \textit{Tennessee v. Garner}, 471 U.S. at *8, 105 S.Ct 1694 (1985)). Although technically a Section 1983 case, the Fourth Amendment analysis in \textit{Graham} has been used in \textit{Bivens} cases as well.

\textsuperscript{20} \textit{Tekle v. United States}, 511 F.3d 839, 844 (9\textsuperscript{th} Cir. 2007).
circumstances confronting them, without regard to their underlying intent or motivation.”\textsuperscript{21} This test of reasonableness is “not capable of precise definition or mechanical application,” but courts will examine “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”\textsuperscript{22}

\textbf{B. Application to Police Brutality and Excessive Force Cases}

Plaintiffs have invoked \textit{Bivens} as grounds under which to recover damages in police brutality and excessive force cases. For example, in \textit{Abdullah v. Cassanta}, plaintiff alleged that after he was handcuffed, DEA agents assaulted him by kicking, punching, smothering and bending his arms.\textsuperscript{23} There, the Court did not reach the merits of the issues, but construed these allegations as raising a \textit{Bivens} claim against the agents.

Similarly, in \textit{Tekle}, the Ninth Circuit considered allegations that federal officers pointed a gun at the head of an unarmed child and subjected him to an unreasonable detention.\textsuperscript{24} Although the court did not discuss the \textit{Bivens} claim in detail, it reversed a summary judgment ruling where the lower court had ruled in favor of the officers on the \textit{Bivens} claim. In reversing, the Ninth Circuit focused on the excessive force inquiry and found that “a reasonable officer should have known that it was constitutionally excessive to use such force and to use the handcuffs in the manner alleged against an unarmed eleven-year-old child who was fully complying with the

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\item \textsuperscript{21} \textit{Graham}, 490 U.S. at 397.
\item \textsuperscript{22} \textit{Id.} at 396.
\item \textsuperscript{23} \textit{Abdullah v. Cassanta}, No. 3:06cv183 (AHN), 2007 WL 1521058 (D. Conn., May 22, 2007).
\item \textsuperscript{24} \textit{Tekle}, 511 F.3d at 844.
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officer’s requests.”25 The Supreme Court has never held that Bivens applies to First Amendment claims, although it has assumed without deciding that a First Amendment free exercise claim would be actionable under Bivens. However, the Court has not yet decided that Bivens applies to First Amendment retaliatory arrest claims.26

C. The Qualified Immunity Hurdle

Shortly after it decided Bivens, the Supreme Court issued an opinion in 1982, Harlow v. Fitzgerald, that heightened the requirements for a plaintiff to defeat a defense of qualified immunity.27 The qualified immunity doctrine protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”28 The qualified immunity defense can be overcome at the pleading stage where a complaint contains “sufficient factual allegations to show that the defendant’s conduct violated a constitutional right and that the right was clearly established at the time of the alleged violation.”29

V. EMPIRICAL DATA AND PRACTICAL CONSIDERATIONS

Although Bivens provides a framework for pursuing damages against federal agents in police brutality cases, Bivens actions are regarded by some commentators as “being more powerful in theory than in practice” and a “working assumption in both the academy and the

25 Id. at 856.
28 Id.; see also Engel v. Buchan, 710 F.3d 698, 2013 WL 819375, at *10 (7th Cir. Mar. 5, 2013).
judiciary has been that *Bivens* litigation is remarkably unsuccessful.” As one court described after noting various barriers to bringing a successful claim, “bringing a *Bivens* action is a Herculean task with little prospect of success.” On the other hand, as discussed below in connection with Section 1983 litigation, it seems reasonable to posit that *Bivens* actions do provide some deterrence against police misconduct; it is again impossible to measure the extent to which there would be additional misconduct if the *Bivens* framework did not exist.

In a recent quantitative analysis, a professor surveyed *Bivens* litigation in the five districts with the most federal case filings. He concluded that the total success rate of *Bivens* lawsuits is approximately 16%. After adjusting his analysis to exclude suits dismissed *sua sponte* on frivolity grounds, however, he concluded that the success rate jumped to about 30%. Although *Bivens* litigation is not always successful and there are a number of hurdles to overcome, it can be a viable tool to collect money damages from federal officials who have engaged in police brutality.

**VI. FEDERAL STATUTORY OVERVIEW**


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Section 1983 authorizes individuals to bring civil lawsuits against certain defendants for depriving the plaintiffs of rights that are guaranteed by the U.S. Constitution and federal laws. The statute only allows actions against individuals who act under the color of State law.\(^{33}\) The statute authorizes both damages and injunctive relief as remedies.\(^{34}\) The text of the statute is as follows:

> 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.\(^{35}\)

In order to ensure that federal district courts have the power to adjudicate cases under this statute, the U.S. Congress enacted a jurisdictional statute that specifically references Section 1983.\(^{36}\) Thus, litigation under Section 1983 takes place in the general courts of first instance for the federal judicial system, not specialized panels.\(^{37}\)

\(^{34}\) See id.  
\(^{35}\) Id.  
\(^{37}\) Section 1983 also provides the prevailing party with the ability to recover its attorney’s fees under certain circumstances. 42 U.S.C § 1988(b).
Section 242 of Title 18 of the U.S. Code is a federal criminal analogue to Section 1983 that punishes persons who, “under color of any law, statute, ordinance, regulation, or custom” willfully deprive others of their rights under federal law. See 18 U.S.C. § 242. Depending on the offense committed, the maximum penalty ranges from one year of imprisonment to life in prison or the death penalty. The U.S. Department of Justice is responsible for prosecuting such cases in federal district courts. Additionally, Section 14141 of Title 42 of the United States Code is a police misconduct provision that prohibits State and local law enforcement officers from engaging in “a pattern or practice of conduct … that deprives persons of rights, privileges or immunities secured or protected by the Constitution or laws of the United States,” including excessive force, false arrests and unlawful stops, searches or arrests. A lawsuit under this section, however, can only be brought by the Department of Justice; it does not provide a cause of action to a victim of police misconduct.

In one notable example, the United States Department of Justice investigated the Los Angeles Police Department following the significant concerns raised about the misuse of force in during riots that happened in Los Angeles in 1992. The LAPD reached a settlement with DOJ, known as a Consent Decree, in 2001, which contained very detailed reform and oversight provisions including monitoring of the use of force and search and arrest procedures.38 According to a detailed study performed by the Harvard Kennedy School, the Consent Decree

38 See http://www.lapdonline.org/assets/pdf/final_consent_decree.pdf
was successful in reducing the use of force by the LAPD.\textsuperscript{39} According to another study, multiple other jurisdictions that have agreed to similar settlements.\textsuperscript{40}

\textbf{VII. CONSTITUTIONAL CONSIDERATIONS}

It is worth mentioning the constitutional context to Section 1983, because of its significance for U.S. jurisprudence under the statute.\textsuperscript{41} Section 1983 derogates from the constitutional principles of State sovereignty and immunity in the United States. As a general matter, the Tenth Amendment of the U.S. Constitution recognizes the principle of federalism, whereby the States retain a measure of sovereignty unless such power is superseded by a provision of the U.S. Constitution or federal legislation enacted pursuant to the U.S. Constitution.\textsuperscript{42} Furthermore, the Eleventh Amendment generally restricts lawsuits by individuals against State governments and officials in federal courts.\textsuperscript{43}

Notwithstanding these constitutional limits, individuals are entitled to relief for misconduct committed by State and local officials in violation of their federally guaranteed civil liberties as enshrined in the Fourteenth Amendment. In the wake of the U.S. Civil War in the

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\textsuperscript{39} See \url{http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/Harvard_LAPD_Report.pdf}
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\textsuperscript{40} See \textit{Merrick Bobb, Internal and External Police Oversight in the United States} (October 2005), at 18, \url{http://www.parc.info/client_files/altus/10-19\%20altus\%20conf\%20paper.pdf}
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\textsuperscript{41} See discussion below on “qualified official immunity” as a defense in Section 1983 litigation.
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\textsuperscript{42} See U.S. Const., art. VI, cl. 2 (“Supremacy Clause”).
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\textsuperscript{43} See, \textit{e.g.}, \textit{Scruggs v. Lee}, 256 Fed. App’x 229, 232 (11th Cir. Ga. 2007) (“We conclude that Sheriff Peterson, in his official capacity, is an ‘arm of the State’ entitled to immunity … As employees of the sheriff, deputies Howell and Peterson, in their official capacities, are also entitled to Eleventh Amendment immunity.”)
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1860s, the United States adopted the Fourteenth Amendment to ensure that newly freed slaves would enjoy civil liberties guaranteed by the U.S. Constitution and federal laws and equal protection under the law. Section 5 of the Fourteenth Amendment empowered the U.S. Congress “to enforce, by appropriate legislation,” the civil-rights guarantees under the Fourteenth Amendment. In other words, this constitutional provision specifically authorizes the federal government to assert power over the States and State officials when it is necessary to ensure that the States do not deprive citizens of their rights under federal law. Accordingly, the U.S. Congress enacted Section 1983 in 1871 as part of the “Ku Klux Klan Act,” a legislation designed to prevent collusion between State and local officials and organizations such as the Ku Klux Klan that engage in racially-motivated violence. The statute authorizes suits against officials in their individual capacity, notwithstanding the immunity of State governments from suit, if officials engage in conduct that violates the rights of citizens as recognized under federal constitutional and other laws.

44 The Fourteenth Amendment directly guarantees federal civil rights to citizens of the United States, thereby superseding any State law that prevents citizens from exercising their rights under federal law. See U.S. Const. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).


46 See McDonald v. City of Chicago, 130 S. Ct. 3020, 3088 n.23 (2010) (Thomas, J., concurring) (discussing racial violence against blacks after the U.S. Civil War and the purpose of the Fourteenth Amendment).

VIII. ELEMENTS OF A PRIMA FACIE CASE UNDER SECTION 1983

For historical reasons that are beyond the scope of this Memorandum, Section 1983 was not widely used for civil-rights litigation against State officials until the latter half of the twentieth century. In 1961, the landmark U.S. Supreme Court case in Monroe v. Pape, which was a case alleging police brutality, revitalized Section 1983 litigation by holding that “under color of any statute … of any State” included situations where state actors (in this case, local police officers) acted in ways that actually violated state laws. Since then, U.S. federal courts have elaborated on the elements of a prima facie case that a plaintiff must establish in Section 1983 cases, and the defenses that State officials (which include police officers) must establish in rebuttal.

A. Existence Of A Right Under Federal Constitution Or Law

Plaintiffs must establish the existence of a right under the U.S. Constitution or federal law that the defendants allegedly infringed. Importantly, this means that a broad range of wrongs committed by state actors can be addressed by a lawsuit under Section 1983. As former Supreme Court Justice Harry A. Blackmun observed in a law review article detailing the history of Section 1983:

In the context of racial equality, many of the major school desegregation cases were filed as § 1983 actions. In the First Amendment area, § 1983 was relied on for a challenge to state laws that required loyalty oaths, or prevented the wearing of armbands in protest of our policy in Vietnam. It was also used to restrain prosecutions under Louisiana’s Subversive Authorities and Communist Control Law. It was utilized by the NAACP to establish that organization’s authority to advise [African-American persons] of their legal rights. It was used to challenge bans on lawyer advertising and spending limitations on the public education activities of charities. Section 1983 has been the vehicle for

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48 Id.

establishing significant due process rights. The case establishing that a welfare recipient has a right to notice and hearing before his benefits are terminated was a § 1983 case. . . This list includes challenges to state restrictions on the right to vote, from poll taxes and white primaries to unequal appointment schemes. . . And it includes successful efforts by mental patients and by prisoners to achieve First Amendment freedoms, basic medical care, and due process rights, while within institutional walls.50

Allegations of excessive use of force by the State or municipal police could implicate several constitutional provisions, depending on the circumstances. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. courts have interpreted this provision to ban searches and arrests without warrants issued upon a finding of probable cause by a neutral magistrate, with certain well-defined exceptions (e.g., exigent circumstances, crimes committed in presence of police, searches of arrestees that are incidental to lawful arrests).51 Malicious prosecution without probable cause could also violate the Fourth Amendment.52

Moreover, the Fourth Amendment has been held to prohibit the use of unreasonable force by the police in making an arrest.53 U.S. courts assess allegations of excessive use of force based on the objective reasonableness of the use of force under the circumstances.54 According


51 Messerschmidt v. Millender, 132 S. Ct. 1235, 1245 (2012); see, e.g., Virginia v. Moore, 553 U.S. 164, 176-77 (2008) (holding that police may arrest suspect without warrant for crimes committed in the presence of police and that searches incidental to arrests are proper); Robinson v. Cook, 706 F.3d 25 (1st Cir. 2013) (finding exigent circumstances for search of vehicle).

52 See, e.g., Marcilis v. Twp. of Redford, 693 F.3d 589, 604 (6th Cir. 2012) (rejecting claim for malicious prosecution under Fourth Amendment because police had probable cause to arrest plaintiff and charge plaintiff with commission of a crime).

53 See, e.g., Abbot v. Sangamon County, 705 F.3d 706 (7th Cir. 2013) (finding that plaintiff sufficiently established prima facie case of excessive force by police in violation of Fourth Amendment to proceed to trial on the issue).

54 Graham, 490 U.S. at 396.
to the U.S. Supreme Court, “the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.55

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.56

This analysis “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”57 Because the analysis is objective, “[a]n officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”58 Although the Supreme Court’s test does not specifically require that the officer use the least amount of force to accomplish the objective, to the extent that an officer grossly exceeds that level of force, the victim of such force will likely have a strong argument that the use of force was not objectively reasonable.

55 Id. at 397.
56 Id. at 396-97.
57 Id. at 396.
58 Id. at 397.
Of note, Section 1983 has been used by protesters to remedy improper police conduct and/or excessive force. For example, in *Vodak v. City of Chicago*, people protesting the Iraq war were arrested by Chicago police officers and then brought a class action under § 1983. After a legal challenge by the defendants, the Court of Appeals for the Seventh Circuit ruled that the suit could continue. The court noted that there was “considerable evidence of unprofessional behavior by police in arresting and jailing the people [involved],” but declined to specify what that evidence was. The case ultimately settled for $6.2 million.

Harms caused by the police after a plaintiff has been detained may violate the Fifth Amendment. For example, in *Devereaux v. Abbey*, an appellate court of the Ninth Circuit held that there was a clearly-established due process right not to be subject to criminal charges on the basis of false evidence that was deliberately fabricated by government actors, and that violation of this right was cognizable as a Section 1983 claim. After conviction and sentence, such harm may violate the Eighth Amendment, which generally prohibits cruel and unusual punishments. “[T]he use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury.”

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59 *Vodak v. City of Chicago*, 639 F.3d 738 (7th Cir. 2011).

60 *Id.* at 744.

61 *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001). In *Devereaux*, the court found that the plaintiff failed to meet his burden of proof.

62 See, *e.g.*, *Giroux v. Somerset County*, 178 F.3d 28, 31-32 (1st Cir. 1999) (explaining the types of inhumane prison conditions prohibited under the Eighth Amendment).

force claims based on the nature of the force rather than the extent of the injury.”

“When prison officials maliciously and sadistically use force to cause harm . . . contemporary standards of decency always are violated . . . whether or not significant injury is evident.” At the same time, the U.S. Supreme Court cautions that not “every malevolent touch by a prison guard gives rise to a federal cause of action.” . . . “The Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.”

Alternatively, arbitrary infliction of harm by state or local police at any point in time could violate the principle of substantive due process of law that is guaranteed under the Fourteenth Amendment. However, the courts have construed this provision restrictively to require such egregious misconduct as to “shock the conscience.” The U.S. Supreme Court has spoken of the cognizable level of executive abuse of power as that which shocks the conscience. . . . [W]e found the forced pumping of a suspect's stomach enough to offend due process as conduct that shocks the conscience and violates the decencies of civilized conduct. . . . [W]e reiterate[ed] that conduct that shocked the conscience and was so brutal and offensive that it did not comport with traditional ideas of fair play and decency would violate substantive due process. . . . [W]e said again that the substantive component of the Due Process Clause is violated by

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64 Id.
65 Id. (quoting Hudson, 503 U.S. at 9).
66 Id. (quoting Hudson, 503 U.S. at 9).
68 Id. The “shock the conscience” standard is specific to the United States and not the same standard used internationally. In general, the United Nations Convention Against Torture contains more specific definitions of torture and cruel, inhumane and degrading treatment.
executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.\(^{69}\)

Distinguishing the constitutional standard of “substantive due process” from ordinary tort law, the U.S. Supreme Court held that “conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.”\(^{70}\)

**B. State Action**

Section 1983 only allows suits against State actors or those acting under color of State law.\(^{71}\) This provision limits the scope of proper defendants to State officials (including police) and others who are deemed to be State actors.\(^{72}\) “Anyone whose conduct is ‘fairly attributable to the state’ can be sued as a State actor under § 1983.”\(^{73}\) Courts use a two-part test to determine if there has been sufficient State action:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . .

Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a State official, because he has acted together with or has obtained significant aid from State officials, or because his conduct is otherwise chargeable to the State.\(^{74}\)


\(^{70}\) *Id.* at 849.

\(^{71}\) Blum & Urbonya, *Section 1983 Litigation*, supra note 45, at 5.

\(^{72}\) See *id.* at 5-7.


\(^{74}\) *Lugar*, 457 U.S. at 937.
In addition, “[i]t is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State.”75

Municipalities are also liable under Section 1983 whenever the municipality itself subjects a person or causes a person to be subjected to that deprivation.76 The liability of a city is not, however, derivative (as it is for non-constitutional torts through *respondeat superior* (i.e., vicarious liability)).77 Instead, “[t]he municipality must be at fault in some sense for establishing or maintaining the policy which causes the injurious result, although the policy in question may be an informal custom which has not received formal approval but has attained the ‘force of law.’”78 “[W]hether the basis of the claim is an officially promulgated policy or an unofficially adopted custom, it must be the ‘moving force behind the constitutional deprivation before liability may attach.’”79

“In order for a plaintiff to demonstrate a policy or custom, it is generally necessary to show a persistent and wide-spread practice.”80

A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. A custom is a practice that is so settled and permanent that it takes on the force of law.81

76 *Id.* at 67.
77 *Owens v. City of Atlanta*, 780 F.2d 1564 (11th Cir. 1986) (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)).
78 *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985) (quoting *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2434 (1985)).
80 *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997).
“Even in the absence of an express policy or custom, a local government body can be held liable for a single act or decision of a municipal official with final policymaking authority in the area of the act or decision.”

It is also possible to hold a municipality liable under Section 1983 for failing to properly supervise or train its employees and agents acting under color of state law. The U.S. Supreme Court has explained “that there are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.” “Since a municipality rarely will have an express written or oral policy of inadequately training or supervising its employees, . . . a plaintiff may prove a city policy by showing that the municipality’s failure to train evidenced a ‘deliberate indifference’ to the rights of its inhabitants.” “To establish a . . . ‘deliberate indifference,’ a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action.”

When private persons or organizations are responsible for the deprivation of a victim’s federal rights, such victim may still assert claims under Section 1983 in some narrowly-defined circumstances. To establish that a private person or organization is liable under Section 1983,

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82 Cuesta v. Sch. Bd., 285 F.3d 962, 968 (11th Cir. 2002) (internal quotations omitted).
83 Blum & Urbonya, Section 1983 Litigation, supra note 45, at 59-62.
85 Gold v. City of Miami, 151 F.3d 1346, 1350-51 (11th Cir. 1998).
86 Id. (citing Bd. of County Comm’rs v. Brown, 117 S. Ct. 1382 (1997)).
87 Blum & Urbonya, Section 1983 Litigation, supra note 45, at 7-11.
the U.S. Supreme Court has developed three primary tests: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test.88

The public function test limits state action to instances where private actors are performing functions traditionally the exclusive prerogative of the state. . . . The state compulsion test limits state action to instances where the government has coerced or at least significantly encouraged the action alleged to violate the Constitution. . . . The nexus/joint action test applies where the state has so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise.89

For example, in Adickes v. S.H. Kress & Company, a white woman brought a Section 1983 claim against a restaurant based on allegedly denying her service because she was with a group of black students. Because she alleged that there was a police officer in the restaurant at the time and further alleged that the restaurant manager acted in concert with the police officer, the Supreme Court held that the restaurant could be liable under Section 1983 as a state actor.90

IX. DEFENSES UNDER SECTION 1983

A. Qualified Official Immunity

Once a plaintiff establishes a prima facie case, a State official is entitled to assert a defense of qualified official immunity.91 This immunity only bars awards of damages, not

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88 Willis v. Univ. Health Servs., Inc., 993 F.2d 837, 840 (11th Cir. 1993).
89 Id. (internal quotations and citations omitted).
91 Blum & Urbonya, Section 1983 Litigation, supra note 45, at 81.
Injunctive relief.92 “The qualified immunity defense does not extend to municipalities or to claims against state actors in their official capacities.”93

“The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation.”94 “Because qualified immunity is a defense not only from liability, but also from suit, it is important for a court to ascertain the validity of a qualified immunity defense as early in the lawsuit as possible.”95 This defense applies if the official’s conduct in his or her personal capacity does not violate any “clearly established” rights established in the U.S. Constitution or federal statutes that a reasonable official should have known.96

In order to receive qualified immunity, the public official must first prove that she was acting within the scope of her discretionary authority when the allegedly wrongful acts occurred. . . . If the official establishes that she was acting within her discretionary authority, the burden shifts to the plaintiff to show, with the facts taken in his favor, that (1) the officer violated a constitutional right, and (2) the right was clearly established.97

92 Id.
93 Heggs v. Grant, 73 F.3d 317, 320 n.5 (11th Cir. 1996) (citing, inter alia, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 165-67 (1993)).
94 Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002).
95 Storck v. City of Colorado Springs, 354 F.3d 1307 (11th Cir. 2003) (internal quotations omitted).
96 Id. at 81-82; see Harlow v. Fitzgerald, 457 U.S. 800 (1982).
97 Wolk v. Seminole County, 276 Fed. App’x 898, 899 (11th Cir. 2008) (internal citations and quotations omitted).
B. Absolute Immunity

Certain actions by State officials are absolutely immune from suits for damages (but not injunctive relief) under Section 1983. These absolute immunities are rooted in the immunities generally recognized at federal common law for certain governmental functions. State, local, and regional legislators are entitled to absolute immunity from liability under Section 1983 for their legislative activities. Judges are absolutely immune from actions taken in the course of performing their judicial duties. Prosecutors are absolutely immune from actions undertaken in the course of “initiating a prosecution and in presenting the State’s case.” In all cases, “the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.”

X. EFFICACY OF SECTION 1983 AS TOOL OF ENFORCEMENT

The historical significance of Section 1983 in advancing civil rights in the United States and remedying law enforcement misconduct certainly can not be questioned. An examination of Section 1983 on a case-by-case basis as a tool for the enforcement of civil liberties shows that the cause of action has been extraordinarily successful in vindicating important constitutional rights. The sheer number of Section 1983 cases in the United States shows that many

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98 Blum & Urbonya, Section 1983 Litigation, supra note 45, at 71.
99 Id.
104 See Blackmun, supra note 50.
105 See id.
individuals are taking advantage of its protections, and the cause of action is often analyzed in law review journals, such as the scholarly article by Justice Blackmun cited above.

For example, a recent study of Section 1983 litigation in the city of Chicago, Illinois found that the lawsuits have resulted in significant payments to plaintiffs. The author found that plaintiffs filed 459 cases under Section 1983 in 2009 that alleged civil rights violations by the police in Chicago. By late 2012, 157 of these cases had closed. Of these closed cases, 87 involved alleged illegal searches of the plaintiff’s person, which frequently included allegations of excessive force. Sixteen cases proceeded to trial, and the jury delivered verdicts for the plaintiffs in three cases. Despite this low number of favorable judgments on the merits, the actual amounts paid to plaintiffs varied widely, because the city frequently agreed to settle claims by payment without proceeding to trial.

One attorney alone was responsible for 17 percent of the cases filed in 2009 alleging illegal searches (which include searches of the person, vehicles, and premises). A number of these cases settled for around $2000 to $6000. Of the cases that proceeded to trial, four ended

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107 *Id.* at 126. This number declined substantially the following year, by 47 percent, because of a new city policy against settling cases without litigation. *Id.* at 127.

108 *Id.* at 131.

109 *Id.* at 132.

110 *Id.*

111 *See id.* at 132-37. Thirty-one cases involving alleged illegal searches of the person ended in settlement. *Id.* at 132.

112 *Id.* at 131.

113 *Id.*
with judgments for the police defendants, one concluded with a judgment for the plaintiff for $146,000, and another ended with a judgment for the plaintiff for $25,000 in compensatory damages and $50,000 in punitive damages. Some have argued that U.S. Supreme Court decisions have expanded the definition of who can qualify as a municipal policy maker, thereby making it easier to assert a single incident case against a municipality, and such expansion has made Section 1983 a more effective deterrent. Others cite problems associated with municipal liability, directly or indirectly through insurance, as preventing Section 1983 from deterring police brutality on an individual level. Lastly, there are also significant hurdles that a plaintiff must overcome in order to obtain injunctions against abusive conduct under Section 1983, namely a showing that the defendant will likely repeat the same deprivation of civil liberties in the future.

According to the author of the Chicago-area study, based on his personal experience of serving for 21 years as executive director of the Chicago Police Board, which is a civil service

\[114\] Id.

\[115\] Adam S. Lurie, Note, *Ganging Up on Police Brutality: Municipal Liability for the Unconstitutional Actions of Multiple Police Officers Under 42 U.S.C. § 1983*, 21 Cardozo L. Rev. 2087, 2101-05 (2000); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 129-132 (1988) (“Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced.”).


\[117\] Id. at 766 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-113 (1983)) (“Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles.”).
commission that oversees that city’s police force, only a handful of police disciplinary actions involved allegations of illegal searches by the police.\textsuperscript{118}

XI. CONCLUSION

Section 1983 and \textit{Bivens} actions have been extremely important in the evolution of civil rights and minority rights in the United States. Although there are a number of procedural and substantive hurdles to overcome, including qualified immunity, both causes of action have been used successfully by private citizens to obtain redress for law enforcement misconduct including police brutality. In some jurisdictions, police oversight bodies can provide a mechanism for ensuring accountability for police officers who engage in misconduct, although such mechanisms generally do not provide for financial recovery to the civilian victim.

\textsuperscript{118} Iris, \textit{Illegal Searches in Chicago}, supra note 106, at 145.