NEW YORK LAW SCHOOL

NYLS Law Review

Volume 34 | Issue 3 Article 4

January 1989

Civil Rights and the States: Section 1983 in New York

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CIVIL RIGHTS AND THE STATES: SECTION 1983 IN NEW YORK

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom or usage, of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

I. INTRODUCTION

Although section 1983 of the Civil Rights Act of 1871 itself confers no substantive rights,[2] through 28 U.S.C. § 1343(3), it has been shaped into a powerful weapon for the judicial vindication of both actual and perceived rights. Enacted by the forty-second Congress in 1871, the purpose of section 1983 is well-known: to vest in the federal courts the authority to protect federal constitutional and other rights, whose fate in post-Civil War state courts was problematic at best.[3]

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1. Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871). Almost universally, this statute is cited, as codified, as 42 U.S.C. § 1983 (1982), as it will be in this article.

2. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979).

3. There is vast case law addressing the purpose of post-bellum constitutional amendments and civil rights-type statutes. The Supreme Court has often discussed the historical aspects of these measures. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 242 (1972) (legislative history of the Civil Rights Act of 1871 indicates that Congress intended to alter relations between the state and the federal governments with respect to protection of federally created rights because Congress felt that state officers and courts were unable or unwilling to protect these rights); Steffel v. Thompson, 415 U.S. 452, 463-68 (1974) (traces history of Congress' intent to empower federal courts to grant injunctive and declaratory relief in testing the constitutionality of state criminal statutes); Patsy v. Board

As Representative Coburn said at the time of enactment:

> The United States courts are further above mere local influence than the county [i.e., state] courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so clearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily.[4]

However, times change and so do values. Today, as in the past, "[l]itigants seeking . . . relief under federal law in cases against state or local governments and their officials generally prefer federal courts, and section 1983 has become the principal modern remedy for asserting such claims."[5] But as the Supreme Court becomes less willing to recognize rights not firmly rooted in the Constitution "litigants increasingly have been turning to state law and state courts as alternative sources of judicial protection. The resulting explosion of interest in state law, especially state constitutional law, has led to the characterization of the 1980's as the 'decade of the state courts.'"[6]

A. Effect of Monroe v. Pape

The Supreme Court's decision in *Monroe v. Pape*[7] set the stage for transforming section 1983 into the principal modern means for asserting federal constitutional and other claims, thereby contributing to the relatively recent "explosion" of litigation in state courts. In *Monroe*, the plaintiff alleged that thirteen Chicago police officers engaged in an illegal search when they

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of Regents, 457 U.S. 496, 506 (1982) (legislative history indicates that Congress did not intend to impose "exhaustion" requirement and reflects distrust of state fact-finding procedures).

4. Cong. Globe, 42d Cong., 1st Sess. 460 (1871) (quoted in Mitchum v. Foster, 407 U.S. at 241, and District of Columbia v. Carter, 409 U.S. 418, 428 (1973)).

5. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 383-84 (1984). Although Professor Steinglass' footnotes 7-12 have been omitted, they contain a wealth of data supporting and elaborating the material quoted in the text. Indeed, neither before nor since the 1984 Steinglass article have the law reviews traversed so thoroughly and knowledgeably the broad subject of section 1983 cases in state fora. While Professor Steinglass does not specifically address all of the New York section 1983 cases — which are the subject of this article — much of his more general research has proved extremely useful and its value is hereby acknowledged.

6. *Id.*

7. 365 U.S. 167 (1961), *overruled by*, Monell v. New York City Dep't of Soc. Servs., 436 U.S. 663 (1978).

"broke into [plaintiff's] home in the early morning, routed [him and his family] from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[8] Monroe also alleged that he was detained at the police station without being formally charged for ten hours. He was not brought before a magistrate nor allowed to make any phone calls. Eventually, Monroe was released "without criminal charges being [pressed] against him."[9]

Monroe claimed that the warrantless search of his home and his arrest and detention without arraignment constituted a deprivation of the "rights, privileges, or immunities secured by the Constitution" within the meaning of section 1983.[10] The thirteen police officers moved to dismiss the complaint. Additionally, the City of Chicago moved to dismiss, claiming that the Civil Rights Act was inapplicable to a city's "acts committed in performance of its governmental functions."[11] The district court dismissed the complaint and the court of appeals affirmed.[12] The Supreme Court granted certiorari[13] "because of a seeming conflict . . . with [its] prior cases."[14]

In reversing the dismissal of the complaint, Justice Douglas' majority opinion relied heavily on the legislative history of the Civil Rights Act in establishing the section 1983 claim against the states.[15] The Court found that Congress "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[16]

Monroe was thus a turning-point in the use of section 1983 as a remedy against civil rights abuses. As Professor Steinglass points out:

> The *Monroe* decision not only contributed to the expanded role of federal law in protecting individual rights but also guaranteed direct access to a federal forum in [section] 1983 actions whether or not state law authorized the challenged conduct or provided remedies to redress it. The subsequent rejection of the personal-property rights jurisdictional limitation and the repeal of the jurisdictional amount requirement in federal question cases further broadened direct access to federal court in [section] 1983 litigation.

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8. *Id.* at 169.

9. *Id.*

10. *Id.* at 170.

11. *Id.*

12. *Id.*

13. 362 U.S. 926 (1959).

14. 365 U.S. at 170.

15. *Id.* at 167.

16. *Id.* at 172. This precedent-establishing conclusion in no way diminishes the Court's other conclusion that "Congress did not undertake to bring municipal corporations within the ambit of section 1983." *Id.* at 187.

> Decisions stripping municipalities of their absolute immunity from suit under [section] 1983 and denying them a qualified immunity for their official actions also encouraged the use of [section] 1983. Finally, Congress' authorization of attorney fees to prevailing parties in [section] 1983 actions, and its rejection, to date, of legislative proposals to restrict [section] 1983 have contributed to the substantial increase in the use of this remedy.[17]

B. The Supreme Court and the State Courts

As a result of the decision in *Monroe*, section 1983 actions have proliferated and matured in the federal courts. However, it was initially far from self-evident that a role existed for a section 1983 remedy on the state level, despite the concurrent jurisdiction of state courts. Indeed, the prejudice in favor of federal courts for litigation of federal issues has had a long life. There has been a pervasive and, in this writer's mind, persuasive attitude that:

> [F]ederal courts have developed a vast experience in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy. It would be unreasonable to expect state procedures to possess a facility equal to that of the federal courts in adjudicating federal law. Moreover, because federal judges are guaranteed the independent protections of Article III [i.e., life tenure and protection against salary diminution], while many state judges are forced to stand for election, we can generally be assured of a greater degree of independence of the federal judiciary from external political forces.[18]

Ironically, the Civil Rights Act was enacted because of perceived state court reluctance (or perhaps unwillingness) to enforce federal rights. Although the Act granted concurrent jurisdiction to both state and federal courts, many state courts accepted this jurisdiction grudgingly. Thus, even in those states where the courts were ready, willing, and able to entertain litigation seeking vindication of federal rights, plaintiffs were advised to seek redress in federal courts. And so they did, thereby stunting the growth of section 1983 claims in state courts.

A typical example of the grudging acceptance of jurisdiction by a

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17. Steinglass, *supra* note 5, at 389-91 (footnotes omitted).

18. M. REDISH, FEDERAL JURISDICTION, TENSION IN THE ALLOCATION OF JUDICIAL POWER 2-3 (1980).

state court is the New York case of *Brody v. Leamy*.[19] There, a motorist brought a section 1983 action against a state trooper. The motorist asserted that the officer had wrongfully arrested and manhandled him. The court considered the jurisdictional question first, discussing sovereign immunity, federalism, the history of section 1983, and several state and federal decisions construing the statute. The trial court finally held, albeit reluctantly, that it had concurrent jurisdiction:

> It would be incongruous . . . to conclude that Congress meant for state courts to exercise concurrent jurisdiction over these newly created rights, which were born of necessity and with the express intention and purpose of bypassing the state judicial system. To hold . . . that [s]ection 1983 does not relieve state courts of their duty to protect the civil rights of their citizens . . . does not necessarily lead to the inescapable conclusion of concurrent jurisdiction.
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> . . . .
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> If the only United States Supreme Court decision tangentially in point were *Monroe* and its progeny, . . . this court would be inclined to the view that federal jurisdiction is exclusive . . . .[20]

However, the court recognized that, "'[section] 1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts.'"[21] Thus, the *Brody* court held that, "unless and until the United States Supreme Court determines otherwise, there is no legal barrier to presentation of [s]ection 1983 claims in the Supreme Court of this [s]tate."[22]

Not long after the *Brody* court took cognizance of the section 1983 claim, the question of concurrent jurisdiction was definitely resolved by the Supreme Court in two 1979 Term cases, *Martinez v. California*[23] and

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19. 90 Misc. 2d 1, 21, 393 N.Y.S.2d 243, 256 (Sup. Ct. 1977).

20. *Id.* at 19, 393 N.Y.S.2d at 256.

21. *Id.* at 19, 393 N.Y.S.2d at 257 (citing Aldinger v. Howard, 427 U.S. 1, 36 n.17 (1976) (Brennan, J., dissenting)).

22. 90 Misc. 2d at 18-20, 393 N.Y.S.2d at 257.

23. 444 U.S. 277, 283 n.7 (1980). In New York, Krieger v. State, 54 Misc. 2d 583, 283 N.Y.S.2d 86 (Ct. Cl. 1966), had long before recognized that a thirteenth amendment involuntary servitude claim was cognizable in the state Court of Claims under § 1983, and nearly a decade later Holt v. City of Troy, 78 Misc. 2d 9, 355 N.Y.S.2d 94 (Sup. Ct. 1974), had acknowledged concurrent federal-state jurisdiction over the § 1983 claim. *Brody*, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977), had of course accepted, albeit reluctantly, the section 1983 claim four years before Maine v. Thiboutot, 448 U.S. 1 (1980), and

Maine v. Thiboutot.[24]

Martinez v. California,[25] originating in a California trial court, involved the murder of a fifteen-year-old girl by a parolee. The father of the victim claimed that the state officials who released the criminal were liable under California law and section 1983 for the harm caused by the parolee.

The Supreme Court of the United States agreed with the California Court of Appeals (the highest California court to decide the case) that California's immunity statute[26] insulated the state officials from liability under the circumstances of that case. *Martinez*, however, is significant in another more important respect. While the Supreme Court found that there had been no deprivation of a right "secured by the Constitution and laws" of the United States, it also dealt with the question of concurrent state-federal jurisdiction over section 1983 claims:

> [The] exercise of jurisdiction appears to be consistent with the general rule that where "an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." . . . We have never considered, however, the question whether a State *must* entertain a claim under [section] 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim . . . .[27]

Later that same year, the Supreme Court decided *Maine v. Thiboutot*.[28] In *Thiboutot*, the Court reiterated its commitment to concurrent jurisdiction as expressed in *Martinez*.[29] Especially noteworthy in *Thiboutot* is that even the dissent did not quarrel with the majority's view that the state courts had jurisdiction concurrent with the federal courts over section 1983 claims.

With the Supreme Court's decisions in *Martinez* and *Thiboutot*, the state courthouse door was, if not wide open, then at least ajar for section 1983 claims. But, before analyzing the important section 1983 cases which crossed the threshold of New York's courtrooms, this article will examine,

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Martinez v. California, 444 U.S. 277 (1980).

24. 448 U.S. 1, 3 n.1 (1980).

25. 444 U.S. 277 (1980).

26. CAL. GOV'T CODE § 845.8(a) (West 1980).

27. 444 U.S. at 283 n.7 (citations omitted).

28. 448 U.S. 1 (1980).

29. *Id.* at 10-11.

in a general way, the nature and scope of a section 1983 claim.[30] The article will also demonstrate that state courts have created additional limitations to this cause of action beyond those created by federal courts.[31]

C. *The Section 1983 Claim*

As stated above, section 1983 itself confers no substantive rights.[32] However, by using the "bridge" of 28 U.S.C. § 1343(3), section 1983 paves the way for pursuing constitutional and statutory claims.[33] Professor Nahmod has observed that:

> Restrictive application of the state action doctrine, a narrow reading of the [f]ourteenth [a]mendment's privileges and immunities clause, a similarly narrow reading of [section] 1983's jurisdictional counterpart, and the Court's refusal to incorporate completely the provisions of the Bill of Rights were jointly responsible for the dormancy of [section] 1983 from the time of its enactment to the year 1961. However, the picture began to change dramatically in that year, largely because of the broad scope given [section] 1983 by the Supreme Court in *Monroe v. Pape*. . . .
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> *Monroe* meant that much official conduct previously thought not to be actionable under [section] 1983 was now within its scope. Continuing this broadening trend, later Supreme Court decisions incorporat[ing] more and more provisions of the Bill of Rights into the [f]ourteenth [a]mendment, held that [section] 1983 and its jurisdictional counterpart covered deprivations of property rights as well as personal rights, and asserted that exhaustion of state judicial and administrative remedies was not required for [section] 1983 purposes.

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30. *See infra* notes 32-41 and accompanying text.

31. *See infra* notes 42-87 and accompanying text. It should also be noted that although the prospective section 1983 *plaintiff* has a choice of federal or state court, 28 U.S.C. § 1441(a) provides the *defendant* with the power of removal to federal court. The many complex and interesting questions incident to removal generally, and to removal of section 1983 cases in particular, are beyond the scope of this article. For present purposes, we are concerned with the response of New York's courts to section 1983 cases which have *not* been removed, cases in which the judicial power of the state *has* been applied.

32. *See supra* note 2 and accompanying text; *see also* Brody v. Leamy, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977).

33. There are, of course, other contextual aspects to section 1983 claims, for example: who may sue and be sued; the "person" question; "state action"/"color of law" issues; respondeat superior; mental state; proximate cause; cause in fact; and immunities. These are not discussed within this Article except as necessary, where New York section 1983 cases have addressed them.

> The relation between [section] 1983 and the [f]ourteenth [a]mendment is best described as very close. *Monroe* and early cases indicate that the section makes [f]ourteenth [a]mendment violations actionable, whether for damages or injunctive relief. Consequently, [f]ourteenth [a]mendment interpretation significantly determines the scope of the prima facie cause of action under [section] 1983 for claimed constitutional violations.[34]

Thus, the substantive ambit of section 1983 claims is extremely broad; it includes every specific Bill of Rights safeguard which has been "incorporated" against the states through the due process clause of the fourteenth amendment, every other procedural (and, likely, substantive) guaranty, and certain federal statutory claims.[35]

D. Limitations on the Section 1983 Claim

The potential power of section 1983 is restricted because the section is merely a conduit for the litigation of federal constitutional and statutory claims, and because the Supreme Court has exercised restraint in expanding these substantive rights. If, for example, the Court decided that hard-core pornography *was* protected expression under the first amendment, the seizure or other suppression of such material would present a section 1983 cause of action[36] (assuming, of course, that all other requisite criteria were satisfied). Such a ruling would have an extremely broad effect, creating section 1983 causes of action in each of the fifty state jurisdictions. However, until the Court changes substantive free speech rights in this manner, a section 1983 cause of action against a state for suppression of hard-core pornography is nonexistent.

The Supreme Court's unwillingness to allow section 1983 plaintiffs to easily satisfy the statute's "under color of" state action requirement, as well as some of the Court's decisions concerning what federal statutory claims can be raised in a section 1983 case,[37] have served to inhibit section

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34. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 74-75 (2d ed. 1986).

35. Because the availability of federal statutes as predicates for section 1983 causes of action is an extremely complex subject, and because there appear to be no reported New York cases in which section 1983 plaintiffs have successfully attempted to assert federal statutes in state courts, this topic will not be discussed.

36. The action must violate plaintiff's constitutional rights. *See* Paul v. Davis, 424 U.S. 693 (1976) (reputation is not a tangible property right entitled to protection under section 1983); Parratt v. Taylor, 451 U.S. 527 (1981) (property loss as a result of negligence by state agents in performing their duties does not constitute a due process violation within the scope of section 1983).

37. *See* Steinglass, *supra* note 5, at 392 n.39.

1983 litigation.[38] In addition to section 1983's express and implied *substantive* limitations, the Supreme Court has imposed other procedural limitations on the power of section 1983 actions.[39]

Not to be outdone by the federal courts' various restrictions on section 1983 claims, the states have created limitations of their own. According to Professor Steinglass:

> State restrictions on [section] 1983 actions fall into five areas. First, there are threshold or door-closing restrictions that can result in complete or partial denials of access to particular state forums. [For example, most states have a variety of courts, some quite specialized jurisdictionally.] Second, there are state policies that may conflict with the language, legislative history, or policies of [section] 1983. [For example, a cap on damages recoverable against the state.] Third, federal courts use some state policies to fill gaps in [section] 1983. [For instance, statutes of limitations.] Although state courts would also generally apply these policies, the choice of a particular policy may violate minimum federal standards. Fourth, there are policies governing state court litigation that deviate from analogous federal court policies and that, despite their housekeeping nature, may limit the use of [section] 1983. [For example, the availability of jury trials.] Finally, there are state doctrines of justiciability, the use of which in state courts may burden federal rights secured by [section] 1983. [For example, stricter "cases

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38. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (warehouseman's threatened sale of individual's property pursuant to the New York Uniform Commercial Code is not "state action"); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (private school's decision to fire teachers not state action despite existence of state regulations and the school's receipt of federal funds); Blum v. Yaretsky, 457 U.S. 991 (1982) (state regulation of private nursing home is not an avenue for state action because the state had no responsibility or coercion in decision to fire employees).

39. *See, e.g.*, Allen v. McCurry, 449 U.S. 90 (1980) (Court held that motions of collateral estoppel apply with full force to a § 1983 claimant in federal court who was barred by *Stone v. Powell* from seeking a writ of habeas corpus in that court); Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100 (1981) (Court held that federal court § 1983 actions, where taxpayers assert a right to a constitutionally administered state tax system, were barred by the principle of comity); Rizzo v. Goode, 423 U.S. 362 (1972) (Court held that the doctrine of respondeat superior restricted the reach of the § 1983 cause of action); Quern v. Jordan, 440 U.S. 332 (1979) (Court held that state eleventh amendment immunity has not been abrogated by § 1983); Warth v. Seldin, 442 U.S. 490 (1975) (Court held that Article III and prudential standing-to-sue criteria are fully applicable to § 1983 actions); Briscoe v. Lattue, 460 U.S. 325 (1983) (Court held that § 1983 was not intended to abrogate common immunity of policeman testifying in a court of law); Preiser v. Rodriguez, 411 U.S. 475 (1973) (Court held that habeas corpus, not § 1983, is the appropriate vehicle for relief sought by state prisoner challenging fact or duration of physical confinement).

and controversies" requirements.][40]

States have also limited damages awarded under section 1983. Many states "cap" the amount of damages—compensatory, punitive, and every other kind—which can be assessed against themselves and their subordinate entities.[41]

It is against this background of the federal section 1983 cause of action that New York State court's response must be assessed.

II. SECTION 1983 IN THE NEW YORK COURTS[42]

A. Introduction

New York courts, in adjudicating section 1983 cases, have not written on a clean slate for several reasons. Federal courts have given and withheld substantive content to section 1983, and have imposed procedural limitations on the availability of such a remedy. Additionally, other state courts have superimposed their own substantive and procedural criteria upon the statute. However, even with all the writing on the slate, there remains ample space for New York to contribute to the development of section 1983.

As developed as the substantive content of a section 1983 claim has become *in the federal courts*, most states, including New York, which have accepted section 1983 jurisdiction, have failed to adequately develop the remedy. As Professor Steinglass has observed:

> state courts have not answered many questions concerning the procedural or collateral rules that apply in state court [section] 1983... litigation. State courts have invariably exercised concurrent jurisdiction over [section] 1983 litigation without fully discussing or analyzing the issues involved in borrowing federal causes of action.... [T]he absence of any well developed analytic framework

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40. Steinglass, *supra* note 5, at 455-56 (footnotes omitted).

41. *Id.* at 486-89.

42. The New York cases to be discussed in this part are those state court decisions where at least one litigant sought, or was deemed by the court to be seeking, some affirmative relief related to section 1983. Cases making merely passing references to section 1983, or which implicate section 1983 in an insignificant manner are not discussed. *See, e.g.*, Spitz v. Abrahms, 123 Misc. 2d 446, 473 N.Y.S.2d 931 (Sup. Ct. 1984), *aff'd*, 105 A.D.2d 904, 482 N.Y.S.2d 68 (App. Div. 3d Dep't 1984) (entitlement of state employee-defendant in § 1983 to be defended by Attorney General under Public Officers Law § 17); Chemung County v. Hartford Casualty Ins. Co., 130 Misc. 2d 648, 496 N.Y.S.2d 933 (Sup. Ct. 1985) (duty of private insurer to defend county in § 1983 case); Giordano v. O'Neill, 131 A.D.2d 722, 517 N.Y.S.2d 41 (App. Div. 2d Dep't 1987) (duty of the county to defend correction officer). Decisions of federal courts sitting in New York are also not generally discussed.

> to examine specific instructions on state court [section] 1983 actions has left the courts and litigants with little guidance.[43]

Regrettably, as the next part of this article will demonstrate, New York is among the guilty; its courts have shown little interest in, or facility with, developing a cohesive body of state-based section 1983 law. A close examination of approximately 200 New York cases which have mentioned section 1983 in the past twenty-five years or so, reveals that the courts are conservative in their decisions. New York courts have neither ignored obviously applicable precedents and necessary conclusions nor blazed new paths—especially concerning core section 1983 issues such as immunity, "person," res judicata, and, probably most important, the elements of a section 1983 claim.

B. Plaintiffs' Lack of Success, as a Matter of Law

Of all the New York cases which have expressly discussed section 1983, about half have denied relief as a matter of law. The courts' reasons for dismissing state section 1983 complaints fall into several identifiable categories. Examination of the cases within those groupings provides interesting insights into what sort of factual allegations will fail to support or will nullify a section 1983 claim, and by implication, what a would-be section 1983 plaintiff must set forth in order to plead successfully.

1. Miscellaneous Defects

The principal reasons why many New York section 1983 claimants have found themselves out of court—immunity, lack of statutory "person," and res judicata, failure to plead a violation of federal rights—are discussed below. However, there have been other, relatively minor situations which this article now briefly notes.

A few cases, though cast in other terms, are actually explainable on the basis of conventional "standing to sue" principles. For example, in *Elmwood-Utica Houses, Inc. v. Buffalo Sewer Authority*,[44] the plaintiff challenged sewer rents which he never paid, and in *423 South Salina Street, Inc. v. City of Syracuse*,[45] the complaint concerned the over-assessment of property at a time when it was owned by plaintiff's predecessor.

In *Cartwright v. Golub Corporation*,[46] the court held that although a

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43. Steinglass, *supra* note 5, at 438.

44. 96 A.D.2d 174, 468 N.Y.S.2d 227 (App. Div. 4th Dep't 1983), *aff'd*, 65 N.Y.2d 489, 482 N.E.2d 549, 492 N.Y.S.2d 931 (1985).

45. 112 A.D.2d 745, 492 N.Y.S.2d 241 (App. Div. 4th Dep't 1985), *aff'd*, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986).

46. 51 A.D.2d 407, 381 N.Y.S.2d 901 (App. Div. 3d Dep't 1976); *see also* D'Avino v.

civil action, alleging a deprivation of constitutional rights pursuant to section 1983, can be maintained in the New York courts, discharge by a private employer from an employment-at-will contract lacks the necessary "color" of state action. A claim against an electric utility for its termination of, and refusal to restore, electric service was not actionable under section 1983 because, among other reasons, there were no factual allegations showing a connection between the challenged action and the state. The Appellate Division observed that furnishing utility services is neither a state function nor a municipal duty.[47]

2. Immunity

Among the New York section 1983 cases decided to date, about a half dozen involve the issue of immunity.[48] The first, and by far the most thoughtful, analysis of the immunity issue is contained in *Cooper v. Morin*.[49] Among the defendants accused of maintaining intolerable jail conditions were Monroe County and members of its legislature. The Court held that all defendants were immune, despite assertions of derivative liability and the theory of respondeat superior. *Smith v. County of Livingston*[50] also involved the liability of local authoritities. There, the plaintiffs alleged false imprisonment, malicious prosecution, and the deprivation of constitutional rights. The court cited *Monell v. Department of Social Services*[51] for the proposition that although municipalities and other government units are intended to be among those against whom the Civil Rights Act applies, a local government may not be sued for an injury inflicted solely by its *employee* unless the action which caused a constitutional tort occurred

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Trachtenberg, 149 A.D.2d 401, 539 N.Y.S.2d 755 (App. Div. 2d Dep't 1989) (employment-related decisions of a non-profit legal services corporation do not constitute state action); McWilliams v. Catholic Diocese of Rochester, 145 A.D.2d 904, 536 N.Y.S.2d 285 (App. Div. 4th Dep't 1988) (defendants accused of mistreating a retarded girl not liable for due process violation, care of the mentally retarded is not an exclusive state function).

47. Macey v. New York State Elec. & Gas Corp., 80 A.D.2d 669, 436 N.Y.S.2d 389 (App. Div. 3d Dep't 1981); *see also* Montalvo v. Consolidated Edison Co., 92 A.D.2d 389, 460 N.Y.S.2d 784 (App. Div. 1st Dep't 1983) (electric utility's denial of recipient's application for residential service did not constitute state action for purposes or either state of federal due process claims), *aff'd*, 61 N.Y.2d 810, 462 N.E.2d 149, 473 N.Y.S.2d 972 (1984); Goldner v. Sullivan, 105 A.D.2d 1149, 482 N.Y.S.2d 606 (App. Div. 4th Dep't 1984) (suit against attorneys for insurance company dismissed where there was no allegation that defendants controlled conduct of public officials).

48. Some of these cases implicate more than one issue. The issues other than immunity will be considered later in the appropriate sections of this article.

49. 91 Misc. 2d 302, 398 N.Y.S.2d 36 (Sup. Ct. 1977), *aff'd*, 64 A.D.2d 130, 409 N.Y.S.2d 30 (App. Div. 1st Dep't 1978).

50. 69 A.D.2d 993, 416 N.Y.S.2d 130 (App. Div. 4th Dep't 1979).

51. 436 U.S. 658 (1978).

pursuant to *official policy*. The court concluded that a municipality could not be held liable under section 1983 on a respondeat superior theory, and thus the county and village defendants were eliminated from the case.[52]

For those who would bring section 1983 cases in New York State, the two-fold immunity message is clear: do not name the state itself as a defendant; second, if a municipality is to be the defendant, the inapplicability of the respondeat superior doctrine necessitates meaningful allegations of culpable conduct by the government *itself*, not by its servants, agents, or employees.[53] The latter statement is subject to a narrow exception recently recognized by the Supreme Court of the United States in *City of Canton v. Harris*.[54] There, the Supreme Court stated that the municipality may be held liable under section 1983 only when the execution of the government's policy inflicts the injury. It continued:

> [O]ur first inquiry in any case alleging municipal liability under 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation . . . .
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> [W]e conclude, as have all the Courts of Appeals that have addressed this issue, that there are limited circumstances in which

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52. 69 A.D.2d at 995, 416 N.Y.S.2d at 130. Other cases which turned on an absence of an official municipal policy included Kolko v. City of Rochester, 93 A.D.2d 977, 461 N.Y.S.2d 650 (App. Div. 4th Dep't 1983), LaMar v. Town of Greece, 97 A.D.2d 955, 468 N.Y.S.2d 744 (App. Div. 4th Dep't 1983), Muka v. Greene County, 101 A.D.2d 965, 477 N.Y.S.2d 444 (App. Div. 3d Dep't 1984), and Simpson v. New York City Transit Auth., 112 A.D.2d 89, 491 N.Y.S.2d 645 (App. Div. 1st Dep't 1985), *aff'd*, 66 N.Y.2d 1010, 489 N.E.2d 1298, 499 N.Y.S.2d 396 (1985).

The principle that the doctrine of respondeat superior is inapplicable to local governmental units was also applied in LaBelle v. St. Lawrence County, 85 A.D.2d 759, 445 N.Y.S.2d 275 (App. Div. 3d Dep't 1981), where the Appellate Division declined to allow suit against the county or village under section 1983 for an injury allegedly caused by their agents or employees. To the same effect are Kolko v. City of Rochester, 93 A.D.2d 977, 461 N.Y.S.2d 650 (App. Div. 4th Dep't 1983), and Johnson v. Town of Colonie, 102 A.D.2d 925, 477 N.Y.S.2d 513 (App. Div. 3d Dep't 1984). Two cases decided in 1986, Davis v. State, 124 A.D.2d 420, 507 N.Y.S.2d 520 (App. Div. 3d Dep't 1986), and Edmonson v. State, 132 Misc. 2d 452, 504 N.Y.S.2d 979 (Ct. Cl. 1986), recognized that the State of New York itself was immune from section 1983 claims.

53. *See* Creary v. Village of Marmaroneck, 110 A.D.2d 870, 488 N.Y.S.2d 427 (App. Div. 2d Dep't 1985); *see also* Board of Educ. of Northport v. Ambach, 90 A.D.2d 227, 458 N.Y.S.2d 680 (App. Div. 3d Dep't 1982) (court observed that government officials performing discretionary tasks "are shielded from liability for civil damages by a qualified immunity so long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware"), *aff'd*, 60 N.Y.2d 758, 457 N.E.2d 775, 469 N.Y.S.2d 669 (1983).

54. 109 S. Ct. 1197 (1989).

> an allegation of a "failure to train" can be the basis for liability under [section] 1983.[55]

A re-reading of the section 1983 New York immunity and related cases in light of *City of Canton* does not suggest that their outcome necessarily would have been different had that case already been decided. However, *City of Canton*, to the extent that it opens the door of municipal liability another few inches, can be expected to result in pleadings in New York which are calculated to take advantage of the new "inadequate training" route to a plaintiff's recovery.

3. "Person"

Holt v. City of Troy[56] involved an individual who allegedly had been shot in the leg by police officers while in custody. Holt's first claim was based on negligence, his second on assault, and his third on section 1983. The defendant moved to dismiss, claiming that federal courts had exclusive jurisdiction over section 1983 claims. The motion was denied since the trial court recognized that, at a minimum, the state and federal courts possessed concurrent jurisdiction over those claims.[57] However, the section 1983 claim was dismissed against both the City of Troy and its police department because the court found that a municipality was not a "person" within the meaning of section 1983.[58] The section 1983 claim, however, survived against the individual defendants.

Only a handful of cases after *Holt* failed for lack of a proper "person" defendant.[59] The message here, too, is clear: a would-be section 1983 plaintiff

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55. *Id.* at 1203-04 (quoting Massachusetts v. Kibbe, 480 U.S. 257, 267 (1987) (quoting Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)).

56. 78 Misc. 2d 9, 355 N.Y.S.2d 94 (Sup. Ct. 1974).

57. *Id.* at 10, 355 N.Y.S.2d at 96. Interestingly, the trial court also observed that "it has been held that redress for an individual's invasion of another's civil rights must be sought in state courts, not federal courts, under the Federal Civil Rights Act, in the absence of diversity of parties' citizenship. *Id.* (citing Williams v. Yellow Cab Co., 280 F.2d 302 (3d Cir. 1952), *cert. denied. sub nom.* Dargan v. Yellow Cab Co., 346 U.S. 840 (1953)).

58. 78 Misc. 2d at 11, 355 N.Y.S.2d at 96.

59. *See, e.g.*, Cooper v. Morin, 91 Misc. 2d 302, 398 N.Y.S.2d 36 (Sup. Ct. 1977) ("person" point had not been raised by the defendant, but by the court *sua sponte*), *aff'd*, 64 A.D.2d 130, 409 N.Y.S.2d 30 (App. Div. 1st Dep't 1978); Clemente v. Little, 59 A.D.2d 752, 398 N.Y.S.2d 698 (App. Div. 2d Dep't 1977) (county was not a person); Thomas v. N.Y. Temporary State Comm'n on Regulation of Lobbying, 83 A.D.2d 723, 442 N.Y.S.2d 632 (App. Div. 3d Dep't 1981) (neither the state nor any department of state government is considered a person under § 1983), *aff'd*, 56 N.Y.2d 666, 436 N.E.2d 1310, 451 N.Y.S.2d 708 (1982); 405 Co. v. State, 118 Misc. 2d 305, 460 N.Y.S.2d 455 (Ct. Cl. 1983) (same as *Thomas*); Hudak v. D'Elia, 120 A.D.2d 667, 502 N.Y.S.2d 261 (App. Div. 2d Dep't 1986) (violations of deceased's civil rights after death cannot be redressed by § 1983 since the

in New York had better understand a central term of the Act—the concept of who is a "person."

4. Res Judicata

The doctrine of res judicata—the rule that a final judgment or decree on the merits, rendered by a court of competent jurisdiction,[60] is conclusive of the rights of the parties and their privies in all subsequent actions on issues actually determined[61]—is employed by New York courts to bar in rem litigation of a federal section 1983 claim. New York courts have not only held that *intra*-state re-litigation of the same issues by the same parties is barred by the doctrine of res judicata in the section 1983 context,[62] but that *inter*-judicial re-litigation is similarly barred.[63]

The first New York case barring a section 1983 action on these grounds is *McKinney v. City of New York*.[64] There, the Appellate Division held that three claims asserted in New York were barred by the doctrine of res judicata because a federal district court had found that the claims did not state a cause of action under section 1983.[65]

Zarcone v. Perry[66] established that a prior *federal* court judgment in

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term "other person" means a living person); Marx v. Cuomo, 128 A.D.2d 965, 513 N.Y.S.2d 285 (App. Div. 3d Dep't 1987) (state is not a person); Duesler v. Trebby, 137 Misc. 2d 88, 520 N.Y.S.2d 135 (Sup. Ct. 1987) (state agencies are not persons).

60. In New York the concept of res judicata is largely a common law doctrine. *See* Israel v. Wood Dolson Co., 1 N.Y.2d 116, 118, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 3 (1956). There are no statutes which specifically require its application. As a result of the requirement that a judgment be on the merits in order for the doctrine of res judicata to be invoked, there are, however, statutes which affect the doctrine. *See* N.Y. CIV. PRAC. L. & R. § 5013 (McKinney 1963 & Supp. 1989) (defining when a dismissal is on the merits); N.Y. CIV. PRAC. L. & R. § 3216(a) (McKinney 1970) (dismissal for want of prosecution not on merits).

61. American S.S. Co. v. Wickwire Spencer Steel Co., 8 F. Supp. 562 (D.C.N.Y. 1934).

62. *See, e.g.*, Alexander v. City of Peekskill, 80 A.D.2d 626, 436 N.Y.S.2d 327 (App. Div. 2d Dep't 1981) (plaintiff seeking damages for concededly perjured testimony used against him in obtaining his conviction was collaterally estopped from re-litigating issue of his own guilt since plaintiff had not also sought to set aside his own guilty plea or conviction).

63. McFerran v. Board of Education, Enlarged City School District of Troy, 45 N.Y.2d 729, 380 N.E.2d 301, 408 N.Y.S.2d 474 (1978), *cert. denied*, 440 U.S. 923 (1976). *But see* Kleinberger v. Town of Sharon, 116 A.D.2d 367, 501 N.Y.S.2d 746 (App. Div. 3d Dep't 1986) (Special Term's application of the res judicata doctrine in an inter-judicial setting was reversed by the Appellate Division).

64. 78 A.D.2d 884, 433 N.Y.S.2d 193 (App. Div. 2d Dep't 1980).

65. *Id.* at 886, 433 N.Y.S.2d at 196; *see also* Hines v. City of Buffalo, 79 A.D.2d 218, 436 N.Y.S.2d 512 (App. Div. 3d Dep't 1981) (principles of res judicata and collateral estoppel apply in a civil rights action under a federal statute to bar a subsequent action under state law for common-law tort action where action substantially coincides with the action brought under the federal statute).

66. 78 A.D.2d 70, 434 N.Y.S.2d 437 (App. Div. 2d Dep't 1980), *aff'd*, 55 N.Y.2d 782,

a section 1983 damage action would bar a *state* court action under the principles of res judicata—even though the claim, alleging the violation of one's right to be free from false arrest and to engage in free enterprise, would ordinarily state an actionable section 1983 claim. In acknowledging that, aside from *McKinney*, no New York case has held that res judicata bars a state court action after a judgment in a section 1983 action in federal court, the Second Department adverted to several federal court cases applying res judicata to a prior judgment.[67] The Appellate Division also drew on *dicta* in *Preiser v. Rodriquez*,[68] concluding "that the . . . policy underlying the invocation of res judicata generally—conservation of judicial time, the reliance to be properly laid on judgments rendered after a fair trial of the issues, and the avoidance of harassment of litigants—support a conclusion consistent with the expression of that view."[69]

In *Neulist v. County of Nassau*,[70] the court ruled that "the action . . . is comprehended within the prior civil rights action and is based upon the same allegations of fact and the same proof."[71] However it went further: even if res judicata did not apply, collateral estoppel did. The federal district court's determination of good faith by the police in their handling of Neulist's criminal case was conclusive on Neulist's state court action. "Clearly," said the court,

> the finding that there was no lack of good faith by the police officers was necessary to the determination of the action before Judge Mishler. Consequently, that finding acts as a collateral bar to re-litigation of the issue of lack of good faith and precludes the plaintiff from establishing either the absence of probable cause or malice, critical elements of this action for malicious prosecution and necessitates dismissal of his complaint.[72]

A few years later, Genesee Brewing Company brought an action against the Village of Sodus Point alleging, among other things, a violation of the former's civil rights under section 1983, because the village failed to refund amounts collected pursuant to the sewer rent law and an Environmental Protection Agency grant.[73] The court held that because the

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431 N.E.2d 974, 447 N.Y.S.2d 248 (1981).

67. *Id.* at 77, 434 N.Y.S.2d at 441-42.

68. 411 U.S. 475, 497 (1973).

69. 78 A.D.2d at 77, 434 N.Y.S.2d at 442.

70. 108 Misc. 2d 160, 437 N.Y.S.2d 239 (Sup. Ct. 1981), *aff'd*, 88 A.D.2d 587, 450 N.Y.S.2d 762 (App. Div. 2d Dep't 1982).

71. *Id.* at 166, 437 N.Y.S.2d at 244.

72. *Id.* at 169, 437 N.Y.S.2d at 245-46.

73. Genesee Brewing Co. v. Village of Sodus Point, 126 Misc. 2d 827, 482 N.Y.S.2d

allegations were identical to those in a prior federal action brought by the brewery against the village, re-litigation of the civil rights claim was barred. The federal court had held that federal law did not require a refund. Thus, since plaintiff had already had an opportunity to litigate that issue, defendant's motion to dismiss the complaint had to be granted.[74]

In *Montauk-Caribbean Airways, Inc. v. Hope*,[75] a plaintiff-lessee of town property brought an action against the town, its board, and a new lessee. The complaint alleged breach of contract, conspiracy to create a monopoly, and deprivation of rights under 49 U.S.C. § 2210(a),[76] resulting in damages in violation of section 1983. The section 1983 claim was dismissed in the state court on res judicata and collateral estoppel grounds because it had previously been dismissed on the merits in an action commenced by the same plaintiff in the United States District Court for the Eastern District of New York.[77]

Lastly, in the most definitive res judicata ruling to date, albeit in an *intra*-state application,[78] the Court of Appeals held that the res judicata doctrine barred plaintiff's claim for lost salary (as well as for attorney's fees under section 1988). The court reasoned that since plaintiff could have recovered on that claim in his prior Article 78[79] proceeding, relief could not be deemed merely incidental to the prior relief awarded.

Although in *Pauk* the Court of Appeals had occasion to address a conventional *intra*-state application of res judicata, it seems clear from that case and from the few lower court decisions that have dealt with the point, that New York courts will not hear claims previously litigated in federal fora, and will not bend their normal intra-state res judicata rules to accommodate the federal claims. Therefore, section 1983 plaintiffs have a choice of forum, and the New York courts will hold them to the consequences of that decision, for better or worse.

5. Federal Constitutional Violations

The majority of New York cases that have denied section 1983 plaintiffs relief as a matter of law have done so not so much on the basis of the peripheral, albeit important, issues of immunity, "person," and res

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693 (Sup. Ct. 1984), *aff'd*, 115 A.D.2d 313, 496 N.Y.S.2d 720 (App. Div. 4th Dep't 1985).

74. *Id.* at 830, 482 N.Y.S.2d at 698.

75. 132 Misc. 2d 496, 505 N.Y.S.2d 297 (Sup. Ct. 1986).

76. 49 U.S.C. § 2210(a) (1982 & Supp. V 1987).

77. The dismissal was affirmed by the Second Circuit. Montauk-Caribbean Airways v. Hope, 784 F.2d 91 (2d Cir. 1986), *aff'g dismissal of* 1985-2 Trade Cas. (CCH) ¶ 66,660 (Oct. 1, 1985).

78. Pauk v. Board of Trustees, 68 N.Y.2d 702, 497 N.E.2d 675, 506 N.Y.S.2d 308 (1986).

79. N.Y. CIV. PRAC. L. & R. § 7801 (McKinney 1981).

judicata, as discussed above, but rather because of a core pleading defect: *the failure to allege a violation of plaintiff's legitimate federal constitutional rights.* Limited only by the ingenuity of lawyers, unsuccessful section 1983 claims in New York have run the gamut from the plausible to the absurd.[80]

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80. The following cases are examples where the plaintiff failed to prove that a section 1983 situation existed. Mermer v. Constantine, 131 A.D.2d 28, 520 N.Y.S.2d 264 (App. Div. 3d Dep't 1987) (an overweight teacher with bad teeth did not have a right to refuse a school mandated physical examination); Sullivan v. Board of Educ. Union Free School Dist., 131 A.D.2d 836, 517 N.Y.S.2d 197 (App. Div. 2d Dep't 1987) (a school principal did not have the right to avoid stigmatization from a suspension based on apparently false charges); Duesler v. Trebby, 137 Misc. 2d 88, 520 N.Y.S.2d 135 (Sup. Ct. 1987) (an unsuccessful applicant did not have a right to a liquor license); Bonacorsa v. Van Lindt, 132 Misc. 2d 581, 505 N.Y.S.2d 519 (Sup. Ct. 1986) (a harness racing licensee, previously convicted of an industry-related offense, did not have a right to reinstatement of his license without compliance with state procedures), *rev'd*, 129 A.D.2d 518, 514 N.Y.S.2d 370 (App. Div. 1st Dep't 1987), *aff'd*, 71 N.Y.2d 605, 523 N.E.2d 806, 528 N.Y.S.2d 519 (1988); Lapiana v. Gliedman, 108 A.D.2d 857, 485 N.Y.S.2d 361 (App. Div. 2d Dep't 1985) (a rent-controlled landlord did not have the right to force bureaucrats to correct erroneously published information about him); Bykofsky v. Hess, 107 A.D.2d 779, 484 N.Y.S.2d 839 (App. Div. 2d Dep't) (an untenured college teacher did not have the right to continued employment), *aff'd*, 65 N.Y.2d 730, 481 N.E.2d 569, 492 N.Y.S.2d 29, *cert. denied*, 474 U.S. 995 (1985); Carpenter v. City of Plattsburgh, 105 A.D.2d 295, 484 N.Y.S.2d 284 (App. Div. 3d Dep't) (a policeman did not have the right not to have his personal records disclosed to third parties), *aff'd*, 66 N.Y.2d 791, 488 N.E.2d 839, 497 N.Y.S.2d 909 (1985); Robideau v. South Colonie Cent. School Dist., 127 Misc. 2d 979, 487 N.Y.S.2d 696 (Sup. Ct. 1985) (an 11-year-old handicapped student did not have a right to remain in his neighborhood school); *In re* McGinty, 129 Misc. 2d 56, 492 N.Y.S.2d 349 (Surr. Ct. 1985) (a party to probate proceedings did not have a right to necessarily win his case); Torres v. Little Flower Children's Servs., 64 N.Y.2d 119, 474 N.E.2d 223, 485 N.Y.S.2d 15 (1984) (a student did not have a right to a better education); Rivera v. Monroe County, 103 A.D.2d 1057, 482 N.Y.S.2d 164 (App. Div. 4th Dep't 1984) (an arrestee did not have a right not to be taken into custody given a valid warrant); *In re* Estate of Sherburne, 124 Misc. 2d 708, 476 N.Y.S.2d 419 (Sup. Ct. 1984) (a party to probate proceedings did not have the right to win his case); Tango by Tango v. Tuleveult, 61 N.Y.2d 34, 459 N.E.2d 182, 471 N.Y.S.2d 73 (1983) (a parent, whose claim to custody was not free from question, did not have an absolute right to custody); Elmwood-Utica House, Inc. v. Buffalo Sewer Auth., 96 A.D.2d 174, 468 N.Y.S.2d 227 (App. Div. 4th Dep't) (a sewer user-mortgagor did not have a right that its mortgagee not be told that the sewer rents were unpaid), *aff'd*, 487 N.Y.2d 558, 476 N.E.2d 1003, 492 N.Y.S.2d 93 (1983); Utas v. Power Auth., 96 A.D.2d 940, 466 N.Y.S.2d 390 (App. Div. 2d Dep't 1983) (an employee did not have a property right in continued employment nor did he have a liberty interest in his reputation); 405 Co. v. State, 118 Misc. 2d 305, 460 N.Y.S.2d 455 (Ct. Cl. 1983) (claimants had a right to a refund of money paid under a statute which was repealed retroactively; however, this right was vested under state law but not under § 1983); Legal Aid Soc'y v. Ward, 91 A.D.2d 532, 457 N.Y.S.2d 250 (App. Div. 1st Dep't 1982) (Legal Aid employees did not have a right to restored access to correctional facilities), *aff'd*, 61 N.Y.2d 744, 460 N.E.2d 1349, 472 N.Y.S.2d 914 (1984); Crosby v. Town of Bethlehem, 90 A.D.2d 134, 457 N.Y.S.2d 618 (App. Div. 3d Dep't 1982) (the father of the victim of a drunk driving accident did not have a right to have the police arrest an intoxicated driver before the fatal accident); Carroll v. New York Property Ins. Underwriting Ass'n, 88 A.D.2d 527, 450 N.Y.S.2d 21 (App. Div. 1st Dep't 1982) (an insured,

Unfortunately, few of the New York cases have offered much by way of explanation. However, the language of two cases is worth noting. In *Brody v. Leamy*,[81] the plaintiff claimed that a police officer violated his federally protected right to be free from unnecessary force during the course of an arrest. The Court found that:

> [I]n the context presented, only use of excessive force leading to severe personal injury or death have been adjudged within the ambit of section 1983 . . . . Mere tortious conduct does not constitute a deprivation of constitutional rights under the statute .... Stated differently, grievances easily remedied under traditional state law concepts should not be the subject of national concern

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during litigation over non-payment on a policy, did not have a right not to be accused of arson); Young v. City of Binghamton, 112 Misc. 2d 1017, 447 N.Y.S.2d 1017 (Sup. Ct. 1982) (builders did not have a right to the issuance of a building permit); LaBelle v. County of St. Lawrence, 85 A.D.2d 759, 445 N.Y.S.2d 275 (App. Div. 3d Dep't 1981) (parents did not have a right not to have their unattended children placed overnight in a foster home); Burgher v. Purcell, 109 Misc. 2d 531, 440 N.Y.S.2d 480 (Sup. Ct. 1981) (residents of an institution for the indigent do not have a right to a due process hearing before transfer to a lower-care facility), *aff'd*, 87 A.D.2d 888, 449 N.Y.S.2d 527 (App. Div. 2d Dep't 1982); Easterling v. Blum, 82 A.D.2d 859, 440 N.Y.S.2d 44 (App. Div. 2d Dep't 1981) (a social services client did not have a right not to have a public assistance grant reduced); Shields v. Blum, 80 A.D.2d 668, 436 N.Y.S.2d 393 (App. Div. 3d Dep't 1981) (a social services client did not have the right not to be transferred from a hospital to a facility which offered lesser care); Privitera v. Town of Phelps, 79 A.D.2d 1, 435 N.Y.S.2d 402 (App. Div. 4th Dep't 1981) (a town resident did not have the right not to be defamed and consequently lose a real estate deal); Iovinella v. General Elec. Credit Corp., 79 A.D.2d 748, 434 N.Y.S.2d 806 (App. Div. 3d Dep't 1980) (a debtor did not have the right to be free from a creditor's seizure order authorizing a search of the former's premises); Schwed v. Turoff, 73 A.D.2d 615, 422 N.Y.S.2d 134 (App. Div. 2d Dep't 1979) (former employees of the New York City Taxi and Limousine Commission did not have a right to represent clients there); Long Island Region NAACP v. Town of N. Hempstead, 102 Misc. 2d 704, 424 N.Y.S.2d 319 (Sup. Ct. 1979) (the NAACP did not have a right to have a town approve low-income housing projects and rezone and convey rights to a particular site), *aff'd*, 75 A.D.2d 842, 427 N.Y.S.2d 861 (App. Div. 2d Dep't 1980); Bess v. Toia, 93 Misc. 2d 140, 402 N.Y.S.2d 706 (Sup. Ct. 1977) (a deceased's family did not have a right to a burial assistance grant), *aff'd*, 66 A.D.2d 844, 411 N.Y.S.2d 651 (App. Div. 2d Dep't 1978); Holy Spirit Ass'n for the Unification of World Christianity v. New York State Congress of Parents and Teachers, Inc., 95 Misc. 2d 548, 408 N.Y.S.2d 261 (Sup. Ct. 1978) (a religious group did not have the right not to be criticized by a parents-teachers organization); Cooper v. Morin, 91 Misc. 2d 302, 398 N.Y.S.2d 36 (Sup. Ct. 1977), *aff'd*, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979) (female detainees' rights to have "contact" visits were decided on state, not federal, constitutional grounds); Brody v. Leamy, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977) (an arrestee did not have a right not to be "manhandled" by the police); Stewart v. Scheinert, 84 Misc. 2d 672, 374 N.Y.S.2d 585 (Sup. Ct. 1975) (taxpayers did not have a right to prevent public funds from being illegally expended), *aff'd*, 52 A.D.2d 636, 382 N.Y.S.2d 558 (App. Div. 2d Dep't 1976).

81. 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977).

> . . . . In sum, absent severe personal injury, simple assaults are not within the ambit of section 1983, and the insertion of language in the complaint to give the 'appearance of a suit under the civil rights acts' will not defeat a motion to dismiss . . . .[82]

In *Broadway and 67th St. Corp. v. City of New York*,[83] a property owner alleged that defendants maliciously conspired to deprive him of rent increases. The Appellate Division found that the Special Term had no basis on which to find a section 1983 cause of action. The finding was "plainly premature, if not erroneous."[84] More specifically, the Appellate Division held that the rent commissioner's refusal to comply with the Special Term's order directing that a study be done in a rent control proceeding did not provide grounds for a section 1983 action.[85] Concluding that a section 1983 action was improper in this situation, the court discussed the scope of those actions:

> Every adverse ruling by a governmental agency may invite a claim for abuse, excess, misuse or distortion of authority. But, obviously not all such rulings deny due process or give rise to a cause of action under [section] 1983 . . . . [W]here the alleged misconduct is that of an individual state official, it must be so egregious to rise to constitutional proportions before a valid civil rights claim may arise under [section] 1983. Otherwise, every case involving alleged official misconduct would support a [section] 1983 civil rights action. Unless the established procedure is itself unconstitutional, no cause of action . . . arises.[86]

In sum, official wrongdoing is not necessarily a violation of *federal* statutory or constitutional rights—a principle that would-be section 1983 plaintiffs are well advised to heed, especially since New York courts seem increasingly prepared to emulate the sanction mechanism of rule 11 of the Federal Rules of Civil Procedure.[87]

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82. *Id.* at 21-22, 393 N.Y.S.2d at 257-58 (citations omitted).

83. 100 A.D.2d 478, 475 N.Y.S.2d 1 (App. Div. 1st Dep't 1984).

84. *Id.* at 482, 475 N.Y.S.2d at 4.

85. *Id.* at 483, 475 N.Y.S.2d at 4 ("There is no showing that there is a constitutional right to a comparability hearing in connection with establishing a maximum base rent, the issue here involved.").

86. *Id.* In this regard, the court also stressed that the "power of state courts to hear [s]ection 1983 claims does not require State courts to ignore their own procedures." *Id.* at 486, 475 N.Y.S.2d. at 6. Further, the court pointed out the adequacy and availability of state remedial action to correct agency abuses, such as Article 78 remedies. *Id.* at 484, 475 N.Y.S.2d at 5.

87. FED. R. CIV. P. 11.

6. Successful Claims, as a Matter of Law

Some plaintiffs in New York have successfully pleaded an actionable violation of their federal constitutional rights. Apart from whether those claims could be later proved, they survived motions to dismiss and are thus instructive in analyzing the hospitality of New York courts to section 1983 cases.

The roots of section 1983 claims raised in New York courts can be traced back nearly a quarter-century to the first of several prisoner cases involving the Black Muslims. *Bryant v. Wilkins* was an action brought by Black Muslims against the correctional authorities of the State of New York.[88] An earlier proceeding was commenced in the federal court under section 1983, but that court abstained from reaching a decision, and returned the case to the state supreme court.[89] Although the trial court did not *expressly* invoke section 1983, it nevertheless granted summary judgment in the Muslims' favor, requiring the Commissioner "to prepare and promulgate, in accordance with this opinion, revised regulations [concerning the circumstances under which Black Muslims in the prison system could practice their religion] consistent with the Federal and State Constitutions and the spirit and intent of [section] 610 of the Correction Law."[90] *In Samarion v. McGinnis*,[91] a related case, the plaintiffs charged a violation of section 1983 in connection with the alleged deprivation by the Department of Correctional Services of their rights to embrace and practice Islam while incarcerated in New York State penal institutions. On review of the Department's newly-promulgated, *Bryant*-inspired regulations, the trial court still was not satisfied and ordered the Commissioner of Corrections to revise them. Thus, *Samarion* and *Bryant* suggest that the Muslims' religious claims may be cognizable in New York State through the mechanism of section 1983.

Judo, Inc. v. Peet[92] appears to be the first case in New York invoking section 1983, not in a criminal law context as presented in the Muslim cases, but rather in a civil context. Three questions were presented in

88. 45 Misc. 2d 923, 258 N.Y.S.2d 455 (Sup. Ct.), *rev'd*, 24 A.D.2d 1077, 265 N.Y.S.2d 995 (App. Div. 4th Dep't 1965). Whether religious freedom was *excessively* denied is a factual issue requiring a hearing. After a full hearing, the Supreme Court, Erie County, found for the plaintiffs. Samarion v. McGinnis, 55 Misc. 2d 59, 284 N.Y.S.2d 504 (Sup. Ct. 1967) (*Bryant* was consolidated with *Samarion*).

89. Federal courts frequently invoke the "abstention" doctrine in § 1983 actions against the states. However, a discussion of this doctrine is beyond the scope of this article. *See generally* C.A. WRIGHT, A.R. MILLER & E.H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4241-55 (1988).

90. 45 Misc. 2d at 932, 258 N.Y.S.2d at 464.

91. 55 Misc. 2d 59, 284 N.Y.S.2d 504 (Sup. Ct. 1967).

92. 68 Misc. 2d 281, 326 N.Y.S.2d 441 (Civ. Ct. 1971).

Judo, each of which was extremely important to the nascent section 1983 practice in the courts of New York.

Judo, Inc. sued Peet for the balance due under a contract to take judo lessons and obtained a default judgment. After having the default opened, Peet asserted a counterclaim against the plaintiff. She also served a third party complaint against the process server and his employer, alleging that they had conspired to obtain the default judgment based on a phony affidavit of service. Peet claimed that she had a claim under section 1983 because the alleged "sewer service" constituted a conspiracy to deprive her of the notice constitutionally required by the due process clause of the fourteenth amendment. In response to Peet's claim, the trial court's three holdings substantially advanced the cause of section 1983 actions in New York State courts.

First, the court held that New York courts could indeed accept section 1983 jurisdiction when asked to do so. Second, the court held that the section 1983 allegation may be brought in the form of a counterclaim. Third, the court held that the alleged conspiracy to commit "sewer service" did state a cause of action under the due process clause of the fourteenth amendment to the Constitution. Thus, the claim was valid under section 1983.

Judo, though only a civil court decision, was the true beginning for the successful assertion of section 1983 claims in the New York courts. Following *Judo*, a county court acknowledged in *Markese v. Cooper*,[93] that a deprivation as unusual as a "retaliatory eviction" might constitute a cause of action under section 1983. The tenant's affirmative defense was that her landlord was evicting her in retaliation for her reporting housing code violations. She claimed that the retaliatory eviction infringed on her constitutional right "to petition her government for redress of grievances."[94]

The Appellate Division reached the section 1983 issue in *Clark v. Bond Stores, Inc.*,[95] a unanimous, *per curiam*, decision of the First Department which reversed the trial court's dismissal of a section 1983 claim as a matter of law. It is significant that the Appellate Division categorically acknowledged that "[s]ince jurisdiction over suits brought under [that] section ha[ve] not been restricted to federal courts, an action thereunder may also be maintained in a state court."[96] Moreover, that case cited a United States Supreme Court case as authority.[97]

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93. 70 Misc. 2d 478, 333 N.Y.S.2d 63 (County Ct. 1972).

94. *Id.* at 479, 333 N.Y.S.2d at 65 (citing tenant's affirmative defense, paragraph eleven of her answer).

95. 41 A.D.2d 620, 340 N.Y.S.2d 847 (App. Div. 1st Dep't 1973).

96. *Id.* at 620, 340 N.Y.S.2d at 848.

97. *See* Grubb v. Public Utils. Comm'n, 281 U.S. 470 (1930).

The first time the New York State Court of Appeals focused on section 1983, the plaintiff did not fare well. In *James v. Board of Education*,[98] a school teacher, who was also a faculty advisor to the yearbook, sued the school board for failing to renew his contract. He claimed that the principal's displeasure with the teacher's yearbook photograph was the sole reason for his termination.[99] The majority of the court stated that "a board of education has an unfettered right to terminate the employment of a teacher during his probationary period, unless the teacher establishes that the board terminated for a constitutionally impermissible purpose or in violation of statutory proscription."[100] The court found no facts on the record indicating that the photograph was the sole reason for the teacher's dismissal. Thus, the court refused to find that the termination was improper. The court also refused to find a constitutional infringement of plaintiff's speech rights.

One dissent, however, thought that the plaintiff had satisfactorily pleaded a prima facie tort. The other dissent, by Judge Fuchsberg, advanced the then-novel contention that even though the plaintiff had not expressly pleaded a section 1983 claim, "his amended complaint should be regarded as though his case had been formally brought under that statute as well."[101] Judge Fuchsberg argued that the New York State Court of Appeals possessed the power to somehow convert the plaintiff's prima facie tort case into a section 1983 federal civil rights case, if the facts were present. According to him, plaintiff's federal "communicative rights" might have been violated. Judge Fuchsberg failed to persuade the majority. However, although there is no way to be certain, Judge Fuchsberg's innovative willingness to find a section 1983 claim might have set the stage for many of the successful uses that followed.

Ashley v. Curtis[102] reveals how an activist state court displays not merely its willingness to *entertain* section 1983 claims, but its creative ability actually to *manufacture* such claims. The *Ashley* court considered whether a local social services official, required by law to notify a recipient of a determination to discontinue public assistance payments, would be allowed to forward the requisite notice in an envelope bearing on its face special printed instructions which virtually guaranteed that the notice would not reach the addressee. The legal services organization brought suit for injunctive relief under Article 78 of the New York Civil Practice Laws and Rules. However, citing New York authority, the trial court *sua sponte*

98. 37 N.Y.S.2d 891, 340 N.E.2d 735, 378 N.Y.S.2d 371 (1975).

99. 37 N.Y.2d 891, 340 N.E.2d 735, 378 N.Y.S.2d 371.

100. *Id.* at 892, 340 N.E.2d at 735-36, 378 N.Y.S.2d at 371.

101. *Id.* at 895, 340 N.E.2d at 737, 378 N.Y.S.2d at 373 (Fuchsberg, J., dissenting).

102. 96 Misc. 2d 45, 408 N.Y.S.2d 858 (Sup. Ct. 1978).

converted the claim to one under section 1983. Having done that, the court then enjoined the social services office from using envelopes addressed in a manner calculated not to reach the intended recipient.

Although a few courts had previously upheld the right of prisoners to adequate medical care,[103] the right of low income and minority group members to own low-income housing,[104] and the right of female prisoners to enjoy housing conditions substantially equivalent to those of male prisoners, including remunerative work and "trusty" status,[105] *James* and *Ashley* set the stage in New York for about a dozen section 1983 claims that have survived challenges as a matter of law.[106]

However, even though there may be a few arguably innovative decisions among those mentioned above,[107] New York courts upholding section 1983 claims have stayed well within conventional constitutional limitations.[108]

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103. Cooper v. Morin, 50 A.D.2d 32, 375 N.Y.S.2d 928 (App. Div. 4th Dep't 1975).

104. Suffolk Hous. Serv. v. Town of Brookhaven, 91 Misc. 2d 80, 397 N.Y.S.2d 302 (Sup. Ct. 1977).

105. Cooper v. Morin, 91 Misc. 2d 302, 398 N.Y.S.2d 36 (Sup. Ct. 1977).

106. *See* Titus v. Hill, 134 A.D.2d 911, 521 N.Y.S.2d 932 (App. Div. 4th Dep't 1987) (the right of an arrestee not to be taken into custody on a facially invalid warrant); Weissman v. Bellacosa, 129 A.D.2d 189, 517 N.Y.S.2d 734 (App. Div. 2d Dep't 1987) (the right of certain county court judges not to suffer from unfavorable salary disparities); New York City Coalition to End Lead Poisoning v. Koch, 138 Misc. 2d 188, 524 N.Y.S.2d 314 (Sup. Ct. 1987) (the right of a public interest group to enforce laws designed to prevent lead poisoning of children); Cahil v. Public Serv. Comm'n., 128 Misc. 2d 510, 490 N.Y.S.2d 90 (Sup. Ct. 1985) (the right of a public utility customer not to bear the cost of the utility's support of organizations which championed abortion); Zoepy Marie, Inc. v. Town of Greenburgh, 103 A.D.2d 776, 477 N.Y.S.2d 411 (App. Div. 2d Dep't 1984) (the right of a merchant not to have his free speech rights violated); Lasoff v. Blum, 85 A.D.2d 219, 448 N.Y.S.2d 852 (App. Div. 3d Dep't 1982) (the right of food stamp recipients not to have their allotments arbitrarily reduced); Broadway & 67th St. Corp. v. City of New York, 116 Misc. 2d 217, 455 N.Y.S.2d 347 (Sup. Ct. 1982) (the right of a landlord not to be maliciously deprived of rent increases); Fairley v. Fahey, 79 A.D.2d 35, 436 N.Y.S.2d 365 (App. Div. 3d Dep't 1981) (the right to attorney fees is allowable as part of a remedy in § 1983 suits); New York Bus Tours, Inc. v. City of New York, 111 Misc. 2d 10, 443 N.Y.S.2d 309 (Sup. Ct. 1981) (the right of a bus company providing only express service not to be discriminatorily taxed); Hewlett-Woodmere Public Library v. Rothman, 108 Misc. 2d 715, 438 N.Y.S.2d 730 (Dist. Ct. 1981) (the right of a library patron to a hearing before suspension of borrowing privileges); Browne v. Town of Hamptonburgh, 76 A.D.2d 848, 428 N.Y.S.2d 526 (App. Div. 2d Dep't 1980) (the right of property owners not to have their land restrictively zoned and condemned); Felder v. Foster, 71 A.D.2d 71, 421 N.Y.S.2d 469 (App. Div. 4th Dep't 1979) (the right of "home relief singles" not to have aid terminated).

107. *See* Hewlett-Woodmere Public Library v. Rothman, 108 Misc. 2d 715, 438 N.Y.S.2d 730 (Dist. Ct. 1981); Broadway & 67th Street Corp. v. City of New York, 116 Misc. 2d 217, 455 N.Y.S.2d 347 (Sup. Ct. 1982).

108. It should be noted that there is a nearly 3-1 ratio between failed and successful § 1983 claims pleaded in New York.

C. Attorney's Fees

> Title 42 U.S.C. § 1988 provides that in federal civil rights actions, [including section 1983 cases], "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."[109]

Although New York has not experienced the often considerable litigation over section 1983 attorneys' fee awards which has taken place elsewhere, some cases are worth noting.

Gayton v. Shang[110] appears to be the first New York case in which fees were sought under the Federal Civil Rights Attorneys' Fees Award Act. Plaintiff, represented by a legal services organization, brought suit to compel issuance of a decision in connection with welfare benefits. Her application for attorneys' fees under section 1988 was denied because, according to the court, "civil rights" were not at issue in the case. Rather, since what was involved was merely the performance of an act required of a state official—simply making a decision—it was not mandatory to award fees. Section 1988 states that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney[s'] fee as part of the costs."[111] The court found this language plain and unambiguous.[112] Furthermore, the court noted that it would actually be improper to award fees, even as a matter of discretion, because to do so would result in requiring payment out of state treasury funds.[113] United States Supreme Court decisions have long made it clear that there can be no monetary recovery against a state itself under section 1983.[114]

The court deciding *Ashley v. Curtis*[115] emphasized that, although the award of attorneys' fees under section 1988 in section 1983 cases is discretionary, "the area in which such discretion may properly be exercised has been circumscribed by the rule that in an appropriate case a prevailing plaintiff 'should ordinarily recover . . . attorney[s'] fee[s] unless special circumstances would render such an award unjust.'"[116] Accordingly, since relief had been granted by the trial court against defendant, the Appellate

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109. Hensley v. Eckerhart, 461 U.S. 424, 426 (1983) (Powell, J., quoting 42 U.S.C. § 1988).

110. 93 Misc. 2d 780, 400 N.Y.S.2d 1016 (Sup. Ct. 1978).

111. 42 U.S.C. § 1988 (1988).

112. 93 Misc. 2d at 782, 400 N.Y.S.2d at 1017.

113. *Id.* at 783, 400 N.Y.S.2d at 1018.

114. *Id.*

115. 67 A.D.2d 828, 413 N.Y.S.2d 528 (App. Div. 4th Dep't 1979).

116. *Id.* at 829, 413 N.Y.S.2d at 529 (citing Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1977)).

Division remanded the case with directions that the trial court seriously consider granting attorneys' fees to the plaintiff.

The "mandatory-discretionary" issue took on an added twist in *Young v. Toia*.[117] The case involved a section 1983 action seeking a declaration that certain New York statutes violated the state and federal constitutions. In the trial court, plaintiff had obtained some relief—though not on all of his claims—so he sought attorneys' fees under section 1988. The trial court denied the award of attorneys' fees. The Appellate Division, reading the trial court's denial of attorneys' fees as rooted in *law*, rather than as an exercise of discretion, reversed. The Appellate Division did so even though the trial court had based its finding of unconstitutionality on *state* law, rather than on a violation of section 1983. Acknowledging that the award of counsel fees lies within the sound discretion of the court, the appellate court nonetheless noted that the discretion had never been exercised; the trial court ruled *as a matter of law* that attorneys' fees could not be granted. Accordingly, the case was remanded to the trial court in order that it exercise its discretion.

The first New York section 1983 and section 1988 case to anticipate the Supreme Court's decision in *Hensley v. Eckerhart*,[118] was *Harradine v. Board of Supervisors of Orleans County*.[119] Plaintiff won a voting rights case based on alleged violations of both the federal and state constitutions. A battle then ensued concerning a reapportionment issue. There was an interim appeal, followed by further proceedings in the trial court. At one point an award of attorneys' fees was made by the trial court, albeit with no basis in state law. Undeterred, however, plaintiff contended, for the first time in the appellate court, that the lawsuit was "essentially a civil rights action brought pursuant to section 1983 . . . and that he [was] entitled to attorneys' fees under section 1988."[120] The plaintiff had struck upon a novel idea. After considerable discussion of section 1988 and section 1983, the appellate court considered whether plaintiff should be permitted "to recover attorneys' fees under the Civil Rights Attorneys' Fees Awards Act of 1976 if he is a prevailing party in a state court suit which does not allege a violation of section 1983 but seeks to enforce federal civil rights."[121] Since plaintiff *had* alleged deprivation of "equal protection" under the Constitution, and violation of the state constitution, and even though he had not actually invoked section 1983, the state court, relying on *Young v. Toia*, held that the Civil Rights Attorneys' Fees Awards Act must be broadly applied to achieve its remedial purpose. The court summarized:

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117. 66 A.D.2d 377, 413 N.Y.S.2d 530 (App. Div. 4th Dep't 1979).

118. 461 U.S. 424 (1983).

119. 73 A.D.2d 118, 425 N.Y.S.2d 182 (App. Div. 4th Dep't 1980).

120. *Id.* at 124, 425 N.Y.S.2d at 186.

121. *Id.* at 125, 425 N.Y.S.2d at 187.

> In view of the number of apportionment cases brought in federal court pursuant to section 1983, the similarity in language of section 1983 and section 1 of Article I of the New York State Constitution, the policy behind section 1988 which is to encourage the private citizen to take action as a "private attorney general", and the fact [that] this action is premised upon a constitutional claim, we conclude that attorneys' fees may be recovered in this context pursuant to section 1988 in a state court. Plaintiff's cause of action is embraced within the *spirit* of section 1983 and Special Term *implicitly* found a violation of this section . . . .[122]

Because the section 1988 question was neither presented to nor considered by Special Term, a remand was ordered with an invitation to the court below to decide the section 1983 question. The "spirit" moved the court to "implicitly" decide an unraised section 1983 claim.

The "spirit" that moved the *Harradine* court revealed itself again the next year in *Felder v. Foster*.[123] There, the court held that plaintiffs were not barred from recovering attorneys' fees under section 1988 in a section 1983 case even though their litigation might have been *unnecessary* and even *duplicative*. While defendant legislators might have been personally immune from money damage claims arising from actions which were taken in their legislative capacity, that immunity did not bar imposing attorneys' fees against them in their official capacity in an action brought under section 1983. Nor was an attorneys' fees award precluded for want of finding bad faith.

The *Felder* court also recognized that if a party substantially prevails on the merits under section 1983, compensation under section 1988 should be awarded for time spent even on unsuccessful research or litigation, unless the positions taken were clearly without merit, frivolous, or made in bad faith. Furthermore, the fact that representation was by a non-profit legal organization which provided its services to plaintiff without charge should not bar the recovery of legal fees.[124]

Up to and including *Felder*, the attitude of the few New York courts which had adjudicated section 1988 claims was fairly clear: (1) the courts had to exercise discretion in awarding fees; (2) the award was to be presumed; (3) a request for fees could be implied even if not expressly sought; (4) organizational counsel could qualify for attorneys' fees; and

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122. *Id.* at 126, 425 N.Y.S.2d at 188 (emphasis added) (citation omitted).

123. 107 Misc. 2d 872, 436 N.Y.S.2d 675 (Sup. Ct. 1981).

124. *Id.*; *see also* Campbell v. Blum, 110 Misc. 2d 678, 442 N.Y.S.2d 862 (Sup. Ct. 1981) (award of attorneys' fees granted in case where attorneys prevailed within the guidelines of the Civil Rights Attorneys' Fees Awards Act), *rev'd*, 91 A.D.2d 937, 457 N.Y.S.2d 816 (App. Div. 1st Dep't 1983).

(5) even second-rate lawyering would not necessarily bar an award.[125]

A turning point in the New York courts' attitude toward the discretionary aspect of the section 1988 award came in the Court of Appeals' decision in *Johnson v. Blum*.[126] There, petitioners brought a proceeding against the Commissioner of the New York Department of Social Services challenging a denial of public assistance for petitioners' minor children. Special Term ordered defendant to provide assistance and declared that the denial violated the equal protection clause of the United States Constitution as well as the equal protection clause of the New York State Constitution. The court did not, however, grant petitioners' request for attorneys' fees, and the Appellate Division affirmed that denial. The Court of Appeals reversed and discussed the standard to be applied when determining whether to award attorneys' fees under section 1988. The court departed from earlier decisions which held that the award of attorneys' fees is entirely discretionary, deciding instead that "the prevailing party ordinarily should recover reasonable fees 'unless special circumstances would render such an award unjust' . . . . "[127]

Essentially, the Court of Appeals embraced the view that an award under section 1988 should be broadly construed so as to insure that those who violate fundamental laws do not proceed without punishment and also to facilitate access to judicial redress for the victims of those violations. Thus, this new standard automatically awards fees to a successful litigant, *unless* those opposing the award can demonstrate special circumstances militating against a fee.

Although *Johnson* switched the presumption concerning the award of section 1988 attorneys' fees, it did not explain the criteria for their assessment. That explanation was presented in *Rahmey v. Blum*.[128] Petitioner, a food stamp recipient, brought an Article 78 proceeding to set aside a determination of the Commissioner of Social Services which had discounted his food stamp authorization. He claimed that the accounting method employed by the agency for reviewing his eligibility to receive food stamps failed to comply with federal and state regulations. Special Term annulled the determination but denied petitioner's request for attorneys' fees. On review, the Appellate Division clarified the standard for an attorneys' fee

125. This article will not address the cases which merely hold that since an award of attorneys' fees is discretionary, the trial court's decision would not be disturbed on appeal. *See, e.g.*, Ellis v. Blum, 82 A.D.2d 761, 440 N.Y.S.2d 208 (App. Div. 1st Dep't 1981) (attorneys' fees under an Article 78 proceeding not available to plaintiff because litigation was unnecessary and such fees are discretionary); Harradine v. Board of Supervisors, 73 A.D.2d 118, 425 N.Y.S.2d 182 (App. Div. 4th Dep't 1980) (judgment requiring defendant to pay attorneys' fees reversed because lower court failed to apply discretionary rule that it *may* award attorneys' fees).

126. 58 N.Y.2d 454, 448 N.E.2d 449, 461 N.Y.S.2d 782 (1983).

127. *Id.* at 458, 448 N.E.2d at 451, 461 N.Y.S.2d at 784 (citations omitted).

128. 95 A.D.2d 294, 466 N.Y.S.2d 350 (App. Div. 2d Dep't 1983).

award in a section 1983 action: "a prevailing party should ordinarily recover an attorney[s'] fee unless special circumstances would render such an award unjust."[129] Citing *Johnson v. Blum* for the proposition that section 1988 awards should be broadly construed and that a respondent's burden of proof to establish special circumstances requiring a denial of the fee is not met solely by evidence that petitioner's counsel is a publicly funded legal services organization, the Appellate Division concluded that a denial of the award would constitute an abuse of discretion. The court raised two threshold questions: (1) whether petitioner was a "prevailing party" and therefore entitled to an award, and (2) whether "special circumstances" existed which required denial of an award. After reviewing the record, the court answered those questions in favor of the petitioner and granted attorneys' fees.

Most importantly, the *Rahmey* court demonstrated that there are limitations on a court's discretion in determining a proper award of attorneys' fees and set forth guidelines initially formulated by federal circuit courts to consider when computing a reasonable fee. The following factors emerged from the discussion: hours reasonably expended by counsel, reasonable hourly rate, computation of that data (the "lodestar" fee), and adjustments to that fee in light of:

1. the novelty and difficulty of the questions presented;
2. the skill requisite to perform the legal services properly;
3. the preclusion of other employment;
4. whether the fee is fixed or contingent;
5. time limits imposed by client or circumstances;
6. the nature and length of the professional relationship;
7. amount involved and results obtained;
8. undesirability of the case; and
9. awards in similar cases.

The court further stressed that when applying these guidelines, courts should be cognizant of the purpose of section 1988, which is to attract competent attorneys without "affording any windfall to those who undertake such representation."[130] Based on its finding that the petitioner had prevailed, and that representation by the legal service organization did not constitute a special circumstance warranting denial of an award, the court remanded the matter to the state supreme court to fix a reasonable fee consistent with the above factors.

After *Rahmey*, the few other New York attorneys' fee cases mainly addressed two issues: what constituted "prevailing," and what were "special circumstances." Following the United States Supreme Court's

129. *Id.* at 296, 466 N.Y.S.2d at 354.

130. *Id.* at 305, 466 N.Y.S.2d at 359.

decision in *Hensley v. Eckerhart* holding "that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney[s'] fees under 42 U.S.C. § 1988,"[131] New York courts held, for example, that settlement agreements allowed an award,[132] and that limited success was not an absolute bar to an award.[133]

Thus, "prevailing" in New York, for the purpose of claiming attorneys' fees under section 1988, seems to be straightforward and a not-too-difficult status to attain. As to those "special circumstances" which bar an award, the court in *Haussman ex rel. Schneider v. Kirby* held that serving without a fee was insufficient,[134] and in *Joseph v. Ruffo* the Court of Appeals recognized that prevailing exclusively on state issues should not prevent an award.[135] Additionally, *Perkins v. Town of Huntington* held that advancing a portion of the fee to private counsel should not bar the granting of attorneys' fees.[136] Finally, *Campain v. Marlboro Central School District* found that acting in good faith in reliance on the plain language of a statute would not prevent a section 1988 award,[137] nor would a settlement based merely on a claim of underbudgeting and yielding only an insignificant sum act as a bar.[138] It appears that the "special circumstance" must be truly extraordinary to bar an award of attorneys' fees.

Only one case in the Appellate Division reversed, as a matter of law, a trial court's award of attorneys' fees. In *Misuraca v. Perales*,[139] the asserted federal constitutional claims were nominal, and the eventual settlement was predicated on state, not federal claims. *Misuraca*, however, appears to be an aberration. The cases discussed above make it quite clear that the section 1988 attorneys' fee award is alive and well in New York. If there is even a modicum of success, by trial or settlement, on

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131. 461 U.S. 424, 440 (1983); *see* Joseph v. Ruffo, 64 N.Y.2d 980, 981, 478 N.E.2d 179, 180, 489 N.Y.S.2d 38, 39 (1985).

132. Haussman *ex rel.* Schneider v. Kirby, 96 A.D.2d 244, 250, 468 N.Y.S.2d 375, 379 (App. Div. 2d Dep't 1983); *In re* Goodwin v. D'Elia, 132 Misc. 2d 527, 529, 504 N.Y.S.2d 389, 390 (Sup. Ct. 1986), *aff'd*, 141 A.D.2d 543, 529 N.Y.S.2d 715 (App. Div. 2d Dep't 1988).

133. Joseph v. Ruffo, 64 N.Y.2d 980, 981, 478 N.E.2d 179, 180, 489 N.Y.S.2d 38, 39 (1985); State Communities Aid Ass'n v. Regan, 112 A.D.2d 681, 684, 492 N.Y.S.2d 497, 502 (App. Div. 3d Dep't 1985).

134. 96 A.D.2d at 249, 468 N.Y.S.2d at 379.

135. 64 N.Y.2d at 981, 478 N.E.2d at 180, 468 N.Y.S.2d at 379.

136. Perkins v. Town of Huntington, 117 A.D.2d 726, 727, 498 N.Y.S.2d 451, 453 (App. Div. 2d Dep't 1986).

137. Campain v. Marlboro Cent. School Dist. Bd. of Educ., 138 A.D.2d 914, 915, 526 N.Y.S.2d 658, 659 (App. Div. 3d Dep't 1988).

138. *In re* Goodwin v. D'Elia, 132 Misc. 2d 527, 529, 504 N.Y.S.2d 389, 390 (Sup. Ct. 1986); *see also* Martinez v. Perales 135 A.D.2d 818, 522 N.Y.S.2d 922 (App. Div. 2d Dep't 1987).

139. 120 A.D.2d 592, 501 N.Y.S.2d 907 (App. Div. 2d Dep't 1986).

claims which even resemble a section 1983 claim, virtually any plaintiff can expect to receive at least partial counsel fees.

D. Statute of Limitations

> Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.[140]

Prior to two Supreme Court decisions on the subject of statute of limitations in section 1983 cases,[141] New York courts dealt with the topic in only a handful of cases. However, the courts did not write on a clean slate. The Second Circuit's decision in *Pauk v. Board of Trustees*[142] was already inscribed there. The Second Circuit held that since a relatively short period of limitations would conflict with the broad remedial purposes of section 1983, those causes of action were claims "arising on a statute" and thus governed by the three-year period of section 214(2) of the New York Civil Practice Laws and Rules.[143]

In the consolidated cases of *Fields v. Board of Higher Education* and *Pitt v. City of New York*,[144] the Appellate Division held that the appropriate statute of limitations was three years for section 1983 actions brought in state courts, since that was the period for actions to recover upon a liability created or imposed by statute. Although the court recognized that it was not bound by the doctrine of stare decisis to follow the federal courts' interpretations of state law, nevertheless it saw:

> no logical or otherwise compelling reason to reject the analysis and conclusion of the Second Circuit [in *Pauk*] regarding the appropriate New York statute of limitations to be applied to an action under 42 U.S.C. § 1983. Indeed, the interest of uniformity warrants applying C.P.L.R. § 214(2) as the appropriate statute of limitations to all suits brought under 42 U.S.C. § 1983, whether in our state court or the federal court.
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> Given the broad remedial purposes served by [section] 1983 and the [c]onstitutionally guaranteed rights to be redressed . . . we find no persuasive basis for or compelling state interest in creating different periods of limitations in actions brought under

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140. Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).

141. Wilson v. Garcia, 471 U.S. 261 (1985); Okure v. Owens, 109 S. Ct. 571 (1988).

142. 654 F.2d 856 (2d Cir. 1981).

143. N.Y. CIV. PRAC. L. & R. § 214(2) (McKinney 1972 & Supp. 1989).

144. 94 A.D.2d 202, 463 N.Y.S.2d 785 (App. Div. 1st Dep't), *aff'd*, 63 N.Y.2d 817, 472 N.E.2d 43, 482 N.Y.S.2d 267 (1983).

[section] 1983, dependent merely upon whether the action is commenced in the federal court or in the state court.[145]

As thoughtful as Justice Alexander's opinion was in *Fields*, he wrote only for the First Department, and reached a conclusion different from the Fourth Department in *Staffen*. Two years later in *Brown v. Village of Albion*,[146] a post-*Wilson v. Garcia*[147] case, an inferior court was faced with

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145. 94 A.D.2d at 205, 463 N.Y.S.2d at 788. The court went on to say:

> We are mindful of the recent decision by the Appellate Division, Fourth Department, rendered in 1981, in the case of Staffen v. Rochester. That decision however, appears to be predicated upon an interpretation of the decision of the U.S. Supreme Court in Chapman v. Houston Welfare Rights Organization, holding that [s]ections 1983 and 1985 of Title 42 of United States Code do not provide a substantive right, but only furnish a remedy for the enforcement of Federal constitutional rights. The Staffen court concluded that since C.P.L.R. § 214(2) "[]does not apply to statutes that regulate a substantive right or the procedure for its enforcement because such statutes do not create or impose a liability, penalty or forfeiture . . . ," the appropriate statute to be applied in that action, involving a suit against a municipality based upon the tortious conduct of its police officers, was General Municipal Law § 50-i.
>
> We note that both the *Staffen* and *Cortelle* decisions were considered by the Circuit court in reaching its determination that § 214(2) was the appropriate statute of limitations to be applied to Pauk's § 1983 claim. The court discussed, but did not adopt, the possibility of applying § 214(2) to § 1983 claims on the rationale that the United States Constitution should be deemed a statute for purposes of § 214(2).
>
> However, in his concurring opinion in *Pauk*, Judge Sofaer suggested that not only was C.P.L.R. § 214(2) '[]an appropriate provision to borrow for actions brought pursuant to 42 U.S.C. § 1983, but rather is squarely applicable to such suits' because it imposes liability. Indeed, in suggesting that the *Staffen* court incorrectly construed *Chapman* as holding that § 1983 is not a statute that creates liability and did not consider whether the statute could be viewed as imposing liability, Judge Sofaer pointed out that *Chapman* recognized that ". . . § 1983 'served to ensure that an individual had a cause of action for violation of the Constitution, which the Fourteenth Amendment embodied and extended to all individuals as against state action, the substantive protections afforded by § 1 of the 1866 Act. . . .' In other words, although the Constitution creates the substantive right asserted in a § 1983 action . . . it is § 1983 that imposes civil liability and provides a cause of action in Federal court."
>
> It is clear then that the Second Circuit Court of Appeals has in the light of *Chapman*, thoroughly reconsidered its view enunciated in *Taylor*, *Singleton*, etc., . . . that C.P.L.R. § 214(2), is the appropriate state statute of limitations to be applied to an action brought pursuant to 42 U.S.C. § 1983, as a matter of federal law and has reaffirmed that view.

94 A.D.2d at 205-06, 463 N.Y.S.2d at 788-89 (citations omitted).

146. 128 Misc. 2d 586, 490 N.Y.S.2d 958 (Sup. Ct. 1985).

147. 471 U.S. 261 (1985). *Wilson* had held "that § 1983 claims are best characterized as personal injury actions . . . ." *Id.* at 280.

the choice of applying *Fields* or *Staffen* in a section 1983 case alleging police misconduct. Believing itself bound by *Pauk*, the court adopted the three-year statute. Although the Second Department later adopted the *Pauk-Fields* position,[148] the statute of limitations problem in New York section 1983 cases was not yet over.

Wilson v. Garcia had established that "courts entertaining claims brought under 42 U.S.C. § 1983 should borrow the state statute of limitations for *personal injury actions.*"[149] However it failed to address the question of what a court should do in a case like *Owens* containing allegations that plaintiff was unlawfully arrested, had been "forcibly transported" to a police detention center, then "battered and beaten by [the police] and forced to endure great emotional distress, physical harm, and embarrassment," and consequently, "sustained personal injuries, including broken teeth and a sprained finger, mental anguish, shame, humiliation, legal expenses and the deprivation of his constitutional rights."[150] New York's one-year statute of limitations applies to eight specific intentional torts: assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, and the violation of the right of privacy.[151] The state also has a residual three-year statute of limitations for "personal injury" claims which are not provided for in other, specific periods of limitations.[152] A motion to dismiss was made in *Owens* on the basis that the action, commenced twenty-two months after the alleged events, was time-barred. The United States District Court for the Northern District of New York denied the motion on the grounds that applying the one-year statute of limitations would be inconsistent with the principle underlying *Wilson.*[153]

The Second Circuit chose the three-year statute and affirmed. Its rationale was that since the *Wilson* Court described section 1983 claims as general personal injury actions, an expansive statute of limitations is required to accommodate the wide range of personal injury torts that section 1983 now embraces. Comparing the two New York statutes of limitations, the Second Circuit observed that, "[b]y nature, section 214(5) is general; section 215(3) is more specific and exceptional. This dichotomy survives no matter how many similar intentional torts are judicially added

148. Jemison v. Crichlow, 139 A.D.2d 332, 531 N.Y.S.2d 919 (App. Div. 2d Dep't 1988), *aff'd*, 74 N.Y.2d 726, 543 N.E.2d 78, 544 N.Y.S.2d 813 (1989).

149. 471 U.S. 261, 271 (1985) (emphasis added).

150. 109 S.Ct. 573, 575 (1988).

151. N.Y. CIV. PRAC. L. & R. § 215(3) (McKinney 1972).

152. *Id.* § 214(5).

153. 625 F. Supp. 1568 (N.D.N.Y. 1986).

to those enumerated in section 215(3)."[154] The court also favored section 214(5) for its three-year period of limitations because it "more faithfully represents the federal interest in providing an effective remedy for violations of civil rights than does the restrictive one year limit."[155]

In the Supreme Court's review of the Second Circuit's rationale and conclusion in *Owens*, one cannot escape the justices' frustration with having to address the section 1983 statute of limitations issue yet again:

> In this case, we again confront the consequences of Congress' failure to provide a specific statute of limitations to govern [section] 1983 actions. . . . [Section] 1988 does not, however, offer any guidance as to which state provisions to borrow. To fill this void, for years, we urged courts to select the state statute of limitations "most analogous," to the particular [section] 1983 action, so long as the chosen limitations period was consistent with federal law and policy. . . .
>
> The practice of seeking state-law analogies for particular [section] 1983 claims bred confusion and inconsistency in the lower courts and generated time-consuming litigation. Some courts found analogies in common-law tort, others in contract law, and still others in statutory law. . . .
>
> In *Wilson*, we sought to end this "conflict, confusion and uncertainty." Recognizing the problems inherent in the case-by-case approach, we determined that 42 U.S.C. § 1988 requires courts to borrow and apply to all [section] 1983 claims the one most analogous state statute of limitations. We concluded . . . that [section] 1983 "confer[s] a general remedy for injuries to personal rights."[156]

In *Owens*, not only did the Court answer the general question of choice of statutes of limitations in state section 1983 actions, but it solved the problem in New York as well. Henceforth, New York courts must apply the three-year period of the New York Civil Practice Laws and Rules section 214(5).[157]

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154. 816 F.2d 45, 48 (1987).

155. *Id.* at 49.

156. 109 S. Ct. 573, 576 (1988) (citations omitted).

157. *See, e.g.*, Minto v. County of Suffolk, 148 A.D.2d 508, 540 N.Y.S.2d 176 (App. Div. 2d Dep't 1989) (§ 1983 action commenced in 1986 to recover damages for an alleged breach of employment contract in 1978 is time barred); Manti v. New York City Transit Auth., 146 A.D.2d 551, 537 N.Y.S.2d 32 (App. Div. 1st Dep't 1989) (reversed lower court's partial denial of plaintiff's motion to amend his complaint and add parties in a § 1983 action,

E. Notice-of-Claim Statutes, Felder v. Casey, and Beyond

In the October 1987 Term, the Supreme Court of the United States sounded the death knell for New York's notice-of-claim impediment to state court section 1983 actions in *Felder v. Casey*.[158] At the same time, the Court signaled its impatience with state immunity bars to such cases and urged that state courts be more hospitable to section 1983 claims.

Although *Felder* was a Wisconsin case, its impact on section 1983 actions in New York is bound to be substantial. The case and its facts need to be closely examined. Felder, a black man, was stopped by the Milwaukee police in their search for an armed suspect. Initially, the interrogation was "hostile and apparently loud."[159] However, the police urged Felder to go home after family members and neighbors convinced the officers that they were mistaken. Felder, however, was not satisfied with their change of heart. "He continued to argue and allegedly pushed one of them, thereby precipitating his arrest for disorderly conduct."[160] The plaintiff alleged that the police brutally beat him with their nightsticks in the presence of his family and neighbors.

The neighborhood's outrage attracted a local city alderman and other police officers to the scene who began interviewing witnesses to the arrest. The charges against Felder were subsequently dropped. No disciplinary action was taken against the arresting officers.

Felder instituted an action in state court against the city of Milwaukee and the officers, alleging that the beating was unprovoked and racially motivated and violated his rights under the fourth and fourteenth amendments to the United States Constitution and the Civil Rights Act.[161] The officers moved to dismiss the action based on Felder's failure to comply with a notice-of-claim statute.[162] The trial court denied the motion

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holding that § 1983 actions are governed by a three-year statute of limitations).

158. 108 S. Ct. 2302 (1988).

159. *Id.* at 2304.

160. *Id.* at 2305.

161. Felder v. Casey, 139 Wis. 2d 614, 408 N.W.2d 19 (1987), *rev'd*, 108 S. Ct. 2302 (1988).

162. WIS. STAT. § 893.80 (1983 & Supp. 1989) provides in relevant part:

(1) Except as provided in sub. (1m), no action may be brought or maintained against any . . . governmental subdivision or agency thereof nor against any officer, agent or employee of the . . . subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision or agency and on the officer, official, agent or employee . . . . Failure to give the requisite notice shall not bar action on the claim if the . . . governmental subdivision or agency

as to Felder's federal claims but dismissed the state law based causes of action.

The Wisconsin Appellate Court affirmed but the Supreme Court of Wisconsin reversed.[163] That court reasoned that while Congress may establish the procedural framework under which claims are heard in federal courts, states retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals. Accordingly, a party who chooses to vindicate a congressionally created right in state court must abide by the state's procedures. The court noted that the notice requirement advances the state's legitimate interests in protecting against stale or fraudulent claims, facilitating prompt settlement of valid claims, and identifying and correcting inappropriate conduct by governmental employees and officials.[164]

Thus, the Wisconsin Supreme Court had erected an insurmountable procedural bar against a clear-cut substantive section 1983 claim brought in a state forum. A similar result could have occurred in New York.

The United States Supreme Court reversed. Conceding that states possess the power to control the procedures in their own courts, Justice Brennan nevertheless wrote:

> The question before us today, therefore, is essentially one of preemption: is the application of the State's notice-of-claim provision to [section] 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the

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had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant . . . subdivision or agency or to the defendant officer, official, agent or employee; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant . . . subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant . . . subdivision or agency nor against any defendant officer, official, agent or employee may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect . . . .

Many states have adopted similar provisions. 108 S. Ct. at 2305-06 n.2. (citing CIVIL ACTIONS AGAINST STATE GOVERNMENT, ITS DIVISIONS, AGENCIES, AND OFFICERS 559-69 (W. Winborne ed. 1982)).

163. 139 Wis. 2d 614, 408 N.W.2d 19 (1987).

164. *Id.* at 620, 408 N.W.2d at 24 (quoting Mills v. County of Monroe, 59 N.Y.2d 307, 311, 451 N.E.2d 456, 458, 464 N.Y.S.2d 709, 711 (1983).

> enforcement of such a requirement instead "'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'?"[165]

The answer was unequivocal:

> Because the notice-of-claim statute at issue here conflicts both in its purpose and effects with the remedial objectives of [section] 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in [section] 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is preempted when the [section] 1983 action is brought in a state court.[166]

To support this conclusion Brennan traversed a good deal of ground, relying on a half dozen arguments. Emphasizing that section 1983 is directed toward government bodies and their officials as defendants, Brennan found that the Wisconsin notice-of-claim statute undercut the federal civil rights remedy in three ways: (1) by conditioning recovery in order to minimize the liability of those intended to be reached by the statute; (2) by discriminating against the federal right by setting what amounted to a mere four month limitations period versus a two year period for intentional torts; and (3) by creating a de facto exhaustion requirement.[167] Brennan also pointed out that under the principle of *Wilson v. Garcia*[168]—section 1983 actions are suits for personal injuries and, as a matter of federal law, are controlled by applicable state tort statutes of limitations—to uphold Wisconsin's notice-of-claim statute would be to allow different outcomes in section 1983 litigation "depending solely on whether they are brought in state or federal court within the same state."[169] Such an outcome is "obviously inconsistent with this federal interest in intra-[s]tate uniformity."[170]

The Court also found the Wisconsin notice-of-claim statute inconsistent with the "goals of the federal civil rights laws"[171] and "an obstacle to the

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165. 108 S. Ct. at 2306.

166. *Id.* at 2306-07.

167. *Id.* at 2308. The Court made short shrift of the reasons that the state of Wisconsin advanced in support of its notice-of-claim statute.

168. 471 U.S. 261 (1985).

169. 108 S. Ct. at 2314.

170. *Id.*

171. *Id.* at 2306.

accomplishment and execution of the full purposes and objectives of Congress."[172]

Although the holding is important, the *implications* of that holding are far more important for section 1983's future in state courts in general, and New York courts in particular. Brennan's opinion recognizes that states cannot use their procedures to burden a section 1983 claim. Additionally, Wisconsin's notice-of-claim statute was construed as an exhaustion requirement. *Patsy v. Board of Regents,*[173] a federal case, was seemingly applied to section 1983 cases brought in state courts, and the use of exhaustion requirements in state section 1983 cases was repudiated. Furthermore, the Court, in *Felder*, had rejected the defendants' reliance on the Wisconsin notice-of-claim statute as a means of expeditiously resolving disputes in an alternative manner. Again, as laudable as such a goal may be, the means to achieve it cannot be permitted to burden the section 1983 claim.

Finally, of extreme importance for the main focus of this article, New York's notice-of-claim principles, and by implication other immunity barriers, are in serious jeopardy to the extent that *Felder* reinforces the *Martinez* proposition. The proposition is that state-granted immunities, applied even in state courts, must be consonant with federal immunity principles, and, if not, they will be preempted.

Interestingly, prior to 1987 there were few section 1983 cases in New York which turned on a notice-of-claim issue.[174] The first case was *423 South Salina Street, Inc. v. City of Syracuse.*[175] There, a property owner had alleged that the city's continued overassessment constituted an abuse of its taxing power. Although the Court of Appeals found that the plaintiff possessed standing to sue, that the complaint successfully pleaded a section 1983 cause of action, that the action had been timely brought under the applicable three-year statute of limitations, and that available state remedies were no bar to the section 1983 claims, dismissal of the complaint was required. A unanimous court held that the plaintiff had failed to file the notice-of-claim mandated by New York's General Municipal Law. The next major notice-of-claim case, and the last before *Felder,*[176] was *Cepeda v.*

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172. *Id.*

173. 457 U.S. 496 (1982).

174. *See* Mills v. County of Monroe, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 709 (1983) (not a § 1983 case; held that New York's notice-of-claim requirements were applicable to actions asserting federal rights, but an exception, not applicable here, existed for suits seeking to "vindicate a public interest"); *see also* Industrial Refuse Sys. v. O'Rourke, 134 Misc. 2d 45, 509 N.Y.S.2d 988 (Sup. Ct. 1986) (a § 1983 case where the "public interest" exception did apply), *aff'd,* 129 A.D.2d 76, 516 N.Y.S.2d 940 (App. Div. 2d Dep't 1987).

175. 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986).

176. Professor Steinglass has observed that "*Felder* calls into question the use of state policies such as the New York law that effectively immunizes state correctional officials

Coughlin.[177] *Cepeda* involved a fight in a New York State prison between correction officers and inmates. Complaining that the use of excessive force violated their federal due process and 8th amendment rights, the prisoners brought a section 1983 case in the state court.

However, section 24 of the New York State Correction Law provides in pertinent part:

> 1. No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.
> 2. Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of any officer or employee of the department shall be brought and maintained in the court of claims as a claim against the state.[178]

To escape the facial "scope of employment" bar of section 24, the plaintiffs argued that the correction officers' use of excessive force took the case out of that section. The plaintiffs lost. The Appellate Division held that the trial court had correctly decided that the officers acted within the scope of their employment and that, on that ground at least, section 24 barred the civil rights claims.

Plaintiff's other argument, more important for purposes of section 1983, was "that Correction Law [section] 24 violates the supremacy clause of the [United States] Constitution because it effectively precludes any action in this State, pursuant to 42 U.S.C. § 1983, against a correction officer . . . ."[179]

Regrettably, however, the appellate court noted that this assertion "was neither raised in the pleadings nor before [the] Supreme Court and, thus, was not preserved for [its] review . . . ."[180]

Thus, the issue of a section 24 immunity bar was not decided by the *Cepeda* court. Moreover, the Appellate Division—not content to let sleeping issues lie—gratuitously observed, in dicta, that:

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from [s]ection 1983 liability by withdrawing jurisdiction from the New York courts in such cases." Steinglass, *Court's Notice-of-Claim Ruling May Encourage Sec. 1983 Cases*, NAT'L L.J., Aug. 15, 1988, at 20, col. 1.

177. 128 A.D.2d 995, 513 N.Y.S.2d 528 (App. Div. 3d Dep't 1987).

178. N. Y. CORRECT. LAW § 24 (McKinney 1987).

179. 128 A.D.2d at 997, 513 N.Y.S.2d at 530 (citation omitted).

180. *Id.* at 997, 513 N.Y.S.2d at 530 (citations omitted).

> In any event, subject matter jurisdiction of its courts is exclusively a matter for the State, and since Correction Law [section] 24 prohibits all civil actions against correction officers in their personal capacities, we perceive no violation of the supremacy clause. Moreover, as defendants note in their brief, plaintiffs are free to pursue their claim in Federal court, and several apparently have done so.[181]

As to the Appellate Division's parting shot—implying that section 1983 claims belong in federal, not state courts—one may wonder whether the court even read (let alone understood) *Maine v. Thiboutot* and *Martinez v. California*, notwithstanding that it's penultimate observation actually invoked *Martinez*.

While it is certainly true, as the Appellate Division noted, that generally "subject matter jurisdiction of its courts is exclusively a matter for the state,"[182] that observation paints with too broad a stroke. If the court meant that the New York Legislature decides, in the first instance, what claims can be heard in the state's courts, the court was correct. On the other hand, if the court meant that state court jurisdiction could not be preempted under the supremacy clause, it was obviously incorrect.[183] That presents the question of whether, in the name of controlling its subject matter jurisdiction, a state may immunize its officials from federal causes of action, like section 1983 claims, brought in state courts, either by not consenting to be sued or by affirmatively prohibiting such actions. Regrettably, the *Cepeda* court's dicta rested on no foundation at all. Of the two cases it cited, *Gulf Offshore Company v. Mobil Oil Company*[184] is wholly irrelevant. The other, *Maloney v. State*,[185] a Jones Act case, found the Court of Appeals merely adopting the Appellate Division's decision which, in turn, offered no support for its conclusion that New York courts were free to reject Jones Act cases.

Moreover, *Cepeda*'s subject matter jurisdiction point is difficult to understand in light of recent decisions, including the *Felder* opinion. *Felder* prohibited state courts from burdening the section 1983 cause of action when it is asserted in a state forum. It is hard to imagine that a

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181. *Id.* at 997, 513 N.Y.S.2d at 530-31 (citation omitted).

182. *Id.* at 997, 513 N.Y.S.2d at 530.

183. *See, e.g.*, McDermott v. Wisconsin, 228 U.S. 115 (1913) (state legislation regulating the labeling of articles which are regulated by the Federal Pure Food and Drug Act, is void under the supremacy clause); Texas v. Bland, 369 U.S. 663 (1962) (Treasury Department regulations creating a right of survivorship in certain United States savings bonds preempt any inconsistent provisions of Texas property law).

184. Gulf Offshore Co. v. Mobil Oil Comp., 453 U.S. 473, 477-78 (1981).

185. Maloney v. State, 2 A.D.2d 195, 154 N.Y.S.2d 132 (App. Div. 4th Dep't 1956), *aff'd*, 3 N.Y.2d 356, 144 N.E.2d 364, 165 N.Y.S.2d 465 (1957).

state may not burden section 1983 litigation once it gets into its courts, but that if it wishes, the state may bar it entirely.

Cepeda's final point is utterly incomprehensible. Citing *Martinez*'s footnote seven, the Appellate Division stated that "since Correction Law [section] 24 prohibits all civil actions against correction officers in their personal capacities, we perceive no violation of the supremacy clause . . . ."[186] While ignoring the first two words of section 1983—"[e]very person"—and disregarding the plain intention of section 1983, this seems to say that New York possesses the power to bar section 1983 claims by immunizing officials *qua individuals* so long as they are not immunized *qua officials*.[187]

Thus, not only does footnote seven not support the *Cepeda* court's conclusion that Correction Law section 24 would survive a supremacy clause challenge because the section immunizes only individual, not official, liability, but the footnote, albeit in *dicta*, cuts against the court's earlier subject matter jurisdiction point.

Although that point was not actually decided in *Cepeda*, to the extent that the case suggested that New York could bar section 1983 claims via immunization, *Felder* cuts the other way. Indeed, *Felder* makes it plain that *all* of New York's immunity policies in section 1983 cases must be consonant with federal immunity principles. *Felder* may have made New York's immunity practices wholly subordinate to the federal standard. That is the importance of *Felder v. Casey*, and New York practitioners must take notice.[188]

III. CONCLUSION

A 1985 survey conducted by the National Institute of Municipal Law Officers disclosed that since 1980 alone, section 1983 plaintiffs had sued for $4.7 billion in damages. "The actual payout by 45 municipalities losing or settling such actions was $4.2 million—an average taxpayer loss of

186. 128 A.D.2d at 997, 513 N.Y.S.2d at 530.

187. Moreover, quite apart from that, here is what *Martinez*'s footnote 7 says:

> We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where "an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." We have never considered, however, the question whether a State must entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts are generally not free to refuse enforcement of the federal claim.

444 U.S. 277, 283-84 n.7 (1980).

188. *See* Zurat v. Stockport, 142 A.D.2d 1, 534 N.Y.S.2d 777 (App. Div. 3d Dep't 1988) (dismissing an appeal as moot in light of *Felder*).

$49,321 for each of the 86 municipalities responding."[189]

Even without this survey, and other anecdotal evidence in the professional literature and public press, there is no doubt that section 1983 cases are big business and, like RICO lawsuits, steadily growing.

Yet, from the analysis of the approximately two hundred New York cases which have mentioned section 1983 in the past twenty-five years, it certainly cannot be said that the state has been a Mecca for federal civil rights plaintiffs. On the one hand, it is not difficult to speculate as to why would-be plaintiffs have eschewed the New York State courts for their section 1983 cases. The reasons may include counsel having greater confidence in asserting federal claims in federal courts, discovery advantages, faster trials, and fewer appellate hurdles for the successful plaintiffs. On the other hand, the paucity of cases is puzzling. The jurisdictional issue has been settled, the limitations on the cause of action are no more onerous than in the federal forum, basic principles of immunity, "person," res judicata, attorney's fees, and now, notice-of-claim impediments have been settled. A good number of claims have failed as a matter of law, but many others have survived.

In short, apart from considerations which are impossible to predict, such as who the judge might be, there appears to be no persuasive substantive reason to forego New York courts for the assertion of section 1983 claims. Although Chief Justice Rehnquist might not have had section 1983 in mind when he told the American Bar Association in February 1989 that he was "talking about remitting to the state courts from the federal courts business very similar to that which state courts regularly handle now,"[190] it is reasonable to expect that more of these cases will be brought in New York courts. When that happens, our federal system will be the better for it. Moreover, citizens will recognize that federal courts are not the only place to vindicate federal rights. The triumph will be that finally, some one hundred-or-so years after the Civil Rights Act was enacted because of state recalcitrance in enforcing federal rights, those rights will be deemed secure in state courts.

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189. Blum, *Lawsuits Put Strain on City Budgets*, NAT'L L.J., May 16, 1988, at 32, col. 2.

190. MANHATTAN L., Feb. 14-20, 1989, at 17, col. 1 (text of Chief Justice William Rehnquist's speech before the American Bar Association in Denver on Feb. 6, 1989).