

# Section 1983 and the Narrowing Scope of Liability for the Government

A brief overview of claims under 42 U.S.C. § 1983

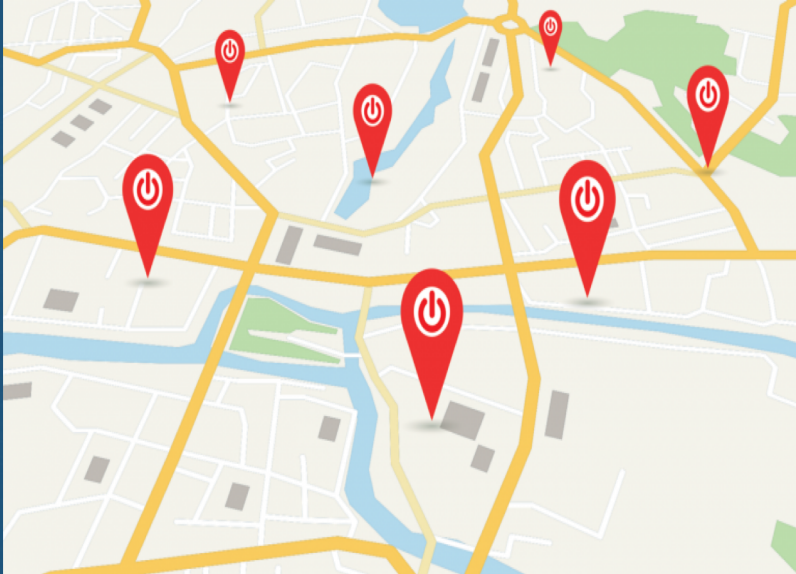
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WILLIAM W. KRUEGER III  
BENJAMIN J. GIBBS  
MAVISH BANA





# Roadmap



- Brief overview of § 1983
- Municipal Liability
- Individual Liability and Qualified Immunity
- “Clearly Established” Law
  - *Fact Specific Analysis and Sheehan*
  - *Mullenix v. Luna*
  - *Supreme Court Analysis*
  - *5<sup>th</sup> Circuit Cases*
- Lessons to Take Back to the Office



# Overview of 42 U.S.C. § 1983

Enabling statute

No substantive rights, merely  
remedies

Act under “color of state law”

“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 [...].”

42 U.S.C. § 1983

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# The Elements of § 1983

**Section** 1983 does not specify what kind of causation is required for a valid claim.

1. A Person
2. Under Color of Law
3. Subjects or Causes to be Subjected
4. Any Citizen or Person under the Jurisdiction of the United States
5. To a Deprivation of Rights, Privileges, or Immunities



# § 1983 is a Species of Tort

In *Wilson v. Garcia*, the Supreme Court explicitly identified § 1983 as a personal-injury tort.

*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727-29 (1999) (quoting *Wilson v. Garcia*, 471 U.S. 261, 277 (1985)).

- Purports to compensate plaintiff for violation of legal rights
- Legal rights derive from the Constitution and Federal law, instead of common law or state statutes
- In some cases the damages claimed are identical (excessive force)



# Tort-Claim Concepts Fill the Gap

The Supreme Court uses tort-claim concepts to aid in their analyses when § 1983 or federal common law remain silent.

- For Example:
- Statute of Limitations for § 1988
  - *See Wilson v. Garcia*, 471 U.S. 261, 277 (1985))
  - *See Shelby v. City of El Paso*, 577 F. App'x 327, 331 (5<sup>th</sup> Cir. 2014)



# The Ninth Circuit “Provocation” Rule

Federal common law has developed certain causation requirements for certain constitutional claims.

- Under the “Provocation Rule”
  - In an alleged series of Constitutional violations, a Plaintiff need only prove the first *caused* a deprivation of rights.
  - Subsequent alleged violations would be presumed to cause deprivation of Rights.
- Post-*Mendez*: A Plaintiff must prove causation for each Cause of Action
  - An invalid search does not render a later use of force excessive.
  - Each alleged violation must be analyzed completely, and each element proved.





## Provocation Rule

Supreme Court: “the provocation rule ...is incompatible with our excessive force jurisprudence”

### *Graham v. Connor (1989)*

- The Objective Reasonableness standard
- Operative question in excessive force – “whether totality of circumstances justifies a particular sort of search or seizure”.
- Judged from the perspective of reasonable officer on the scene, rather than 20/20 vision of hindsight.



# Municipal Liability Claims

## Elements:

- (1) a policymaker;
- (2) an official policy; and
- (3) violation of constitutional rights whose *moving force* is the policy or custom.”

*Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir. 2012) (citing *Hampton Co. Nat’l Sur., LLC v. Tunica Cty.*, 543 F.3d 221, 227 (5th Cir. 2008)).

- Species of Vicarious Liability:
  - Policymaker
  - Policy
  - Constitutional Violation
- Failure-to-Train Claims
  - Deliberate Decision
  - Affirmative Link



# Pattern, Practice, or Custom

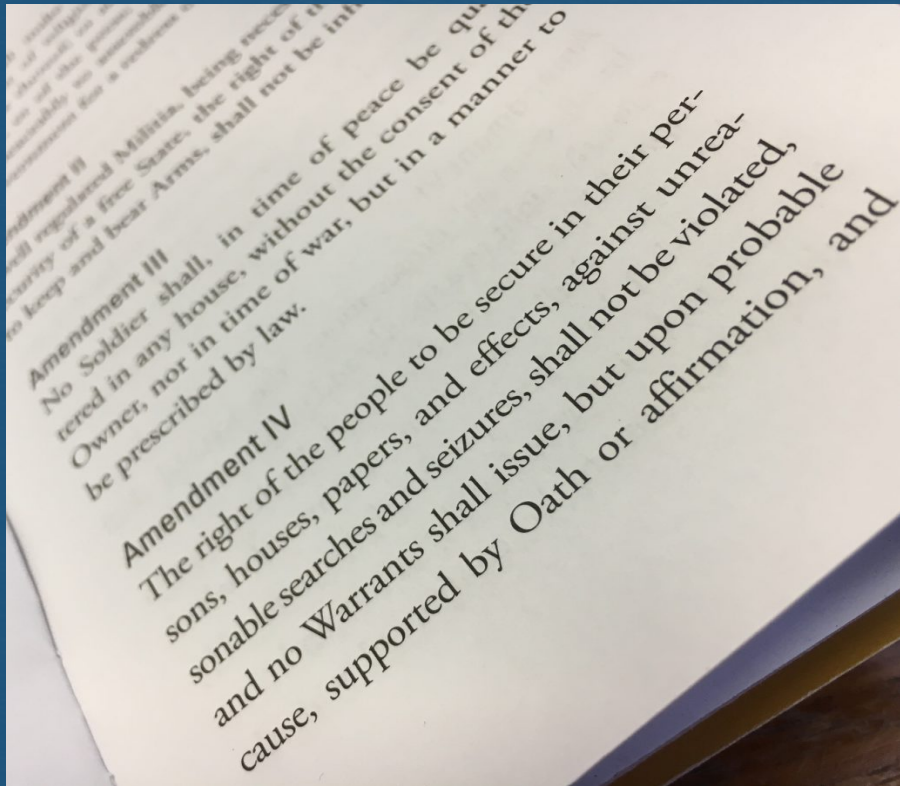
A persistent, widespread practice of City Officials or Employees which, although not authorized by officially-adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents Municipal Policy.

*Bishop v. Arcuri*, 674 F.3d 456 (5<sup>th</sup> Cir. 2012); quoting *Bennett v. City of Slidell*, 735 F.2d 861 (5<sup>th</sup> Cir. 1984)

- Demonstrating a widespread practice:
  - Specific, Factual Instances
  - Actual or constructive knowledge by a Municipal Policymaker
- Single, Isolated Instance
  - Generally Insufficient
  - Unless remarkably egregious
    - *Grandstaff v. City of Borger*, 767 F.3d 161 (5<sup>th</sup> Cir. 1985)



# Individual Liability and Qualified Immunity



- Executive/Qualified Immunity
  - Predates § 1983
  - *See, e.g., Den Ex Dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272 (1855); *De Groot v. United States*, 72 U.S. 419 (1866)



# Qualified Immunity Analysis

- Two-Prong Analysis:
  - 1. Was there an underlying violation?
    - § 1983 Elements
  - 2. Was the specific conduct Clearly Established as violative?
    - Does the Case Law place the statutory or constitutional question “beyond debate?”
    - Was the law so clear that every reasonable officer would have known that the specific conduct was violative?



# *Sheehan's* fact-specific analysis

*City and County of San  
Francisco v. Sheehan*, 135 S.  
Ct. 1765 (2015).

- Qualified Immunity
  - *Graham v. Connor* sets out Excessive Force factors
  - *Graham* is too general to control generally
- “No precedent clearly established that there was not ‘an objective need for immediate entry’ here.”
  - *Sheehan* at 1777



# *Mullenix v. Luna* (2015) and Qualified Immunity

5<sup>th</sup> Circuit Case

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- Six Months after *Sheehan*
  - An officer made contact with Leija at a fast-food restaurant
  - The Officer attempted to serve a warrant.
  - Leija led officers on an 18 minute automobile chase
  - Leija threatened to shoot officers, and claimed to have weapons
  - Spike strips had been deployed
  - Mullenix attempted to shoot Leija's engine from an overpass, against explicit orders.
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# *Mullenix* at the District and Fifth Circuit Courts

- The District Court denied Mullenix's Qualified Immunity
  - The Court found that a genuine issue of material fact existed
- The Fifth Circuit Affirmed
  - The Fifth Circuit found an issue of fact as to the "immediacy of the risk" posed by Leija.
  - The Fifth Circuit denied *en banc* review
  - The Court found that factors which justified deadly force in previous cases were absent in this case
  - The Fifth Circuit held it was clearly established that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.



# The Supreme Court Decision in *Mullenix*

- The Dispositive question, as stated in *Sheehan*, is whether the particular conduct was clearly established as violative
- The question, then, is whether Mullenix behaved reasonably under *these circumstances*
- No precedent squarely governed the facts



## Supreme Court Analysis since *Mullenix*

### Not Clearly Established

- *White v. Pauly*,  
137 S. Ct. 548 (2017)
  - Officer arrived late to a shootout, and shot a man without first shouting a warning
- *Kisela v. Hughes*,  
138 S. Ct. 1148 (2018)
  - Officer fired on a woman standing and holding a knife
- *District of Columbia v. Wesby*,  
138 S. Ct. 577 (2018)
  - Officers arrested people who seemed to be attending an exotic dance club in an abandoned house



# Vann v. City of Southaven

884 F.3d 307 (5<sup>th</sup> Cir. 2018)

- Not Clearly Established: An officer fired on an car attempting to escape, after being boxed-in by unmarked police cars in a parking lot
- Dissent cited Provocation Rule
  - On Rehearing, 5<sup>th</sup> Circuit Granted Qualified Immunity
- “In the district court, Plaintiff, Vann's representative, cited nary a pre-existing or precedential case. That alone dooms his case here.”





# Hale v. City of Biloxi

731 F. App'x 259 (5<sup>th</sup> Cir. 2018)

- Not Clearly Established: An officer fired on a man who took his hand out of the Officer's line of sight, to obtain a cigarette lighter, after being ordered not to
- It is insufficient to differentiate other cases; "Clearly established" will generally require case law on point





# Lessons to Take Back to the Office

- Elements of a § 1983 Claim
- Municipal Liability and a “Pattern, practice, or custom”
- Individual Liability and “Clearly Established”

## § 1983 and Me

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William W. Krueger III

Benjamin J. Gibbs

Mavish Bana

