28. Constitutional Torts

"Don't taze me, bro!"

– Andrew Meyer, University of Florida student, 2007

Introduction

If one of your fellow citizens invades your home, that's trespass to land. If the neighbors lock you in their basement, that's false imprisonment. But what if the government does these things to you?

As discussed in the last chapter, tort law does not apply to the government unless it waives its sovereign immunity. And, as we saw, the federal government has not waived its sovereign immunity with respect to intentional torts. The result is that people are often left with no common-law tort cause of action to use when the government undertakes abusive actions that would otherwise be tortious.

It might occur to you that the Constitution offers protection. Entering your home without probable cause and a warrant is generally a violation of the Fourth Amendment. Locking you in a basement without due process of law would be a violation of the Fifth Amendment. But so what? If the government violates the Constitution, what are *you* going to do about it? Patiently explaining your constitutional rights to a group of armed agents in blue windbreakers is unlikely to help you. Theoretically, you could go to court to ask for an injunction, but as a practical matter, how will that help you while agents are in your house?

After the dust settles and the dark-tinted Chevy Suburbans drive off, you could file a lawsuit. The problem, however, is finding a cause of action. The Constitution says nothing about the ability of citizens to sue the government for damages arising from violations of its provisions.

The solution is to use a "constitutional tort" as the basis for your suit.

The cause of action you can use depends on whether your rights were violated by state officials or federal officials. A claim under **§ 1983** allows a cause of action against state officials, and a ***Bivens* action** allows a claim against federal officials.

Section 1983

The federal statute known as § 1983 is the great workhorse of the civil-rights plaintiffs' bar. It provides a cause of action to use against any state or local authorities who violate someone's federally guaranteed rights. In other words, it's a basis for suing non-federal defendants alleged to have violated federal rights.

When someone says "Section 1983," they mean 42 U.S.C. § 1983. The statute is so well known, however, you rarely see the "42 U.S.C."

Appreciating the history of § 1983 is helpful in understand its essential function. During the reconstruction era after the Civil War, the United States added the Reconstruction Amendments to the Constitution – the 13th, 14th, and 15th. Those amendments abolished slavery and guaranteed essential rights to all citizens, including freed slaves. Yet it became clear that local police and courts in the South could simply decline to enforce these rights. In fact, § 1983 was originally part of a set of legal provisions designed to combat the Ku Klux Klan, a secret vigilante network dedicated to white supremacy.

Thus, § 1983 provides a private right of action for plaintiffs to sue state and local officials in federal court for violations of their rights. Here is the text:

> 42 U.S.C. § 1983. Civil action for deprivation of rights
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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

> party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

After its passage, a string of cases gave § 1983 a restrictive interpretation. The modern power of § 1983 blossomed in 1961, when the U.S Supreme Court established the statute's vitality in the landmark case of *Monroe v. Pape,* 365 U.S. 167 (1961).

Today, § 1983 lawsuits routinely involve claims by arrestees against police officers for using excessive force and claims by inmates against corrections officers for various constitutional violations. But § 1983 has much broader applicability, and it can be used entirely outside of the law enforcement context. For instance, a public school teacher denied free speech rights could use § 1983 to get vindication.

The Elements of a § 1983 Action

Here is the blackletter formulation of a cause of action under § 1983:

> A plaintiff can establish **a prima facie case under § 1983** by showing the defendant was (1) a person (2) who acted under color of state law to (3) deprive the plaintiff of a right protected by the Constitution or a federal statute.

Person

There are many issues as to who qualifies as a "person" under § 1983. A natural person definitely qualifies as a "person," and therefore § 1983 lawsuits are commonly filed against state or local officials in their personal capacity.

A state government, however, does not qualify as a "person," and a § 1983 suit cannot be brought against a state. Nor can state officials be sued "in their official capacity," as doing so is the same thing as suing

the state. Arms of the state – such the Department of Corrections – are generally considered the same as the state, so § 1983 suits cannot name them as defendants either.

Largely for historical reasons, a local government is *not* considered an arm of the state. Thus, municipalities, counties, and municipal agencies can each qualify as a "person" and be a § 1983 defendant.

Suing a local government entity is tricky, however, because the principle of vicarious liability (including respondeat superior) does not apply to § 1983. A local government entity is not liable merely because one of its employees committed a deprivation of constitutional rights against the plaintiff. Because of this, a § 1983 plaintiff wishing to sue a local government must show that the government entity itself is to blame for the constitutional violation. This can be accomplished by showing that there is a law, policy, or well-established custom within municipal government that gave rise to the constitutional violation. A municipality can also he held liable for a failure to adequately train officials. For instance, a local police department that fails to provide adequate training to police officers on the use of nonlethal force could be liable on that basis for the overzealous tazing of suspects.

Acting Under Color of State Law

To have a cause of action under § 1983, the defendant must act "under color" of some "statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." The concept is referred to in shorthand as "acting under color of state law."

Defendants act under color of state law when they have "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins,* 487 U.S. 42, 49 (1988) (internal quotes omitted). This includes authority of a local or municipal character.

To put it simply, local and state government employees act "under color of law" when they are on the job, and maybe when they are off

the job too, if they are flashing a badge or otherwise undertaking conduct pursuant to their governmental powers and duties.

The cases are clear that the phrase "under color" does not require that defendants act "in accordance" with state law. *Monroe v. Pape* established that even when a state or local official acts contrary to state law, she or he can act "under color" of state law within the meaning of § 1983. For example, a parks-and-recreation employee who denies a rally permit to an organization the employee finds personally distasteful might well be violating state law, municipal ordinances, and departmental policy by doing so. But because the employee is acting as a parks-and-rec official at the time, § 1983 applies.

Private persons usually cannot be sued under § 1983, since they are not exercising state power. An exception applies when a private person conspires with state or local officials to deprive others of their constitutional rights. In such a situation, the private person can be liable.

While "under color of state law" embraces state and local authority, it most certainly does not include federal authority. If a federal official is alleged to have violated constitutional rights, a § 1983 action will not work. Instead, the plaintiff must look to a *Bivens* action (discussed below).

Depriving a Person of a Right

Any of the rights guaranteed by the U.S. Constitution are eligible for § 1983 actions. In addition, rights guaranteed by federal statute may be enforced through § 1983 – at least if Congress has not provided otherwise. The question of whether a federal statute creates a guaranteed right, however, can be a complex one.

As already mentioned, any right created by state statute or state constitution is outside § 1983's ambit.

Case: *Scott v. Harris*

The following case is a recent example of § 1983 in action.

Scott v. Harris

Supreme Court of the United States
April 30, 2007

550 U.S. 372. TIMOTHY SCOTT, PETITIONER v. VICTOR HARRIS. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT. No. 05–1631. SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. GINSBURG, J., and BREYER, J., filed concurring opinions, omitted here. STEVENS, J., filed a dissenting opinion, also omitted.

JUSTICE ANTONIN SCALIA DELIVERED THE OPINION OF THE COURT.

We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp

turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Brief for Petitioner 4. Having radioed his supervisor for permission, Scott was told to " '[g]o ahead and take him out.' " *Harris* v. *Coweta County*, 433 F. 3d 807, 811 (CA11 2005). Instead, Scott applied his push bumper to the rear of respondent's vehicle. As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under Rev. Stat. §1979, 42 U. S. C. §1983, alleging, *inter alia*, a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." *Harris* v. *Coweta County*, No. 3:01-CV-148-WBH (ND Ga., Sept. 23, 2003), App. to Pet. for Cert. 41a-42a. On interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial. Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee* v. *Garner*, 471 U. S. 1 (1985), and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights." 433 F. 3d, at 816. The Court of Appeals

further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful." *Id.*, at 817. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari and now reverse.

II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz*, 533 U. S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established ... in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States* v. *Treasury Employees*, 513 U. S. 454, 478 (1995) (citing *Ashwander* v. *TVA*, 297 U. S. 288, 346-347 (1936) (*B*randeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established." *Saucier*, *supra*, at 201. We therefore turn to the threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

III

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962) *(per curiam); Saucier*, *supra*, at 201. In qualified immunity cases, this usually

means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals. For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F. 3d, at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test:

> [T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.*, at 815-816 (citations omitted).

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police

cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts... . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 586-587 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 247-248 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment.~

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's

attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' decision to the contrary is reversed.

Bivens Actions

A *Bivens* action is the federal counterpart to § 1983 – that is, a *Bivens* action allows you to sue federal officials for violating rights guaranteed by the federal Constitution. The name comes from the case of *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), in which the court first approved a cause of action for damages for unconstitutional search and seizure under the Fourth Amendment.

Since then, the *Bivens* action has been extended beyond the Fourth Amendment to a range of constitutional rights, and, as a result, it is largely analogous to § 1983. Yet the cause of action under *Bivens* lacks the sprawling vigor of § 1983 – especially so because of a line of recent Supreme Court decisions expressing skepticism about the need for and wisdom behind *Bivens*.

Compared to § 1983, the *Bivens* plaintiff faces additional hurdles to maintaining a successful claim. First, the plaintiff must show there is no viable alternative federal or state remedy or process that would provide adequate protection for the plaintiff's rights. Then, the court must look for special factors that would counsel hesitation before allowing the kind of claim at issue in the case to go forward.

Case: *Bivens v. Six Unknown Agents*

Here is the case that started it all – the eponym of all *Bivens* actions to come afterward.

Bivens v. Six Unknown Agents

Supreme Court of the United States
June 21, 1971

403 U.S. 388. Webster BIVENS, Petitioner, v. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS. No. 301. Mr. Justice Harlan concurred in the judgment and filed opinion, Mr. Chief Justice Burger, Mr. Justice Black and Mr. Justice Blackmun filed dissenting

> remedial mechanism normally available in the federal courts. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.~
>
> Judgment reversed and case remanded.

Bivens Since *Bivens*

The U.S. Supreme Court has approved *Bivens* actions two times since *Bivens* itself.

In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court held that damages were available under the equal protection guarantee of the Fifth Amendment where a female federal employee was allegedly fired because of her gender. In that case, there was no adequate alternative remedy because the employee worked as a staffer for a member of Congress. Congress had chosen to exempt its own employees from coverage of the Civil Rights Act of 1964, which otherwise would have allowed a cause of action.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court allowed a damages suit against federal prison officials for violations of the Eighth Amendment's prohibition on cruel and unusual punishments. While the plaintiff could have sued under the Federal Tort Claims Act, the court said such a remedy was not adequate for several reasons: First, the FTCA was, in the court's judgment, insufficient to deter individuals from violating constitutional rights; second, the FTCA does not allow jury trials; and third, the FTCA would not lead to uniform standards since it borrows state law in any given jurisdiction to determine what is and what is not actionable.

Carlson was the high-water mark for *Bivens* cases. Since then, a grant of cert on *Bivens* case has been a kiss of death for plaintiffs, with the U.S. Supreme Court rebuffing each case before it. In the process, the high court has signaled that it strongly disfavors the prospect of further extending the list of circumstances under which *Bivens* will apply.