Civil Rights /Section 1983 SEMINAR  
Professor Oren  
Spring 2012 DRAFT

**Tuesday & Thursday, 6:00-7:30 p.m., Room 117 TUII**
See also On-line course discussion board. You need to sign on before it closes. (I have to make changes in this.)

Office: TUII, 228; (Ph.) 743-2170; Loren@uh.edu  
Office Hours: Tuesday 4:30-6:00pm, & by appointment  
Rescheduled or cancelled classes: See below; Student 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 or its substitute

**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)

**WEBSITE ON CIVIL RIGHTS LITIGATION:**  
In time for the opening of the Supreme Court’s new term, David Achtenberg, University of Missouri—Kansas City School of Law, is rolling out the **Petition to Decision** website.  
**Petition to Decision** is a comprehensive digital archive of all the available papers of the Supreme Court justices relating to selected civil rights cases. It may be interesting to those who study the internal workings of the Court as well as to those with a particular interest in civil rights litigation. The website, which contains as many as 1800 pages of documents per case, can be accessed at: www.petitiontodecision.com **Petition to Decision** presents an interactive timeline of the various cases, identifying every step in the justices’ decision-making process and linking each step to digital copies the relevant
internal papers. A typical case file includes the pool memoranda regarding certiorari (together with annotations by the various justices and their clerks), notes prior to and during the cert conference, various notes and memoranda prior to oral argument, justices’ oral argument notes, justices’ records of what took place at the merits conference, miscellaneous memoranda to and from the justices discussing the case, and annotated drafts of the various opinions. (Click here for sample documents.) The timelines make it possible to study the Court’s handling of the cases from the filing of the petition for certiorari until announcement of the final decision. (Click here for an example of a timeline.) For those who prefer to review the papers without interpretation, the website also makes it possible to view the documents in archive order, i.e., arranged into digital boxes and folders that correspond to the ones in which the original hard copies are stored. These “Archive Pages” may be particularly useful for teachers who want to give their students a feel for what it is like to do archival legal history research. (Click here for an example of an Archive Page.) Additional features of the website include transcriptions of important but hard-to-decipher handwritten documents, short descriptions of the legal significance and background story of each case, and links to more readily publicly available documents such as briefs, appendices, oral arguments.

The website focuses on decisions in which the Supreme Court interpreted 42 U.S.C. § 1983, the principal statutory vehicle used to sue state and local officials for violations of constitutional rights. The long range plan is for Petition to Decision to include a wide range of § 1983 cases dealing with issues such as municipal liability, official immunity, color of law, etc. The current, pilot version of the website is limited to cases dealing with municipal liability issues. Additional case files and features will be added on a regular basis.

For more information about Petition to Decision, you can reach Professor Achtenberg at AchtenbergD@umkc.edu.

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. Tuesday January 17 & Thursday, January 19, 2012**

*Tuesday: Historical Introduction to Civil Rights Legislation: Reconstruction, "Redemption", and Resuscitation
Eisenberg, 3-66; [Plus “Historical Timeline”, “Statutory Elements” hand-outs available in my Suite and posted at First Day’s Assignment;]

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?

*Thursday: (Historical Introduction Continued) PLUS Brainstorming Paper Topics:
“Choosing a Paper Topic” handout, available in my office suite and posted at First Day’s Assignment. Start preliminary research on paper topic and be prepared to do some paper topic brainstorming in class.

**Week II. January 24 & 26, 2012**

*Tuesday: (See Thursday’s assignment—and start on it)
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.


Monroe v. Pape, 365 U.S. 167 (1961) (read entire case in handout instead of short version in casebook; this is a critical case for this course, read closely. The section on “municipal liability” has been overruled (Section III of the
opinion). You can save it to read later, together with the dissent on that section, 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. Tuesday, January 31st & Thursday, February 2, 2012

Tuesday: 
Continue, Monroe v. Pape; Continue brainstorming about paper topics

Thursday: 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?

Paper topics due today in class

[Advance warning: PRECIS (2pp) plus annotated bibliography will be DUE in 2 weeks]
Week IV.  February 7 & 9, 2012 [you should be working on your précis too]. Conferences as needed on paper topics.

**Tuesday:**
"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?)

**Thursday:**
DUE PROCESS AS AN UNDERLYING RIGHT ENFORCED BY SECTION 1983:
STATE OF MIND AND ADEQUATE STATE REMEDIES
Eisenberg 122-146; plus (posted at TWEN board):

Gilbert v. Homar, 520 U.S. 024 (1997) (pre-suspension hearing); and

[2pp PRECIS with annotated bibliography will be DUE 6pm Thursday February 16, 2012, submit electronically]
Week V. February 14 & 16, 2012

[2pp PRECIS with annotated bibliography will be DUE Thursday February 16, 2012 by 6pm, submit electronically]

**Tuesday:** 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);

**Thursday:** (Schedule conferences)

**PRECIS (2pp) plus annotated bibliography DUE** (submit electronically by 6pm) (see précis description on TWEN board)

*plus*

DUE PROCESS AND THE PROBLEM OF INACTION
(Eisenberg, review 76-99)

**ADD:**

- 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 VI. February 21 & 23, 2012**

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

- Eisenberg, 208-245 (absolute immunity for judges, & prosecutors?);
- **plus** “Thomas v. Sams immunity hypo”, at TWEN course materials

**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?

**THURSDAY**

**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)


Oren, "Immunity and Accountability in Civil Rights Litigation: Who Should Pay?" 50 U OF
Week VII.  February 28 & March 1, 2012 (Class plus individual conferences on précis as needed)

Tuesday:

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:


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

**Week VIII: March 6 & 8, 1012** (Class and Individual Conferences on précis as needed)

Tuesday:

**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?

Thursday,

**DEFENSES AND IMMUNITIES OF GOVERNMENT ENTITIES: SOVEREIGN IMMUNITY** (continued)

Eisenberg, 366-400
Week IX: March 13 & 15, 2012— SPRING BREAK—RESEARCH and WRITING, NO CLASS

Week X. March 20 & 22, 2012— RESEARCH AND WRITING BREAK, NO CLASS

ROUGH DRAFT DUE ELECTRONICALLY no later than Sunday, March 25, 2012 at 5pm.

(no exceptions except without prior approval)

The rough draft must be at least 25 pages including footnotes (or endnotes) (no more than 12 pt font size and double-spaced; standard margins) and the final draft must be a minimum of 35 pages, same requirements.

A one page abstract of your paper should be posted on the class TWEN board by you at least two days before the date of your oral presentation.

All work must be submitted on time, unless you get prior approval from me.

Week XI. March 27 & 29, 2012 (plus conferences)

Tuesday: 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);

Thursday—conferences

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Week XII. April 3 & 5, 2012 – Conferences,

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Week XIII. April 10 & 12, 2012 Presentations

A one page abstract of your paper should be posted on the class TWEN board by
you at least two days before the date of your oral presentation.

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WEEK XIV. April 17 & 19, 2012 Presentations (Everyone is expected to be here for student presentations).

Tuesday Thursday

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WEEK XV. April 24 & 26, 2012 (last week of class) (Everyone is expected to be here for student presentations).

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FINAL PAPER DUE (Electronic submitted by 9 pm Friday, May 11, 2012.)