



*Law Enforcement
Misconduct Civil Rights
Litigation:
A Bird's-Eye View*



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Jordan has been named one of 40 Illinois Attorneys Under 40 to Watch by the Chicago Daily Law Bulletin. He has taught trial advocacy classes, served as a judge for trial advocacy student competitions, and coached a trial advocacy team, in addition to serving as a faculty member for the Kirkland Institute for Trial Advocacy.

Civil rights litigation: pursuing legal claims on behalf of citizens against government actors who have violated citizens' constitutional rights.

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Course Description

This is an introduction to civil rights litigation relating to law enforcement misconduct, including police, sheriffs, and correctional officials and pursuing legal claims on behalf of citizens against government actors who have violated citizens' constitutional rights.

The program discusses the origins of civil rights litigation, including the 14th Amendment and the Civil Rights Act, and common civil rights claims related to law enforcement misconduct. This is a fundamental overview of common issues related to civil rights litigation and law enforcement misconduct.

Course Presentation

This course provides a fundamental overview of common issues related to civil rights litigation and law enforcement misconduct and an examination of the process and procedure of law enforcement claims.

This course provides a fundamental overview of the process and procedure of bringing Section 1983 actions and law enforcement claims.

This course will provide a comprehensive overview of the laws and strategic considerations in First, Fourth, Eight and Fourteenth Amendment cases.

This course provides a base of skills, knowledge and perspectives regarding law enforcement misconduct and an examination of the process and procedure of law enforcement claims.

This course compares various perspectives on specific types of claims that can be filed, the legal standards for different civil rights claims, and the applicable statutes of limitations for these claims.

This course provides an intellectual foundation and introduces a set of learning skills essential for success in the legal profession and for life beyond. The course will provide opportunities for careful reading, for creative and critical thinking, for oral and written communication, and for engaging with others in a shared conversation about stimulating material.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The

course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives

The ability to understand the relevant state and federal law related to bringing and defending against Sec. 1983 lawsuits.

The ability to understand the duties, roles and responsibilities of counsel in situations involving claims against law enforcement.

The ability to recognize and describe specific types of claims that can be filed, the legal standards for different civil rights claims, and the applicable statutes of limitations for these claims.

The ability to identify and distinguish claims under the First, Fourth, Eight and Fourteenth Amendments.

The ability to understand, discuss and implement practice tips to improve an attorney's practice and provide improved representation to clients.

Participants will develop an understanding of the different constitutional provisions governing law enforcement, and how those provisions translate into relief for people whose rights have been violated.

Participants will gain practical skills in the area of identifying whether a potential client has a legal claim against a member of law enforcement, and when that claim would have to be filed.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Timed Agenda:

Presenter Name: Jordan Marsh

CLE Course Title: Law Enforcement Misconduct Civil Rights Litigation: A Bird's-Eye View

Time Format (00:00:00 - Hours:Minutes:Seconds)	Description
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title: Law Enforcement Misconduct Civil Rights Litigation: A Bird's-Eye View
00:00:32	CLE Presenter Introduction
00:00:50	CLE Substantive Material Presentation Introduction
00:03:32	42 U.S.C. § 1983
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00:16:28	First Amendment
00:22:56	Recording the Police
00:24:39	Fourth Amendment
00:29:35	What are Seizures
00:36:36	Seeking an Arrest Warrant – Duty to be Truthful
00:41:29	Use of Force
00:46:31	Deadly Force
00:50:37	Fleeing Felon
00:52:12	Excessive Force Analysis
00:53:36	Prison Litigation Reform Act (PLRA)
00:55:43	Requirements of PLRA
00:57:45	Physical Injury Requirement
01:01:56	Fourteenth Amendment
01:06:20	Qualified Immunity
01:10:29	Failure to Intervene
01:13:38	Statutes of Limitations
01:19:15	File in State or Federal Court?
01:28:27	Final Comments
01:30:44	Presenter Closing
01:31:00	ApexCLE Company Closing Credits
01:31:08	End of Video

Course Material

Civil Rights Act (Sec. 1983)

Hybrid of Constitutional Law and Tort Law

42 U.S.C. § 1983:

“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...”

§1983 is a Vehicle for Enforcing Constitutional Rights

“As we have said many times, §1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’...”

Graham v. Connor, 490 U.S. 386, 394 (1989)

Ku Klux Klan Act of 1871

“An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.”

The third of three enforcement acts passed by Congress in 1870 and 1871 during the Reconstruction Era to protect the rights of African-Americans to vote, to serve on juries, and to receive equal protection of the laws.

Monroe v. Pape (1961)

“There can be no doubt ... that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it....The question with which we now deal is the narrower one of **whether Congress, in enacting § 1979 [now § 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position....We conclude that it did so intend.**”

Monroe v. Pape, 365 U.S. 167, 172 (1961)

Monroe Effect

“Before *Monroe*, state officials were effectively immune from federal oversight and liability for violations of constitutional rights, despite the fact that Section 1983 had been enacted ninety years prior for the very purpose of addressing this type of misconduct.”

Michael S. DiBattista, *A Force To Be Reckoned With: Confronting The (Still) Unresolved Questions Of Excessive Force Jurisprudence After Kingsley*, 48 Colum. H. Rts. L.R. 203 (2017).

Monroe to Monell

“For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of § 1979 [aka § 1983].”

Monroe at 187.

“We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is 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 the government as an entity is responsible under § 1983.”

Monell v. Department of Soc. Svcs., 436 U.S. 658, 694 (1978).

First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Some Common First Amendment Claims

- Give a police officer the finger, get arrested
- First Amendment violation
- Also a false arrest
- Complain about an officer, get arrested
- Retaliatory arrest
- Gang Loitering Ordinance
(*Ultimately decided under 14th Amendment Due Process Clause.*)

Still need absence of probable cause, *usually*

“The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.”
Nieves v. Bartlett, 139 S. Ct. 1715, 1724 (2019).

“[W]e conclude that the no probable-cause requirement **should not apply** when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”
Nieves at 1724.

Recording the Police

“The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”

Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012).

Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Common Fourth Amendment Claims

- **False arrest**
- **Unlawful Detention/Illegal Seizure**
- **Excessive Force**
- **Unlawful Search**
- **Conditions of Confinement (pretrial)**

Warrantless searches violate the Fourth Amendment, *usually*

Exceptions:

- **Consent**
- **Plain Sight**
- **Searches Incident to Arrest**
- **Hot Pursuit**
- **Exigent Circumstances**
- **Vehicle Searches**

What are seizures?

- Arrests
 - Detentions
 - Involuntary Commitment
 - Seizure of property
 - Use of Force
-
- o Show of authority
 - o pointing weapon
 - o Shouting orders

Investigative Detention

a.k.a. Terry Stop

a.k.a. Stop and Frisk

Based on reasonable suspicion -- must be based on specific facts known to the officer, together with the reasonable inferences from those facts.

- More than a hunch/less than Probable Cause
- Requires Articulable Facts
- No longer than reasonably necessary to determine if suspect was involved in criminal activity
- Detention can include handcuffs and pat-down
- Suspect not free to leave

Warrantless Arrest/Probable Cause

Probable cause for an arrest exists if, at the moment the arrest was made, a reasonable person in Defendant's position would have believed that Plaintiff [had committed] [was committing] a crime. In making this decision, you should consider what Defendant knew and the reasonably trustworthy information Defendant had received.

7th Circuit Pattern Jury Instruction 7.08.

Seeking an Arrest Warrant – Duty to be Truthful

“An officer violates the Fourth Amendment if he intentionally or recklessly includes false statements in a warrant application and those false statements were material to a finding of probable cause...An officer similarly violates the Fourth Amendment if he intentionally or recklessly withholds material information from a probable cause affidavit.” **Rainsberger v. Benner**, 913 F.3d 640, 651-52 (7th Cir. 2019).

“Although we generally presume the validity of a warrant, that presumption may be overcome by a showing that the officer who sought the warrant ‘intentionally or recklessly withheld material facts from the warrant-issuing judge.’”

Leaver v. Shortess, 844 F.3d 665, 669 (7th Cir. 2016) (citing **Whitlock v. Brown**, 596 F.3d 406, 410 (7th Cir. 2010)).

“An officer who swears that presented facts support probable cause when he knows that suppressed facts destroy it does not act truthfully. He therefore violates the Warrant Clause, which ‘surely takes the affiant’s good

faith as its premise.” ***Rainsberger v. Benner***, 913 F.3d 640, 651-52 (7th Cir. 2019).

Use of Force

Must be objectively reasonable under the circumstances.

“An officer’s use of force is unreasonable if, judging from the totality of the circumstances at the time of the arrest, the officer uses greater force than was reasonably necessary to effectuate the arrest...This constitutional inquiry is objective and does not take into account the motives or intent of the individual officers.”

Phillips v. Cmty. Ins. Corp., 678 F.3d 513, 519-20 (7th Cir. 2012)

Fourth Amendment Reasonableness Standard

“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application...its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”

Graham v. Connor, 490 U.S. 386, 396 (1989)

Deadly Force

Same reasonableness standard as excessive force, slightly modified.

“An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect’s actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]”

7th Circuit Pattern Jury Instruction 7.10.

Fleeing Felon

“Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

Tennessee v. Garner, 471 U.S. 1, 11-12 (1985)

Illinois Deadly Force Statute 720 ILCS 5/7-5

An officer “is justified in using force likely to cause death or great bodily harm only when he reasonably believes

that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

- (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
- (2) The person to be arrested has committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.”

Excessive Force Analysis

Fourth Amendment: arrestees and free individuals (through PCH)

Objective reasonableness

Fourteenth Amendment: post-PCH pretrial detainees

Objective reasonableness

Eighth Amendment: convicted inmates

malicious and sadistic harm

Eighth Amendment

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Once a person is convicted, his claims will be evaluated under the Cruel and Unusual Punishment standard of the Eighth Amendment.

“The ‘core judicial inquiry’ ... was not whether a certain quantum of injury was sustained, but rather ‘whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.’ ...”

Wilkins v. Gaddy, 559 U.S. 34, 37 (2010)

Prison Litigation Reform Act (PLRA)

- Passed in 1996 to deter frivolous prisoner lawsuits
- Limits ability to file prisoner lawsuits and discourages attorneys from filing such lawsuits.
- Applies to anyone who is detained or incarcerated in a jail or prison.

Failure to exhaust administrative remedies:

42 U.S.C. § 1997e(a):

“No action shall be brought [under 42 U.S.C. § 1983 or any other federal law]...until such administrative remedies as are available are exhausted”.

Three strikes rule:

28 U.S. Code § 1915(g):

“In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”

Physical Injury requirement:

42 U.S. Code § 1997e(e):

“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18)”.

Attorney's Fees Limitations:

42 U.S. Code § 1997e(d)(2):

“Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.”

42 U.S. Code § 1997e(d)(3):

No award of attorney’s fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.

Fourteenth Amendment

“...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.”

Procedural Due Process

Notice, opportunity to be heard, and impartial tribunal

Substantive Due Process

Rights not enumerated elsewhere in the Constitution

Loving v. Virginia (Laws banning interracial marriage violates DPC and EPC)

Obergefell v. Hodges (Laws banning same-sex marriages violates DPC and EPC)

Equal Protection

Brown v. Board of Education (separate schools for black and white students)

Racial profiling

Qualified Immunity

“Qualified immunity requires a two-part inquiry: we must determine (1) whether facts alleged or shown by a plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was clearly established at the time of the defendant’s alleged misconduct.”

Pearson v. Callahan, 555 U.S. 223, 232 (2009)

“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every reasonable official would have understood that what he is doing violates that right.’ (Citation omitted.) We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”

Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011)

Failure to Intervene

“[A]n officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know...that any constitutional violation has been committed by a law enforcement official; and the officer had a realistic opportunity to intervene to prevent the harm from occurring.”

Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994).

Heck Bar

“We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.”

Heck v. Humphrey, 512 U.S. 477, 486-87 (1994)

False Arrest claim accrues immediately

“We hold that the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by

criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process.”

Wallace v. Kato, 549 U.S. 384, 397 (2007)

Same applies for excessive force claim.

Personal v. Official Capacity Suits

- Personal capacity suits are against individuals for their own actions.
- Official capacity suits are against the entities, i.e. Sheriff Tom Dart = Sheriff’s Office.

State Law Causes of Action

Battery (Federal Claim: Excessive Force)

Assault (Federal Claim: Excessive Force)

False Imprisonment/False Arrest

(Federal Claims: False Arrest or Unlawful Detention/Illegal Seizure)

Malicious Prosecution (Federal Claim: Wrongful Conviction)

Intentional Infliction of Emotional Distress

Wrongful Death

Survival

Illinois Tort Immunity Act

“A police officer is not “liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.”

745 ILCS 10/2-202

Willful and wanton conduct

Willful and Wanton conduct is “a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.”

745 ILCS 10/1-210

Statutes of Limitations

- Federal Claims use state law personal injury statutes of limitations: 2 years in Illinois
- But these can vary greatly from state to state.
- State law claims against public entities of public employees is 1 year pursuant to the IL Tort Immunity Act
- Remember accrual dates, i.e. *Heck*.
- Status of plaintiff (minor, disabled, etc.)

Damages

- Compensatory damages
- Punitive damages on federal claims only
- Attorney fees on federal claims only

Punitive Damages

“The purposes of punitive damages are to punish a defendant for his or her conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future...You may assess punitive damages only if you find that [Defendant’s] conduct was malicious or in reckless disregard of Plaintiff’s rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff’s rights if, under the circumstances, Defendant simply did not care about Plaintiff’s [safety] [or] [rights].”
(7th Cir. Civ. P. Inst. 7.28)

§ 1988 Fee-Shifting Statute

“In any action or proceeding to enforce a provision of sections... 1983... of this title... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs...”

42 U.S.C. § 1988 (b)

(Civil Rights Attorney’s Fees Award Act of 1976)

Plaintiff may be liable for costs, or fees (if it’s frivolous).

Can negotiate.

Private Attorney General

A plaintiff in any civil rights suit acts “not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest importance.”

McCaskill v. SCI Management Corp., 298 F.3d 677, 684 (7th Cir. 2002)

File in State or Federal Court?

- Statute of Limitations
- Comfort factor
- Judges
- Availability of Atty fees
- Qualified Immunity
- Jury Pool
- Can file both federal and state claims in either court

Final Notes

- Congress did not create a bureaucratic enforcement mechanism
- Story of the Constitution is Written Every day

- Case law is very fluid
- Every landmark case began with one person filing a lawsuit
- Be creative
- Use FOIA

Program Transcript

There is no program transcript available for this program.

Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org