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Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges

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SECTION 1983 LITIGATION IN THE OHIO COURTS: AN INTRODUCTION FOR OHIO LAWYERS AND JUDGES

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Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.).

I. INTRODUCTION

The federal cause of action contained in 42 U.S.C. § 1983[2] permits persons whose federal rights are violated by defendants acting under color of state law to bring civil suits for both damages and injunctions. The statute is not a source of substantive rights. It is, however, the principal civil remedy for the private enforcement of the federal Constitution against state and local governments and their employees.

Most § 1983 litigation has taken place in federal courts since the Supreme Court's 1961 decision in *Monroe v. Pape*[3] resurrected this seldom used legacy of Reconstruction.[4] *Monroe* established § 1983 as a supplementary federal remedy and refused to require § 1983 plaintiffs to first seek relief under even adequate state remedies.[5] Consequently, § 1983 plaintiffs may seek redress by going directly to court.[6] As a result, the volume of § 1983 litigation in the federal courts has increased more than one hundredfold in the last three decades.[7]

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[2] 42 U.S.C. § 1983 (1988). The statute, in its entirety, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 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.

[3] 365 U.S. 167 (1961).

[4] Prior to *Monroe*, § 1983 suits against state and local governmental defendants were relatively rare because of the narrow construction given to § 1983 itself. *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1499-1506 (1989). Such suits were also infrequent because of the few constitutional limits on the states. *See* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737, 747 ("The decade immediately following *Monroe* was marked by increasing absorption of the Bill of Rights into the fourteenth amendment.").

[5] 365 U.S. at 183 ("The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked.").

[6] *See* Patsy v. Board of Regents, 457 U.S. 496, 504 (1982) (construing § 1983 as providing "immediate access to the federal courts notwithstanding any provision of state law to the contrary").

[7] The Administrative Office of the United States Courts collects statistics on the number of "civil rights" as contrasted to § 1983 cases filed in federal courts. The "civil rights" category is often used as a shorthand for § 1983 cases, *see Patsy*, 457 U.S. at 533 n.20 (Powell, J. dissenting), but the use of this statistic overstates the volume of § 1983 cases in federal courts. *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 522-38 (1982). Nonetheless, the increase in "civil rights" cases is a useful proxy for the increase in § 1983 litigation, and it is significant that in 1961, when *Monroe* was decided, only 270 "civil rights" cases were commenced in federal courts, *see Patsy*, 457 U.S. at 533 (Powell, J., dissenting) (citing ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES

Under the presumption of concurrent jurisdiction that characterizes our system of judicial federalism, state courts may exercise jurisdiction over § 1983 cases,[8] and in recent years there has been a sharp increase in the volume of state court § 1983 litigation throughout the country, including Ohio.[9] Unfortunately, the precise number of state court § 1983 cases is unclear because Ohio, like all other states, does not collect this statistic.[10] Nonetheless, a review of appellate court decisions makes clear that for a variety of ad hominem, doctrinal, and tactical reasons, an increasing number of § 1983 plaintiffs are forsaking the federal courts and seeking relief in the Ohio courts.[11] In fact, the emergence of state court § 1983 litigation in Ohio is suggested by the recent publication of a standard jury instruction to provide guidance to Ohio lawyers and judges.[12]

This review of § 1983 litigation in the Ohio courts has three principal goals. First, it provides an introduction to state court § 1983 litigation for Ohio lawyers and judges. Commentators have recognized the importance of state court § 1983 litigation,[13] and the Supreme Court has begun to pay greater attention to state court § 1983 cases.[14] Nonetheless, most § 1983 materials focus on the

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COURTS 238 (1961), while the comparable figure for 1992 was 40,961, which consisted of 11,316 "other civil rights" cases plus 29,645 prisoner "civil rights" (i.e., non habeas and non-mandamus) cases. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 25 (1992) (Table C-2).

In 1961, there was no separate category in the published reports of the Administrative Office of the United States Courts for prisoner "civil rights" cases, and the 270 "civil rights" cases included both prisoner and non-prisoner cases. In 1963, for the first time, the Administrative Office included a category for "prisoner petitions . . . prison official mandamus, etc.," *see* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 199 (1963) (Table C-2), and it was not until 1971 that the Administrative Office began separately identifying prisoner civil rights cases in the published reports. *Compare* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 232 (1970) (Table C-2) *with* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 263 (1971) (Table C-2).

[8] *See infra* notes 83-85 and accompanying text.

[9] *See* Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 393 n.52 & 435 (1983) [hereinafter Steinglass, *Emerging State Court § 1983 Action*].

[10] *See infra* note 95.

[11] For a discussion of choice of forum considerations in Ohio, see *infra* notes 123-66 and accompanying text.

[12] *See* 2 OHIO JURY INSTRUCTIONS-CIVIL, Ch. 247 (1992). This model instruction and the accompanying commentary provide a useful overview of the § 1983 cause of action.

[13] *See, e.g.*, Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1057 (1989) ("State court is the new frontier of civil rights litigation.").

[14] *See, e.g.*, Dennis v. Higgins, 498 U.S. 439 (1991), *rev'g* 451 N.W.2d 676 (Neb. 1990); Howlett v. Rose, 496 U.S. 356 (1990), *rev'g* 537 So. 2d 706 (Fla. Dist. Ct. App. 1989); National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988), *rev'g* 741 P.2d 1345 (Nev. 1987); Felder v. Casey, 487 U.S. 131 (1988), *rev'g* 408 N.W.2d 19 (Wis. 1987); Spencer

federal courts.[15] Moreover, the few works addressing litigation of § 1983 claims in state courts either lack an Ohio focus[16] or, where there is such a focus, deal narrowly with specific Ohio issues.[17] This article seeks to bridge this gap by providing judges and lawyers with a broad overview of § 1983 litigation in the Ohio courts.

Second, the article addresses a number of the unique procedural and remedial issues that have arisen, or are likely to arise, in § 1983 litigation in the Ohio courts. These issues are sometimes suggested by judicial opinions, but the special problems of litigating federal claims in state courts are often not fully appreciated or adequately addressed. Moreover, the article draws on § 1983 litigation from other state courts for insights and analysis not always available from federal court decisions.

Finally, by taking an in-depth look at § 1983 litigation in a particular state, the article contributes to an understanding of what is actually happening in § 1983 litigation throughout the country.

II. RECONSTRUCTION BACKGROUND

Section 1983, which has its origins in the post-Civil War Reconstruction Era, is the current version of § 1 of the Civil Rights Act of 1871,[18] a statute adopted

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v. South Carolina Tax Comm'n, 471 U.S. 82 (1985) (per curiam), *aff'g by equally divided court* 316 S.E.2d 386 (S.C. 1984); Maine v. Thiboutot, 448 U.S. 1 (1980), *aff'g* 405 A.2d 230 (Me. 1979); Martinez v. California, 444 U.S. 277 (1980), *aff'g* 149 Cal. Rptr. 519 (Cal. Ct. App. 1978).

[15]For example, most § 1983 treatises are devoted almost exclusively to federal court § 1983 litigation. *See, e.g.*, MICHAEL AVERY & DAVID RUDOVSKY, POLICE MISCONDUCT: LAW AND LITIGATION (2d ed. 1993); IVAN C. BODENSTEINER & ROSALIE B. LEVINSON, STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY (1993); JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS (1992); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (3d ed. 1991); MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES (2d ed. 1991); CHARLES RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS (1988).

[16]*See* STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS (rev. ed. 10th release, 1993) [hereinafter STEINGLASS, SECTION 1983 LITIGATION]. Law review articles dealing generally with the litigation of § 1983 claims in the state courts include: Herman, *supra* note 13; Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1983); Steinglass, *Emerging State Court § 1983 Action*, *supra* note 9.

[17]*See, e.g.*, Linda L. House, *Section 1983 and the Collateral Source Rule*, 40 CLEV. ST. L. REV. 101 (1992); Richard B. Saphire & Susan W. Brenner, *The Effect of the Ohio Court of Claims Act on Civil Rights Actions in State and Federal Courts*, 22 U. TOL. L. REV. 167 (1991); Michael J. Solimine, *Adjudication of Federal Civil Rights Actions in the Ohio Courts*, 9 U. DAYTON L. REV. 39 (1983); Michael R. Smalz, *Statute of Limitations for Section 1983 Claims in Ohio*, OHIO LAW. 10 (Nov.-Dec. 1989).

[18]Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (current verison at 42 U.S.C. § 1983 (1988)).

to enforce the Fourteenth Amendment.[19] Ironically, in light of its current prominence, § 1 was a minor, and not heavily debated,[20] provision of a more far-reaching statute designed to restore federal supremacy in the face of a widespread breakdown of law and order in the southern and border states.[21] The Act, also known as the Ku Klux Klan Act, permitted the President to use the military to protect federal rights[22] and to temporarily suspend habeas corpus,[23] restricted federal jury participation by former confederate loyalists,[24] and created civil and criminal sanctions to reach the *private* conspiracies of the Klan and similar organizations.[25] Section one of the Act created a civil remedy to enforce federal constitutional provisions against state or local officials who violated the "rights, privileges, or immunities" of persons within the United States.[26]

Given § 1983's origin in a period marked by a profound distrust of the state courts and by a major change in the relationship between state and federal courts,[27] the emergence of state courts during the 1980s as the forum of choice

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[19] *See infra* note 52.

[20] The absence of controversy surrounding § 1 of the Civil Rights Act of 1871 has been commented upon by the Court in the course of discussing the lack of guidance from the congressional debate on many § 1983 issues. *See* Monell v. Department of Social Servs., 436 U.S. 658, 665 (1978); *see also* Briscoe v. LaHue, 460 U.S. 325, 361 (1983) (Marshall, J., dissenting).

[21] *See generally* Monroe v. Pape, 365 U.S. 167, 174-83 (1961). For a further discussion of the events leading to the passage of the Civil Rights Act of 1871, see *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141-56 (1977).

[22] Civil Rights Act of 1871, ch. 22, § 3, 17 Stat. 13, 14 (1871).

[23] Civil Rights Act of 1871, ch. 22, § 4, 17 Stat. 13, 14 (1871).

[24] Civil Rights Act of 1871, ch. 22, § 5, 17 Stat. 13, 15 (1871).

[25] *See* Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13 (1871). Section 2 of the Act contained the precursor to the civil conspiracy causes of action in 42 U.S.C. § 1985 (1988), which, *inter alia*, authorizes a civil action for conspiracies to "depriv[e], either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws. . . ." *See* 42 U.S.C. § 1985(3) (1988). The 1871 Act also contained the precursor to 18 U.S.C. § 241 (1988), which provides a criminal sanction for such conspiracies. For the Supreme Court's latest word on § 1985(3), see Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (construing § 1985(3) to not reach private conspiracies to deny women access to abortion clinics).

[26] Civil Rights Act of 1871, § 1. This civil cause of action was patterned after the criminal provision contained in § 2 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). *See Briscoe*, 460 U.S. at 360-61. Section two's modern equivalent can be found at 18 U.S.C. § 242 (1988). For discussions of this criminal provision, see Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

[27] In Mitchum v. Foster, 407 U.S. 225 (1972), the Court characterized the predecessor to § 1983 as

> a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century . . . . The very purpose of

for many persons who believed that their federal rights had been violated by state and local governmental defendants is ironic. It is even more ironic, but beyond the scope of this article, that many state court § 1983 defendants have been able to take advantage of the liberal federal question removal statute to veto plaintiffs' choice of state courts and remove § 1983 cases to federal courts.[28] Nonetheless, an increasing number of § 1983 cases are being litigated in the Ohio courts.[29]

III. THE § 1983 REMEDY

A. Nature of the § 1983 Remedy

Section 1983 is a remedial statute that only authorizes a private action against defendants who act under color of state law and violate rights secured by federal law. In its current form, § 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . or other person . . . 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.[30]

The United States Supreme Court has made clear that § 1983 confers no substantive rights,[31] and the Ohio Supreme Court recognized this in *Shirokey v. Marth*.[32]

> Section 1983 provides a remedy to persons whose federal rights have been violated by governmental officials. However, "Section 1983 does not itself create any constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere."

> § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."

Id. at 241 (quoting *Ex parte* Virginia 100 U.S. 339, 346 (1879)). The period from 1863 to 1875 marked the sharpest permanent expansion of federal court jurisdiction in the nation's history. *See* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969).

[28] *See infra* notes 123-25 and accompanying text.

[29] For a statistical review of § 1983 litigation in the Ohio appellate courts, see *infra* notes 95-100 and accompanying tables and text.

[30] 42 U.S.C. § 1983 (1988).

[31] *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979) ("Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all.").

[32] 63 Ohio St. 3d 113, 585 N.E.2d 407, *cert. denied*, 113 S. Ct. 186 (1992).

> Moreover, Section 1983 does not cover official conduct that violates only state law. Rather, the statute is limited to deprivations of federal statutory and constitutional rights.[33]

Similarly, in *1946 St. Clair Corp. v. City of Cleveland*,[34] the Ohio Supreme Court, relying on a United States Supreme Court case, summarized the elements of a § 1983 claim as follows:

> To establish such a claim, two elements are required: (1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.[35]

Thus, for there to be a viable § 1983 claim, a violation of a substantive or rights-conferring provision of federal law must exist. Nonetheless, courts and litigants often assert that defendants have "violated § 1983."[36] There is no such thing, however, and it is a misnomer to speak of "violations of § 1983."

This concern about references to "violations of § 1983" is not simply a law professor's fetish about the aesthetics of pleading. Such references often mask

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[33] 63 Ohio St. 3d at 116, 585 N.E.2d at 410 (citations omitted) (quoting Braley v. City of Pontiac, 906 F.2d 220, 223 (6th Cir. 1990)).

[34] 49 Ohio St. 3d 33, 550 N.E.2d 456 (1990).

[35] 49 Ohio St. 3d at 34, 550 N.E.2d at 459 (quoting Parratt v. Taylor, 451 U.S. 527, 535 (1981)). *See also* Cooperman v. University Surgical Assocs., 32 Ohio St. 3d 191, 199, 513 N.E.2d 288, 296 (1987) ("A complaint alleging Section 1983 as the basis for the action must meet two requirements. First, there must be an allegation that the conduct in question was performed by a person under color of law. Second, the conduct must have deprived . . . [the plaintiff] of a federal right.") (citing Gomez v. Toledo, 446 U.S. 635 (1980)).

Some formulations of the elements of a § 1983 claim also include a causation requirement. *See* 2 OHIO JURY INSTRUCTIONS § 247.01(3) ("The plaintiff must prove by the greater weight of the evidence: . . . (C) [that] the defendant's acts were the proximate cause of any injuries claimed by the plaintiff."). The use of a causation element is consistent with the "subjects, or causes to be subjected" language of § 1983. *See* Monell v. Department of Social Servs., 436 U.S. 658, 691-92 (1978) (relying, in part, on the causation language to reject respondeat superior as a basis of § 1983 municipal liability). *Cf.* City of Canton v. Harris, 489 U.S. 378, 391 (1989) (requiring a showing that the deficiencies in a city's training program caused an injury in order to establish § 1983 municipal liability). It is unclear, however, whether courts should look to state law, such as the detailed Ohio jury instructions on causation, *see* 1 OHIO JURY INSTRUCTIONS Ch. 11, or to more general federal principles for the content of the § 1983 causation requirement.

[36] *See, e.g.*, Schwarz v. Board of Trustees of the Ohio State Univ., 31 Ohio St.3d 267, 267, 510 N.E.2d 808, 809 (1987) (noting that "plaintiff alleged that defendants, acting under color of state law, denied her due process of law in violation of Section 1983"); Medina County Agric. Soc'y v. Swagler, 34 Ohio App.3d 336, 336, 518 N.E.2d 589, 590 (Medina Co. 1987) (syllabus) ("One of two defendants found jointly liable for intentional acts of discrimination in violation of Section 1983, Title 42, U.S. Code, in federal district court, may not bring an action in the court of common pleas for contribution.").

serious analytical flaws on the part of judges and attorneys addressing § 1983 issues. For example, some plaintiffs' attorneys seem to believe that outrageous conduct *simpliciter* is actionable under § 1983, but such an approach deflects attention from the essential task of identifying the specific federal constitutional or statutory provision that the defendants allegedly violated. Therefore, attorneys defending § 1983 cases (and judges entertaining such cases) should force plaintiffs (and their attorneys) to identify with particularity the specific provisions of federal law that they believe the defendants violated.[37]

On the other hand, some defendants' attorneys seem to believe that conduct which violates state law cannot be actionable under § 1983. This may be true in the sense that § 1983 is only available to remedy violations of federal law.[38] The same conduct, however, may be actionable under *both* state law and § 1983,[39] and § 1983 plaintiffs must be prepared to identify the specific provisions of federal law which they claim have been violated. Moreover, there is no exhaustion of state judicial remedies requirement under § 1983, and plaintiffs may join both § 1983 and state law claims in the same action under the liberal joinder provisions that characterize state and federal rules of civil procedure.[40]

B. Color of Law Requirement

The Supreme Court has broadly construed § 1983's color of law requirement to reach not only conduct that is authorized by state law but also conduct that is unauthorized (or even barred) by state law. Thus, in *Monroe v. Pape*,[41] the Court rejected the argument that § 1983 was only available as a remedy for

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[37]This is not to suggest the use of heightened pleading requirements for § 1983 complaints. For a discussion of § 1983 pleading requirements, see *infra* notes 214-36 and accompanying text.

[38]*See Shirokey*, 63 Ohio St. 3d at 116, 585 N.E.2d at 410 ("Section 1983 does not cover official conduct that violates only state law."); *cf.* Davis v. Scherer, 468 U.S. 183 (1984) (violation of clearly established *state* law is not sufficient to deny a qualified immunity to a § 1983 defendant who also violated federal law).

[39]*See* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) ("[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.").

[40]Plaintiffs may join § 1983 and state law claims in federal courts under the doctrine of pendent jurisdiction. *See generally* United Mine Workers v. Gibbs, 383 U.S. 715 (1965). The judge-made doctrine of pendent jurisdiction was recently codified as "supplemental jurisdiction" in Title III of the Judicial Improvements Act of 1990, which contains the Federal Courts Study Committee Implementation Act of 1990. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (creating 28 U.S.C. § 1367 (Supp. III. 1990)). *See generally* Steven H. Steinglass, *State Courts and Supplemental Jurisdiction Under the Civil Rights Act of 1991, in* THE CIVIL RIGHTS ACT OF 1991 93 (1993).

[41]365 U.S. 167 (1961).

officially sanctioned conduct[42] and held that police officers who conducted an unreasonable search and seizure in violation of state law could be sued under § 1983 for violating the Fourth Amendment.

Most § 1983 cases are brought against governmental officials, and there is rarely a dispute about whether such defendants are acting under color of state law.[43] Nonetheless, the § 1983 "color of law" requirement also reaches private individuals who act in concert with governmental officials.[44] Moreover, private conduct that is authorized by state law may sometimes fall within § 1983.[45] On the other hand, the Court has been reluctant to extend § 1983 to private actors simply because they are performing public functions[46] or receiving significant state aid.[47]

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[42] In his *Monroe* dissent, Justice Frankfurter argued that § 1983 was limited to official conduct. *See id.* at 202. *See also* Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985) (defending the Frankfurter position). For a persuasive critique of the Frankfurter-Zagrans position, see Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992).

[43] *See* West v. Atkins, 487 U.S. 42, 50 (1988) (noting that "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law," and holding that a prison physician acts under color of state law). *But see* Polk County v. Dodson, 454 U.S. 312 (1981) (treating a public defender as not acting under color of state law in representing an indigent criminal defendant because public defenders are required to exercise independent professional judgment on behalf of their clients).

[44] *See* Tower v. Glover, 467 U.S. 914 (1984) (public defender who conspires with other public officials acts under color of state law); Dennis v. Sparks, 449 U.S. 24 (1980) (private person who conspires with a judge acts under color of state law despite the judge's absolute immunity).

[45] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (private party's use of statutory prejudgment attachment procedures is state action but the misuse of such state procedures is not).

In *Lugar* the Court held that challenged conduct that constitutes state action under the fourteenth amendment is "also action under color of state law and will support a suit under § 1983." *Id.* at 935. Nonetheless, the Court noted that not all actions taken under "color of state law" necessarily satisfy the fourteenth amendment state action requirement. *Id.* at 935 n.18; *cf.* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082 (1991) (pointing out that the thirteenth amendment does not require state action).

[46] *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (limiting the public function test to functions that have traditionally been the exclusive province of government and holding that the sale of goods under a warehouseman's lien is not state action because such disputes are frequently resolved without governmental involvement). The Court has held that a wide range of government activities are not public functions for purposes of the state action/color of law inquiry. *See, e.g.*, National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (regulation of intercollegiate sports); Blum v. Yaretsky, 457 U.S. 991 (1982) (provision of nursing home services); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (education of maladjusted students); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (provision of utility services). *But see Edmonson*, 111 S. Ct. 2077 (finding state action in a challenge to the discriminatory use of peremptory challenges, in part, because jury selection involves a traditional government function).

In *Cooperman v. University Surgical Associates*,[48] the Ohio Supreme Court recognized that § 1983 is not limited to conduct that is authorized by state law.

> The requirement of action under color of state law encompasses at least state action. It may, however, encompass conduct which is broader than state action. At the heart of this requirement is the notion that individual conduct, to be actionable, must be taken pursuant to powers granted by virtue of state law and possible only because the actor is clothed with the authority of state law.[49]

Thus, § 1983 is available in some cases in which public officials act contrary to state law.

C. Deprivations of Federal Rights

In addition to an act taken under color of state law, a proper § 1983 claim requires the existence of a "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws. . . ."[50] This formulation is quite broad, and the Supreme Court has not limited § 1983 to the types of conduct that led to the passage of the Civil Rights Act of 1871.

1. Constitutional Rights

Section 1983 had its origin in a broad proposal, introduced on March 28, 1871, by Representative Shellabarger at the request of the Grant Administration to address the state of lawlessness throughout much of the South and[51] to enforce the Fourteenth Amendment.[52] The debates on Civil Rights Act of 1871 make

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47 *See, e.g., Blum*, 457 U.S. at 1010-11 (discharge of patients by nursing home not state action despite substantial state funding); *Rendell-Baker*, 457 U.S. at 839-42 (governmental funding of private school not sufficient to constitute state action in a case involving the discharge of teachers); *Jackson*, 419 U.S. at 358-59 (termination of utility services by heavily regulated private utility with a state-created partial monopoly not state action); Moose Lodge v. Irvis, 407 U.S. 163, 171-77 (1972) (possession of state liquor license not sufficient to make discriminatory refusal to serve blacks state action absent state-compelled discrimination).

48 32 Ohio St. 3d 191, 513 N.E.2d 288 (1987).

49 32 Ohio St. 3d at 199, 513 N.E.2d at 297. Moreover, the color of law requirement that defines the reach of § 1983 is broader than the state law scope of employment requirement that defines the reach of state immunity and indemnification statutes. *See infra* notes 373-82 and accompanying text.

50 42 U.S.C. § 1983 (1988).

51 *See* CONG. GLOBE, 42d Cong., 1st Sess. 236 (1871) (President Grant's message to Congress urgently recommended legislation to deal with "[a] condition of affairs . . . in some of the States of the Union rendering life and property insecure.").

52 *See* Monroe v. Pape, 365 U.S. 167, 171 (noting that "the purpose [of § 1983] is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes'") (quoting § 1983).

clear the close nexus between § 1983 and the Fourteenth Amendment.[53] Nonetheless, the reference in § 1983 to "rights, privileges, or immunities secured by the Constitution" is not, by its terms, limited to Fourteenth Amendment rights, and the Supreme Court has not construed § 1983 so narrowly.[54]

Most § 1983 cases involve constitutional claims that are based directly or indirectly on the Fourteenth Amendment, and for many years it remained unclear whether § 1983 reached constitutional claims that were not grounded in the Fourteenth Amendment. Most courts were reluctant to extend § 1983 beyond the Fourteenth Amendment.[55] In *Dennis v. Higgins*,[56] however, the Supreme Court held that dormant Commerce Clause claims were actionable under § 1983. As a result, it is likely that § 1983 can also be used to enforce non-Fourteenth Amendment claims having their origin in the Obligation of Contract Clause,[57] the Ex Post Facto Clause,[58] and the Article IV Privileges and Immunities Clause.[59]

2. Statutory Rights

As enacted in the Civil Rights Act of 1871, the cause of action that became § 1983 did not make any reference to deprivations of federal statutory rights.[60]

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[53] *See generally Developments in the Law, supra* note 21, at 1153-56 (describing Congressional concern about the abdication of law enforcement responsibilities).

[54] *But see* Collins, *supra* note 4, at 1502-04 (describing the earlier use of a narrow definition of what rights are "secured" under § 1983).

[55] *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 2.5(b) (2). A number of these courts took the position that constitutional provisions that addressed the relationship between the state and federal governments rather than conferred individual rights were beyond the scope of § 1983. *See, e.g.*, J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1476 (10th Cir. 1985); Consolidated Freightways v. Kassel, 730 F.2d 1139, 1144-46 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).

[56] 498 U.S. 439 (1991).

[57] U.S. CONST. art. I, § 10.

[58] *Id.*

[59] U.S. CONST. art. IV. Justice Kennedy, in his *Dennis* dissent, decried the breadth of the Court's holding and suggested the likely availability of § 1983 in a wide range of non-fourteenth amendment cases. 498 U.S. at 463 (Kennedy, J., dissenting).

> The Court's logic extends far beyond the Commerce Clause, and creates a whole new class of § 1983 suits derived from Article I. For example, the Court's rationale creates a § 1983 cause of action when a State violates the constitutional doctrine of intergovernmental tax immunities, interferes with the federal power over foreign relations, applies a duty upon imports . . ., invades the federal power over regulations of the entrance and residence of aliens . . ., or attempts to tax income upon a federal obligation . . . .

Id. (citations omitted).

[60] *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1988)).

In 1874, however, in the course of codifying the federal statutes, Congress separated the cause of action in § 1 of the Civil Rights Act of 1871 from the jurisdictional counterpart in the same section and added the phrase "and laws" to the cause of action.[61] The significance of this change remained unclear for more than a century, but in *Maine v. Thiboutot*,[62] the Supreme Court construed the phrase "and laws" to reach all federal statutes.[63]

Despite the broad holding of *Thiboutot*, the Court has restricted the use of § 1983 to enforce federal statutes by defining narrowly when federal statutes contain judicially enforceable rights[64] and by implying limitations on the scope of § 1983 from the existence of private remedies.[65] Moreover, in *Suter v. Artist M.*,[66] the Court may have signaled a retreat from its prior practice of effectively treating § 1983 as being presumptively available for the enforcement of federal statutes by adopting a test much closer to the implied right of action test to govern the availability of § 1983 to enforce federal statutes.[67]

The Ohio Supreme Court has recognized that § 1983 is available to enforce federal statutes. In *Ohio Academy of Nursing Homes, Inc. v. Barry*,[68] the court held

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[61] *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608-09 (1979).

[62] 448 U.S. 1 (1980).

[63] The issue in *Thiboutot* was whether § 1983 was limited to federal statutes "providing for equal rights." The "equal rights" language, which is now codified at 28 U.S.C. § 1343(a) (3) (1988) (conferring original jurisdiction in federal court), had its origin in one of the civil rights jurisdictional provisions that were created as part of the 1874 codification. *See Chapman*, 441 U.S. at 609. The *Thiboutot* Court, however, refused to limit the unmodified phrase "and laws" in § 1983 to "laws providing for equal rights." *See* 448 U.S. at 6-8.

[64] *See generally* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (§ 1983 not available to enforce the Developmentally Disabled Assistance and Bill of Rights Act because it does not create enforceable rights and obligations).

[65] *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."). *But see* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) (§ 1983 available to enforce the state obligation to provide reasonable and adequate Medicaid reimbursement rates); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) (§ 1983 available to enforce preemption claims under the National Labor Relations Act); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987) (§ 1983 available to enforce Brooke Amendment claims under the Housing Act).

[66] 112 S. Ct. 1360 (1992) (§ 1983 not available to enforce the "reasonable efforts" requirement of the Adoption Assistance and Child Welfare Act).

[67] Under the Court's implied private right of action test, legislative intent is the most important factor in determining the availability of private enforcement. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.3 (1989 & 1992 Supp.).

[68] 56 Ohio St. 3d 120, 564 N.E.2d 686 (1990).

that the Boren Amendment,[69] which requires states participating in the Medicaid Program to provide reasonable and adequate nursing home reimbursement rates, conferred rights that were enforceable under § 1983.[70]

D. State of Mind Requirement

In *Monroe v. Pape*,[71] the Supreme Court rejected the existence of a "specific intent" requirement in § 1983[72] and construed § 1983 against principles of tort law.[73] This use of tort principles raised the question of whether § 1983 was available in cases involving only negligent conduct, but in *Parratt v. Taylor*,[74] the Court held that § 1983 does not contain a state of mind requirement.[75] Nonetheless, the federal rights that are actionable under § 1983 often contain state of mind requirements.[76] Thus, the defendant's state of mind is often a relevant issue in § 1983 litigation.[77]

IV. STATE COURT JURISDICTION

A. Jurisdictional Principles

Unlike § 1983, which is only a cause of action, § 1 of the Civil Rights Act of 1871 contained both a cause of action and a jurisdictional provision.[78] The latter

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[69] 42 U.S.C. § 1396a(13) (A) (1988).

[70] The *Barry* court, relying on *Wilder*, held that Medicaid providers could use § 1983 to challenge the state's reduction of reimbursement rates for nursing home care on the ground that the rates violated the controlling federal statute. 56 Ohio St. 3d at 123, 564 N.E.2d at 690.

[71] 365 U.S. 167 (1961).

[72] *Id.* at 187. The *Monroe* Court recognized that § 1983, unlike its criminal counterpart, *see supra* note 26, does not contain an explicit state of mind requirement. *Id.* (discussing Screws v. United States, 325 U.S. 91 (1945)).

[73] 365 U.S. at 187 (observing that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

[74] 451 U.S. 527 (1981).

[75] *Accord* 2 OHIO JURY INSTRUCTIONS § 247.01, comment (1992).

[76] *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (negligent conduct not sufficient to state a due process claim); Estelle v. Gamble, 429 U.S. 97 (1976) (negligent denial of medical care by prison officials not actionable under § 1983, but the eighth amendment is available for claims involving deliberate indifference to inmates' serious medical needs).

[77] The defendant's state of mind is not directly relevant to the availability of either qualified or absolute immunities, *see infra* notes 244-55 and 259-65 and accompanying text, but it is relevant to claims for punitive damages. *See infra* notes 443-44 and accompanying text.

[78] The jurisdictional language was as follows: "such proceedings to be prosecuted in the several district or circuit courts of the United States, with and subject to the same

was necessary because in 1871 there was no general federal question jurisdictional provision for the federal courts.[79] In the 1874 codification of the United States Statutes, however, the jurisdictional provision was separated from the cause of action,[80] and this pattern continues today. Thus, it is necessary to look someplace other than § 1983 to determine whether state or federal courts have jurisdiction over § 1983 actions.[81]

Federal courts are courts of limited jurisdiction. Therefore, it is necessary to find an affirmative grant of subject matter jurisdiction before a federal court may entertain a civil action.[82] State courts, however, are courts of general jurisdiction,[83] and the Supreme Court has relied on the presumption of concurrency that characterizes our system of judicial federalism[84] to hold that state courts have concurrent jurisdiction over § 1983 actions.[85]

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rights of appeal, review upon error, and other remedies provided in like cases in such courts . . . ." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871).

[79]The predecessor to 28 U.S.C. § 1331 (1988), the general federal question jurisdiction statute, was not adopted until the Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875).

[80]*See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608-09 (1979).

[81]The jurisdictional counterpart to § 1983 is 28 U.S.C. § 1343(a) (3) (1988). However, *Chapman* and Maine v. Thiboutot, 448 U.S. 1 (1980), make clear that this jurisdictional provision is narrower than § 1983. The repeal of the jurisdictional amount requirement in 28 U.S.C. § 1331 (1988), *see* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369 (1980), effectively closed this jurisdictional gap by making § 1331 the appropriate (and the broadest) jurisdictional provision for federal court § 1983 actions.

[82]*See* CHEMERINSKY, *supra* note 67, § 5.1. Rule 8(a) (1) of the Federal Rules of Civil Procedure recognizes that federal courts are courts of limited jurisdiction and requires the party seeking to invoke federal court jurisdiction to include in his or her pleading "a short and plain statement of the grounds upon which the court's jurisdiction depends." FED. R. CIV. P. 8(a) (1).

[83]Although some state courts are courts of limited jurisdiction, all states have courts of general jurisdiction. In Ohio, the courts of general jurisdiction are the Courts of Common Pleas. *See* OHIO REV. CODE ANN. § 2305.01 (Anderson Supp. 1992). The Ohio pleading rule reflects the different status of state courts, and, unlike its federal counterpart, *see supra* note 82, OHIO R. CIV. P. 8(A) does not require pleading the existence of subject matter jurisdiction.

[84]Under this presumption, state courts may exercise jurisdiction over federal causes of action as long as Congress has not explicitly or implicitly made federal court jurisdiction exclusive. An implied exclusivity can result from an "unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473, 478 (1981) (citations omitted). The classic statement of the presumption of concurrent jurisdiction is contained in Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("[W]here jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."). *See generally* Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Courts*, 75 MICH. L. REV. 311 (1976); STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 9.2.

The Supreme Court has not decided whether federal law requires states to create forums that can entertain § 1983 claims.[86] Furthermore, the Court has permitted state courts to refuse to entertain federal causes of action when they have a "valid excuse."[87] In *Howlett v. Rose*,[88] however, the Court defined "valid excuse" narrowly.[89] Moreover, the Court has made clear that the nondiscrimination principle prevents state courts from excluding § 1983 claims on a discriminatory basis.[90] Under these federal principles, state courts are

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The Supreme Court has reiterated its support for the presumption of concurrency. *See* Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) (permitting state courts to exercise jurisdiction over Title VII employment discrimination actions); Tafflin v. Levitt, 493 U.S. 455 (1990) (permitting state courts to exercise jurisdiction over civil RICO actions). The Court's only criticism of the presumption comes from Justices who would strengthen it. *See* Tafflin, 493 U.S. at 469 (Scalia, J., concurring) (questioning whether concurrent state court jurisdiction can ever be rebutted by implication from legislative history or by findings of incompatibility).

[85] *See* Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980); Martinez v. California, 444 U.S. 277, 283 n.7 (1980); *see also* Felder v. Casey, 487 U.S. 131, 147 (1988) (reaffirming concurrent state court jurisdiction over § 1983 actions).

[86] *See* Howlett v. Rose, 496 U.S. 356, 378 (1990) ("This case does not present the questions whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights or to authorize service of process on parties who would not otherwise be subject to the court's jurisdiction."); *see also id.* at 378 n.20 ("We have no occasion to address in this case the contention[] . . . that the States need not establish courts competent to entertain § 1983 claims.").

[87] *See* Douglas v. New York, New Haven & Hartford R.R., 279 U.S. 377, 387-88 (1929) (approving evenhanded exclusion of FELA actions by nonresidents on out-of-state accidents); *see also* Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950) (permitting the nondiscriminatory use of forum non conveniens to exclude FELA actions by nonresidents on out-of-state accidents).

[88] 496 U.S. 356 (1990). The *Howlett* Court applied the jurisdictional principles developed in FELA cases to § 1983 cases, noting that "the existence of the jurisdiction creates an implication of duty to exercise it." *Id.* at 373 (citing Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 58 (1912)). The *Howlett* Court also noted that it "is quite inadmissible" for states to decline jurisdiction over federally created causes of action because of disagreements with federal policy. 496 U.S. at 371.

[89] *Id.* at 381 ("The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect."); *see also id.* at 369 ("A state court may not deny a federal right, when the parties and controversies are properly before it, in the absence of 'valid excuse.'"). Finally, the *Howlett* Court also noted that on the occasions that it had found valid excuses for state court refusals to entertain federal causes of action, the cases involved neutral rules of judicial administration, including such matters as the state doctrine of forum non conveniens, the jurisdiction of state courts of limited jurisdiction, and access to state courts by nonresidents. *Id.* at 374-75.

[90] In Martinez v. California, 444 U.S. 277 (1980), the Supreme Court reserved the question of whether state courts are obligated to entertain § 1983 actions, but it relied on the nondiscrimination principle in observing that under certain circumstances state courts must hear federal claims. *Id.* at 283 n.7 ("We note that where the same type of

effectively required to entertain § 1983 cases,[91] but the willingness of state courts to open their doors voluntarily to § 1983 claims[92] makes it unlikely that the Court will have to address the ultimate question of whether a state may refuse to hear § 1983 actions.

B. Section 1983 Cases in the Ohio Courts

In Ohio, a number of state courts of general jurisdiction were initially reluctant to entertain § 1983 suits and even questioned whether they could hear such cases.[93] The Ohio Supreme Court, however, has explicitly held that Ohio

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claim, arising under state law, would be enforced in state courts, the state courts are generally not free to refuse enforcement of the federal claim.").

In *Howlett*, the Court applied the nondiscrimination principle to § 1983 actions and rejected an argument that sovereign immunity represented a jurisdictional limitation on the power of the Florida courts. 496 U.S. at 379-80. Comparing § 1983 actions to the tort claims against state entities that Florida entertains in its courts of general jurisdiction, and looking at the exercise of jurisdiction by Florida courts over § 1983 actions against individuals, the Court held that federal law required the Florida courts to entertain § 1983 actions against local school boards. *See id.* In taking this position, the Court defined broadly the comparison to be made under the nondiscrimination principle and made clear that states that opened their courts to § 1983 actions may not pick and choose among the § 1983 actions they wished to entertain by classifying state policies as jurisdictional. *See id.* at 381; *see also* Bloomingdale's By Mail, Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992) (relying on *Howlett* to hold that Tennessee courts were required to entertain § 1983 cases challenging state tax statutes), *cert. denied*, 113 S. Ct. 3002 (1993); Willbourn v. City of Tulsa, 721 P.2d 803, 805 (Okla. 1986) (relying on the nondiscrimination principle to hold that state courts must entertain § 1983 actions).

The leading pre-*Howlett* Supreme Court cases applying the nondiscrimination principle are: Testa v. Katt, 330 U.S. 386 (1947); McKnett v. St. Louis & San Francisco Ry., 292 U.S. 230 (1934); Mondou v. New York, N.H. & H.R.R., 223 U.S. 1 (1912). For a discussion of these cases, see Steinglass, *Emerging State Court § 1983 Action*, *supra* note 9, at 443-50. See also STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 9.3.

[91] To exclude § 1983 cases, a state would have to close its courts to similar actions authorized by state and federal law against state and local governmental bodies and their employees. Although such wholesale exclusions of legal challenges to governmental action are theoretically possible, they are sufficiently implausible to have led one commentator to conclude that the nondiscrimination principle imposes a "de facto obligatory jurisdiction" on state courts. *See* Neuborne, *supra* note 16, at 759.

[92] *See Howlett*, 496 U.S. at 378 n.20 ("Virtually every state has expressly or by implication opened its courts to § 1983 actions and there are no state court systems that refuse to hear § 1983 cases.").

[93] *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 15.2(d) (2) n. 59; *see also* Solimine, *supra* note 17, at 42-43. Other Ohio courts exercised jurisdiction over § 1983 cases without addressing the jurisdictional issue, *see id.* at 50 n. 60, while some expressly held that Ohio courts had concurrent jurisdiction over § 1983 cases. *See, e.g.*, Williams v. Union-Scioto Bd. of Educ., No. 1204, 1985 WL 8356 (Ohio Ct. App. Ross Co. Oct. 8, 1985); Johnson v. Linder, 14 Ohio App. 3d 412, 471 N.E.2d 815 (Allen Co. 1984); Jackson v. Kurtz, 65 Ohio App. 2d 152, 416 N.E.2d 1064 (Hamilton Co. 1979); Lakewood Homes, Inc. v. Board of Adjustment, 23 Ohio Misc. 211, 258 N.E.2d 470 (Ct. C. P. Allen Co. 1970),

courts have jurisdiction over § 1983 actions.[94] Even before the Ohio Supreme Court expressly held that Ohio courts had concurrent jurisdiction over § 1983 actions, Ohio courts were entertaining such federal claims. Although no statistics are collected on the precise number of § 1983 cases filed in the Ohio courts,[95] a review of appellate court opinions over the past two decades suggests a significant trend. Essentially no § 1983 cases were being heard in the Ohio courts in the 1970s, but as Table I demonstrates, the § 1983 caseload began to take off in the early 1980s. For example, during the four-year period between 1981 and 1984, there were 11 opinions issued per year by the Ohio appellate courts, but between 1990 and 1993, the most recent four-year period, the number of opinions issued per year by the Ohio appellate courts had jumped more than threefold to 35.25.[96] Appellate court opinions, of course, represent only the tip of the iceberg, but they are a useful surrogate for trends taking place in trial courts. Thus, it is fair to say that there has been a sharp increase in the volume of § 1983 cases being filed in the Ohio trial courts.[97]

There also appears to be changes in the nature of the § 1983 caseload in Ohio. This conclusion is necessarily impressionistic, but Table II is suggestive. In the early 1980s, § 1983 cases filed in the Ohio courts were most likely to involve public employment disputes and only rarely involved the criminal justice process. In more recent years, however, the state court § 1983 caseload in Ohio has come to more closely resemble the federal court § 1983 caseload, and there

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rev'd, modified and aff'd, in part, on other grounds, 25 Ohio App. 2d 125, 267 N.E.2d 595 (Allen Co. 1971).

[94]*See* Cooperman v. University Surgical Assocs., 32 Ohio St. 3d 191, 513 N.E.2d 288 (1987) (holding that Court of Common Pleas has jurisdiction over § 1983 individual capacity damage actions against state employees); Schwarz v. Board of Trustees of Ohio State Univ., 31 Ohio St. 3d 267, 510 N.E.2d 808 (1987) (holding that Court of Common Pleas has jurisdiction over § 1983 claims for prospective injunctive relief against state officials); *see also* Conley v. Shearer, 64 Ohio St. 3d 284, 292-93, 595 N.E.2d 862, 869-70 (1992) (reaffirming *Schwarz*).

[95]Telephone Interview with Douglas R. Stephens, Statistics Officer, Ohio Supreme Court (Apr. 22, 1993). Nor does it appear that statistics on the volume of § 1983 cases are gathered in other states. Telephone Interview with Brian J. Ostrom, Director of Court Statistics, National Center for State Courts (July 26, 1993) (indicating his lack of awareness of any state that systematically collects statistics on the volume of § 1983 cases).

[96]Most of the appellate court opinions reflected in Table I are Court of Appeals decisions, and only 21 of the 292 listed opinions are Ohio Supreme Court cases.

[97]Until recently, less than 5% of the opinions of the Ohio Courts of Appeals were being reported annually. *See* William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 316 N. 24 (1985). Effective March 1, 1983, the Ohio Supreme Court adopted a new rule for the reporting of opinions, *see* SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, and there has been an increase in the reporting of Court of Appeals opinions. It should be noted, however, that the increase in Court of Appeals opinions reflected in Table I is not a function of any changes in publication policies, as the statistics include both reported and unreported opinions.

appears to be an increasing percentage of § 1983 suits involving police practices and other aspects of the criminal justice system, including disputes arising out of jails and prisons.[98]

TABLE I
§ 1983 LITIGATION IN THE OHIO COURTS
APPELLATE COURT OPINIONS[99]

date	ctapp	sct	total
1979	1	0	1
1980	0	0	0
1981	12	1	13
1982	7	2	9
1983	11	2	13
1984	7	2	9
1985	28	1	29
1986	12	1	13
1987	16	2	18
1988	22	1	23
1989	23	0	23
1990	35	3	38
1991	33	3	36
1992	37	3	40
1993	27	0	27

TABLE II
§ 1983 LITIGATION IN THE OHIO COURTS
BREAKDOWN BY SUBJECT MATTER[100]

Key to Table II

1. public employment
2. police abuse/excessive force
3. criminal justice/prosecutorial abuse
4. prisoners' rights
5. land use
6. education/juvenile rights
7. taxation/business regulation/interference
8. welfare/governmental benefits
9. miscellaneous

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[98]This appears to be consistent with the changing nature of the § 1983 caseload in other states. *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 2.7.

[99]These cases represent reported and unreported appellate court opinions in which the opinion makes clear that a claim was made under § 1983. These cases were found by using the following WESTLAW search to locate Ohio cases that cited § 1983: "42 w/5 1983." In cases in which both the Court of Appeals and the Ohio Supreme Court wrote opinions, both are included.

[100]This is the subject matter breakdown of the cases in Table I.

	1	2	3	4	5	6	7	8	9	total
1979	1	0	0	0	0	0	0	0	0	1
1980	0	0	0	0	0	0	0	0	0	0
1981	5	1	0	2	2	1	0	1	1	13
1982	4	0	0	0	3	2	0	0	0	9
1983	4	1	4	0	1	0	0	1	2	13
1984	3	0	0	2	1	0	1	1	1	9
1985	12	1	5	2	1	3	2	1	2	29
1986	4	1	4	1	0	0	2	0	1	13
1987	8	0	3	1	2	0	0	0	4	18
1988	4	0	4	5	5	1	1	1	2	23
1989	7	0	1	3	2	1	2	1	6	23
1990	6	3	7	4	5	2	4	2	5	38
1991	12	3	5	7	1	1	2	1	4	36
1992	3	3	9	17	2	3	1	0	2	40
1993	8	2	3	6	2	1	2	2	1	27

C. Selective Refusals to Exercise Jurisdiction

Although no state court system categorically excludes § 1983 cases from its courts, some states exclude subclasses of § 1983 cases.[101] Such selective exclusions, however, are improper where they are not based on valid excuses and neutral rules of judicial administration.[102] The Ohio Court of Appeals recognized these principles in *Weinfurtner v. Nelsonville-York School District Board of Education*.[103] Relying on *Howlett*, the court held that the state policy of providing the State Employment Relations Board with exclusive jurisdiction over disputes involving unfair labor practice charges was not a neutral jurisdictional rule and thus was not a valid excuse for divesting Ohio courts of subject matter jurisdiction over § 1983 claims arising out of such disputes.[104]

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[101] *See, e.g.*, Faulkner-King v. Wicks, 590 N.E.2d 511 (Ill. Ct. App.) (holding that Illinois courts lack subject matter jurisdiction over § 1983 employment discrimination claims), *appeal denied*, 602 N.E.2d 450 (1992), *cert. denied*, 113 S. Ct. 1384 (1993); Cepeda v. Coughlin, 513 N.Y.S.2d 528 (N.Y. App. Div.) (holding that New York courts lack subject matter jurisdiction over § 1983 suits against correctional officers), *appeal denied*, 512 N.E.2d 560 (N.Y. 1987); *see also* State v. Quill, 500 N.W.2d 196 (N.D. 1993) (holding that North Dakota courts are not required to entertain § 1983 suits challenging state tax policies).

[102] *See supra* notes 86-92 and accompanying text.

[103] 77 Ohio App. 3d 348, 602 N.E.2d 318 (Athens Co. 1991).

[104] *Id.* at 321-22; *accord* Thomas v. Allen, 837 S.W.2d 631, 632-33 (Tex. 1992) (relying on *Howlett* and the absence of a neutral rule of judicial administration to reverse a trial court's discretionary refusal to assume jurisdiction over an inmate's § 1983 claim against correctional officers).

D. Courts of Limited Jurisdiction

1. Court of Claims

States have some leeway in determining which courts they will open to federal causes of action,[105] but states may not adopt jurisdictional policies that burden the litigation of § 1983 or other federal claims.[106] This principle raises two distinct questions. First, may courts of limited jurisdiction entertain § 1983 actions? Second, if they may, does this preclude courts of general jurisdiction from also entertaining such actions?

In *Manning v. Ohio State Library Board*,[107] the Ohio Supreme Court indirectly addressed an aspect of these questions in the context of a Title VII employment discrimination suit against a state agency. The court had previously held that Ohio courts could not entertain Title VII actions.[108] But in *Manning*, the court responded to an intervening Supreme Court decision,[109] reversed itself, and opened the Ohio courts to such federal claims.[110] Because the suit was against the state, however, the court held that the Ohio Court of Claims had exclusive jurisdiction.[111]

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[105] *See* Herb v. Pitcairn, 324 U.S. 117 (city court of limited jurisdiction may decline to exercise jurisdiction over FELA actions on the ground that the action arose outside its territorial jurisdiction), *supplemental opinion*, 325 U.S. 77 (1945).

[106] *See generally* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 11.2(b).

[107] 62 Ohio St. 3d 24, 577 N.E.2d 650 (1991).

[108] *See* Fox v. Eaton Corp., 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976) (treating Title VII actions as exclusively within the jurisdiction of the federal courts).

[109] *See* Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) (holding that state courts have concurrent jurisdiction over Title VII actions).

[110] In describing its decision in *Fox*, the *Manning* court observed that in Title VII "Congress afforded room for disagreement on the issue of jurisdiction" by "not expressly grant[ing] exclusive jurisdiction to the federal courts." *Manning*, 62 Ohio St. 3d at 28, 577 N.E.2d at 653. This apparent attempt to justify *Fox*, however, completely ignores, as did the decision by the *Fox* court, the well-established presumption of concurrency. *See supra* note 84.

[111] 62 Ohio St. 3d at 29-30, 577 N.E.2d at 654-55. The Ohio Courts of Common Pleas have jurisdiction over actions against the state that they could have heard prior to the creation of the Court of Claims in 1975. *See* OHIO REV. CODE ANN. § 2743.02(A) (1) (Anderson 1992) ("To the extent that the state has previously consented to be sued, this chapter has no applicability."); *see also* Friedman v. Johnson, 18 Ohio St. 3d 85, 86, 480 N.E.2d 82, 83 (1985) ("[T]he Court of Claims was not to have exclusive, original jurisdiction over claims from which the state was not immune prior to the effective date of the Act.").

Despite *Fox*, the state was not immune from suit under Title VII in state or federal courts as a result of the 1972 amendments to Title VII, which made Title VII applicable to state and local governments. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that the 1972 amendments making Title VII applicable to the states overrode the states' eleventh amendment immunity from suit in federal courts). As the *Manning* dissenters noted, correctly, "[e]ven had the [Court of Claims] Act not been passed, the state of Ohio

In the course of holding that Ohio courts may entertain § 1983 suits, the Ohio Supreme Court has held that the Ohio Courts of Common Pleas have subject matter jurisdiction over § 1983 suits against state officials for both damages and injunctive relief.[112] Since § 1983 damage suits may only be brought against state officials in their individual capacities,[113] there is no question that the proper Ohio court for such suits is the Court of Common Pleas and not the Court of Claims.

States are not "persons" within the meaning of § 1983. Thus, they cannot be sued under § 1983 in any forum. Nevertheless, the Supreme Court has held that official capacity suits seeking prospective injunctive relief against state officials are within the scope of § 1983.[114] This bifurcated definition of "person" under § 1983 raises a difficult state law question. Specifically, that issue is whether the Court of Claims[115] may exercise jurisdiction over some § 1983 injunctive claims against state officials. The Ohio Supreme Court has approved jurisdiction in the Court of Claims over injunctive suits against the state in limited circum-

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. . . would still be amenable to suit for a violation of Title VII." *Manning*, 62 Ohio St. 3d at 32, 577 N.E.2d at 656 (Douglas, J., dissenting, in part).

Because states that entertain federal causes of action are required to apply all the attributes of the federal remedy, *see infra* notes 189-93 and accompanying text, *Manning* raises the unusual possibility that in order to entertain Title VII actions the Ohio Court of Claims may be required to ignore features of state law identified by the *Manning* dissenters as otherwise applicable in the Court of Claims, including the waiver provision, the application of a special collateral source rule, and the bar on joinder of individual state employees as defendants. *Id.* In addition, it will be curious to see how the Court of Claims deals with the provision of the Civil Rights Act of 1991 creating a right to trial by jury on intentional employment discrimination claims. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (1991) (providing that the right to trial by jury on intentional employment discrimination claims under 42 U.S.C. § 1981A extends to any party in a case in which "a complaining party seeks compensatory . . . damages"). *But cf.* Kermetz v. Cook-Johnson Realty Corp., 54 Ohio App. 2d 220, 376 N.E.2d 1357 (Franklin Co. 1977) (treating the bringing of a just compensation claim in the Court of Claims as a waiver of the right to trial by jury guaranteed by the Ohio Constitution, but permitting the suit to be brought in the Court of Common Pleas).

[112] *See supra* note 94.

[113] Official capacity § 1983 damage suits against state officials are really suits against the state and not within the definition of "person" in § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Thus, the § 1983 cause of action does not reach such claims, regardless of forum. Moreover, the eleventh amendment denies federal courts jurisdiction over suits against nonconsenting states. Quern v. Jordan, 440 U.S. 332 (1979).

[114] *See Will*, 491 U.S. at 71 n.10.

[115] The jurisdiction of the court of claims is defined as follows: "The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims . . . in accordance with the same rules of law applicable to suits between private parties . . . ." OHIO REV. CODE ANN. § 2743.02(A) (1) (Anderson 1992).

stances.[116] Furthermore, there is nothing in *Manning* that suggests that the court will (or should) reexamine its earlier decisions and deny the Courts of Common Pleas jurisdiction over § 1983 suits against state officials for injunctive relief,[117] especially in light of the fact that such suits could be brought prior to the adoption of the Court of Claims Act.[118] Nonetheless, when plaintiffs join § 1983 claims for prospective injunctive relief with non-§ 1983 damage claims against the state (permitted in the Court of Claims), there is no reason why the Court of Claims cannot exercise jurisdiction over the § 1983 claims.

2. Municipal Courts

Analogous issues concerning courts of limited jurisdiction and § 1983 litigation can arise with respect to the Ohio Municipal Courts. Under state law, Municipal Courts have concurrent jurisdiction with Courts of Common Pleas over civil actions in which the amount claimed does not exceed $10,000,[119] and it is likely that, as a matter of state law, Municipal Courts are required to entertain § 1983 suits within the jurisdictional amount requirement.[120]

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116 *Cf. Friedman*, 18 Ohio St. 3d at 87, 480 N.E.2d at 84 (holding that the presence of a claim for declaratory relief joined with claims for damages and injunctive relief against the state did not divest the Court of Claims of jurisdiction). *But cf.* Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980) (holding that absent a statute authorizing an injunctive action directly against the state in the Court of Common Pleas that court lacked jurisdiction over such a suit).

117 *Accord* Clark v. Russell, No. 1-92-28, 1993 WL 19649 (Ohio Ct. App. Allen Co. Jan 29, 1993) (rejecting the argument that *Manning* deprives the Court of Common Pleas of subject matter jurisdiction over § 1983 suits against state officials).

118 Although there is no evidence of official capacity § 1983 cases being brought in the Ohio Courts of Common Pleas against state employees for prospective injunctive relief prior to 1975, there was no state or federal impediment to such state court litigation. Moreover, despite the absence of express consent to such suits, consent may be implicit in the state's obligation under the Supremacy Clause to follow federal law. *Cf.* Howlett v. Rose, 496 U.S. 356 (1990) (rejecting the use of state sovereign immunity as a bar to the exercise of state court jurisdiction over § 1983 claims). *But cf. Manning*, 62 Ohio St. 3d at 29, 577 N.E.2d at 654 ("Prior to the enactment of the Court of Claims Act, it was a fundamental principle of the common law in Ohio that sovereign immunity applied whenever the state was sued without its express consent."). For a discussion of the obligation of state courts to entertain federal claims against the state, see *infra* note 406.

119 *See* OHIO REV. CODE ANN. § 1901.17 (Anderson 1983) ("A municipal court shall have original jurisdiction only in those cases where the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed ten thousand dollars."); *see also* OHIO REV. CODE ANN. § 1901.18(A) (2) (Anderson Supp. 1992) ("[S]ubject to the monetary jurisdiction of municipal courts, . . . a municipal court has original jurisdiction within its territory . . . [i]n any action or proceeding at law for the recovery of money . . . of which the court of common pleas has jurisdiction.").

120 *Cf.* Terry v. Kolski, 254 N.W.2d 704 (Wis. 1977) (relying on state law to hold that the small claims courts in Wisconsin may entertain § 1983 claims). *But see* City of Cleveland v. A.A. Rose Mfg. Co., 89 Ohio App.3d 267, 273, 624 N.E.2d 245, 249 (Cuyahoga Co. 1993) ("There is no authority for maintaining a § 1983 action . . . in the municipal courts because they are not courts of general jurisdiction.").

Moreover, even if state law permitted the exclusion of § 1983 suits from Municipal Courts, treating federal causes of action differently from state causes of action raises serious questions under the nondiscrimination principle.[121] Thus, it is likely that federal law requires Ohio to open its Municipal Courts to § 1983 claims.[122]

V. CHOICE OF FORUM CONSIDERATIONS

Most choice of forum discussions focus on plaintiffs because they are responsible for choosing the court in which a suit is filed. Defendants, however, have an equal interest in which court will hear a case. Accordingly, the factors that convince some § 1983 plaintiffs to select state courts often lead defendants to seek ways to avoid remaining in state courts. Given the liberal federal question removal statute,[123] state court defendants who prefer to defend § 1983 claims in federal court can almost always remove such cases,[124] and they are increasingly doing so.[125]

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[121] *See supra* note 90 and accompanying text.

[122] The converse issue of whether Ohio may make the Municipal Courts the exclusive forums for entertaining § 1983 claims that meet their territorial and other jurisdictional requirements is principally of academic interest given the fact that the Courts of Common Pleas have concurrent jurisdiction with Municipal Courts over small damage claims. *See* OHIO REV. CODE ANN. § 2305.01 (Anderson Supp. 1992) ("The court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts . . . ."). Under the nondiscrimination principle, a state may not single out § 1983 or other federal claims for less favorable treatment than that afforded state law claims. *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 10.4. A state that evenhandedly placed all "small claims" (without regard to their state or federal character) in a special court, however, could probably do so under federal law unless this burdened the litigation of the federal claims. *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 11.2(a) (2).

[123] 28 U.S.C. § 1441(a) (1988) (permitting state court defendants to remove cases to federal court if the action could have originally been filed in federal court). *See generally* Dorsey v. City of Detroit, 858 F.2d 338 (6th Cir. 1988) (applying § 1441 to permit removal of a state court § 1983 case).

[124] Removal of state court § 1983 cases is not available when the state court defendant fails to meet the timeliness and other procedural requirements of removal, *see* 28 U.S.C. § 1446(b) (1988), when less than all state court defendants join the removal petition, *see* Hewitt v. City of Stanton 798 F.2d 1230, 1232 (9th Cir. 1986), when the defendant's conduct in the litigation constitutes a waiver of the right to remove, *see infra* note 127, or when the federal court "lacks subject matter jurisdiction" over the case. *See* 28 U.S.C. § 1447(c) (1988).

State courts are not required to follow the justiciability requirements of Article III of the United States Constitution, and defendants may not remove § 1983 cases that meet state, but not federal, justiciability requirements. See International Primate Protection League v. Administrators of Tulane Educ. Fund, 111 S. Ct. 1700, 1710 (1991) (noting that "plaintiff's lack of Article III standing would not necessarily defeat its standing in state court"). Likewise, federal courts do not have removal jurisdiction over cases that are barred from federal court by the eleventh amendment. *See* McKay v. Boyd Constr. Co., 769 F.2d 1084, 1086-87 (5th Cir. 1985); David Nursing Home v. Michigan Dep't of Social Servs., 579 F. Supp. 285, 288 (E.D. Mich. 1984) (removal to federal court not a waiver of

A full review of choice of forum considerations relevant to § 1983 litigation in Ohio is beyond the scope of this article,[126] but some of the more important factors deserve mention. At first, however, a caveat: at best, any choice of forum discussion only identifies factors that those responsible for such decisions should consider. What direction these factors point will vary based on the nature of the case, the identity and attitudes of the parties and attorneys, the relief sought, the identity of the judge, and the respective roles of the judge and the jury. In addition, the body of relevant precedents as well as a myriad of tactical considerations influence choice of forum decisions.

A. The Decisionmakers

1. The Judges

The identity of the judge who will hear a case is one of the more important choice of forum factors. It is difficult, however, to generalize as to how differences between state and federal judges influence choice of forum decisions in specific cases. Moreover, because it is not possible to know which judge in a multijudge district or division will be assigned to a particular case, judgments about the attractiveness of the state or federal benches are necessarily collective judgments.[127]

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eleventh amendment). When cases are removed to federal courts that lack subject matter jurisdiction, federal courts are required to remand the cases to state courts. *See* 28 U.S.C. § 1447(c); *see also* Henry v. Metropolitan Sewer Dist., 922 F.2d 332 (6th Cir. 1991) (treating a § 1983 official capacity claim as a suit against the state that is barred by the eleventh amendment and ordering a remand but retaining jurisdiction over the § 1983 individual capacity claim). For a further discussion of jurisdictional issues in removed § 1983 cases, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 24.4.

[125]This conclusion about the increase in the removal of state court § 1983 actions is based on the author's analysis of raw statistical data from the Administrative Office of the United States Courts, from discussions with practicing attorneys throughout the country, including Ohio, and from the increasingly frequent references to removal in federal court § 1983 opinions. *Cf.* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 389 n.86 (1992) (documenting the increase in federal question removal).

[126]For a general review without an Ohio focus, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, Chs. 5-9.

[127]Plaintiffs' attorneys rarely know which judge will be assigned to their case, but state court defendants know the identity of the state trial judge to whom a case has been assigned. Thus, removal permits defendants to divest a particular state court judge of jurisdiction by removing the case to a different judicial system. *But cf.* Rothner v. City of Chicago, 879 F.2d 1402, 1404 (7th Cir. 1989) ("The thought that Congress could have intended litigants to use § 1441 to 'test the waters' in state court before deciding whether to exercise their right to remove is simply absurd."). Defendants, however, must not only remove within the thirty-day period of 28 U.S.C. § 1446(b) (1988), but they must also take care to avoid extensive participation in state court within the thirty-day period or risk waiving their right to remove. *See Rothner*, 879 F.2d at 1412-16 (discussing the waiver doctrine but expressing doubts about its status).

Federal court judges clearly have better jobs than their state counterparts. They have higher wages, better working conditions, and greater job security, including a guarantee of life tenure that enables them to remain not only above partisan politics but also independent of the bar, the public, and the media.[128] But this guarantee of independence may also account for what some view as a federal judiciary that has lost touch. State court judges lack the independence that characterizes the federal bench.[129] This is especially true in Ohio which, despite a nonpartisan general election ballot,[130] has a tradition of a politicized and partisan state judiciary.[131] Perhaps even more importantly, federal judges have the institutional support to give their cases adequate attention.[132] On the other hand, state court trial judges in Ohio have significantly higher caseloads than their federal counterparts and far fewer resources to perform their duties.[133]

The most analogous procedural device available to plaintiffs who wish to change forums after "testing the waters" are the rules on voluntary dismissals. *Cf.* Woods v. Ohio High Sch. Athletic Ass'n, No. 80 CA 30, 1981 WL 6063 (Ohio Ct. App. Pickaway Co. Nov. 9, 1981) (refusing to apply res judicata to a federal court suit that was voluntarily dismissed after the decision was announced but before entry of judgment). *But cf.* Feldman v. Village of Lombard, No. 86 C 3295, 1987 WL 9000 (N.D. Ill. Mar. 26, 1987) (requiring any new filing after a voluntary dismissal to be treated as a "related case" and reassigned to the original judge).

[128]*See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 30-48 (1985).

[129]This is not to suggest that all federal judges leave their political or partisan concerns behind after their confirmation. Nor does it suggest that all state court judges lack independence. Rather, it suggests that it is easier for federal judges to remain independent.

[130]*See* OHIO REV. CODE ANN. § 3505.04 (Anderson 1988) (nonpartisan general election ballot for election to judicial office).

[131]In addition to the partisan primary, political parties in Ohio play an active role in funding and managing "nonpartisan" general election campaigns for the bench. *See generally* Kathleen L. Barber, *Ohio Judicial Elections-Nonpartisan Premises With Partisan Results*, 32 OHIO ST. L.J. 762 (1971); *see also* G. ALAN TARR & MARY C. A. PORTER, STATE SUPREME COURTS IN STATE AND NATION 124-83 (1988).

[132]This is true despite the funding crisis that recently led to a temproary suspension of civil jury trials in the federal courts. *See* Stephen Labaton, *U.S. Judges Refuse To Add Civil Cases Citing Gap in Funds*, N.Y. TIMES, Apr. 9, 1993, at A1. *But see* Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, 107 Stat. 241, 246 (1993) (appropriating interim funding for juror fees for civil cases).

[133]In 1992, 154,890 new cases were filed in the General Division of the Ohio Courts of Common Pleas. *See* OHIO COURTS SUMMARY 1E (1992). In the 12 of the 19 Ohio counties in which the General Division of the Court of Common Pleas does not have jurisdiction over domestic relations, probate, and juvenile cases, which are almost exclusively the most populous Ohio counties, an average of more than 800 new civil and criminal cases were filed in 1992 for each year judge. *Id.* at 2E. In six counties in this group, there were more than 1,000 new filings (including transfers and reactivations) per judge in 1992. In order of caseload, these counties were: Erie (1,321), Franklin (1,259), Cuyahoga (1,207), Summit (1,088), Hamilton (1,015), and Lorain (1,008). *Id.*

These generalizations do not do justice to the subtle forces that influence individual judges. Many state court judges, despite their lack of resources, efficiently manage their caseloads. Likewise, many federal court judges, despite their institutional advantages, do not.[134] Thus, like collective judgments about the competence or attitudes of the state or federal judiciary,

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Federal court caseloads in Ohio, on the other hand, are far lighter. For example, in 1993, there were 4,012 new cases (divided into 3550 civil cases and 462 criminal cases) filed in the United States District Court for the Northern District of Ohio. ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET FOR THE CALENDAR YEAR 1993 PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (United States District Court for the Northern District of Ohio)[hereinafter "NORTHERN DISTRICT"]. The comparable figures for the Southern District of Ohio for 1993 were 3040 new cases (divided into 2632 civil cases and 408 criminal cases). 10th ANNUAL REPORT 1993 (Office of the Clerk - United States District Court for the Southern District of Ohio). The number of case filings per full-time equivalent federal judge in the Northern District of Ohio for 1993 was 486.3, which consisted of 430.3 new civil cases per judge and 56 new criminal cases per judge. NORTHERN DISTRICT, *supra*. These figures allocate the time of federal judges who have taken senior status and elect not to take a full draw of cases. They also reflect the fact that five of the twelve authorized federal judgeships in the Northern District of Ohio were vacant during 1993. If this court had been fully staffed during all of 1993, the per judge new filings would have been 302.8, which would have consisted of 267.9 new civil cases and 34.9 new criminal cases. Ignoring the contribution of the senior judges in the Northern District of Ohio, the case filings per federal judge in the district for 1993 (assuming that all twelve of the judgeships had been filled) would have been 334.3 cases, which would have consisted of 295.8 new civil cases per judge and 38.5 new criminal cases per judge. The Southern District of Ohio does not generate any statistics based on the number of case filings per full-time equivalent federal judge. All eight of the federal judgeships in the Southern District of Ohio were filled during 1993. Ignoring the contribution of senior judges, the number of case filings per federal judge in the Southern District of Ohio for 1993 was 380, which consisted of 329 new civil cases per judge and 51 new criminal cases per judge.

Unlike the federal court statistics, which sometimes take into consideration the contribution of senior district court judges, the state court statistics ignore the role of reserve judges. The statistics also ignore the greater complexity of many federal cases. Nonetheless, the statistics provide some indication of the higher caseloads in the state courts in many Ohio counties.

The above assessments of the caseloads of the federal courts in Ohio do not breakdown the caseload, but in fiscal year 1992, which is the year ending September 30, 1992, there were 648 new civil rights cases filed in the Northern District of Ohio (including 492 voting, employment, housing and accommodations, welfare, and other civil rights cases and 156 "prisoner civil rights" cases) and 628 new civil rights cases filed in the Southern District of Ohio (including 373 voting, employment, housing and accommodations, welfare, and other civil rights cases and 255 "prisoner civil rights" cases). ANNUAL REPORT OF THE DIRECTOR 30 (1992) (Table C-3). This greater number of prisoner cases in the Southern District is undoubtedly explained by the greater number of prisons in the southern part of Ohio. As noted earlier, there are no comparable figures available as to the § 1983 caseload of Ohio courts, *see supra* note 95, but it is clear that most § 1983 cases in Ohio are filed in federal court.

[134]The Judicial Improvements Act of 1990 attempts to improve the efficiency of the federal bench by requiring all federal districts to adopt "a civil justice expense and delay reduction plan." Pub. L. No. 101-650, § 103(a), 104 Stat. 5098 (1990) (creating 28 U.S.C. § 471 (Supp. III 1991)).

generalizations about efficiency or capacity have little relevance to how individual judges act in specific cases.

2. The Juries

There are significant differences in the composition of juries in the state and federal courts in Ohio as well as in their mode of selection and methods of operation. State court juries in Ohio are selected from a venire representing a single county, unlike multicounty federal juries.[135] Thus, state court juries more closely resemble the county in which a suit is filed. Attorneys in the Ohio courts conduct the voir dire and thus play a greater role in selecting juries than do attorneys in the federal courts. The methods of deciding cases also differ. State court juries in Ohio decide civil cases by a three-fourths vote[136] rather than by the unanimous vote required in federal court under both the Seventh Amendment and the federal rules.[137]

B. Doctrinal Limitations

Federal courts are courts of limited jurisdiction, and federal practice is characterized by restrictive policies on such justiciability requirements as standing, mootness, and ripeness. Likewise, the various abstention doctrines limit the equitable power of federal courts. In addition, the Eleventh Amendment limits the ability of federal courts to enter decrees having an impact on the state treasury.[138]

State courts in Ohio operate independently of these federal constraints. Although there may be Ohio counterparts to many of these federal limitations, Ohio courts may reach the merits of claims that federal courts cannot reach. For example, unlike the federal courts, Ohio courts make broad use of taxpayer standing.[139] Also, unlike the federal courts, Ohio courts are not subject to the narrow federal mootness doctrine.[140]

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[135]For example, juries in the Western Division of the Northern District of Ohio, which sits in Toledo, come from a 21-county area. The Eastern Division is divided into three regions for jury selection purposes, and juries in Akron are selected from 11 counties; in Cleveland from 4 counties, and in Youngstown from 4 counties. *See* JUROR SELECTION PLAN, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 2 (Sept. 1, 1992).

[136]OHIO CONST. art. I, § 5.

[137]*See* American Publishing Co. v. Fisher, 166 U.S. 464, 467-68 (1897); *see also* FED. R. CIV. P. 48.

[138]*See generally* CHEMERINSKY, *supra* note 67, § 7.4.

[139]*Compare* State *ex rel.* Meshel v. Keip, 66 Ohio St. 2d 379, 423 N.E.2d 60 (1981) (upholding the use of taxpayer standing to permit a challenge to the constitutionality of the General Assembly's delegation of authority to the Controlling Board to transfer funds from one fiscal year to another) *and* State *ex rel.* Nimon v. Springdale, 6 Ohio St. 2d 1, 215 N.E.2d 592 (1966) (permitting a municipal taxpayer to enforce the right of the public to the performance of a public duty) *with* United States v. Richardson, 418 U.S. 166 (1974) (denying taxpayer and citizen standing to plaintiffs challenging secrecy

C. Tactical Differences

State courts are often seen by plaintiffs as more attractive forums in which to litigate § 1983 damage claims. Among the reasons for this attraction is the fact that in the age of "civil justice reform,"[141] federal courts have become less friendly places for litigating cases.[142] Furthermore, state court judges are less likely to block the path to the jury.

Despite Ohio's adoption of civil rules of procedure that are patterned after the Federal Rules of Civil Procedure, there are differences not only in specific rules but also in the practices followed by state and federal courts. Rule 11 of the Federal Rules of Civil Procedure and the willingness of federal judges to use (or to threaten to use) Rule 11 and other sanctions may deter some plaintiffs from filing § 1983 cases in federal courts.[143] In Ohio, however, the analogous rules have far fewer teeth.[144] Even more importantly, state trial court judges are often reluctant to use sanctions aggressively against attorneys whose support they may need to retain their jobs.

Federal case management procedures are also more demanding than analogous state procedures. Because moving cases to trial quickly is one of

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concerning expenditures of the Central Intelligence Agency as inconsistent with U.S. CONST. art. I, § 9, cl. 7, requiring a regular statement and account of public funds).

[140]*Compare* Franchise Developers, Inc. v. City of Cincinnati, 30 Ohio St. 3d 28, 29, 505 N.E.2d 966, 967 (1987) (syllabus) ("Although a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest.") *with* Weinstein v. Bradford, 423 U.S. 147 (1975) (limiting capable of repetition yet evading review mootness exception to cases in which the named party may again be affected).

[141]Under the Judicial Improvements Act of 1990, the United States District Court for the Northern District of Ohio was designated a "demonstration" district and was required to "experiment with systems of differentiated case management." Publ. L. No. 101-650, § 104(b) (1), 104 Stat. 5098 (1990). In addition, the district opted to be an early implementation district and to adopt its expense and delay reduction plan by December 31, 1991. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105, 104 Stat. 5098 (1990). The district's differentiated case management plan, which became effective on January 1, 1992, permits early intervention and encourages the use of alternative dispute resolution mechanisms. *See* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, LOCAL RULES 7 & 8 (dealing with alternative dispute resolution and differentiated case management respectively).

[142]*See* Miller, *supra* note 125, at 396-423 (summarizing the results of a survey of attorneys' choice of forum decisions).

[143]The revision of Rule 11, which became effective on December 1, 1993, is intended to place "greater constraints on the imposition of sanctions." Advisory Committee on Civil Rules, comment (on proposed Rule 11).

[144]*Compare* OHIO R. CIV. P. 11 (limiting sanctions to willful violations) with FED. R. CIV. P. 11 (authorizing sanctions without any showing of willful violations). The recent change in FED. R. CIV. P. 11, *see supra* note 143, places greater constraints on the imposition of sanctions but still leaves the federal rule far more powerful than the Ohio counterpart.

plaintiffs' goals, one might think that plaintiffs would prefer judges who have both the tools and the inclination to accomplish this. Nonetheless, some plaintiffs resist what they believe to be overly demanding case management requirements, and they often have concerns about the interventionist approach of many federal judges.

Discovery rules in the state and federal courts in Ohio have long been virtually identical, but this may be changing. The federal courts have made major changes in discovery,[145] but it is unclear whether they will apply to § 1983 cases in the Ohio federal courts.[146] Nor is it clear whether such changes will remain in effect,[147] and, if they do, whether Ohio will follow the federal lead.[148]

There are also different procedural tools available in state and federal courts. Ohio expressly permits the use of Doe Defendants to allow the joinder of unknown defendants after the expiration of the statute of limitations.[149] In contrast, the availability of this practice in federal court is unclear.[150] The federal offer of judgment rule[151] also evinces a difference between federal and Ohio civil procedure. Though used only occasionally, this rule is a powerful

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[145]On April 22, 1993, the Supreme Court recommended the adoption of rules that would significantly change the current system of discovery and replace it with a system that relies heavily on voluntary disclosure. *See* Order, 146 F.R.D. 404 (1993) (transmitting proposed amendments to Congress). Because Congress failed to block these changes, they became effective December 1, 1993.

[146]Under Fed. R. Civ. P. 26(a) (1), as amended, federal district courts may adopt local rules that make inapplicable or modify disclosure procedures.

[147]*See* Randall Samborn, *Rules for Discovery Uncertain Opposition Lingers to Mandatory Disclosure,* NAT'L L.J., Dec. 20, 1993, at 1 (describing the unsuccessful effort to get Congress to block the mandatory disclosure rules before their December 1, 1993 effective date, and the uncertainty as to whether Congress will intervene now that the rules have become effective).

[148]The Ohio Supreme Court has relied on federal principles in defining the scope of discovery in § 1983 litigation. *See* Henneman v. City of Toledo, 35 Ohio St. 3d 241, 520 N.E.2d 207 (1988) (noting that "[w]here a particular claim is based on the United States Constitution or federal statutes, federal law controls on the question of evidentiary privilege" and permitting discovery of information and records compiled by a police department pursuant to its internal investigation of alleged police misconduct subject to an in camera inspection by the trial court).

[149]*See* OHIO R. CIV. P. 3(A) & 15(D).

[150]*See* Lewellen v. Morley, 875 F.2d 118 (7th Cir. 1989) (acknowledging that state law supplied the applicable tolling policies for § 1983 actions, but refusing to apply this borrowed state policy to federal court § 1983 when there is a provision of federal law on point); *see also* Worthington v. Wilson, 790 F. Supp. 829 (C.D. Ill. 1992) (refusing to permit relation back of amendment adding Doe Defendants under FED. R. CIV. P. 15(c), as amended in 1991). *But see* Cabrales v. Los Angeles County, 864 F.2d 1454 (9th Cir. 1988) (permitting such relations back), *vacated on other grounds,* 490 U.S. 1087 (1989). For a further discussion of this issue, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, at § 8.2(c).

[151]FED. R. CIV. P. 68.

weapon for federal court defendants. It provides leverage to force settlements by limiting their exposure to fee awards in § 1983 suits.[152] There is no analogous provision under Ohio law.[153] Finally, the clear availability of interlocutory appeals of § 1983 qualified immunity issues in the federal system, as contrasted to the uncertainty of such interlocutory review in the Ohio courts,[154] is another reason § 1983 plaintiffs may prefer state courts and § 1983 defendants may remove cases to federal courts.[155]

Differences between state and federal practice, however, are more than simply a question of the formal rules. One of the most significant areas of difference involves the availability of summary judgment. Despite the virtually identical rules,[156] federal judges are far more likely than Ohio judges to dispose of cases on summary judgment. In part, this is a result of recent Supreme Court decisions that encourage greater use of summary judgment,[157] especially in § 1983 cases,[158] but it also may be a function of the greater resources that federal courts can bring to the task of addressing complex, document-intensive motions for summary judgment.

Ohio has embraced the federal approach to summary judgment,[159] but the Ohio Supreme Court appears more reluctant than federal courts to approve the

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[152] *See* Marek v. Chesny, 473 U.S. 1 (1985) (construing FED R. CIV. P. 68 to permit the use of rejected offers of judgment to limit awards of attorney fees to plaintiffs under 42 U.S.C. § 1988 (1988).

[153] *See* OHIO R. CIV. P. 68 (barring the use of rejected offers of judgment to determine costs).

[154] *See infra* notes 327-48 and accompanying text.

[155] Some additional differences involve voluntary dismissals. *Compare* OHIO R. CIV. P. 41(A) (1) (permitting plaintiffs to dismiss cases voluntarily up until the commencement of trial) *with* FED. R. CIV. P. 41(a) (1) (only permitting plaintiffs to dismiss cases voluntarily before service of an answer or a motion for summary judgment). Differences also exist with regard to the rules on verdicts. *Compare* OHIO R. CIV. P. 49(C) (barring the use of special verdicts) *with* FED. R. CIV. P. 49(a) (permitting the use of special verdicts).

[156] *See* FED. R. CIV. P. 56; OHIO R. CIV. P. 56.

[157] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); *see also* Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Unlike federal courts, the Ohio courts do not permit sua sponte grants of summary judgment. *See* Besser v. Griffey, 88 Ohio App. 3d 379, 382 n.4, 623 N.E.2d 1326, 1328 n.4 (Ross Co. 1993).

[158] *See infra* notes 260-63 and accompanying text (discussing the adoption of an almost exclusively objective qualified immunity standard).

[159] *See* Wing v. Anchor Media, Ltd. of Texas, 59 Ohio St. 3d 108, 108, 570 N.E.2d 1095, 1096-97 (1991) (syllabus no. 3) (relying on *Celotex* and holding that "[a] motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial").

use of summary judgment and has required trial courts to strictly adhere to the summary judgment rule.

> Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. Recently, this court reiterated that, because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. Doubts must be resolved in favor of the non-moving party.[160]

Independent of doctrine, it is often easier for state court judges to deny summary judgment and to set a case for trial rather than to produce a written opinion granting summary judgment.[161] Federal judges, on the other hand, are more likely to refer the stack of depositions, affidavits, and briefs to a law clerk (or law student intern), a luxury available to few state trial courts.

D. Federal Law and the Law of the Circuit

State courts often look to the Court of Appeals for the federal circuit in which their state is located for guidance in construing § 1983. Even though the same body of federal law governs § 1983 actions in state and federal courts, state courts are not obligated to follow the law of their federal circuit.[162] Although somewhat surprising, this is consistent with the structure of the federal judicial system in which the United States Supreme Court is responsible for resolving conflicts between state and federal courts on the meaning of federal law.[163]

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[160] Murphy v. City of Reynoldsburg, 65 Ohio St. 3d 356, 358, 604 N.E.2d 138, 140 (1992) (citations and quotations omitted). The syllabus in *Murphy* was as follows: "Civ.R. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error." 65 Ohio St. 3d at 356, 604 N.E.2d at 138. The *Murphy* court also made clear that the independent consideration by an appellate court cannot cure a trial court's failure to examine the evidence. 65 Ohio St. 3d at 360, 604 N.E.2d at 141.

[161] 65 Ohio St. 3d at 359, 604 N.E.2d at 140 (requiring trial courts to thoroughly examine all appropriate materials before ruling on a motion for summary judgment).

[162] *See* United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

[163] *See generally* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 5.4; *see also* Beason v. Harcleroad, 805 P.2d 700, 704 (Or. Ct. App. 1991) (noting that "in cases in which federal law is applied, Oregon courts are not bound by Ninth Circuit decisions . . .."); Graham v. Scissor-Tail, Inc., 623 P.2d 165, 179 (Cal. 1981) ("[T]his court is in any event under no obligation to follow federal lower court precedents interpreting acts of Congress when we find those precedents unpersuasive."); Gayety Books v. City of Baltimore, 369 A.2d 581, 585 (Md. 1977) ("The courts of this State . . . are not bound by the holdings of a federal district court or of a federal circuit court of appeals.").

Because Ohio courts need not follow Sixth Circuit interpretations of federal law,[164] those responsible for choice of forum decisions should carefully review the state of the relevant law in the Sixth Circuit[165] and the Ohio Supreme Court.[166]

VI. THE METHODOLOGY OF STATE COURT § 1983 LITIGATION

As the volume of § 1983 state court litigation increases, state courts have had to address a number of novel issues. State courts that entertain § 1983 actions tend to apply familiar state policies, including state rules of practice and procedure. This application of state policies raises a range of discrete state and federal law issues, including whether the state policies apply to § 1983 claims as a matter of state law, and, if so, whether such applications are consistent with federal law.

The Supreme Court requires state courts to use federal standards to define the elements of the § 1983 cause of action.[167] States may not go beneath this federal floor to reject federal policies on such matters as the available immunities, the absence of exhaustion requirements, and the availability of attorney fees to prevailing parties.[168] Nor may states adopt policies that discriminate against or burden § 1983 actions.[169] On the other hand, when the policies applicable to federal court § 1983 litigation are not derived from § 1983 itself, such as with the jury unanimity requirement of the Seventh Amendment or the case or controversy requirement of Article III, state courts are generally free to follow their own policies.[170]

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[164]For example, the Sixth Circuit has interpreted federal law as requiring the use of a two-year statute of limitations for § 1983 cases, but some Ohio Courts of Appeals have selected a four-year limitations period. For a discussion of the statute of limitations issue, see *infra* notes 491-506 and accompanying text.

[165]For a discussion of the Sixth Circuit's recent treatment of § 1983 issues, see Steven H. Steinglass, *Section 1983 and the Reaganization of the Sixth Circuit: Closing the Doors to the Federal Courthouse*, 20 U. TOL. L. REV. 497 (1989)[hereinafter Steinglass, *Sixth Circuit*].

[166]Only decisions of the Ohio Supreme Court are binding on trial courts throughout the state. *See* Richman & Reynolds, *supra* note 97, at 322. Thus, when the Ohio Supreme Court has not spoken on an issue, it is important to look at the decisions of the state Court of Appeals whose decisions are binding on state trial courts within a district. *See* SUPREME COURT RULES FOR REPORTING OPINIONS 2(G) (2) ("Opinions [of the Court of Appeals] reported in the Ohio Official Reports . . . shall be considered controlling authority for all purposes in the judicial district in which they were rendered unless and until each such opinion is reversed or modified by a court of competent jurisdiction.").

[167]*See infra* notes 189-93 and accompanying text.

[168]*See infra* notes 239-42, 471-90 and 554-61 and accompanying text.

[169]*See infra* notes 194-207 and accompanying text.

[170]*See generally* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, at § 10.3.

A. The Meaning of State Law

State courts must initially determine whether state law applies to § 1983 actions. By addressing this issue first, state courts can avoid reaching federal issues. For example, in *Terry v. Kolski*,[171] the Wisconsin Supreme Court relied on principles of state court jurisdiction to hold that state law required small claims courts to entertain § 1983 actions otherwise within their jurisdiction. *Terry* therefore had no reason to reach the ultimate question of whether federal law required the same result.[172]

Ohio has similarly avoided reaching federal issues when state statutes, by their terms, only apply to state causes of action. Under these circumstances, the Ohio Supreme Court has not extended such requirements to § 1983 claims. For example, in *Conley v. Shearer*,[173] the court treated the immunity of state officials under § 9.86 of the Ohio Revised Code[174] as not applicable to § 1983 actions because the statute "*expressly limits* its coverage to 'any civil action that arises under *the law of this state.*'"[175]

In many cases, state statutes are not clear as to whether they apply to § 1983 actions, and this raises difficult issues of state statutory construction. In such cases, state courts often assume that state policies apply to § 1983 claims *as a matter of state law*.[176] An alternative approach to this initial state law issue is followed by the Supreme Judicial Court of Massachusetts. In *Mellinger v. Town of West Springfield*,[177] the court adopted a "clear statement rule". Under that rule, the court refused to apply the Massachusetts notice of claim requirement[178] to § 1983 claims "absent a clear legislative statement that § 1983 claimants must comply" with the state policy.[179] Because state legislators rarely have § 1983 or other federal causes of action in mind when they adopt policies to govern state court litigation, the Massachusetts rule of statutory construction seems more

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[171] 254 N.W.2d 704 (Wis. 1977).

[172] *See id.* at 713.

[173] 64 Ohio St. 3d 284, 595 N.E.2d 862 (1992).

[174] OHIO REV. CODE ANN. § 9.86 (Anderson 1990).

[175] 64 Ohio St. 3d at 291, 595 N.E.2d at 869 (first emphasis added) (quoting OHIO REV. CODE § 9.86).

[176] *See, e.g.*, Felder v. Casey, 408 N.W.2d 19 (Wis. 1987) (construing state statute providing that "no action may be brought . . . unless" a claimant complies with the state notice of claim requirement as reaching § 1983 actions), *rev'd on other grounds*, 487 U.S. 131 (1988).

[177] 515 N.E.2d 584 (Mass. 1987).

[178] Under notice of claim requirements, a plaintiff is typically required to serve a notice of an injury on a governmental body within 90 or 120 days of the accrual of an action and then wait until the claim is denied (or a statutory period of time runs) before filing a civil suit.

[179] *Id.* at 589.

sound than a rule that presumptively applies state substantive policies (or state procedural policies that have a substantive impact) to federal causes of action.

The importance of this threshold issue of state statutory construction is easy to overlook, and the Ohio courts have not addressed it directly. For example, it is unclear whether the waiver provision of the Ohio Court of Claims Act is applicable to § 1983 claims. The statute, by its terms, treats the filing of a civil action against the state in the Court of Claims as a waiver of "any cause of action, based on the same act or omission, which the filing party has against any state officer or employee."[180] In *Leaman v. Ohio Department of Mental Retardation*,[181] the Sixth Circuit construed the statute literally and applied it to § 1983 claims,[182] but in *Conley v. Shearer*,[183] the Ohio Supreme Court treated the related immunity provision as not applying to § 1983 claims.[184] This conclusion, however, may have been based on federal law rather than state law,[185] and a number of Ohio courts have cited *Leaman* favorably without addressing the state law issue.[186] In any case, at some point, the Ohio courts will be required to authoritatively decide whether the waiver provision in the Court of Claims Act applies to § 1983 claims as a matter of state law.[187] Likewise, the Ohio courts will have to decide whether § 1983 actions are "tort

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[180]OHIO REV. CODE ANN. § 2743.02(A) (Anderson 1992).

[181]825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1204 (1988).

[182]*Id.* at 952 ("[T]he Ohio legislature clearly provided for waiver of federal causes of action . . . ."). In so construing state law, the Sixth Circuit relied on two federal district court cases and its own interpretation of state law. *See id.* There are no Ohio appellate court decisions addressing this issue.

[183]64 Ohio St. 3d 284, 595 N.E.2d 862 (1992).

[184]*See supra* notes 173-75.

[185]*See Conley*, 64 Ohio St. 3d at 282, 595 N.E.2d at 869 (referring to § 9.86 and § 2743.02(F) of the OHIO REV. CODE and stating that "[t]hose sections, however, do not apply to claims brought under federal law."). It is unclear, however, whether this conclusion was based exclusively on the language in OHIO REV. CODE § 9.86.

[186]*See, e.g.*, Weinfurtner v. Nelsonville-York Sch. Dist. Bd. of Educ., 77 Ohio App. 3d 348, 602 N.E.2d 318 (Athens Co. 1991); White v. Morris, 69 Ohio App. 3d 90, 590 N.E.2d 57 (Scioto Co.), *juris. motion overruled*, 56 Ohio St. 3d 704, 564 N.E.2d 707 (1990).

[187]The leading commentators on the relationship between the Court of Claims Act and § 1983 view it as "anomalous that such an important state law should receive its authoritative interpretation by the federal courts." Saphire & Brenner, *supra* note 17, at 246. This is particularly true in the case of the Court of Claims Act since "neither the language nor the structure of the Act establishes, explicitly or by necessary implication, that the Ohio General Assembly either sought purposefully—or, indeed, that it even considered—whether, or the extent to which, it would affect or perhaps even foreclose the ability of an individual to obtain an adjudication of rights secured by federal law." *Id.* at 245.

The Ohio courts are free to disagree with the Sixth Circuit's conclusion in *Leaman* that federal law permits the state to apply this waiver provision to § 1983 claims. For a discussion of this issue, see Steinglass, *Sixth Circuit*, *supra* note 165, at 571-78.

actions" for purposes of the provision of the 1987 legislation that imposed a heavier burden of proof on those seeking punitive damages and removed responsibility for determining the amount of punitive damages from juries.[188]

B. A Federal Definition of § 1983

When states voluntarily open their courts to federal causes of action, they must give plaintiffs "the benefit of the full scope of these [federally created] rights."[189] This principle requires state courts to apply the federal definition of the § 1983 cause of action.[190] In *Howlett v. Rose*,[191] the Court extended this principle and rejected the availability of state sovereign immunity as a defense to a § 1983 suit against a local school board. In so holding, the Court stated that "[t]he elements of, and the defenses to, a federal cause of action are defined by federal law."[192] Thus, the Court made clear that federal principles define both the § 1983 cause of action and the available defenses.[193]

C. The Nondiscrimination Principle

The Supreme Court has relied on the nondiscrimination principle to limit the ability of state courts to exclude § 1983 actions from their courts.[194] This jurisdictional principle, however, also prevents states from singling out federal causes of action and applying policies not followed in analogous state-created actions.[195] Moreover, in *Felder v. Casey*,[196] the Court broadened the nondiscrimination principle by treating state policies as discriminatory when

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[188] *See infra* notes 447-70 and accompanying text.

[189] Felder v. Casey, 487 U.S. 131, 151 (1988) (quoting Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942)).

[190] *See generally* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, §§ 10.3, 15.2(c) (1). *See also* Martinez v. California, 444 U.S. 277, 284 n.8 (1980) (holding that states may not narrow § 1983 cause of action by immunizing conduct wrongful under § 1983).

[191] 496 U.S. 356 (1990).

[192] *Id.* at 375.

[193] In asserting the primacy of federal rules in defining § 1983, the *Howlett* Court stated that

> as to persons Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.

Id. at 383.

[194] *See supra* note 90.

[195] *See generally* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 10.4.

[196] 487 U.S. 131 (1988).

they were imposed "only upon those who seek redress for injuries resulting from the use or misuse of governmental authority."[197]

D. State Policies and Burdens on § 1983 Litigation

The purposes of § 1983 are compensation and deterrence.[198] State policies that are inconsistent with those purposes, or that burden the litigation of § 1983 claims, should be rejected in § 1983 litigation in both state and federal courts. Thus, federal law bars the use of state policies in state court § 1983 litigation even when state courts apply those policies evenhandedly to both state and federal causes of action.

In *Felder*, the Court gave content to the compensation purpose of § 1983 by holding that state policies that limited the right of recovery in order to minimize governmental liability were inconsistent with federal law.[199] In addition, the Court held that state policies applicable only to state court § 1983 actions must be rejected not only when they are inconsistent with federal policies concerning immunities, exhaustion and statutes of limitations but also when they burden state court § 1983 litigation.[200]

Although state court judgments based on state procedural doctrines are insulated from Supreme Court review under the adequate state ground doctrine,[201] the adequacy of the state ground is itself a federal question. For example, in FELA litigation, the Supreme Court observed that "the forms of local practice" cannot defeat the federal right,[202] and further stated that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[203] States may not use procedural

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[197] *Id.* at 141. The *Felder* Court rejected the application to § 1983 of a notice of claim requirement that the state applied only on a specific class of plaintiffs—those who sue governmental defendants, the archetypical § 1983 defendant.

[198] *See generally* Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

[199] *Felder*, 487 U.S. at 153.

[200] *Id.* at 150. ("Federal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'") (quoting Brown v. Western Ry. of Ala., 338 U.S. 294, 298-99 (1949)).

[201] Under the adequate state ground doctrine, the Supreme Court cannot review a decision resting on an adequate and independent state ground because the Court's review of the federal issue will not affect the state court judgment and, thus, will only be an advisory opinion. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). For a discussion of the adequacy of state procedural doctrines grounds as a bar to Supreme Court review of state court § 1983 decisions, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 10.6.

[202] *Brown*, 338 U.S. at 296.

[203] *Id.* at 298.

doctrines that discriminate against federal causes of action to refuse to reach the merits of federal claims; nor may they give their courts unlimited discretion to determine when to overlook procedural defaults and reach federal issues.[204]

In *Howlett v. Rose*,[205] the Court explored the adequate state ground doctrine in the course of rejecting the use of the state-created doctrine of sovereign immunity to protect local school boards that would have been subject to suit under § 1983 in federal court. Noting "the concern that the state court may be evading federal law and discriminating against federal causes of action," the *Howlett* Court stated that "[t]he adequacy of the state law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review de novo."[206] The Court then stated that it "is within our province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."[207]

E. Intra-State Uniformity and the "Reverse-Erie" Approach

In *Felder*, the Court also rejected the use of "outcome determinative" state policies in state court § 1983 litigation.[208] In doing so, the Court relied heavily on the federal interest in "intra-state uniformity" and the principles developed in diversity cases under the *Erie* doctrine. "Just as federal courts are constitutionally obligated to apply state law to state claims, . . . so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'"[209] Because the notice of claim requirement did not apply to § 1983 claims filed in the federal courts,[210] the application of the requirement to § 1983 state court actions would permit the choice of forum to dictate the outcome and thus would encourage the type of forum shopping that the Erie doctrine was intended to limit.

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[204] *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (state rule concerning notice for reviewing a transcript on appeal deemed discretionary and not an adequate state ground to prevent Supreme Court review of federal issues in a § 1982 case).

[205] 496 U.S. 356 (1990).

[206] *Id.* at 366.

[207] *Id.*

[208] *Felder*, 487 U.S. at 151-52.

[209] *Id.* at 151 (quoting Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942)).

[210] Prior to *Felder*, the Supreme Court had not rejected the application of notice of claim requirements to federal court § 1983 actions, but virtually all federal courts had done so. *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 17.5.

Nonetheless, *Felder* made clear that states may adopt policies that differ from federal policies and are more congenial to § 1983 claims.[211] Thus, federal policies that are not derived from § 1983 itself, such as policies involving jury unanimity or the standing and other justiciability requirements applicable in federal courts, need not be followed by state courts in § 1983 actions.[212] On the other hand, state courts may not apply restrictive state policies that burden § 1983 claims. For example, a state court that maintained a case or controversy requirement that was narrower than the federal counterpart could not apply the requirement to § 1983 claims. Such an interpretation of what controversies are justiciable under state law is not an adequate state ground on which to base a judgment and deny Supreme Court review of the federal issues in such a case.[213]

VII. SECTION 1983 REMEDIAL ISSUES

A. Pleading

Plaintiffs in § 1983 cases need only plead that some person, acting under color of state law, deprived them of federal rights secured by § 1983.[214] It is not necessary to allege that defendants acted in bad faith or abused their qualified immunities, and defendants must raise such "confession and avoidance" defenses affirmatively.[215] Despite this liberal apporach to pleading, most federal courts, until recently, had applied a strict or heightened pleading requirement to § 1983 complaints.[216] This had been most common on immunity issues,[217] but some federal courts had extended the heightened pleading requirement to non-immunity issues such as the facts necessary to establish municipal liability.[218] The Supreme Court, however, in *Leatherman v.*

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211 *See Felder*, 487 U.S. at 151 ("States may make the litigation of federal claims as congenial as they see fit . . . because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals.").

212 The ability of state courts to avoid some of the justiciability doctrines that characterize federal court practice is an important choice of forum factor. *See supra* notes 139-40 and accompanying text.

213 *See generally* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, §§ 10.6, 13.2. *Cf.* Liner v. Jaco, Inc., 375 U.S. 301 (1964) (treating a decision based on state mootness grounds as not resting on an adequate state ground).

214 For a discussion of the elements of a § 1983 claim, *see supra* notes 30-77 and accompanying text.

215 *See* Gomez v. Toledo, 446 U.S. 635, 640-41 (1980).

216 *See* Hobson v. Wilson, 737 F.2d 1, 30 n.87 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), and cases cited.

217 *See infra* note 286.

218 *See, e.g.*, Sivard v. Pulaski County 959 F.2d 662, 667 (7th Cir. 1992) ("This Court demands that plaintiffs suing a municipal body under § 1983 plead with greater specificity than might ordinarily be required."); *accord* Palmer v. City of San Antonio,

Tarrant County Narcotics Intelligence and Coordination Unit,[219] rejected the application of strict pleading requirements to § 1983 claims.

In *Leatherman*, the plaintiff alleged that a municipality engaged in a policy or custom of inadequate police training for which the municipality could be held liable.[220] The Fifth Circuit dismissed the § 1983 complaint because it failed to allege with particularity all material facts establishing the plaintiff's right to recovery, including facts that supported the allegation of inadequate training.[221] In rejecting this heightened pleading standard, the Supreme Court relied on the normal pleading requirements of the federal rules and the failure of the drafters to extend the special pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure to § 1983 or other civil rights complaints.[222]

Prior to *Leatherman*, the Ohio Court of Appeals, in *Roe v. Hamilton County Department of Human Services*,[223] applied the notice pleading standards of the Ohio rules to § 1983 claims.[224] This was consistent with the approach followed by some state courts,[225] but a number of state courts had relied on

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810 F.2d 514, 516-17 (5th Cir. 1987); Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir. 1985).

219113 S. Ct. 1160 (1993), *rev'g* 954 F.2d 1054 (5th Cir 1992).

220*See* 954 F.2d at 1058.

221*Id.*

222*See* 113 S. Ct. at 1163 (noting that FED. R. CIV. P. 9(b) imposes a particularized pleading requirement for averments of fraud and mistake). Nonetheless, the *Leatherman* Court expressly declined to consider the application of a heightened pleading requirement to § 1983 immunity issues. *Id.* at 1162. For a discussion of this issue, see *infra* notes 284-93 and accompanying text.

22353 Ohio App. 3d 120, 124, 560 N.E.2d 238, 242 (Hamilton Co. 1988), *cause dismissed*, 49 Ohio St. 3d 714, 552 N.E.2d 953 (1990).

224In taking this position, the *Roe* court expressly rejected reliance on the Sixth Circuit's approach.

> [The defendants] wish us to follow the Sixth Circuit's decision in Jones v. Sherrill (C.A.6, 1987), 827 F.2d 1102, which holds that the factual allegations of the complaint must be examined to determine if the conduct alleged in the complaint rises to the level of "gross" negligence rather than merely stating "simple" negligence. We decline to follow this rule because we think it is in conflict with the concept of "notice" pleading adopted by the Ohio Supreme Court.

53 Ohio App. 3d at 124, 560 N.E.2d at 242; *see also* O'Brien v. University Community Tenants Union, Inc., 42 Ohio St. 2d 242, 327 N.E.2d 753 (1975) (syllabus) ("In order for a court to dismiss a complaint for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.") (citation omitted).

225*See* Cunha v. City of Algona, 334 N.W.2d 591, 596 (Iowa 1983) (rejecting strict pleading standard for § 1983 cases); Casteel v. Vaade, 481 N.W.2d 476 (Wis. 1992) (applying liberal pleading standards to pro se § 1983 complaints). *But see* Black v. Rouse, 587 So. 2d 1359, 1361 (Fla. Dist. Ct. App. 1991) (applying Florida strict pleading rules requiring the pleading of a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief" to a § 1983 complaint), *review denied*, 598 So. 2d 75 (Fla.

pre-*Leatherman* federal cases as authority for the use of strict pleading requirements.[226] *Leatherman* undercuts federal support for an across-the-board strict pleading requirement for § 1983 cases, but it does not answer whether states may independently, as a matter of state law, impose strict pleading requirements on § 1983 or other federal civil rights claims.

Under the nondiscrimination principle, a state may not impose heightened pleading requirements on federal claims, if it does not impose the same standards on state claims,[227] but a difficult question arises when a state demands the evenhanded application of strict state pleading rules to state and federal claims. The Supreme Court has not directly addressed this issue. In *Brown v. Western Railway of Alabama*,[228] however, the Court stated that "strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[229] The *Brown* Court further made clear that it would not "fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings . . . ."[230] State courts have relied on these federal principles to reject the application of state pleading requirements to § 1983 complaints.[231]

A frequent pleading issue that arises in state court § 1983 litigation is whether plaintiffs must specifically plead that they are relying upon § 1983.[232] Federal

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1992); International Soc'y for Krishna Consciousness v. City of Evanston, 411 N.E.2d 1030 (Ill. App. Ct. 1980) (applying Illinois strict pleading rules to § 1983 complaints), *cert. denied*, 454 U.S. 878 (1981).

226*See, e.g.*, Kyle v. Civil Serv. Comm'n, 588 So. 2d 1154, 1160 (La. Ct. App. 1991) (expressing concern about permitting plaintiffs to state § 1983 claims with "vague, broadly worded complaints," and, relying on Fifth Circuit decisions, imposing a stringent pleading requirement under which "to commence a lawsuit against a public official for acts for which he is potentially immune, the complaint must allege with particularity all material facts on which [the claimant] contends . . . that the plea of immunity cannot be sustained") (internal quotations omitted), *writ denied*, 595 So. 2d 654 (La. 1992); Henschke v. Borough of Clayton, 598 A.2d 526, 530 (N.J. Super. Ct. App. Div. 1991) (relying on Third Circuit cases and stating that "a plaintiff is required to set forth specific conduct by the state or its officials which violated the constitutional rights of the plaintiff . . . [and] is required to establish with specificity that defendant deprived him of a right secured by the Constitution and that such a deprivation was caused by a person acting under color of state law").

227*See supra* notes 194-97 and accompanying text.

228338 U.S. 294 (1949).

229*Id.* at 298.

230*Id.* at 299.

231*See* Bach v. County of Butte, 195 Cal. Rptr. 268, 272-74 (Cal. Ct. App. 1983) (relying on *Brown* and federal standards to determine the sufficiency of a § 1983 complaint); Kay v. David Douglas Sch. Dist., 719 P.2d 875 (Or. Ct. App. 1986) (holding state rule requiring specific pleading of attorney fees inapplicable to § 1983), *rev'd as moot*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 484 U.S. 1032 (1988).

232This often comes up at the end of litigation when the issue is whether a prevailing plaintiff may recover attorney fees. *See, e.g.*, Bloomingdale's By Mail, Ltd. v. Huddleston,

courts have not imposed such a pleading requirement,[233] and state courts have generally followed suit.[234] Rather, courts look to the course of the litigation to determine whether the suit included a § 1983 claim. Nonetheless, a number of courts have observed that the "better practice is to specifically plead" reliance on § 1983."[235]

Unlike the refusal of federal and state courts to require specific pleading of § 1983, some courts have strictly required plaintiffs to plead whether § 1983 claims are being brought against defendants in their individual or official capacities. The use of such a pleading standard, however, even if occasionally appropriate in federal courts of limited jurisdiction, seems inappropriate in state courts of general jurisdiction.[236]

B. Official Immunities

Section 1983, by its terms, is silent about the availability of any immunities for officials who violate federal law.[237] Despite this silence, the Court has established an elaborate system of absolute and qualified immunities to protect government officials and employees from personal liability under § 1983. It has done this by reading § 1983 against the background of the common law that existed in 1871. When an immunity was well established at that time, the Court has been unwilling to assume that Congress would have overridden the immunity without expressly providing so.[238]

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848 S.W.2d 52 (Tenn. 1992), *cert. denied*, 113 S. Ct. 3002 (1993). The importance of this pleading issue is underscored by the fact that plaintiffs who prevail only on state law claims may sometimes recover fees if the suit also included a § 1983 claim. *See infra* note 561 and accompanying text.

[233] *See, e.g.*, Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 835 F.2d 627, 635 (6th Cir. 1987).

[234] *See, e.g.*, Gumbhir v. Kansas State Bd. of Pharmacy, 646 P.2d 1078 (Kan. 1982), *cert. denied*, 459 U.S. 1103 (1983); Rzeznik v. Chief of Police of Southampton, 373 N.E.2d 1128, 1134 n.8 (Mass. 1978); L.K. v. Gregg, 425 N.W.2d 813 (Minn. 1988); Marx v. Truck Renting and Leasing Ass'n, 520 So. 2d 1333 (Miss. 1987); Tarkanian v. National Collegiate Athletic Ass'n, 741 P.2d 1345 (Nev. 1987), *rev'd on other grounds*, 488 U.S. 179 (1988); Packard v. Gordon, 537 A.2d 140 (Vt. 1987); Boldt v. State, 305 N.W.2d 133 (Wis.), *cert. denied*, 454 U.S. 973 (1981).

[235] *Gumbhir*, 646 P.2d at 1085; *accord Rzeznik*, 373 N.E.2d at 1134 n.8; *L.K.*, 425 N.W.2d at 820.

[236] This issue comes up most often in § 1983 suits against state officials. *See infra* notes 416-31 and accompanying text.

[237] *See* Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2612-13 (1993).

[238] *See generally* Pierson v. Ray, 386 U.S. 547, 554-55 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

The immunities applicable to federal court § 1983 claims also apply in state courts, and the Supreme Court, in *Martinez v. California*,[239] made clear that federal, not state, law governed their availability.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . . The immunity claim raises a question of federal law.[240]

The Ohio Supreme Court has accepted the *Martinez* principle. In *Cooperman v. University Surgical Associates*,[241] the court noted that "[i]mmunity, for purpose of a federal claim, is clearly a question of federal law."[242] Yet, neither the United States Supreme Court nor the Ohio courts have addressed the extent to which, or even whether, states may develop their own policies for the administration of federal immunities. Thus, it is unclear whether state courts entertaining § 1983 claims are required to follow the lead of federal courts and limit discovery, make expanded use of summary judgment, restrict the role of the jury, or expand the availability of interlocutory appeals.[243]

1. Absolute Immunities

The Court maintains a presumption against absolute immunity and has been "quite sparing in approving it."[244] Most governmental officials, including governors and executive branch officials, have only a qualified immunity from

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[239]444 U.S. 277 (1980).

[240]*Id.* at 284 n.8 (citation omitted) (quoting Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir.), *cert. denied*, 415 U.S. 917 (1973)); *see also Felder*, 487 U.S. at 139 ("[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, . . . which of course already provides certain immunities for state officials.").

[241]32 Ohio St. 3d 191, 513 N.E.2d 288 (1987).

[242]32 Ohio St. 3d at 198, 513 N.E.2d at 296; *accord*, Conley v. Shearer, 64 Ohio St. 3d 284, 292, 595 N.E.2d 862, 869 (1992).

[243]*See infra* notes 301-02, 324-26 and 332-41 and accompanying text.

[244]Burns v. Reed, 111 S. Ct. 1934, 1939 (1991); *accord* Antoine v. Byers & Anderson, 113 S. Ct. 2167, 2169 (1993) (stating that "[t]he proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity" in the course of rejecting absolute immunity for court reporters for the ministerial act of preparing verbatim transcripts of criminal trials).

§ 1983 damage suits.[245] Nonetheless, some § 1983 defendants are entitled to claim an absolute immunity from suit. For example, state legislators have absolute immunity from § 1983 damage suits for their legislative acts[246] as do regional[247] and local legislators.[248] Likewise, state court judges and prosecutors have absolute immunity from § 1983 damage claims involving their judicial or prosecutorial functions.

Such absolute immunity, however, is limited. Judges only have an absolute immunity for judicial acts taken within their jurisdiction,[249] and they may be liable under § 1983 for their administrative decisions.[250] They may also be sued

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[245] *See* Scheuer v. Rhodes, 416 U.S. 232 (1974); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (observing that qualified immunity represents the norm for executive officials).

[246] *See* Tenney v. Brandhove, 341 U.S. 367 (1951); *see also* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 732 (1980) ("Although *Tenney* involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or injunctive relief.").

[247] *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

[248] The Supreme Court has not decided whether local legislators have absolute immunity from § 1983 damage claims, *but cf.* Spallone v. United States, 493 U.S. 265, 278-80 (1990) (relying on considerations developed in state legislative immunity cases to reverse contempt sanctions against city council members), but the federal circuits have consistently extended absolute immunity to local legislators for legislative acts. *See, e.g.*, Acevedo-Cordero v. Cordero-Santiago, 958 F.2d 20 (1st Cir. 1992); Haskell v Washington Township, 864 F.2d 1266, 1277 (6th Cir. 1988); Aitchison v. Raffiani, 708 F.2d 96, 98-100 (3d Cir. 1983). Legislators, however, may lose their absolute immunity when performing administrative and other non-legislative acts. *See Acevedo-Cordero*, 958 F.2d at 23 (exploring the distinction between legislative and administrative acts and looking to the nature of the underlying facts and the particularity of the impact of the action to determine the availability of absolute immunity); see also Gross v. Winter, 876 F.2d 165, 169-73 (D.C. Cir. 1989) (city council member not entitled to absolute immunity for the administrative act of terminating a legislative researcher); *cf. Haskell*, 864 F.2d at 1278 (suggesting that local legislators performing "even traditionally legislative actions" lose their absolute immunity when they act in "bad faith, because of corruption, or primarily in furtherance of personal instead of public interests").

[249] *See* Stump v. Sparkman, 435 U.S. 349 (1978) (absolute judicial immunity for ordering sterilization of a "somewhat retarded" 15-year old girl); Pierson v. Ray, 386 U.S. 547 (1967) (absolute judicial immunity for unconstitutionally convicting persons challenging segregated interstate bus terminal facilities); *see also* Mireles v. Waco, 112 S. Ct. 286 (1991) (per curiam) (absolute judicial immunity for allegedly ordering a police officer to use excessive force to bring a public defender to the judge's courtroom); *cf.* Butz v. Economou, 438 U.S. 478 (1978) (hearing examiner and administrative law judge performing independent adjudicatory activities entitled to absolute immunity); Sparks v. Character and Fitness Comm. of Ky., 818 F.2d 541 (6th Cir. 1987) (absolute judicial immunity to the members of a character and fitness committee of the state bar for assisting the court in screening candidates for admission to the bar), *vacated*, 484 U.S. 1022, *adhered to on remand*, 859 F.2d 428 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

[250] *See* Forrester v. White, 484 U.S. 219 (1988) (no absolute judicial immunity for the nonjudicial administrative act of demoting and dismissing a court-attached probation

under § 1983 for injunctive relief (on claims for which they have an absolute immunity from damage suits). They may also be subject to liability for attorney fees.[251]

Similarly, prosecutors have absolute quasi-judicial immunity when performing prosecutorial functions intimately associated with the judicial phase of the criminal process,[252] but they are not entitled to absolute immunity for either their investigative or other non-prosecutorial activities. Thus, in *Burns v. Reed*,[253] the Court denied absolute immunity to a prosecutor for providing legal advice to police officers concerning the hypnotizing and questioning of a suspect. Likewise, in *Buckley v. Fitzsimmons*,[254] the Court held that prosecutors who were engaged in entirely investigative activities before there was probable cause to make an arrest were not entitled to absolute immunity either for fabricating evidence during the preliminary investigation of a crime or for making false statements at a press conference announcing the return of an indictment.[255]

In addressing the availability of § 1983 immunity, Ohio courts have followed federal standards and provided absolute immunity to judges and clerks of

officer); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979) (denying absolute judicial immunity to a judge who used his political influence to have a police officer disciplined), *cert. denied*, 445 U.S. 938 (1980); Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978) (denying absolute judicial immunity to a judge who ordered a coffee vendor brought before him in handcuffs because of the poor quality of the coffee); *cf.* Antoine, 113 S. Ct. at 2171 (observing that even if judges, not court reporters, were responsible for preparing verbatim transcripts of criminal trials, they might not be entitled to absolute judicial immunity).

[251] *See* Pulliam v. Allen, 466 U.S. 522 (1984).

[252] *See* Imbler v. Pachtman, 424 U.S. 409, 430 (1976); *see also* Butz v. Economou, 438 U.S. 478 (1978) (applying a functional test to extend absolute immunity to federal administrative officials responsible for initiating administrative proceedings). The Supreme Court has also extended absolute immunity to police witnesses sued as a result of their testimony. *See* Briscoe v. LaHue, 460 U.S. 325 (1983). *But see* White v. Frank, 855 F.2d 956 (2d Cir. 1988) (holding that complaining witnesses are not entitled to absolute immunity for testifying before a grand jury, although witnesses who merely testify before grand juries are protected by absolute immunity).

[253] 111 S. Ct. 1934 (1991).

[254] 113 S. Ct. 2606 (1993).

[255] The Court has not decided whether social workers are entitled to absolute immunity, but lower courts have applied a functional approach and provided social workers with absolute prosecutorial immunity for initiating dependency and related court proceedings. *See, e.g.*, Vosburg v. Department of Social Servs., 884 F.2d 133 (4th Cir. 1989); Meyers v. Contra Costa County Dep't of Social Servs., 812 F.2d 1154 (9th Cir.), *cert. denied*, 484 U.S. 829 (1987). *But cf.* Achterhof v. Selvaggio, 886 F.2d 826 (6th Cir. 1989) (denying absolute immunity to social worker for opening a child abuse case and placing a father's name on a central registry because such acts were either investigatory or administrative).

courts for issuing a capias,[256] and to prosecutors for obtaining a release-dismissal agreement.[257] On the other hand, they have denied absolute immunity to officials performing executive or other administrative functions.[258]

2. Qualified Immunities

a. public officials

The Supreme Court has held that public officials who are not entitled to absolute immunity may still be immune from § 1983 damage suits when their performance of discretionary functions violates federal law.[259] In 1975, in *Wood v. Strickland*,[260] the Supreme Court defined the § 1983 qualified immunity in both objective and subjective terms. Seven years later, however, in *Harlow v. Fitzgerald*,[261] a *Bivens* action,[262] the Court eliminated the subjective leg and defined qualified immunity in objective terms by asking whether the defendants violated clearly established federal law.

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time the action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know"

256*See* Kelly v. Whiting, 17 Ohio St. 3d 91, 477 N.E.2d 1123 (1985), *cert. denied*, 474 U.S. 1008 (1985).

257*See* Hunter v. City of Middleton, 31 Ohio App. 3d 109, 509 N.E.2d 93 (Butler Co. 1986).

258*See, e.g.*, Dalhover v. Dugan, 54 Ohio App. 3d 55, 560 N.E.2d 824 (Hamilton Co. 1989) (official in charge of administration of juvenile detention center not entitled to quasi-judicial absolute immunity for failing to prevent juvenile's suicide); *cf.* Jaeger v. Wracker, 21 Ohio App. 3d 150, 486 N.E.2d 1240 (Lorain Co. 1985) (township trustees have qualified immunity for summary removal of volunteer fireman because law not clearly established).

259*See* Scheuer v. Rhodes, 416 U.S. 232, 246-49 (1974); Pierson v. Ray, 386 U.S. 547, 564 (1967).

260420 U.S. 308 (1975).

261457 U.S. 800 (1982).

262*Bivens* actions are suits brought against federal officials directly under the federal constitution. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Many of the Court's most important qualified immunity decisions arose in *Bivens*, not § 1983, actions, but the Court has applied the same immunity policies to both actions. *See Harlow*, 457 U.S. at 818 n. 30; Butz v. Economou, 438 U.S. 478, 504 (1978).

> that the law forbade conduct not previously identified as unlawful. If the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct.[263]

In *Anderson v. Creighton*,[264] the Court held that the determination of whether the law was clearly established required a particularized definition of the issue of federal law that must be clearly established.

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[265]

Anderson requires courts addressing qualified immunity issues to define the underlying right with a high degree of particularity, thus expanding the utility of qualified immunity for § 1983 defendants.[266] The Court, however, has not provided guidance as to where courts should look to determine whether federal law is clearly established.[267] The Sixth Circuit has provided a number of different formulations of where courts should look in order to make this determination,[268] but the Ohio courts have not focused on this issue.[269]

263*Harlow*, 457 U.S. at 818-19; *see also* Davis v. Scherer, 468 U.S. 183 (1984) (holding that federal, not state, law must be clearly established to deny defendants a qualified immunity). The *Harlow* definition of qualified immunity also contained a small subjective component under which an official who violates clearly established federal law is nonetheless entitled to qualified immunity if the official "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." 457 U.S. at 819.

264483 U.S. 635 (1987).

265*Id.* at 640.

266*Cf.* Elliott v. Thomas, 937 F.2d 338, 341 (7th Cir. 1991) ("By sleight of hand you can turn any defense on the merits into a defense of qualified immunity."), *cert. denied*, 112 S. Ct. 1242 (1992).

267*See* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 22 GA. L. REV. 597, 605 n.41 (1989). For a discussion of the role of state law in determining whether federal law is clearly established, see Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621 (1993).

268*See* Steinglass, *Sixth Circuit*, *supra* note 165, at 543-46; *see also* Saphire, *supra* note 267, at 631 n.52. In *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993), the Sixth Circuit described the sources of clearly established law as follows:

> In inquiring whether a constitutional right is clearly established, we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally

b. private defendants

The rationale for providing government officials with an objectively defined qualified immunity flows from the Court's characterization of the immunity as an immunity from suit, and from its concern that individuals will not take governmental jobs if they can be forced to trial on the basis of allegations of bad faith conduct.[270] Private individuals, who may also be sued under § 1983 when they act under color of state law,[271] however, are not entitled to the same immunity available to governmental officials. Thus, in *Wyatt v. Cole*,[272] the Court held that private defendants who relied on a state replevin statute subsequently declared unconstitutional were not entitled to an objectively defined qualified immunity.[273]

> to decisions of other circuits. [I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. Thus, it is only in extraordinary cases that we can look beyond Supreme Court and Sixth Circuit precedent to find "clearly established law."

Id. at 1336. (internal quotations and citations omitted); *see also* Marsh v. Arn, 937 F.2d 1056, 1069 (6th Cir. 1991) (observing that "when there is no controlling precedent in the Sixth Circuit our court places little or no value on the opinions of other circuits in determining whether a right is clearly established").

The Sixth Circuit's search for controlling precedent in *Walton* and *Marsh* can be contrasted not only with other pronouncements of the court, *see, e.g.*, Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) ("In order to be clearly established, a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court."), but with the more flexible reliance of other circuits on all decisional law. *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 203-05 (1993).

269 *But see* Moore v. Hayman, 67 Ohio App. 3d 184, 586 N.E.2d 233 (Allen Co. 1988) (noting that the "Supreme Court has not defined the phrase 'clearly established'" and relying on *Robinson v. Bibb* for the applicable definition). For a critique of this formulation, see Steinglass, *Sixth Circuit*, *supra* note 165, at 543-45.

270 *See Harlow*, 457 U.S. at 816.

271 *See supra* notes 45-47 and accompanying text.

272 112 S. Ct. 1827 (1992).

273 The *Wyatt* Court did not reach, however, whether such defendants are entitled to a good faith or probable cause defense to § 1983 suits on the merits. *Id.* The Sixth Circuit, however, anticipating the Supreme Court's decision in *Wyatt*, rejected the availability of qualified immunity for private defendants and held that private defendants sued for using an unconstitutional execution statute are entitled to a good faith defense. Duncan

3. Administering § 1983 Qualified Immunities

In addition to the threshold question of whether a defendant is entitled to absolute or qualified immunity, difficult administrative issues arise in the area of immunities, especially qualified immunities.[274] These issues have taken on even greater importance in § 1983 litigation because the Court has relied on the breadth of qualified immunity to restrict the availability of absolute immunity.[275]

a. pleading

In *Gomez v. Toledo*,[276] the Supreme Court held that qualified immunity was an affirmative defense that § 1983 plaintiffs were not obligated to anticipate and rebut in their complaints. Until recently, however, the Court has provided little guidance on either the pleading standards applicable to § 1983 qualified immunity issues or on the proper approach to deciding such issues. In 1991, however, the Court addressed this aspect of § 1983 litigation.

In *Siegert v. Gilley*,[277] an action involving an alleged deprivation of a liberty interest without due process,[278] the Court made clear that the plaintiff must plead the violation of a clearly established constitutional right.[279] Prior to *Siegert*, many federal courts would assume the existence of a violation of the underlying federal right but dispose of cases on qualified immunity grounds because the federal right was not clearly established.[280] *Siegert* rejected this approach. It held that the initial inquiry was not whether the defendant alleged a violation of clearly established federal law, but whether the defendant alleged *any* violation of federal law.[281]

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v. Peck, 844 F.2d 1261, 1267-68 (6th Cir. 1985); *accord* Wyatt v. Cole, 994 F.2d 1113, 1118-21 (5th Cir.) (on remand), *cert. denied*, 114 S. Ct. 470 (1993).

[274]The discussions that follow deal principally with administering qualified immunities, but many of the same issues apply to absolute immunities.

[275]*See* Burns v. Reed, 111 S. Ct. 1934, 1944 n.8 (1991).

[276]446 U.S. 635 (1980)

[277]111 S. Ct. 1789 (1991).

[278]*Siegert* was a *Bivens* suit by a former federal employee who alleged that his supervisor wrote a defamatory letter thus depriving the plaintiff of a liberty interest without procedural due process.

[279]*Id.* at 1793.

[280]*See, e.g.*, Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989) (not reaching the merits of a § 1983 jail suicide claim because the underlying law was not clearly established), *cert. denied*, 494 U.S. 1027 (1990).

[281]*Seigert*, 111 S. Ct. at 1793; *accord* Silver v. Franklin Township, 966 F.2d 1031, 1036 (6th Cir. 1992) ("[W]e need not reach the issue of qualified immunity because we hold . . . [that the plaintiff] has failed to establish the violation of any substantive due process right."). *But see Walton*, 995 F.2d at 1339 (holding that there was no clearly established right to personal security forbidding the police from abandoning passengers in 1988,

In addition, *Siegert* provided guidance for the analysis of qualified immunity issues. Initially, the Court noted that "[q]ualified immunity is a defense that must be pleaded by a defendant official."[282] The Court then described the qualified immunity inquiry in terms of both current law and the law at the time the action occurred. "Once a defendant pleads a defense of qualified immunity, '[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.... Until this threshold immunity question is resolved, discovery should not be allowed.'"[283]

Although *Siegert* makes an important clarification of the analytical approach to deciding qualified immunity issues, the Court did not reach the issue on which it had granted certiorari, namely, the application of strict or heightened pleading requirements to civil rights actions.[284] Most federal circuits had imposed such heightened pleading requirements,[285] and this had been most common on qualified immunity issues.[286] Nonetheless, some federal judges had suggested that a heightened pleading standard was inconsistent with the notice pleading requirements of the federal rules,[287] and the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*[288] rejected the use of such a standard. The Court, however, expressly left open whether the use of a heightened pleading standard could be justified for § 1983 suits against individuals who could raise immunity defenses.[289]

Most federal courts have construed *Leatherman* as precluding the use of strict pleading requirements on qualified immunity issues,[290] but Justice Kennedy,

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and reversing the denial of qualified immunity to police officers who left minor children unattended after arresting their mother without addressing whether the plaintiffs established a substantive due process violation).

[282] *Seigert*, 111 S. Ct. at 1793 (relying on Gomez v. Toledo, 446 U.S. 635 (1980)).

[283] *Id.* (quoting *Harlow*, 457 U.S. at 818).

[284] *Id.* at 1791.

[285] *See supra* note 216 .

[286] *See* Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992), and cases cited; *see also* Siegert v. Gilley, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991); Elliott v. Perez, 751 F.2d 1472, 1477-78 (5th Cir. 1985). *But see* Bergquist v. County of Cochise, 806 F.2d 1364, 1367 (9th Cir. 1986) (rejecting the use of a strict pleading standard for § 1983 claims).

[287] *See Elliott v. Perez*, 751 F.2d at 1482-83 (Higginbotham, J., concurring); *see also Elliott v. Thomas*, 937 F.2d at 345.

[288] 113 S. Ct. 1160 (1993).

[289] *Id.* at 1162 ("We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials.").

[290] *See* Callaghan v. Congemi, No. CIV.A.91-1496, 1993 WL 114523, at *5-6 (E.D. La. Apr. 8, 1993) (treating *Leatherman* as "sound[ing] the death knell for ... [the] requirement of heightened pleading in suits involving individual government officials" and noting

in his concurring opinion in *Siegert*, concluded that it was appropriate to impose a heightened pleading requirement on § 1983 qualified immunity issues.

> There is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it. The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine . . . [and] [t]he substantive defense of immunity controls.[291]

Given the decision in *Leatherman*, federal courts would have difficulty imposing a heightened pleading requirement on § 1983 qualified immunity issues without taking the bold step of construing the immunity from suit as an element of substantive law that overrides the broad delegation of rule-making that Congress gave the Supreme Court in the Rules Enabling Act.[292]

"that *Leatherman* cannot be limited to its holding"); *see also* Dodson v. City of Kenner, No. CIV.A.92-3530, 1993 WL 149111 (E.D. La. May 4, 1993) (on reconsideration); Kelly v. Blake, No. CIV.A.93-CV-0365, 1993 WL 131518 (E.D. Pa. Apr. 26, 1993); *cf.* Jordan v. Jackson, 15 F.3d 333, 339 (4th Cir. 1993) (relying on the rationale of *Leatherman* to reject a heightened pleading standard that would require a § 1983 plaintiff to plead multiple incidents of similar constitutional violations to support an allegation of municipal policy or custom); Garus v. Rose Acre Farms, Inc., 839 F. Supp. 563, 568 (N.D. Ind. 1993) (relying on *Leatherman* to reject the application of a heightened pleading requirement to Title VII complaints). *But see* Moore v. Agency for Int'l Dev., 994 F.2d 874, 877 (D.C. Cir. 1993) (noting that *Leatherman* had not rejected the use of a heightened pleading requirement for individual defendants, and relying on circuit precedent to apply a heightened pleading standard); *but cf.* Richardson v. Oldham, 12 F.3d 1373 (5th Cir. 1994) (declining to reach the pleading question expressly reserved in *Leatherman*, namely whether a heightened pleading standard is permissible for § 1983 cases against individual government officials).

[291]111 S. Ct. at 1795. Kennedy also stated in his concurrence that "[t]he heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice [in some substantive constitutional claims] and the objective test that prevails in qualified immunity as a general matter". *Id.*

[292]28 U.S.C. § 2072 (1988). Under § 2072(b), the Court may not adopt rules that "abridge, enlarge, or modify any substantive right," but the delegation of rule-making to the Court is quite broad. *See generally* Hanna v. Plummer, 380 U.S. 460 (1965). The Court has never rejected a federal rule because of a conflict with the substantive law. *See* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 40[C][2] 159 (1989); *see also* Burlington N. R.R. v. Woods, 480 U.S. 1, 6 (1987) ("[T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, . . . give the Rules presumptive validity under both the constitutional and statutory constraints."). The Court, however, has often construed a federal rule narrowly to avoid such a conflict. *See Hanna*, 380 U.S. at 472. Given the relatively recent characterization of the qualified immunity as an immunity from suit, *see* Harlow v. Fitzgerald, 457 U.S. 800 (1982), it is difficult to argue

If the Supreme Court held that federal immunity law was substantive and overrode the liberal pleading requirements of the federal rules (and required the application of a heightened pleading requirement to § 1983 complaints against individuals), plaintiffs would not be able to resist the argument that federal law also overrode liberal state pleading requirements. On the other hand, if the Supreme Court rejected the application of a heightened pleading requirement to § 1983 suits against individuals, state courts that desired to continue to apply strict state pleading requirements could do so only if the state pleading rules did not burden § 1983.[293]

b. discovery

In *Harlow v. Fitzgerald*,[294] the Court treated the existence of qualified immunity as a threshold legal issue based on whether the federal right in question was clearly established at the time of the alleged violation.[295] This analysis also led the *Harlow* Court to require courts to stay discovery until the threshold issue is resolved.[296]

Despite this preference for resolving qualified immunity issues early in the litigation, the Court, in *Anderson v. Creighton*,[297] opened the door to limited discovery, at least when the immunity issue is fact-specific. In *Anderson*, the Court recognized that "the determination whether it was objectively legally reasonable to conclude that [the alleged conduct was legal] . . . will often require an examination of the information possessed by" the defendants.[298] "The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the defendant's conduct] . . . to be lawful, in light of clearly established law and the information the [defendant] . . . possessed. [The defendant's] . . . subjective beliefs . . . are irrelevant."[299] The *Anderson* Court also acknowledged that when the factual allegations of the parties differ, "discovery may be necessary before [the plaintiff's] . . . motion for summary judgment . . . can be resolved."[300]

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that the drafters of the federal rules did not intend the liberal pleading requirements to apply to suits against public officials. *But see* Nixon v. Fitzgerald, 457 U.S. 731, 744 (1982) ("This Court consistently has recognized that government officials are entitled to some form of immunity from suit.").

293 *See supra* notes 198-207 and accompanying text.

294 457 U.S. 800 (1982).

295 *Id.* at 817-19.

296 *Id.* at 818 ("Until this threshold immunity question is resolved, discovery should not be allowed.").

297 483 U.S. 635 (1987).

298 *Id.* at 641.

299 *Id.*

300 *Id.* at 646 n.6.

It is unclear whether these limitations on discovery apply with equal force to state court § 1983 litigation. Even given the characterization of the § 1983 immunity as an immunity from suit, it is difficult to accept the proposition that federal law requires states to organize their judicial systems to mirror the federal model. Some state court systems might rely heavily on summary judgment and limit discovery, while others might downplay summary judgment, expand discovery, and rely more heavily on trials.[301] While a state that imposed cumulative burdens on the qualified immunity available to individual § 1983 defendants might violate federal law, the interest of states in the administration of their judicial systems may well outweigh the relevant federal interest and give state courts some leeway in approaching the timing of discovery in § 1983 cases.[302]

c. summary judgment

In redefining qualified immunity, the *Harlow* Court expressly relied on its concern about the difficulty of resolving qualified immunity issues on summary judgment.[303] Although the Supreme Court has defined the qualified immunity in objective terms, the underlying constitutional rights enforceable through § 1983 often contain state of mind requirements.[304] Some federal courts, however, relying on the Court's desire to expand the use of summary judgment,[305] have refused to permit state of mind discovery even when motive or bad faith relates to the underlying substantive federal standard unless the plaintiff comes forward with *direct* nonconclusory allegations of evidence of

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[301]States are involved in a number of experiments to make civil litigation more efficient. *See, e.g.*, Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11 (1993) (discussing Arizona's Mandatory Alternative Discovery Track program for reducing discovery costs and minimizing the time involved in getting civil cases through the system).

[302]*But cf.* Felder v. Casey, 487 U.S. 131, 145 (1988) (rejecting the argument that sound notions of public administration justified the application of a state notice of claim requirement to state court § 1983 litigation). In New York v. United States, 112 S. Ct. 2408 (1992), the Court relied on the tenth amendment and principles of state sovereignty to strike down provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required states, under some limited circumstances, either to take title to radioactive waste (and become liable for damages suffered by the failure to do so promptly) or to regulate according to federal instructions. In treating this "take title" provision as an unconstitutional commandeering of the state's legislative process into federal service, the Court contrasted the "well established power of Congress to pass laws enforceable in state courts," which it treated as a personal obligation imposed on judges by the Supremacy Clause. *Id.* at 2429. Nonetheless, *New York* suggests there may be limits on the extent to which federal law may commandeer state institutions.

[303]*Harlow*, U.S. at 815-18.

[304]*See supra* note 76.

[305]Moreover, the use of summary judgment in federal court has been made more popular by the Supreme Court's trilogy of decisions in 1986 placing greater burdens on plaintiffs who are resisting summary judgment. *See supra* note 157.

unconstitutional motive.[306] Justice Kennedy, who appears to be the Court's strongest proponent of a heightened pleading requirement,[307] has rejected the use of a direct evidence requirement and has taken the position that plaintiffs can meet their burden in cases involving unconstitutional motives by presenting circumstantial evidence.[308]

As with other issues involving the administration of § 1983 qualified immunities, it is unclear whether states must follow the federal model or whether they may apply summary judgment standards that place a greater burden on defendants' seeking to assert an immunity from suit. Although the Ohio Supreme Court has embraced some aspects of the federal summary judgment model,[309] it is difficult to imagine federal law requiring Ohio trial courts to make greater use of summary judgment on § 1983 qualified immunity issues than Ohio law otherwise permits.

d. role of the jury

There remains a great deal of confusion over the precise role of the judge and the jury on qualified immunity issues. In *Hunter v. Bryant*,[310] the Supreme Court summarily reversed a Ninth Circuit decision because the circuit court framed the qualified immunity issue for the jury in terms of whether a reasonable officer could have believed he had probable cause to make a warrantless arrest. The Court concluded that this routinely placed the question

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306See Siegert v. Gilley, 895 F.2d 797, 803-04 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991); Whitacre v. Davey, 890 F.2d 1168, 1171 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990); *accord* Moore v. Agency for Int'l Dev., 994 F.2d 874, 877 (D.C. Cir. 1993) (adhering to Circuit's heightened pleading standard and requiring the plaintiff to "produce some *direct* evidence that the officials' actions were improperly motivated . . . if the case is to proceed to trial").

307*See supra* notes 290-91 and accompanying text. Judge Easterbrook of the Seventh Circuit has suggested that the debate over the use of a heightened pleading requirement on § 1983 qualified immunity issues does not really involve the pleadings but rather the timing of motions for summary judgment and the showing that a plaintiff must make to be permitted to conduct discovery when state of mind is an element of the underlying claim. *See* Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992).

308*See Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring) ("Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal. I would reject, however, the . . . statement that a plaintiff must present direct, as opposed to circumstantial, evidence. . . . Circumstantial evidence may be as probative as testimonial evidence."); *see also id.* at 1795 (Marshall, J., dissenting) (rejecting the refusal of the court of appeals to permit limited discovery of unconstitutional motive absent *direct* evidence, and noting that "[b]ecause evidence of such intent is peculiarly within the control of the defendant, the 'heightened pleading' rule . . . effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim"); *accord Elliott v. Thomas*, 937 F.2d at 345; Branch v. Tunnell, 937 F.2d 1382, 1386-87 (9th Cir. 1991).

309*See supra* notes 159-61 and accompanying text.

310112 S. Ct. 534 (1991) (per curiam).

of qualified immunity in the hands of the jury whereas "[i]mmunity ordinarily should be decided by the court long before trial" by the court "ask[ing] whether the [defendants] acted reasonably under settled law in the circumstances. . . ."[311]

Prior to *Hunter*, federal courts had taken different positions on the role of the jury on qualified immunity issues,[312] and *Hunter*'s significance is unclear. There is no disagreement that federal court judges are responsible for determining what is clearly established federal law for qualified immunity purposes. Most federal judges, however, view qualified immunity as involving a two-step analysis that requires the court to determine not only whether the law was clearly established but also the "objective legal reasonableness of the defendants' conduct."[313]

The most difficult qualified immunity issues arise when the legal standard itself contains a reasonableness requirement. In cases involving such standards, most federal courts have viewed the second step of the analysis as raising an issue for the judge. For example, in *Scott v. Henrich*,[314] in an opinion that is presently being reconsidered, the Ninth Circuit treated the standard for analyzing excessive force claims as the same as the qualified immunity standard, but it noted that "even though reasonableness traditionally is a question of fact for the jury, . . . defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the

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311 *Id.* at 537.

312 *Compare* Finnegan v. Fountain, 915 F.2d 817 (2d Cir. 1990) (treating availability of qualified immunity as a legal question for the court); *and* Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir.) (treating qualified immunity as a legal question for the court but encouraging the use of special interrogatories to the jury on the underlying factual issues), *cert. denied*, 498 U.S. 967 (1990); *and* Coffman v. Trickey, 884 F.2d 1057, 1063 (8th Cir. 1989) (reversible error to submit question of the availability of qualified immunity to the jury), *cert. denied*, 494 U.S. 1056 (1990) *with* Melear v. Spears, 862 F.2d 1177, 1184 (5th Cir. 1989) (requiring the "trier of fact . . . [to] determine the objective legal reasonableness of an officer's conduct by construing the facts in dispute"); *and* Thorsted v. Kelly, 858 F.2d 571, 575 (9th Cir. 1988) (treating as a triable issue of fact "whether a reasonable [police] officer placed in the circumstances faced by . . . [the defendant] could reasonably believe that his conduct was legal . . .").

313 *See, e.g.*, Biddle v. Martin, 992 F.2d 673, 675 (7th Cir. 1993). The *Harlow* Court treated the qualified immunity inquiry as a single question and assumed that if the law was clearly established a reasonable public official would be aware of this and act accordingly. *See Harlow*, 457 U.S. at 818-9. ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."). *Anderson* required a more particularized definition of the clearly established federal right. *See supra* notes 264-65 and accompanying text. The Court in *Hunter*, for the first time, albeit in a per curiam opinion, expressly treated the inquiry as involving two discrete steps. 112 S. Ct. at 536-37.

314 1993 WL 168332, 994 F.2d 1338 (9th Cir. May, 21, 1993) (amended opinion), *withdrawn from bound volume*, 994 F.2d 1343 (9th Cir. 1993).

circumstances."[315] Moreover, in *ActUp!/Portland v. Bagley*,[316] the Ninth Circuit made explicit its broad reading of *Hunter*.

> We interpret *Hunter* to hold that the question of whether a reasonable officer could have believed probable cause (or reasonable suspicion) existed to justify a search or an arrest is "an essentially legal question," that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment.
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> The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court. The determination of whether the facts alleged could support a reasonable belief in the existence of probable cause or reasonable suspicion is also a question of law to be determined by the court.[317]

On the other hand, in *Mahoney v. Kesery*,[318] Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit described the problem when the qualified immunity issue merges with the merits as follows:

> [C]ases in this and other circuits keep saying that the question of immunity is for the judge because it is a question of law. But that proposition requires qualification to be precise. What is true is that *often* the question of immunity is one of law—specifically, it is the question: what was the clearly established rule of law when the officers committed the acts for which they are being sued? But where as in this case the only contested issue bearing on immunity is whether a reasonable officer would have thought the defendant had committed a crime, there is no question of law—at least in the sense of a question reserved for judges, for the jury is going to decide the same question. As there can be no doubt therefore that the jury is legally competent to decide the question, and as the jury must decide it anyway when the case goes to trial, there is an argument that the jury might as well be allowed to decide it with preclusive effect on the judge's determination of immunity.
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> If the issue of the adequacy of the grounds for the arrest is the same in the immunity inquiry and on the merits of the false-arrest charge, then unless some legal rule or standard bearing on probable cause has changed since the arrest, the jury's determination that there was or was

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315 *Id.* at *2.

316 988 F.2d 868 (9th Cir. 1993) (modified opinion).

317 *Id.* at 873.

318 976 F.2d 1054 (7th Cir. 1992).

> not probable cause will automatically resolve both immunity and the merits. That way of resolving the matter implies, it is true, that the issue of immunity drops right out of the case if there are genuine issues of material fact and the law has not changed since the officers acted. But maybe that is correct.[319]

Even read broadly, however, *Hunter* does not eliminate the role for juries in performing the fact-finding that is relevant to qualified immunity issues. For example, in *Washington v. Newsom*,[320] a case involving the use of deadly force, the Sixth Circuit recognized the factual nature of the qualified immunity question by pointing out that the question of whether an objectively reasonable police officer would have known that the decedent was not armed depended upon the factual question of the precise information possessed by the officers.

Under the practices generally followed in state and federal courts, juries apply the law to the facts.[321] In the area of determining entitlement to qualified immunity, the Court has made clear that the judge, not the jury, is responsible for identifying the clearly established federal law, but the Court has not explained why it has deviated from the prevailing policies that govern whether the judge or the jury will be responsible for applying the law to the facts.[322] Nor has the Court explained how either the Seventh Amendment or sound principles of judicial administration support giving federal trial judges responsibility for determining whether § 1983 defendants acted reasonably in violating clearly established federal law.[323]

Even assuming that federal court judges, not juries, are responsible for determining whether § 1983 defendants acted unreasonably in failing to follow federal law, states are not precluded by federal law from following their traditional practices in allocating decision-making authority between judges

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319*Id.* at 1058-59.

320977 F.2d 991 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1848 (1993).

321*See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 37, at 235-38 (5th ed. 1984) (discussing the functions of the court and the jury in negligence cases); *see also* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 7.18, at 353-56 (4th ed. 1992) (discussing the role of the jury in assessing the legal consequences of the facts).

322In his dissent from the refusal to grant an en banc rehearing in *Bagley*, Judge Norris described the panel opinion as "def[ying] our common law tradition, which since time immemorial has considered the reasonableness of human conduct to be a quintessential jury question." *See Bagley*, 988 F.2d at 874 (Norris, J., dissenting).

323Judge Norris has also suggested some of the administrative problems that will result from leaving the jury with the responsibility for fact-finding but denying it the right to decide the ultimate question of the reasonableness of the official conduct. *See id.* at 875-78 (Norris, J., dissenting) (describing the "procedural nightmares" that would result from asking the jury to answer extremely detailed interrogatories or from using special verdict forms).

and the juries.[324] For example, in Ohio, the jury is responsible for deciding whether the defendant acted reasonably in light of the applicable legal principles.[325] Therefore, Ohio courts should be permitted to assign juries a similar task in determining whether § 1983 defendants are entitled to a qualified immunity.[326]

e. interlocutory appeals

Under the final judgment rule[327] federal appellate courts, with limited statutory exceptions not relevant here,[328] only have jurisdiction over appeals from final decisions of district courts. There is, however, a judicially developed collateral order exception to the final judgment rule, and in *Cohen v. Beneficial Industrial Loan Corp.*,[329] the Supreme Court permitted the immediate appeal of district court decisions that fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[330] The Supreme Court has applied this collateral order exception to the *immunity from suit* provided by absolute and qualified immunity,[331] and

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[324] *But cf.* Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (treating the allocation of responsibility between judge and jury as a matter of federal law in a state court FELA action). *Dice*, however, involved the federal statutory right to trial by jury in FELA cases, which the Supreme Court has applied to the states. *See infra* note 467 and accompanying text.

[325] *See* Gibbs v. Village of Girard, 88 Ohio St. 34, 44, 102 N.E. 299, 301 (1913) ("Ordinarily, the question of negligence, if not one of fact, is of mixed law and fact, and is a proper issue for the determination of the jury."), *overruled on other grounds*, Hamden Lodge No. 517 v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934).

[326] *See* Banks v. Village of Oakwood, No. 57225, 58020, 1990 WL 151662 (Ohio Ct. App. Cuyahoga Co. Oct. 11, 1990) (treating the issue of whether a reasonable person would have known that probable cause is necessary for an arrest as raising a qualified immunity issue for the jury), *dismissed*, 57 Ohio St.3d 718, 568 N.E.2d 690 (1991).

[327] 28 U.S.C. § 1291 (1988) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

[328] *See, e.g.*, 28 U.S.C. § 1292(a) (1) (1988) (permitting interlocutory appeals from orders granting or denying preliminary injunctions); 28 U.S.C. § 1292(b) (1988) (permitting interlocutory appeals from orders certifying controlling questions of law).

[329] 337 U.S. 541 (1949).

[330] *Id.* at 546.

[331] *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (construing 28 U.S.C. § 1291 to permit immediate appeals of the "denial of a claim for qualified immunity, to the extent that it turns on an issue of law"); *see also* Nixon v. Fitzgerald, 457 U.S. 731, 742-43 (1982) (permitting immediate appeal of denials of absolute immunity).

individual § 1983 defendants may immediately appeal trial court decisions denying them either type of immunity.[332]

It is unclear, however, whether states are required by federal law to follow the federal model, and state courts throughout the country have taken different positions on the availability of immediate appeals of trial court decisions denying qualified or absolute immunity.[333] The Ohio Supreme Court has not addressed this issue, but in *Ohio Civil Service Employees Ass'n v. Moritz*,[334] the Ohio Court of Appeals refused to permit such immediate appeals, noting that

> while a state court hearing a Section 1983 case is bound by the terms of such statute as construed by the United States Supreme Court as it relates to substantive law, it may proceed in matters of practice and procedure in accordance with local rules and the civil procedural practice of the state.[335]

The availability of a federally-required right to an immediate appeal of state trial court denials of qualified or absolute immunity is a close question. Section 1983 defendants in the Ohio courts can rely on *Felder v. Casey*[336] and argue that the immunity from suit (as contrasted to a defense on the merits that can be asserted at trial) is a federal substantive right that states may not burden.[337] Plaintiffs, on the other hand, can characterize the federal "right" as procedural and rely on the observation of Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit that "it is hard to depict a 'right not to be tried' as substantive; it sounds distinctly *procedural*."[338]

The availability of such immediate appeals in state courts may ultimately depend on the source of the putative federal right. The Ohio Supreme Court has provided some guidance, albeit in another context, as to its approach to such issues. In *Celebrezze v. Netzley*,[339] a libel case with a First Amendment defense, the court treated the collateral order doctrine as a construction of the federal jurisdictional statutes and noted that Ohio neither had a similar rule

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[332]Municipalities, on the other hand, are not entitled to an immediate appeal of federal trial court decisions forcing them to go to trial. *See* McKee v. City of Rockwall, Tex., 877 F.2d 409, 412 (5th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); Kraus v. County of Pierce, 793 F.2d 1105, 1108 (9th Cir. 1986). *But see* Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993) (applying the collateral order exception to permit immediate appeals by defendants claiming an eleventh amendment immunity from suit in federal court).

[333]*See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 8.11(b) (1).

[334]39 Ohio App. 3d 132, 529 N.E.2d 1290 (Franklin Co. 1987).

[335]39 Ohio App. 3d at 134, 529 N.E.2d at 1292.

[336]487 U.S. 131 (1988).

[337]*See supra* notes 198-207 and accompanying text.

[338]Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991) (emphasis added), *cert. denied*, 112 S. Ct. 1242 (1992).

[339]51 Ohio St. 3d 89, 554 N.E.2d 1292 (1990).

nor was required to adopt the federal policy.[340] Thus, the court refused to permit defamation defendants to file an immediate appeal of a trial court decision denying a motion for summary judgment and forcing them to trial.[341] Following this approach, the Ohio courts could view the federal right to bring an immediate appeal of the denial of a qualified immunity as an interpretation of federal statutes governing the jurisdiction of the appellate courts and not applicable in a state that has a different policy on what is a final appealable judgment.

Until recently, § 1983 defendants seeking immediate appellate review of Ohio trial court decisions denying them qualified or absolute immunity could attempt to fit their appeals into the state court appellate framework. To do this, they could have relied on the Ohio Supreme Court's decision in *Amato v. General Motors Corp.*[342] *Amato* interpreted the state definition of a final appealable order[343] and permitted interlocutory appeals when the need for immediate appellate review outweighed the "harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal."[344] This option, however, is no longer open to defendants as the Ohio Supreme Court has overruled *Amato*[345] and embraced a strict final judgment rule.

Ohio's rule goes so far as to reject the federal practice and deny state court criminal defendants the right to take immediate appeals of motions to dismiss prosecutions on double jeopardy grounds.[346] Given the refusal of the Ohio

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[340]51 Ohio St. 3d at 91, 554 N.E.2d at 1295 ("This doctrine involves judicial construction of the federal final order statute and is thus not applicable to the states, although a state may of course adopt a similar rule under its own statutes. . . . This court has not adopted a similar collateral order rule . . . .").

[341]*Id.* The court also noted that even if Ohio had such a rule the case would not have been immediately appealable because the first amendment provided a defense to liability not an immunity from suit. *Id.* Nonetheless, there is nothing in *Celebrezze* that suggests that the court would adopt a collateral order exception to the final judgment rule in cases involving an immunity from suit.

[342]67 Ohio St. 2d 253, 423 N.E.2d 452 (1981).

[343]OHIO REV. CODE ANN. § 2505.02 (Anderson 1991) (defining "final order" as "an order that affects a substantial right made in a special proceeding"). For a discussion of the Ohio Supreme Court's treatment of interlocutory appeals under this statute, see Donald Gitlin, Note, *Special Proceedings in Ohio: What is the Ohio Supreme Court Doing with the Final Judgment Rule?*, 41 CLEV. ST. L. REV. 537 (1993).

[344]67 Ohio St. 2d at 258, 423 N.E.2d at 456.

[345]Polikoff v. Adam, 67 Ohio St. 3d 100, 616 N.E.2d 213 (1993).

[346]In federal courts, criminal defendants may take immediate appeals of denials of double jeopardy claims. *See* Abney v. United States, 431 U.S. 651 (1977). The Ohio Supreme Court had followed such a policy, *see* State v. Thomas, 61 Ohio St. 3d 254, 400 N.E.2d 897 (1980), but, prior to overruling of *Amato*, the court overruled *Thomas* and refused to permit immediate double jeopardy appeals in the Ohio courts. State v. Crago, 53 Ohio St. 3d 243, 559 N.E.2d 1353 (1990), *cert. denied*, 499 U.S. 941 (1991). Finally, in Wenzel v. Enright, 68 Ohio St. 3d 63, 623 N.E.2d 69 (1993), a post-*Polikoff* decision, the

Supreme Court to follow the federal model and to permit immediate appeals by criminal defendants raising double jeopardy claims, the court is unlikely to extend the right to immediate appeal to § 1983 defendants asserting an immunity from suit. Thus, any relief for § 1983 defendants will most likely come from a review of this issue by the United States Supreme Court[347] or from a major change in the rules governing interlocutory appeals in Ohio.[348]

C. *Municipal Liability*

In *Monroe v. Pape*,[349] the Supreme Court held that cities were not "persons" within the meaning of § 1983 and thus were not amenable to suit. In *Monell v. Department of Social Services*,[350] however, the Court reversed this aspect of *Monroe* and held that cities could be sued under § 1983, but the Court rejected

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court reaffirmed its rejection of immediate appeals of denials of double jeopardy claims. *See* 68 Ohio St. 3d at 64, 623 N.E.2d at 70 (syllabus no. 2) ("In Ohio, the proper remedy for seeking judicial review of the denial of a motion to dismiss on the ground of double jeopardy is a direct appeal to the court of appeals at the conclusion of the trial court proceeding."); *see also* 68 Ohio St.3d at 67 n.1, 623 N.E.2d at 72 n. 1 (stating that "*Abney* does not mandate, as a matter of federal constitutional law, that a state provide a mechanism for an interlocutory appeal from the denial of a motion to dismiss on grounds of double of jeopardy").

[347]The Supreme Court, however, has been reluctant to address this issue and has consistently denied certiorari in cases raising this issue. *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 8.11(b) (1).

[348]Alternative approaches to obtaining immediate appellate review of denials of qualified immunity could involve the extraordinary writ practice used in Oklahoma, *see* McLin v. Trimble, 795 P.2d 1035, 1036-40 (Okla. 1990), the writ of error used in New Mexico, *see* Carrillo v. Rostro, 845 P.2d 130, 139-42 (N.M. 1992) (adopting the collateral order doctrine "as a matter of sound judicial administration" and holding that the writ of error is the proper procedural device for bringing qualified immunity appeals), or the certification procedure used in Wisconsin. *Cf.* Baxter v. Wisconsin Dep't of Natural Resources, 477 N.W.2d 648, 650 n.3 (Wis. Ct. App. 1991) (permitting review by certification of a denial of qualified immunity in a Rehabilitation Act suit, and noting that such a denial will usually satisfy the criteria for leave to appeal under the state certification procedure), *review denied*, 485 N.W.2d 412 (Wis. 1992). The American Bar Association has recommended a certification procedure to ameliorate the harshness of the final judgment rule. *See* AM. BAR ASS'N, STANDARDS OF JUDICIAL ADMINISTRATION RELATING TO APPELLATE COURTS § 3.12 (1977).

These alternatives, however, may be not consistent with the Ohio Constitution. *See* OHIO CONST. art. IV, § 3(B) (2) ("Courts of Appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals . . . ."); *cf.* In re Hawke, 107 Ohio St. 341, 140 N.E. 583 (1923) (holding that the jurisdiction of the Court of Appeals cannot be extended beyond the limits in the state constitution).

[349]365 U.S. 167 (1961).

[350]436 U.S. 658 (1978).

respondeat superior as a basis for liability.[351] Nonetheless, municipalities and other units of local government may be liable under § 1983 for violations of federal rights when the challenged actions 1) are based on official policies made by the municipality's lawmakers;[352] 2) are taken by other official policymakers;[353] 3) are the result of inadequate training or other policies that reflect a deliberate indifference to the constitutional rights of persons with whom municipal employees come into contact;[354] or 4) are part of the custom or practice of the municipality.[355] In all cases, however, there must be a causal connection between the action or inaction of the municipality and the resulting injury.[356]

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[351] *Id.* at 691 ("[A] municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.").

[352] *Id.* at 694.

[353] *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737-38 (1989); *see also* City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). The Supreme Court treats "the identification of those officials whose decisions represent the official policy of the local governmental unit . . . [as] a legal question to be resolved by the trial judge before the case is submitted to the jury." *Jett*, 491 U.S. at 737. The determination of who is an official policymaker may involve not only an analysis of "state and local positive law" but also "custom or usage having the force of law." *Id.* (internal quotations omitted) (quoting *Praprotnik*, 485 U.S. at 124 n.1). Although the Supreme Court apparently expects federal judges to do whatever fact-finding is necessary to identify the official policymakers, state courts may have more authority to assign such fact-finding to the jury. For a recent discussion of municipal liability based on the actions of a putative policymaker, see Feliciano v. City of Cleveland, 988 F.2d 649 (6th Cir. 1993) (police chief did not have authority to make final city policy regarding drug testing of police cadets).

[354] *See* City of Canton v. Harris, 489 U.S. 378 (1989). A single unconstitutional act by a municipal employee, standing alone, may not be the basis for inferring an improper training policy. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985); *accord* Lytle v. City of Columbus, 37 Ohio App. 3d 99, 590 N.E.2d 421 (Franklin Co. 1990) (rejecting proof of municipal liability under § 1983 from the alleged misconduct of a single police officer). However, when combined with sufficient evidence of inadequate policies of training or supervision, a single act may be the basis for imposing § 1983 liability on a municipality. *See City of Oklahoma City*, 471 U.S. at 821-22; *accord Pembaur*, 485 U.S at 480 ("[I]t is plain that [§ 1983] municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."). For a recent discussion of municipal liability based on a training policy, see Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992) (refusing to permit entry of summary judgment on a claim involving an alleged city failure to properly train police officers on the use of deadly force).

[355] *See* Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989); Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246-48 (6th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990).

[356] *See Jett*, 491 U.S at 737 ("Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue . . . .").

In *Murphy v. City of Reynoldsburg*,[357] the Ohio Supreme Court recognized that § 1983 municipal liability may be based on customs or practices that are not authorized by policymakers.

> Even though a particular practice is not explicitly authorized by city officials, where the practice is sufficiently persistent and widespread it may constitute a custom that represents municipal policy. Sufficiently numerous prior incidents of police misconduct . . . may tend to prove a custom and accession to that custom by the municipality's policymakers.[358]

Unlike individual governmental employees, municipalities and other political subdivisions cannot claim a qualified immunity under § 1983.[359] As a result, § 1983 plaintiffs often join municipalities or other governmental entities to assure the presence of a defendant that lacks an immunity and is capable of satisfying a judgment. The joinder of political subdivisions in § 1983 suits, however, can complicate the litigation, especially when entity liability is based either on inadequate training or supervision or on the existence of a custom.[360]

Plaintiffs may sometimes avoid these difficulties in states like Ohio that not only permit some suits to be brought directly against political subdivisions[361] but also have liberal indemnification policies under which judgments against employees are paid by the governmental entity.[362] There are, however, limitations on the extent to which state law provides an alternative to § 1983.

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[357] 65 Ohio St. 3d 356, 604 N.E.2d 138 (1992).

[358] 65 Ohio St. 3d at 359, 604 N.E.2d at 140 (quotations and citations omitted) (quoting McConney v. City of Houston, 863 F.2d 1180, 1184 (5th Cir. 1989)). The Ohio appellate courts have followed Supreme Court cases defining municipal liability under § 1983. *See, e.g.*, Steplight v. Belpulsi, 76 Ohio App. 3d 384, 601 N.E.2d 656 (Lake Co. 1991) (affirming a the directed verdict in favor of defendant in a § 1983 claim against a municipality for the actions of a police detective because of the plaintiff's failure to establish a municipal custom or policy); *Lytle*, 70 Ohio App. 3d at 110, 590 N.E.2d at 429 (rejecting the inference of a city policy for purposes of § 1983 municipal liability from a single incident of misconduct); Kazel v. City of Eastlake, No. 10-089, 1985 WL 7780, at *4 (Ohio Ct. App. Lake Co. Feb. 1, 1985) (city not liable under § 1983 for an arrest absent an official policy); Amurri v. City of Columbus, Nos. 84AP-597, 84AP-598, 84AP-618, 84AP-619, 84AP-681, 84AP-682, 1985 WL 9634 (Ohio Ct. App. Franklin Co. Feb. 28, 1985) (respondeat superior not a basis for § 1983 municipal liability).

[359] *See* Owen v. City of Independence, 445 U.S. 622 (1980).

[360] Section 1983 claims against governmental entities represent a case within a case and can significantly lengthen and complicate a trial. Thus, a number of federal judges bifurcate § 1983 claims and hear the claims against the individual defendants first. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993) (criticizing the practice of bifurcating § 1983 claims).

[361] *See infra* notes 363-66 and accompanying text.

[362] *See infra* notes 369-82 and accompanying text.

Moreover, Ohio law in this area, like § 1983, has its own ambiguities and complexities.

In the early 1980s the Ohio Supreme Court abrogated the doctrine of governmental immunity and made municipalities and other units of local government liable for the acts of their employees on a theory of respondeat superior.[363] This abrogation of governmental immunity made municipalities directly liable under state law for some conduct for which the municipality could also be found liable under § 1983.[364] In addition, it permitted suits directly against municipalities under state law for conduct that was actionable under § 1983 (against individual employees) but for which § 1983 municipal liability did not extend.[365]

This abrogation of governmental immunity did not remain the law of Ohio for very long. Effective November 20, 1985, Chapter 2744 of the Ohio Revised Code, the Political Subdivision Tort Liability Act, largely restored governmental immunity by making municipalities and other political subdivisions immune from suit under state law for "governmental functions" subject to a narrow group of statutory exceptions.[366] As a result, in many of those circumstances in which § 1983 claims are likely to be brought, there is no basis for joining analogous state law claims against municipalities.[367]

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[363]*See* Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983) (holding that municipalities will be held liable, the same as private corporations and persons, for the negligence of their employees and agents in the performance of the activities once the decision has been made to engage in activities characterized by the exercise of a high degree of official judgment or discretion); Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 30, 442 N.E.2d 749, 752 (1982) (abolishing the doctrine of sovereign immunity for municipal corporations, and stating that "[a] municipal corporation, unless immune by statute, is liable for its negligence in the performance or nonperformance of its acts").

[364]*See, e.g.*, Longfellow v. City of Newark, 18 Ohio St. 3d 144, 480 N.E.2d 432 (1985) (city lacks sovereign immunity for actions of a police officer in making an arrest without a valid warrant).

[365]*See* Molton v. City of Cleveland, 839 F.2d 240, 243-48 (6th Cir. 1988) (finding city liable under state law but not § 1983 for the suicide of a pretrial detainee, *cert. denied*, 489 U.S. 1068 (1989).

[366]OHIO REV. CODE ANN. § 2744.02(A) (1) (Anderson 1992). Under § 2744.02(A) (1) municipalities and other political subdivisions have immunity for governmental and proprietary functions subject to certain express exceptions for which the immunity of political subdivisions is waived in OHIO REV. CODE ANN. § 2744.02(B) (Anderson 1992). *See generally* Sawicki v. Ottawa Hills, 37 Ohio St. 3d 222, 226-7, 525 N.E.2d 468, 472-73 (1988) (noting that the cases judicially abrogating sovereign immunity are no longer the law of Ohio).

[367]Some state courts address this problem by implying suits directly under the state constitution. *See, e.g.*, Corum v. University of North Carolina, 413 N.E.2d 276, 289-92 (N.C.) (finding an implied right of action under the North Carolina Constitution and holding the doctrine of sovereign immunity not applicable to such actions), *cert. denied*, 113 S. Ct. 493 (1992). *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES Ch. 7 (1992). The Ohio Supreme Court, however, has rejected the availability of such implied claims when there are other

Ironically, however, the Act, while largely insulating political subdivisions from liability under state law, did not provide similar protection to governmental employees who have been left with a narrower immunity under state law than that available under § 1983.[368]

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reasonably satisfactory remedies. *See* Provens v. Stark County Bd. of Mental Retardation, 64 Ohio St. 3d 252, 594 N.E.2d 959 (1992) (rejecting the availability of a *Bivens* claim directly under the Ohio Constitution on behalf of a teacher alleging that retaliatory actions were taken against her as a result of her having criticized the board because of the availability of "other reasonably satisfactory remedies provided by statutory enactment and administrative process"). The court has not addressed, and it is unclear, whether Chapter 2744 meets the *Provens* standard in light of the apparent immunity for police practices, *see infra* note 369, and the other significant gaps in its coverage. *See, e.g.*, OHIO REV. CODE ANN. § 2744.02(B) (4) (Anderson 1992) (political subdivisions are immune from liability for injuries caused within or on the grounds of jails, places of juvenile detention, workhouses, or other detention facilities despite their liability for injuries caused in other public buildings); OHIO REV. CODE ANN. § 2744.03(A) (4) (Anderson 1992) (political subdivisions are immune from liability for "injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of his sentence by performing community service work for or in the political subdivision").

The Ohio Courts of Appeals have upheld the constitutionality of § 2744.02(B) (4). *See, e.g.*, Phipps v. City of Dayton, 57 Ohio App. 3d 11, 566 N.E.2d 181 (Montgomery Co. 1988) (upholding the constitutionality of the grant of immunity to political subdivisions for injury or death that is caused by the negligence of their employees and that occurs in their jails), *cause dismissed*, 41 Ohio St. 3d 708, 534 N.E.2d 1204 (1989); *accord* Agee v. Butler County, 72 Ohio App. 3d 481, 594 N.E.2d 1050 (Butler Co. 1991), *juris. motion overruled*, 60 Ohio St. 3d 712, 573 N.E.2d 672 (1991); *cf.* Menefee v. Queen City Metro, 49 Ohio St. 3d 27, 550 N.E.2d 181 (1990) (relying on the state's legitimate interest in preserving the financial soundness of its political subdivisions, and upholding on state and federal constitutional grounds the provision of OHIO REV. CODE ANN. § 2744.05(B) granting political subdivisions immunity against claims subrogated to an insurance company).

[368]In addition to not having an immunity for "acts or omissions [that] were manifestly outside the scope of his employment or official responsibilities," OHIO REV. CODE ANN. § 2744.03(A) (6) (a) (Anderson 1992), employees of political subdivisions do not have an immunity from liability for "acts or omissions [that] were [taken] with malicious purpose, in bad faith, or in a wanton or reckless manner." OHIO REV. CODE ANN. § 2744.03(A) (6) (b) (Anderson 1992). Unlike the objective immunity available to governmental employees under § 1983, *see supra* notes 261-66 and accompanying text, the immunity under state law is framed in subjective terms that, at least in part, are dependent on the subjective state of mind of the individual employees. Thus, an employee of a political subdivision who acted in subjective bad faith might have an objective § 1983 qualified immunity (because federal law was not clearly established) but, at the same time, could be found liable under state law and denied an immunity because of the relevance of the employee's subjective beliefs. *Cf.* Brodie v. Summit County Children Servs. Bd., 51 Ohio St. 3d 112, 117, 554 N.E.2d 1301, 1307 (1990) (pre-Chapter 2744 case, relying on the statutory immunity of OHIO REV. CODE ANN. § 9.86 (Anderson 1990) to "hold that officers or agents of a county children services bureau are immune from civil liability for the exercise of discretionary functions unless a plaintiff challenging the public officer's good faith can show that the official acted in willful, reckless or wanton disregard of rights established under law"). In addition, OHIO REV. CODE ANN. § 2744.03(A) (7) (Anderson 1992), recognizes a common law immunity for political subdivisions and for certain prosecutorial, legal, and judicial officers.

Despite the restoration of governmental immunity for most state law claims involving the type of governmental conduct that is most often the subject of § 1983 suits,[369] the duty of municipalities and other political subdivisions[370] to indemnify § 1983 judgments provides an indirect way for § 1983 plaintiffs to have their judgments satisfied. Under § 2744.07(A) of the Ohio Revised Code,[371] this duty extends to claims brought under § 1983.[372] Thus, there is a state law alternative to suing municipalities directly under § 1983.

The duty to defend and the duty to indemnify employees, however, are not couched in the same language. The duty to defend only exists "if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities."[373] On the other hand, the duty to indemnify is narrower and

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The Revised Code provides in part:

> The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state, is entitled to any defense or immunity available at common law or established by the Revised Code.

Id.

[369]For example, many § 1983 suits involve police practices, but "[t]he provision or nonprovision of police . . . services or protection" is a "governmental function" under OHIO REV. CODE ANN. § 2744.01(C) (2) (a) (Anderson Supp. 1992), for which the immunity of political subdivisions is not waived under OHIO REV. CODE ANN. § 2744.02(B) (Anderson 1992); *accord Sawicki*, 37 Ohio St. 3d at 224-25, 525 N.E.2d at 472-73 (observing that "[t]he current law . . . appears to immunize municipal corporations from liability deriving from the actions of their police officers").

[370]Political subdivisions are defined in OHIO REV. CODE ANN. § 2744.01(F) (Anderson Supp. 1992) to include a broad range of local governmental entities, including "a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state."

[371]OHIO REV. CODE. ANN. § 2744.07(A) (1), (2) (Anderson 1992) (defining the duty of political subdivisions to defend and indemnify employees sued under both state and federal law); *see also* OHIO REV. CODE. ANN. § 9.87 (Anderson 1990) (comparable indemnification provision for state employees).

[372]Generally, Chapter 2744, the Political Subdivision Tort Liability Act, does not apply to § 1983 or other federal claims, but this exclusion is not applicable to OHIO REV. CODE ANN. § 2744.07 (Anderson 1992), which deals with the duty to defend and indemnify employees. *See* OHIO REV. CODE ANN. § 2744.09(E) (Anderson 1992) ("This chapter does not apply to, and shall not be construed to apply to . . . (E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 . . . shall apply to such claims or related civil actions.").

[373]OHIO REV. CODE ANN. § 2744.07(A) (1) provides as follows:

> Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have

only exists "if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities."[374]

In *Rogers v. City of Youngstown*,[375] the Ohio Supreme Court held that the duty to defend a federal court § 1983 action was triggered by an allegation that a police officer "while acting within the scope of his employment . . . assaulted and battered the Plaintiff."[376] The fact that the complaint did not allege that the defendant acted in good faith but rather claimed that he acted "unlawfully" did not absolve the city of its obligation to defend the suit, which also included state law claims.[377] Thus, the city was obligated to pay the cost of defending the § 1983 action.[378]

Unlike the duty to defend, which is determined from the pleadings at the outset of the litigation, the duty to indemnify "any judgment, other than a

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occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities.

[374]OHIO REV. CODE ANN. § 2744.07(A) (2) provides as follows:
Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission of the employee in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities.

[375]61 Ohio St. 3d 205, 574 N.E.2d 451 (1991).

[376]61 Ohio St. 3d at 209, 574 N.E.2d at 454.

[377]In refusing to limit the duty to defend to cases in which the complaint in the underlying suit contained an allegation that the employee acted in good faith, the court observed that such a requirement "would be incongruous with suing the employee in his or her individual capacity." *Id.* Neither the absence of good faith nor the presence of bad faith, however, is a prerequisite to a § 1983 claim, and there is nothing incongruous about an allegation of good faith in an individual capacity § 1983 complaint. For example, a prison official could be found liable under § 1983 for the deliberate indifference to the serious medical needs of an inmate without a finding of bad faith. *See* Estelle v. Gamble, 429 U.S. 97 (1976). Likewise, a police officer may be found liable for an improper use of deadly force without a finding of bad faith. *See* Tennessee v. Garner, 471 U.S. 1 (1985). Nonetheless, plaintiffs rarely include allegations about the defendants' good faith in § 1983 complaints, and any policy that conditioned the defendants' ability to receive a defense on the allegations of the complaint would be odd indeed. Thus, the decision in *Rogers* to look to the complaint to determine the nature of the suit but to not require any formalistic allegations avoids giving the statute an absurd construction that would virtually eliminate the duty to defend.

[378]*Rogers*, 61 Ohio St. 3d at 209, 574 N.E.2d at 454. The city was also required to pay the costs of the declaratory judgment action for indemnification brought under OHIO REV. CODE ANN. § 2744.07(C) (Anderson 1992). *Id.*

judgment for punitive or exemplary damages"[379] is determined after the case has gone to judgment.[380] Moreover, the duty to indemnify, although tied to a scope of employment inquiry,[381] is based on whether the employee was actually acting within the scope of his or her employment.[382]

The governmental immunity that was restored by Chapter 2744 is not applicable to "[c]ivil claims based upon alleged violations of the Constitution or statutes of the United States."[383] This provision clearly makes the state immunity inapplicable to § 1983 claims *as a matter of state law*.[384] It is unclear, however, whether this broad statutory exclusion[385] is limited to federal claims

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379OHIO REV. CODE. ANN. § 2744.07(A) (2).

380The duty of Ohio political subdivisions to indemnify employees is applicable to § 1983 claims, *see supra* note 372, but the duty is contingent upon a judgment having been entered against the employee. Even though municipalities cannot claim a qualified immunity under § 1983, *see supra* note 359, the duty to indemnify is only available when the employee is not entitled to qualified immunity and a judgment may be entered against the employee. Thus, state law, as a practical matter, permits the political subdivision to share the employee's qualified immunity. Nonetheless, in cases in which the employee but not the political subdivision is liable under § 1983, the state indemnification statute effectively imposes liability on the entity based on respondeat superior.

381Scope of employment is a factual issue to be decided by the jury. Osborne v. Lyles, 63 Ohio St. 3d 326, 330, 587 N.E.2d 825, 829 (1992) (plurality opinion) (stating that "it is commonly recognized that whether an employee is acting within the scope of his employment is a question of fact to be decided by the jury" and treating whether an off-duty police officer was acting within the scope of his employment when he allegedly exceeded his lawful authority and committed tortious acts as raising factual issues on which summary judgment was not available). *But cf.* Conley v. Shearer, 64 Ohio St. 3d 284, 595 N.E.2d 862 (1992) (treating the scope of employment determination in the Court of Claims Act, OHIO REV. CODE ANN. § 2743.02(F) (Anderson 1992), as procedural in nature and not subject to the right to trial by jury).

382By tying the duty to represent to whether the employee's acts or omissions were "not *manifestly* outside he scope of his employment or official responsibilities," OHIO REV. CODE ANN. § 2744.07(A) (1) (emphasis added), Ohio gives employees the benefit of the doubt and permits representation when it appears from the allegations that the employee was acting somewhat (but not manifestly) beyond the scope of his or her employment.

383OHIO REV. CODE ANN. § 2744.09(E) (Anderson 1992).

384*Conley*, 64 Ohio St. 3d at 292, 595 N.E.2d at 869 (treating state immunities as inapplicable to § 1983 under both state and federal law).

385Unlike OHIO REV. CODE ANN. § 2744.09(E), which makes Chapter 2744 inapplicable to "*[c]ivil claims* based upon alleged violations of the constitution or statutes of the United States," the other four subsections of OHIO REV. CODE ANN. § 2744.09(Anderson 1992) (emphasis added) make the chapter inapplicable to specific types of "[c]ivil actions." *See* OHIO REV. CODE ANN. § 2744.09(A)-(D). Read literally, the broad language of § 2744.09(E) appears to make the state stutory immunities inapplicable to hybrid actions in which state-created remedies are used to enforce duties imposed by federal law. For a discussion of hybrid actions in which state-created causes of action are used to enforce duties imposed by federal law, see Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831 (1992); Pauline E. Calande, *State*

in which the cause of action is authorized by § 1983 and other provisions of federal law or whether it also makes the statute inapplicable to state-created actions to enforce federal law.[386]

D. Suits Against States

Cities and other units of local government are "persons" for purposes of suit under § 1983, but in *Will v. Michigan Department of State Police*,[387] the Supreme Court held that states are not. Thus, the Court immunized states from § 1983 suits in state courts.[388]

Prior to *Will*, unconsenting states could not be sued in federal court under § 1983 because of the Eleventh Amendment.[389] State officials, however, have long been subject to § 1983 official capacity suits in federal court for prospective injunctive relief even though such relief really runs against the state.[390] *Will* made clear that § 1983 was equally available in state courts for suits against state officials for prospective injunctive relief,[391] and the Ohio Supreme Court has held that the Court of Common Pleas has jurisdiction over official capacity § 1983 suits for injunctive relief against state officials.[392]

The Ohio courts also anticipated *Will* and refused to permit § 1983 suits against the state in either the Court of Common Pleas[393] or the Court of

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Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action, 94 YALE L. J. 1144, 1153 (1985); Ronald J. Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289 (1969).

[386]For a discussion of the use of state-created remedies to enforce provisions of federal law that are also actionable under § 1983, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 5.3(b). *See also* Akhil Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse § 1983*, 64 U. COLO. L. REV. 159 (1993) (discussing the use of state remedies to enforce federal rights against federal officers in state courts).

[387]491 U.S. 58 (1989).

[388]In rejecting the availability of § 1983 as a basis for obtaining relief against the state in state courts, the Supreme Court in *Will* imported the distinctions used in federal court for purposes of the eleventh amendment into the definition of "person" under § 1983. *See Will*, 491 U.S. at 66-67 ("[I]n deciphering congressional intent as to the scope of § 1983, the scope of the eleventh amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.").

[389]*See* Quern v. Jordan, 440 U.S. 332 (1979).

[390]*See generally* Edelman v. Jordan, 415 U.S. 651 (1974); *cf. Ex Parte* Young, 209 U.S. 123 (1908) (creating a fiction under which state officers could be sued for injunctive relief directly under the constitution despite the eleventh amendment).

[391]491 U.S. at 71 n.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.'").

[392]*See supra* note 94.

[393]*See* Kinney v. Ohio Dep't of Admin. Servs., 30 Ohio App. 3d 121, 507 N.E.2d 399 (Franklin Co. 1986) (state agency not a "person" under § 1983).

Claims.[394] The Ohio courts, however, do not need § 1983 in order to entertain claims against the state for violations of federal law.[395] Ohio has consented to suit in the Court of Claims,[396] and this consent extends to federal claims in which the state is a proper party.[397]

Moreover, the Ohio Supreme Court has not followed the federal model in determining the scope of relief available against the state in the Court of Claims on injunctive claims. In *Edelman v. Jordan*,[398] a federal court § 1983 case, the United States Supreme Court held that the Eleventh Amendment barred retroactive injunctive relief where the relief—illegally withheld public assistance benefits—would have to come from the state treasury. The Ohio Supreme Court, however, in *Ohio Hospital Ass'n v. Ohio Department of Human Services*,[399] rejected the *Edelman* approach and held that Medicaid providers suing for injunctive relief (as contrasted to damages) in the Court of Claims may recover payments that had been improperly withheld in violation of federal law even though the judgment would have to be satisfied from the state treasury.[400]

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394 *See* Burkey v. Southern Ohio Correctional Facility, 38 Ohio App. 3d 170, 528 N.E.2d 607 (Franklin 1988).

395 *See* Ohio Hosp. Ass'n v. Ohio Dep't of Human Servs., 62 Ohio St. 3d 97, 579 N.E.2d 695 (1991) (permitting suit against the state directly under the federal Medicaid statute despite the unavailability of § 1983 but not reaching the availability of suits directly under the United States Constitution), *cert. denied*, 112 S. Ct. 1483 (1992); Wilcox Indus., Inc. v. State, 79 Ohio App. 3d 403, 607 N.E.2d 514 (Hamilton Co. 1992) (permitting the Ohio Court of Claims to entertain a taking claim directly under the fifth amendment to the United States Constitution), *juris. motion overruled*, 65 Ohio St. 3d 1416, 598 N.E.2d 1168 (1992).

396 OHIO REV. CODE ANN. § 2743.02(A) (1) (Anderson 1992) ("The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims . . . in accordance with the same rules of law applicable to suits between private parties . . . ."); *see also* Reynolds v. State of Ohio, Div. of Parole and Community Servs., 14 Ohio St. 3d 68, 471 N.E.2d 776 (1984) (rejecting a narrow construction of the private parties limitation in the Court of Claims Act and holding that the state could be liable for failing to supervise an inmate on a work release furlough); *accord* Bennett v. Ohio Dep't of Rehabilitation and Correction, 60 Ohio St. 3d 107, 573 N.E.2d 633 (1991) (relying on *Reynolds* and holding that state is not immune for unlawfully confining a prison inmate beyond the lawful term of his incarceration).

397 *See* Manning v. Ohio State Library Bd., 62 Ohio St. 3d 24, 577 N.E.2d 650 (1991) (holding that Ohio courts may entertain Title VII employment discrimination actions against the state in the Court of Claims).

398 415 U.S. 651 (1974).

399 62 Ohio St. 3d 97, 579 N.E.2d 695 (1991), *cert. denied*, 112 S. Ct. 1483 (1992).

400 In taking this position, the court distinguished a suit for equitable relief in the form of monies withheld under an invalid administrative rule from money damages and permitted a suit for the former in the Court of Claims. *See id.* at 62 Ohio St. 3d 103-04, 579 N.E.2d at 699-700. It is unclear, however, why the waiver of sovereign immunity in the Court of Claims Act would not also apply to damage suits against the state.

Likewise, in *Wilcox Industries, Inc. v. State of Ohio*,[401] the Ohio Court of Appeals held that the Court of Claims had jurisdiction over a patent holder's claim that the state prison was making, using, and selling products that were protected by the patent. Cases arising under the federal patent laws are within the exclusive jurisdiction of the federal courts,[402] but the patent holder framed its case as a taking claim under the federal Constitution.[403] After holding that federal law did not prevent the plaintiff from framing its claim as a state court taking claim, the court held that the Court of Claims was the proper forum for such a suit.[404]

Neither the claim for retroactive payments in *Ohio Hospital Ass'n* nor the claim for just compensation in *Wilcox* was brought under § 1983, but in both cases the Ohio courts allowed full relief in the Court of Claims. These decisions implicitly recognize that states may have remedies that are more favorable than federal remedies for the enforcement of federal rights,[405] and Ohio has taken such an approach in permitting the Court of Claims to award relief not available under federal statutory remedies.[406]

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[401] 79 Ohio App. 3d 403, 607 N.E.2d 514 (Hamilton Co.1992), *juris. motion overruled*, 65 Ohio St. 3d 1416, 598 N.E.2d 1168 (1992).

[402] *See* 28 U.S.C. § 1338 (1988).

[403] *Wilcox*, 79 Ohio App. 3d at 403-04, 607 N.E.2d at 514-15.

[404] 79 Ohio App. 3d at 405-06, 607 N.E.2d at 515-16.

[405] *Accord* Mitchell v. Steffen, 487 N.W.2d 896 (Minn. Ct. App. 1992) (holding that an award of retroactive benefits in the form of equitable relief is not barred by state sovereign immunity and ordering retroactive general assistance benefits withheld under a state durational residency requirement that violated both the state and federal constitutions), *aff'd on other grounds*, 504 N.W.2d 198 (Minn. 1993), *cert. denied*, 114 S. Ct. 902 (1994).

[406] The United States Constitution, however, may require states to provide *full* relief for state violations of the federal constitution. *See* General Oil Co. v. Crain, 209 U.S. 211, 226 (1908) ("If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution and may be forbidden by a state to its courts, . . . an easy way is open to prevent the enforcement of many provisions of the Constitution . . . ."). *See generally* Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189, 314 (1981) (concluding that "[t]he idea that there are some wrongs without remedies, whatever its force in the field of private law, has no place in regulating the rights of individuals against government in a system with a written constitution like our own"). *Cf.* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) (strengthening the presumption in favor of the retroactive application of new civil divisions and requiring states to offer taxpayers adequate predeprivation procedural due process or provide retrospective relief in the form of either tax refunds or the retroactive elimination of discriminatory tax policies); McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 49 n.34 (1990) (noting that Florida had waived sovereign immunity through its authorization of a state court refund action and requiring the state to provide refunds of taxes paid under an unconstitutional state tax statute). *But see* Mossman v. Donahey, 46 Ohio St. 2d 1, 346 N.E.2d 305 (1976) (pre-Court of Claims Act case holding

E. Suits Against State Officials

In contrast to the availability of § 1983 suits seeking prospective injunctive relief against state officials, § 1983 is not available in official capacity damage actions against state officials. Nonetheless, in *Hafer v. Melo*,[407] the Supreme Court made clear that state officials were subject to personal liability in individual capacity § 1983 damage claims for acts taken as part of their official duties.[408] Thus, the Court treats an official capacity claim against a governmental official as a claim against the governmental entity on behalf of which the official is acting. Under this approach, the question of whether a suit is brought against a governmental official in that official's individual or official capacity is important in suits against both state and local governmental defendants.[409] As a result, in any § 1983 suit that is even nominally against an individual, it is necessary to determine the capacity in which the defendant is being sued.

An issue that has arisen frequently in Ohio involves the provision of Ohio law that conditions the availability of individual capacity suits against state employees on a determination by the Court of Claims that they acted in bad faith or beyond the scope of their employment.[410] Until recently, lower courts in Ohio had been split as to the applicability of this required scope of employment determination to individual capacity § 1983 claims.[411] In *Conley*

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that the state cannot be sued for damages in the state courts on a federal claim without its consent).

[407]112 S. Ct. 358 (1991); *accord* Midwest Pride IV, Inc. v. Wray, No. 92AP-627, 1992 WL 323917, *3 (Ohio Ct. App. Franklin Co. Nov. 3, 1992) (relying on *Hafer* to hold that "state officials may be sued for damages in their individual capacity for acts performed in their official capacity under color of state law if such acts are violative of constitutional rights").

[408]Prior to *Hafer*, the Sixth Circuit had misconstrued *Will* and held that state officials could not be sued under § 1983 for acts taken in their official capacity. *See* Cowan v. Louisville School of Medicine, 900 F.2d 936, 942-43 (6th Cir. 1990); Rice v. Ohio Dep't of Transp., 887 F.2d 716, 719 (6th Cir. 1989), *vacated*, 110 S. Ct. 3232 (1990). *See generally* William Burnham & Michael C. Fayz, *The State as a "Non-Person" Under Section 1983: Some Comments on Will and Suggestions for the Future*, 70 OR. L. REV. 1, 35-43 (1991).

[409]In an individual capacity suit against a local governmental official, the defendant may assert a qualified or an absolute immunity. No such immunity is available to governmental entities. *See* Owen v. City of Independence, 445 U.S. 622 (1980) (holding that a city may not share the qualified immunity of city employees). Because an official capacity § 1983 suit against a local governmental official is really another way of naming the entity, *see* Brandon v. Holt, 469 U.S. 464 (1985), the governmental entity may not claim an immunity. On the other hand, to prevail in an official capacity § 1983 damage suit against a local governmental official, a § 1983 plaintiff must meet *Monell* standards and prove that an official policy of the governmental entity caused the deprivation of federal law.

[410]*See* OHIO REV. CODE ANN. § 2743.02(F) (Anderson 1992).

[411]*Compare* Besser v. Dexter, 68 Ohio App. 3d 510, 589 N.E.2d 77 (Hocking Co. 1990) (rejecting applicability to § 1983); *and* White v. Morris, 69 Ohio App. 3d 90, 590 N.E.2d

v. Shearer,[412] however, the Ohio Supreme Court, relying on the *Martinez* principle,[413] held that it was plain error to apply this scope of employment requirement to § 1983 claims against state employees.[414] Therefore, a plaintiff suing a state employee under § 1983 need not first file an action against the state in the Court of Claims (to determine whether the employee was acting within the scope of his or her employment), although this requirement is applicable to state law claims.[415]

Federal courts, however, are divided as to how to construe § 1983 complaints that seek damages against state officials for their official acts but do not make clear whether the suits are being brought against the officials in their individual or official capacities. For example, the Sixth Circuit treats § 1983 complaints that fail to expressly state that governmental officials are being sued in their individual capacities as official capacity suits.[416] Moreover, even though issues of capacity are generally waivable, the Sixth Circuit treats this issue as jurisdictional because it implicates the Eleventh Amendment.[417]

The Supreme Court did not reach the pleading issue in *Hafer*[418] and thus did not decide whether the Third Circuit acted properly in looking to the proceedings below to determine whether the § 1983 damage suit was brought

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57 (Scioto Co. 1990), *juris. motion overruled*, 56 Ohio St. 3d 704, 564 N.E.2d 707 (1990) *with* Mullins v. Rower, No. 1-90.6 1991 WL 44174 (Ohio Ct. App. Allen Co. Mar. 20, 1991) (applying requirement to § 1983 claims); Bell v. Newnham, No. L-89-373, 1990 WL 131972 (Ohio Ct. App. Lucas Co. Sept. 14, 1990).

[412]64 Ohio St. 3d 284, 595 N.E.2d 862 (1992).

[413]*See infra* notes 239-42 and accompanying text.

[414]The *Conley* court relied on the supremacy of federal law in construing § 1983.

> [C]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law, . . . even though the federal cause of action [was] being asserted in the state courts. . . . [A] construction of . . . [§ 1983] which permit[s] a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise . . .

64 Ohio St.3d at 292-93, 595 N.E.2d at 869 (quotations ommitted). *But see* note 185 and accompanying text (discussing a possible state law basis for *Conley*).

[415]Haynes v. Marshall, 887 F.2d 700 (6th Cir. 1989).

[416]*See* Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989). *See also* Yeksigian v. Nappi, 900 F.2d 101, 104 (7th Cir. 1990) ("In the absence of any express statement that the parties are being sued in their individual capacities, an allegation that the defendants were acting under color of law generally is construed as a suit against the defendants in their official capacities only."); *cf.* Lovelace v. O'Hara, 985 F.2d 847 (6th Cir. 1993) (refusing to permit an amended complaint naming a deputy county sheriff in his individual capacity to relate back for purposes of the statute of limitations).

[417]*See Wells*, 891 F.2d at 593.

[418]*See Hafer*, 112 S.Ct. at 361 n.*.

against the state official in her official or her personal capacity.[419] Nonetheless, the *Hafer* Court agreed with the Third Circuit's observation that "[i]t is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity."[420]

Despite the Supreme Court's failure to reach this issue and its obvious preference for clarity in pleading, the Court has approached the issue of determining the capacity in which a § 1983 suit has been brought by looking to the course of the proceedings.[421] Moreover, the Court's willingness to permit the *Hafer* suit to go forward suggests that the pleading of individual capacity is not jurisdictional.

In *Cooperman v. University Surgical Associates., Inc.*,[422] the Ohio Supreme Court addressed a related issue and recognized that some suits against individual defendants were really suits against the state and thus subject to the exclusive jurisdiction of the Court of Claims.

> An action against a state officer or employee will be treated as one against the state for purposes of R.C. Chapter 2743 where the state, though not a party to the suit, is the real party against which relief is sought, and where a judgment for the plaintiff, though nominally against the defendant as an individual, could operate to control the action of the state or subject it to liability.[423]

Despite this statement, the determination of whether a § 1983 claim is brought as an official or an individual capacity claim should be governed by federal standards, and the Ohio courts should not rely on the above language from *Cooperman* for this purpose. Nor should they require a specific pleading of capacity,[424] or confuse the allegation that a § 1983 defendant was acting in his or her official capacity with the independent question of the capacity in which the defendant is being sued.[425]

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[419] *See* Melo v. Hafer, 912 F.2d 628, 635-36 (3d Cir. 1990), *aff'd*, 112 S. Ct. 360 (1990). Other circuits following this approach and cited by the Court are: Conner v. Reinhard, 847 F.2d 384, 394 n.8 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988); Houston v. Reich, 932 F.2d 883, 885 (10th Cir. 1991); Lundgren v. McDaniel, 814 F.2d 600, 603-04 (11th Cir. 1987). The Court cited the Sixth and Eighth Circuit decisions in *Wells* and Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989), as imposing more rigid pleading requirements.

[420] *See Hafer*, 112 S. Ct. at 361 n. * (quoting 912 F.2d at 636 n.7).

[421] In Kentucky v. Graham, 473 U.S. 159, (1985), the Court observed that "[i]n many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." *Id.* at 167 n.14 (quoting Brandon v. Holt, 469 U.S. 464, 469 (1985)).

[422] 32 Ohio St. 3d 191, 513 N.E.2d 288 (1987).

[423] 32 Ohio St. 3d at 195, 513 N.E.2d at 293.

[424] *See* OHIO R. CIV. P. 9(A).

[425] *Hafer*, 112 S. Ct. at 363.

Finally, the treatment of capacity as jurisdictional, even if proper for suits against state officials in federal court, is inapplicable to state court § 1983 claims. *Carrillo v. State*[426] is the leading state court case addressing the construction of § 1983 complaints that are ambiguous as to the capacity in which individuals are being sued. In that case, the Arizona Court of Appeals recognized the "important repercussions" of treating a § 1983 suit as a personal capacity as contrasted to an official capacity suit.[427] Nonetheless, the court rejected a requirement that plaintiffs plead that they are suing a defendant in his or her personal or individual capacity.[428]

Viewing the strict pleading approach as derived, in part, from the jurisdictional requirements of the Eleventh Amendment, the Arizona court refused to impose such a requirement on state court § 1983 plaintiffs.

> [A] plaintiff should allege specifically the capacity in which he is suing the official. Such specificity both relieves courts from the difficulty inherent in interpreting an ambiguous complaint and gives the defendant clear notice of his possible personal liability for damages. We decline to hold, however, that failure to allege specifically official or personal capacity will be the death knell of a section § 1983 action or that an allegation of capacity, standing alone, is determinative of this issue. Such a conclusion would result in a harsh elevation of form over substance.[429]

Instead, the court applied an "interpretive" approach, which it found supported by the Supreme Court's decision in *Brandon v. Holt*.[430] Under this approach, the court reviewed the pleadings and the course of the proceedings to determine that the case before it was a § 1983 personal capacity suit.[431]

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[426]817 P.2d 493 (Ariz. Ct. App. 1991).

[427]The court defined the "repercussions" as follows:

> The plaintiff in a section 1983 action can recover monetary damages, including punitive damages, only against a defendant named in his personal capacity. Balanced against that right of recovery, however, is the right of a defendant named in his personal capacity to assert a defense of qualified or absolute immunity, a defense not available to one named in his official capacity.

Id. at 496 (citation omitted).

[428]*Id.* at 497.

[429]*Id.* The court also relied on ARIZ. R. CIV. P. 9(a), which limits required allegations of capacity to those going to jurisdiction. *Id.* at 497 n.3. OHIO R. CIV. P. 9(A), however, does not even contain such a provision.

[430]469 U.S. 464, 469 (1985).

[431]817 P.2d at 497.

F. Damages

1. Compensatory Damages

In *Carey v. Piphus*,[432] the Supreme Court looked to the federal principle of compensation as the source of a uniform § 1983 damage policy that would not vary from state to state. The *Carey* Court also made clear that § 1983 damages are not limited to those that were available in 1871, when the predecessor to § 1983 was enacted, but are based on evolving federal standards.[433] Finally, the Court rejected the availability of presumed damages for procedural due process violations.[434]

Under federal principles, a broad range of damages may be awarded in § 1983 cases, including damages for mental and emotional distress.[435] In *Memphis Community School District v. Stachura*,[436] however, the Court rejected the availability of presumed damages to supplement § 1983 damage awards but permitted such damages as a substitute when traditional damages are difficult to prove.[437] Thus, in the typical § 1983 case, a plaintiff may not recover damages for the value of the constitutional right itself.

The damage policies in § 1983 actions are based on the common law but are not dependent upon the law of the forum state.[438] For example, the Sixth Circuit has held that the federal doctrine of joint and several liability applies to § 1983 claims.[439] Likewise, most federal courts apply a federal, not a state, collateral source doctrine to determine whether reductions should be made to

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[432] 435 U.S. 247 (1978).

[433] *Id.* at 257-59.

[434] *Id.* at 260-64.

[435] *Id.* at 263-64 & n.20.

[436] 477 U.S. 299 (1986).

[437] *Id.* at 310-11.

[438] *See* Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965) ("We believe that the benefits of the [Civil Rights] Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought."); *see also* Gordon v. Norman, 788 F.2d 1194, 1199 (6th Cir. 1986) ("Federal standards govern the determination of damages under the civil rights statutes."); *accord* Gordon v. Gerhardt, No. 6796, 1981 WL 2710, at *5 (Ohio Ct. App. Montgomery Co. March 5, 1981) ("Where an action for damages is based on . . . Sec. 1983, whether that action is brought in a state court or in a federal court, federal law with regard to the right to recover punitive damages applies.").

[439] Weeks v. Chaboudy, 984 F.2d 185, 188-89 (6th Cir. 1993) (holding that there is a federal rule of joint and several liability in § 1983 cases and reversing the apportionment of liability for compensatory damages among the defendant and other prison personnel who were not parties to the action).

§ 1983 damage awards.[440] State courts have generally followed federal policies to determine the damage policies applicable to § 1983 claims,[441] and the Ohio courts should apply such federal policies in § 1983 actions.[442]

2. Punitive Damages

Under federal standards, punitive damages are available in § 1983 litigation when defendants act intentionally or with reckless or callous disregard for plaintiffs' rights.[443] Furthermore, under federal common law principles, punitive damages are available against individual defendants even absent actual damages,[444] and it is the responsibility of the jury to determine eligibility for and amount of punitive damages under the traditional civil burden of proof: the preponderance of the evidence standard.[445] Municipalities, however, are not subject to § 1983 claims for punitive damages.[446]

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[440] *See* House, *supra* note 17, at 112-13.

[441] *See, e.g.*, Sundholm v. City of Bettendorf, 389 N.W.2d 849 (Iowa 1986) (following federal law to permit punitive damages under § 1983 despite the absence of actual damages); Janda v. City of Detroit, 437 N.W.2d 326 (Mich. Ct. App. 1989) (applying federal standards to affirm a § 1983 award of punitive damages despite the unavailability of punitive damages for punishment under state law); Rogers v. Saylor, 760 P.2d 232 (Or. 1988) (rejecting the application of the $100,000 damage ceiling of the Oregon Tort Claims Act and the immunity of governmental employees from awards of punitive damages to § 1983 actions); Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983) (following federal law to uphold a § 1983 damages award for mental anguish absent physical injury), *cert. denied*, 469 U.S. 981 (1984); Thompson v. Village of Hales Corners, 340 N.W.2d 704 (Wis. 1983) (holding that the state $25,000 damage ceiling on municipal liability does not apply to § 1983 actions under principles of federal law that require full compensation for deprivations of federal rights). *But see infra* notes 458-59 and accompanying text.

[442] *See* House, *supra* note 17, at 116-24, 129-30 (arguing in favor of a federal common law collateral source rule in both state and federal court § 1983 actions).

[443] *See* Smith v. Wade, 461 U.S. 30, 51 (1983) ("[R]eckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages.").

[444] *See* King v. Macri, 993 F.2d 294, 297 (2d Cir. 1993); Erwin v. County of Manitowoc, 872 F.2d 1292, 1299 (7th Cir. 1989); Wilson v. Taylor, 658 F.2d 1021, 1023 (5th Cir. 1981); Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir. 1965); *cf.* Gordon v. Norman, 788 F.2d 1194, 1199 (6th Cir. 1986) ("[P]unitive damages may be awarded under § 1983 even where they would not normally be recoverable under the local law in the state where the violation occurred.").

[445] *See* Bird v. Figel, 725 F. Supp. 406 (N.D. Ind. 1989).

[446] *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). The Court in *Fact Concerts* left a small opening for the award of punitive damages against municipalities under § 1983 in an "extreme situation where the taxpayers are directly responsible for perpetuating an outrageous abuse of constitutional rights." *Id.* at 267 n.29. Courts have generally rejected the availability of § 1983 punitive damage awards against municipalities even in egregious circumstances. *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 16.3(c) n.51.

Under the tort reform legislation that became effective on January 5, 1988, Ohio has made a number of changes in the common law policies that previously governed the availability of punitive damages in what the General Assembly broadly defined as "tort actions."[447] Punitive damages are now only available in such actions under standards that are far more stringent than the standards applicable to § 1983 claims in federal court. Under Section 2315.21(B) of the Ohio Revised Code, punitive damages may not be recovered from a defendant in a "tort action" unless "[t]he actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult . . . ."[448] In addition, for punitive damages to be awarded under Ohio law "[t]he plaintiff . . . [must have] adduced proof of actual damages . . . ,"[449] but there is no such requirement under federal law.[450]

Finally, Ohio has followed the lead of a number of other states by imposing a more stringent burden of proof on punitive damages awards,[451] and by reducing the role of the jury in awarding punitive damages. Under this policy, the plaintiff must satisfy the state's clear and convincing standard of proof in order to permit a jury to conclude that the plaintiff is entitled to punitive damages. The jury's function, with respect to such damages, is limited to determining only whether the plaintiff is entitled to the award. Determining the *amount* of the award is a decision made exclusively by the judge.[452]

There are substantial questions as to whether these new punitive damages policies apply to § 1983 and other federal causes of action as a matter of state

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447OHIO REV. CODE. ANN. § 2315.21(A) (1) (Anderson 1991) (defining "tort action" as "a civil action for damages for injury or loss to person or property").

448OHIO REV. CODE ANN. § 2315.21(B) (Anderson 1991).

449§ 2315.21(B) ("[P]unitive or exemplary damages are not recoverable from a defendant . . . in a tort action unless . . . [t]he plaintiff . . . has adduced proof of actual damages . . . ."). Curiously, the new statute may not require that actual damages be awarded. Prior to its adoption, there was disagreement as to whether punitive damages were available in Ohio absent proof of actual damages, but the committee responsible for drafting jury instructions in Ohio took the position "that exemplary or punitive damages may not be awarded in the absence of proof of actual damages." 1 OHIO JURY INSTRUCTIONS-CIVIL § 23.70, (1) comment; *see also* 1 OHIO JURY INSTRUCTION-CIVIL § 23.70(1) ("If you do not find actual damage, you cannot consider punitive damages."). In the comment to the provisional jury instruction on punitive damages under the new statute, the committee interprets OHIO REV. CODE ANN. § 2315.21(B) (2) as "explicitly codif[ying] the requirement of proof (but not necessarily an award) of actual damages for recovery of punitive damages." 1 OHIO JURY INSTRUCTIONS-CIVIL § 23.71(1) (provisional), (1) comment (interpreting this provision as codifying the requirement of proof of actual damages that appeared in Shimola v. Nationwide Ins. Co., 25 Ohio St. 3d 84, 495 N.E.2d 391 (1986)).

450*See supra* note 444.

451*See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1046 n.11 (1991) (citing and speaking favorably of state statutes that require a higher burden of proof for punitive damages awards).

452OHIO REV. CODE ANN. § 2315.21(C) (Anderson 1991).

law, but the Ohio courts have not addressed this issue.[453] Assuming their applicability under state law, there are also substantial questions as to whether federal law permits states to apply such policies to § 1983 claims.

One relatively easy issue involves the standards for awarding punitive damages under § 1983. Although the Supreme Court has not directly addressed the issue, the damages available in § 1983 actions are part of the federal definition of the § 1983 cause of action.[454] Consequently, state courts generally rely upon uniform federal, not state, policies to determine the damages available under § 1983, and the Ohio courts should apply federal punitive damages standards rather than the state statutory standards to § 1983 claims.[455] Thus, the decision of the Ohio Court of Appeals in *Gordon v. Gerhardt*[456] upholding a § 1983 award of punitive damages even though no compensatory damages were allowed seems correct.

The more difficult federal issues involve the change in the burden of proof and the reduction in the role of the jury. Federal courts entertaining diversity actions treat the burden of proof as part of the definition of the element of damages and apply state policies under the *Erie* doctrine.[457] State courts, however, have been reluctant to abandon state punitive damages policies. The Louisiana courts do not allow punitive damages in § 1983 cases,[458] while the Colorado Supreme Court has upheld the application of the state's unusual

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[453]For a discussion of the importance of the threshold state law issue, *see supra* notes 171-88 and accompanying text. Plaintiffs can argue that § 1983, though literally within the statutory definition of "tort action" and sometimes referred to as a "constitutional tort," *see* Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontier Beyond*, 60 NW. U. L. REV. 277 (1965), was not intended by the General Assembly to be a "tort action" within the meaning of OHIO REV. CODE ANN. § 2315.21(C) (Anderson 1991). Moreover, § 1983 is available in a wide variety of cases having nothing to do with traditional tort actions. *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 19-20 (1985) (describing the range of federal claims that have been litigated under § 1983).

[454]*See supra* note 189-93 and accompanying text.

[455]*See infra* note 443 (defining the federal standard).

[456]No. 6796, 1981 WL 2710 (Ohio Ct. App. Montgomery Co. March 5, 1981) (relying on *Basista* and the applicable federal standards to uphold an award of punitive damages).

[457]*See, e.g.*, Nereson v. Zurich Ins. Co., No. A3-91-72, 1992 WL 212233 (D. N.D. Aug. 20, 1992) (diversity case applying the state punitive damages statute, including the statute's clear and convincing burden of proof on punitive damages); *see also* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 16.3(c) n.70.17.

[458]*See* Ricard v. State, 390 So. 2d 882 (La. 1980); *see also* Price v. Louisiana Dep't of Transp. and Dev., 608 So. 2d 203 (La. Ct. App. 1992) (reading *Wade* as not having effectively overruled *Ricard*, and holding that punitive damages are not available in § 1983 actions in the Louisiana courts). For a recent federal court case rejecting *Ricard* and holding that punitive damages are available in § 1983 actions in federal courts in Louisiana regardless of state law, see Thomas v. Frederick, 766 F. Supp. 540 (W.D. La. 1991).

"beyond a reasonable doubt" burden of proof to § 1983 claims.[459] The better view, however, is that the available damages are part of the § 1983 remedy and that state courts entertaining § 1983 claims are required to provide the full range of damages that are available under federal standards. Because the burden of proof is bound up with the element of damages, the Ohio courts entertaining § 1983 claims should apply the traditional preponderance of the evidence burden of proof rather than the state clear and convincing standard to punitive damage claims.[460] Moreover, the use of "outcome determinative" state policies to govern the availability of punitive damages in state court § 1983 litigation would violate the the federal interest in "intra-state uniformity" and the "reverse Erie" principle that the Supreme Court applied to state court § 1983 cases in *Felder v. Casey*.[461]

The removal from the jury of the power to determine the amount of punitive damages also raises difficult questions of both state and federal law. In federal court, such a policy raises substantial Seventh Amendment issues,[462] but the Seventh Amendment is not applicable to state courts.[463] Nonetheless, federal statutory causes of action often have their own jury trial guarantees,[464] and the right to trial by jury in § 1983 cases may come from § 1983 itself.

Although there is no explicit trial by jury provision in § 1983, it is likely that the members of the 42nd Congress, which enacted the predecessor to § 1983, contemplated that juries would hear such cases. The language in § 1 of the Civil Rights Act of 1871 providing that defendants shall "be liable to the party injured in any *action at law*"[465] suggests that Congress was thinking about legal actions to which the jury trial guarantee attached. Moreover, in response to a question about how to measure damages under a different section of the 1871 Act, a

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459*See* Boulder Valley Sch. Dist. R-2 v. Price, 805 P.2d 1085 (Colo. 1991).

460*See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 16.3(c).

461487 U.S. 131 (1988). *See also infra* notes 208-13 and accompanying text.

462*See* McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984) (reversing a district court's remittitur of punitive damages, without option of a new trial, in a § 1983 case, and noting that the "Seventh Amendment reserves the determination of damages, in jury trials within its scope, to the jury"); *cf.* Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502, 507 (4th Cir. 1991) (en banc) ("An assessment by a jury of the amount of punitive damages is an inherent and fundamental element of the common-law right to trial by jury."). *But cf.* Tull v. United States, 481 U.S. 412 (1987) (holding that the Seventh Amendment does not guarantee a jury trial to assess civil penalties under a federal statute).

463*See* Walker v. Sauvinet, 92 U.S. 92-93 (1876).

464For example, under the new cause of action for intentional employment discrimination, 42 U.S.C. § 1981a (Supp. III 1991), created by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (1991), the right to trial by jury extends to any party in a case in which "a complaining party seeks compensatory or punitive damages." *See* 42 U.S.C. § 1981a(c) (Supp. III 1991).

465Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added) (current version at 42 U.S.C. § 1983 (1988)).

member of the House responded as follows: "Precisely the same as you do in an action of tort. The question of damages is a question in the sound discretion of the jury."[466] Although this seems like slender support for finding a statutory right to jury in § 1983 itself, the Supreme Court has not required an explicit statutory provision to extend the jury right to state court litigation of other federal causes of action.[467] Finally, the removal from the jury of the right to assess the amount of punitive damages raises substantial questions under the Ohio Constitution.[468]

Even if a federal right to trial by jury extended to state court § 1983 litigation, courts would have to determine which attributes of the federal right applied in state courts. The Supreme Court has not addressed these issues in the context of § 1983 actions, but it has provided some guidance in FELA litigation in which it has not required state courts to follow the federal jury unanimity policy[469] but has treated the allocation of responsibility between judge and jury as a matter of federal law.[470]

G. No-Exhaustion Policy

In *Patsy v. Board of Regents of the State of Florida*,[471] the Supreme Court applied a general no-exhaustion policy to § 1983 actions and held that § 1983 plaintiffs need not exhaust state administrative remedies.[472] A number of state courts,

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[466]CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871) (statement of Rep. Poland).

[467]The right to trial by jury in state court FELA cases is not derived from an explicit provision of the federal statute but from the Court's conclusion that "the right to trial by jury . . . is part and parcel" of the FELA remedy. Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943). The only statutory reference to the jury in the FELA statute is in 45 U.S.C. § 53 (1988), which deals with the role of the jury in reducing damage awards based on the comparative negligence of the empoloyee. For a further discussion of these issues, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, ch. 14; *see also* Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 508-09 (1957) (discussing the history of the proposed FELA provision on the right to trial by jury and the congressional concern that the factual issue of employer fault be decided by juries not judges).

[468]*See* Margaret M. Koesel, *Invading the Province of the Jury: Section 2135.21(C) and Judicial Determination of the Amount of Punitive Damages*, 15 OHIO N.U. L.REV. 55 (1988) (concluding that removal of the power to assess punitive damages from the jury violates Article I, § 5 of the Ohio Constitution). *But cf.* Digital & Analog Design Corp. v. North Supply Co., 63 Ohio St. 3d 657, 590 N.E.2d 737, 742 (1992) (relying on Tull v. United States, 481 U.S. 412, 425-26 (1987), and the punitive nature of an award of attorney fees, and "find[ing] no right under the Ohio Constitution to a jury determination on the issue of attorney fees in a tort action").

[469]See Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916).

[470]*See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952).

[471]457 U.S. 496 (1982).

[472]Some federal courts had construed the Supreme Court's decision in Monroe v. Pape, 365 U.S. 167 (1961), as creating a flexible no-exhaustion policy. *See Patsy*, 457 U.S. at 532 (Powell, J., dissenting). However, the *Patsy* Court rejected such an approach. *Id.* at 516.

however, initially viewed the *Patsy* no-exhaustion policy as only applicable in federal courts.[473] But in *Felder v. Casey*,[474] the Court applied the no-exhaustion policy to state court § 1983 actions in the course of holding that state courts could not apply notice of claim requirements to § 1983 claims. Most state courts have recognized that *Felder* goes beyond notice of claim requirements and bars the use of exhaustion of administrative remedy requirements in state court § 1983 litigation.[475] Thus, in *Gibney v. Toledo Board of Education*,[476] the Ohio Supreme Court held that Ohio courts should not dismiss § 1983 actions for failure to exhaust administrative remedies.

The *Patsy-Felder* no-exhaustion policy must be contrasted with *Parratt v. Taylor*[477] in which the Court held that in cases involving random and unauthorized actions, states can meet their obligation to provide procedural due process by having adequate postdeprivation remedies.[478] *Parratt*, however, does not impose an exhaustion requirement with which plaintiffs must comply before filing § 1983 claims. Rather, it is an interpretation of the requirements of procedural due process and a recognition that in limited circumstances in which it is not feasible to provide predeprivation remedies,[479] the state may meet its constitutional obligation by providing adequate postdeprivation remedies.[480] The Ohio Supreme Court, in *Cooperman v. University Surgical Associates*,[481] recognized that *Parratt* was limited to procedural due process claims and did not apply to claims involving deprivations of substantive rights.[482]

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[473] *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 17.3(b) n.34.

[474] 487 U.S. 131 (1988).

[475] *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 17.3(b) n.51.10.

[476] 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988).

[477] 451 U.S. 527 (1981).

[478] *See also* Hudson v. Palmer, 468 U.S. 517 (1984) (applying the *Parratt* requirement to intentional acts). *But see* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (holding *Parratt* inapplicable to established state policies).

[479] *See* Zinermon v. Burch, 494 U.S. 113 (1990) (limiting *Parratt* to cases in which it is not feasible to provide predeprivation remedies). The *Zinermon* Court characterized the plaintiff's claim as neither a challenge to an established state policy nor to a random and unauthorized action. Nonetheless, the Court found *Parratt* inapplicable. *Id.* at 136-39; *accord* Mertik v. Blalock, 983 F.2d 1353 (6th Cir. 1993) (observing that there are cases, like *Zinermon*, that do not involve challenges to random and unauthorized conduct but that also do not involve challenges to established state procedures).

[480] Both the Sixth Circuit and the Ohio Supreme Court require plaintiffs with claims to which *Parratt* is otherwise applicable to allege and prove the inadequacy of state remedies. *See* Vicroy v. Walton, 721 F.2d 1062 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984); 1946 St. Clair Corp. v. City of Cleveland, 49 Ohio St. 3d 33, 550 N.E.2d 456 (1990).

[481] 32 Ohio St. 3d 191, 513 N.E.2d 288 (1987).

[482] *Id.* at 297-98; *see also* Shirokey v. Marth, 63 Ohio St. 3d 113, 585 N.E.2d 407, *cert. denied*, 113 S. Ct. 186 (1992). In *1946 St. Clair Corp.*, the court limited *Parratt* to procedural

Despite the general no-exhaustion policy applicable to § 1983 claims, there are limited circumstances in which Congress, expressly or by implication, has authorized exhaustion of administrative remedies requirements. For example, in § 1983 suits by prisoners, the Civil Rights of Institutionalized Persons Act[483] permits courts to stay judicial proceedings for up to ninety days while prisoners use prison grievance procedures that are "plain, speedy and effective."[484] Likewise, some members of the Court have suggested that there are special concerns in the area of taxation that justify requiring taxpayers who wish to bring § 1983 suits challenging the constitutionality of state tax policies[485] to first present their claims to state administrative agencies.[486] Finally, the Supreme Court has interpreted the ripeness requirement of Article III to prevent property owners with regulatory taking claims from bringing suits prior to obtaining a final administrative decision.[487]

The applicability of these special exhaustion requirements to state court § 1983 litigation depends on the source of the federal court requirement. The Civil Rights of Institutionalized Persons Act does not expressly apply to state courts, but state courts have treated it as applicable.[488] With respect to tax litigation, most state courts that have entertained § 1983 suits challenging the constitutionality of state tax policies have done so on behalf of taxpayers who first exhausted state tax remedies.[489] Finally, most state courts have assumed

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due process claims involving purely economic interests, *see* 49 Ohio St.3d at 36, 550 N.E.2d at 460, but the Supreme Court's decision in *Zinermon* makes clear that *Parratt* also applies to procedural due process claims involving nonecomomic interests. *See Zinermon*, 494 U.S at 130-32 (treating *Parratt* as applying to deprivations of liberty interests).

483Pub. L. No. 96-247, 94 Stat. 352 (1980) (current version at 42 U.S.C. § 1997 (1988)).

48442 U.S.C. § 1997e(a) (1) (1988).

485Federal courts are limited in their ability to entertain suits involving state taxation by the Tax Injunction Act, 28 U.S.C. § 1341 (1988), and by principles of comity. *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

486*See Fair Assessment*, 454 U.S. at 136-37 (Brennan, J., concurring). *Fair Assessment* preceded *Patsy*, and the full Court has not addressed the suggestion in the *Fair Assessment* concurring opinion which would require taxpayers to exhaust state administrative tax remedies before bringing § 1983 state tax challenges in federal court.

487*See* Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.").

488*See* Casteel v. Vaade, 481 N.W.2d 476 (Wis. 1992) (rejecting a § 1983 exhaustion of administrative remedies requirement that does not comply with the standards of the Civil Rights of Institutionalized Persons Act). For a discussion of the applicability of this requirement to state court § 1983 litigation, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 17.4(a).

489*See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 18.3(d). A number of state courts, however, have completely shut their doors on § 1983 tax claims, relying on the

that the ripeness requirement applicable to federal court regulatory taking claims also applies in state courts, despite the strong argument that can be made that state courts, which are not required to follow the ripeness and other requirements of Article III, may entertain regulatory taking claims that federal courts may not hear.[490]

H. Statutes of Limitations

Section 1983 does not contain a statute of limitations, but the Supreme Court has applied the borrowing principles authorized by 42 U.S.C. § 1988,[491] the civil rights choice of law statute,[492] to fill this gap in federal law with state statutes of limitations. Under *Wilson v. Garcia*,[493] courts must select a single statute of limitations for § 1983 claims in each state, and this is the personal injury limitations period.[494] Some states, however, have multiple limitations periods for personal injury actions, but in *Owens v. Okure*,[495] the Supreme Court held that in such cases the relevant period is found in the "general or residual statute for personal injury actions."[496]

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refusal of federal courts to entertain such claims. *See, e.g.*, State v. Quill, 500 N.W.2d 196 (N.D.), *cert. denied*, 114 S. Ct. 173 (1993). *But see* Bloomingdale's By Mail, Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992) (exercising jurisdiction and awarding attorney fees to a prevailing taxpayer in a § 1983 tax refund action brought by a nonresident mail-order business), *cert. denied*, 113 S. Ct. 3002 (1993). State courts are also divided as to whether taxpayers are required to exhaust state administrative tax remedies as a condition of § 1983 actions. *Compare* Nutbrown v. Munn, 811 P.2d 131 (1991) (requiring exhaustion), *cert. denied*, 112 S. Ct. 1242 (1992) and Hogan v. Musolf, 471 N.W.2d 216 (1991) (same), *cert. denied*, 112 S. Ct. 867 (1992) *with* Murtagh v. County of Berks, 634 A.2d 179 (Pa. 1993) (rejecting exhaustion requirement).

[490] *See* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 6.6(a). *But see* Karches v. City of Cincinnati, 38 Ohio St. 3d 12, 526 N.E.2d 1350 (1988) (applying the *Williamson* ripeness test in a challenge to the constitutionality of a riverfront zoning ordinance).

[491] 42 U.S.C. § 1988 (1988). For a discussion of this complex statute, see Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 612-25 (1985)[hereinafter Steinglass, *Wrongful Death Actions*].

[492] Although § 1988, by its terms, appears to be addressed to federal courts, the Supreme Court has treated it as applicable to state courts. *See* Sullivan v. Little Hunting Park, 396 U.S. 229, 240-41 (1969); *see also* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, § 10.5.

[493] 471 U.S. 261 (1985).

[494] *Id.* at 279-80.

[495] 488 U.S. 235 (1989). The *Owens* Court also rejected the use of the statute of limitations for intentional torts. *Id.* at 249.

[496] *Id.* at 250. The *Owens* Court, however, reaffirmed the Court's earlier rejection of the residual limitations periods, while allowing the use of the residual *personal injury* limitations period.

> Our decision today is fully consistent with *Wilson*'s rejection of a state residual, or "catch-all," limitations provision as the appropriate one for § 1983 actions. In *Wilson*, we rejected recourse to such pro-

State and federal courts in Ohio disagree as to the proper § 1983 statute of limitations. Immediately after *Wilson*, the Sixth Circuit, in *Mulligan v. Hazard*,[497] selected the one-year period for enumerated intentional torts found in Section 2305.11 of the Ohio Revised Code.[498] In *Browning v. Pendleton*,[499] however, in light of the Supreme Court's intervening decision in *Owens*, the Sixth Circuit reversed itself and in an unanimous en banc decision selected the two-year limitations period for bodily injury in Section 2305.10 of the Ohio Revised Code.[500] Despite *Browning*, a number of state courts in Ohio have expressly rejected the Sixth Circuit's approach and applied the four-year limitations period in Section 2305.09(D) of the Ohio Revised Code[501] to § 1983 claims.[502]

Browning only addressed the choice between one-year and two-year limitations periods in the course of rejecting the Sixth Circuit's earlier embrace of the one-year period. Subsequently, however, a Sixth Circuit decision broadly construed *Browning* as having rejected the four-year period.[503] Nonetheless, any fair reading of *Browning* makes clear that the Sixth Circuit did not address the application of the four-year limitations period to § 1983 claims.[504]

> visions in the first instance, a position we continue to embrace. Courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly or by judicial construction, unspecified personal injury actions.

Id. at 250 n.12.

[497] 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986); *accord* Miller v. Stevens, 37 Ohio App. 3d 179, 525 N.E.2d 533 (Wood Co. 1990).

[498] OHIO REV. CODE ANN. § 2305.11 (Anderson Supp. 1992) ("An action for libel, slander, malicious prosecution, or false imprisonment . . . shall be commenced within one year after the cause of action accrued . . . .").

[499] 869 F.2d 989 (6th Cir. 1989) (en banc).

[500] OHIO REV. CODE ANN. § 2305.10 (Anderson 1991) ("An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.").

[501] OHIO REV. CODE ANN. § 2305.09(D) (Anderson 1991) (four-year residual limitations period "[f]or an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.").

[502] *See* Bojac Corp. v. Kutevac, 64 Ohio App. 3d 368, 581 N.E.2d 625 (Trumball Co. 1989) (expressly rejecting *Browning*); *see also* Weethee v. Boso, 64 Ohio App. 3d 532, 582 N.E.2d 19 (Franklin Co. 1989), *juris. motion overruled*, 48 Ohio St. 3d 709, 550 N.E.2d 482 (1990). *But see* Francis v. City of Cleveland, 78 Ohio App. 3d 593, 605 N.E.2d 966 (Cuyahoga Co. 1992).

[503] Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505 (6th Cir. 1991), *cert. denied*, 111 S. Ct. 2917 (1992).

[504] Although federal district courts in the Sixth Circuit and other Sixth Circuit panels were free to limit *Browning* to its rejection of the one-year limitations period, federal courts in the Circuit cannot similarly limit the *Hull* court's interpretation of *Browning*.

Moreover, a strong case can be made that the Sixth Circuit's adoption of the two-year limitations period for claims involving bodily injury is simply wrong. The Supreme Court in *Owens* had required the use of the residual personal injury limitations period when there are multiple personal injury limitations periods, and the Court identified Ohio as an example of a state in which multiple limitations periods for intentional torts, including the two-year limitations for bodily injury, made necessary the use of the *general or residual personal injury* limitations period.[505] Thus, it is difficult to reconcile the Sixth Circuit's adoption of the two-year limitations period for claims involving bodily injury with the Supreme Court's decision in *Owens*.[506]

I. Survival/Wrongful Death Policies

As with statutes of limitations, § 1983 does not directly address either the survival policies applicable to § 1983 claims or the availability of § 1983 as a wrongful death remedy.[507] The Supreme Court, however, has followed the borrowing policies of § 1988 to fill this gap in federal law with the state survival policy. Thus, in *Robertson v. Wegmann*,[508] the Court instructed courts entertaining § 1983 claims to borrow the state survival policy unless that policy is inconsistent with § 1983's dual purposes of compensation and deterrence.

Robertson involved a § 1983 suit that abated under state survival policies, but the plaintiff's death was unrelated to the claims in the suit.[509] The Court, however, suggested that when a death resulted from the complained-of act, the action would not abate,[510] and in *Carlson v. Green*[511] the Court refused to permit a *Bivens* action to abate under such circumstances.

A number of states, including Ohio, do not permit claims to survive when a death is instantaneous.[512] Most courts, however, have relied on *Carlson* to

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505 *Owens*, 488 U.S. at 244.

506 For a critical discussion of the Sixth Circuit's selection of a statute of limitations for § 1983 actions, see Steinglass, *Sixth Circuit, supra* note 165, at 504-12; *see also* Smalz, *Statute of Limitations for Section 1983 Claims in Ohio, supra* note 17, at 10.

507 For a discussion of § 1983 survival and wrongful death issues, see Steinglass, Wrongful Death Actions, *supra* note 491; *see also* STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, ch. 21.

508 436 U.S. 584 (1978).

509 *Id.* at 594.

510 *Id.* ("We intimate no view . . . about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death.").

511 446 U.S. 14 (1980).

512 *See* Rubeck v. Huffman, 54 Ohio St.2d 20, 23, 374 N.E.2d 411, 413-14 (1978); *see also* Jaco v. Bloechle, 739 F.2d 239, 242 n.4 (6th Cir. 1984) (relying on *Rubeck* and other Ohio cases).

reject state policies and to permit decedents' estates to pursue § 1983 claims.[513] Similarly, in *Jaco v. Bloechle*[514] the Sixth Circuit did not permit the abatement of a § 1983 suit brought in Ohio by the survivors of an allegedly wrongful killing.

The more difficult issue involves the use of § 1983 as a wrongful death remedy. Unlike survival policies, which permit the decedent's representatives to continue the action that the decedent had prior to his or her death, wrongful death policies address the claims of survivors for damages that they suffered as a result of the killing of their decedent. Wrongful death actions were not permitted at common law, but they are now widely recognized by both statutes and judicial decisions.[515]

The Supreme Court has entertained § 1983 claims involving wrongful killings,[516] but it has provided little guidance on the proper approach to the use of § 1983 as a wrongful death remedy.[517] Nonetheless, state and federal courts have generally permitted survivors to seek recoveries for their own losses, but they have followed a variety of approaches to reach this result.

Some courts have entertained § 1983 wrongful death claims by following the *Robertson* approach to survival issues and relying on § 1988 to borrow state wrongful death remedies.[518] Other courts have approached the § 1983

513*See* Bell v. City of Milwaukee, 746 F.2d 1205, 1237-38 (7th Cir. 1984); Heath v. City of Hialeah, 560 F. Supp. 840, 843-44 (S.D. Fla. 1983); O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981). *But see* Jones v. George, 533 F. Supp. 1293, 1302-04 (S.D. W. Va. 1982); Carter v. City of Birmingham, 444 So. 2d 373, 377-79 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984).

514739 F.2d 239 (6th Cir. 1984). In refusing to rely on Ohio law to require the survival claim to abate, the Sixth Circuit in *Jaco* did not cite *Carlson* but read the narrow holding in *Robertson* as suggesting that a state abatement policy should not be borrowed under § 1988 when the alleged wrongful conduct caused the death. *Id.* at 244-45 & n.6.

515*See* Moragne v. States Marine Lines, 398 U.S. 375, 388 (1970) (noting that "the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law"). Moreover, at the time the predecessor to § 1983 was adopted in 1871, 30 of the 37 states had adopted wrongful death statutes. *See Steinglass, Wrongful Death Actions, supra* note 491, at 573 n.78.

516*See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985); Scheuer v. Rhodes, 416 U.S. 232 (1974).

517The Court granted certiorari in Jones v. Hildebrant, 432 U.S. 183 (1977) (per curiam), *dismissing cert. as improvidently granted*, 550 P.2d 339 (Colo. 1976) (upholding use of Colorado wrongful death damage limitations in § 1983 actions), to address the availability of § 1983 as a wrongful death remedy, but it dismissed the case after oral argument. For a detailed discussion of *Jones*, see *Steinglass, Wrongful Death Actions, supra* note 491, at 587-90.

518*See, e.g.*, Brazier v. Cherry, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); *see also* Rhyne v. City of Henderson, 973 F.2d 386, 390-91 (5th Cir. 1992) (adhering to the view first expressed by the Fifth Circuit in *Brazier* that both state survival and wrongful death causes of action are incorporated into federal law under § 1988); *Bell*, 746 F.2d at 1236 ("Where the constitutional deprivation sought to be remedied in a Section 1983 action causes death and the applicable state law would deem the action to survive or would allow recovery for the damage claim at issue, courts generally apply the state law."). The Supreme Court has construed § 1988 as not permitting the incorporation of

wrongful death issues independently of state law and permitted survivors to assert their own constitutional interest in their continued relationship with the decedent.[519] The First Circuit, however, in *Valdivieso Ortiz v. Burgos*,[520] rejected this approach and held that a stepfather and siblings did not have a constitutionally protected interest in the association and companionship of their adult son and brother who was unlawfully killed by the police.[521]

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new and independent state causes of actions, *see* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 732-33 (1989); Moor v. County of Alameda, 411 U.S. 693, 703-04 (1973), but the use of state wrongful death remedies in § 1983 litigation only expands the plaintiffs who may sue defendants already amenable to suit under § 1983 for the same wrongful acts. Moreover, in Felder v. Casey, 487 U.S. 131, 140 (1988), the Court defined the "deficiency clause" of § 1988 as requiring federal courts to look to state law when federal law lacks "universally familiar aspects of litigation considered indispensable to any scheme of justice." Given the widespread adoption of wrongful death remedies by states, *see supra* note 515 and accompanying text, *Felder* provides additional support for the incorporation of state wrongful death remedies into § 1983.

[519] *See Bell*, 746 F.2d at 1242-48; Mattis v. Schnarr, 502 F.2d 588, 593-95 (8th Cir. 1974); Espinoza v. O'Dell, 633 P.2d 455, 463-65 (Colo. 1981), *cert. dismissed for want of jurisdiction*, 456 U.S. 430 (1982); *see also* Estate of Bailey v. County of York, 768 F.2d 503, 509 n.7 (3d Cir. 1985); Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985). Even courts that have recognized a constitutionally protected liberty interest in the parent-child relationship have generally been unwilling to extend that liberty interest to permit siblings to sue for the wrongful killing. *See Bell*, 746 F.2d at 1242-48; *cf.* Ascani v. Hughes, 470 So. 2d 207, 211-12 (La. Ct. App.), *appeal dismissed*, 474 U.S. 1001 (1985). *But see* Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1190 (10th Cir. 1985) (holding that siblings have a constitutionally protected interest but requiring proof that the defendants intended to interfere with that interest by killing the deceased sibling); Danese v. Asman, 670 F. Supp. 729, 737-39 (E.D. Mich. 1987) (siblings have a constitutionally-protected interest in familial relationships), *rev'd on other grounds*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

[520] 807 F.2d 6 (1st Cir. 1986).

[521] In taking this position, the First Circuit recognized the availability of a substantive due process claim based on a violation of familial privacy interests when the state action is directly aimed at the parent-child relationship. *Id.* at 7-9. Thus, § 1983 claims may be brought when the state interferes in certain particularly private family decisions, *see id.* at 8 (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (procreation), and Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (choice of religious schools)), or where the state seeks to change or affect the relationship of parent or child. *See Ortiz*, 807 F.2d at 8 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982) (termination of parental rights), and Little v. Streater, 452 U.S. 1, 13 (1981) (determining paternity)). On the other hand, when the state action does not interfere with the right to choose how to conduct family affairs or is not directly aimed at severing the parent-child relationship, the First Circuit takes the position that there is no violation of the familial associational right and only the person toward whom the state action was directed may maintain a § 1983 claim for a violation of the family associational right. *See also* Manarite v. City of Springfield, 957 F.2d 953 (1st Cir.) (minor daughter of a pretrial detainee who committed suicide does not have a protected liberty interest in her familial relationship with her father because the actions of the state that led to his death were not directed at the parent-child relationship and only incidentally affected the relationship), *cert. denied*, 113 S. Ct. 113 (1992).

An alternative approach to this issue treats § 1983, standing alone, as a wrongful death remedy that permits a survivor (the "party injured" under § 1983) to sue defendants who violate the constitutional rights of the decedent.[522] In *Crumpton v. Gates*,[523] the Ninth Circuit held that a child could bring a § 1983 action based on the alleged wrongful killing of his father even though the child was a fetus at the time of the killing. In the course of its opinion, the court noted that the text of § 1983 supports the availability of such suits by third parties.

> While § 1983 speaks of a "person" subjecting a "citizen . . . or other person" to a deprivation of civil rights, it specifically makes a remedy available to "the party injured." Although we could read "the party injured" merely as a shorthand reference to the civil rights victims who could be either citizens or persons, we believe that the better reading, consonant with the legislative history, is that Congress intended by this provision to allow survivors to sue for their harm stemming from the deprivation of a loved one's civil rights.[524]

The most novel approach to the availability of § 1983 as a wrongful death remedy was the decision of the Tenth Circuit, in *Berry v. City of Muskogee*,[525] in which the court concluded that Congress envisioned a significant remedy for wrongful killings. Although § 1983 does not permit a federal court to borrow

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A variation of this approach is followed in the Tenth Circuit by the use of an intent requirement that effectively precludes survivors from bringing constitutionally-based § 1983 claims. *See Trujillo*, 768 F.2d at 1190. Although the Tenth Circuit, which once rejected the existence of a parents' constitutional right in their son's life, *see* Dohaish v. Tooley, 670 F.2d 934, 936 (10th Cir.) ("[T]he § 1983 civil rights action is a personal suit. It does not accrue to a relative, even the father of the deceased."), *cert. denied*, 459 U.S. 826 (1982), recognizes a constitutionally protected interest in the familial association, albeit based on the First Amendment right of intimate association, it requires proof that the defendants intended to interfere with that interest by killing the decedent. *See also* Apocada v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445, 1448 (10th Cir. 1991) (refusing to reexamine the requirement in *Trujillo* that relatives of persons injured or killed by state actors must establish an intent to interfere with a protected relationship in order to bring a § 1983 claim based on violation of associational rights).

522*See* Steinglass, *Wrongful Death Actions*, *supra* note 491, at 644-56; *see also* Greene v. City of New York, 675 F. Supp. 110, 114-15 (S.D.N.Y. 1987). *But see Jaco*, 739 F.2d at 241) (treating cause of action under § 1983 as "personal to the injured party and noting that "[b]y its own terminology, the statute grants the cause of action 'to the party injured'").

523947 F.2d 1418 (9th Cir. 1991).

524*Id.* at 1421 n.1. *But cf.* Purnell v. City of Akron, 925 F.2d 941, 948 n.6 (6th Cir. 1991) (noting that it had previously relied on *Jaco* to hold that § 1983 provides a "cause of action which is personal to the injured party" but "not address[ing] the merits of the difficult question of whether the children of [the decedent] . . . could state a claim for damages under section 1983 based on the killing of their father").

525900 F.2d 1489 (10th Cir. 1990).

new and independent state causes of action,[526] the court concluded that "the 'new' cause of action theory would not warrant rejection of state wrongful death remedies as appropriate to vindicate § 1983 violations when death results."[527] Nonetheless, the court rejected the adoption of state wrongful death remedies in § 1983 death cases. In taking this position, the *Berry* court relied on the derivative nature of wrongful death claims and on the role of wrongful death remedies as simply providing remedial assistance to effectuate well-established primary rules of behavior otherwise enforceable under § 1983.[528] The *Berry* court was concerned, however, about placing into the hands of states the decision concerning the allocation of recovery in § 1983 actions. Thus, rather than borrow state law, it treated the remedy as a survival action[529] and specified a broad range of both survival and wrongful death damages that would be available in such § 1983 actions.[530]

The approach of the Tenth Circuit avoids the need to constitutionalize the § 1983 wrongful death remedy, while it creates a uniform § 1983 cause of action and measure of damages not dependent on the vagaries of state survival or wrongful death law. Nonetheless, given the broad range of wrongful death damages available under Ohio law,[531] the borrowing of the state wrongful death remedy is the preferable approach for Ohio plaintiffs pursuing § 1983 claims in cases involving unconstitutional killings.[532]

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[526] *See supra* note 518.

[527] *Id.* at 1505.

[528] *Id.* at 1505 at n.22.

[529] *Id.* at 1506-07.

[530] The court concluded that the following compensatory damages must be available: "medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions." *Id.* at 1507. In addition, the court concluded that "punitive damages may be recovered in appropriate cases." *Id.*

[531] *See* OHIO REV. CODE. ANN. § 2125.02(B) (Anderson Supp. 1993).

[532] The various approaches to the § 1983 wrongful death remedy issue are not mutually exclusive, and plaintiffs pursuing such claims are well advised to preserve all their options. It is also important for plaintiffs who wish to maximize the chances of recovery to distinguish their survival and wrongful death claims and to pursue both, when appropriate. *Cf.* Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1187-90 (7th Cir. 1985) (reversing an award of wrongful death damages in a survival action); Gilmere v. City of Atlanta, 737 F.2d 894, 898 n.8 (11th Cir. 1984) (upholding district court's treatment of claim solely as a survival issue and its refusal to permit the plaintiff to amend the judgment to treat the claim as a wrongful death action), *vacated on other grounds*, 774 F.2d 1495 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986).

J. Preclusion

Federal courts are required to give state court judgments the same preclusive effect that state courts give them,[533] and this principle is applicable to § 1983 litigation.[534] Thus, both state and federal courts entertaining § 1983 and related actions look to state law for the applicable preclusion policies.[535] When prior judgments are rendered by federal courts, the relevant preclusion policies come from federal law. The principle that the court rendering a judgment determines the scope of the judgment has guided federal courts in developing a *federal* law of res judicata,[536] and federal law requires state courts to give federal judgments the same full faith and credit that federal courts give them.[537]

State courts, however, tend to look to their own law of preclusion, rather than federal law, when determining the preclusive effect of prior federal court judgments. Usually, this does not result in different outcomes, but in states that

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533 *See* 28 U.S.C. § 1738 (1988).

534 *See* Migra v. Warren City Sch. Dist., 465 U.S. 75 (1984) (claim preclusion); Allen v. McCurry, 449 U.S. 90 (1980) (issue preclusion).

535 Under Ohio law of claim preclusion, a party is barred from relitigating claims that the party or (those in privity with the party) actually litigated or could have litigated in a prior proceeding. *See* Rogers v. City of Whitehall, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387, 1388 (1986); Norwood v. McDonald, 142 Ohio St. 299, 305, 52 N.E.2d 67, 71 (1943). This principle, however, only bars the second suit where there is an "identity not only of subject matter but also of the cause of action." *Id.* Thus "a judgment in a former action does not bar a subsequent action where the cause of action prosecuted is not the same, even though each action relates to the same subject matter." *Id.* The determination as to whether a final judgment on a prior claim is res judicata as to a subsequent claim "must be made from an examination of the essential operative facts stated as constituting plaintiff's cause of action and the legal implications arising therefrom in each proceeding." *Norwood*, 142 Ohio St. at 309, 52 N.E.2d at 73. *See also* State ex rel. White v. Franklin County Bd. of Elections, 65 Ohio St.3d 45, 47, 600 N.E.2d 656, 658 (1992) (per curiam) ("The most accurate test for deciding if two cases are based on the same cause of action is whether different proof is required to sustain them.").

536 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court."). *See generally* Stephen B. Burbank, *Interjurisdicitonal Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

537 *See* Limbach v. Hooven & Allison Co., 466 U.S. 353, 361-63 (1984) (treating the collateral estoppel effect of a prior federal court ruling in state court as governed by federal law); *see also* International Bhd. of Electrical Workers v. Hawaiian Tel. Co., 713 P.2d 943, 955 n.17 (Haw. 1986) ("In a subsequent state court action, the collateral estoppel effect of a federal law ruling in a prior federal court adjudication is a question of federal law."); Veiser v. Armstrong, 688 P.2d 796, 799 (Okla. 1984) ("Federal law governs both the preclusive and res judicata effect of the prior federal-court judgment."). Moreover, the full faith and credit that state courts give federal judgments raises a federal question ultimately reviewable by the Supreme Court. *See generally* Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976). For a recent discussion of these issues, see Watkins v. Resorts Int'l Hotel and Casino, Inc., 591 A.2d 592 (N.J. 1991) (recognizing that the federal law of claim preclusion, not the state "entire controversy" doctrine, governs the preclusive effect of prior federal court judgments in state courts).

define "claim" more narrowly than federal law, this difference can be significant.[538]

These issues often arise in § 1983 litigation when federal court plaintiffs fail to take full advantage of the doctrine of supplemental jurisdiction to join potential state law claims with their § 1983 claims.[539] When federal courts refuse to exercise jurisdiction over state law claims, most state courts entertain the state law claims.[540] On the other hand, when plaintiffs fail to join state law claims that are within the supplemental jurisdiction of the federal courts, both state and federal doctrines of res judicata (or claim preclusion) generally bar state courts from hearing the state cause of action.[541]

When federal courts lack the power to exercise supplemental jurisdiction over state law claims, state courts should not refuse to entertain the state law claims. For example, federal courts may not exercise supplemental jurisdiction over certain state law claims as a result of the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*.[542] Accordingly, plaintiffs often bifurcate their claims by filing their state claims in state court and their federal claims in federal court. In such circumstances, state courts should not require federal court litigants to go through the futile task of attempting to join their state law claims in federal court.

On the other hand, when federal courts have the power to entertain supplemental state law claims, state courts are appropriately reluctant to assume that the federal courts will exercise that discretion to decline to hear the state law claims. Thus, state courts in such cases generally require plaintiffs to either attempt to join the state law claims in federal court or to make a strong showing that it would have been futile to do so.[543] Some state courts, however, have excused plaintiffs who failed to even attempt to join state law claims in earlier federal court litigation by asking whether the federal court would have

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[538] *See, e.g.*, Lamartiniere v. Allstate Ins. Co., 415 So. 2d 499 (La. Ct. App.) (narrowly defining a "cause of action" for purposes of res judicata and permitting plaintiffs to bifurcate their state and federal claims), *writ denied*, 420 So. 2d 442 (La. 1982); Cranwill v. Donahue, 426 N.E.2d 337 (Ill. App. Ct. 1981) (relying on state definition of cause of action to permit litigation of pendent claims dismissed by federal court).

[539] Federal courts may exercise supplemental (previously pendent) jurisdiction over state law claims. *See supra* note 40.

[540] *See, e.g.*, Terrell v. City of Bessemer, 406 So. 2d 337 (Ala. 1981); Merry v. Coast Community College, 158 Cal. Rptr. 603 (Ct. App. 1979); DeLaurentis v. City of New Haven, 597 A.2d 807 (Conn. 1991); Blazer Corp. v. N.J. Sports and Exposition Auth., 488 A.2d 1025, 1028 (N.J. Super. Ct. App. Div. 1985); Toomey v. Blum, 426 N.E.2d 181 (N.Y. 1981); Rennie v. Freeway Transp., 656 P.2d 919, 924 at n.8 (Or. 1982). *But see* Mattson v. City of Costa Mesa, 164 Cal. Rptr. 913 (Ct. App. 1980).

[541] *See* City of Los Angeles v. Superior Court, 149 Cal. Rptr. 320 (Ct. App. 1978).

[542] 465 U.S. 89 (1984) (erecting an Eleventh Amendment bar to litigation in federal court of state claims for injunctive relief against state officials).

[543] STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, at § 19.3(c) n.59.

exercised jurisdiction over the state law claims;[544] but plaintiffs who wish to preserve access to a federal forum without risking losing their state law claims are well advised to at least attempt to join those claims in the federal court proceeding.[545]

Ohio courts generally recognize these principles and entertain state law claims that federal courts have declined to hear.[546] Similarly, when § 1983 plaintiffs failed to join state law claims in federal court litigation under pendent jurisdiction, the Ohio Supreme Court in *Rogers v. City of Whitehall*[547] refused to entertain the state law claim.[548]

Federal courts do not adhere to the requirements of mutuality, and the Supreme Court has permitted both the offensive and defensive use of collateral estoppel (or issue preclusion).[549] Consequently, federal courts have precluded parties from relitigating issues that were resolved against them in earlier § 1983 litigation. In states, like Ohio, that hold on to some aspects of mutuality,[550]

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[544] *See, e.g.*, City and County of Denver v. Block 173 Assocs., 814 P.2d 824 (Colo. 1991) (relying on the consistent refusal of federal courts to exercise pendent jurisdiction over state law claims after the dismissal of federal claims to refuse to apply claim preclusion to bar a state law claim after a federal court dismissed factually identical federal claim at summary judgment; refusing to apply issue preclusion to issues that were not actually decided in the earlier federal court case); *see also* Watkins v. Resorts Int'l Hotel & Casino, Inc., 591 A.2d 592 (N.J. 1991) (holding that a federal court dismissal of a suit for insufficiency of process or lack of standing is without prejudice and does not preclude a plaintiff, who did not seek to raise a pendent state law claim in federal court, from filing a state claim in state court and arguing for standing under state principles); Stanton v. Godfrey, 415 N.E.2d 103 (Ind. Ct. App. 1981) (entertaining federal claim for retroactive welfare benefits that federal court could not award because of the Eleventh Amendment); *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment e (1982), and Reporter's Note on (e) (p. 227-28).

[545] It would serve little purpose to require a plaintiff to join a state law claim that was barred by *Pennhurst* or that was unrelated to the jurisdiction-conferring federal claim to go through the formal step of attempting to first join the state law claim in the federal court proceeding. However, where the federal court would have the power to exercise supplemental jurisdiction over the state law claim, a plaintiff would be taking a great risk in concluding that this was the type of case in which a federal court would exercise its discretion under 28 U.S.C. § 1367(c) (Supp. III 1991), and decline to hear the state law claim.

[546] *See, e.g.*, Deryck v. Akron City Sch. Dist., No. 13442, 1988 WL 87229, at * 1 (Ohio Ct. App. Summit Co. Aug. 17, 1988).

[547] 25 Ohio St. 3d 67, 494 N.E.2d 1387 (1986).

[548] 25 Ohio St. 3d at 70, 494 N.E.2d at 1389. The *Rogers* court relied on state, not federal, preclusion principles, although this did not produce a different outcome. *Id.*

[549] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (permitting offensive use of issue preclusion); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (permitting defensive use of issue preclusion).

[550] *See* Goodson v. McDonough Power Equip., 2 Ohio St. 3d 193, 443 N.E.2d 978, 984 (1983) ("Ohio has continued the requirement of mutuality for the application of collateral estoppel, as a general principle . . . .").

nonparties to earlier litigation may not use findings of fact and conclusions of law against the parties in whose case both legal and factual issues were resolved. When the earlier litigation was in federal court, however, state courts may be required to set aside their own preclusion principles and give the federal court judgment the same preclusive effect that federal courts would give it. Thus, despite the unwillingness of the Ohio courts to embrace fully the offensive use of collateral estoppel (or issue preclusion),[551] Ohio courts may be required under *federal* principles to apply issue preclusion to permit nonparties to take advantage of earlier judgments rendered against their adversaries.

Federal courts also apply the state doctrine of administrative res judicata to preclude relitigation of factual issues that were determined in earlier administrative proceedings.[552] Because this involves a borrowing process, however, both state and federal courts will face the difficult task of determining the contours of this doctrine in Ohio before applying it to § 1983 litigation.[553]

K. Attorney Fees

Prevailing plaintiffs in § 1983 actions are entitled to attorney fees as a result of the Civil Rights Attorney's Fees Awards Act of 1976,[554] which added fee-authorizing language to 42 U.S.C. § 1988.[555] The Fees Act was adopted to overrule a Supreme Court case which held that federal courts had no inherent authority to award fees to prevailing parties under a private attorneys general theory.[556] The language in the Act, however, is not limited to federal court litigation, and in *Maine v. Thiboutot*[557] the Supreme Court characterized the

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551*See* Hicks De La Cruz, 52 Ohio St.3d 71, 369 N.E.2d 776 (1977) (permitting limited offensive use of collateral estoppel); *see also* Goodson, 52 Ohio St.3d at 202, 443 N.E.2d at 987 (discussing *Hicks* but making clear that the court had not fully embraced offensive use of collateral estoppel, and affirming its adherence "to the principle [of mutuality] as a general proposition").

552*See* University of Tennessee v. Elliott, 478 U.S. 788 (1986).

553For a discussion of administrative res judiciata in Ohio, see Randy J. Hart, Note, *Administrative Res Judicata in Ohio: A Suggestion for the Future*, 37 CLEV. ST. L. REV. 595 (1989).

554Pub. L. No. 94-559, 90 Stat. 2641 (1976).

55542 U.S.C. § 1988(b) (Supp. III 1991) ("In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

556*See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

557448 U.S. 1 (1980).

availability of attorney fees as an "integral" part of the § 1983 remedy[558] and applied the Fees Act to state court § 1983 litigation.[559]

The Ohio appellate courts have recognized the applicability of the Fees Act to § 1983 litigation in the Ohio courts. In making fees available, the Ohio courts have followed federal standards under which prevailing plaintiffs are presumptively entitled to fee awards except where defendants can point to special circumstances that justify the denial of fees.[560] For example, the Ohio Courts of Appeals have upheld awards of attorney fees to plaintiffs who prevailed on state law claims that were joined with substantial federal claims.[561]

VIII. CONCLUSION

As this review of § 1983 litigation in the Ohio courts suggests, § 1983 litigation is no longer exclusively the province of the federal courts. And that is how it should be in a system of judicial federalism. As Justice William J. Brennan, Jr., a former state court judge, once observed, "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."[562] In part, this means that state courts should pay close attention to their own constitutions, but it also suggests the important role that state courts should play in enforcing federal law.

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[558] *Id.* at 10.

[559] For a discussion of the application of the Fees Act in state courts, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, §§ 22.3, 22.4.

[560] *See* Doe v. Cuddy, 21 Ohio App. 3d 270, 487 N.E.2d 914 (Hamilton Co. 1985) (reversing the refusal to enhance a fee award because fees were sought by a legal aid society); Holden Arboretum v. City of Kirtland, 19 Ohio App. 3d 125, 483 N.E.2d 167 (Lake Co. 1984) (reversing a fee award in favor of a prevailing plaintiff because of the trial court's failure to properly exercise discretion).

[561] *See, e.g.*, Cincinnati *ex rel.* Kuntz v. Cincinnati, 79 Ohio App. 3d 86, 606 N.E.2d 1028 (awarding fees to a plaintiff who prevailed on a state law claim that was joined with a substantial § 1983 constitutional claim), *juris. motion overruled*, 65 Ohio St. 3d 1412, 598 N.E.2d 1165 (Hamilton Co. 1992), *cert. denied*, 113 S. Ct. 1277 (1993); *Doe*, 21 Ohio App. 3d at 272-73, 487 N.E.2d at 916-17 (affirming an award of fees to plaintiffs who prevailed on a state law claim joined with a § 1983 claim). For a discussion of the availability of fees to § 1983 plaintiffs who prevail on state law claims, see STEINGLASS, SECTION 1983 LITIGATION, *supra* note 16, ch. 23.

[562] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).