Federal Courts
Law School Legends
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CHOICE OF LAW IN THE FEDERAL SYSTEM: *ERIE RR.* AND FEDERAL COMMON LAW

I. *Erie Railroad Co. v. Tompkins*

A. Foundations of *Erie*: *Swift v. Tyson*

1. General Common Law – A body of law not connected to any particular government.

2. Common law could be replaced or superseded by statute, whether passed at the state or federal level.

B. Federal-State Disparity

1. If courts disagreed about the common law, there were two responses:

a. For an issue that was intrinsically local, federal courts deferred to the court in that state or locality.

i. Example – Title to land.

b. For matters of general tort or contract doctrine, the courts in every jurisdiction were free to decide independently.

2. Forum-shopping – This situation led plaintiffs to select federal or state court depending on what rule they wanted

C. *Erie v. Tompkins*

1. *Erie* eliminated the category of general common law. All law is either state or federal.

2. *Erie* said that the choice of federal or state law does not depend on the court you are in. Rather, it depends on the issue.

    a. Federal law governs federal issues, whether in state or federal court.

    b. State law governs state issues, whether in state or federal court.

3. Choice of law is a question of whose law, not which court. In diversity cases, federal courts follow state substantive law.

D. Not Limited to Diversity Jurisdiction

1. *Erie* is not a rule for cases.

2. State law governs state issues, no matter where the case is litigated or why a federal court has jurisdiction.

> **EXAMPLE:** A federal court may have federal question jurisdiction over a federal claim and pendent or supplemental jurisdiction over a related state claim. *Erie* says that you apply state substantive law to the pendent state claim, even though jurisdiction is not based on diversity.

3. Not all issues in diversity cases are necessarily controlled by state law. Federal issues can also be raised under diversity jurisdiction and federal law would govern for those issues.

> **KEY POINT:** *Erie* is a rule of **issues, not cases**. It says that state law governs state issues, no matter where the case is heard, and federal law governs federal issues, no matter where the case is heard.

E. Substantive Law Only

1. *Erie* applies to **substance, not procedure**. Federal courts always apply federal procedures.

2. According to *Hanna v. Pummer*, federal procedures include any matter covered by the Federal Rules of Civil Procedure.

3. Generally speaking, state courts apply state procedures, even if the substantive issue is governed by federal law.

F. Which State Law Applies? *Klaxon Co. v. Stentor Electric Mfg. Co.*

1. *Klaxon* says that *Erie* applies to choice among state laws. When a federal court is required by *Erie* to apply state law, it follows the conflicts rules of the state in which it sits.

G. Vertical vs. Horizontal Forum Shopping

1. *Erie* and *Klaxon* eliminate vertical forum shopping. The same substantive law applies whether you are in a state court or a federal court in that state.

2. Horizontal forum shopping is still possible because different states have different laws, and federal courts sitting in different states will apply different state laws.

H. Substance vs. Procedure in the Law of Conflicts

1. Typically, states apply their own procedures even when they apply another state's law to the substance of a transaction.

> **EXAMPLE:** If a New York court is following the law of Pennsylvania to determine who is liable in a train wreck – perhaps because it occurred in Pennsylvania – the New York court will follow its own procedures.

> **KEY POINT:** The line between substance and procedure for purposes of *Erie* is not necessarily the same as the line between substance and procedure under state conflicts law.

I. Statutes of Limitation

1. Under *Erie*, statutes of limitation are substantive, as are burdens of proof.

2. A federal court hearing a state law claim will apply the state's statute of limitation and the state's law on burdens of proof.

3. State conflicts rules often regard statutes of limitation and burdens of proof as procedural for conflicts purposes. So a state might say: "We'll let you enforce a claim that arose in another state, but we'll use our own statute of limitations because we consider that procedural," or "We agree that the law of

some other state determines whether you have the defense of contributory negligence, but we'll use our own law on who has the burden of proof because we consider that procedural."

4. The state regards the limitations period and the burden of proof as procedural for conflicts purposes, and therefore applies its own law even though the law of another state governs the substantive rights and liabilities.

> **EXAMPLE 1:** A federal court sitting in Massachusetts hears a diversity case involving an automobile accident that occurred in Maine. Which statute of limitations applies?
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> *Erie* says that state law applies to all substantive issues in that case, including whether the claim is time barred. That is to say, under *Erie*, the statute of limitations is substantive, and state law applies.
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> Which state's law applies? There is a choice between Massachusetts, where the case is litigated, and Maine, where the automobile accident occurred. *Klaxon* says that the federal court sitting in Massachusetts should apply Massachusetts conflicts rules.
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> The federal court sitting in Massachusetts looks to Massachusetts conflicts law. The Massachusetts courts say that they look to Maine law to determine the rights and liabilities arising from an accident in Maine, but that they apply the Massachusetts statute of limitation. Because it is procedural for conflicts purposes.
>
> The federal court applies a state statute of limitations because that issue is substantive under *Erie*. Then it applies the Massachusetts statute of limitations rather than the Maine statute of limitations because Massachusetts regards that issue as procedural under the law of conflicts.

J. Transfer

1. When a case is transferred from one federal court to another for convenience, the law of the transferor forum controls. *Klaxon* requires the transferee court to act as if it were sitting in the transferor state in applying state law.

2. As long as the suite was filed in the proper venue, if your case is transferred to another district for convenience, even if the transfer is initiated by the plaintiff, you can take the transferor's law with you.

II. Federal Common Law

A. *Swift* and *Erie* Distinguished

1. Federal Common Law – Post-*Erie* federal common law is judge-made federal law. It differs from constitutional law in that Congress is free to overrule it. But unless and until Congress acts, federal common law is real federal law and is fully binding on state courts.

2. *Erie* did not eliminate federal common law. It ended general common law of the sort endorsed in *Swift v. Tyson*.

3. All law is either state or federal. If an issue is controlled by state law, the state rule of decision applies in both state and federal court.

4. It does not matter whether the state law is statutory or judge-made. It applies equally in state and federal court.

5. If an issue is controlled by federal law, the federal rule of decision applies in both state and federal court, whether the federal law is constitutional, statutory, or judge-made.

B. When Courts Make Federal Common Law

1. Federal courts create federal common law to protect uniquely federal interests.

a. Federal law governs the rights and duties of the United States.

b. State law governs the rights and duties of private parties.

C. *Clearfield Trust Co. v. United States*

1. In *Clearfield Trust*, the Supreme Court said that the decision to create federal common law involves two questions.

a. Question # 1: Are the rights and duties of the United States directly in issue? If so, federal law controls.

b. Question # 2: Is there need for a uniform federal rule of decision?

i. If there is a need for a uniform federal rule of decision, the federal courts will announce one.

ii. If there is not a need for a uniform federal rule of decision, the federal courts will apply state law as the federal rule of decision.

> **EXAMPLE:** When the United States government leases office space, the transaction is technically controlled by federal law. Federal law, though, simply adopts state law as the rule of decision for ordinary commercial leases. Therefore, practically speaking, the United States is subject to the same rule of decision as everyone else.

D. Aberrant or Hostile

1. When federal courts borrow state law, they reserve the right to reject state laws that are aberrant or hostile.

2. If a particular state law is inimical to federal interests, the federal courts will replace it with a more acceptable approach.

> **KEY POINT:** Federal law applies whenever the rights and duties of the United States are directly in issue, but there is a federal rule of decision only when there is a special need for uniformity or when state law is aberrant or hostile. Otherwise, state law is applied as the federal rule of decision.

III. Implied Rights of Action

A. Definition – Implied rights of action are a type of federal common law. They can arise under federal statutes or directly under the Constitution. In either case, they question is whether the court will create a private right of action, usually for money damages, even though there is no explicit legislative or constitutional authorization to do so.

B. Private Rights of Action to Enforce Federal Statutes – *Cort v. Ash*

1. *Cort v. Ash* (1975) – Set forth a four-factor test to determine when a private right of action should be created.

   a. Is the plaintiff a member of the class for whose especial benefit the statute was enacted?

   b. Is there indication of legislative intent to create or deny such a remedy?

   c. Would a private right of action be consistent with the underlying purpose of the statute?

d. Is the cause of action one traditionally relegated to state law, so that a federal right of action might be inappropriate?

2. The Supreme Court is very reluctant to create a private right of action unless Congress somehow indicates that it wants one or unless the statutory scheme makes no sense without it.

C. Implied Rights of Action to Enforce Constitutional Rights

1. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* held that a federal officer can be sued for money damages to redress an illegal search and seizure.

2. The remedy in *Bivens* is federal common law.

3. *Bivens* applies to most constitutional rights, but not all.

4. Sometimes, the Court finds "special factors counseling hesitation." This means that the private right of action is not available.

a. Example – If Congress has provided an alternative remedy, right of action will probably not be implied.

KEY POINT: A private right of action to collect money damages for violation of constitutional rights is not constitutionally required. This right against state and local officers exists because Congress so provided in § 1983. And this right exists against federal officers – unless there are "special factors counseling hesitation" – because the Supreme Court held so as a matter of federal common

JURISDICTION OF THE FEDERAL COURTS

I. Subject Matter Jurisdiction – There are two main categories of subject matter jurisdiction of federal district courts: diversity and federal question.

A. Diversity of Citizenship

1. The general diversity statute is 28 U.S.C. §1332. The statute has been interpreted to require complete diversity. This means that all plaintiffs must be diverse from all defendants.

2. A corporation is a citizen of the state or states where it is incorporated and where it has its principal place of business.

3. A partnership, limited partnership, or other unincorporated association is a citizen of every state of which its members are citizens.

B. Ancillary or Supplemental Jurisdiction

1. The Federal Rules of Civil Procedure allow additional claims and parties to be added to the original litigation. The additional claims and parties may piggyback on the original diversity jurisdiction in certain situations.

a. This used to be called "ancillary jurisdiction," but 28 U.S.C. §1367 calls it "supplemental jurisdiction."

b. In diversity cases, ancillary supplemental jurisdiction includes:

i. compulsory (but not permissive) counterclaims

ii. cross claims

iii. intervention as of right

iv. impleader of third-party defendants.

c. Ancillary or supplemental jurisdiction does not include:

i. permissive counterclaims

ii. permissive intervention

iii. joinder of necessary and indispensable parties

C. Federal Question or "Arising Under" Jurisdiction

1. 28 U.S.C. §1331 – Requires that a claim "arising under" federal law must appear on the face of the well-pleaded complaint.

2. Declaratory judgments

   a. Declaratory judgments are an exception to the rule because the parties are reversed.

   b. The declaratory judgment plaintiff is the party against whom a claim is made, and the declaratory judgment defendant is the party who makes that claim.

   c. Federal question jurisdiction exists for a declaratory judgment if the claim of the declaratory judgment defendant would have been based on federal law.

3. Pendent or Supplemental Jurisdiction

   a. If a federal claim and a state claim share a common nucleus of operative fact, the federal court may hear the pendent state claim.

   b. Pendent jurisdiction is within the sound discretion of the court.

   c. The supplemental jurisdiction statute, 28 U.S.C. §1367, allows pendent party jurisdiction on the same basis.

> **EXAMPLE:** A plaintiff has a federal claim against defendant A and a pendent state claim against defendants A and B. The only claim pending against defendant B is the pendent state claim, but that's okay. The federal court may exercise pendent party jurisdiction if it wants.

II. Congressional Control Over Jurisdiction

A. Article III

1. Lower Courts – Article III says that the "judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

    a. Congress has the option to create lower federal courts rely entirely on state courts, or rely partly on state courts.

    b. The power of Congress to control the jurisdiction of the lower federal courts comes from the power of Congress to control the existence of lower federal courts.

2. The Supreme Court – The Supreme Court's existence is commanded by Article III. Article III, §2 says that the Supreme Court's jurisdiction exists "with such exceptions, and other such regulations as the Congress shall make."

    a. Since 1789, this provision has been read to give Congress the power to make exceptions to the jurisdiction of the Supreme Court.

B. What Can Congress Do?

1. The traditional view is that Congress can use its power under Article III to control the jurisdiction of the federal courts.

2. At no time has the entire judicial power of the United States been vested in any federal court.

C. What Can Congress Not Do?

1. Unconstitutional Outcomes – Congress cannot require that courts render unconstitutional decisions.

> **EXAMPLE:** Congress cannot allow federal courts to try federal criminal prosecutions but forbid them from entertaining constitutional defenses.

2. Other Theories

    a. Some have argued that Congressional control over jurisdiction cannot be used to destroy the essential functions of the Supreme Court.

b. Others have argued that Congress cannot use its control over jurisdiction to accomplish any independent unconstitutionality such as disadvantaging a particular race or political point of view.

KEY POINT: Generally, Congress can control the jurisdiction of the federal courts, so long as it does not require unconstitutional decisions and there is no clearly established limitation on that power.

III. Article III Courts

A. Text and History – Article III provides that judges of both supreme and inferior courts have life tenure, assuming good behavior, and guaranteed pay.

1. Under Article III, every federal judge must have these protections.

2. From the beginning of the republic, there have been some federal courts whose judges did not have life tenure and guaranteed pay. Examples of non-Article III courts include:

a. Territorial Courts

b Military Courts

c. D.C. Local Courts

d. Administrative Agencies

B. *Northern Pipeline v. Marathon Pipe Line* – In general, the Supreme Court has found ways to allow Congress to do what it wants, despite the text of Article III. The chief exception is *Northern Pipeline v. Marathon Pipe Line* (1982).

1. The Supreme Court struck down the Bankruptcy Act of 1978 because the bankruptcy judges were appointed for fourteen-year terms and could be removed by the judicial council of the circuit.

2. This arrangement was struck down, in part, because the bankruptcy courts were given jurisdiction over state law disputes related to federal bankruptcy cases.

C. Two Explanations of Non-Article III Courts

1. Public Rights – The public rights approach seeks to differentiate among non-Article III courts. This approach is followed in *Northern Pipeline*, particularly in the plurality opinion of Justice Brennan.

    a. "Public rights," as Brennan defined them, are "disputes between the government and others."

    b. Since the government can resolve disputes between itself and others without going to the courts at all, it can also resolve those disputes in special or legislative courts that do not fit the strictures of Article III.

    c. This exception does not address military courts or D.C. local courts, but it does explain administrative agencies.

    d. The problem with this view, though, is that bankruptcy courts hear disputes between private parties.

2. Appellate Review – The appellate review approach focuses on the availability of appellate review by an Article III court.

    a. Under this view, you might allow all sorts of non-Article III adjudication, so long as meaningful appellate supervision is available from an Article III court.

    b. The appellate review approach is consistent with current practice, especially regarding administrative agencies, but it is not consistent with *Northern Pipeline*.

IV. Adequate and Independent State Grounds

A. Introduction

1. State courts are final, binding, and authoritative on questions of state law. The only question the Supreme Court will consider is whether state law, as construed by the state courts, violates federal law.

2. The Adequate and Independent State Ground Doctrine translates this idea into a rule of jurisdiction.

KEY POINT: The Supreme Court will review a state court judgment only if it turns on federal grounds. There is no Supreme Court review if the state court decision is supported by an adequate and independent state ground.

B. Adequate to Support the Judgment

1. A state ground is adequate to support a judgment if it controls the outcome.

2. A state ground controls the outcome when the case would be decided the same way no matter what the merits of the federal claim. This happens in two situations:

    a. Substantive – When the federal claimant wins anyway under state substantive law.

EXAMPLE: Search and Seizure.

Suppose a state criminal defendant claims that a search violated both the state and federal constitutions. The highest state court agrees because the search violated state law.

It does not matter whether the search also violated federal law. The federal claimant wins no matter what the merits of the federal claim.

    b. Procedural – When the federal claimant loses anyway because of a statute procedural default.

EXAMPLE 1: Contemporaneous Objection

A defendant claims that a search violated the federal Constitution but does not object when the evidence is introduced. Under valid state procedural rules, one must object when evidence is introduced.

The state court would be entitled to bar the claim whether or not the search was valid. In cases of procedural default, the federal claimant loses no matter what the merits of the federal claim.

EXAMPLE 2: Appeal

A defendant wants to appeal a conviction on federal constitutional grounds, but fails to file the notice of appeal within the required time.

The state appeals court would be entitled to not hear the appeal whether or not the federal claims are good. Again, the federal claimant loses no matter what the merits of the federal claim.

3. The state court must have actually relied on the adequate and independent state grounds. It does not matter that there might have been an adequate and independent state ground, which the state court chose not to invoke.

C. Independent of Federal Law – An adequate and independent state ground must also be independent of federal law.

> **EXAMPLE:** Florida Search and Seizure
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> Suppose, as in Florida, that the state search-and-seizure provision has been interpreted to mean exactly what the federal search-and-seizure provision means.
>
> Therefore, if a search violates the 4th Amendment, it also violates the Florida Constitution, and if a search is permissible under the 4th Amendment, then it is also permissible under the Florida Constitution. The state rule follows federal law.
>
> In that case, the state ground is not independent of federal law. There is no adequate and independent state ground, and the Supreme Court can review the validity of the search under federal law.

D. The Rule for Uncertain Cases – Where the state court decision is unclear, the Supreme Court can hear the federal issue.

> **EXAMPLE 1:** *Michigan v. Long*
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> In *Michigan v. Long*, the Michigan Supreme Court found a search invalid. It did not make clear whether it thought the search was invalid under the federal 4th Amendment, under the Michigan Constitution, or both.
>
> Here, the Supreme Court can review the federal issue. If it finds the search invalid under federal law, it affirms the decision in the defendant's favor.
>
> If it finds the search valid under federal law it remands to the state court so that the state court can determine whether the search is also valid under state law. If the search is found to violate the state constitution, the case still comes out the same way.

> **EXAMPLE 2:** *State Tax Commission v. Van Cott*
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> In the 1930s, a Utah court held that the state income tax did not apply to wages of federal employees. At that time, that conclusion seemed to be required by the federal Constitution.
>
> The Supreme Court considered whether the U.S. Constitution would allow Utah to tax the salaries of federal employees. It held that Utah could tax the salaries of federal employees under federal law.
>
> The Court remanded the case to state court so that the state court could take a fresh look at the meaning of the state law, once the federal issue was clarified. The state court was then free to interpret its statue either way.

FEDERAL-STATE REGULATIONS: ABSTENTION, THE ELEVENTH AMENDMENT, AND 42 U.S.C. § 1983

I. Abstention

A. Abstention – A federal court's refusal to hear a case properly within its jurisdiction when doing so would interfere with state courts.

1. *Younger* Abstention – You cannot be a federal plaintiff it you are already a state defendant.

a. A federal court will abstain from hearing suits brought by defendants in pending state criminal prosecutions or civil enforcement proceedings.

B. When is a Case Pending?

1. If the state's case starts first, the state proceeding is pending, and *Younger* abstention is required.

2. If the federal claimant sues before the state indicts, the state action is not pending and abstention is not ordinarily required.

a. *Hicks v. Miranda* (1975) complicated this rule by holding that even if the federal suit is filed first, *Younger* abstention is required if the state criminal prosecution is begun before "proceedings of substance on the merits" in federal court.

C. Anti-Injunction Act – The Anti-Injunction Act, 28 U.S.C. §2283, bars federal courts from enjoining state court proceedings, except in specified circumstances, including expressly authorized exceptions.

1. In *Mitchum v. Foster* (1972), 42 U.S.C. §1983 – the all-purpose civil rights act – was found to be an expressly authorized exception to the Anti-Injunction Act. As far as the statute is concerned, there is no bar to federal court intervention in state court proceedings.

2. *Younger*, however, creates such a bar as a matter of the equitable discretion of the federal courts. *Younger* abstention is therefore not statutorily compelled; it is a judicial invention under judicial control.

D. Exception – The defendant in a pending state proceeding can go directly to federal court if he can show that the state prosecution is bad faith harassment. This is very hard to demonstrate.

II. THE ELEVENTH AMENDMENT

> **KEY POINT: T**he Eleventh Amendment means that you cannot sue a state as such for money damages in federal court.
>
> The Eleventh Amendment protects states and state agencies, but not local governments. There is no Eleventh Amendment immunity for cities, counties,

A. History – The Eleventh Amendment was designed to overrule *Chisholm v. Georgia* (1793). In *Chisholm*, the Supreme Court held the state of Georgia liable on a contract to a citizen of South Carolina, despite Georgia's claim of state sovereign immunity.

1. Two Readings of the Eleventh Amendment – What the Eleventh Amendment did beyond overruling *Chisholm* is a matter of intense dispute. There are two radically different interpretations.

    a. Immunity Interpretation – The Eleventh Amendment reinstates state sovereign immunity and makes it applicable in federal court. This reading is potentially very broad, as it would make states effectively immune to money damages unless they consented.

    b. Diversity Interpretation –The Eleventh Amendment says that the mere fact of diversity jurisdiction does not abrogate state sovereign immunity. This reading is very narrow and interprets the Eleventh Amendment to practical insignificance.

B. The Eleventh Amendment Today

1. The Supreme Court has basically adopted the immunity interpretation, but limited it in ways that sharply reduced its scope.

    a. *Hans v. Louisiana* – A Louisiana citizen sued to force the state to honor on a bond. This case was based on federal law and jurisdiction was based on federal question. The Supreme Court said that the Eleventh Amendment nevertheless applied, and that Louisiana could claim immunity from suit in federal court.

b. *Hans* has been limited in three important ways.

i. *Ex parte Young* – Young allows suits against states for injunctive or prospective relief, as long as a state officer, rather than the state itself, is named as the defendant.

(a) Since the state must always act through a state officer, there is always someone to enjoin.

(b) The result is that injunctive or declaratory relief against states is freely available.

ii. Federal Legislative Power – Congress can override a state's Eleventh Amendment immunity as long as two things are true.

(a) Rule of Clear Statement – Congress must expressly say that it wishes to allow suits against states in federal court. This is very strictly applied.

EXAMPLE: It is not good enough for Congress to say that "any person who" does so and so can be sued in federal court. Congress must say that "any person who" does so and so can be sued in federal court and that the word "person" includes states.

(b) Congress must be acting to protect civil liberties guaranteed against states by the Fourteenth Amendment. These include equal protection and free speech.

(1) Rationale: Because the Fourteenth Amendment came after the Eleventh Amendment, Congress's power under the Fourteenth Amendment suffices to override immunity.

(2) If the law is supported by §5 of the Fourteenth Amendment, Congress can make the state pay damages.

(3) Valid legislation under §5 of the Fourteenth Amendment must have "congruence and proportionality." That is, it must have a clear relationship to, a judicially recognized right under the Fourteenth Amendment.

(4) Congress can only act to implement and protect constitutional rights that the courts have recognized. Congress cannot simply legislate to do whatever it wants in the field of individual rights.

(c) 42 U.S.C. §1983 – You can almost always sue a state officer for money damages in federal court under §1983.

(1) The suit is normally brought against the state officer, and the judgment is entered against him or her individually, but in fact the state almost always pays the judgment.

III. 42 U.S.C. §1983

A. The §1983 Cause of Action – Section §1983 is the all-purpose federal civil rights statute. It provides a cause of action for violations of federal rights by persons acting "under color of" state law.

1. Under *Monroe v. Pape* (1961), a person acting with the apparent authority of a state or local government acts "under color of" state law, even if the act complained of is specifically forbidden by state law.

2. §1983 authorizes damages or injunctive relief.

3. §1983 defines no rights. It simply gives a cause of action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

4. §1983 does not include actions against federal officers

5. NOTE: To bring a §1983 action, you must prove an underlying constitutional or statutory violation.

B. Official Immunities – §1983 liability is limited by official immunities. Immunity may be absolute or qualified.

1. Absolute Immunity – Legislators and judges are absolutely immune from the award of damages under §1983.

a. Government officials are absolutely immune from legislative and judicial actions. The scope of absolute immunity is determined by the function performed, not the office held.

EXAMPLE: A judge accused of wrongfully discharging an employee would be acting in an administrative, not judicial capacity, and absolute immunity would not apply.

b. Prosecutors are also absolutely immune from damages, but only for acts "intimately associated with the judicial phase of the criminal process." For other acts, chiefly those associated with an investigation, prosecutors have only qualified immunity.

EXAMPLE:

A prosecutor is absolutely immune:

- For statements made in court,
- For the decision to bring charges, or
- For conduct in a hearing on a search warrant.

However, a prosecutor has only qualified immunity:

- For directions given to the police,
- For conspiring with police to manufacture false evidence, or
- For statements made at a press conference.

2. Qualified Immunity – Everyone else, including executive officers at all levels, but for the President of the United States, enjoys only qualified immunity.

   a. Qualified immunity is a defense. It must be pleaded and proved by the defendant, not by the plaintiff.

   b. Qualified immunity is not available if a reasonable officer in the defendant's situation could have thought the action was lawful. Thus, the issue usually boils down to the clarity of the law.

   c. Three Observations on Qualified Immunity

      i. The issue of objective reasonableness is ordinarily an issue of law. Ordinarily, it can and should be determined by the judge on a pre-trial motion for summary judgment.

      ii. Under the Supreme Court's precedents, the objective reasonableness of the officer's actions is determined at a low level of specificity. The constitutional right that the defendant is accused of violating must be clearly established with respect to the particular facts of the case.

> **EXAMPLE:** It is "clearly established" that the use of excessive force constitutes illegal seizure under the Fourth Amendment. But that general proposition does not preclude a claim of qualified immunity for using excessive force. Rather, the defendant has immunity unless clearly established precedent shows that the use of force, based on the particular facts at hand, was unconstitutionally excessive.

iii. Under the Supreme Court's precedents, a court must determine the merits of a claimed violation of a constitutional right before determining whether the officer was entitled to qualified immunity.

C. Governmental Liability – §1983 authorizes damages against any person who violates federal rights while acting under color of law.

1. *Monell v. Department of Social Services* (1978) held that local governments are persons within the meaning of §1983. Thus, cities, counties, towns, and school boards may be sued directly under this statute.

2. *Monell* also held that localities, unlike individual persons, are liable only if the conduct complained of was the official policy or custom of the locality.

> **KEY POINT:** Local officers can be sued for any constitutional violation, but the locality itself can be sued only if the constitutional violation resulted from an official policy or custom.

3. *Owen v. City of Independence* held that localities, unlike every other person who can be sued under §1983, have no immunity, qualified or otherwise. Localities are strictly liable for any constitutional violations that result from official policy or custom.

a. Resulting Structure

i. If your constitutional rights are violated by a state officer, you can sue that officer personally. He will have the defense of qualified immunity.

ii. If your constitutional rights are violated by a local officer, you can sue that officer personally, and he will have the defense of qualified immunity.

iii. You can also sue the locality itself, but only if the act was part of an official policy or custom. Where this is true, the locality is strictly liable. No qualified immunity.

b. Official Policy or Custom – There need not be a generally applicable policy or custom. Isolated acts will do, so long as they are done by policy makers rather than by low-level employees.

c. Failure to Train – The Supreme Court has said that failure to train is official policy or custom only if it involves deliberate indifference to violations of constitutional rights. This means that there is strict liability where you can show fault.

D. "And Laws"

1. In recent years the Supreme Court has moved to bring the question of damages actions under §1983 to enforce a federal statute closer into alignment with the question of an implied right of action in the underlying statute.

a. §1983 provides a cause of action for violation of rights, privileges, and immunities secured by the "Constitution and laws" of the United States.

b. If §1983 were read literally, it would provide a damages action for violations of all federal statutes by persons acting under color of state law.

c. *Cort v. Ash*, the leading case on private rights of action, says that courts usually should not find a private right of action absent some indication of legislative intent.

d. *Gonzaga University v. Doe* (2002), held that the implied right of action inquiry elucidated in *Cort* controls the interpretation of the "and laws" section of §1983.

KEY POINT: If a federal statute does not expressly provide for enforcement by a private damages action, you cannot sue under §1983 just because the defendant is acting under color of state law.

Rather, you have to resort to *Cort v. Ash* to determine if the statute is appropriate for private enforcement.. Under *Cort*, the courts are generally reluctant to recognize a right of private enforcement, absent some indication that Congress actually wanted that result.