CIVIL RIGHTS LITIGATION
EVALUATING THE PLAINTIFFS' CASE
With Emphasis on the Police Misconduct Case

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CHAPTER 23

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Out of life's school of war: What does not destroy me, makes me stronger
Friedrich Nietzsche, The Twilight of the Idols (1899)

Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.
John Adams 'Argument in Defense of the Soldiers in the Boston Massacre Trials, December 1770'

Get your facts first, and then you can distort them as much as you please.
Mark Twain

Evaluation of the plaintiff's civil rights case is more art than mathematics, comprised of equal parts mysticism, speculation, prediction, guesswork, extrapolation and inference, all tempered by experience. If the question is, "how does the plaintiff's lawyer evaluate a potential case?" the answer will be different than if the question is "what factors effect the evolving view of the plaintiff's case?" It is the rare case in which the lawyer's opinion, once arrived at, remains frozen in time. Better lawyers constantly evaluate their cases and their opinions change as the case develops.

There is no litmus test that clearly suggests that a case should be accepted or rejected. There are, however, indicators that experience suggests are important to be considered. There is no compass that tells the plaintiff's lawyer that the case remains set on the original course. But there are waypoints. Instinct, like in no other area of practice, can and often does provide valuable signals.

Clarence Darrow wrote about the predilections of jurors based on their ethnicity and religion. See, James W. Jeans, Sr. *Trial Advocacy* 2d Edition (West 1993) at pp. 275-80. How backward and awkward that type of analysis seems in our age of enlightenment and sensitivity to equality. Yet, who among us does not consider, at some level, stereotypes in our professional lives. We may do it when selecting a jury. We may do it when examining witnesses and we may do it when deciding whether to offer representation. We may do it, but we don't speak of it openly, except in the most secure and trustworthy environs. What is important to the lawyer considering whether to offer a prospective client representation is not so much whether the lawyer's impression is confined to a stereotyped view but rather whether the jury's might be.

A seasoned plaintiff's lawyer commented, 'you make money on the cases you turn away.' Lawyers who do plaintiffs' civil rights work tend to be 'true believers,' who are invested first in doing justice. They can be a trusting and naive lot who view clients' recitations of facts through the filter of outrage. The evaluation of a plaintiff's civil rights case begins with the client, which is a completely trite observation. Who the client is and how the client appears and how the client presents herself and how the client acted out on the street are all important factors in any case, but in a civil rights case, unlike other types of matters, the lawyer may and should reject representation based on answers to the questions 'who is the client and how did she act?' For the most part, in other types of litigation, the who and what of the client can weigh on whether the case will be won or lost, but it would be unusual for the who and what to compel that the lawyer decline to offer representation. In an automobile collision case or a contract dispute or a criminal matter, the lawyer will usually note the client's demeanor and behavior as factors going to proof or defense, but not going to whether the case should be accepted by the law firm. Credibility is everything in civil rights litigation and frequently, the defendants have built in credibility. The word of a citizen will not match up with the word of a police officer or of a prison official. If credibility is a crucial even dispositive factor in the decision to offer representation or not, are there factors that might inform counsel on a more objective basis about the likely credibility of the plaintiff. Put another way, will the jury like the plaintiff? Or, if the prospective client makes less than a great first impression, can, in the vernacular, the client be "cleaned up?"

Physical Appearance:

Does the client present with tatoos, long hair or piercings. Is the client large or have unpleasant features? As crass and unfair as it may seem, physical appearance must play some role in the evaluation of the plaintiff's civil rights case. After all, the first impression of the jurors will be of plaintiff on one side and one or more uniformed public servants on the other. It would be foolish to predict that a plaintiff would lose simply because he had tatoos and equally foolish to ignore the possible influence on the jury. Similarly, depending on the type of case, the size of the plaintiff can be a material fact. A six foot five inch man is going to have difficulty convincing a jury that a five foot five inch female police officer used excessive force against him.

Intoxication:

Physical appearance is mentioned first here only because it is the first thing that the police saw and the first thing that the lawyer and jury will see. In the police misconduct case, by far, the most important factor in the

evaluation of the plaintiff's case is whether the plaintiff was or arguably was under the influence of alcohol or drugs. Kappeler et. al. discuss the way that police label subjects/defendants/plaintiffs and thereby stain the credibility of the plaintiff. . *See* Kappeler, Sluder and Alpert, *Forces of Deviance: Understanding the Dark Side of Policing* (Waveland Press, Inc., 1994) at 161-164:

> As the [Rodney] King case demonstrates, the police as public officials are free to inject speculation if not actual misrepresentation into official accountings of police-citizen encounters. These constructions later become part of the official record that a jury or other fact finder uses to determine whether an officer's actions in a particular situation amounted to misconduct, a civil rights violation or criminal behavior. Social definitions and constructed facts also play a major role in the public perception of police and citizen interactions. Police officers are in unique positions, as compared to victims, to characterize situations, events and behaviors in such a fashion to lend "official" credibility to their inferences, speculations or even fabrications. In the conversion from observation or fabrication to official reporting, information takes on a new and more authoritative meaning. This characterizations then retroactively matches society's signification of deviance regardless of the actual initial behavior of the citizen during the police encounter . . .
>
> Some police officers have learned that the characterization of citizens as drug abusers and criminals carries with it certain advantages in terms of justifying the use of force. Justification of the use of force in the drug war extends to the use of force in other criminal matters, if the citizen is characterized as a drug offender. Such characterizations serve some very pragmatic police purposes. When citizens are characterized as drug users, it tends to support the inference that force was necessary in order to subdue the citizen, since the constructed reality of drug use instructs that users are dangerous people with a propensity for violence.

Kappeler, et al., at 161 and 164.

The labeling can even be absurdly comical. Experience shows that officers will often attribute statements to the subject that could have the effect of placing the plaintiff in a false light in the minds of the jury . The officers of one particular police department were fond of attempting to label African-American subjects as racist, by writing that the subject called the white officer a "Honky M_____ F_____." Of course, the vernacular was no longer in use, and had not been in use for over ten years, at the time of the reports. In another case, the clumsy attempt to corroborate the police description of plaintiff as drunk, included altering plaintiff's mug shot that was offered at trial to have a pinkish hue, which made the plaintiff's eyes appear to be bloodshot. Fortunately, the mug shot had been produced in discovery and was not 'pinked,' a point argued to the jury in closing argument.

How Does The Prospective Client Present:

People who feel that the government has abused them – has violated their 'rights' – almost always present as angry. The abuse of power by government actors evokes that response in even the most calm and level headed individual. The important analysis comes after the initial venting. Rational and irrational clients alike, will want to tell the story of the injustice they suffered and it is important that they have the opportunity to do that at least one time. Lawyers who permit the client to vent and who actively and empathetically listen will find it easier to get to the important work of probing and sifting the facts. More important, or equally important is an evaluation of the client's demeanor after the initial venting.

Civil rights clients tend to be either 'normal' or 'unbalanced.' Normal clients may be emotional demanding, unrealistic, difficult, bothersome and annoying, but these troubling traits and behaviors abate with time and with the realization that someone is fighting the fight for them. Unbalanced clients on the other hand, present in much the same way as normal clients but they never seem get better and often get worse. Just as it is uncomfortable to say out loud that physical appearance of a client is a point of consideration in the evaluation process, it is disquieting to speak of client's as 'unbalanced' without appearing insensitive or worse. There is simply no denying that some civil rights claimants – as a group, perhaps more frequently than other types of plaintiffs – tend to view the world around them in a unique way. Some act paranoid. Some have outrage that appears to be an extreme reaction to the events that bring them to court. Some have unrealistic expectations. Some are simply bossy. Some exhibit a caustic combination of many challenging traits. If counsel is concerned with a successful outcome the unbalanced client threatens it because they can be unpredictable, unreasonable and irrational. There is no experience that is quite as disheartening as having the client torpedo the lawyer's good efforts. Anyone who has had the experience of a client failing to appear at trial for closing arguments appreciates the wisdom of this assertion.

Lest anyone conclude that only 'normal' 'attractive' people are worthy of representation in civil rights cases, recall that the theme here is the evaluation of plaintiff's case. It would be disingenuous to avoid a candid discussion of the plaintiff himself. The fact is that civil rights plaintiffs may come from a segment of society that is a traditional target of discrimination and abuse. They may be of a class of people that the authorities consider 'soft targets' in that the they have little economic wherewithal, little education and little or no power in our system. It is important that plaintiff's counsel guards against perpetuating the stereotypical treatment while at the same time, making a realistic and painfully candid evaluation of the plaintiff's ability to carry his own banner in the litigation. The tension between wanting to help the prospective client and feeling put off or at least skeptical by the presentation of the prospective client, is natural. It is impossible to identify a list of criteria that will apply to every case. It is only possible to identify the issue and forewarn counsel that the analysis is challenging.

The Plaintiff's Tale:

The power of accurate observation is commonly called cynicism by those who have not got it.
George Bernard Shaw

Cynicism is an unpleasant way of saying the truth.
Lillian Hellman, The Little Foxes, 1939

A cynic is not merely one who reads bitter lessons from the past, he is one who is prematurely disappointed in the future. Sidney J. Harris

Plaintiffs' civil rights lawyers who thrive have at least one common attribute. They all have a hair trigger internal truth meter. And they pay attention to it. The most common and most fatal mistake a plaintiff's lawyer can make – in general and in particular in civil rights work – is to blithely believe what the client says. This assertion does not require disbelief, but it does require skepticism. It is not good for the attorney-client relationship to begin with the lawyer challenging the veracity of the client's account. The mindset that best serves the need for skepticism and still fosters a trusting and intimate attorney client relationship is one in which the lawyer does not disbelieve the clients fanciful assertions, but one that causes counsel to be cautious and curious. The client who describes his conduct as sober, peaceful, calm and non-violent before the police officer used force against him may be telling the absolute truth. However, experience and common sense suggest that only in the rarest of circumstances will the police simply begin using force on a non-confrontational, sober, calm, compliant subject. It has no doubt happened, but it is not the norm. So, counsel's job is to probe and investigate.

Usually, in a use of force case, the client has done *something* to invite the police attention. Many citizens don't appreciate the nuances between permissible resistance and arguably illegal non-compliance. The "I didn't do anything" assertion may be accurate in the client's mind, but it rarely is true. Counsel blindly accepts the client's demurrer at his peril. Counsel's task is to ferret out the evidence about what occurred, realizing that the police officers' accounts will likely be just as tainted as the plaintiff's.

Characterization of Plaintiff's Conduct and Neutralizing It:

Just as the police will cast aspersions on plaintiff by characterizing her as on drugs, or drunk, they get the first crack at naming the conduct of the plaintiff, which in turn presumptively legitimizes the conduct of the officers. Perhaps what the client did was 'resisting' but there may be another name for it: self defense. By attaching the 'resisting' label, the officer immediately legitimizes his conduct. It behooves counsel to challenge that label.

This observation leads to another which is a corollary to one made before. The facts that effect a change in counsel's opinions about the case will not be readily apparent or discoverable. Civil rights plaintiffs always seem to be hitting with two strikes on them. The power of the state translates to an immediate advantage in the litigation. Not only can the authorities choose the characterization of the plaintiffs conduct, but they also use the criminal justice system to put plaintiff in legal jeopardy. To carry the baseball metaphor further, the plaintiff's victory usually results from 'small ball' -- doing a lot of little things right, working hard and being diligent and persistent rather than on one big swing of the bat. Plaintiff must be patient at a time when it is supremely difficult. The indignity of the affront compels the desire for immediate action. One of the many ways that counsel can, and must, assist the plaintiff is to make clear how a civil rights case unfolds. They usually get worse before they get better. The race to the finish is more a marathon than a sprint. Patience is crucial to success.

Resisting Defendant's Attempt to Call it All Resisting:

A recent case demonstrates an effort to peel back the layers of defendants' attempt to characterize and justify their use of force against a motorist. In the wake of the death of Stanley Harlan, a 23 year old man in apparently exceptional health who died soon after being tasered, the city and police department made statements to the press and public that accused decedent of assaulting the police, by among other things, pulling away with one hand cuff on and swinging it at the officers. The officers in their reports characterized Stanley's conduct as 'resisting.' Most of the incident was captured on two in-car police video recorders. The incident began as a traffic stop. The officer who made the stop, asked for back-up and two more cars with three more officers arrived. The stopping officer had a conversation with the Stanley. If it was not a cordial visit, it was at worst a disagreement without rancor or threats. When the stopping officer stepped to the rear of his car to 'run' the Stanley via radio, the tasering officer stepped in and almost immediately grabbed Stanley's arm as Stanley took out his cell phone. Ultimately, three officers grabbed the Stanley, who pulled away and moved away from the officers while facing them with his hands in the air. He was then tasered.

The video tape shows the Stanley resisting the efforts of the officers to subdue him, so the challenge was to re-cast that action from a 'resisting' to something else. The following dialogue occurred in the first two depositions taken in the case.

Deposition testimony from Officer Dotson (who was riding with the tasering officer, Baird, and who observed what occurred)

Q. Please tell me every violation of ordinance or law, state law or whatever body of law you're familiar with that you observed while you were present at the scene of Stanley Harlan's death.
A. I observed the resisting between him and Officer Baird.
Q. Any other violation?
A. No, none on the scene.
Q. And I take it from your response any other violations that you might have information about is information you derived from someone else?
A. Yes.
Q. So the resisting, and you've shortened the name for the crime to resisting and so are you talking about resisting in violation of local ordinance, resisting in violation of state law, both or something else?
A. The resisting arrest it would have probably been a state ordinance.
Q. State law?
A. Yes, our ordinances mirror state laws.
Q. I see. So if it's a violation of state law you think it would also be a violation of local ordinance?
A. Yes, it would.
Q. So the full title is resisting arrest, correct?
A. Yes.
Q. And given the title and given the elements of the offense, is it fair to say that for someone to commit that offense they must be under arrest?
A. Yes.
Q. I take it you have some -- have had some training about the importance of notifying a subject who is going to be under arrest that in fact he is being placed under arrest, correct?
A. Yes.
Q. Absent some exceptional circumstance, whenever you -- you've been trained whenever a subject is put under arrest you must inform them you are under arrest?
A. Yes, I inform them.
Q. And that -- and there are a lot of good reasons for that, right?
A. Yes.
Q. Such as?
A. So they know they are.
Q. And that might trigger in them compliance with your request, right?
A. Yes.
Q. It certainly informs them that things have escalated beyond whatever was going on before, correct?
A. Yes.

Q. And it also triggers the potential new offense of resisting arrest if something other than compliance occurs? Returning you to the scene of Stanley Harlan's stop, you said that the violation of law that you observed, the single violation of law by implication in your answer was resisting arrest. And the question I have now is: Did you hear an officer say to Stanley Harlan you are under arrest?
A. No.

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Q. You characterized what you saw between Officer Baird and Mr. Harlan, Stanley Harlan as a resisting arrest, right?
A. Yes.
Q. You also testified you never heard anybody say he was under arrest, correct?
A. Yes.
Q. That would be a precondition for him to be resisting arrest; is that right?
A. Yes.
Q. At the moment it occurred, did you1elieve that a resisting arrest had occurred or was occurring before your eyes?
A. I did not know the circumstances before I observed them -- them starting to struggle.
Q. At the moment you saw the struggle begin, did you believe that you were witnessing a resisting arrest?
A. Before he started to struggle you're asking?
Q. No, at the moment they began to struggle.
A. I believe so, yes.
Q. Can you explain why you characterized it as a resisting arrest and not self-defense?
A. Because the other officers were acting.
Q. Who was the first person to initiate physical contact?
A. Officer Baird.
Q. What did you see Officer Baird do physically first?
A. It appeared he was attempting to place him in handcuffs.
Q. Really. And what -- what actions did you see him take to attempt to place him in handcuffs?
A. He was attempting to place Mr. Harlan's arm behind his back.
Q. That's the first thing you saw?
A. Yes.
Q. Was somebody else holding on to Stanley at that time?
A. No.
Q. It was just Officer Baird holding on to him?
A. Yes.
Q. Is it unlawful to use a cell phone in the city of Moberly?
A. No.
Q. Have you ever been trained that it is lawful for a police officer to direct someone not to use a cell phone?
A. We have an ordinance but.
Q. What's the ordinance say?
A. It's failure to obey a law enforcement officer.
Q. Okay. But does that ordinance require that the order that's failed to be obeyed must be lawful?
A. Must -- no.
Q. So if you tell me to jump off a bridge and I don't do it, you can arrest me?
A. A lawful, lawful order.
Q. Lawful order?
A. Yes.
Q. I'm trying to understand how it can be a lawful order to tell someone not to use a cell phone in Moberly. Can you think of a circumstance in which it would be?
A. No.

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Q. Up to this point at 4:39 in the video, have you seen anything to change your perception that this is a relatively calm situation, Stanley and Officer Breyfogle are having a conversation?

A. No.
Q. Stanley's not presenting a threat to Officer Breyfogle, correct?
A. No.
Q. And the conversation is, if not cordial, it's meaningful, I mean they're not screaming at each other or escalating it, correct?
A. Yes, they're having a conversation.
Q. Any part of your training involve reading body language on the part of people, subjects?
A. Yes.
Q. Anything about Stanley's body language up to 4:47 that based on your training suggests that he is a threat?
A. No.

****

Q. Stop the video. Who's the first person to touch whom in this scenario?
A. Officer Baird.
Q. Did Stanley have something in his hand when Officer Baird touched him?
A. I don't know what it was. I saw him out there.
Q. You don't know what it was? As we sit here today you don't know what it was?
A. I've heard it was a cell phone.
Q. From who?
A. Multiple people.
Q. Has Officer Baird ever explained to you what he was doing grabbing his hand with his cell phone in it?
A. No.
Q. Did Stanley commit an offense prior to Officer Baird putting his hands on him?
A. Other than a traffic, no.
Q. That wouldn't have justified grabbing him when he's got a cell phone in his hand, would it?
A. I don't know what all was said either so I can't -- I can't judge on just seeing.
Q. Just try and answer the question, would you please. Would the traffic stop have justified this officer touching Stanley Harlan when Stanley Harlan had a cell phone in his hand?
A. (WITNESS NODS HEAD.)
Q. No, right?
A. No.
Q. Would -- is there anything, and you said there's no offense committed in your presence now, you haven't seen an offense, right?
A. No.
Q. And even if Officer Baird or Officer Breyfogle or any other officer said put the cell phone away, that would not be a lawful order, would it?
A. It would be a request.
Q. Right. And -- but it would not be an offense not to do it, correct?
A. Yes.
Q. Stop. At 5:10 and probably the 10, 15 seconds before, Officer Baird puts his hands, it appears to me his left hand in the area of Stanley Harlan's pocket or maybe two pockets, you agree?
A. Yes.
Q. And at 5:10 it looks like his hand is, and he's looking at Stanley Harlan's rear pocket; is that right?
A. I can't really gauge that from --
Q. Could be side pocket, but it appears he's --
A. He's looking at him.
Q. Okay. And now we see you have returned to the camera, the field of view in the camera, right?
A. Yes.
Q. You're standing in the right rear area of Stanley's Blazer?
A. Yes.
Q. And this is the point in time when you have moved to this position because you saw the physical conduct between Baird and Stanley, correct?
A. Yes.
Q. But what I see here is you with your hands sort of like gripping the front of your duty belt, is that it?
A. Resting.

Q. Resting?
A. Yes. I stopped there.
Q. Okay. And you're just looking, correct?
A. Yes, because the confrontation stopped.
Q. Stop. Now, you said you stopped where you were at at 5:10 because the confrontation stopped, then you moved, correct?
A. Yes.
Q. And you perceived that the confrontation was on again?
A. Yes, it was -- it was continuing.
Q. What -- who made the next move to continue the confrontation?
A. Officer Baird it looks as on the video.
Q. Did Officer Baird at any time in your presence say you are under arrest?
A. No.
Q. Did Officer Baird at any time in your presence give Stanley any command?
A. Yes, to stop resisting.
Q. When did he say that?
A. When he's attempting to place his hands behind his back.
Q. The first words you heard Officer Baird say to Stanley Harlan were stop resisting, correct?
A. Correct. They were loud, yes.
Q. Stop resisting what?
A. Stop resisting, that's what he said.
Q. What did he mean, stop resisting what?
A. I do not know.
Q. Did Baird ever tell you that he had given Stanley a command?
A. No, I heard him.
Q. Stop resisting?
A. Yes.
Q. Before saying stop resisting, did Baird tell you that he had given him a command?
A. No.
Q. Ever?
A. No.
Q. Did Baird ever tell you he had said you're under arrest?
A. No.
Q. Did Baird ever tell you that prior to saying stop resisting he told Stanley to do anything, put his hands behind his back, drop the cell phone, stand on his head, anything?
A. No.
Q. The first command you're aware of from your observation and from talking to Officer Baird is stop resisting, correct?
A. Yes.
Q. And at this point the only person who has initiated physical contact is Officer Baird, correct?
A. Yes.
Q. And the -- the event had calmed down so much that you were just standing there observing, correct?
A. Yes.
Q. Then it escalated again and that started when Officer Baird began using force again; is that correct?
A. Yes.

****

Q. Is a citizen legally entitled to defend himself against an assault?
A. Yes, he can defend himself.
Q. Does that same rule apply if a police officer is committing an assault against a citizen?
A: Yes.

Deposition testimony from Officer Breyfogle, the officer who initiated the traffic stop.

Q. State your name.

A. Officer Gary Breyfogle.
Q. Did Stanley Harlan ever threaten you?
A. No.
Q. Did he ever hit you?
A. No.
Q. Ever kick you?
A. No.
Q. Did he touch you before you touched him?
A. No.
Q. Did you touch him?
A. At some point in the evening, yes, sir, I touched him.
Q. You put your hands on him, right?
A. Yes, sir.
Q. Why?
A. He was refusing to cooperate with us, sir.
Q. With who?
A. Myself and Officer Baird and other officers on the scene.
Q. Describe how he refused to cooperate with you.
A I went to assist Officer Baird when he requested my assistance.
Q. How did Stanley Harlan refuse to cooperate with you?
A. Pulling away from my grasp.
Q. Pulling away from your grasp?
A. Yes.
Q. How did he refuse to cooperate with anyone else?
A. I believe he -- excuse me -- refused to cooperate with Officer Baird by not taking his hands out of his pockets also, sir.

****

Q. Now, you testified today under oath that you do not recall hearing anyone tell Stanley Harlan that he was under arrest?
A. Yes.
Q. That's your testimony?
A. Yes.
Q. By that testimony, is it fair for me to conclude that you did not tell him he was under arrest?
A. That's what I recall.

****

Q. At 4:11 on the video, you will agree with me, it shows you having a conversation with Stanley Harlan, is that correct?
A. Yes.
Q. And by this time -- by this time Officer Dotson had arrived, correct?
A. With Officer Baird.
Q. And Officer Baird was with him or they were together, right?
A. Yes.
Q. And they both walked up together?
A. Yes.
Q. And Officer Baird was to your right --
A. Yes.
Q. -- at this point?
A. Yes.
Q. He's off camera?
A. Right.
Q. Standing by. Fair to say he was permitting you to conduct the interview or the contact with Stanley Harlan at that point?

A. Yes.
Q. And by that, I mean to ask whether he was involved in any part of the discussion, was he saying anything?
A. At this point, no.
Q. Did he say anything to you as you walked up up to this point in the video?
A. I don't recall.
Q. So you testified earlier today that the way that Stanley Harlan was not cooperating was he was not complying with your directives, your being the officers, specifically Baird's directive to keep his hands out of his pockets, correct?
A. Yes.
Q. I want you to -- we are going to play this video forward and I want you to tell me -- strike that. I want you to say stop at the point in the video when Officer Baird communicated to Stanley that he should keep his hands out of his pockets, okay?
A. Okay.
A. I would say there when he had his hands in his pocket, sir.
Q. So we passed 4:57. A few seconds before that, Stanley it appears reached in his pocket and retrieved what do you think it was?
A. I believe it was his cell phone.
Q. We are going to go through and count how many times he goes in and out of his pocket when he is dealing with you, okay? Have you ever done that?
A. No, sir.
Q. You agree with me he did that, numerous times he went in and out of his pocket while he was dealing with you?
A. He had his hands in his pockets a couple times.
Q. Right. So your testimony was Stanley Harlan was refusing to cooperate with Officer Baird's directive to keep his hands out of his pockets, correct?
A. Yes.
Q. And the command came from Officer Baird at 4:55, 4:56, correct?
A. Can I clarify something real quick, sir?
Q. Yeah, please.
A. I'm standing behind the car at this time, as the other video shows. I'm running this guy's information. I can't see what's going on other than Officer Baird asked me, I need your help, or something to that effect. I can't see everything that is going on in front of that car, sir.
Q. Could you hear it?
A. I could hear him say I need your help or something to that effect.
Q. Did I misunderstand your testimony this morning?
A. No, sir.
Q. Just to be clear, your testimony was the reason you put your hands on Stanley Harlan is because he refused Office Baird's direction not to put his hands in his pockets.
A. Yes.
Q. But you didn't hear that?
A. I don't recall.
Q. Now, we are going to play this video forward, okay. And I want you to stop it again at the point in time when you see Stanley Harlan put either or both of his hands in his pockets, okay?
A. Okay.
MR. RYALS: Go.

(VIDEO PLAYING.)

QUESTIONS BY MR. RYALS:

Q. All right. I'm going to stop the video now because we have come to the point at 5:38 where you have arrived and there's a struggle between Stanley and three police officers, correct, including you?
A. Yes.
Q. And between the time you stopped it before and the time I just stopped it at 5:38, fair to say he did not put his hands or either of them?
A. Not that I observed, no.

Q. At 4:19, what criminal ordinance violation offenses has Stanley committed as far as you know at this point in time?
A. Suspected DWI.
Q. What else?
A. A couple traffic violations.
Q. What?
A. Following too close and speeding.
Q. Anything else?
A. Not at this time.
MR. RYALS: Play it.

(VIDEO PLAYING.)

QUESTIONS BY MR. RYALS:

Q. Stop. Up until this point in time, which is 4:45, and you will agree with me that Officer Baird is about to enter the picture, correct?
A. Yes.
Q. Up until this point in time, did you have any conversation with Officer Baird?
A. No.
Q. Did you communicate any fact to him?
A. Not yet, no.
Q. All right. Fair to conclude that since you didn't communicate any fact to him, what he would know about this situation was what had been communicated on the radio?
A. Yes.
Q. Because nobody else, to your knowledge, would have had any knowledge about this stop such that they could tell Baird what was going on?
A. No.
Q. So what I want you to do now is we are going to play it from 4:46, and I want you to stop the tape when you see a violation of law or Moberly ordinance. Just say stop, okay?
MR. RYALS: Go.

(VIDEO PLAYING.)

THE WITNESS: Stop.

QUESTIONS BY MR. RYALS:

Q. We are at 5:36, correct?
A. Yes.
Q. What violation of law or ordinance do you see at 5:36?
A. Resisting.
Q. Resisting what?
A. Officers.
Q. Resisting officers. Is there a statute that says a citizen shall not resist officers?
A. Fail to obey, that's a better term, sir.
Q. Is that a ordinance or a statute?
A. We have an ordinance for that.
Q. Failure to obey?
A. Yes.
Q. Failure to obey what?
A. Law enforcement officer.
Q. All right. What are the limits of that violation? In other words, can a citizen commit that offense if the command of the law enforcement officer is unlawful?
A. Can you restate your question, sir? I'm sorry.

Q. Does the failure to obey in violation of Moberly ordinance, does it have to be a failure to obey a lawful order of the police?
A. Yes.
Q. What lawful order of police did Stanley Harlan fail to obey at 5:36?
A. Office Baird's commands.
Q. What were Officer Baird's commands?
A. I don't exactly know what he said to him up front of the car.
Q. How do you know he said anything to him?
A. I don't know.
Q. See, you have said that there's a violation here, but you're assuming, aren't you, some facts that you don't have?
A. I know I'm helping Officer Baird.
Q. I understand that. But what are you helping him do, a lawful act or an unlawful act?
A. It's a lawful act, sir.
Q. How is it a lawful act if the command was not lawful to begin with?
A. I don't know if I didn't hear it.
Q. Exactly. How do you know Stanley Harlan is not simply defending himself against an unlawful assault by the police?
A. Officer Baird is not assaulting Mr. Harlan, sir.
Q. You characterize this as a violation of ordinance, right? Failure to obey?
A. Absolutely.
Q. Wouldn't you agree with me, it is equally justifiable to characterize this as self-defense by a citizen?
A. No.
Q. Why not?
A. Officer Baird from what I could tell, he was trying to keep his hands out of his pockets. I didn't hear that, from what I can tell, that's what he was trying to do. And I was trying to assist him when he was having problems with Mr. Harlan.
Q. Did you just see Officer Baird touch Stanley Harlan's pockets?
A. No, I saw him touch the area of his right hip, yes, sir.
Q. Is that called a Terry pat down, Terry frisk?
A. You could characterize it as that, yes.
Q. You know about Terry vs. Ohio, right?
A. Yes.
Q. Would you agree with me as a police officer you cannot simply put your hands on a citizen without legal justification to do so?
A. Yes.
Q. Would you agree with me that the Fourth Amendment would allow a search including a Terry frisk any time there is consent given by the subject?
A. As far as a Terry frisk, I can pat a guy down, okay, without his consent, if I think there's probable cause this guy might be armed, okay. If I feel a weapon without digging into the guy's pockets or taking his clothes off, if I can feel a weapon, I can secure it but I can't be going in his pockets, that's correct.
Q. In order for Officer Baird to touch Stanley Harlan's hip as you have described it, he must have, did you say, probable cause? Actually, it's reasonable suspicion.
A. Reasonable suspicion.
Q. He must have reasonable suspicion that Stanley Harlan is armed, correct?
A. Yes.
Q. Otherwise, the touch by this officer of his hip area, his pockets, is unlawful, would you agree?
A. Yes.
Q. Now, when I interrupted, we were going to play the video forward and you were going to identify any action on the part of Stanley Harlan that you interpret as him trying to go in his pockets.

MR. RYALS: Play it forward, please.

(VIDEO PLAYING.)

QUESTIONS BY MR. RYALS:

Q. Stop. We are at 5:41, you agree we are not going to see Stanley Harlan anymore in this video, correct?
A. That's correct.
Q. And you didn't stop the video in response to my question, did you?
A. No.
Q. Is it against the law in the City of Moberly to possess a cell phone?
A. No.
Q. Is it against the law in the City of Moberly to talk on a cell phone?
A. No.
Q. Under any circumstances?
A. Not that I'm aware of.
Q. Can you identify any lawful justification for a police officer to tell a person not to talk on a cell phone under any circumstances?
A. No.
Q. I take it then since it's not unlawful to possess a cell phone or talk on a cell phone, it would not be proper -- that is, it would not be lawful for a police officer to try to seize someone's cell phone simply because that person is attempting to use it, is that correct?
A. I cannot seize your cell phone, no.
Q. Simply because I'm trying to use it?
A. That's correct.
Q. Under any circumstances, correct?
A. None that I'm aware of.

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Q. Give him any directions other than get back in the car?
A. No.
Q. When Stanley got out, did you perceive that he was a threat to you?
A. No.
Q. From the time that he got out of the car after you stopped him until Officer Baird put his hands on Stanley, did you ever perceive that Stanley was a threat to you?
A. No.
Q. Did you ever perceive that Stanley was a threat to anyone?
A. Prior to the physical contact?
Q. Prior to Officer Baird putting his hands on him.
A. I don't know.
Q. I'm asking for your perception not anyone else's.
A. From my perception he was not a threat to me, no.
Q. Did you perceive that he was a threat to anyone else before Baird put his hands on him?
A. I don't know what the other officers perceived, sir.
Q. I know. I'm not asking what they perceived. I'm asking what you perceived. Did you think he was a threat to anyone else, you?
A. At what time?
Q. Before Baird put his hands on him?
A. No.

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A. There was no intention for this gentleman to die, sir.
Q. Maybe not on your part, right? Who do you mean? Who do you mean no one had intention for this kid to die?
A. None of the officers involved, sir.
Q. How do you know?
A. We are not out to do -- we weren't out to hurt Mr. Harlan.
Q. You are speaking for yourself I take it for sure, right?
A. Absolutely.
Q. How do you know what was in Baird's mind?

A. I don't know what's in Officer Baird's mind. I'm not going to testify for him.
Q. So when you say we had no intention to hurt Stanley Harlan for this to happen, you really don't know what Officer Baird's intention was, do you?
A. I know Officer Baird was not there to hurt Mr. Harlan.
Q. All right. You saw Officer Baird put his hand on Stanley's body, right?
A. Yes.
Q. And would you agree with me, prior to Officer Baird arriving as we talked about before, Stanley had his hands in and out of his pockets several times in your presence, correct?
A. Correct.
Q. You perceived no threat?
A. No.
Q. You perceived no threat at all in Stanley Harlan, right, before Officer Baird arrived?
A. No.
Q. You said you thought he was suspect DWI, correct?
A. Yes.
Q. And you certainly would have been within your rights under those circumstances to place him under arrest suspect DWI, correct?
A. Yes.
Q. And at that point cuff him up?
A. Yes.
Q. Put him in your car?
A. Put him in a car, yes.
Q. Well, you are not going to put him back with your dog obviously but put him in a car, right?
A. Yes.
Q. And you did none of those things?
A. No.
Q. You performed no field sobriety tests?
A. No.
Q. You had no objection to Stanley having his cell phone in his hands, correct?
A. Correct.
Q. Nor using it?
A. Correct.
Q. It was not a violation of law for him to have a cell phone in either hand, correct?
A. Correct.
Q. Or to pull it out of his pocket, correct?
A. Correct.
Q. Or to use it, correct?
A. Correct.
Q. What was Officer Baird doing? Give me a legal justification for Baird putting his hands on Stanley to begin with.
A. I don't know.
Q. Right. He should have never tasered that boy, should he? Go ahead and say it. He should not have tasered that boy, right?
A. I'm not here to say what Officer Baird should or should not have done.
Q. You had a hold of him, right?
A. I'm not here to say what Officer Baird should or should not have done.
Q. You had a hold of Stanley --
A. Correct.
Q. -- when he was tasered?
A. Yes.
Q. It was not necessary to taser him, is that right? Go ahead and say it.
A. I don't know what you want to me to say, sir.
Q. I want you to tell the record and me it was not necessary to taser Stanley Harlan because you had a hold of him.
Q. There were four police officers out there, three of them had their hands on them, didn't they?

Q. You testified before that you had no intention to hurt him. Why did you let go of him and grab the taser instead of taking him down?
A. Sir, I'm not here to tell you why he should or should not have tased Mr. Harlan.
Q. Should you have gotten the dog out?
Q. Absolutely not, right? It's a ludicrous suggestion you would have gotten the dog out under these circumstances, agreed?
A. Yes.
Q. Because you had four officers, three of whom had their hands on this young man, correct?
A. I believe I testified I know I had my hands on him.
Q. I think I understand -- I think your testimony is clear, but I want to make sure that I correctly understand what you are saying about why you touched Stanley Harlan. Is it because Officer Baird asked you to?
A. He asked for my assistance, sir.
Q. All right. And he didn't say help me subdue Stanley, right?
A. I don't recall what the actual words were, sir.
Q. But the context in which the request was made was such that you determined that the action you would take would be to put your hands on Stanley?
A. Yes.
Q. I want to make sure that there's no other reason that you identify, nor why you touched Stanley Harlan other than what you just said?
A. That's correct.
Q. Spoke to Dotson yesterday and he was talking about -- among other things, how the presence of numerous police officers at the scene of an event can raise the stress level and particularly the stress level of the subject, the citizen who is in the encounter. Do you agree with that?
A. Yes.
Q. We will look at the video here, but it appears to me that there was no -- that the matter was under control, the stop was under control by you, and that it escalated into something other than a situation under control when Baird arrived, is that accurate?
A. I don't know if that's accurate, sir.
Q. The change in -- well, let's break it down. Would you agree you had it under control?
A. At the time?
Q. Yes.
A. Yes.
Q. I mean, you were talking to Stan, you were having a conversation with him, right?
A. Yes.
Q. And Baird and Dotson showed up and they didn't feel the need to directly intervene, they permitted you to continue your dialogue, correct?
A. Yes.
Q. You didn't feel threatened, you have already testified about that, correct?
A. Correct.
Q. And fair to say if they felt that you were threatened or you felt threatened, they didn't take any action as a result, correct?
A. Yes.
Q. Before you left the immediate scene, did you hear any profanity from Stanley?
A. I don't recall.
Q. Did you ever give him a command that he did not follow?
A. Yes.
Q. Get back in the car?
A. Yes.
Q. Aside from that, it looked to me like you directed him to go stand somewhere and he went and stood there?
A. Yes.
Q. Did you ever give him a command to put his hands -- assume the position and put his hands on your trunk?
A. No.
Q. Or put his hands behind his back so he could be cuffed up?
A. No.
Q. So aside from not getting back in the car as you have testified to, he did what you told him to?
A. Correct.

Q. Then you left the scene and Baird sort of took over, he stood closer to Stanley, right?
A. Yes.
Q. The event that preceded the escalation of this stop was Baird putting his hands on Stanley, is that accurate?
A. I don't know.
Q. What's the universe of possibilities if not Baird putting his hands on Stanley?
A. A reaction of what Mr. Harlan did.
Q. Would you agree of having the entire shift of officers present at this traffic stop would have increased Stanley Harlan's stress level?
Q. Would you acknowledge that you have been trained that that is an expected consequence of the increase show of force?
A. It can.
Q. And would you agree that you have been trained that a consequence of a police officer putting his hands on a subject is that it can increase the stress level of the subject?
A. Yes.
Q. And escalate the situation to the use of force?
A. Yes.
Q. Apparently in this case, until Officer Baird put his hand on Stanley, the first couple levels of the use of force continuum were effective to control the situation, is that right, that is officer presence and verbal commands?
A. Yes.
Q. Does a citizen have a right to defend himself against a police officer's assault? He does, doesn't he?
A. Yes.

The challenge of neutralizing the police labeling is evidenced by the fact that all the officers have to say is that the subject was resisting. It takes pages worth of deposition dialogue to undermine that conclusion.

The Scene Of The Crime And Other Factors Effecting Case Selection:

While each case, as each client, should be taken on its own merit and each should be reviewed with an open, if slightly cautious mind, experience shows that there are scenarios and factors that suggest either caution or more interested attention. Some of those are summarized in Appendix B, a list prepared in the context of lecturing police officer candidates about civil rights liability.

The Type of Call for Service:

When a police officer receives a call for a domestic dispute, she understands that it presents one of the most hazardous types of police activity. Counsel should probably view the prospective client's account of injury or injustice at the scene of a domestic call with an added layer of caution. Add to the mix an allegation of alcohol or substance abuse at the scene, and the caution may turn more to skepticism. The good thing about domestic cases is that there are often witnesses about and counsel can get a relatively quick and inexpensive corroboration or rebuttal by knocking on few neighbors' doors.

Any claim that arises from a police presence at a club, tavern, bar or other social establishment should be viewed with a similar caution. Witnesses, credible or otherwise, may be more challenging to find. Conversely, if dramatic things happen to a client in a situation in which drama is not the predicted result, the natural question is, "why?" and the answer may be that the officer did something improper. Counsel may be particularly sensitive to the possibility that the client committed 'contempt of cop' or 'talked himself into getting arrested.' Of course, it is usually not unlawful to vituperate against a police officer and if the officer takes exercises his power in response, there is the possibility of a First Amendment claim looming. See, *Nichols v. Chacon*, 110 F. Supp. 2d 1099 (W.D. Ark. 2000)(arrest in retaliation for exercise of First Amendment rights is without probable cause)

There are two facts, taken together or alone, that should always command the attention of counsel: if the plaintiff suffered a head injury from a blow with an instrument and if the officer(s) went into plaintiff's home without a warrant. The corollary to the second fact is if the officer(s) are alleged to have removed the subject from behind the threshold and the offending conduct then occurred outside. Head blows with an instrument are characterized as deadly force. Deadly force can only be used in limited circumstances. *Tennessee v. Garner*, 471 U.S. 1 (1985). Odds are that facts that would justify the police in using deadly force would immediately (or soon after) convince counsel to pass on the case and if there was no justification for the use of deadly force, then the head wound is evidence of a very bad officer or at least a very careless officer.

The home is one the last areas of firm Fourth Amendment protection. Warrantless entry is presumptively unlawful.

See, *Payton v. New York*, 445 U.S. 573 (1980),

Experience With or the Reputation of the Agency:

Counsel will have interest in the reputation of the defendant officer and the agency they work for. Criminal defense lawyers are a great resource, particularly public defenders. It would be foolish to make a decision about a case based only on reputation or even based on personal experience with a department or officer(s). But, if counsel's initial reaction to the prospective client is not positive a good reputation might weigh heavily in support of rejecting the case. Similarly, a poor reputation or past misconduct by the officer or department may persuade counsel to accept a case that appears to be at the margins of desirable.

Corroboration:

Corroboration is the keystone to success in litigation and it is especially important in civil rights litigation. If the client says that he was tasered seven times, there should be physical evidence consistent with that assertion. If the officer minimizes the use of force, an obviously well beaten client is inconsistent with the defense. Corroboration or the failure of corroboration is the aspect of civil rights litigation that most often turns the tide, for better or worse.

Instinct:

A seasoned lawyer was once pitching a civil rights case for possible referral or co-counseling. As he described the plaintiff, he said, "He doesn't work. I don't like that." Instinct honed by experience is more valuable than mere instinct but mere instinct is important and valuable. It is mentioned nearly last in the discussion because it alone, or it along with experience will fail counsel. Not many good lawyers will invest the resources to prosecute a case simply on instinct. But all lawyers should pay attention to it because, at the very least, if counsel has a doubt, someone on the jury will too. If a situation strikes counsel as outrageous, it may turn out not to be, but outrage is a powerful element of civil rights litigation. One judge commented that the bar is higher in a civil rights case. The law may say that the burden of proof is a preponderance, but juries appear to require more mere tipping of the scales. They want good proof and convincing proof that a public servant has violated the trust that most of us have in law enforcement. But, if plaintiff can meet the challenge, the results are often quite satisfactory and even exceptional.

The Law:

It may seem backwards to relegate a discussion of the law to the end of a discussion of factors effecting civil rights case selection. It is insofar as there are incredibly powerful defenses available in the form of immunity from suit for individuals and in the form of the non-respondeat superior rule for municipal liability of *Monell* and its progeny. *Appendix A* is a concise outline of the law effecting civil rights case selection. The most important admonition for plaintiff's counsel is: **Identify a violation of the Constitution, that is clearly established**. This simplistic formulation acknowledges that 'constitutional tort' is misleading insofar as the term suggests that all common law torts are cognizable under the constitution. They are not. While some acts that are torts under the common law also invoke a protection of the Constitution – a battery by a police officer under the common law may also be the use of excessive force under the Fourth Amendment – it is a tempting, but rookie error for counsel to conclude that just because a state actor did something tortious or mean, that there is a constitutional remedy. Moreover, even if the conduct is a violation of the constitution, the individual defendant will be immune -- and it is immunity from suit, not a mere defense – unless the right violated is clearly established in a particularized sense relative to the specific facts of the case. See, *Anderson v. Creighton*.483 U.S. 635 (1987). At the same time counsel is sizing up the plaintiff and investigating the facts, she should be identifying precedent that says the defendant committed a violation of the constitution.

Conclusion:

Lawyers like maxims. Old and crusty lawyers like them more because those who move in the halls of justice long enough appreciate the vagaries of "just" versus "unjust" results. Or perhaps, experience simply proves the powerful truth of the maxim. One interesting maxim is, "if you are explaining, you are losing." It applies to plaintiff's civil rights work. "I had a couple of beers, but...." "I pulled away from the officer, but...." The less explaining the plaintiff has to do, the better for his cause. Another maxim is "plaintiff's victory really comes down to whether the jury likes the plaintiff and/or dislikes the defendant(s)," and its corollary about the like or dislike of the lawyers. While it is clearly a misleadingly simplistic formulation, especially with the qualified immunity defense always looming, there is power and truth in it. In many or most venues, the defendant public servants have an inherent credibility and are liked if not revered by citizen jurors. If counsel thinks to himself, 'this guy (the prospective client) asked for it' chances are the jurors will too.

APPENDIX A

Basic Principles of Litigation Under 42 U.S.C. Section 1983

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I) The Statute:

> *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 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.*

Reduced to its essence, Section 1983 requires pleading and proof of two elements: (1) deprivation of a federal right, (2) by a person who acted under color of law. See, *Gomez v. Toledo*, 446 U.S. 635 (1980).

Professor Martin Schwartz, one of the foremost authorities on Section 1983, opines that there are four elements: "a. conduct by a 'person'; b. who acted under 'color of state law'; c. proximately causing; d. a deprivation of federally protected rights." Martin A. Schwartz, *Fundamentals of Section 1983 Litigation,* in 21st Annual Section 1983 Civil Rights Litigation, Vol. 1, p. 41, 45, Practising Law Institute (October 12, 2004)[1].

Section 1983 contains no state of mind requirement. See *Monroe v. Pape*, 365 U.S. 167 (1961)(rejecting requirement that defendant must have acted 'willfully'). However, the constitutional provision that is invoked may require proof of state of mind. See, e.g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977)(Equal Protection Clause claim for gender discrimination requires showing of intentional discrimination), *Daniels v. Williams*, 474 U.S. 327 (1986)(negligent conduct does not rise to the level of due process violation). *Estelle v. Gamble*, 429 U.S. 97 (1976)(deliberate indifference to serious medical need required to support Eighth Amendment claim of prisoner).

II) The Broad View: Focusing on the Big, Most Frequently Troublesome Issues.

A. IDENTIFY A VIOLATION OF THE CONSTITUTION (OR LAWS).

1. Usually, unless there is a "state actor" there is no violation.

2. The existence and scope of a given Constitutional protection requires careful analysis. Section

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[1] The annual Practising Law Institute program in New York City is an excellent two day immersion into Section 1983 Litigation. Georgetown University and the University of Chicago-Kent College of Law also sponsor annual Section 1983 seminars. The outline of Professor Schwartz, cited here, contains a complete summary of all of the issues in Section 1983 litigation and his multi-volume treatise, cited *infra*, contains an excellent, in depth treatment.

1983 suits for violation of "laws" are limited.

B. IDENTIFY A LEGALLY RESPONSIBLE PARTY.

1. Individuals who act under color of law can be liable. However, an immunity defense is usually available to an individual.

2. A municipality/county is a "person" subject to suit, and is not entitled to immunity. Respondeat superior is expressly rejected as a basis for entity liability.

3. A state is not a "person" subject to suit for damages under Section 1983.

C. SUMMARY JUDGMENT IS COMING

III) Usually, Unless There is a State Actor, There is No Constitutional Violation

Usually, a non-governmental employee/entity cannot violate the Constitution.

"State action" is a Fourteenth Amendment concept. If there is no state action, then the Fourteenth Amendment is not violated, and hence, none of the provisions of the Bill of Rights (applicable to the states through the Incorporation Doctrine) are violated. See, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001).

"Color of law" is, textually, a Section 1983 concept. If there is "state action" the color of law element of Section 1983 is satisfied. If there is no "state action," there is no claim under Section 1983. See, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)(the courts generally treat color of law and state action as meaning the same thing).

A person who abuses the power of his office acts under color of law. *Monroe v. Pape*, 365 U.S. 167 (1961).

While a state actor engaged in his official responsibilities will be subject to suit under Section 1983, there is one exception. A public defender representing clients is not acting under color of law and therefore is not subject to suit under Section 1983. *Polk County v. Dodson*, 454 U.S. 312 (1981).

It is a mistake to conclude that simply because the potential defendant is a private, non-governmental person or entity, that there is no cause of action under Section 1983. For example, in the following circumstances, the private, or arguably private actor may be sued under Section 1983:

$ a private physician under contract to provide medical care to prisoners. *West v. Atkins*, 487 U.S. 42 (1988)

$ The Missouri State High School Activities Association (MSHSAA), which is a non-governmental association, See, *Brentwood Academy, supra*; *ABC League v. Missouri State High School Activities Assoc.*, 530 F. Supp 1033, 1044 (E.D. Mo. 1981)

$ An off-duty police officer may act under color of law. *Rivera v. La Porte*, 896 F.2d 691 (2d Cir. 1990). See generally, *Roe v. Humke*, 128 F.3d 1213 (8th Cir. 1997).

$ A private citizen who conspires with a state actor. *White v. McKinley*, 519 F.3d_806 (8th Cir. 2008).

A series of state action cases reveal circumstances in which private parties may be liable under Section 1983. See, 1 Schwartz, Section 1983 Litigation: Claims and Defenses, §§ 5.11 -5.18 (Aspen, 4th Ed. 2003, Supp. 2005)

IV) Identifying a Violation of the United States Constitution or Laws

Section 1983 creates no substantive rights, rather it is the vehicle for vindication of violations of federal law. See, *Albright v. Oliver*, 510 U.S. 266 (1994). Most Section 1983 suits seek redress for violation of provisions of the

Bill of Rights and the Fourteenth Amendment.

Section 1983 claims have been referred to as "constitutional torts." That phrase may be misleading because not every action that is a common law tort is also a constitutional violation. See, e.g., *Kurtz v. City of Shrewsbury,* 245 F.3d 753 (8th Cir. 2001)(malicious prosecution); *Paul v. Davis*, 424 U.S. 693 (1976)(defamation).

Section 1983 constitutional claims are not limited to those alleging violations of the Bill of Rights and Fourteenth Amendment. See, e.g., *Dennis v. Higgins*, 498 U.S. 43 (1991)(Dormant Commerce Clause). *O'Reilly v. Board of Appeals*, 942 F. 2d 281 (4th Cir. 1991)(Privileges and Immmunities Clause of Article IV)

Not all provisions of the Constitution create rights that may be vindicated in a Section 1983 suit. See, *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989)(Supremacy Clause). A constitutional provision that has not been made applicable to the states through incorporation is not be the basis for a Section 1983 claim. See, e.g., *Edwards v. City of Goldsboro*, 178 F. 3d 231 (4th Cir. 1999)(Second Amendment right to bear arms). But see, *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

If there is a textual source of constitutional protection, it, rather than the amorphous rules of substantive due process will provide the source of protection. See, e.g. *Albright v. Oliver*, supra, *Graham v. Connor*, 490 U.S. 386 (1989). However, that rule does not mean that a claimant is precluded from bringing a claim alleging separate, independent constitutional violations. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993)(Forfeiture of property may violate Fourth Amendment and procedural due process rights). *Nichols v. Chacon,* 110 F. Supp. 2d 1099 (W.D. Ark. 2000)(arrest in retaliation for exercise of First Amendment rights is without probable cause).

Substantive due process may provide protection when a specific provision of the Bill of Rights does not. See, *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)(passenger injured in police pursuit was not "seized," therefore the Fourth Amendment does not apply. Fourteenth Amendment substantive due process does).

Violation of a federal statute can be actionable under Section 1983. See, 1 Schwartz, Section 1983 Litigation: Claims and Defenses, Ch. 4 (Aspen, 4th Ed. 2003, Supp. 2005). "Under [Supreme Court precedent], a federal statute is enforceable under § 1983 unless (1) the statue was not intended to create enforceable rights, or (2) the statutory scheme reflects a congressional intent to preclude its enforcement under § 1983." *Id*. at § 4.01, p. 4-3 (citations omitted).

A wide variety of federal constitutional and statutory claims are asserted under § 1983. A large percentage of § 1983 claims allege some form of police misconduct. Public employees, prisoners, mental patients, recipients of public benefits, licensees, students, consumers, property owners, and other who claim that state and local officials have violated their federal rights routinely invoke § 1983. The Supreme Court described the breadth of § 1983 claims:

> 'A catalog of . . . constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard – to identify only a few.'

Schwartz, *supra,* § 1.01[B], p. 1-6, citing *Wilson v. Garcia*, 471 U.S. 261, 273 (1985).[2] The annotations for the one paragraph statute take up 2300 pages on Westlaw. The lesson for the practitioner is that whenever a state actor is involved, or whenever an arguably state actor is involved, plaintiff's counsel should explore whether a Section 1983

[2] Professor Schwartz provides a comprehensive coverage of protected rights in chapter 3 of his treatise.

claim is viable.

V) Identifying a Legally Responsible Party and That Party's Immunity

A. State

A State is not a Section 1983 "person" for purposes of a suit for damages, but a State official in her official capacity can be sued for prospective relief. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

A suit against an individual in his "official capacity" is a suit against the entity that employs him. *Kentucky v. Graham*, 473 U.S. 159 (1985).

An employee of the State, sued in her individual capacity, may be liable for damages under Section 1983. *Hafer v. Melo*, 502 U.S. 21 (1991).

Moreover, the Eleventh Amendment bars suit for retrospective relief against a State under Section 1983. *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974).

B. Municipality/County

A municipality [3] is a person under Section 1983. *Monell v. Department of Social Services*., 436 U.S. 658 (1978). Counties may be liable under Section 1983. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Smith v. Copeland*, 892 F. Supp. 1218 (E.D. Mo. 1995).

A municipality is not subject to liability based on respondeat superior. *Id.* [4] The bases for entity liability can be categorized as follows:

a. the municipality has an express policy that causes a constitutional violation. *Id*.

b. the municipality has a custom and practice or usage of engaging in the constitutionally violative conduct. See, *City of St. Louis v. Praprotnik*, 485 U.S.112 (1988).

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3 The terms 'municipality,' 'county' and 'entity' are used interchangeably here, as they generally are in the cases.

4 The no-respondeat-superior rule has been called into question by several Justices. See, *Board of County Cmmnr's. of Bryan County v. Brown*, 520 U.S. 397, 430-437(1997)(Breyer, J. dissenting); *Oklahoma City v. Tuttle,* 471 U.S. 808, 834-844 (1985) (Stevens, J. dissenting).

c. a municipal policymaker makes a decision that causes a constitutional violation. *Id*.; *Pembaur v. Cincinnati*, 475 U.S. 469 (1986).

d. the municipality is deliberately indifferent in failing to take action to prevent the constitutional violation suffered by plaintiff. See, e.g., *City of Canton v. Harris*, 489 U.S. 378 (1989)(failure to train police officers), *Board of County Cmmnr's. of Bryan County v. Brown*, 520 U.S. 397 (1997)(deliberate indifference in hiring)[5]

A strict standard of causation must be satisfied for liability to attach to a municipality. The deficient policy or custom of the municipality must be the "moving force" behind the constitutional violation suffered by the plaintiff. *Bryan County, supra*.

A municipality is immune from claims for punitive damages. *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981).

A municipality is not protected by immunity from suit. *Owen v. City of Independence*, 445 U.S. 622 (1980); *Leatherman v. Tarrant*, 507 U.S. 163, 166 (1993).

D. Individuals: Capacity in Which Defendants are Sued

When suing an individual in her individual as opposed to, or in addition to, his official capacity, the complaint must clearly reveal that fact. Absent a clear indication that the suit seeks individual capacity liability, the court will construe it to be one against the individual in his official capacity. *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989).

E. Individuals: Absolute or Qualified Immunity?

1. Absolute Immunity protects:

a. Judges – if performing judicial acts that are not in clear absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978).

b. Prosecutors – if acting "as an advocate for the state" and the conduct is "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). However, prosecutors may be entitled to only qualified immunity for acts that are investigative or administrative. See, e.g., *Kalina v. Fletcher*, 522 U.S. 118, (1997)(swearing to facts in support of probable cause); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)(holding a press conference and conducting investigation prior to probable cause determination).

c. Witnesses – who testify in a judicial proceeding. *Briscoe v. LaHue*, 460 U.S.325 (1983). Mere qualified immunity protects the "complaining witness," who initiates a prosecution. *Malley v Briggs*, 475 U.S. 335 (1986).

d. Legislators – for their legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

2. Qualified Immunity protects:

a. all other individual state actors, who carry out executive or administrative

[5] Justice Souter's dissent in *Bryan County*, 520 U.S. at 416, contains an excellent, concise explanation of the bases for municipal liability.

functions, when:

1. there is no violation of the constitution or,

2. the right alleged to have been violated was not "clearly established"

Hope v. Pelzer, 536 U.S. 730 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Qualified immunity is immunity from suit, not mere immunity from liability. The denial of a motion asserting qualified immunity may be immediately appealable. *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Private persons are not entitled to the protection of qualified immunity. See, *Richardson v. McKnight*, 521 U.S. 399 (1997); *Wyatt v. Cole*, 504 U.S. 158 (1992).

VI) Miscellany

A. Forum A Section 1983 action may be prosecuted in state court.

B. Statute of Limitations

Section 1983 contains no statute of limitations. The general or residual limitations period in the state in which the claim is filed controls. *Wilson v. Garcia*, 471 U.S. 261 (1985)**.** In Missouri, the statute of limitations for Section 1983 suits is five years. *Sulik v. Taney County*, *Mo.,* 393 F.3d 765 (8th Cir. 2005).

"[T]he accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace v. Kato*, 127 S. Ct. 1091, 1095 (2007)(emphasis by the Court).

The Supreme Court has generally referred to state law on the issue of statute of limitations tolling. *Wallace v. Kato*, 127 S. Ct. 1091 (2007).

C. Pleadings

Notice pleadings are sufficient. *Swierkewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant*, 507 U.S. 163 (1993), *Erickson v. Pardus*, 127 S.Ct. 2197 (2007). However, decisions of the Court create an issue about whether a 'heightened' pleading standard may apply to certain Section 1983 claims. *Iqbal v. Hasty*, 490 F. 3d 143, 153-59 (2nd Cir. 2007)(thorough and careful analysis of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.1955 (2007) and of the conflicting signals to be found in the Supreme Court pleading jurisprudence).

D. Damages

"Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

While plaintiff may recover for common law based, traditional tort damages, he may not recover damages for the intrinsic value of the constitutional right that was violated. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

E. Heck v. Humphrey

"We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or

sentence that has *not* been so invalidated is not cognizable under § 1983." *Heck v. Humphrey* 512 U.S. 477, 486-87 (1994).

Caution: The mere fact of a conviction does not mean that every claim that the Plaintiff may assert is subject to the *Heck* rule. See *Wilkinson v. Dotson,* 544 U.S. 74 (2005)(inmates challenge to eligibility and suitability under Section 1983 not barred by *Heck*); *Whitmore v. Harrington*, 204 F.3d 784 (8th Cir. 2000)(unlawful stop claim not barred by *Heck*).

APPENDIX B

YOU MIGHT BE A DEFENDANT IF :

1. YOU HIT A SUBJECT IN THE HEAD WITH AN INSTRUMENT.
2. YOU ENTER/SEARCH A HOME WITHOUT A WARRANT.
3. YOU EVER THINK/UTTER THE PHRASE, "I'M THE POLICE, I CAN DO WHATEVER I WANT.
4. YOU EVER THINK/UTTER THE PHRASE, "YOU DON'T HAVE ANY RIGHTS."
5. YOU EVER THINK/UTTER THE PHRASE, "DON'T COOPERATE, YOU GO TO JAIL."
6. YOU EVER ARREST SOMEONE FOR "CONTEMPT OF COP."
7. YOU EVER PERMIT ANOTHER OFFICER TO VIOLATE THE LAW OR A CITIZEN'S RIGHTS IN YOUR PRESENCE.
8. YOU EVER ASK A CITIZEN FOR A DATE WHILE ON THE JOB.
9. YOU EVER USE POLICE POWERS IN A PERSONAL SITUATION.
10. YOU EVER STRIKE OR ABUSE A SUBJECT AFTER THE SUBJECT HAS BEEN SUBDUED.
11. YOU EVER LIE TO PROTECT YOURSELF OR ANOTHER OFFICER.
12. YOU EVER STRIP/BODY CAVITY SEARCH A SUBJECT.
13. YOU EVER TREAT A PERSON WHO IS NOT A WHITE MALE, DIFFERENTLY THAN YOU WOULD A WHITE MALE.
14. YOU EVER PUT HANDCUFFS ON TOO TIGHT.
15. YOU EVER GET BETWEEN A SUBJECT AND HIS LAWYER.
16. YOU WORK IN A DEPARTMENT WHERE ANY OF THE FOREGOING OCCURS.

MOST COMPLAINTS/LAWSUITS ARISE FROM ENCOUNTERS INVOLVING RELATIVELY MINOR OFFENSES, THAT IS FROM ARRESTS AND CONDUCT NOT INVOLVING SERIOUS FELONIES.