Civil Rights /Section 1983 SEMINAR  
Professor Oren  
Fall 2009  

Monday & Wednesday, 1:00-2:30, Room 119 TUII  
See also On-line course discussion board. You need to sign on before it closes.  
Office: TUII, 228; (Ph.) 743-2170; Loren@uh.edu  
Office Hours: Monday and Wednesday, 2:30-4:30, & by appointment  
Rescheduled or cancelled classes: See below; Conferences TBA  

Draft Syllabus (always check since guests or other reasons may change this schedule)  
See Also: Choosing a Paper Topic (for additional seminar requirements), first day assignment posting, & on-line discussion board  

Books:  
Theodore Eisenberg, CIVIL RIGHTS LEGISLATION (5th ed. 2004) (Looseleaf edition available at 40% discount)  

2004 Statutory Supplement to Eisenberg (recommended)  

Articles & Handouts TBA.  

Reference Works:  

Sheldon Nahmod  CIVIL RIGHTS LITIGATION  
Cook & Sobieski , CIVIL RIGHTS ACTIONS  
“Write Right” posting (on-line discussion board)  
“Shamelessly Stolen Writing Tips” (on-line discussion board)  
“Precis” (on-line discussion board)  
“Roadmap” (on-line discussion board)  
“Historical Timeline” (first day assignment posting & on-line discussion board)  

Course Objectives:  
The objectives of this course are produce a publishable quality research paper that satisfies the Law Center’s senior writing requirement, to teach the substantive law of the subject matter as a necessary background to that research paper, and to develop the analytical and writing skills necessary to the practice of law.  

Paper Topics: See Choosing a Paper Topic (for additional course requirements and guidance)  
I expect to see all of you for individual conferences as you select your topics, write your precis, pursue your research, and start your writing. Please do NOT wait until the last minute to research or begin your writing, as problems often appear only in that process. The earlier that
you consult me, the more I can help you.

The paper required for this seminar must meet all the criteria established for the senior writing requirement of the Law Center. That includes proper form for citations and most important all relevant rules on plagiarism and original work. You MUST submit your rough and final drafts to me in two forms, that is in a hard copy, but also in a data file via e-mail. The final draft must be a minimum of 35 pages, including footnotes (or endnotes) (no more than 12 pt font size and double-spaced; standard margins) and the rough draft must be at least 25 pages.

Note: The Law Center’s policy on original work and plagiarism requires submission of your papers (both rough drafts and final drafts) in electronic form (as well as a hard copy). For additional details see Choosing a Paper Topic.

***Assignments are Subject to Change)***

Reading Assignments:

**Week I. Monday, August 24, 2009 & Wednesday, August 26**

Elements of the Statute; and Historical Introduction to Civil Rights Legislation: Reconstruction, "Redemption", and Resuscitation

Eisenberg, 3-60; Supplement; Historical Timeline at first day’s assignment and at on-line discussion board [Recommended: Eric Foner, A Short History of Reconstruction]

**Question:** In which ways did the Supreme Court limit the reach of the Reconstruction-era civil rights statutes almost immediately, through statutory interpretation and through constitutional interpretation, respectively? What difference does it make which route they took?

[Start paper topic brainstorming on Wednesday; see the handout on “Choosing a Paper Topic,” posted at on-line discussion board; start preliminary research on paper topic]

**Week II. August 31, & W, September 2, 2009**

**Monday:** Professor Tobi Tabor on legal analysis and researching and writing a seminar paper (and tips to avoid accidental plagiarism). Your attendance is required and essential.

**Wednesday, 9/2: (Paper Topics Due Next Wednesday)**

(Read everything in this assignment for today)
Monroe v. Pape and the Resuscitation of Section 1983 ("Under Color of State Law")

Monroe v. Pape, 365 U.S. 167 (1961) (read entire case instead of short version in casebook; this is a critical case for this course, read closely. See the case at the on-line discussion board. The section on “municipal liability” has been overruled (Section III of the opinion). You can save it, together with the dissent on that section, for later, but please read the concurring and dissenting opinions about “under color of state law” (Sections I & II) at this time.

Plus Eisenberg 61-76 (except omit 66-72).

Questions for reading Monroe:

a) Look for 3 expansive interpretations of the statute in the Majority opinion;
b) How does the Majority and the Dissent use legislative history?
c) What would you have done?

RECOMMENDED FURTHER READING:


Week III. [No class Monday, September 7, 2009], Wed, Sept. 9

Wednesday, September 9, 2009
Continue, Monroe v. Pape; Continue brainstorming about paper topics

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Paper topics due today in class

[PRECIS (2pp) plus annotated bibliography will be DUE on Wednesday, September 30, 2009]

Week IV.  9/14 & 9/16/ 2009 [you should be working on your précis too]. Conferences as needed on paper topics.

Monday:
THE RELATIONSHIP BETWEEN ACTION ‘UNDER COLOR OF LAW’ AND STATE ACTION
Eisenberg, 76-99

Questions: Does conduct have to satisfy both the state action and the under color of state law tests to be actionable under Section 1983? Are those the same thing? Always?

Wednesday:
"RIGHTS DEPRIVED":
Enforcing federal statutes through §1983?
Eisenberg 100-122;

Q: When does a violation of a purely statutory federal right (as contrasted to a constitutional right) become actionable under Section 1983? How can you tell which statutory rights are enforceable and which are not? (Are you sure you know the difference between a federal constitutional and a federal statutory right?)

Week V.  9/21 & 9/ 23 [PRECIS with annotated bibliography will be DUE next Wednesday, September 30]

Monday: DUE PROCESS AS AN UNDERLYING RIGHT ENFORCED BY SECTION 1983:
STATE OF MIND AND ADEQUATE STATE REMEDIES
Eisenberg 122-146; plus
Wilkinson v. Austin 545 U.S. 209 (2005) (placement in supermax prison) (posted at online discussion board);
Gilbert v. Homar, 520 U.S. 024 (1997) (pre-suspension hearing); and
Wednesday:
BIVENS ACTIONS,
Eisenberg 146-170; and
THE REALITY OF CONSTITUTIONAL TORT CLAIMS
Eisenberg, 170-182,
Query: How do we draw the line between ordinary torts and constitutional torts involving due process claims? Why is it important to draw this line?

Further reading (recommended):


Nahmod, "Section 1983 Discourse: The Move From Constitution to Tort," 77 GEORGETOWN L.REV. 1719 (1989);

Brown, "Defederalizing Common Law Torts: Empathy for Parratt, Hudson, and Daniels," 28 BOSTON COLLEGE L.REV. 813 (1987);

Monaghan, "State Law Wrongs, State Law Remedies, and the Fourteenth Amendment," 86 COLUMBIA L.REV. 979 (1986);


Week VI. [No Class Monday 9/28] Wednesday 9/30
WEDNESDAY PRECIS (2pp) plus annotated bibliography DUE. (Schedule conferences) plus
DUE PROCESS AND THE PROBLEM OF INACTION
Eisenberg, revisit 76-99
PLUS:
DeShaney v Winnebago County Dept of Social Services, 489 U.S. 189 (1989)
**Question:** Why does the Court draw a bright line between action and inaction for due process violations (with certain exceptions—what are they?) Is this distinction defensible? Why or why not?

**AND RECOMMENDED, one of the following articles:**


**Week VII. 10/5 & 10/7, 2009 (Class plus individual conferences on précis)**

**Monday:** DEFENSES AND IMMUNITIES OF INDIVIDUAL OFFICERS

- Eisenberg, 208-245 (absolute immunity for judges, & prosecutors?);

  *plus* Thomas v. Sams immunity hypo, at on-line discussion board

**Question:** How did the Court interpret §1983 to include immunity defenses for individual defendants? Who has the burden of proof and what must be shown in order to establish or avoid the immunity defense? Why is it critical to your entire Section 1983 case (not just defenses) to know which defendants’ actions are at issue?

**Wednesday, October 7: Defenses and Immunities of Officers—Qualified Immunity**

- Eisenberg, 245-283 (qualified immunity & supervisory liability)


**Further Reading (recommended):**

*Schuck, Peter, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983), ch. 3 "Official Liability for Damages" (59-81) (3 copies available on reserve)*


**Week VIII: 10/12 & 10/14, 2009** (Class and Individual Conferences on précis)

**Monday:**

MUNICIPAL LIABILITY ("ANY PERSON"): MONROE, MONELL, AND RECENT MUNICIPAL LIABILITY DECISIONS (COMPARING DISSENT IN ZINERMON V. BURCH)

Eisenberg, 285-335 on supervisory and municipal liability

*Plus* the overruled Section III of *Monroe v. Pape*, and the dissent to that section, for purposes of comparison to *Monell*.

**Question:** How is suing a “municipality,” i.e. the governmental employer, different than suing an individual defendant under §1983? What do you have to prove and against what kind of entity? What is the significance of state law in that proof? [Louima hypo]

[Thought Question: Compare liability for Section 1983 municipality to liability for "employers" under Title VII; Americans with Disabilities Act (ADA)].

**Recommended Reading:**


Brown, Mark R. "Correlating Municipal Liability and Official Immunity Under Section 1983"


Bandes, Susan "Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act" 72 IOWA L. REV. 101-162 (1986)


See also, Peter Schuck, “Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory,” in Sheldon Nahmod’s A SECTION 1983 CIVIL RIGHTS ANTHOLOGY October 9-10 Individual Conferences

Wednesday, October 14, 2009:

DEFENSES AND IMMUNITIES OF GOVERNMENT ENTITIES: SOVEREIGN IMMUNITY

Eisenberg, 335-366--

Question: The Eleventh Amendment provides: “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.” What difficulties does this Eleventh Amendment immunity (different than sovereign immunity, or the same?) create for §1983 lawsuits against an “arm of the state”? What are the ways around this limitation (and the exceptions to the exceptions?) (Remember, focus on the defendant.) Is the determination whether a particular state agency is independent or an arm of the state a matter of federal or of state law? How do you handle these cases which may involve a claim against an arm of the state? What should you worry about?

Week IX: 10/19 & 10/21, 2009—

Monday, October 19, 2009
DEFENSES AND IMMUNITIES OF GOVERNMENT ENTITIES: SOVEREIGN IMMUNITY (continued)
Eisenberg, 366-400

Wednesday, Oct. 21—Research and writing break, no class

[Your rough drafts will be due next week by 5pm on 10/28/09. Draft must be a minimum of 25 pp long (normal font size, margins, and spacing) and must be submitted in electronic and hard copy form both.]

Week X. 10/26 & 10/28, 2009—RESEARCH AND WRITING BREAK, ROUGH DRAFT DUE this Wed. by 5pm

****25 pp Wednesday 10/28/09 ROUGH DRAFTS DUE by 5 pm (hard copy AND e-copy) (no exceptions except with prior approval; PLUS ONE PAGE ABSTRACT OF YOUR PAPER. The Abstract is due at the time of your presentation****

Week XI. 11/2 & 11/4, 2009 (plus conferences and/or guest)

Monday PRISONER REMEDIES: THE FINE LINE BETWEEN HABEAS AND SECTION 1983
Eisenberg, 498-517; 537-547; AND
Muhammad v. Close, 540 U.S. 749 (2004);
Wilkinson v. Dotson, 544 U.S. 74 (2005);

Wednesday—conferences or guest

Week XII.  11/9 & 11/11 2009 – Conferences, Maybe presentations


Week XIII.  11/16 & 11/18, 2009 Presentations


WEEK XIV. 11/23, 2009 Presentations (No Class Wednesday, 11/25 for Thanksgiving Break)

Monday


WEEK XV. 11/30/2009; December 2, 2009 (last week of class) (Everyone is expected to be here for student presentations).


FINAL PAPER DUE (HARD COPY AND E-MAIL) 5 pm MONDAY, December 21, 2009