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In This Issue

Picking the Right Defendant Under Section 1983: Where the Civil Rights Law Has Been and Where to Go with It

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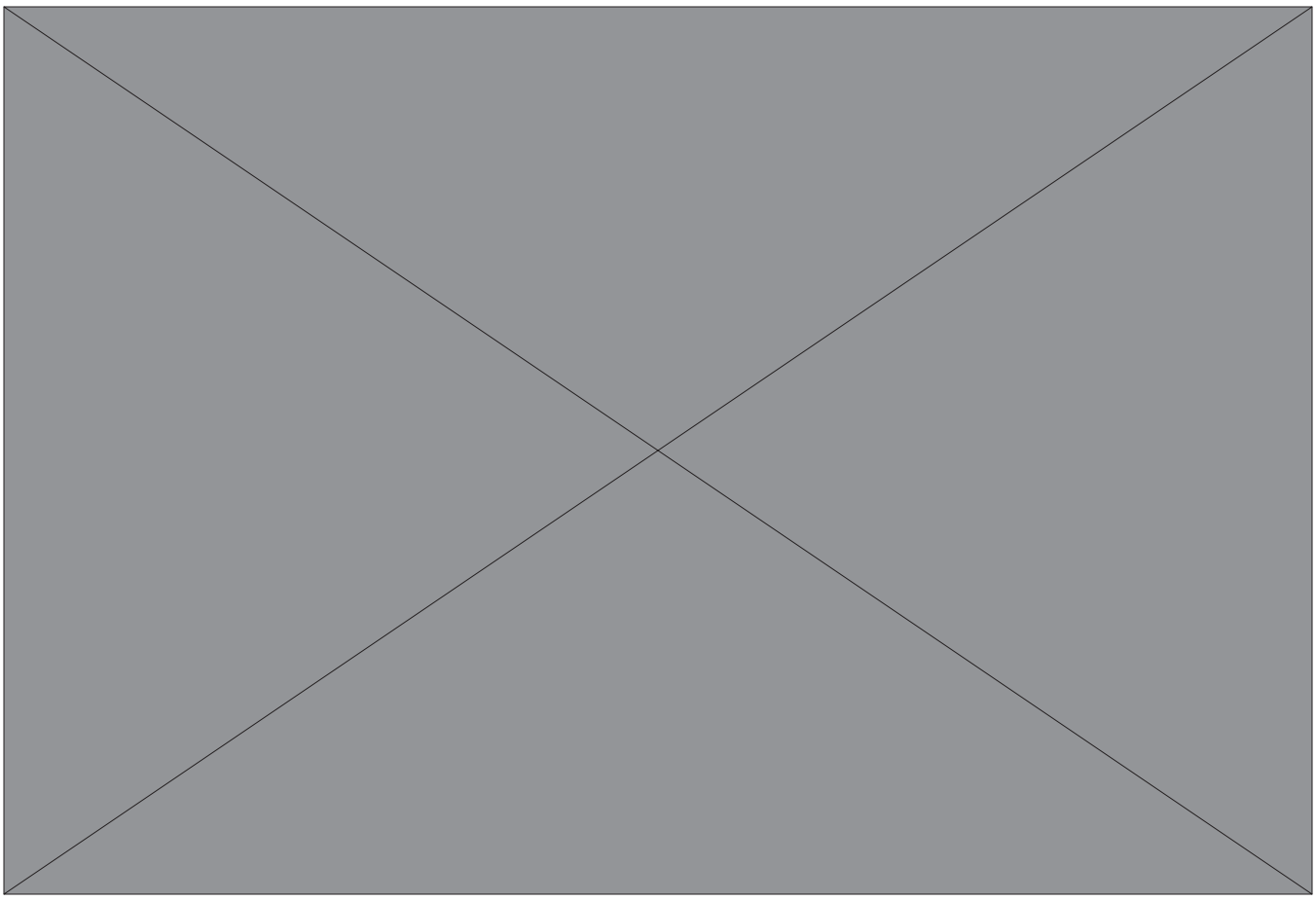
During a raid upon an unoccupied residence, an officer mistakes his partner for a gun-wielding occupant and shoots.[1] After a collision, an officer who has punched, kicked and trampled an arrestee refuses his plea to be taken to the hospital.[2] During a stop, an officer confiscates a driver's cash, makes no arrest and never returns it.[3] In front of a sting house, police officers force a man down, solely at the request of news-show cameramen.[4] In the county jail, a deputy says, "Bend over and spread."[5] At a demolition hearing, the chairman says, "Prove you're the owner, right now."[6] In all of these cases, the victim bids fair to recover – with a claim of 'deliberate indifference' under the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983.

Three little pigs might open law offices, devoted to practice under section 1983. Each might take a different attitude toward the foregoing scenarios. The youngest would say, "The purpose of Section 1983 is to enforce the Fourteenth Amendment, and the section is directed against a person who defeats the Amendment under color of state law. Let me find the person who caused the deprivation and sue him right away." The middle would say, "Yes, but if this miscreant acted pursuant to an official policy, then liability belongs to the government itself. Let me sue the city, too, for it can better afford to pay the damages and attorney fees." The oldest would say, "The individual has penury, and the government has privileges. Perhaps the government was misled into misconduct by a wealthy corporation. Let me start by looking for a private malefactor." Doubtless, each of the pigs knows something. It is best that they go into partnership.

SECTION 1983

Rightly so, Section 1983 has always been known as an act to enforce the provisions of the Fourteenth Amendment.[7] The Fourteenth Amendment prohibits deprivation without due process of law of life, liberty or property and denial of equal protection of the laws.[8] The due process clause (a) incorporates



many of the specific protections defined in the Bill of Rights, (b) contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them and (c) guarantees fair procedure.[9]

Section 1983 is directed against a person who acts under color of state law.[10] The statute was enacted in the aftermath of the Civil War: it is a statute of considerable breadth, providing judicial remedies for state violations of federal law.[11] If the state actor subjects someone within the jurisdiction of the United States to the deprivation of a right, privilege or immunity secured by the Constitution and federal laws, then the actor is liable to the party injured for redress.[12]

The protections of the Fourteenth Amendment are not triggered by mere lack of due care: for a tort to rise to constitutional stature, the wrongdoer must have acted with deliberate or callous indifference.[13] Deliberate indifference is a stringent standard of fault, requiring proof that a defendant disregarded a known or obvious consequence of the conduct.[14] Deliberate indifference involves a state of mind that shocks the conscience.[15] It requires more than negligence, but less than conduct undertaken for the very purpose of causing harm.[16] It is equivalent to subjective recklessness, as the term is used in criminal law.[17] As a standard, deliberate indifference originated in a case of inattention to a prisoner's serious illness or injury.[18] The standard was next extended to inhumane conditions of confinement, in general.[19]

As an example of inattention to illness where the governmental entity is liable, suppose that, at 8:00 p.m, a sheriff's deputy interrupts your client's taking an insulin shot and drags him to the county jail, where all night long he pleads for his medication and for water, but gets neither – being so desperate as to try drinking from the toilet. Your client receives no medical care until the next afternoon and eventually collapses to the floor – unresponsive, dehydrated and hypothermic. The county is liable: as a matter of policy, the medical department of its jail was understaffed, and there was no true system for ensuring adequate care for inmates with diabetes.[20]

In an action under Section 1983, the court may award attorney fees, pursuant to 42 U.S.C. § 1988. If the action was frivolous, unreasonable or without foundation, then these fees will go to the defendant.[21] There is no rule that the attorney fees be limited in proportion to the damages recovered: such a rule would be totally inconsistent with Congress' intent to ensure vigorous enforcement.[22]

In a Section 1983 action, the defendant is exposed both to an injunction and to compensatory damages, even for mental and emotional distress.[23] A public entity is impervious to punitive damages; this is in accord with the common law, with the language of Section 1983 and with general principles of public policy.[24] Any other defendant is vulnerable to punitive damages, so long as the conduct was motivated by evil motive or intent, or involved reckless or callous indifference (albeit this is the threshold for compensatory damages, too, which are mandatory).[25] In addition to an individual defendant, vulnerable defendants include a private entity that, in concert with a public actor, has acted under color of state law. An award of punitive damages against this private miscreant can have a deterrence effect but does not punish taxpayers.[26]

For the most part, a Section 1983 claimant is not required to exhaust his state judicial or administrative remedies.[27] However, under the Prison Litigation Reform Act of 1995 (PLRA), as amended, a prisoner challenging prison conditions must generally exhaust his administrative remedies, within reason. 42 U.S.C. § 1997e *et seq*. Suppose that a prisoner cannot pay for basic hygiene products, so he requests them for free. Pursuant to its policy, the prison denies this request, and the prisoner goes without – to the point that he loses a tooth and needs surgery for gum infection. The prisoner completes a step-one grievance and gets no response. He files a step-two grievance, and the prison denies it. Seven months after filing the final, step-three grievance, the prisoner has received no response. A response was required within the time limits that are specified in the official grievance policy.[28] The prisoner is not required to wait indefinitely; a response must come within a reasonable time.[29] He is entitled to go forward with a federal suit before evidence, witnesses and memories are lost.[30] This prisoner is deemed to have exhausted his administrative remedies.

GOVERNMENTAL LIABILITY REQUIRES DEPRIVATION PURSUANT TO OFFICIAL POLICY

In a Section 1983 action, governmental liability requires a constitutional deprivation visited pursuant to official policy – governmental custom even if not formal decision-making. The entity is not liable merely because it employed a tortfeasor, on a theory of *respondeat superior*.[31] There should be a true local policy at issue, not a random event.[32] This policy must have been the injury's moving force.[33] The 'official policy' requirement is intended to limit governmental liability to action for which the entity is truly responsible.[34] Units of local government are

responsible only for their policies, rather than for misconduct by their workers.[35] A city can be liable when it has a well-established custom or practice of using administrative inspections of regulated businesses as a pretext or guise to gather, without a warrant, evidence of criminal activity.[36] A city can also be liable when it has a policy and practice of harassing, provoking, assaulting and arresting law-abiding citizens who merely desire to continue upon their lawful way.[37] Unless there is an offending policy, liability cannot be in an official capacity, and can only be individual.[38]

As an example of where the governmental entity is not liable because its medical policies are adequate, suppose that a nurse is faced with the concern of guards and a bag of vomit. Instead of examining the inmate, she merely remarks, "That woman likes drugs. Besides, my shift is almost over." In truth, the inmate has a heart condition and her cardiac medications have failed to be delivered. Although prison policies are sufficient to provide adequate medical care, the nurse has simply failed to follow these policies.[39] This assumes that the prison engages in adequate training and supervision: deliberate indifference may be found if a violation of federal rights is a highly predictable consequence of a municipality's failures in training or supervision.[40]

The practitioner who desires a defendant capable of paying the various compensatory damages and attorney fees should not take for granted that the court will find a municipal policy or custom. In one case, a psychiatrist observed that a prison inmate was suffering from depression, nightmares, flashbacks and guilt associated with a house fire that had killed his mother and his girlfriend, of which he was the lone survivor. The psychiatrist noted multiple prior suicide attempts. "He is the most suicidal person I have ever seen." Nevertheless, the psychiatrist merely told the prison, "He needs to be watched closely." If the psychiatrist had said "constantly," then the inmate would have gone to a maximum-security cell. The court saw no evidence indicating that the county had a policy or custom warranting the psychiatrist's laxity and added that a court is not meant to be a pig, hunting for truffles in the record.[41]

The decision of even one official on a single occasion may be enough to establish an unconstitutional local policy, provided that under state law s/he has final policymaking authority in that area of governmental business.[42] The identification of final policymakers is a legal question to be resolved by the trial judge before the case is submitted to the jury.[43] Various officers are often found to be final policymakers. Often, a police commissioner and a police chief are final policymakers if they condone police misconduct and ignore civilian complaints, they are acting as final decision-makers as to custom and policy, and the town is exposed to liability under Section 1983.[44] Often, a superintendent of schools is a final policymaker: if he fires a teacher in retaliation for her having criticized a district program, the district is exposed to liability.[45] A county can be liable under Section 1983, when its county prosecutor orders axe-wielding sheriffs to chop down a door and enter and search a medical clinic without a search warrant, merely in order to serve writs for the arrest of employees alleged to be participating in welfare fraud. The prosecutor's command is more than simple bad advice – because authority already has been delegated from the county to the prosecutor, for the sheriff's office to follow the prosecutor's instructions is standard office procedure.[46]

FAILURE TO TRAIN QUALIFIES AS A GOVERNMENTAL POLICY

Whenever a locality's failure to train its employees evidences deliberate indifference to the rights of its inhabitants, the shortcoming qualifies as a local policy or custom that is actionable under section 1983.[47] Ideally, the inadequacy in training should be program-wide and involve more than a single officer.[48] Deliberate indifference makes a local entity liable under Section 1983 for the constitutional torts committed by its inadequately trained agents.[49] When city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.[50]

Suppose that one member of a SWAT team shoots and kills another (three times in the back, from a distance of three feet) during a raid upon an unoccupied residence. The complaint will allege that the city has acted with deliberate indifference in the maintenance, training and control of its SWAT teams and thereby was the moving force behind the shooter's actions. The city has failed to adequately train and equip its officers, as well as to control those with a known propensity for violence and to investigate its officers for potential substance-abuse and mental problems.[51]

Similarly, suppose that a lieutenant in the county sheriff's department is responsible for training officers regarding the use of deadly force. He trains them to use deadly force whenever they subjectively believe it is warranted. "You have to determine

whether or not you feel a fear for your life, or the life of others, and be able to verbalize that fear." The lieutenant is wrong; the law is that an officer's actions must be objectively reasonable, without regard to his subjective motivation.[52] The county has failed properly to train its officers in the use of force, thereby exposing itself to liability on a Section 1983 claim of excessive force.[53] Likewise, a city can be liable for failing to train its police officers as to discharging a weapon.[54] In a related context, liability can attach for failing to provide proper training as to the conduct of searches and seizures.[55]

A PUBLIC ENTITY THAT CONTRACTS FOR SERVICES NEVERTHELESS RETAINS ITS OBLIGATION TO HAVE SOME POLICY

Suppose that, under an express contract, city arrestees are housed at the county jail. The city can be liable for routine, humiliating strip and visual body-cavity searches that are conducted of absolutely all admittees to the county jail – even though the city, unlike the county, has no express policy of subjecting arrestees to such searches. The city's duty to its arrestees is non-delegable. Although the county has contracted to perform an obligation owed by the city, the city itself retains its oversight obligations and has an affirmative obligation to monitor conditions for its arrestees, no matter where housed. Both of these governmental entities are liable.[56] On the other hand, suppose that this jail houses a prisoner of the State, not the city. Because of a doctor's indifference, the prisoner is forced to endure nearly two months of serious oral pain without a simple dentist visit.[57] Under the Eleventh Amendment, the State cannot be liable.

INDIVIDUAL AND OFFICIAL CAPACITY

A public officer may be sued either in his individual capacity, official capacity, or in both. When suit is brought against the officer in his official capacity, e.g. as the chief of police, the plaintiff is in effect suing the governmental entity, e.g. the city of which the chief is an agent.[58] The pockets exposed by section 1983 include those of municipalities and other local government units.[59]

In general, a victim will desire to bear down on the officer in both his official capacity and his individual capacity. Suppose that a van is stopped by a city police officer. He orders the occupants out of the van, searches one and confiscates $400 in cash; he then searches a second and confiscates $800 in cash; he then searches the van and confiscates a lockbox containing $31,400. The officer then orders the party to leave immediately, placing his hand on his gun. Afterwards, the officer is arrested and charged with robbery and official oppression.[60] For the city itself to be held liable under Section 1983, the victims will allege that the city should have known of previous allegations of criminal misconduct against this officer, but failed to investigate. The victims will further allege that the city failed to take adequate measures to prevent such misconduct, by this officer and in general. Through these failures, along with a general failure to supervise and train its police officers, the city maintained a policy of indifference that enabled the officer to commit the acts of which the victims complain. The victims are prepared to demonstrate that the city, through the execution of a government policy or custom, inflicted the robbery. This policy was the moving force behind the violation of constitutional rights.[61]

THE MORE THAT AN OFFICIAL VIOLATES POLICY, THE LESS IS THE GOVERNMENT LIABLE

Paradoxically, the more that a governmental officer violates official policy, the less is his employer liable. Suppose that a case is founded upon the fact that an official who is not a final policymaker has committed a one-time violation of policy. Specifically, contrary to the established policy of the county, the county sheriff directs the jail not to accept a court-approved bond, involving property located outside of the county, as security for an arrestee's bail. In consequence, the arrestee remains incarcerated, and thus falsely imprisoned. The arrestee will probably have the greatest success with claims that the sheriff personally participated in a one-time due-process violation and is therefore liable in an individual capacity, for whatever that is worth, under Section 1983.[62]

Similarly, suppose that a sheriff's deputy is crossing a front yard, among the toys. The mother goes to the front door, accompanied by her five-year old daughter, who is holding the dog. It starts to exit. Startled, the deputy fires his gun, and a bullet hits the dog's paw and then the porch and then ricochets and fragments. Fragments graze the mother's right leg and the daughter's chest, and one enters the daughter's right thigh. By shooting in the direction of an open doorway, the deputy must have violated both his police training (to be aware of the surroundings) and a department policy (not to fire when non-threatening individuals are in range). Because of these violations, the suit is headed toward individual liability only. A wise practitioner must make doubly sure to plead failure to train, and the like, and muster the evidence; if that fails, then the deputy's actions will not be chargeable

to the county.[63]

A DEFENSE OF 'QUALIFIED IMMUNITY' IS AVAILABLE TO AN OFFICER SUED IN HER INDIVIDUAL CAPACITY

When an officer is sued in her individual capacity, then a defense of 'qualified immunity' is available.[64] This defense is successful when the action was taken in good faith and objectively reasonable, not violating clearly-established law.[65] Ordinarily, a defense of qualified immunity cannot survive proof of deliberate indifference, even though in theory it can.[66]

For example, after an arrest, as the suspect is sitting on the curb in handcuffs, an evidence technician arrives at the scene and repeatedly adds to the beatings that the arresting officers have administered, to the point that the suspect loses consciousness. Afterwards, the technician deliberately disregards a need for medical treatment. The technician has deprived the suspect of actual constitutional rights that were clearly established long before these events and about which he should have known. There is no qualified immunity to shield this heartless technician from liability under Section 1983.[67]

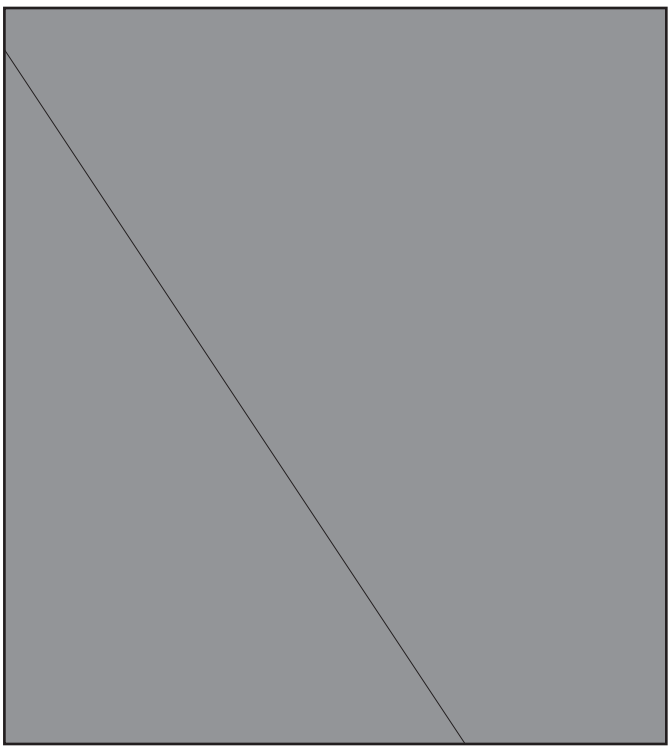
As another example, suppose that your client has long been the owner of an apartment building. The file of the urban-renewal board often refers to this ownership. On the file, the listed property owners include the client, who is also the owner in the city tax records. The board's administrator is the custodian of this file, but fails to give your client notice of a demolition hearing, scheduled because of her supposed failure to comply with previous board orders to make repairs. Instead, the administrator relies solely upon a title search that culminates with a 'substitute trustee's deed' showing the building as 'struck off' to a mortgage holder. When your client gets wind at the last minute and comes to the hearing, her vehement protestations that she is the owner, and did not receive notice and needs more time, are rejected. The clearly-established law should have put any reasonable official in the administrator's position on notice that reliance upon the title search was not objectively reasonable, and a defense of qualified immunity should fail.[68]

TO THE EXTENT THAT OFFICIAL RACIAL DISCRIMINATION HAS BEEN ELIMINATED, ONLY INDIVIDUAL LIABILITY IS AVAILABLE

The central purpose of the Fourteenth Amendment was to eliminate racial discrimination.[69] Even though an entity may be opposed to racial discrimination as a matter of policy, it remains possible that some degree of racial discrimination will have crept into the day-to-day conduct of its affairs.[70] In an action under Section 1983, to the extent that the entity's opposition is full-fledged – as reflected in policy, training and supervision – then the employees are liable only in an individual capacity.

Suppose that, at a little-league game, an African-American male calls, "Get your body behind the ball!" Later, his remark is "You're throwing too hard!" Soon, a police officer arrives in the park, puts him under arrest and signs a criminal complaint for harassment, which later is changed to disorderly conduct. Four weeks later, the client returns to the park. An employee of the recreation department comes over and falsely states that your client is not permitted to enter. "Will you leave, or do I have to call the authorities?" Eventually, there is a trial, and the client is acquitted. If the city is 'on the level,' then your client's viable claims appear to include one for denial of equal protection, against the police lieutenant and the employee – but only in their individual capacities.[71]

Suppose that, in kindergarten, a teacher forces a biracial student to use a different color crayon to draw his self-portrait instead of the color he has chosen. The mother speaks to the kindergarten teacher and writes a note to the principal. Toward the end of the year, believing that the teacher and principal continuously have failed to stop peers from calling her son names, the mother files a complaint



with the state human-rights commission against the school board, giving it actual notice for the first time. The employees' inaction, if any, may well constitute deliberate indifference to the boy's right to be free from racial discrimination.[72] Unless the principal somehow is deemed to have worn a mantle of final policymaker, it is likely that liability will be confined to an individual capacity.[73]

Suppose that, in the drunk tank, officers use a takedown maneuver to get your client down on the floor. He screams out in pain, "You broke my neck! I can't move." An officer responds with a racially derogatory remark. They literally drag your client into a jail cell, leaving him lying there and ignoring his screams. Eventually, tests determine that your client has indeed sustained an injury to the spinal cord. Although this conduct surely amounts to deliberate indifference on the officers' part, it quite possibly does not expose the pockets of the city.[74]

ONE MAY ASSERT CONCURRENTLY A VIOLATION BOTH UNDER SECTION 1983 AND UNDER TITLE VII

An employee who has been the victim of discrimination may assert simultaneously both a violation under Section 1983 and a violation of her rights to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.[75] Suppose that a woman, along with ten men, attains the top score on a civil-service exam for promotion to the rank of lieutenant. Immediately beneath are two women, along with eighteen men. No women, but nine men, were appointed. Meanwhile, a revealing calendar hangs in the unit trailer, and so forth. All told, your client is the target of at least ten sexually-charged statements made by her supervisors. If the disparate treatment is severe and pervasive, then the employer should be liable.[76] On the other hand, suppose that an employee is subjected to a hostile work environment by his supervisor, but any complaints concerning a supervisor with regard to harassment are subject to review by the administrative-services director (with whom the employee has indeed lodged a complaint); the supervisor does not qualify as a final policy-maker, and the employer is not liable.[77]

THE STATE ITSELF IS IMMUNIZED FROM LIABILITY BY THE ELEVENTH AMENDMENT

In a Section 1983 action, the potential defendants do not include an arm of the State, because the State is immunized by the Eleventh Amendment.[78] In determining whether a governmental entity qualifies as an arm of the State, the controlling question is whether its financial obligations are binding upon the State.[79] The State's police are immune,[80] but not the local police.[81] The State's university is immune,[82] but not the local school board.[83] When the public treasury is not directly affected, a defense of the Eleventh Amendment is not indicated, even if the officer works for the State[84] and even if the State indemnifies the officer pursuant to some statute.[85]

As one example of inattention where the State cannot be liable because of its Eleventh Amendment immunity, suppose that, in the extreme heat, an inmate at a state prison feels dizzy and falls to the floor. The nurse refuses to see him until her regularly-scheduled medication run, in three and a half hours. Before then, he is wheeled to the medical unit, sweating profusely, with vomit on his clothing. The nurse advises him to return to his housing unit, which she should know to lack air-conditioning, and take aspirin. Eventually, the inmate is brought by wheelchair again to see the nurse, but she leaves him with an officer in order to resume distributing medication. Shortly thereafter, the inmate begins shaking uncontrollably and becomes completely non-responsive. To this day, he remains in a locked-in state, quadriplegic. Deliberate indifference has been shown whenever the nurse delayed an examination, failed to provide an air-conditioned holding cell or failed to place the inmate on a gurney.[86] As a second example of the State's immunity, consider an inmate in a state prison who tells his case manager about a threat from a gang member and who begs to be transferred. The plea is ignored, and soon there begins a rapid series of vicious assaults. Although this case manager may well be liable, his employer cannot be.[87]

AN ENTITY FROM THE PRIVATE SECTOR, AND THEREFORE SUSCEPTIBLE TO PUNITIVE DAMAGES, MAY WELL BE THE BEST DEFENDANT

At the frontier of Section 1983 jurisprudence, there are times when a private entity, such as a broadcaster working with the police, has so far insinuated itself into a position of interdependence with a public actor that even the private entity is acting under color of state law.[88] A private party involved in such a conspiracy, although not an official of the State, may well be the best defendant at whom to aim in an action under Section 1983.[89]

For example, working with the local police department, a nationwide television broadcaster sets up a large sting house. Posing online as a young teenager alone at home, an actor lures a possible sexual predator. At the house, the decoy offers a

drink. Then the host of the show appears, without identifying himself at first. "Why are you here?"

Meanwhile, outside the sting house, several police officers have emerged from a U-Haul truck parked on the adjacent property. The broadcaster has encouraged them to give a special intensity to the public humiliation, in order to enhance the camera effect and thereby sensationalize and enhance the entertainment value of the confrontation. When show personnel give the signal, the officers arrest the visitor in a dramatically-staged scenario – displaying guns, forcing the men to the ground face-down and then handcuffing them.

The individuals are taken to the police station where they are processed, photographed and interviewed. Eventually, they are arraigned in court (on charges that will eventually be dropped as unworthy of prosecution). All of these events – the arrival at the sting house, the first meeting with the decoy, the conversation with the host, the arrest outside, the processing and interview at the police station, and the arraignment in court – are captured on camera. Although both the city and the broadcaster clearly are liable, it may well be best to focus upon the punitive-susceptible private entity that acted under color of law.[90]

CONCLUSION

The purpose of Section 1983 is to enforce the Fourteenth Amendment. The section is directed against a person who causes a deprivation under color of state law, and its protections are triggered by deliberate indifference. The court may award attorney fees, damages encompass even emotional distress, and punitive damages are available, other than against the public entity itself. A Section 1983 claimant generally is not required to exhaust his administrative remedies. Governmental liability requires deprivation pursuant to official policy; policy is made by a final decision-maker, and failure to train qualifies as a governmental policy. A public entity that contracts for services nevertheless retains its obligation to have some policy.

A public officer has both an individual and an official capacity. Generally, it is wise to sue the official in both capacities. The more that an official violates policy, the less is the government liable. A defense of 'qualified immunity' is available to an officer sued in her individual capacity. To the extent that official racial discrimination has been eliminated, only individual liability is available. One may assert concurrently a violation both under Section 1983 and under Title VII. The state itself is immunized from liability by the Eleventh Amendment. An entity from the private sector, and therefore susceptible to punitive damages, may well be the best defendant.

By bearing in mind the foregoing guiding principles, it should be possible to enrich your law practice with cases arising under Section 1983, and without taking in partners that you would otherwise avoid.

1 See Jensen v. City of Oxnard, 145 F.3d 1078 (9th Cir.), cert. den., 525 U.S. 1016, 119 S.Ct. 540, 142 L.Ed.2d 449 (1998).
2 See Linares v. Jones, 551 F.Supp.2d 12 (D.D.C. 2008).
3 See Brown v. City of Memphis, 440 F.Supp.2d 868 (W.D.Tenn. 2006).
4 See Conradt v. NBC Universal, Inc., 536 F.Supp.2d 380 (S.D.N.Y. 2008).
5 See Ford v. City of Boston, 154 F.Supp.2d 131 (D.Mass. 2001).
6 See Swann v. City of Dallas, 922 F.Supp. 1184 (N.D.Tex. 1996), aff'd, 131 F.3d 140 (5th Cir. 1997).
7 What is now Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes." See generally Jett v. Dallas Independent School Dist., 491 U.S. 701, 722, 109 S.Ct. 2702, 2716, 105 L.Ed.2d 598 (1989).
8 The second sentence of Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
9 Zinermon v. Burch, 494 U.S. 113, 125-6, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).
10 Although Section 1983 applies to a person acting under color of state law, it does not apply to someone acting under color of federal law; nevertheless, violation of the Fourth Amendment right to be secure against unreasonable searches and seizures by a federal agent acting under color of his authority does give rise to a comparable Bivens cause of action. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389, 91 S.Ct. 1999, 2001, 29 L.Ed.2d 619 (1971).
11 Langlois v. Abington Housing Auth., 234 F.Supp.2d 33, 48 (D.Mass. 2002).
12 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983. 'Laws' means the laws of the United States. See generally Wheeldin v. Wheeler, 373 U.S. 647, 650 n 2, 83 S.Ct. 1441, 1444 n 2, 10 L.Ed.2d 605 (1963).

13 Davidson v. Cannon, 474 U.S. 344, 347-8, 106 S.Ct. 668, 671, 88 L.Ed.2d 677 (1986). See also Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 291, 118 S.Ct. 1989, 1999, 141 L.Ed.2d 277 (1998).

14 Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 410, 117 S.Ct. 1382, 1391, 137 L.Ed.2d 626 (1997).

15 County of Sacramento v. Lewis, 523 U.S. 833, 850, 118 S.Ct. 1708, 1718-9, 140 L.Ed.2d 1043 (1998).

16 Hathaway v. Coughlin, 37 F.3d 63, 66 (2nd Cir. 1994).

17 Salahuddin v. Goord, 467 F.3d 263, 280 (2nd Cir. 2006).

18 "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) (citation omitted).

19 Wilson v. Seiter, 501 U.S. 294, 303, 111 S.Ct. 2321, 2326-7, 115 L.Ed.2d 271 (1991).

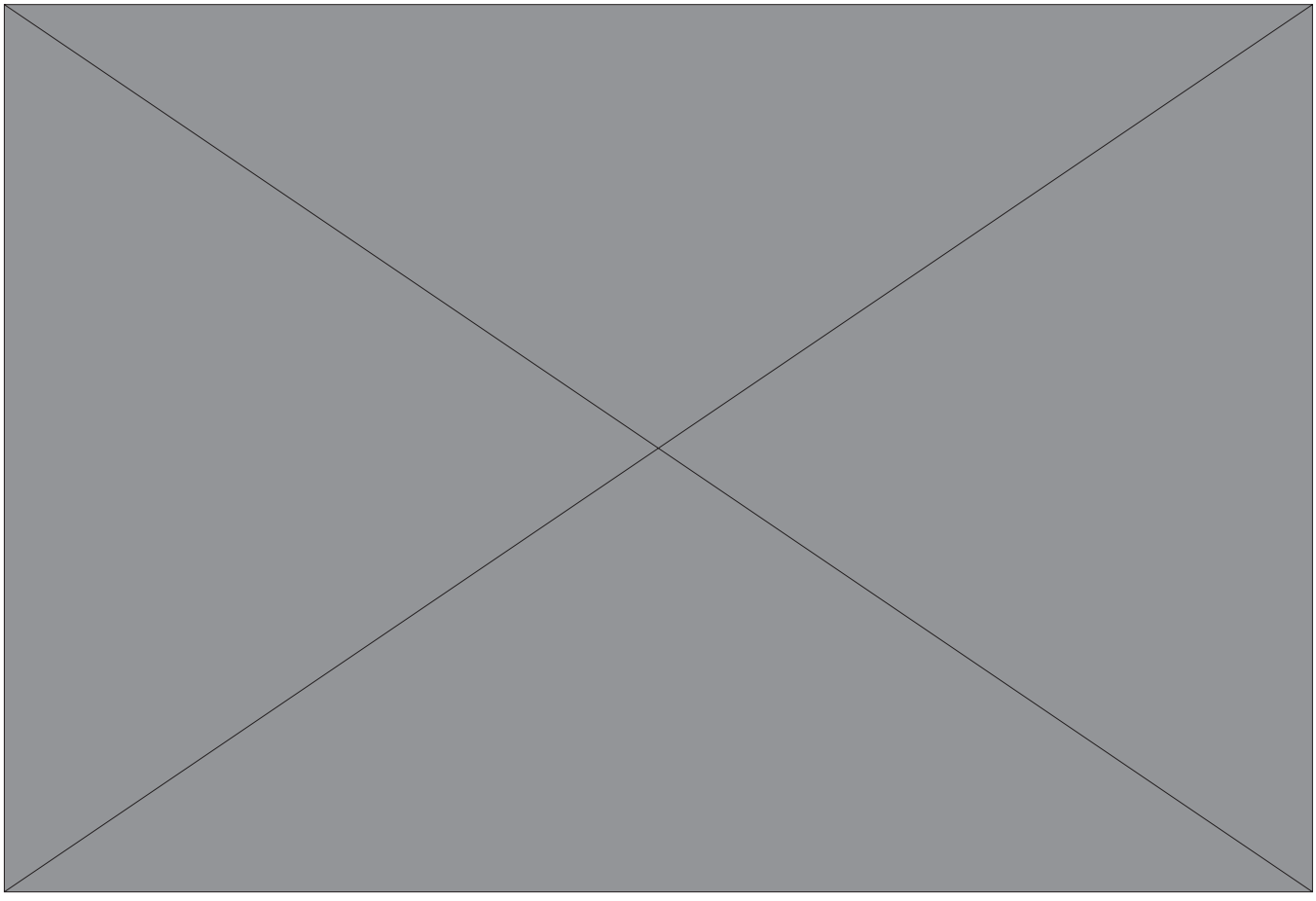
20 Beatty v. Davidson, 713 F.Supp.2d 167, 169 (W.D.N.Y. 2010) (wherein, ironically, the arrestee was himself a corrections officer, elsewhere in the county).

21 Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980).

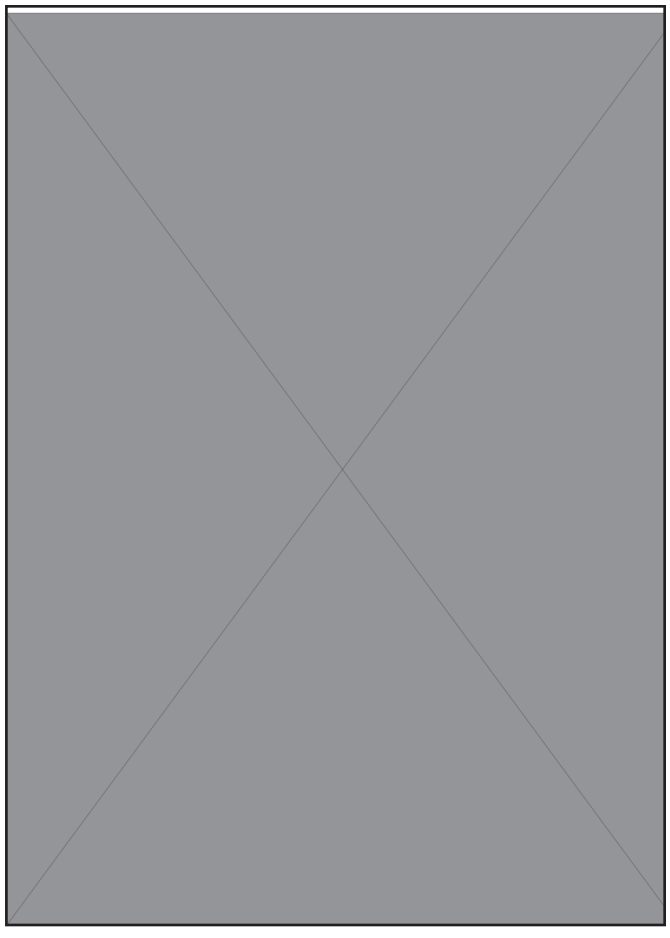
22 City of Riverside v. Rivera, 477 U.S. 561, 578, 106 S.Ct. 2686, 2696, 91 L.Ed.2d 466 (1986).

23 Carey v. Piphus, 435 U.S. 247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978).

24 "[C]onsiderations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981).



25 Smith v. Wade, 461 U.S. 30, 52-6, 103 S.Ct. 1625, 1638-40, 75 L.Ed.2d 632 (1983).
26 Segler v. Clark County, 142 F.Supp.2d 1264, 1269 (D.Nev. 2001).
27 Ellis v. Dyson, 421 U.S. 426, 432, 95 S.Ct. 1691, 1695, 44 L.Ed.2d 274 (1975).
28 Whitington v. Ortiz, 472 F.3d 804, 808 (10th Cir. 2007).
29 Wilson v. Cartwright, 557 F.Supp.2d 482, 485 (D.Del. 2008).
30 Brengettcy v. Horton, 423 F.3d 674, 679 (7th Cir. 2005).
31 Monell v. Department of Social Services of City of New York, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978), overruling Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).
32 Calhoun v. Ramsey, 408 F.3d 375 (7th Cir. 2005).
33 Monell, supra, 436 U.S. at 694, 98 S.Ct. at 2038.
34 Pembaur v. City of Cincinnati, 475 U.S. 469, 479, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986).
35 Fairley v. Fermaint, 482 F.3d 897, 904 (7th Cir.), cert. den., 552 U.S. 824, 128 S.Ct. 181, 169 L.Ed.2d 35 (2007).
36 Rodriguez v. City of Cleveland, 619 F.Supp.2d 461, 482 (N.D.Ohio 2009).
37 Alexander v. City and County of Honolulu, 545 F.Supp.2d 1122, 1133 (D.Hawaii 2008).
38 Estate of Sims ex rel. Sims v. County of Bureau, 506 F.3d 509, 514-5 (7th Cir.(Ill.) Oct 19, 2007).
39 Gayton v. McCoy, 593 F.3d 610, 622 (7th Cir. 2010).
40 Board of County Com'rs of Bryan County, supra, 520 U.S. at 409, 117 S.Ct. at 1391; Bryson v. City of Oklahoma City, 627 F.3d 784, 789 (10th Cir. 2010).
41 Francis ex rel. Estate of Francis v. Northumberland Co., 636 F.Supp.2d 368, 399 (M.D.Pa. 2009).
42 City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988).
43 Jett, supra, 491 U.S. at 737, 109 S.Ct. at 2724.
44 Johns v. Town of East Hampton, 942 F.Supp. 99, 106 (E.D.N.Y. 1996).
45 Lytle v. Carl, 382 F.3d 978, 986 (9th Cir. 2004).
46 Pembaur, supra, 475 U.S. at 484-5, 106 S.Ct. at 1301.
47 City of Canton, Ohio v. Harris, 489 U.S. 378, 388-92, 109 S.Ct. 1197, 1204-6, 103 L.Ed.2d 412 (1989) (inadequacy of police training).
48 See Blankenhorn v. City of Orange, 485 F.3d 463, 484-5 (9th Cir. 2007), where the facts were not ideal, and the shortfall was classified as mere negligence.
49 Collins v. City of Harker Heights, Tex., 503 U.S. 115, 124, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992). However, the entity is not liable when the inadequately trained employee was merely the victim. In Collins, the tort had been committed *against*, not *by,* a sanitation-department employee him who ignorantly entered a manhole and died of asphyxia. The duty to provide this employee with a safe working environment was deemed not to be a "substantive component of the Due Process Clause." 503 U.S. at 126, 112 S.Ct. at 1069.
50 Connick v. Thompson, 131 S.Ct. 1350, 1360 (2011).
51 Jensen, supra, 145 F.3d at 1086-7.
52 Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).
53 Megargee v. Wittman, 550 F.Supp.2d 1190, 1203 (E.D.Cal. 2008).
54 Santibanes v. City of Tomball, Tex., 654 F.Supp.2d 593, 615 (S.D.Tex. 2009).
55 See e.g., Rodriguez v. City of Cleveland, supra, 619 F.Supp.2d at 483.
56 Ford, supra, 154 F.Supp.2d at 149-50.
57 See Berry v. Peterman, 604 F.3d 435, 441 (7th Cir. 2010).
58 McMillian v. Monroe County, Ala., 520 U.S. 781, 785 n 2, 117 S.Ct. 1734, 1737 n 2, 138 L.Ed.2d 1 (1997). Also to list the city separately as a defendant is a harmless redundancy. Brown v. City of Memphis, supra, 440 F.Supp.2d at 873. It should be noted that Federal Rule of Civil Procedure 25(d) provides that an "action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party." Similarly, Federal Rule of



Appellate Procedure 43(c)(2) provides that when "a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party."

59 Monell, supra.

60 Brown v. City of Memphis, supra, 440 F.Supp.2d at 871-2.

61 Id., at 874.

62 Campbell v. Johnson, 586 F.3d 835, 842 (11th Cir. 2009).

63 See Bailey v. County of San Joaquin, 671 F.Supp.2d 1167, 1174 (E.D.Cal. 2009).

64 Owen v. City of Independence, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673, reh. den., 446 U.S. 993, 100 S.Ct. 2979, 64 L.Ed.2d 850 (1980).

65 Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 822, 172 L.Ed.2d 565 (2009).

66 Phillips v. Roane County, Tenn., 534 F.3d 531, 539 (6th Cir. 2008); Pourmoghani-Esfahani v. Gee, 625 F.3d 1313, 1319 (11th Cir. 2010).

67 Linares, supra, 551 F.Supp.2d at 17.

68 Swann, supra, 922 F.Supp. at 1199-1200.

69 McLaughlin v. State of Fla., 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964)

70 See generally Gates v. Georgia-Pacific Corp., 326 F.Supp. 397, 399 (D.Or. 1970), aff'd, 492 F.2d 292 (9th Cir. 1974) (arising under Title VII, but not section 1983).

71 Coward v. Town and Village of Harrison, 665 F.Supp.2d 281, 304 (S.D.N.Y. 2009).

72 DiStiso v. Town of Wolcott, 750 F.Supp.2d 425, 445 (D.Conn. 2010).

73 See Rabideau v. Beekmantown Cent. School Dist., 89 F.Supp.2d 263, 268 (N.D.N.Y. 2000).

74 See Harris v. City of Circleville, 583 F.3d 356, 369 (6th Cir. 2009).

75 Rivera v. Puerto Rico Aqueduct and Sewers Authority, 331 F.3d 183, 192 n 7 (1st Cir. 2003).

76 Anderson v. Nassau County Dept. of Corrections, 558 F.Supp.2d 283, 295 (E.D.N.Y. 2008).

77 Rodriguez v. City of Clermont, 681 F.Supp.2d 1313, 1332 (M.D.Fla. 2009).

78 The Eleventh Amendment to the United States Constitution provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." A State is also immune to a federal suit by its own citizen. Hans v. Louisiana, 134 U.S. 1, 15, 10 S.Ct. 504, 507, 33 L.Ed. 842 (1890).

79 "In determining whether an entity is an arm of a state, six factors are initially considered[:] (1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state. If these factors point in one direction, the inquiry is complete. If not, a court must ask whether a suit against the entity in federal court would threaten the integrity of the state and expose its treasury to risk. If the answer is still in doubt, a concern for the state fisc will control." McGinty v. New York, 251 F.3d 84, 95-6 (2nd Cir. 2001) (citations omitted).

80 See, e.g., Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

81 See, e.g., Thomas v. St. Louis Bd. of Police Com'rs, 447 F.3d 1082 (8th Cir. 2006).

82 See, e.g., Lewis v. Kelchner, 658 F.Supp. 358 (M.D.Pa. 1986).

83 See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

84 Hafer v. Melo, 502 U.S. 21, 30-1, 112 S.Ct. 358, 364, 116 L.Ed.2d 301 (1991).

85 Regents of the University of California v. Doe, 519 U.S. 425, 428, 117 S.Ct. 900, 903, 137 L.Ed.2d 55 (1997) (by implication). See also Sales v. Grant, 224 F.3d 293, 297-8, reh. den., 237 F.3d 348 (4th Cir. 2000), cert. den., 532 U.S. 1020, 121 S.Ct. 1959, 149 L.Ed.2d 754 (2001) and the cases collected there.

86 Dominguez v. Correctional Medical Services, 555 F.3d 543, 552 (6th Cir. 2009); see also Hardy v. 3 Unknown Agents, 690 F.Supp.2d 1074, 1095 (C.D.Cal. 2010) (physician declines to examine ear of state prisoner because other inmates are waiting).

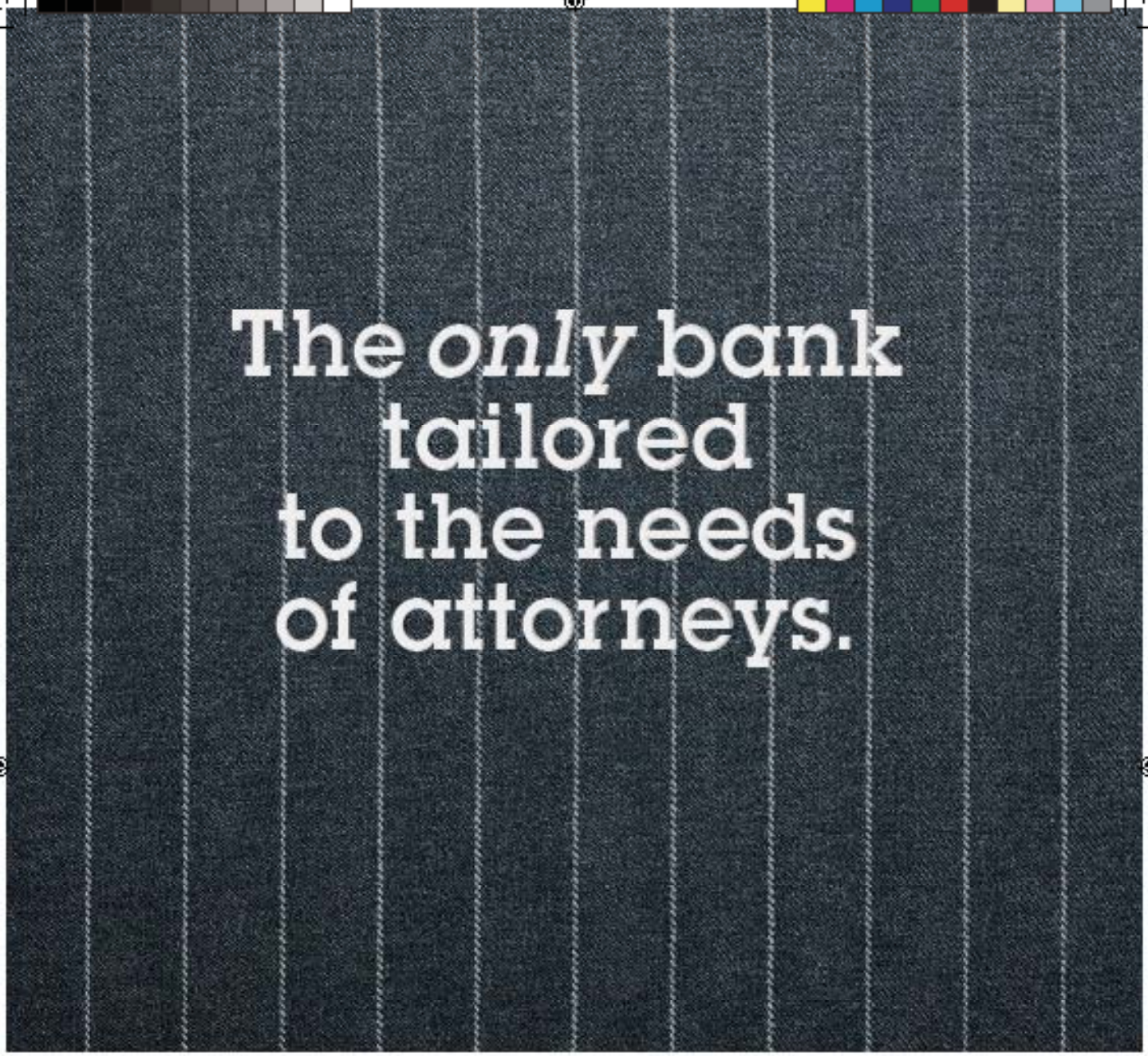
87 See Howard v. Waide, 534 F.3d 1227, 1241 (10th Cir. 2008).

88 Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961).

89 Adickes v. S. H. Kress & Co., 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970).

90 See Conradt, supra, 536 F.Supp.2d at 389-90.

Bruce Baron is the principal of Baron Associates P.C., a boutique litigation law firm located in Brooklyn, New York. He was appointed Special Counsel to the President of the New York State Court Officers Association.



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