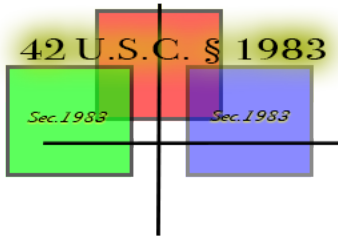
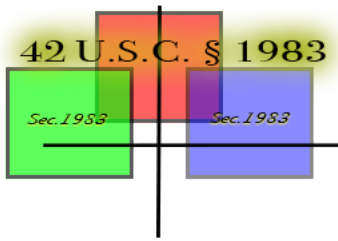


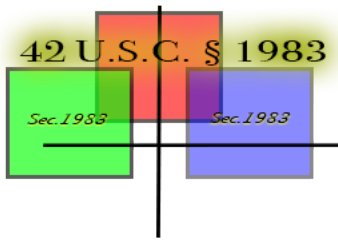
Individual v. Official Capacity

- Complaints should specify capacity in which each Defendant sued
- Capacity impacts the ***relief*** and ***defenses*** available
- **Injunctive** relief: typically only available from Defendants in their official capacity
- **Damages**: typically only available from Defendants in their individual capacity, but subject to defense of **qualified immunity**.



42 U.S.C. 1983

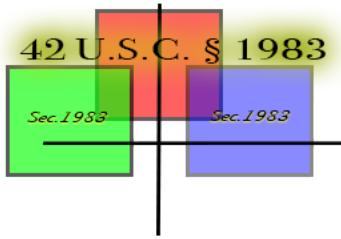
- "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable…"



Will v. Michigan, 491 U.S. 58 (1989)

- "a State is not a 'person' within the meaning of § 1983"

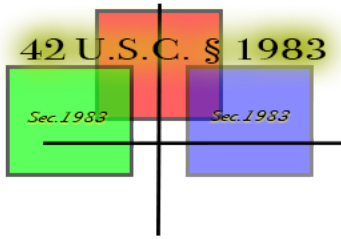
- "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. …As such, it is no different from a suit against the State itself…. We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."



Will v. Michigan, 491 U.S. 58 (1989)

- Footnote 10: "Of course a state official in his or her official capacity, when sued for **injunctive relief**, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'"

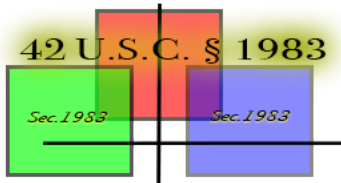
- Takeaways:
  - Neither the State nor a state official sued in their official capacity can be sued for damages in an action under Section 1983.
  - State officials in their official capacity can be sued for injunctive relief to the extent consistent with the 11th Amendment.



Methods of Establishing *Monell* Liability

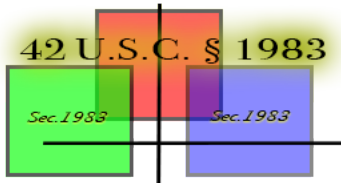
1. Officially adopted policy (*Monell v. Dep't of Social Services* (1978))
2. Widespread custom or practice that has the force of law
3. Failure to _____ or "gap in policy" that, while not unconstitutional itself, is *deliberately indifferent* to the violation of citizens' constitutional rights by non-policymakers (*City of Canton, Bryan County v. Brown, Connick v. Thompson*)
   - Note: Deliberate indifference can be shown by demonstrating:
   a. obvious need to _____ to prevent constitutional violations *or*
   b. pattern of similar violations putting entity on notice of problem.
4. Attribution of unconstitutional decision or act of final policymaker to entity (*Pembaur*)

- In all cases, Plaintiff must show that policy or custom or failure to _____ was the "moving force" behind and proximate cause of the constitutional injury.
- No respondeat superior liability



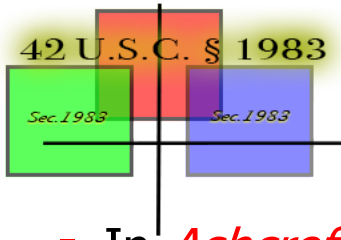
Recent Cases on Policy/Custom/Failure to Train

- *Wadsworth v. Nguyen* (1st Cir. Feb. 19, 2025)
  - SJ for school district on failure to train claim where no pattern shown and no obvious need to train staff on how to report sexual harassment when the harasser is the principal.
- *Cosenza v. City of Worcester* (1st Cir. 2024)
  - SJ for City where no record evidence that Worcester had an express policy that caused its officers to fabricate or suppress evidence or failed to train its officers in that regard.
- *Cohen v. City of Portland* (1st Cir. 2024)
  - A finding of municipal liability under a failure-to-train theory requires a predicate constitutional violation by an individual defendant.
  - Note: While there *must be a constitutional violation*, there *need not be a finding of liability on the part of an individual actor*.
- *Kurland v. City of Providence* (D.R.I. 2024)
  - A reasonable jury could find that a **custom of ordering people on public sidewalks to move without cause** exists in the Providence PD that caused a constitutional harm to P.



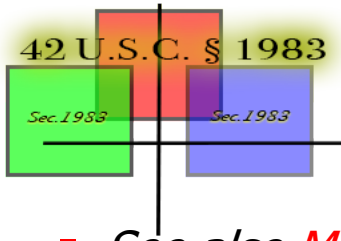
Recent Cases on Policy/Custom/Failure to Train

- *Monteiro v. Cormier* (D.R.I. 2023)
  - SJ for Pawtucket denied where evidence could support finding of no training in DNA.
  - In era when DNA testing is established tool of law enforcement investigations, and PPD had been using DNA evidence since 2005, a jury could find that total failure grossly negligent.
  - Evidence also supported finding that PPD officers received no training in how to draft applications for warrants, what those applications should include, or how they should handle exculpatory evidence.
- *Gonsalves v. Clements* (D.R.I. 2021)
  - Like the firearms discussed in *Canton*, vehicles can be weaponized to effect deadly force.
  - Because of this inherent dangerousness, Plaintiff may be able to establish that the risk of constitutional violations was so patently obvious or highly predictable that the supervisory and municipal Defendants are liable for failure to train despite a lack of prior incidents.
  - But, the lack of alleged prior incidents dooms the improper hiring, screening, supervision, remediation, and discipline claims.
  - If there were no prior unconstitutional acts, there were no opportunities for supervisors or City to discipline or correct the officers' behavior.



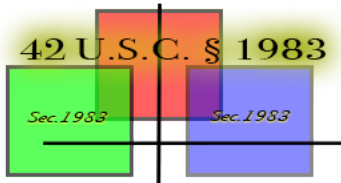
Supervisory Liability

- In *Ashcroft v. Iqbal* (U.S. 2009), S. Ct. made clear that for a supervisor to be held liable under §1983, the supervisor must have violated the Constitution.
- *Justiniano v. Walker* (1st Cir. 2021)
  - A supervisor cannot be held liable under § 1983 on a respondeat superior theory.
  - A supervisor's liability must be premised on his or her own acts or omissions and does not attach automatically even if a subordinate is found liable.
  - Generally, will require showing of deliberate indifference that caused the subordinate to violate the Constitution.
  - Deliberate indifference requires a plaintiff to demonstrate or allege (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk.
- *See also Parker v. Landry* (1st Cir. 2019) (no plausible supervisory liability claim where no allegations supported actual or constructive knowledge on part of supervisors of rogue correctional officer's sexual abuse of female prisoner)



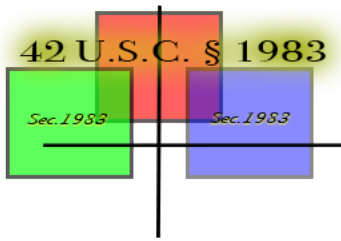
Supervisory Liability

- *See also* *Morales v. Chadbourne* (1st Cir. 2015)
  - Plaintiff set out plausible claim that heads of the ICE Boston Field Office and Rhode Island sub-office, knew or should have known that their subordinates, regularly issued immigration detainers against individuals such as Ms. Morales, without conducting sufficient investigation and without probable cause to believe that the subject of the immigration detainer was a non-citizen subject to removal and detention.
  - These supervisors either formulated and implemented a policy of issuing detainers against naturalized U.S. citizens without probable cause or were deliberately indifferent to the fact that their subordinates were issuing detainers against naturalized U.S. citizens without probable cause.
- *Morales v. Chadbourne* (D.R.I. 2017)
  - Director Chadbourne is liable for the unconstitutional detainer because his supervision and training of his agents, or the lack thereof, was deliberately indifferent to the possibility that their performance, ignorant of the legal standard for issuing a detainer, could cause a deprivation of civil rights.



Supervisory Liability

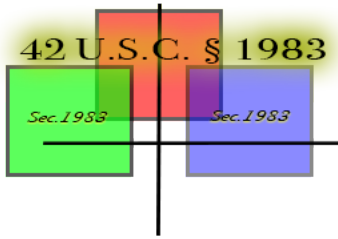
- *See also* *McLaren, as Administratrix of the Estate of Leyland v. Salisbury* (D.R.I. Mar. 18, 2025) and *De Los Santos, as Administratrix of the Estate of De Los Santos v. Salisbury* (D.R.I. Mar. 18, 2025)
  - Supervisory liability may attach under § 1983 for failure to train police or correctional officers on the prevention of detainee suicides.
  - In both cases, Estates asserted plausible claims that the Supervisory Defendants failed to train the John Doe CO Defendants on the RIDOC's suicide-prevention policy, failed to implement the policy, and failed to hold COs responsible or accountable for violating the policy, thus demonstrating deliberate indifference to serious and known medical need.



Sovereign Immunity and the 11th Amendment

- *Kentucky v. Graham*, 473 U.S. 159, 169 (1985): "absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court."

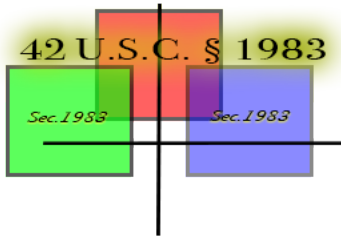
- In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court carved out injunctive relief and ruled that federal courts may enjoin state officials from ongoing violations of federal law.



11th Amendment

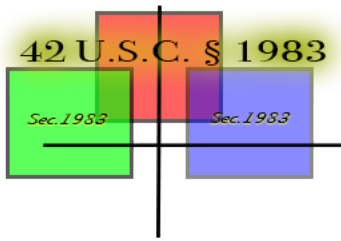
- 11th Amendment immunity is not absolute
  - Congress may abrogate the States' sovereign immunity.
  - States may consent to suit in Federal Court
  - Immunity may be waived

- Section 1983 did not abrogate the Eleventh Amendment immunity of the states. *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)



11th Amendment

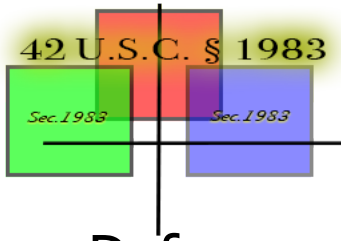
- The test for determining whether the State has waived its Eleventh Amendment immunity from suit in Federal Court is "a **stringent one**."… "Consequently, a state will be deemed to have waived its immunity 'only where **stated by the most express language or by such overwhelming implication** from the text as will leave no room for any other reasonable construction.'" *Bergemann v. State of R.I.*, 676 F. Supp. 2d 1, 5 (D.R.I. 2009).
- *Laird v. Chrysler Corp.*, 460 A.2d 425 (R.I. 1983): interpreted the State Tort Claims Act to waive immunity for bringing tort claims against the State in federal court.
- *Langley v. Rhode Island*, No. 24-CV-031-JJM-PAS, 2024 WL 3677801, at *4 (D.R.I. Aug. 6, 2024): State has not waived its Eleventh Amendment immunity as to a Fair Employment Practices Act ("FEPA") claim.



11th Amendment

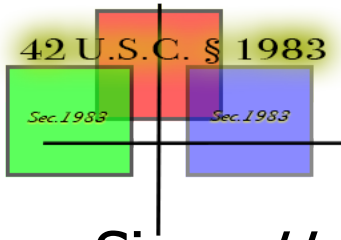
- A state's conduct during litigation may amount to a waiver of its Eleventh Amendment immunity. *Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002).

- *See also Bergemann v. Rhode Island Dep't of Env't Mgmt.*, 665 F.3d 336, 340 (1st Cir. 2011).



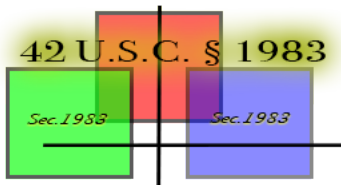
Qualified Immunity: Basic Principles

- Defense only for individuals sued in individual capacity
- Individual must have been acting within the scope of discretionary authority
- Defense only to damages actions
- Immunity not just from liability, but from suit and burdensome discovery; thus, availability of interlocutory appeals at both 12(b)(6) and summary judgment stages
- The QI analysis has two steps:
    1. Has P asserted the violation a federal constitutional (or statutory) right under current law?
    2. If so, was that right clearly established at the time of the challenged conduct?
- Modern QI doctrine is the product of the S. Ct. decision in *Harlow v. Fitzgerald* (1982).



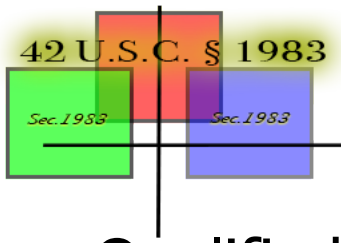
Qualified Immunity: Current Landscape

- Since *Harlow* (1982) the S. Ct. has confronted the qualified immunity issue in roughly 30 cases.
- Plaintiffs have prevailed three times. *Hope* (2002); *Groh* (2004); *Taylor v. Riojas* (2020)
- *See also McCoy v. Alamu, cert. granted, vacated and remanded in light of Taylor v. Riojas*
- Note that *Hope, Taylor, and McCoy* all involve claims under 8th Amdt, not 4th.
- The doctrine has been subject to much criticism by scholars and judges from both the left and the right.
- Yet, since June 2020, the Supreme Court has denied cert. in 74 cases (by my count) where qualified immunity was in issue, demonstrating little to no interest in modifying or eliminating the doctrine.



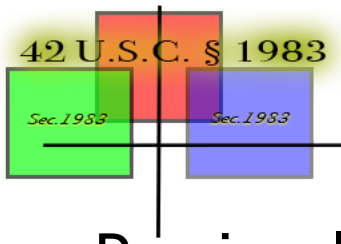
Still Confusion on Some Basics of the Doctrine

1. Who Has the Burden of Proof?
2. Should a court address the "merits" prong when prong 2 is dispositive?
3. What Law Controls?
4. How Clear Must Clearly Established Law Be?
5. What is the Role of the Judge and Jury?



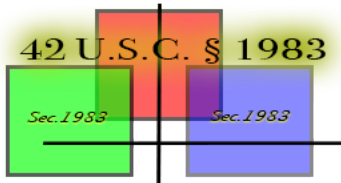
Burden of Proof

- Qualified immunity is an affirmative defense. *Gomez v. Toledo* (1980)
- But, once raised, some courts hold that the burden then shifts to the **Plaintiff** to show that the right allegedly violated was clearly established. *See, e.g., Lachance v. Town of Charlton* (1st Cir. 2021)
- Courts in 2d, 3d, and 4th Circuits put burden on the Defendant.
- But note that the ultimate QI question presents a question of law. Thus, a court should use its full knowledge of its own and other relevant precedents. *Elder v. Holloway* (U.S. 1994) *See also Baca v. Cosper* (10th Cir. Feb.24, 2025)



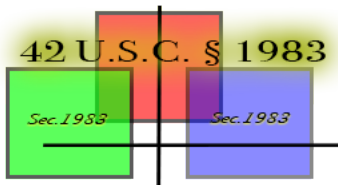
Order of Battle in Two-Step Analysis

- Previously, *Wilson-Saucier* sequencing:
  - Required courts to (1) decide whether P asserted the violation of a constitutional right under current law *before* (2) determining whether the identified right was clearly established at time of the challenged conduct.
- *Pearson v. Callahan* (2009)
  - Rejects the "rigid order of battle"
  - Allows courts to jump to second prong without deciding "merits" question
- *D.C. v. Wesby* (2018): We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim.
- Most courts are following the S. Ct.'s lead and "jumping to the second prong."



Order of Battle in Two-Step Analysis

- But, there are an increasing number of cases where appellate courts are deciding the "merits" question, even when granting QI on prong two.
- *See, e.g., Perry v. Spencer* (1st Cir. 2024) (en banc)
  - While Perry supportably has shown that his segregated confinement implicated a liberty interest and that the defendants denied him the process that was due to him before depriving him of that interest, there is no basis for concluding on this record that it would have been clear to a reasonable corrections officer that the confinement implicated a liberty interest.
  - In so holding, we clarify both the circumstances in which the use of solitary confinement results in a deprivation of a liberty interest that the Due Process Clause protects and the process that is due in consequence of such a deprivation.
  - We have discretion to bypass the first step if we conclude that the right was not clearly established at the time of its alleged violation
  - We decline to bypass that first step here, however, because of the stakes involved in the use of prolonged solitary confinement and the concomitant need to provide legal clarity in this area.

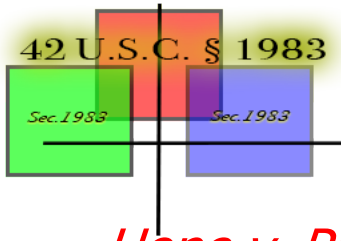


What Law Controls?

- Wilson v. Layne (1999) suggests:
  - Decisions of Supreme Court
  - Controlling authority from jurisdiction: Court of Appeals/highest court of state
  - Law of other jurisdictions: consensus of persuasive authority
- But, the Supreme Court recently has reserved judgment on the question whether decisions of a federal court of appeals are a source of clearly established law for purposes of qualified immunity analysis. *See City of Escondido, Kisela v. Hughes, Taylor v. Barkes, City & Cnty. of San Francisco, Cal. v. Sheehan*, *Carroll v. Carman,* and *Reichle v. Howards.*
- *DC v. Wesby* (2018) (We have not yet decided what precedents--other than our own-- qualify as controlling authority for purposes of qualified immunity.)
- *See Wadsworth v. Nguyen* (1st Cir. Feb. 20, 2025) (We have made clear that we may look to the case law of sister circuits in determining whether a right was clearly established)

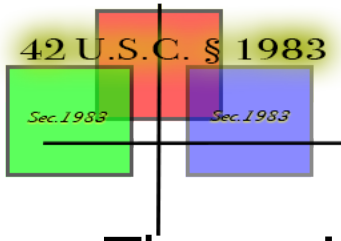
What's Constitutes a "Consensus of Persuasive Authority?"

- ***Compare*** ***Frasier v. Evans*** (10th Cir. 2021), *cert. denied* (2021) (granting QI to officers on 1st Amendment claim arising out of citizen video recording them while they were engaged in performing duties in public place, even though officers admitted being trained and having knowledge that such a right existed and even though **Four Circuits** had held such a right existed at the time of the conduct (2014). There was no case from the S. Ct. or the Tenth Circuit.) ***with*** ***Irizarry v. Yehia*** (10th Cir. 2022) (denying QI on same when events took place in 2019 and by that time, **Six Circuits** had held that citizens have a First Amendment right to record officers when engaged in their official duties in public.
- ***Compare*** ***Irish v. Fowler*** (1st Cir. 2020), *cert. denied* (Sister circuit law is sufficient to clearly establish a proposition of law when it would provide notice to every reasonable officer that his conduct was unlawful. Here, officers put on notice by consensus of persuasive authority (**Nine Circuits**) that conduct was actionable under state-created-danger theory.) ***with*** ***Fisher v. Moore*** (5th Cir. 2023), *cert. denied* (The mere fact that a large number of courts [virtually every other circuit] had recognized the existence of a right to be free from state-created danger in some circumstances is insufficient to clearly establish the theory of liability in our circuit.)



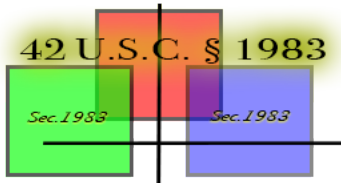
How Clear Must Clearly-Established Law Be?

- *Hope v. Pelzer* (2002), *Taylor v. Riojas* (2020)
  - Cases with fundamentally or materially similar facts not required so long as officer had "fair warning" that conduct was unconstitutional.
  - Conduct can be obviously unconstitutional.
- *Saucier, Brosseau, al-Kidd, Mullenix, Pauly, Wesby, Kisela, Escondido*
  - Emphasis on specific context of case, situation officer confronted, law that "squarely governed" and placed the statutory or constitutional question beyond debate for every reasonable officer.
- *See Wadsworth v. Nguyen* (1st Cir. 2025)
  - Case law from First Circuit, as well as cases from 4 other circuits, made clear that sexual harassment in the form of 'pointed threats,' 'sexual advances,' and 'sexually charged nicknames,' along with other forms of sex-based comments, is enough to establish a prima facie case of sexual harassment in an educational context.



Role of the Judge/Jury

- The majority of circuits hold that the clearly established prong of qualified immunity is a question of law for the judge.
- If there are material issues of fact that must be decided before resolving QI, the jury may be given special interrogatories.
- Judges don't always agree on whether there are material issues of fact in dispute that would preclude a finding of QI at summary judgment.
- *See, e.g., Bannon v. Godin* (1st Cir. 2024) and *Estate of Rahim v. Doe* (1st Cir. 2022)



Impact of Finding of Qualified Immunity on *Monell* Claim

- When a finding of qualified immunity is based on a conclusion that the officer has committed no constitutional violation – i.e., the first step of the qualified immunity analysis – a finding of qualified immunity does preclude the imposition of municipal liability.
- But, a number of courts have held that a grant of QI on the grounds that the law was not clearly established does preclude a failure-to-train claim against the municipality.
- *See, e.g., Dundon v. Kirchmeier* (8th Cir. 2023)
  - It was not clearly established in November 2016 that the officers' use of force to disperse protestors violated a constitutional right under the Fourth Amendment.
  - Thus, the need for training and supervision on dispersal of protestors was not so obvious that it can be characterized as *deliberate* indifference to the protestors' rights to be free from unreasonable seizures.