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INTRODUCTION

There is no more important area of civil litigation in the federal courts than actions brought under 42 U.S.C. section 1983.[1] Section 1983 authorizes individuals who assert violations of their federally protected rights to seek redress against those who acted under color of state law.[2] A broad range of important federal constitutional claims are asserted under this statute, including many by arrestees, public employees, mental patients, prisoners, landowners, consumers, recipients of public benefits and students.[3] Additionally, section 1983 claimants

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[1] Section 1983 provides:

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

42 U.S.C. § 1983 (1988).

Although federal *habeas corpus* proceedings might have an arguably equal claim of importance to that of § 1983, *habeas* proceedings are civil in nature only in the technical sense, Browder v. Director, Dep't of Corrections of Illinois, 434 U.S. 257, 269, *reh'g denied*, 434 U.S. 1089 (1978), existing essentially to test the constitutional validity of state court convictions and sentences. 28 U.S.C. § 2254 (1988).

[2] *See, e.g.*, West v. Atkins, 487 U.S. 42, 48 (1988); Gomez v. Toledo, 446 U.S. 635, 640 (1980); Flagg Bros. v. Brooks, 436 U.S. 149, 155 (1978).

[3] *See generally* Wilson v. Garcia, 471 U.S. 261, 274 (1985); Harry A.

assert a large variety of federal statutory claims.[4]

The complex world of section 1983 litigation derives from diverse sources and entails an unusually broad array of potential defenses and other issues. For example, section 1983 itself governs who can sue and be sued, provides what types of wrongs may be redressed and requires that the defendant have acted under color of state law. The Federal Constitution in Article III sets forth the outer limits of the subject-matter jurisdiction of the lower federal courts, implicitly including pendent claims and arguably pendent party jurisdiction; recognizes federally protected individual rights in the Bill of Rights and Fourteenth Amendment; and, gives the states sovereign immunity in the Eleventh Amendment.[5] Federal court decisional law establishes various abstention doctrines[6] and recognizes the ripeness, standing and mootness defenses. Other issues include common law immunities, which provide potential defenses to personal capacity claims,[7] whether or not there is a basis for imposing municipal liability, and proximate cause.[8] Finally, state law provides a pivotal role in issues of res judicata,[9] statute of limitations and survivorship.[10]

Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 19-20 (1985). *See also* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES ch. 3 (2d ed. 1991).

[4] *See* SCHWARTZ & KIRKLIN, *supra* note 3, at ch. 4. The Supreme Court appears to have cut back on the scope of federal statutory claims that can be asserted under § 1983. *Compare* Suter v. Artist, 112 S. Ct. 1360 (1992) (denying enforcement of federal statutory reasonableness provision) *with* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) (allowing enforcement of federal statutory reasonableness provision).

[5] *See* Quern v. Jordan, 440 U.S. 332 (1979) (Eleventh Amendment applies in § 1983 actions).

[6] *See* SCHWARTZ & KIRKLIN, *supra* note 3, at ch. 14. Some abstention doctrines are embodied in federal statutes. *See* 28 U.S.C. §§ 1341, 1342 (Tax Injunction Act and Johnson Act respectively) (1988).

[7] *See* SCHWARTZ & KIRKLIN, *supra* note 3, at ch. 9.

[8] *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980) (reading § 1983 as imposing a proximate cause requirement).

[9] *See, e.g.*, Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980).

[10] Robertson v. Wegmann, 436 U.S. 584 (1978) (the mere fact of abatement of a particluar lawsuit is not sufficient ground to declare state law "inconsistent" with federal law and, thus, the District Court should have adopted Louisiana survivorship law). Additionally, applications for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 invoke a complex area of specializa-

Like the federal courts throughout the country, the Second Circuit handles a large number of section 1983 cases presenting a wide range of claims and issues, many of which are complex and important.[11] The major reported decisions rendered by the Second Circuit in 1992 focused primarily upon two areas, municipal liability and qualified immunity. This is not surprising as these are both highly significant issues frequently raising difficult, contentious questions.

Part I of this Article analyzes the court's municipal liability decisions. Part II then examines an important decision involving absolute immunity and its application to officials who initiate civil suits. Part III explores the court's complex qualified immunity decisional law. Finally, Part IV discusses other significant section 1983 decisions, specifically those involving malicious prosecution claims, state action and punitive damages.

I. MUNICIPAL LIABILITY

The Second Circuit in 1992 rendered three important decisions concerning municipal liability under 42 U.S.C. section 1983. The court ruled that a municipality may not claim the protection of absolute legislative immunity in *Goldberg v. Town of Rocky Hill*;[12] found sufficient evidence of a New York City Police Department practice of disciplining probationary officers that discriminated on the basis of gender in *Sorlucco v.*

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tion in its own right.

[11] Approximately 47,000 § 1983 actions were filed in the federal courts in the twelve-month period that ended September 30, 1992. *See U.S. District Courts—Civil Cases Commenced by Basis of Jurisdiction and Nature of Suit During the Twelve Month Period Ended September 30, 1992* & *U.S. District Courts—Civil Cases Commenced by Nature of Suit During the Twelve Month Period Ended September 30, 1992, in* THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE TWELVE MONTH PERIOD ENDED SEPTEMBER 30, 1992, 24, 27 (1992) [hereinafter Tables C-2 and C-3 respectively]. Of these, the Second Circuit heard 2023 civil rights appeals and 1493 prisoner civil rights appeals. *See* Table C-3 *supra* n.13. The 47,000 figure was derived by adding the more than 11,000 "other civil rights cases with over 25,000 prisoner civil rights actions." Similarly, the 2023 civil rights cases do not consist solely of § 1983 cases. Section 1983 and its case annotations occupy a separate volume of the annotated United States Code, running 1271 pages with a cumulative supplement for 1982-1992 case developments of an additional 563 pages.

[12] 973 F.2d 70 (2d Cir. 1992).

New York City Police Department;[13] and determined that a complaint sufficiently alleged failures to train and supervise police officers and assistant district attorneys regarding perjured testimony and *Brady*[14] material in *Walker v. City of New York*.[15] These three decisions provide important guidance on several recurring section 1983 municipal liability issues.

A. *Legislative Immunity:* Goldberg v. Town of Rocky Hill

In *Goldberg v. Town of Rocky Hill*,[16] the Second Circuit considered whether a municipality could claim the protection of absolute legislative immunity. This was an issue of first impression in the Second Circuit.[17] To place the case in its proper legal context, it is necessary to consider the trio of Supreme Court decisions fleshing out the basic contours of section 1983 municipal liability, *Monell v. New York City Department of Social Services*,[18] *Owen v. City of Independence*,[19] and *City of Newport v. Fact Concerts*.[20]

Modern section 1983 municipal liability jurisprudence begins with the Court's holding in *Monell* that municipal entities are "persons" subject to section 1983 liability.[21] At the same time, however, the *Monell* Court determined that municipal liability may not be based upon the doctrine of respondeat superior.[22] Thus, neither monetary nor equitable relief may be imposed against a municipality solely because it employed a constitutional tortfeasor.[23] It is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that" section 1983 municipal

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[13] 971 F.2d 864 (2d Cir. 1992).
[14] Brady v. Maryland, 373 U.S. 83 (1963).
[15] 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1387 (1993).
[16] 973 F.2d 70 (2d Cir. 1992).
[17] *Id.*
[18] 436 U.S. 658 (1978).
[19] 445 U.S. 622 (1980).
[20] 453 U.S. 247 (1981).
[21] The *Monell* Court overruled Monroe v. Pape, 365 U.S. 167 (1961) on this point.
[22] *Monell*, 436 U.S. at 691.
[23] *Id.*

liability may attach.[24]

The *Monell* Court left open the question of whether municipalities may assert some type of "official immunity,"[25] such as qualified or good faith immunity. It did hold, however, that municipal entities could not claim *absolute* immunity because it would obviously be meaningless to hold that although municipal bodies could be sued under section 1983, they are absolutely immune from liability.[26] Such a decision would amount to taking away with one hand what had just been given with the other.

Taking up the issue left open in *Monell*, the Court resolved that municipalities could not assert qualified immunity based upon the good faith of their officers in *Owen v. City of Independence*.[27] In resolving section 1983 immunity issues, the Supreme Court has focused upon the immunities existing under the common law in 1871, when the original version of section 1983 was enacted, and the policies that underlie section 1983.[28] On both scores the City's claim in *Owen* of good faith immunity failed: municipalities were generally not protected by a good faith immunity defense under the common law in 1871, and denying qualified immunity to municipal defendants furthers section 1983's compensatory and deterrent purposes. Given that municipal officials who are sued for monetary relief under section 1983 in their personal capacities are frequently shielded from liability by absolute or qualified immunity, "many victims of municipal malfeasance would be left remediless if the city were . . . allowed to assert a good-faith defense."[29] Additionally, the threat of municipal liability provides municipal officials with an incentive to adopt policies designed to minimize constitutional violations. All of these considerations called for a rejection of the qualified immunity defense. *Owen* thus resolved that municipal bodies may not defeat claims for compensatory damages merely because their

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[24] *Id.* at 694.

[25] *Id.* at 701.

[26] *Id.*

[27] 445 U.S. 622 (1980).

[28] *See* Wyatt v. Cole, 112 S. Ct. 1827 (1992); Malley v. Briggs, 475 U.S. 335 (1986); Tower v. Glover, 467 U.S. 914 (1984); City of Newport v. Fact Concerts, 453 U.S. 247 (1981); Owen v. City of Independence, 445 U.S. 622 (1980).

[29] *Owen*, 445 U.S. at 651.

officers or employees acted in good faith.[30]

Considering punitive damages in *City of Newport v. Fact Concerts*,[31] however, the Court ruled that municipal bodies are absolutely immune. The Court found that municipalities were immune from punitive damages under the common law in 1871 and that the legislative history of section 1983 revealed no intent to abolish this immunity. Furthermore, immunizing municipal bodies from punitive damages does not conflict with either the policies of section 1983 or the punishment-deterrence purposes of punitive damages. On the contrary, immunizing municipal bodies from punitive damages sensibly shields the innocent taxpayers, who ultimately must foot the bill, and leaves punitive damages where they rightly belong, with the offending official in his or her personal capacity.[32]

It was against this background that the Second Circuit considered in *Goldberg v. Town of Rocky Hill*[33] whether a municipality sued under section 1983 based upon legislative action could assert absolute legislative immunity. The plaintiff, Kenneth Goldberg, was a part-time supernumerary police officer for the Town of Rocky Hill, Connecticut. He publicly supported the Chief of Police concerning his handling of a controversial incident in the town. The town council subsequently passed a resolution eliminating the position of supernumerary police officer from the budget.[34] Plaintiff brought suit in federal court under section 1983, presumably for compensatory damages,[35] alleging that the resolution was passed

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[30] *Id.* At the time *Owen* was decided, the Supreme Court couched qualified immunity in good faith terms, with good faith having objective and subjective components. Wood v. Strickland, 420 U.S. 308, 321 (1975). This undoubtedly accounts for *Owen's* reference to good faith immunity. The Supreme Court subsequently reformulated qualified immunity into a wholly objective test. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

[31] 453 U.S. 247 (1981).

[32] *See* Smith v. Wade, 461 U.S. 30 (1983) (punitive damages may be imposed against state and local officials who act with malice or callous indifference).

[33] 973 F.2d 70 (2d Cir. 1992). The panel consisted of Chief Judge Meskill and Judges Pratt and Nickerson (district court judge sitting by designation).

[34] Actually, this was the second of two resolutions passed by the Town Council. The first had limited the number of hours supernumerary police officers were allowed to work each week. *Goldberg*, 973 F.2d at 71. After passage of the second resolution eliminating the position altogether, the Town Manager offered a number of former supernumeraries the position of "Special Constable," but no such offer was made to plaintiff Goldberg. *Id.* at 71.

[35] The specific relief sought is not spelled out in either the circuit or district

in retaliation for his exercise of his First Amendment right to speak out in support of the Chief of Police. He sued the town and its mayor, town manager and eight councilmen, all in their official capacities. Because a suit against an official in an official capacity is tantamount to suit against the entity,[36] naming the various officials was superfluous. The Second Circuit thus properly considered the suit as if it had been brought solely against the town.

The town argued that it was entitled to absolute legislative immunity. The parties agreed that the town council resolution abolishing the position of supernumerary police officers was a "legislative act."[37] Two important consequences flow from this conclusion. On the one hand, the resolution is a municipal policy providing a potential basis for the imposition of municipal liability.[38] On the other hand, if the council members had been sued for damages in their *personal* capacities, they would have been protected by absolute legislative immunity. The Supreme Court has resolved that both state[39] and regional[40] legislators enjoy absolute legislative immunity, but has never resolved whether local legislators are also so protected.[41] Nor had the Second Circuit directly confronted the issue.[42] The court in *Goldberg*, however, expressed agreement with the view of "at least nine other circuits" and Chief [District] Judge Brieant's "thorough and scholarly" opinion in *Dusanenko v. Maloney*,[43] extending absolute immunity to local legislators.[44] This conclusion makes sense, especially when

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court opinions. Goldberg v. Whitman, 740 F. Supp. 118 (D. Conn. 1989), *on reconsideration*, 743 F. Supp. 943 (D. Conn. 1990), *aff'd sub nom.* Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992).

[36] Hafer v. Melo, 112 S. Ct. 358, 361 (1991); Kentucky v. Graham, 473 U.S. 159, 165 (1985) (official-capacity suits "generally represent only another way of pleading an action against an entity of which the officer is an agent."); Monell v. Department of Social Services, 436 U.S. 635, 690 n.55 (1978).

[37] *Goldberg*, 973 F.2d at 72.

[38] *See Monell*, 436 U.S. at 694 (municipality may be liable for policy "made by its lawmakers").

[39] Tenny v. Brandhove, 341 U.S. 367 (1951).

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

[41] The issue was left open in Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 738 (1980).

[42] Goldberg v. Town of Rocky Hill, 973 F.2d 70, 72 (2d Cir. 1992).

[43] 560 F. Supp. 822 (S.D.N.Y. 1983), *aff'd on other grounds*, 726 F.2d 82 (2d Cir. 1984).

[44] *Goldberg*, 973 F.2d at 72-73 and authorities cited therein; *see also* SCHWARTZ

one considers the Supreme Court's command that application of the common law immunities depends upon the nature of the function carried out, not the title of the official.[45] Viewed in this light, it should be irrelevant whether an official who carried out a legislative function was employed by the state or a municipality.

The pivotal issue in *Goldberg* was whether the council's legislative act, in addition to providing a basis for establishing municipal responsibility and providing council members with absolute immunity from personal liability, had still another consequence, namely, of providing the town itself with the defense of absolute immunity.[46] The Second Circuit held that it did not.[47] Judge Pratt, writing for the court, looked to the rationale of *Monell* and *Owen*.[48] Granting the municipality absolute immunity would severely undercut section 1983's purpose of providing a remedy when enforcement of a municipal policy or practice causes a deprivation of federally protected rights.[49] *Monell* specifically held that municipal bodies sued under section 1983 are not entitled to absolute immunity[50]—a ruling specifically acknowledged in *Owen*.[51] *Owen's* rejection of qualified immunity for municipalities rests in significant part upon the realization that because absolute and qualified immunity frequently defeat personal capacity claims, the remedy against the municipality may be the sole avenue for redressing a violation of federally protected rights.

It is arguable that *Monell* and *Owen* did not definitively resolve whether a municipal body is protected from liability when the officials who engaged in the constitutionally offensive conduct are shielded from liability by absolute immunity because they performed, for example, a judicial, prosecutorial or, as in *Goldberg*, a legislative function.[52] The great weight of

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& KIRKLIN, *supra* note 3, at § 9.11.

[45] *See, e.g.*, Forrester v. White, 484 U.S. 219 (1988); Butz v. Economou, 438 U.S. 478 (1978); *Supreme Court of Virginia*, 446 U.S. at 719.

[46] *Goldberg*, 973 F.2d at 72.

[47] *Id.* at 70.

[48] *Id.* at 72-73.

[49] *Id.* at 74.

[50] Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 659 (1978).

[51] Owen v. City of Independence, 445 U.S. 662, 665 (1980).

[52] Dicta in Kentucky v. Graham, 473 U.S. 159, 167 (1985), however, states that qualified and absolute immunity are "unavailable" in an official capacity action.

authority in the lower federal courts, however, rejects municipal immunity in these circumstances,[53] and rightly so. *Owen's* rationale that a remedy against the municipality is especially important because common law immunities frequently defeat personal capacity claims holds even truer for claims confronted by absolute immunity than for those governed by qualified immunity. After all, qualified immunity will not defeat the section 1983 claim when the official violated clearly established federal law.[54] By contrast, officials shielded by absolute immunity may be protected not only in these circumstances, but even when they act maliciously or in bad faith.[55] There is, therefore, an even greater need for a remedy against the municipality when officials benefit from absolute immunity than when qualified immunity is at issue.

The town in *Goldberg* made one last-ditch effort to snag the riches of legislative immunity. Relying upon a Connecticut state law privilege that protects legislators against being questioned about their legislative motives, the town argued "that at any trial it would be prevented from calling its own legislators about the alleged retaliatory purpose and motive behind their legislation."[56] The Second Circuit was unmoved. To the extent that the town sought to interpose a state law immunity defense to the section 1983 claim, this was clearly at odds with the Supreme Court's teaching in *Howlett v. Rose*[57] that immunity from section 1983 liability is a matter of federal law.

Whether federal legislative immunity protects state and local officials from having to testify as to their legislative motives presents a more difficult question. The Supreme Court has told us only that in "some extraordinary circumstances" legislative officials may be compelled to give such testimony, but that this will "frequently be barred by privilege" and is "usually to be avoided."[58] The court in *Goldberg* took the com-

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[53] SCHWARTZ & KIRKLIN, *supra* note 3, at § 7.2 (citing numerous cases).

[54] Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see also* Hunter v. Bryant, 112 S. Ct. 534 (1991); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986).

[55] *See* Mireles v. Waco, 112 S. Ct. 286 (1991) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity).

[56] Goldberg v. Town of Rocky Hill, 973 F.2d 70, 74 (2d Cir. 1992).

[57] 496 U.S. 356 (1990).

[58] Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 & n.18 (1977) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420

mon sense approach that since the Supreme Court has made legislative motive dispositive (or at least highly relevant) in so many constitutional areas, such as racial discrimination,[59] freedom of speech,[60] and the Establishment Clause,[61] legislative officials cannot be given an absolute privilege from testifying about their legislative motives.[62]

The municipal liability issue presented in *Goldberg* does not seem to arise with great frequency because normally the mere enactment of legislation does not cause a constitutional violation; in most cases the alleged constitutional wrong comes about from the *enforcement* of the legislative policy. *Goldberg* presented the somewhat unusual situation where the enactment of the legislative policy itself was claimed to be unconstitutional.[63] For this situation, however, *Goldberg* correctly resolved that absolute legislative immunity protects legislators, not municipalities.[64]

(1971)).

[59] *See, e.g., Arlington Heights*, 429 U.S. at 265-66.

[60] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[61] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[62] *Contra* Hollyday v. Rainey, 964 F.2d 1441 (4th Cir. 1992); Baker v. Mayor and City Council, 894 F.2d 679 (4th Cir.), *cert. denied*, 498 U.S. 815 (1990); Schlitz v. Virginia, 854 F.2d 43 (4th Cir. 1988).

[63] This situation is seen with some frequency in the land use area, where the enactment of a zoning ordinance or other local legislation affecting the use of property may be claimed to be unconstitutional. *See, e.g.*, Brown v. Crawford County, 960 F.2d 1002 (11th Cir. 1992); Calhoun v. St. Bernard Parish, 937 F.2d 172 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992). So, too, the mere enactment of legislation itself may be claimed to violate freedom of speech. *See, e.g.*, Brodarick v. Oklahoma, 413 U.S. 601, 612 (1973).

[64] One possible complication that may arise from *Goldberg*, which was not explored by the Second Circuit, stems from the Supreme Court's decision in Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 732 (1980), holding that legislative immunity in § 1983 actions covers not only damages but also declaratory and injunctive relief. Claims for prospective relief are normally asserted against officials in their official capacity since the relief in substance is sought against the entity. Reading *Consumers Union* and *Goldberg* together may suggest that although legislative immunity does not shield a municipality from monetary relief (*Goldberg*), it does prohibit equitable relief (*Consumers Union*). This would create a dichotomy of available relief in reverse to that drawn by Eleventh Amendment decisional law which, in § 1983 cases, generally prohibits monetary relief while allowing for prospective equitable relief. *See* Edelman v. Jordan, 415 U.S. 651 (1974); SCHWARTZ & KIRKLIN, *supra* note 3, at § 8.7. But such a combined reading of *Consumers Union* and *Goldberg* is not accurate. The defendants in *Consumers Union* were *state*, not local, officials. The Supreme Court in *Consumers Union*, therefore, had no occasion to consider the implications of *Monell* and *Owen* upon the legislative immunity issue as applied to municipalities.

B. *Municipal Custom or Practice:* Sorlucco v. New York City Police Department

The Supreme Court in *Monell* recognized that municipal responsibility for constitutional violations may result from the promulgation of a formal policy, acts or edicts by final decisionmakers, or a practice or custom that is so "persistent and widespread" as to have "the force of law."[65] A persistent practice may constitute a municipal policy whether carried out by municipal policymakers[66] or subordinates. When subordinates engage in a sufficiently widespread practice, the policymakers are deemed to have received actual or constructive notice and to have acquiesced in the practice.[67] In fact, a practice or custom may represent municipal policy even when it conflicts with an expressly articulated or formally promulgated policy. For example, in *City of St. Louis v. Praprotnik*[68] all of the justices appeared to accept the proposition "that a municipal charter's precatory admonition against discrimination" in employment would not insulate the municipality from a discriminatory practice that is inconsistent with the stated policy.[69] "Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced."[70]

There is, of course, no magical formula for determining whether the conduct of municipal officials was sufficiently persistent to constitute a custom or practice. Relevant factors include the longevity of the course of conduct, the number and percentage of officials involved and the gravity of the conduct.[71] Ultimately, each case must be evaluated on the basis

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[65] Monell v. Department of Social Services, 436 U.S. 635, 691 (1978) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)); *see also* City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

[66] A municipal policymaker is one who, under the state law, is given final decisionmaking authority. *Praprotnik*, 485 U.S. 112; Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

[67] *Praprotnik*, 485 U.S. at 130 ("It would . . . be a different matter if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware . . . . [T]he supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official."); SCHWARTZ & KIRKLIN, *supra* note 3, at § 7.8.

[68] 485 U.S. 112 (1988).

[69] *Id.* at 145, n.7 (Brennan, J., concurring); *see id.* at 130-31 (O'Connor, J.).

[70] *Id.* at 131 (O'Connor, J.).

[71] Eric Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213

of its own particular facts.

In *Sorlucco v. New York City Police Department*,[72] the Second Circuit considered the sufficiency of the evidence demonstrating that the New York City Police Department ("NYPD") had engaged in a pattern of disciplining probationary officers that discriminated against female officers. The plaintiff, Karen Sorlucco, had been a probationary police officer in the NYPD. In 1983, John Mielko, a tenured NYPD officer, brutally sexually assaulted her for some six hours in her Nassau County apartment.[73] Mielko had located Ms. Sorlucco's service revolver in her apartment, threatened her with it and fired it into her bed.[74]

Upon learning of the alleged attack, the NYPD made what might generously be described as a perfunctory investigation that culminated in departmental charges being filed against Ms. Sorlucco for failing to safeguard her service revolver and failing to report that it had been fired.[75] While this was occurring in New York City, Nassau County officials subjected her to vulgar and abusive treatment and, in fact, filed criminal charges against her for having falsely stated that she did not know the man who raped her. Ultimately, the NYPD fired Ms. Sorlucco for initially alleging and maintaining (for four days before she actually identified Mielko) that her attacker was simply named John, while Mielko, the accused rapist, subsequently retired from NYPD with his regular pension.[76]

Ms. Sorlucco brought suit under section 1983 alleging that her termination was the product of unlawful gender discrimination.[77] Her theory of municipal liability was that the NYPD engaged in a "pattern of disciplining probationary officers who had been arrested while on probation . . . in a discriminatory . . . manner based upon . . . gender."[78] Although the jury

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(1979).

[72] 971 F.2d 864 (2d Cir. 1992). Chief Judge Oakes and Judges Lumbard and Walker heard the case.

[73] *Id.* at 866.

[74] *Id.*

[75] *Id.* at 869-73.

[76] *Id.* at 869.

[77] She also brought suit under Title VII but that claim is beyond the scope of this Article.

[78] *Sorlucco*, 971 F.2d at 871. It should be noted that lower federal courts routinely hold that police and other law enforcement departments are not suable

rendered a verdict in favor of the plaintiff,[79] the district court granted NYPD's motion for judgment N.O.V., setting aside the verdict.[80] The district court found that there was no evidence linking the Police Commissioner to Ms. Sorlucco's discriminatory termination and "that no reasonable jury could infer an unconstitutional pattern or practice of gender discrimination from the evidence of disparate disciplinary treatment between male and female probationary officers who had been arrested."[81]

The Second Circuit, in a valuable opinion by Judge Walker, ruled that the district court erred in granting the NYPD judgment N.O.V., reversed the judgment and remanded with instructions to reinstate the jury verdict.[82] As to the district court finding that there was no evidence linking the Police Commissioner to Ms. Sorlucco's discriminatory termination, the court concluded that "[w]hile discrimination by the Commissioner might be sufficient, it was not necessary."[83] Although the court did not elaborate in much detail, what it undoubtedly meant was that although a final decision of a municipal *policymaker* provides a potential basis for imposing municipal liability,[84] so does a widespread custom or practice, even if carried out by subordinates.[85] Stated differently, mu-

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entities under § 1983, thus requiring the plaintiff to sue the county, town or city. *See, e.g.*, Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992); Fields v. District of Columbia, Department of Corrections, 789 F. Supp. 20, 22 (D.D.C. 1992); East Coast Novelty Co. v. City of New York, 781 F. Supp. 999, 1010 (S.D.N.Y. 1992); Chan v. Chicago, 777 F. Supp. 1437 (N.D. Ill. 1991); Stump v. Gates, 777 F. Supp. 808, 816 (D. Colo. 1991). In Dean v. Barber, 951 F.2d at 1214, after observing that "sheriff's departments and police departments are not usually considered legal entities subject to suit," the circuit court found the issue governed by Federal Rule of Civil Procedure 17(b), which provides that "capacity to sue or be sued shall be determined by the law of the state in which the district court is held." This issue, however, was not raised in *Sorlucco*.

[79] This jury verdict came after the Second Circuit had reversed the district court's grant of summary judgment to the defendants on the § 1983 and Title VII claims. Sorlucco v. New York City Police Dep't, 888 F.2d 4 (2d Cir. 1989).

[80] *Sorlucco*, 971 F.2d at 870 (describing the district court decision).

[81] *Id.*

[82] *Id.* at 875.

[83] *Id.*

[84] St. Louis v. Praprotnik, 485 U.S. 112, 121-31 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986).

[85] *Sorlucco*, 971 F.2d at 871 ("a § 1983 plaintiff may establish a municipality's liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior

nicipal liability may be based upon *either* a final decision of a municipal policymaker *or* a sufficiently persistent custom or practice. The one theory is not dependent on the other.

The district court's determination that no reasonable jury could infer a practice or gender based employment discrimination was the focal point of the Second Circuit's decision. Contrary to the district court's evaluation, the court found that Ms. Sorlucco introduced "sufficient evidence from which the jury could reasonably infer an unconstitutional NYPD practice of sex discrimination."[86]

Plaintiff's evidence can be broken down into three categories: (1) the way in which the NYPD investigated the plaintiff's complaint including, most significantly, the dramatically different ways it treated Mr. Mielko and Ms. Sorlucco;[87] (2) expert testimony from an experienced former NYPD lieutenant with Internal Affairs "that the department's investigation of Mielko was dilatory and negligent";[88] and (3) a statistical study prepared by the NYPD regarding actions taken against probationary officers who had been arrested between 1980 and 1985. During this period, 47 probationary officers were arrested, 12 of whom resigned. Of the remaining 35, 31 were male; 22 of the male officers were terminated and 9 reinstated. All 4 of the female officers who had been arrested were terminated.[89]

Having received this evidence, the court disagreed with the district court's conclusion that the study was "statistically insignificant" because only 4 female officers were fired. The 4 women represented over 10% of the 35 probationary officers who were disciplined. While 100% of the female officers were terminated, only 63% of the male officers were fired.[90]

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policymakers").

[86] *Id.* at 870.

[87] "The actions of two internal offices of the NYPD . . . , working independently of each other, could have been reasonably taken to indicate that, as between Sorlucco and Mielko, department officials reflexively assumed the former was lying because she was a woman." *Id.* at 872-73.

[88] *Id.*

[89] *Id.* at 871.

[90] *Id.* at 872. The district court also believed that the nine men who were reinstated were arrested for less serious charges than the four women who were fired. The Second Circuit however, stated that "the district court should not have substituted its judgment for that of the jury on this point. This type of analysis went to the weight of the statistical evidence presented, not its relevancy . . . ." *Id.*

Although the statistical evidence by itself in all likelihood would have been an insufficient basis upon which to find a discriminatory practice, there was sufficient evidence when the statistics are considered together with the expert testimony and evidence of the discriminatory treatment afforded Ms. Sorlucco.[91] The way the investigation of her complaint was handled made the cold statistics come alive, at least to the extent that the jury could rationally reach the result it did.[92]

Sorlucco is an important decision, principally because of its careful legal, factual and evidentiary analysis of the custom and practice issue. Relatively few lower court decisions have analyzed these issues with such care. A custom or practice will almost always depend upon the introduction of circumstantial evidence. The Second Circuit's decision sends a clear message to the district courts that they should not lightly take these issues from the jury. Finally, *Sorlucco* demonstrates how a plaintiff's counsel can creatively piece together a case of circumstantial evidence to demonstrate a constitutionally offensive practice.

C. *Inadequate Training*: Walker v. City of New York

The ink was barely dry on Judge Walker's opinion in *Sorlucco* when the Second Circuit issued another important municipal liability decision, *Walker v. City of New York*.[93] Judge Walker also authored this opinion, which focused upon plaintiff's claim of inadequate training.

Plaintiff Walker "spent nineteen years in prison for a crime that it now appears he did not commit. In 1971 [New York City] police officers and [Kings County] prosecutors covered up exculpatory evidence and committed perjury in order to insure Walker's conviction despite their knowledge of Walker's probable innocence."[94] After finally securing his release in state court in 1990, plaintiff brought suit for damages under section 1983, alleging that the conviction violated his constitutionally protected rights and was attributable to New

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[91] *See also* Watson v. Kansas City, 857 F.2d 690, 695 (10th Cir. 1988).

[92] *Sorlucco*, 971 F.2d at 872.

[93] 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1387, *and cert. denied*, 113 S. Ct. 1412 (1993). The panel included Judges Newman, Pratt and Walker.

[94] *Id.* at 294.

York City's deliberately indifferent training and supervision of its police officers and assistant district attorneys. "Specifically, Walker asserted that the City should have trained police officers and [Assistant District Attorneys ("ADAs")] not to commit or suborn perjury and not to suppress exculpatory evidence."[95]

The district court granted the City's motion to dismiss for failure to state a claim upon which relief could be granted, reasoning that the obligations not to commit or suborn perjury and to turn over exculpatory evidence were so obvious as to not require specific training.[96] Finding that the complaint pled proper failure to train and supervise claims, however, the Second Circuit reversed the dismissal of the complaint, relying in part on *City of Canton v. Harris*.[97]

In *City of Canton v. Harris*, decided eleven years after *Monell*, the Supreme Court resolved that a municipality's failure to train could provide the basis for imposing section 1983 municipal liability. The Court's unanimous decision, however, imposed especially stringent requirements upon section 1983 plaintiffs. The plaintiff must show (1) deliberately indifferent training policies and (2) that specific training deficiencies proximately caused the violation of the plaintiff's federally protected rights.[98]

The Court in *City of Canton* provided two examples in which training deficiencies might reflect a deliberate indifference that would result in violations of federally protected rights. First, there are situations in which the need for training is so obvious that a failure to train is very likely to result in violations of constitutionally protected rights as, for example, with respect to the constitutional limits on the use of deadly force mandated by *Tennessee v. Garner*.[99] "It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must

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[95] *Id.* at 295.

[96] *Id.* In the alternative, the district court found that any failure to train regarding exculpatory evidence "did not proximately cause Walker's injuries, since the police did turn over the exculpatory evidence to the prosecution and only the prosecutor had a duty to turn the evidence over to the defense." *Id.*

[97] 489 U.S. 378 (1989).

[98] *Id.* at 387-92. The same requirements apply to failure to supervise claims. SCHWARTZ & KIRKLIN, *supra* note 3, at § 710.

[99] 471 U.S. 1 (1985); *see City of Canton*, 489 U.S. at 390 n.10.

have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need."[100] Although many section 1983 claimants choose to hinge their municipal liability claims upon alleged inadequate training, relatively few ultimately succeed.[101] This is not particularly surprising given the "high degree of fault" that the plaintiff is required to demonstrate[102] and the Supreme Court's explicit admonition that federal courts not easily second-guess the wisdom of municipal training programs.[103]

The Second Circuit in *Walker* read *City of Canton* as imposing three requirements upon section 1983 claimants who allege a deliberately indifferent failure to train or supervise:

> First, the plaintiff must show that a policymaker knows 'to a moral certainty' that her employees will confront a given situation . . . . [A] policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events.
>
> Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation . . . .
>
> Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.[104]

In order to determine whether the complaint satisfied these standards, the court broke down the plaintiff's claims to those against the New York City Police Department and those against the Kings County District Attorney's office. Within each of these categories the court separated the claims concerning exculpatory evidence from those regarding perjured testimony.

Starting with the claims against the Police Department, the Second Circuit found that the district court had not erred in dismissing the claim regarding exculpatory evidence. Plaintiff alleged that the police had in fact turned over all exculpa-

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[100] *Harris*, 489 U.S. at 390 n.10.

[101] SCHWARTZ & KIRKLIN, *supra* note 3, at § 7.10 & 1993 Cumulative Supplement No. 2.

[102] *Harris*, 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part).

[103] *Id.* at 392.

[104] Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1387, *and cert. denied*, 113 S. Ct. 1412 (1993).

tory material to the prosecutors, which satisfied the Police Department's obligations under *Brady v. Maryland*.[105] The district court thus did not err in dismissing this part of the complaint. It erred, however, in dismissing the claim concerning perjured testimony. Under normal circumstances a municipality would not be considered deliberately indifferent in failing to train and supervise police officers not to commit or suborn perjury because this is such an obvious obligation that the failure to train or supervise would not likely result in deprivations of constitutionally protected rights.[106] But this reasoning does not apply where there is a history of wrongdoing, which negates the assumption that the subordinates have "common sense" and basic ethical values.[107] In these circumstances, the city would be deliberately indifferent in failing to train or supervise. Thus, the Second Circuit concluded that the plaintiff should be permitted to pursue discovery to determine whether there was a pattern of police officers committing, suborning or condoning perjury "sufficient to require the police department to train and supervise police officers to assure they tell the truth."[108]

Moving to the claims against the District Attorney's Office, the court found that the plaintiff had stated proper training-failure claims with respect to both the use of perjured testimony and withholding of exculpatory evidence. As with the Police Department, if there was a pattern of ADAs using perjured testimony, the City's failure to train, even for something as obvious as the obligation not to commit or suborn perjury, would constitute deliberate indifference. With regard to exculpatory material, it could not be said that in 1971, only seven years after *Brady* was decided, that the various "intricacies of *Brady*" were so obvious that no training or supervision was required.[109] Plaintiff, therefore, had adequately alleged deliberately indifferent training by the Kings County District Attorney.

There was an additional complication in *Walker*: whether the Kings County District Attorney was a municipal or a state

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[105] 373 U.S. 83 (1963).
[106] *Walker*, 974 F.2d at 299-300.
[107] *Id.* at 300.
[108] *Id.*
[109] *Id.*

policymaker. The answer to this question is critical because if he was a municipal policymaker, *Monell-Owen* municipal liability principles would control; on the other hand, if he was a state policymaker, the state's sovereign immunity guaranteed by the Eleventh Amendment would apply.[110]

Prior to *Walker*, the Second Circuit had held that when *prosecuting* criminal cases county district attorneys in New York act for the State, thereby implicating the Eleventh Amendment.[111] The court in *Walker*, however, determined that county district attorneys act as county policymakers when making administrative or managerial decisions, such as those involving the training and supervision of staff.[112]

Walker's significance lies primarily in the circuit court's careful and inciteful analysis of the training and supervision issues. The decision is particularly important because it sends a message that claims of inadequate training and supervision should not lightly be dismissed at the pleading stage.[113]

The Second Circuit's three municipal liability decisions rendered in 1992 cover a remarkable range of issues. They encompass the most frequently invoked bases for imposing municipal liability: formally promulgated polices (*Goldberg*), policymakers' decisions and customs and practices (*Sorlucco*), and inadequate training and supervision (*Walker*). The deci-

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[110] The Eleventh Amendment, which protects state government against a federal court award of retrospective monetary relief, does not protect local government. Missouri v. Jenkins, 495 U.S. 33, 55 n.20 (1990); Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Lincoln County v. Luning, 133 U.S. 529 (1890). This is true even for violations of federally protected rights. Edelman v. Jordan, 415 U.S. 651 (1974).

[111] Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989).

[112] *Walker*, 974 F.2d at 301, *relying upon* Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) (District Attorney acts as county policymaker with respect to discipline of subordinates).

One final complication in *Walker* stemmed from the fact that the plaintiff had sued the City of New York, not Kings County. The City conceded, however, that within their geographic domains the county district attorneys have final decisionmaking authority over training and supervision matters. The Kings County District Attorney thus acted as a City policymaker. *Walker*, 974 F.2d at 301.

[113] *See also* Ricciuti v. New York City Transit Authority, 941 F.2d 119 (2d Cir. 1991). Subsequent to the Second Circuit's decision in *Walker*, the Supreme Court rejected a "heightened" pleading requirement for § 1983 municipal liability claims. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993).

sions reflect both an understanding of the policies behind *Monell* and *Owen* as well as the difficulties facing section 1983 claimants seeking to establish municipal liability. They should provide significant guidance to both section 1983 litigants and to district courts within the Second Circuit.

II. ABSOLUTE IMMUNITY: *SPEAR V. TOWN OF WEST HARTFORD*

Although the Supreme Court has been "quite sparing in its recognition of claims to absolute official immunity[,]"[114] it has accorded absolute immunity from personal liability to officials carrying out legislative,[115] judicial[116] and prosecutorial[117] functions. In *Spear v. Town of West Hartford*,[118] the Second Circuit considered whether absolute immunity also shielded town officials who had instituted a RICO suit. The controversy had its genesis in an anti-abortion protest staged by Operation Rescue at a women's health facility in West Hartford, Connecticut. A few days later, an editorial written by John Spear criticizing the police department's efforts to disband the demonstrators appeared in a local newspaper.

The West Hartford Town Council passed a resolution authorizing the Town's Corporation Counsel, Marjorie Wilder, to take legal action to prevent these protests. "West Hartford brought suit in federal court to prohibit illegal protest activities. The suit, authorized by Wilder and acting Town Manager and Police Chief Robert McCue, named Spear among other defendants, and asserted RICO and nuisance claims . . . ."[119] Spear turned around and brought suit in federal court under section 1983 against, *inter alia*, Wilder and McCue in their personal capacities, alleging that the RICO suit was brought to retaliate against him for his editorial in violation of his First Amendment freedom of speech rights. The district court dis-

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[114] Forrester v. White, 484 U.S. 219, 224 (1988).

[115] Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Tenney v. Brandhove, 341 U.S. 367 (1951).

[116] Stump v. Sparkman, 435 U.S. 349 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872).

[117] Imbler v. Pachtman, 424 U.S. 409 (1976); *see also* Burns v. Reed, 111 S. Ct. 1934 (1991).

[118] 954 F.2d 63 (2d Cir.), *cert. denied*, 113 S. Ct. 66 (1992). Chief Judge Oakes and Judges Van Gaafeiland and Newman heard the case.

[119] *Id.* at 65.

missed the complaint, holding, *inter alia*, that Wilder and McCue were entitled to absolute immunity. The Second Circuit agreed with that conclusion.[120]

In an opinion by Chief Judge Oakes, the court relied heavily upon the rationale of *Butz v. Economou*,[121] which extended absolute prosecutorial immunity to executive officials who initiate administrative proceedings. The Court in *Butz* had reasoned that the official's decision to initiate administrative proceedings is akin to the prosecutor's decision to initiate a criminal prosecution. In both cases absolute immunity seeks to insure that the decision whether to initiate proceedings will not be influenced by the potential of monetary liability.

The court in *Spear* found that this rationale applies to an official's initiation of civil proceedings as well.[122] The court thus concluded that "when a high executive officer of a municipality authorizes a civil lawsuit in pursuit of that municipality's government interests, absolute immunity attaches."[123] The court noted that the Supreme Court's recent decision in *Burns v. Reed*[124] did not call for a different result. In that case, the Supreme Court ruled that prosecutors who gave legal advice to the police regarding the existence of probable cause to arrest could not claim absolute immunity, primarily because such advice was too far removed from the adjudicatory function. *Burns* does not require rejection of "absolute immunity for decisions to institute legal proceedings on behalf of the government."[125] Indeed, the decision in *Spear* appears to com-

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[120] The Second Circuit also ruled: (1) that the complaint failed to state a proper First Amendment claim because of plaintiff's "failure to allege any non-speculative chilling effect[;]" (2) the complaint failed to state a substantive due process claim because there was no allegation of conduct that "shocks the conscience[;]" (3) that a § 1983 claim may not be based upon "malicious abuse of process[;]" and (4) that there were no specific facts supporting plaintiff's claim of conspiracy between the health center and town officials. *Id.* at 67-68.

[121] 438 U.S. 478 (1978).

[122] The *Spear* court cited prior authority extending absolute immunity to government attorneys defending civil suits, Barrett v. United States, 798 F.2d 565, 572 (2d Cir. 1986), and to government attorneys who initiate civil suits. Augustyniak v. Koch, 588 F. Supp. 793, 797 (S.D.N.Y.), *aff'd*, 794 F.2d 676 (2d Cir. 1984), *cert. denied*, 474 U.S. 840 (1985). *Spear*, 954 F.2d at 66.

[123] *Spear*, 954 F.2d at 66. The court observed that if defendant McCue had not authorized the suit but was only a complaining witness "he would not receive absolute immunity." *Id.* (citing White v. Frank, 855 F.2d 956 (2d Cir. 1988)).

[124] 111 S. Ct. 1934 (1991).

[125] *Spear*, 954 F.2d at 68.

port with both the functional approach to common law immunities as well as the rationale of prosecutorial immunity applied in *Butz*.[126]

III. QUALIFIED IMMUNITY

Section 1983 claims are very frequently resolved on the basis of qualified immunity. Indeed, the qualified immunity defense may be asserted by any state or local official who is sued personally and charged with violating the plaintiff's federally protected rights in the course of carrying out an executive or administrative function.[127] This accounts for a very high proportion of all section 1983 claims. The qualified immunity defense understandably is very attractive to section 1983 defendants. It potentially enables them to obtain a pre-trial or even pre-discovery ruling disposing of the action as a matter of law without a judicial resolution of the merits of the plaintiff's constitutional claim. Moreover, a defendant whose pre-trial motion for summary judgment on qualified immunity grounds is denied may seek immediate review in the court of appeals if the immunity defense can be resolved as a matter of law.[128] It is not surprising, therefore, that attorneys and jurists involved in section 1983 litigation devote considerable attention to this defense.

The qualified immunity defense focuses upon whether the defendant-official violated clearly established federal law.[129] This seemingly straightforward inquiry and the right of immediate appeal on this supposedly "legal" question have generated a steady stream of difficult issues and ongoing problems in

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[126] *See also* Shoultes v. Laidlaw, 886 F.2d 114 (6th Cir. 1989) (prosecutorial immunity protected city attorney's decision to bring contempt proceeding and commencement of action to enforce zoning ordinance authorizing criminal penalties). *But see* Canell v. Oregon Dep't of Justice, 811 F. Supp. 546, 551-52 (D. Or. 1993) (state attorneys who instituted suit to collect debt not entitled to absolute immunity; absolute immunity appropriate only when attorneys commence proceedings inherently governmental in nature, not when acting as a common creditor to collect a debt).

[127] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982); *accord* Hunter v. Bryant, 112 S. Ct. 534 (1991); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986).

[128] Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

[129] *See* cases cited *supra* note 126.

administration. The Second Circuit, like other circuit courts, has been inundated with a large volume of qualified immunity appeals, many of which present difficult issues. Application of qualified immunity has proven to be as elusive in the Second Circuit as elsewhere. Before tackling the Second Circuit's experiences with the qualified immunity defense in 1992,[130] however, a review of the evolution of the qualified immunity defense in the United States Supreme Court is necessary.

A. *The Supreme Court's Qualified Immunity Decisions*

1. The Rulings

A logical starting point is the Supreme Court's 1975 ruling in *Wood v. Strickland*[131] that qualified immunity has both objective and subjective components. Under this approach, an official who either took action that a reasonable person should have known was unconstitutional (the objective prong), or maliciously intended to cause a deprivation of federally protected rights or other injury (the subjective prong) was not protected by qualified immunity. But by the time the immunity issue came before the Supreme Court in 1982 in *Harlow v. Fitzgerald*,[132] the Court was convinced that *Wood's* subjective prong was incompatible with qualified immunity's primary goal of weeding out insubstantial claims during the pre-trail stage.[133] The section 1983 claimant could easily *plead* that the defendant-official had acted with a malicious intent, a factual issue, thereby enmeshing the official in potentially "broad ranging discovery" and, very likely, a trial.[134] The

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[130] Because of the importance of the qualified immunity defense, the discussion will include three important decisions rendered during the latter part of 1991 and reported in 1992: Golino v. City of New Haven, 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992); Moffitt v. Town of Brookfield, 950 F.2d 880 (2d Cir. 1991); and Napolitano v. Flynn, 949 F.2d 617 (2d Cir. 1991).

[131] 420 U.S. 308 (1975).

[132] 457 U.S. 800 (1982). Although *Harlow* was a *Bivens* action against a federal official, *see* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Court applies the same immunities standards in *Bivens* actions as it does in § 1983 actions. *Harlow*, 457 U.S. at 818 n.30; *accord* Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986).

[133] *Harlow*, 457 U.S. at 815-16.

[134] *Id.* at 816-18; *see* Wyatt v. Cole, 112 S. Ct. 1827, 1832 (1992).

Harlow Court therefore eliminated the subjective malice prong and defined qualified immunity solely by reference to a standard of objective reasonableness: did the official "violate 'clearly established' [federal] statutory or constitutional rights of which a reasonable person would have known."[135] This issue was intended to be a question of law for the district court to decide as early in the litigation as possible.[136]

There were two especially important post-*Harlow* developments in the Supreme Court. In *Anderson v. Creighton*,[137] the Court ruled that application of Harlow immunity requires an evaluation of the specific federal right in light of the particular factual circumstances. It is not sufficient, for example, to talk about a "clearly established"[138] right to due process of law. Rather, the proper inquiry is whether the defendant's specific conduct violated a clearly established principle of due process.[139] There is often a tension, however, between *Anderson's* fact-specific issue-specific focus and *Harlow's* purpose of resolving the immunity defense resolved as a matter of law prior to any significant development of the facts.

The other major post-*Harlow* development was the Court's holding in *Mitchell v. Forsyth*[140] that, as an exception to the federal courts' final judgment rule, a district court's denial of qualified immunity is immediately appealable if the immunity defense can be determined as a matter of law. Because qualified immunity "is an *immunity from suit* rather than a mere defense to liability[,] . . . it is effectively lost if a case is erroneously permitted to go to trial."[141] Thus, "a district court's de-

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[135] *Harlow*, 457 U.S. at 818.

[136] Hunter v. Bryant, 112 S. Ct. 534, 536 (1991).

[137] 483 U.S. 635 (1987).

[138] *See, e.g., infra* notes 145-146 and accompanying text.

[139] *Anderson*, 483 U.S. at 639. The Court in *Anderson* stated:

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

Id. at 640.

[140] 472 U.S. 511 (1985).

[141] *Id.* at 526.

nial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. section 1291, notwithstanding the absence of a final judgment."[142] The impact of the *Mitchell* right of immediate appeal cannot be overstated. Defendants are pursuing these appeals in record numbers. The appeal effectively puts the case pending in the district court on hold while the interlocutory appeal is processed.[143] Additionally, the right to an interlocutory appeal may mean that the plaintiff will have to shoulder the burden and expense of multiple appeals.[144]

2. Difficulties at Large

At first glance the Supreme Court's qualified immunity case law appears to articulate a fairly workable set of principles. After all, the Court has established an objective legal standard to which it has devoted a good deal of attention. Thus, it might seem that the lower courts need only apply this objective standard to the facts of the particular case before them. But the simplicity is deceiving. The overriding problem is the Supreme Court's insistence that the immunity defense be decided as a matter of law, when the reality is that factual issues must frequently be resolved in order to determine whether the defendant violated clearly established federal law.[145] It is one thing to apply an objective legal principle

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[142] *Id.* at 530. The order is appealable under the "collateral order" doctrine. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

[143] Aposstol v. Gallion, 870 F.2d 1335 (7th Cir. 1989).

[144] Additionally, there are several other important post-*Harlow* Supreme Court rulings. *See, e.g.*, Wyatt v. Cole, 112 S. Ct. 1827 (1992) (private party state actor who utilized a prejudgment remedy could not claim qualified immunity); Hunter v. Bryant, 112 S. Ct. 534 (1991) (reaffirming that qualified immunity is an issue of law to be decided by the district court at the earliest possible time and should not be "routinely" put to the jury); Siegert v. Gilley, 111 S. Ct. 1789 (1991) (holding that before resolving the immunity defense court must first determine whether the plaintiff has asserted a violation of a constitutional right); Anderson v. Creighton, 483 U.S. 635 (1987) (applying *Harlow* to warrantless arrests and searches); Malley v. Briggs, 475 U.S. 335 (1986) (applying *Harlow* qualified immunity to warrant applications); Davis v. Scherer, 468 U.S. 183 (1984) (official's violation of clearly established *state* law is irrelevant under *Harlow*, as the pertinent inquiry is whether the defendant violated clearly established *federal* law).

[145] *See* Karen Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 207 (1993).

once the facts are found. It is quite another matter to apply it before the facts are found.

There are other significant recurring difficulties surrounding the *Harlow* defense as well. For example, the Supreme Court has provided very little guidance on how to evaluate whether the federal law was "clearly established." As a result, the circuit courts are not in accord as to what body of law should be considered and "[e]ven within the same circuit, there is not always agreement on whether the contours of the right have been clearly established."[146] Also, application of *Harlow's* purely objective standard has been especially awkward in cases where intent or motive is an element of the constitutional claim,[147] as well as in cases where objective reasonableness is itself the constitutional standard.[148] Additionally, it is often far from clear whether an interlocutory appeal from a district court's denial of qualified immunity turns on an issue of law, an issue of fact or mixed issue of law and fact.[149] Finally, even assuming that there is a right of immediate appeal, there is much disagreement over the issues that can be raised on the appeal.[150] Thus, a lower court faced with a qualified immunity defense cannot apply *Harlow* by rote, as evidenced by the Second Circuit's 1992 decisions.

B. *The Second Circuit Experience*

In six qualified immunity decisions, the Second Circuit grappled with both issues of appealability and the underlying merits of immunity claims.

1. Appealability

All six of the Second Circuit's qualified immunity decisions reported in 1992 came to the court on interlocutory appeal from the district court's denial of the defendant's summary

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[146] *Id.* at 202; *see also* SCHWARTZ & KIRKLIN, *supra* note 3, § 9.20, at 534.

[147] SCHWARTZ & KIRKLIN, *supra* note 3, § 9.18, at 530; *see infra* notes 236-52 and accompanying text.

[148] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635 (1987) (warrantless searches and arrests); Posr v. Doherty, 944 F.2d 91 (2d Cir. 1991) (excessive force claim).

[149] *See infra* notes 155-235 and accompanying text.

[150] *See* SCHWARTZ & KIRKLIN, *supra* note 3, § 9.26, at 581.

judgment motion. Of these one was affirmed,[151] three were reversed[152] and two were dismissed because resolution of the qualified immunity issue required a determination of factual issues.[153] One should not, however, read too much, if anything, into this statistical breakdown of reported decisions because there is a strong likelihood that there were a large number of affirmances in non-published summary orders.[154]

In each decision, the court held true to *Anderson v. Creighton's*[155] mandate that the court evaluate the federal law in light of the specific facts of the case. The court paid close attention to the facts in cases in which the immunity defense was appealable because it turned on an issue of law, as well as in those cases in which the order denying immunity was found to be non-appealable because the defense turned on factual issues.

In *Moffitt v. Town of Brookfield*,[156] the plaintiff, a former police officer, alleged that he was forced to resign in violation of his right to procedural due process. The district court denied the defendant-Police Commissioners' motion for summary judgment on immunity grounds because their entitlement to qualified immunity depended upon the resolution of material issues of fact. The critical issue on appeal was the propriety of this conclusion. The Second Circuit found that because factual issues had to be resolved in order to determine the defendant Commissioners' qualified immunity defense, the defendants had no right to an immediate appeal. Specifically, because of the section 1983 rule against respondeat superior liability,[157] the Commissioners, as supervisory officials, could be held lia-

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[151] Golino v. City of New Haven, 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992).

[152] Cecere v. City of New York, 967 F.2d 826 (2d Cir. 1992); Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992); Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992).

[153] DiMarco v. Rome Hosp. and Murphy Memorial Hosp., 952 F.2d 661 (2d Cir. 1992); Moffitt v. Town of Brookfield, 950 F.2d 880 (2d Cir. 1991).

[154] *See* 2D CIR. R. § 0.23.

[155] 483 U.S. 635 (1987).

[156] 950 F.2d 880, 881 (2d Cir. 1991).

[157] Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). The rule established in *Monell* for § 1983 municipal liability applies in § 1983 actions generally, including those in which supervisory liability is at issue. SCHWARTZ & KIRKLIN, *supra* note 3, §§ 6.4, 7.11; *see also* Kentucky v. Graham, 473 U.S. 159, 166 (1985); Rizzo v. Goode, 423 U.S. 362 (1976).

ble only for their own wrongs; that is, for their personal involvement in the plaintiff's resignation. There were, however, genuine issues of material fact concerning the Commissioners' involvement in plaintiff's employment termination. The court thus dismissed their appeal for lack of appellate jurisdiction.[158]

As in *Moffitt*, the appeal in *DiMarco v. Rome Hospital and Murphy Memorial Hospital*[159] was dismissed for lack of jurisdiction because of the presence of factual issues material to the immunity defense. In that case, the plaintiff-physician claimed that the defendant-hospital had denied him the privilege of performing "esophageal dilation" in retaliation for his "whistle blowing," thereby violating the First Amendment.[160] In an opinion by Judge Pratt, the court read *Mitchell v. Forsyth*[161] as meaning that an immediate appeal lies only if the qualified immunity defense can be determined as a matter of law. "If resolution of the immunity defense depends upon disputed factual issues, or upon mixed questions of fact and law, an immediate appeal will not lie, and review of the qualified immunity determination will have to await the district court's resolution of the factual questions."[162]

Claims by public employees like Dr. DiMarco that adverse action was taken against them because of protected First Amendment activity require an evaluation of (1) whether the employee spoke out on a matter of public, and not merely private concern[163] and (2) if so, whether, under *Pickering v. Board of Education*'s balancing formula,[164] the employee's interest in freedom of expression outweighs the government's interest in effective and efficient government operations. Undoubtedly, these are "fact-sensitive" matters.[165] In spite of the well established legal principles governing the plaintiff's First Amendment claim, there were disputed factual issues that had

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[158] *Moffitt*, 950 F.2d at 886.

[159] 952 F.2d 661 (2d Cir. 1992).

[160] *Id.* at 662.

[161] 472 U.S. 511 (1985).

[162] *DiMarco*, 952 F.2d at 665 (citing Second Circuit decisions). Judges Mahoney and McLaughlin joined in the opinion.

[163] Connick v. Myers, 461 U.S. 138, 139 (1983).

[164] Pickering v. Board of Educ., 391 U.S. 563 (1968).

[165] *DiMarco*, 952 F.2d at 665; *see also* Grady v. El Paso Community College, 979 F.2d 1111 (5th Cir. 1992).

to be resolved in order to decide the First Amendment claim. "Since the qualified immunity issue is 'inextricably bound up with the merits' of DiMarco's claim, those merits should be determined first by the district court."[166] The court explained the significance of the factual issues to the merits which, in turn, were critical to resolution of the immunity issue:

> The facts as developed at trial may show that DiMarco was so disruptive to the efficient and effective operation of the hospital that a reasonable and prudent hospital and staff could not have anticipated that their actions violated DiMarco's First Amendment rights. Alternatively, the facts may show disruption so minimal that a reasonable and prudent hospital and staff would have to anticipate that disciplining DiMarco was in retaliation for protected speech. Since "the immunity question cannot be decided without addressing [DiMarco's] underlying claims on the merits," . . . the claim of qualified immunity does not "turn[ ] on an issue of law," . . . and the appeal must be dismissed.[167]

DiMarco, then, is an excellent illustration of the difficulties that often exist in separating the immunity defense from the merits. There was no serious dispute concerning the governing legal principles; rather, the parties disagreed about what took place. The defendants in essence raised the "I didn't do it defense[,]"[168] a highly predictable position when a plaintiff alleges to have been victimized by an official's retaliatory conduct.

Moffitt and *DiMarco* demonstrate that when the Second Circuit is convinced that there are disputed factual issues which are material to the immunity defense, it will reject jurisdiction over the interlocutory appeal and dispose of it by dismissing the appeal. The dismissals in *Moffitt* and *DiMarco*, however, occurred only after the Second Circuit had written full opinions carefully analyzing the qualified immunity defense. Although the appeals were technically dismissed for lack of appellate jurisdiction,[169] the court in each case acknowl-

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[166] *DiMarco*, 952 F.2d at 666 (quoting Bolden v. Alston, 810 F.2d 353, 356 (2d Cir.), *cert. denied*, 484 U.S. 896 (1987)).

[167] *Id.* The court stressed, however, that its ruling should not be read as meaning that all public employees' free speech claims "will elude pretrial determination of qualified immunity." *Id.* (citing Giacalone v. Abrams, 850 F.2d 79, 86 (2d Cir. 1988)).

[168] *See* Henry v. Perry, 866 F.2d 657, 659 (3d Cir. 1989) (Sloviter, J., concurring); Chinchello v. Fenton, 805 F.2d 126, 131 (3d Cir. 1986) (dicta).

[169] A circuit court's dismissal of an appeal for lack of appellate jurisdiction is

edged agreement with the district court's conclusion that the existence of material issues of fact called for denial of immunity. Therefore, the court's dismissals of the appeals operated pragmatically as an affirmance of the district court's determination that the presence of factual issues required denial of qualified immunity on summary judgment.[170]

It is not always clear, however, whether the immunity defense depends upon disputed factual issues. In *Cartier v. Lussier*,[171] the plaintiffs claimed that the defendant-police officers' affidavits did not establish probable cause to arrest them. The officers moved for summary judgment on the ground of qualified immunity, but the district court found that factual disputes called for denial of the motion. The Second Circuit disagreed, stressing that only *material* issues of fact justify denial of qualified immunity. "Whether disputed facts are material to resolving the applicability of [qualified immunity] is a legal question subject to [the court of appeals'] *de novo* review."[172] The court ultimately concluded that the officer was entitled to qualified immunity, reversed the district court's denial of his summary judgment motion and directed the district court to dismiss the complaint.[173]

In *Cecere v. City of New York*,[174] the plaintiff challenged the temporary removal of her child from their home by the defendants, who were social services officials. Defendant Puryear, a supervisory official, moved for summary judgment on the ground of qualified immunity, but the district court denied the motion, finding the presence of material issues of fact. A majority of the Second Circuit[175] disagreed with that assessment. Given Puryear's supervisory role and the necessity

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not regarded as a ruling on the merits of the appeal. PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983); Elsenbein v. Gulf & W. Indus., 590 F.2d 445, 449 (2d Cir. 1978). Therefore, as a technical matter, such a dismissal would not operate as the "law of the case," whereas an affirmance of the denial of immunity would be the law of the case.

[170] *See* Harris v. Coweta County, 5 F.3d 507, 509 (11th Cir. 1993) ("seems to be no difference in the effect of the litigation" whether appeal from denial of qualified imunity is affirmed or dismissed).

[171] 955 F.2d 841 (2d Cir. 1992).

[172] *Id.* at 844.

[173] *Id.* at 847. For an analysis of the application of qualified immunity in *Cartier*, see *infra* notes 229-35 and accompanying text.

[174] 967 F.2d 826 (2d Cir. 1992).

[175] Judge Newman, joined by Judge Winter, wrote for the court.

that he rely upon the evaluations of his subordinates, the court found "that Puryear's belief that an emergency situation existed was objectively reasonable."[176] Judge Lumbard, however, dissented, finding that disputed factual issues had to be resolved in order to decide the immunity defense. Because he could not "find as a matter of law that it was objectively reasonable for Puryear to believe that an emergency existed, . . . the appeal must be dismissed."[177] All told, of the four federal court judges who considered the immunity defense in *Cecere*, two thought there were no material issues of fact while two others thought otherwise.

The issue of whether the defendant official has a right of immediate appeal if she is denied qualified immunity on a state law claim came before the Second Circuit in *Napolitano v. Flynn*.[178] In that case the plaintiff alleged a section 1983 claim, which he conceded on appeal to be without merit, and a Vermont State law claim that was supported by diversity jurisdiction.[179] In holding that the district court's denial of immunity is immediately appealable, the Second Circuit, in an opinion by Judge McLaughlin,[180] found that although state law determined the scope of immunity on the state law claim, federal law determined the appealability of the district court's order. Under federal law, however, appealability turned "on whether Vermont law, like federal law, holds that qualified immunity is an immunity from suit rather than simply a defense to substantive liability."[181] Because Vermont law considered its qualified immunity an immunity from suit, and not just from liability, the court found the denial of qualified immunity immediately appealable.[182] Finding that the officers had not violated clearly established state law, the court held

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[176] *Cecere*, 967 F.2d at 829.

[177] *Id.* at 830 (Lumbard, J. dissenting).

[178] 949 F.2d 617 (2d Cir. 1991).

[179] In the typical § 1983 case the state law claim falls within the federal court's pendent jurisdiction or, as it is now called, supplemental jurisdiction. 28 U.S.C. § 1367 (1990).

[180] Judges Walker and Cardamone joined the opinion.

[181] *Napolitano*, 949 F.2d at 621.

[182] *Id.* at 618; *cf.* Brown v. Grabowski, 922 F.2d 1097 (3d Cir. 1990) (denial of state law immunity not immediately appealable because immunity was not immunity from suit), *cert. denied*, 111 S. Ct. 2827 (1990), *and cert. denied*, 111 S. Ct. 2827 (1991).

that the officers were protected by the state law immunity, reversed the order of the district court and remanded the action to the district court with instructions to grant summary judgment to the defendant-officers.

Finally, the Second Circuit's decision in *Golino v. New Haven*[183] provides an illustration of the wide range of potentially difficult issues concerning the appealability of an interlocutory order denying qualified immunity. Anthony Golino had been arrested pursuant to a warrant and charged in Connecticut Superior Court with murder. The trial court, following a preliminary evidentiary hearing, found probable cause to support the murder charge. Ultimately, as a result of a blood test substantiating Golino's claim of innocence, the murder charge was dropped. Golino then brought a section 1983 suit in federal court against the arresting officers and several others. His constitutional claims focused upon the alleged lack of probable cause to arrest him. The officers moved for summary judgment on qualified immunity and collateral estoppel grounds. The district court denied the motion on the grounds that factual issues precluded resolution of qualified immunity on summary judgment, and found collateral estoppel inapplicable because Golino was not given an adequate opportunity to litigate the probable cause issue in the preliminary hearing.[184] The defendant-officers appealed the denial of their summary judgment motion, arguing that the district court had erred in rejecting their immunity and preclusion defenses.

The Second Circuit first tackled the issue of appealability, which presented some especially sticky issues. In an opinion by Judge Kearse, the court noted that a district court's denial of qualified immunity "is immediately appealable where the district court has rejected the defense as a matter of law [,]" but not where it has determined that the "immunity defense requires resolution of genuinely disputed questions of material fact . . . ."[185] This is not entirely accurate. Read literally, it would mean that an immediate appeal would never lie whenever the district court denies a summary judgment motion on

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[183] 950 F.2d 864 (2d Cir. 1991).

[184] Golino v. City of New Haven, 761 F. Supp. 962 (D. Conn. 1991).

[185] *Golino*, 950 F.2d at 868. Joining in the opinion were Judges Kaufman and McLaughlin.

immunity grounds because it finds disputed issues of material fact. Rather, because the court of appeals has the authority to determine its own jurisdiction,[186] it can determine whether the district court *correctly* found that the qualified immunity defense depended upon the resolution of disputed issues of fact.[187] If the court finds that the district court was wrong and that the immunity issue can be decided as a matter of law, the district court's order is immediately appealable.[188] Thus, the more accurate principle of appealability is that the court of appeals has jurisdiction to review the district court's denial of immunity to the extent that the court of appeals can decide the immunity defense as a matter of law.[189]

Nevertheless, the Second Circuit in *Golino* stated that because the district court found factual issues pertaining to the immunity defense, namely whether it was objectively reasonable for the officers to believe they had probable cause, the "ruling is not, in principle, immediately appealable."[190] It is not clear what the court meant by "in principle." In any case, this statement is erroneous since the court could determine whether the district court's conclusion concerning the existence of material issues of fact was correct.[191] The court, however, found an alternate route to appealability. There were no questions of fact relating to the preclusion defense, which was directly related to the immunity defense. This is because if the state court's finding of probable cause was binding in the federal court action, it would mean both that there was no violation of constitutional rights and, of course, that defendants could not have violated clearly established constitutional

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[186] Sierra Club v. Yeutter, 911 F.2d 1405, 1421 (10th Cir. 1990); Bouchet v. National Urban League, 730 F.2d 799, 805 (D.C. Cir. 1984); Roth v. McAllister Bros., 316 F.2d 143, 145 (2d Cir. 1963).

[187] *But see* Blum, *supra* note 145, at 215 ("Some confusion and conflict exists about the availability of interlocutory appeal when qualified immunity has been denied because of material issues of fact in dispute.").

[188] *See* Cecere v. City of New York, 967 F.2d 826 (2d Cir. 1992); Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992); Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992).

[189] *Golino*, 950 F.2d at 868 ("Thus, we have jurisdiction to review appellants' immunity defense only to the extent that it can be decided as a matter of law.").

[190] *Id.*

[191] *Cartier*, 955 F.2d at 842 ("We think rather the rule is when, as here, the factual disputes are immaterial to resolving the qualified immunity issue, its protective mantle remains undissolved.").

law.[192] Thus, the denial of immunity was appealable to the extent that it turned on the purely legal preclusion issue.[193]

To the extent that the immunity defense raised factual issues, the court ruled that it could exercise pendent appellate jurisdiction over these related questions. Because there was a close relationship between the collateral estoppel immunity issue and the "factual" aspect of the immunity defense, the court exercised its discretion in favor of assuming pendent jurisdiction "to review the district court's ruling that there exist material questions of fact" concerning the probable cause immunity defense.[194] The Supreme Court, however, has never sanctioned the doctrine of pendent appellate jurisdiction and the circuit courts are in conflict on the issue.[195] The Second Circuit itself has sent out inconsistent signals.[196] Nevertheless, having assumed jurisdiction over the interlocutory appeal in *Golino*, the Second Circuit agreed with the district court's rejection of the preclusion defense and its determination that material factual issues pertaining to probable cause prevented resolution of the immunity defense as a matter of law. It thus upheld the district court's denial of qualified immunity.[197]

2. Applying Qualified Immunity

Once a court of appeals has determined that the qualified immunity defense can be decided as a matter of law, it must address the merits of the defense. In 1992, the Second Circuit applied qualified immunity in two especially difficult contexts, applications for arrest warrants and allegations of retaliatory

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[192] *Golino*, 950 F.2d at 868 (citing Siegert v. Gilley, 111 S. Ct. 1789 (1991)).

[193] *Id.*

[194] *Id.* at 869.

[195] *See* SCHWARTZ & KIRKLIN, *supra* note 3, § 9.26, at 586 and 1993 Cumulative Supplement No. 1.

[196] *See, e.g.*, Natale v. Town of Ridgefield, 927 F.2d 101, 104 (2d Cir. 1991) (doctrine should be "rarely" used); Francis v. Coughlin, 849 F.2d 778, 780-81 (2d Cir. 1988) (rejecting the doctrine); San Filippo v. United States Trust Co., 737 F.2d 246 (2d Cir. 1984) (applying the doctrine), *cert. denied*, 470 U.S. 1035 (1985). Of course where there is no right to an interlocutory appeal on any issue, there is no occasion to consider the issue of pendent appellate jurisdiction. *See* DiMarco v. Rome Hosp. and Murphy Memorial Hosp., 952 F.2d 661, 666 (2d Cir. 1992); Moffitt v. Town of Brookfield, 950 F.2d 880, 886-87 (2d Cir. 1991).

[197] This Article returns to *Golino* in the next section for its application of qualified immunity to plaintiff's claim of arrest without probable cause.

motive.

a. *Arrests and Reasonableness:* Golino v. New Haven and Cartier v. Lussier

As discussed previously, *Harlow v. Fitzgerald*[198] and its progeny[199] defined qualified immunity by the purely objective standard of whether the official violated clearly established federal law. The Supreme Court has applied this objective reasonableness standard even when the governing constitutional standard itself is one of objective reasonableness. Consider, for example, the Fourth Amendment in which a reasonableness standard forms the basis of inquiry into whether there exists probable cause to support a search[200] or an arrest.[201] The subjective good faith of the officer who performed the search or arrest is irrelevant to the determination of probable cause.[202] The Supreme Court has rendered important decisions applying qualified immunity in cases where officers act without a warrant and in cases in which officers apply for warrants.

In *Anderson v. Creighton*,[203] the Supreme Court held that qualified immunity applies to warrantless searches and, by logical extension, warrantless arrests.[204] *Anderson's* application of qualified immunity to warrantless arrests and searches means that an officer who acted without probable cause is shielded from liability so long as she reasonably believed there

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[198] 457 U.S. 800 (1982).

[199] *See, e.g.*, Hunter v. Bryant, 112 S. Ct. 534 (1991); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986).

[200] A search may be conducted only if there is probable cause, which is defined as a *reasonable* ground to believe that items connected with criminal activity will be found in the place searched. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.3, at 138 (2d ed. 1992).

[201] Arrests must also be supported by probable cause. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 57, at 116 (Matthew Bender 1991). Probable cause to arrest exists if the facts available to the officer at the time of the arrest would warrant a person of reasonable prudence to believe that an offense had been committed. Hunter v. Bryant, 112 S. Ct. 534, 537 (1991); Beck v. Ohio, 379 U.S. 89, 91 (1964); Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992); Calamia v. New York, 879 F.2d 1025, 1032 (2d Cir. 1989).

[202] *Beck*, 379 U.S. at 97.

[203] 483 U.S. 635 (1987).

[204] *See Hunter*, 112 S. Ct. at 534 (applying *Andersen* to a warrantless arrest).

was probable cause. Put differently, the officer is protected if her decision about probable cause, though mistaken, was reasonable.[205] The Court thus asks whether the officer was reasonably unreasonable[206] and, accordingly, gives the officer two bites at the apple to show reasonableness: one under the Fourth Amendment probable cause test and one under qualified immunity.[207]

The Supreme Court in *Malley v. Briggs*[208] analyzed the application of qualified immunity to law enforcement officers who apply for arrest warrants, and, logically, search warrants.[209] Under the *Harlow* objective reasonableness test, the pertinent inquiry is "whether a reasonably well-trained officer in [the officer's] position would have known that his affidavit [in support of the warrant] failed to establish probable cause . . . ."[210] It follows, therefore, that neither the officer's belief that the facts in his affidavit were true, nor the magistrate's issuance of the warrant on the basis of the affidavit, automatically shields the officer from liability. On the other hand, allegations of malice will not defeat qualified immunity because, under *Harlow*, the officer's state of mind is irrelevant. Thus, an officer "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized."[211] This is another double reasonableness defense. Initially, the officer's affidavit in support of the warrant application must establish probable cause (a reasonableness standard), but even if it did not, there exists qualified immunity if an officer reasonably believed that there was probable cause.

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[205] *Id.* at 537.

[206] *See* SCHWARTZ & KIRKLIN, *supra* note 3, § 9.22, at 554.

[207] Anderson v. Creighton, 483 U.S. 635, 648, 659-67 (1987) (Stevens, J., dissenting).

[208] 475 U.S. 335 (1986).

[209] *Id.* at 344 n.6 (although *Malley* dealt with application for arrest warrant, "the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant").

[210] *Id.* at 344.

[211] *Id.* at 345.

In two Second Circuit cases—*Golino v. New Haven*[212] and *Cartier v. Lussier*[213]—the court applied the qualified immunity defense to claims that police officers who applied for arrest warrants deliberately omitted or misrepresented material facts. Although *Malley* did not specifically address this question,[214] the *Malley* Court may have had this situation in mind when it concluded that qualified rather than absolute immunity will better serve the judicial process because qualified immunity may motivate officers to reflect upon whether their affidavits in support of warrants reasonably establish probable cause.[215]

The Second Circuit's decisions demonstrate the difficulties involved in applying qualified immunity to claims that law enforcement officers deliberately omitted or misrepresented material facts in their supporting affidavits. In *Golino*, the plaintiff alleged that the arresting officers' warrant application did not establish probable cause. The district court denied defendant's summary judgment motion on qualified immunity grounds because of the presence of material factual issues. After considering the appealability issue, the Second Circuit analyzed the immunity defense and agreed with the district court's assessment regarding the need to resolve factual issues. The court first described qualified immunity as protecting police officers "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,[216] . . . *or* insofar as it was objectively reasonable for them to believe that their acts did not violate those rights[.]"[217] Although described as alternative inquiries, the

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[212] 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992).

[213] 955 F.2d 841 (2d Cir. 1992); *see also* Magnotti v. Kuntz, 918 F.2d 364 (2d Cir. 1990).

[214] *See* Olson v. Tyler, 825 F.2d 1116, 1120-21 (7th Cir. 1987) (dicta).

[215] Malley v. Briggs, 475 U.S. 335, 343-44 (1986).

[216] *Golino*, 950 F.2d at 870 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[217] *Id.* at 870 (emphasis added). On other occasions the Second Circuit has described the qualified immunity test as potentially involving three pertinent inquiries:

> A defendant may establish a right to qualified immunity by showing that it was not clear at the time of the official acts that the interest asserted by the plaintiff was protected by a federal statute or the Constitution; or that it was not clear at the time of the acts at issue that an exception did not permit those acts; or that it was objectively reasonable for the

inquiries are more accurately considered as two different formulations of the same principle. In *Harlow,* the Court referred to "the objective reasonableness of an officer's conduct, as measured by reference to clearly established law" and to the "'clearly established' statutory or constitutional rights of which a reasonable person would have known."[218] Thus, under the *Harlow* test, an officer who violated clearly established federal law did not act in an objectively reasonable manner.

In any event, the *Golino* court then articulated the *Harlow-Malley* standard with respect to arresting officers: "an arresting officer is entitled to qualified immunity . . . if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met."[219] Again, while phrased as alternatives, the standard is merely two ways of stating the same test.

The court then addressed the specific issue of the liability of police officers who apply for arrest warrants. Generally, a magistrate's issuance of a warrant justifies a presumption that the applying officer was objectively reasonable in believing there was probable cause.[220] This presumption can be overcome, however, by a showing that the officer intentionally or recklessly made false statements or omissions of material facts.[221] Indeed, the Supreme Court recognized a Fourth Amendment right to be free from warrant applications that intentionally mistate material facts in *Franks v. Delaware.*[222] This holding logically extends to intentional omissions of material facts as well.[223] *Golino* accordingly recognized that an officer who knows or has reason to know that she "has *materially* misled a magistrate on the basis for a finding of probable

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officer to believe that his acts did not violate plaintiff's rights.

Krause v. Bennett, 887 F.2d 362, 368 (2d Cir. 1989) (quoting Robinson v. Via, 821 F.2d 913, 920-21 (2d Cir. 1987)).

[218] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[219] *Golino*, 950 F.2d at 870.

[220] *Id.*

[221] *Id.* at 871 ("[R]ecklessness may be inferred where the omitted information was critical to the probable cause determination[.]") (relying upon Franks v. Delaware, 438 U.S. 154, 155-56 (1978)).

[222] 438 U.S. 154 (1978).

[223] Olson v. Tyler, 771 F.2d 277, 281 n.5 (7th Cir. 1985); Supreme Video v. Schauz, 808 F. Supp. 1380, 1394 (E.D. Wis. 1992).

cause" is not protected by qualified immunity.[224] The key word here is "material."[225] Following *Franks v. Delaware*, the Second Circuit engages in a "correcting process" to determine whether, after eliminating the material misstatements and adding the material omissions, the corrected affidavit nevertheless contains facts sufficient to establish probable cause.[226] This type of harmless error analysis seeks to assess the likely impact of the misstated and omitted facts on the question of probable cause.[227]

Applying this corrective process, the *Golino* court found that: (1) the record showed that the defendant-officers deliberately withheld highly significant information; (2) disclosure of the withheld information might well have led the state court to find no probable cause; and (3) the weight that a neutral magistrate would likely have given this information is a question of fact. Therefore, the court held that the immunity defense could not be decided as a matter of law and that the district court was correct in denying the defendant-officers' summary judgment motion.[228]

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[224] *Golino*, 950 F.2d at 871 (emphasis added).

[225] The *Golino* court stated that in the context of a summary judgment motion the materiality issue presents "a mixed question of law and fact. The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. The factual component requires an inference as to whether the information would likely be given weight by a person considering that question." *Id.* (citation omitted).

[226] *See* Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992); Magnotti v. Kuntz, 918 F.2d 364 (2d Cir. 1990). A recent federal district court decision contains a clear explanation of the process:

> Under *Franks,* suppression is not warranted unless the misrepresentations at issue were material, i.e., unless probable cause is destroyed by *removing* the misrepresentations at issue from the warrant affidavit. In a "material omissions" case, the question is necessarily reversed, i.e., suppression is not warranted unless probable cause is destroyed by *adding* the omitted information to the warrant affidavit.

Supreme Video, 808 F. Supp. at 1395.

[227] As the court put it in *Cartier*:

> After performing this corrective process, if there remains an objective basis supporting probable cause, no constitutional violation of the plaintiffs' Fourth Amendment rights has occurred, the factual disputes are not material to the use of the qualified immunity defense, and summary judgment should be granted to the defendant. Only if the corrected affidavit did not support an objective finding of probable cause would the factual disputes be material to resolving the issue of probable cause.

955 F.2d at 845.

[228] *Golino*, 950 F.2d at 871-72.

Cartier was decided two months after *Golino*. The *Cartier* opinion, however, makes no reference to *Golino*, even though both cases presented the same qualified immunity-corrective process issues. The plaintiffs in *Cartier*, like the plaintiff in *Golino*, argued that law enforcement officers who deliberately misrepresent facts in their warrant applications cannot be protected by qualified immunity.[229] The *Cartier* court's failure to refer to *Golino* is especially unfortunate because the two decisions do not follow precisely the same analytical route.

The *Cartier* court first noted that under *Harlow* the officer's mental state cannot defeat qualified immunity.[230] But this assertion missed the point of the plaintiffs' argument that the deliberate misrepresentation may constitute a violation of clearly established Fourth Amendment law. Thus, as numerous decisions have recognized, the officer's mental state is relevant not to the *Harlow* immunity standard but to the constitutional violation itself.[231]

The Second Circuit's ultimate resolution, however, was on the mark. Even though there may have been an intentional misrepresentation, the court must perform the corrective process analysis to determine the materiality of the misrepresentation. "[A]fter the affidavit is corrected for intentional misstatements and omissions, if it still supports probable cause, no Fourth Amendment violation has occurred."[232] Unlike the

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[229] *Cartier*, 955 F.2d at 846. In their brief to the court of appeals, plaintiffs argued that "[w]hen the judicial finding of probable cause is based solely on information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth, not only does the arrest violate the Fourth Amendment, but the officer will not be entitled to good faith immunity." Brief for Plaintiffs-Appellees at 12, *Cartier*, 955 F.2d 841 (No. 91-7590).

The plaintiffs' argument in *Cartier* is supported by the Third Circuit's ruling in Lippay v. Christos, 996 F.2d 1490, 1504 (3d Cir. 1993), that "[i]f a police officer submits an affidavit containing statements he know to be false or would know are false if he had not recklessly disregarded the truth, the officer obviously failed to observe a right that was clearly established." Under Malley v. Briggs, 475 U.S. 335 (1986), such an officer is not protected by qualified immunity.

[230] Judge Cardamone, joined by Judge Miner, wrote for the court.

[231] *See, e.g.*, Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62 (1992); Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2796 (1991); Polenz v. Parrott, 883 F.2d 551 (7th Cir. 1989); Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40 (1st Cir. 1988); Musso v. Hourigan, 836 F.2d 736, 743 (2d Cir. 1988) ("*Harlow* does not require us . . . to ignore the fact that intent is an element of the relevant cause of action.").

[232] *Cartier*, 955 F.2d at 846.

court in *Golino*, however, the *Cartier* court framed the immunity issue in legal terms: whether, after correcting the affidavits, a reasonably competent officer could believe that the affidavits established probable cause. Thus, "when reasonable officers could disagree as to whether probable cause exists, the immunity defense is available."[233] The court concluded that because reasonable officers could disagree as to whether the corrected affidavits established probable cause, the defendant-officer was protected by qualified immunity.

It might be possible to reconcile *Golino* and *Cartier* on the basis of their different factual records. That is, from this perspective, one could simply argue that although the *Golino* factual record did not allow for the determination of qualified immunity on summary judgment, the *Cartier* record did. This, however, does not appear to be a complete explanation of the divergent results. Rather, *Golino* viewed the question of "[t]he weight that the neutral magistrate would likely have given" the concealed and misrepresented information as not a legal question, but "a question to be resolved by the finder of fact."[234] To the *Cartier* court, by contrast, the immunity defense presented a predominantly legal inquiry, namely whether, after correcting the affidavit for misstatements and omissions, a reasonably competent police officer could believe that it established probable cause.[235] Given the recurring nature of the issue, the Second Circuit—or even the Supreme Court—at the earliest opportunity should clarify the appropriate approach.

b. *Retaliation Claims*: Mozochi v. Borden

Retaliation claims present another example of the lack of predictability in determining whether the qualified immunity defense will be viewed as presenting a question of law or fact. For example, in *DiMarco v. Rome Hospital and Murphy Memorial Hospital*,[236] the Second Circuit stated that when public employee, free-speech retaliation claims are alleged, it is nor-

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[233] *Id.*

[234] Golino v. City of New Haven, 950 F.2d 864, 872 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3032 (1992); *see also supra* note 225.

[235] *Cartier*, 955 F.2d at 845.

[236] 952 F.2d 661 (2d Cir. 1992); *see supra* notes 159-169 and accompanying text.

mally necessary to resolve the factual merits in order to resolve the immunity defense because the immunity defense is very likely to be " 'inextricably bound up with the merits.'"[237] The court's decision in *Mozzochi v. Borden*,[238] however, demonstrates that in some retaliation cases the immunity defense can be resolved as a matter of law.

In *Mozzochi*, Charles Mozzochi was displeased with Glastonbury Town Manager Richard Borden's job performance. Mozzochi wrote a series of unflattering letters to Borden and other town officials that "often contained profane language and expressed Mozzochi's intense personal dislike of Borden."[239] One of Mozzochi's letters to Borden contained a newspaper article describing "the story of a disgruntled resident who had murdered the mayor of an Iowa City and wounded two members of the city council."[240] Knowing that Mozzochi had a firearm, Borden reported the mailing to the Chief of Police. Mozzochi was subsequently arrested and charged with criminal harassment. The charge was based upon both the newspaper article and other letters. Not deterred, Mozzochi continued his letter writing campaign.[241] The criminal charge was eventually dropped.[242]

Mozzochi brought suit in federal court under section 1983 against Borden, the arresting officer and the Town. He alleged, *inter alia,* that he was arrested and prosecuted in retaliation for having engaged in protected free speech activity. The defendant-officials moved for summary judgment on qualified immunity grounds, but the district court found that factual issues concerning the defendants' motive in having the plaintiff arrested and prosecuted precluded resolution of the immunity defense on summary judgment.

The Second Circuit disagreed with the district court's approach. Following the Supreme Court's decision in *Siegert*

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[237] *Id.* at 666 (quoting *Bolden v. Alston*, 810 F.2d 353, 356 (2d Cir.), *cert. denied*, 484 F.2d 896 (1987)).

[238] 959 F.2d 1174 (2d Cir. 1992).

[239] *Id.* at 1176.

[240] *Id.*

[241] *Id.* at 1178.

[242] The state trial court dismissed the criminal charges with respect to all of Mozzochi's letters except the newspaper article. As to the charge growing out of the newspaper article, the prosecutor "nolled" it (*nolle prosequi*) prior to trial. *Id.* at 1176.

v. Gilley,[243] Judge Meskill wrote for the court that the first step in resolving the qualified immunity defense is to determine whether the complaint alleges any violation of constitutional rights.[244] The idea is that a complaint that does not state a violation of any constitutional rights certainly does not state a violation of clearly established constitutional rights. This is, in fact, what *Siegert* clearly holds.[245] The problem, however, is that although some courts follow *Siegert,* others ignore it altogether, including some Second Circuit panels.[246] As a result, the court's methodology in deciding the immunity defense has not been predictable. The Second Circuit is not alone in failing to comply consistently with *Siegert*.[247]

The court then reasoned that while most of Mozzochi's letters that were critical of Borden were protected by the First Amendment, his mailing of the newspaper article was a threatening communication and, as such, was not protected speech.[248] Thus, the arrest and prosecution did not violate the First Amendment because there was probable cause to support the criminal charge. "[B]ecause there was probable cause . . . to believe that Mozzochi violated the harassment statute, we will not examine the defendants' motives in reporting Mozzochi's actions to the police for prosecution."[249]

Thus, the court held that if there was probable cause to

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[243] 111 S. Ct. 1789 (1991).

[244] Judges Kearse and Pierce joined the opinion.

[245] Under the qualified immunity analysis commonly applied prior to *Siegert*, courts could and would avoid deciding the issue of whether particular conduct violated constitutional law as presently interpreted, if, at the time of the challenged conduct, the right allegedly violated was not clearly established. This process frequently resulted in cases disposed of on qualified immunity grounds, with no resolution of the underlying constitutional claim.

Blum, *supra* note 145, at 193 (footnotes omitted).

[246] *See, e.g.*, Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992); DiMarco v. Rome Hosp. and Murphy Memorial Hosp., 952 F.2d 661 (2d Cir. 1992).

[247] Blum, *supra* note 145, at 192 ("not all courts have digested *Siegert's* message").

[248] "A criminal prosecution solely in response to a threatening communication does not violate the First Amendment." Mozzochi v. Border, 959 F.2d 1174, 1178 (2d Cir. 1982).

[249] *Mozzochi*, 959 F.2d at 1179-1180, *relying upon* Magnotti v. Kuntz, 918 F.2d 364 (2d Cir. 1990). *But cf.* Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988) (probable cause did not exist independent of an allegedly unconstitutional governmental order).

believe that the section 1983 plaintiff had committed a crime, the fact that the arrest and prosecution were undertaken solely in retaliation for protected First Amendment activity is irrelevant. This is hardly a self-evident proposition. Even among those cases in which probable cause exists, police officers and prosecutors have enormous discretion regarding whether to take action against a particular individual. Viewed in this light, the relevant inquiry should be whether the official took the action for the purpose of retaliating against the individual for engaging in protected free speech activity. Under the Supreme Court's framework for evaluating retaliatory motive claims, the pertinent issue is not whether the prosecutor could have initiated prosecution, but rather whether he would have done so but for the retaliatory motive.[250]

The court also thought it relevant that the prosecution did not succeed in silencing Mozzochi. It is not clear why the court relied upon this factor given its holding that the existence of probable cause rendered the alleged retaliatory motive irrelevant. Nevertheless, it held that "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an *unsuccessful attempt* to deter or silence criticism of the government."[251] Reliance upon the lack of success of the officials' efforts to deter speech is not persuasive. Certainly, even if not deterred, it cannot be denied that Mr. Mozzochi may well have been *penalized* for having engaged in protected First Amendment activity. The Second Circuit, however, found that because the plaintiff had not alleged a violation of federally protected rights, defendants were entitled to summary judgment based upon qualified immunity.[252] The decision in *Mozzochi* illustrates that the pressure imposed by the United States Supreme Court to decide the qualified immunity defense as a

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[250] Mount Healthy Sch. Dist. v. Doyle, 429 U.S. 274, 283-84 (1977). A federal district court, relying upon the "bad faith" exception to the doctrine of Younger v. Harris, 401 U.S. 37 (1972), concluded that a federal court may enjoin a state prosection undertaken in retaliation for the exercise of constitutionally protected conduct because "the state has no legitimate interest in pursuing such a prosecution." Ruscavage v. Zuratt, 821 F. Supp. 1078, 1082 (E.D. Pa. 1993).

[251] *Mozzochi*, 959 F.2d at 1180 (emphasis added).

[252] The court also held that defendants were protected by qualified immunity on plaintiff's claim concerning denial of access to the courts. *Id.* at 1181.

matter of law may result in a less than full exploration of all facets of the underlying merits.

Although the Second Circuit has been far from consistent in applying the qualified immunity defense, the blame should not be placed entirely at its door. The Supreme Court has created an unworkable situation by insisting that the objectively reasonable *Harlow* defense normally be applied before the facts have been found. Nevertheless, the Second Circuit's decisionmaking will be enhanced if it follows a consistent methodology, especially with respect to the *Siegert* principle; avoids the temptation to determine qualified immunity as a matter of law when the reality is that it is necessary first to resolve the facts; and pays close attention to existing Second Circuit precedent and explains why cases that appear to raise similar issues are decided differently.

IV. OTHER SECTION 1983 ISSUES

A. *Malicious Prosecution:* Hygh v. Jacobs and Roesch v. Otarola

Since its 1980 decision in *Singleton v. City of New York*,[253] the Second Circuit consistently has adhered to the position that the common-law elements of malicious prosecution[254] give rise to a section 1983 constitutional claim.[255] Circuit courts throughout the country, however, have taken widely different positions on this issue.[256] The Supreme Court recently granted *certiorari* in a case from the Seventh Circuit

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[253] 632 F.2d 185 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

[254] The common law elements are: (1) the institution of a criminal proceeding; (2) without probable cause; (3) with malice; and (4) termination in favor of the accused. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 119 (5th ed. 1984).

[255] Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992); White v. Frank, 855 F.2d 956 (2d Cir. 1988); Raysor v. Port Auth., 768 F.2d 34 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986); Conway v. Mount Kisco, 750 F.2d 205 (2d Cir. 1984), *adhered to*, 758 F.2d 46 (2d Cir. 1985), *cert. dismissed*, 479 U.S. 84 (1986). The Second Circuit, however, takes the position that abuse of civil process normally does not give rise to a § 1983 claim for relief. Spear v. Town of West Hartford, 954 F.2d 63 (2d Cir.), *cert. denied*, 113 S. Ct. 66 (1992); Easton v. Sundram, 947 F.2d 1011 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1943 (1992).

[256] For a survey of circuit court decisional law, *see* SCHWARTZ & KIRKLIN, *supra* note 3, § 3.10 and 1993 Cumulative Supplement No. 1.

which is expected to resolve the issue.[257]

Two Second Circuit cases decided in 1992 analyzed whether a criminal proceeding has been "terminated in favor of the accused," which is one of the elements of a malicious prosecution claim. In *Hygh v. Jacobs*,[258] Judge Mahoney concluded for the court[259] that a dismissal in the interest of justice is not a termination in favor of the accused. Because a dismissal in the interest of justice is neither an acquittal nor a determination on the merits, "it cannot provide the favorable termination required as the basis for a claim of malicious prosecution."[260]

The court returned to this issue in *Roesch v. Otarola*.[261] In a decision by Judge Newman,[262] the court held that a termination pursuant to Connecticut's accelerated pretrial rehabilitation program was not a termination in favor of the accused for purposes of a section 1983 malicious prosecution or false imprisonment claim. In reaching this conclusion the court relied upon its holding in *Singleton v. City of New York*[263] that an adjournment in contemplation of dismissal under New York law is not a favorable termination for purposes of section 1983 malicious prosecution or false imprisonment claims. Like an adjournment in contemplation of dismissal, dismissal under the Connecticut statute leaves open the question of the accused's guilt. Although there were some differences in the New York and Connecticut programs, each was designed for the same basic purpose of giving the defendant a second chance "by behaving well and abiding by the judge's instructions during a designated period to demonstrate that the charges should not be pursued."[264] The Second Circuit reasoned that

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[257] Albright v. Oliver, 975 F.2d 343 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993).

[258] 961 F.2d 359 (2d Cir. 1992).

[259] Judges Altimari and Winter joined in the decision.

[260] 961 F.2d at 368. The decision in *Hygh* also contains an important ruling on damages, namely that damages for false arrest may encompass only the period from initial custody until arraignment; subsequent damages resulting from continued incarceration may be attributed only to the tort of malicious prosecution.

[261] 980 F.2d 850 (2d Cir. 1992).

[262] Judges Feinberg and Cardamone joined the opinion.

[263] 632 F.2d 185 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

[264] *Roesch*, 980 F.2d at 852.

> [i]f we permit a criminal defendant to maintain a section 1983 action after taking advantage of accelerated rehabilitation, the program, intended to give first-time offenders a second chance, would become less desirable for the State to retain and less desirable for the courts to use because the savings in resources from dismissing the criminal proceeding would be consumed in resolving the constitutional claims.[265]

Finally, the court found that the same policy considerations calling for rejection of the malicious prosecution claim also pertained to section 1983 false arrest and imprisonment claims.[266]

Because termination in favor of the accused is not an element of a section 1983 false arrest or imprisonment claim,[267] it is not obvious whether dismissal of the malicious prosecution claim also required dismissal of these other claims. Moreover, although the malicious prosecution decisions in *Hygh* and *Roesch* regarding the favorable termination are sound, they fail to address the more fundamental issue of whether there are circumstances in which malicious prosecution constitutes a constitutional violation. Whatever the United States Supreme Court ultimately decides, it is unlikely to follow the Second Circuit's view that the state law and constitutional elements are simply identical.[268]

B. *State Action and the Unlawfully Appointed Officer:* Malone v. County of Suffolk

In the usual state action controversy the section 1983 plaintiff asserts that the defendant was engaged in state action within the meaning of the Fourteenth Amendment, and acted

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[265] *Id.* at 853.

[266] The court relied upon the reasoning in Konon v. Fornal, 612 F. Supp. 68, 71 (D. Conn. 1985) (having rejected the malicious prosecution claim because of the absence of a favorable termination of the criminal proceeding, "it would be anomalous to allow the tort plaintiff/arrestee to challenge here the existence of probable cause for his arrest and incarceration for that *same* criminal charge.").

[267] *See* SCHWARTZ & KIRKLIN, *supra* note 3, at § 3.11. *But see* Cameron v. Fogarty, 806 F.2d 380 (2d Cir. 1986) (state court conviction bars § 1983 false arrest claims), *cert. denied*, 481 U.S. 1016 (1987).

[268] In prior cases, the Supreme Court has ruled that the state law torts of defamation, false imprisonment and medical malpractice do not, without more, constitute constitutional violations. Paul v. Daves, 424 U.S. 97 (1976); *see also* Baker v. McMollan, 443 U.S. 137 (1979); Estelle v. Gamble, 429 U.S. 92 (1976).

under color of state law within the meaning of § 1983, while the defendant claims otherwise. The state action issue arose in a unique manner in *Malone v. County of Suffolk*.[269]

In that case, the plaintiff claimed that two village police officers had arrested him in violation of his Fourth Amendment rights. He specifically argued that there were defects in the appointments of the officers[270] and that these defects rendered the arrests unreasonable under the Fourth Amendment. Stated differently, plaintiff argued "that an arrest by unlawfully appointed police officers constitutes an unreasonable 'seizure' under the Fourth Amendment."[271]

The Second Circuit found that the district court had correctly relied upon New York State law to determine the status of the police officers as it may have affected the constitutionality of the arrest.[272] New York law distinguishes between *de facto* officers who act under color of governmental authority and whose law enforcement activities are legitimate, and mere usurpers who act without any color of governmental authority, and whose law enforcement activities are invalid.[273] The officers at issues in *Malone* fell into the former category. Interestingly, the court found that by bringing suit under section 1983, the plaintiff "all but concedes that [the officers] acted under color of authority, since [section 1983] requires that [the officers] acted under color of state law."[274] Color of authority was also supported by the officers "full performance of their duties, official recognition of and payment for their services and the fact that the defects in their title had not yet been established at the time of the arrest[.]"[275] Public policy supported this conclusion as well because a contrary determination could place into question a wide array of police officer actions and might even jeopardize the validity of convictions.[276] The

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[269] 968 F.2d 1480 (2d Cir. 1992) (per curiam).

[270] The appointments were found to be defective under New York State law in state court proceedings. Nissequogue v. Suffolk County Dep't of Civil Serv., 157 A.D.2d 784, 550 N.Y.S.2d 384 (2d Dep't 1990), *aff'd*, 77 N.Y.2d 915, 572 N.E.2d 34, 569 N.Y.S.2d 593 (1991).

[271] *Malone*, 968 F.2d at 1482.

[272] *Id.* The members of the panel were Judges Pratt and Altimari and district court Judge Friedman, sitting by designation.

[273] *Malone*, 968 F.2d at 1482-83.

[274] *Id.* at 1483.

[275] *Id.* (citations omitted).

[276] *Id.* (with regard to "police officers acting under imperfect ti-

court thus rejected plaintiff's assertion that defects in the officers' appointments rendered his arrest constitutionally infirm.

The decision in *Malone* is sound. Indeed, a contrary ruling could allow police officers to defend section 1983 Fourth Amendment claims on the ground that defects in their appointments rendered them non-state actors. Certainly, the critical state action issue is not whether there was a state law appointment defect but whether the officer exercised power "possessed by state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ."[277]

C. *Punitive Damages*: Vasbinder v. Scott

The Supreme Court resolved in *Smith v. Wade*[278] that punitive damages may be awarded under section 1983 against a public official whose "conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." In *Vasbinder v. Scott*,[279] the Second Circuit analyzed the scope of appellate review of punitive damages awards in an opinion by Judge Mahoney.[280]

The plaintiff was a "whistleblower" who was discharged from employment, allegedly in violation of the First Amendment, for having reported suspected wrongdoing to the F.B.I. When *Vasbinder* was first before the Second Circuit in 1991, the court rendered an important decision, holding that the district court had erred in setting aside the jury's finding that an award of punitive damages was warranted.[281] In reaching that conclusion the court articulated several important principles. First it found that the district court erroneously assumed that the threshold levels for "compensatory and punitive purposes of punitive damages cannot be the same."[282] *Smith v.*

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tle . . . invalidation of their actions would undermine the finality of convictions and would engender dilatory and costly lawsuits challenging the credentials of arresting officers").

[277] Monroe v. Pape, 365 U.S. 167, 184 (1961).

[278] 461 U.S. 30, 56 (1983).

[279] 976 F.2d 118 (2d Cir. 1992).

[280] Judges Winter and Pratt joined the opinion.

[281] Vasbinder v. Ambach, 926 F.2d 1333 (2d Cir. 1991).

[282] *Id.* at 1342.

Wade "expressly rejected the proposition" that the deterrence and punishment purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability."[283] This does not mean, however, that the principles of compensatory and punitive damages are the same. On the contrary, while there is a *right* to compensatory damages for the loss suffered, punitive damages are a matter of *discretion* when the trier finds that such damages are necessary to punish or deter.[284]

The court also found that the district court had erred in ruling that "no reasonable juror could have concluded that [the defendants] engaged in conduct that was outrageous or in callous disregard of [the plaintiff's] rights."[285] The court found that, in view of the evidentiary record, a reasonable jury could have found that the defendants had acted in callous disregard of the plaintiff's rights and that the punitive damages were designed to encourage "other potential whistle-blowers and [to] deter [defendants] from disguising the retaliatory nature of their action from outsiders."[286] The court also held that the district court should not have dismissed the punitive damages claim without allowing the jury to determine the amount of punitive damages it would have awarded.[287] The desirability of proceeding in this fashion is that, should the court reinstate the award of punitive damages, it would not be necessary to remand the case for a trial on the amount of punitive damages. Because the district court had simply dismissed the punitive damages claim, however, the Second Circuit had to remand the action to the district court for trial on the amount of punitive damages.

On remand, the jury awarded the plaintiff $150,000 in punitive damages against each of the two defendants, but on appeal the Second Circuit found the amount to be greatly excessive.[288] Appellate review of punitive damages ensures that the amount awarded is not so high as to "'shock the judicial conscience'"[289] or, stated differently, the amount is reasonable

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[283] Smith v. Wade, 461 U.S. 30, 51 (1983).
[284] *Id.* at 52.
[285] *Vasbinder*, 926 F.2d at 1342.
[286] *Id.* at 1343.
[287] *Id.* at 1344.
[288] 976 F.2d 118, 121 (2d Cir. 1992).
[289] *Id.* at 121 (quoting Hughes v. Patrolmen's Benevolent Ass'n, 850 F.2d

in light of the twin purposes of punishment and deterrence. In assessing the reasonableness of the amount awarded, the reviewing court should ensure that the award should not: (1) be so high as to work the "financial ruin" of the official; (2) "constitute a disproportionately large percentage of defendant's net worth[;]" and (3) be so high as to constitute a "windfall" to the plaintiff, because punitive damages are not intended to compensate or enrich the plaintiff.[290] Under this standard the jury's punitive damage award was greatly excessive. The award constituted more than fifty percent of one defendant's net worth and, some thirty percent of the other defendant's net worth, as well as over forty percent of his liquid assets.[291] The awards were much greater than what was necessary to punish and deter. The court opined that awards of $20,000 and $30,000 would adequately accomplish these purposes.[292] But because a circuit court cannot simply reduce an amount of punitive damages, it afforded the plaintiff the option of accepting either a new trial on the amount of punitive damages or the reduced amount.[293]

The *Vasbinder* litigation illustrates the large number of issues which can arise solely on the issue of section 1983 punitive damages. These two decisions indicate that the court is struggling to implement fair, workable procedures and to maintain punitive damages as a meaningful section 1983 remedy, without causing the financial ruin of the defendant.

CONCLUSION

The Second Circuit's section 1983 decisions cover an especially wide array of issues. The decisions reflect a conscientious effort by the court to fulfill its judicial responsibility of adhering to the decisional law of the United States Supreme Court. The decisionmaking process could be enhanced somewhat in the qualified immunity area, but most of the difficulties there stem from a fairly unworkable structure imposed by the Su-

876, 883 (2d Cir.), *cert. denied*, 488 U.S. 967 (1988), in turn quoting Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir. 1978)).

[290] *Id.*

[291] *Id.* at 122-23.

[292] *Id.* at 122.

[293] *Id.*

preme Court. Overall, the Second Circuit's work in this highly complex area is to be commended.