

## **Bound By Oath | Season 2 | Episode 11: State Remedies**

**John:** Hello and welcome to the final episode of Season 2 of Bound By Oath. If this is the first episode you're listening to, please back up and start with Episode 1, which is entitled "They're Going to Kill This Man." On this episode, we are heading to new terrain. With the doors to federal courthouses closing, civil rights litigators and plaintiffs are going to start looking to state law to hold the government accountable for official misconduct. After all, states have their own constitutions. They have their own common law. Some states even have their own civil rights laws, like Section 1983, that allow for claims for money damages. And, given that, more than a few federal judges have wondered aloud why everything needs to be federal case.

**Judge Wilkinson:** Why does everything need to be left to Section 1983, as opposed to state legislators, as opposed to state courts? ... I mean everything doesn't have to be a federal claim.

**John:** But are state laws and state courts really a viable alternative? On this episode, we'll take a look. We'll talk to law professors who study remedies under state laws.

**Alex Reinert:** The majority of states don't have any real regime for enforcing state or federal constitutional rights.

**John:** And we'll talk to litigators who, every time they take a case, must decide where they think their clients have the best chance of success.

**Doug Norwood:** Arkansas is not set up to do these cases. That's not to say that we could not be, but everybody goes into federal court.

**John:** And finally, we'll talk about recent legislative reforms.

**KTSM Reporter:** House Bill 4 establishes the New Mexico Civil Rights Act while also eliminating qualified immunity.

**News Nation Anchor:** In other news tonight, New York City has now become the first in the U.S. to end what's called qualified immunity.

**WHDH Reporter:** Here in New Hampshire a bill was taken up last legislative session to eliminate qualified immunity. That bill was tabled, but the representative who sponsored it tells me he will bring it up again.

**John:** And we'll talk about some of the obstacles to those reforms.

**TX law enforcement lobbyist:** This session brings new concerns as it pertains to qualified immunity for police officers. We will not negotiate that sacred right and working condition under any circumstance.

**NH city manager:** What I'd like to talk about today is how this amendment would devastate a community like Franklin.

**Albuquerque police union rep:** What this does is take more money out of already strained budgets.

**John:** Before we begin, one point of order: On this episode, we're only talking about accountability for state & local officials and state & local governments. Realistically, you're not going to be able to sue a federal officer in state court – mostly because of a federal law passed in 1988 called the Westfall Act, which we talked about briefly on Episode 2.

## BBO Montage

**John:** In 2013, an off-duty police sergeant in Albuquerque, New Mexico raced his patrol car through 10 intersections at an average speed 66 miles an hour at 1:30 in the morning. He had his emergency lights on, but not his sirens. At the eleventh intersection, he allegedly ran a red light and smashed into an oncoming car.

**KRQE news:** Investigators say off-duty APD Sergeant Adam Casaus sped through a red light in his patrol car and T-boned an SUV, killing 21-year-old Ashley Browder and seriously injuring her younger sister.

**KRQE news:** Casaus claimed he was pursuing a drunk driver, but no evidence of that driver was ever revealed.

**John:** He killed a woman and then [he lied about it](#). But unlike many of the other cases we talked about this season, the woman's family did get a remedy. Sergeant Casaus was fired and lost his certification to work in law enforcement in New Mexico. He also spent 90 days in jail after a jury convicted him of misdemeanor careless driving. And the family's federal civil rights suit, [Browder v. Albuquerque](#), was allowed to proceed to trial.

**Judge Gorsuch:** He's off-duty. He's not chasing anybody, in an urban area, for his personal convenience. Why – and then he hits and injures people – why wouldn't that shock anybody's conscience?

**John:** That is U.S. Supreme Court Justice Neil Gorsuch in 2014, when he was still an appeals court judge, questioning the lawyer for former Sergeant Casaus.

**Lawyer for officer:** The fact that he had his emergency lights engaged shows he was on – shows that he had an objective, legitimate law enforcement purpose in what he was doing.

**Judge Gorsuch:** No, it doesn't. Counsel, counsel, counsel. Let's not overstate the facts. Just because an officer has lights on doesn't mean he's engaged in any kind of professional activity. ... We don't know what this gentleman's purpose was. But we know it wasn't law enforcement.

**John:** The lawyer for the officer argued that her client was protected by qualified immunity.

**Lawyer for officer:** Our argument, Your Honor, of course, is the law was not clearly established at the time.

**John:** But in 2015, in a unanimous opinion written by Judge Gorsuch, the U.S. Court of Appeals for the Tenth Circuit said that the law was clearly established and that you can sue an officer for reckless driving under the 14th Amendment, which prohibits taking life without due process of law. But the case, which also included claims against the city, didn't go to trial.

**KQRE news:** The city has settled the wrongful death lawsuit. The city will pay the family \$8.5 million dollars. ... The family's settlement includes a list of reforms, driving safety training protocols, and bumper stickers on marked APD vehicles will be placed with a phone number to report dangerous driving.

**Lawyer for family:** Very, very important to the family was that no other family ever have to go through this again.

**John:** The Browder family got a remedy, and they got it in federal court. But in a separate, concurring opinion – writing just for himself and not for the court – Judge Gorsuch wrote that maybe this case should have been pursued in state court under state common law rather than the federal Constitution. Quote: “We shouldn't be surprised that the common law usually supplies a sound remedy when life, liberty, and property are taken. After all, the whole point of the common law as it evolved through the centuries was to vindicate fundamental rights like these.” In a little while, we're going to ask some litigators what they think of Judge Gorsuch's suggestion that just because a claim *can* be characterized as a constitutional violation, doesn't mean that it *should* be characterized as a constitutional violation. But first, some background on state courts:

**Diego Zambrano:** There has been a long debate among scholars of judicial federalism and federal courts about the parity between state and federal courts.

**John:** That is Professor Diego Zambrano of Stanford Law.

**Diego Zambrano:** There was a famous paper in the late 1970s, written by Burt Neuborne, arguing that state courts were so called inferior, technically less competent than federal courts. And Neuborne pointed out that they have judicial elections and many other reasons why you would end up with state judges that are of less quality than federal courts. But we never had any good evidence that this was actually true.

**John:** At IJ, we litigate in state court all the time. You'll never catch us disparaging the good name of state courts. But there is a persistent debate about the quality of state courts, and Professor Zambrano recently published a paper that looks at what evidence is out there.

**Diego Zambrano:** We do see in polls starting in about the late 80s and early 90s, that both defendants' counsel and plaintiffs' attorneys claim that federal judges are more competent than state court judges. So that's the only survey evidence we have. I do present some evidence in the paper showing that state court budgets have not grown as much as federal court budgets in the last 30 to 40 years. And this matches an ongoing set of studies issued by the ABA, National Center for State Courts, and state courts themselves where they argue that state court budgets have been severely underfunded, that state courts are quote "on the edge of an abyss," and that they can barely keep up with their demands – the docket demands. So you do see a lot of rhetoric by state supreme court justices, state court judges, attorneys, arguing that state courts are not up to the same standards as federal court.

**John:** That said:

**Diego Zambrano:** We at least have some evidence that state courts are decaying relative to federal courts. In absolute terms, we don't have really good measures of whether a court is high quality or not. But in whatever way you want to measure it, state courts are probably better now than they were 30, 40, 50, certainly 80 years ago. And why do I say that? Well, one move has been towards consolidating their budgets away from localities. For a long time state courts were being funded by counties and municipalities. And now it's all at the state level. And we think that leads to better treatment, more uniformity, more oversight. So that's only one example where state courts have made a lot of progress. State courts have also created business courts, complex litigation courts that do seem to provide better services, if you want to think of it that way, to litigants. So all of that is to say some evidence of relative decay, some evidence that in absolute terms they're better. However, we still have this issue of no parity, right. Most lawyers would say federal judges are more competent than the average state court judge.

**John:** But if the doors to federal court are closed, you go to battle in the court that will have you.

**Bob Williams:** A lot of lawyers know about the rights granted in the U.S. Constitution and of course are familiar with the Section 1983 cause of action to enforce those constitutional guarantees, including claims for money damages. Many lawyers are not so familiar with the fact that state constitutions include virtually all of those familiar rights plus others.

**John:** That is Professor Robert Williams of Rutgers Law.

**Bob Williams:** You can have mirror image constitutional rights and also rights that have no analogues. And interestingly we've seen over the last 30 years the phenomenon of state supreme courts pretty regularly interpreting their state constitutional provisions to be even more protective than what the U.S. Supreme Court says about federal constitutional rights.

**John:** Of course, a win under state law is not the same as a win under federal law.

**Bob Williams:** Some people say – and they're correct – if you win a state constitutional case it's only for your state. It's not like a big victory in the United States Supreme Court. Of course that's correct. But it must be remembered that's a victory for your client and not only that, of course, your victory in your state can influence first other states. So it's very common for state supreme courts to look to – not so much the U.S. Supreme Court vertically – but horizontally out to the other states.

**John:** There are three different kinds of causes of action under state law we'll talk about that you can use to hold government officials accountable. In the first bucket, there are baby 1983s.

**Bob Williams:** A few states have – we call them little 1983 statutes, state civil rights statutes that do provide a cause of action like 1983.

**John:** In eight states, legislators have passed civil rights acts – like Section 1983 at the federal level – that create a cause of action and give plaintiffs permission to sue for violations of state constitutional provisions – and sometimes federal constitutional provisions as well.

**Bob Williams:** But that's not so common. And of course many people wonder whether state legislators will enact laws enabling people to sue them for money. So the real crucial question that will come up in many states is: Can you bring a direct cause of action for money damages for violations of state constitutional provisions?

**John:** And that's bucket two. Do courts see themselves as obligated to enforce their constitutions – even without the legislature specifically passing a law like Section 1983 telling them to enforce their constitutions?

**Bob Williams:** This came up in a free speech case in Oregon, and the Oregon Supreme Court said there is no statute giving a cause of action for money damages for violation of free speech. And there's nothing in the constitution itself about that, so the court, I think surprisingly, said we are ill equipped to determine whether there's a cause of action for violation of this state constitutional right and you'll have to wait for the legislature to do it.

**John:** In that case, called [Hunter v. City of Eugene](#), police used billy clubs on high school teachers who were on strike to clear a path through the crowd so that substitute teachers could reach the school. The teachers, as well as a news reporter, argued that that violated the Oregon Constitution's protections for free speech. But, in 1990, the Oregon Supreme Court said it



couldn't decide that question. Quote: "Lacking legislative guidance, this court is in a poor position to say what should or should not be compensation for violation of a state constitutional right."

**Bob Williams:** But the alternative view to Oregon is the North Carolina view and New York view, which says wait a second. This is a claim in a state court for a violation of our state constitution and gosh that's our job to enforce the constitution and to provide meaningful remedies.

**John:** In the [New York case](#), police in Oneonta were investigating an attempted sexual assault. The victim told police her attacker was a college-age black male. So police interrogated every single African-American male attending the university nearby, demanding alibis and checking their hands and forearms for signs of a struggle. When that produced no suspects, officers stopped black men they saw on the street for five days, which again didn't turn up any leads. In total, they stopped nearly [300 men](#).

**Bob Williams:** So these plaintiffs in New York went to state court, filed an action for money damages under the state constitutional search and seizure provision.

**John:** And in 1996, the New York Court of Appeals, which is the state's highest court, said yes, there is a direct cause of action for money damages even if the legislature has never said so, at least for equal protection and search and seizure claims.

**Bob Williams:** I do want to mention one other thing and that's the presence of quite unfamiliar kinds of claims that are in the state constitutions. Most of us in law school and reading the media are exposed only to discussions of the United States Constitution. It's a very good idea

for lawyers to pull out their state constitution and read through it. There are many claims in state constitutions that have no analogue in the United States Constitution.

**John:** For example.

**Bob Williams:** People think of prison condition cases as being governed by the Eighth Amendment Cruel and Unusual Clause. And the United States Supreme Court has recognized those claims but has been fairly grudging and requires prison conditions to be pretty much intentionally imposed as punishment which of course is going to be very difficult to prove. But there are five or six states – and they span the east coast to the west coast ending up in Oregon – that have a clause in the constitution that says inmates, both pretrial and convicted, cannot be treated with unnecessary rigor. Says nothing about punishment. It's a test of necessariness, and so the cases look at whatever the condition was that was imposed and determine whether that's necessary or not for prison administration. So this is a local, unique state constitutional claim that might appeal to a state judge in a different way from cruel and unusual punishment that's already been somewhat restricted by the U.S. Supreme Court.

**John:** And then there's the final bucket of claims under state law: common law tort claims, which are what Justice Gorsuch was talking about in the *Browder* case. Every state has a personal injury statute called a tort claims act that allows an injured person to pursue a claim against government officials who injured them.

**Alex Reinert:** A tort is just basically a legal claim that I have when someone injures me in some way. They could injure me physically. They could injure me emotionally. They could injure me reputationally.

**John:** That is Professor Alexander Reinert of the Benjamin Cardozo School of Law. Professor Reinert, along with his co-authors Joanna Schwartz and Jim Pfander, who have both appeared on past episodes, recently published an extensive study of the kinds of causes of actions that are available under state law in all 50 states.

**Alex Reinert:** A classic example is the tort of battery. What is a battery? A battery is someone touching me without my consent. Often we think of a battery as someone punching me. Another classic example is negligence, where I'm harmed because someone was unreasonable in thinking about the risks of the behavior they were engaging in.

**John:** As we talked about on Episode 2, tort claims like trespass and battery can be used to sue private individuals who harm you as well as government officials.

**Alex Reinert:** The majority of states – about 26, or precisely 26 – just rely on common law torts to regulate tortious conduct by state and local officials.

**John:** Which is to say that in a slim majority of states, tort claims are the only way to bring suit. You cannot sue state or local officials for damages for violating the state constitution. Which can be a problem.

**Alex Reinert:** There's not always going to be an overlap between the rights we have that come from common law torts, and the rights that we seek to enforce through the Constitution.

**John:** For instance, there is no tort analogue to constitutional provisions like the equal protection clause or the free speech clause. Right now at the Institute for Justice, we are litigating a free speech case out of Castle Hills, Texas, which is just outside San Antonio. There,

the mayor and the chief of police retaliated against a newly-elected city councilwoman because she championed a citizen petition calling for the resignation of their friend and ally, the city manager.

**Sylvia Gonzales:** I went out and campaigned and spoke with over 500 residents. They complained bitterly about the city. And that they could not even get ahold of anyone because the city manager would not return their calls. Their streets were not being fixed. That's what they talked about.

**John:** Our client, Sylvia Gonzalez, was the first ever Hispanic woman elected to the city council. But she ruffled some feathers among the old guard, and the mayor and other officials retaliated by accusing her of the misdemeanor crime of tampering with a government document. The charge was bogus, a total fabrication. And a prosecutor dismissed it almost immediately – but not before Sylvia was arrested and her mugshot was broadcast all over the news.

**Sylvia Gonzales:** I spent the whole day in jail. And they put the handcuffs so tight on me. They were so hurtful, that I kept asking them to loosen them if they could loosen a little bit. And it was very hard to stay sitting, and they would not let me stand up.

**Anya Bidwell:** May it please the court, I am Anya Bidwell representing plaintiff-appellee here, Ms. Sylvia Gonzalez.

**John:** That is Anya Bidwell, the co-producer of this podcast, at oral argument before the Fifth Circuit last fall.

**Anya Bidwell:** There's a constitutional right, a right to not be retaliated against when you criticize your government, and this right is clearly established.

**John:** As of March 2022, we are awaiting a decision on whether the suit can proceed to trial.

**Anya Bidwell:** We brought this case in federal court under the First Amendment even though because of qualified immunity it might be years before we can get to trial. We never even considered bringing the suit in state court. Firstly, because there is no way to bring a claim for damages under the Texas Constitution. And secondly, the only option to sue an official in Texas is by using state tort law. And there is no tort cause of action for retaliating against someone for their speech. So essentially, Texas state courthouse doors are firmly shut to us. And we have no choice but to go to federal court under federal law.

**John:** Defamation, slander, libel – those are the traditional tort claims that touch on speech, but they're no help to Sylvia at all. The problem isn't that city officials defamed her; it's that they threw her in jail for saying something that every American should feel free to say about government officials: that they weren't doing a good job. However, in other situations, other tort claims do sometimes map pretty closely onto constitutional claims.

**Alex Reinert:** Probably where the overlap is greatest is in maybe excessive force cases, where the tort case that you'd bring in common law would be a battery. And it would be analogous to either a Fourth Amendment claim for excessive use of force during an arrest or maybe an Eighth Amendment claim for excessive use of force in prison.

**John:** And then in yet still other kinds cases, the overlap between a tort claim and a constitutional claim may be there but it might not be all that substantial. For instance, trespass.

If a private person comes onto your property without permission, typically the common law remedy available is for the trespasser to pay for any physical damage to the property. By contrast, when armed government officials burst into your home without a warrant, damages under tort law doesn't really fully acknowledge or redress the enormity of the violation – even if they do pay to fix whatever they broke. In 1961, in his concurrence in the case of *Monroe v. Pape*, Justice Harlan said much the same thing. Quote: “It would indeed be the purest coincidence if the state remedies for violations of common law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.”

**Alex Reinert:** When a state official violates our rights, even if the injury is the same as when a private person violates our rights, that doesn't mean they're the same kind of violation. It has a different cadence, and the importance of the violation is different when it's a state official who's causing the harm.

**John:** Later, in the case of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, which we talked about on Episode 2, the majority of the Court adopted that rationale.

**Alex Reinert:** The logic that the majority adopted in *Bivens* was that, well, the reason we need a Fourth Amendment right is precisely because common law trespass claims won't always vindicate the interests protected by the Fourth Amendment.

**John:** But, returning to Justice Gorsuch's point in *Browder v. Albuquerque*, we do not understand him to be saying that the common law will always or even usually provide a more apt cause of action than a federal constitutional claim. Rather, his argument is that there are at least some cases where the common law does do the job and at least that subset of cases

should be in state court. In his view, *Browder* was really just a case about a tragic car accident and state courts handle cases about car accidents all the time using the common law principle of negligence rather than the federal constitutional standard.

**Anya Bidwell:** The constitutional standard in *Browder* under the due process clause was whether the police officer's conduct shocked the conscience.

**Judge Gorsuch:** 66 miles an hour, through 10 traffic lights why wouldn't that shock anybody's conscience?

**Anya Bidwell:** And Justice Gorsuch's point is that whether something shocks the conscience is pretty subjective.

**John:** So according to Gorsuch, it might be better to use common law, which state courts have lots of experience with.

**Anya Bidwell:** But this ignores this idea that when a government official in a government vehicle is out there committing misconduct that takes on a constitutional dimension that tort law doesn't address.

**John:** The Browder family didn't just want to remedy for a car accident. They wanted police in Albuquerque to stop thinking they could get away with things like this. So that's one reason you might prefer a federal constitutional claim over a state tort claim. But there are lots of nuts-and-bolts, practical considerations to keep in mind as well. For instance, under state law there are often tricky procedural requirements that could cause you to lose your claim even before you get started, or put you at an immediate disadvantage.

**Alex Reinert:** Sometimes you have to file a notice of claim or you can only bring your claims in specific kinds of venues where you might not have a right to a jury trial or where you might not have access to punitive damages.

**John:** A notice of claim is a good example of a tricky procedural requirement. Many states have them and they operate slightly differently in each. But the idea is that soon after a government official injures you and before the expiration of a certain time period, often only three to six months, you must serve the notice of claim on both the government and, sometimes, all of the government employees who are responsible, and also, list the damages you're seeking. And only after that can you sue. And then of course, there's the issue of immunities. Under state common law, officials are protected by common law immunities.

**Alex Reinert:** They often have immunities built in. Common law immunities that look like a good faith immunity. Sometimes they look like qualified immunity. So it doesn't get you out of the immunity problem, either. When you're bringing these kinds of claims. And a good example is a case from Georgia.

**John:** In the case of [Reed v. DeKalb County](#), decided in 2003, a police officer was summoned to an elementary school in Decatur because of a report that a student had brought a weapon to school.

**Alex Reinert:** And while the officer was there, two girls are brought to the vice principal's office because they've been fighting and the officer says, I'm going to arrest these girls. He hasn't been asked to. He didn't come to the school for that purpose. But he decides he's going to arrest them for fighting. And the principal says, I don't want you arresting anyone, right. I don't



think these kids need to go to juvie. Maybe they need discipline within school, but they don't need to go to juvie. So the principal intervenes and attempts to prevent the arrest. And so the officer says, Well, we're gonna arrest you. So the officer ends up arresting the two girls, and also with his supervisor, ends up arresting the principal, arguing that the principal was obstructing a lawful arrest. Eventually, those charges are dropped against the principal, and the principal sues. And the question is, can the officers be sued and the court says no, because of official immunity.

**John:** In Georgia, there is no way to bring a state constitutional claim for damages. So the principal filed common law tort claims. But, the Georgia Court of Appeals said that the state's version of qualified immunity, which is called "official immunity," protected the officer.

**Alex Reinert:** And the immunity that was discussed in this Georgia case was an immunity that requires the plaintiff to show that when the officer is engaged in a discretionary act like a warrantless arrest, in order to survive dismissal, the plaintiff has to show that the officer was acting with malice or intent tend to injure. That's a pretty high standard. And the court says there's no evidence that the officer was acting maliciously. Maybe the officer exercised poor judgment, but no evidence of malice or deliberate intent to injure, and therefore immunity applies.

**John:** In addition to immunities, there can sometimes be a different hurdle under state tort law, and one that is not an issue in federal constitutional litigation. And that is the issue of whether an official was acting within or outside of the scope of their employment when they caused an injury. There's an old trick that dates back to the 1500s in England that we talked about on Episode 5. And that is that when an official is accused of misusing their authority, they – or whoever is going to be paying for any judgment against them – will argue that because they

didn't have the authority to do what they did, that they were acting outside the scope of their employment and there is no liability. The Supreme Court definitively rejected that argument for Section 1983 cases in 1961 in the case of *Monroe v. Pape*. But under state law, it can still be a live issue. For instance, in New York.

**Alex Reinert:** And one great example, or terrible example, really, from New York, is where the New York statute says if you're going to sue a correction officer for a common law tort, you sue the state instead. But if the officer was acting outside the scope of their employment, then the state's not liable. And when the officer in this particular case was accused of beating an incarcerated person for no reason, the court of appeal says, well, that's obviously outside the scope of employment.

**John:** So there are some serious challenges to getting a remedy in the 26 states that only have tort liability for official misconduct. But, shifting focus back to the other two buckets, what about the states where you can file constitutional claims?

**Alex Reinert:** So we looked closely at the eight states in which there actually are statutes that try to create a right that's analogous to Section 1983. And there's a few general points to note about these frameworks. One of them is they're almost all limited in some way.

**John:** The eight states where legislators have passed a statute authorizing claims for money damages for constitutional violations are: Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, New Jersey, and New Mexico. Plus, New York City has passed one too.

**Alex Reinert:** Some of them only apply in cases where you can show a specific intent to violate constitutional rights. Some of them only apply to violations that are accomplished through violence or threats of violence.

**John:** Colorado's law – and also New York City's – only applies to law enforcement officers, for instance. California's civil rights act applies to all state and local officials but only when those officials who have used violence or the threat of violence. Massachusetts' civil rights act doesn't even let you do that. It only allows for suits in cases of quote "threats, intimidation, and coercion," and that's been interpreted to mean an officer could use violence against you but you wouldn't have a claim unless they threatened you first. Another feature of Massachusetts' civil rights act is that [damages are capped](#) at \$5,000, which is not nearly enough to compensate most kinds of injuries or even to get a lawyer to take your case.

**Alex Reinert:** The other piece is that in almost every state, there still is some version of qualified immunity.

**John:** Just like with tort claims, some kind of immunity applies to state constitutional claims. Most of the time. Of the eight states I just mentioned, only California, Colorado, and New Mexico have either restricted or eliminated qualified immunity. In other states, like Arkansas and Maine, courts have essentially adopted the federal qualified immunity standard. Later in this episode we're going to talk about New Mexico's civil rights act in more detail. But if you're a civil rights practitioner in a state without a good civil rights act, and it looks like your client may not be able to get into federal court either, there's another possibility. And that is that maybe your state supreme court will recognize a direct cause of action under the state constitution.

**Alex Reinert:** So the state law implied causes of action are in a way some of the most interesting from an academic perspective.

**John:** By our count, courts in 15 states will allow you to file constitutional claims without the legislature having first passed a civil rights act enabling those claims.

**Alex Reinert:** They're often very limited really. North Carolina is the only state that seems to have a broad implied right of action. So some of the states are limited to cases involving due process. Some of them limited to cases involving searches and seizures. But here's what's so interesting, I think, from an academic perspective, and probably from a practical perspective, too, as your listeners will recall, there's all this rigmarole in the *Bivens* jurisprudence about federal courts implying causes of action and the separation of powers concerns and whether or not this is really the proper role for federal courts.

**John:** That's from Episode 2 where we talk about the main criticism of the *Bivens* doctrine.

**Alex Reinert:** Federal courts are courts of limited power. And really, the power to create causes of action resides with Congress, right? That's what we hear, when we talk about *Bivens*, especially these days, right. That is the current rationale behind the Supreme Court's cutting back on the *Bivens* doctrine. So in the state court cases that look to whether or not to imply a cause of action, what's interesting is that they take the *Bivens* logic, and they just transport it into – many of them, not every single one, but many of them – take the *Bivens* logic, and they just transport it into the state law context. And I've always thought that's a little strange. Because whatever one wants to say about federal courts and their authority, there's no question that in our history state courts have always exercised the right and the authority to create rights of action. There's nothing unusual about state courts doing it. And so maybe if we accept that

there's concern about federal courts doing it because of their special role within the federal system and also within a system of federalism, it's not obvious that one should have the same concerns for state courts. But many of these state courts just take *Bivens* and they just take the logic of *Bivens* and they move it into the state court context without really thinking about whether that makes sense.

**John:** But with only 15 states that have really definitively weighed in, this is something that is ripe for more litigation.

**Bob Williams:** I believe it'll come up in every state eventually as lawyers become more familiar with state constitutions and these cases begin to be brought in state courts. And the states will raise a defense: well, there's no cause of action for money damages. And again that's a big surprise to a lot of lawyers, a lot of professors.

**John:** That's Bob Williams from Rutgers again. In a minute, we're going to take a break, and then we'll hear from civil rights litigators about the challenges and opportunities in their particular states. But before we do that, we'd be remiss not to first mention another immunity doctrine that is pervasive in state court and that also applies both to constitutional claims and tort claims.

**Bob Williams:** There's also in the states a very difficult doctrine of sovereign immunity.

**John:** We talked about sovereign immunity on Episode 2. It means that "King can do no wrong," and so you can't sue the King. We adopted the doctrine from English law, and how it works in practice today is that it means you cannot sue the state for damages unless the state gives its consent, which it does through tort claims acts and sometimes civil rights acts.

**Bob Williams:** Sovereign immunity has three different sources in the states. The most difficult to penetrate is constitutional sovereign immunity that's contained in the state constitution. So you're suing for a violation of the constitution, which also includes the provision that the state can't be made a defendant in a case. But surprisingly a number of the states don't include this in their state constitution. It might be a sort of a common law, judge-made holdover from England. But sometimes it's statutory. So for example, at least on one case I've seen in California where sovereign immunity was statutory, looking closely at the statute turned out that it exempted constitutional claims.

**John:** So, if sovereign immunity was passed by the legislature or created by judges, maybe there's a shot that plaintiffs can get around it. But if sovereign immunity is written into the state constitution, good luck.

**Bob Williams:** And there's a recent [Hawaii case](#) that said, Look, this was a pretrial detainee who was subjected to solitary confinement for nine months before he was ever convicted of anything.

**John:** Under Hawaii law, solitary confinement is supposed to be reserved only for inmates who pose a serious threat to the safety of inmates or jail officials. But the plaintiff in the case was, in the words of the Hawaii Supreme Court, "a model inmate." And he still got put straight into solitary.

**Bob Williams:** And he sued under the Hawaii due process clause. And the Hawaii Supreme Court said, yes, you win that claim. Your due process rights under the state constitution were clearly violated. But you cannot receive a money judgment because of constitutional sovereign immunity. So that's a lot of work for nothing for the client. And this is an interesting situation

where neither declaratory relief, nor injunctive relief would do any good for the client in that case. He was already out of solitary confinement and on with his life.

**John:** In addition to suing the state, he also sued the state officials who put him in solitary. But the Hawaii Supreme Court said too bad. Those officials are entitled to qualified immunity. All of which is to say that state court can be just as rough a ride as federal court. We're going to take a quick break and when we come back, we'll hear from a whole bunch of civil rights litigators and their experiences with state court.

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#### **BREAK 1**

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**John:** What do litigators who actually have to file these cases think? Is suing under state law and in state court an adequate alternative for holding government officials accountable? In some jurisdictions, the answer is an emphatic no.

**Victor Fleitas:** I would say with all due respect to Justice Gorsuch that it is very nice sounding in theory but utterly impractical and divorced from the realities on the ground.

**John:** That is Victor Fleitas, who is a civil rights litigator in Tupelo, Mississippi.

**Vic Fleitas:** We don't see any flexibility in our circuit courts in the development of tort law. We see the opposite. We see retrenchment. I can give you an example: Under Mississippi law, if an

inmate at a state run facility had a guard walk up to that person, pull out a pistol and shoot that inmate in the head – aside from it being a crime and dealt with through the criminal law court – that inmate would have no cause of action for having been killed in that fashion. Because Mississippi law specifically exempts anything that happens to an inmate in a jail from any liability. So that would seem to me to sort of dispel this idea that the courts in Mississippi are available and open to provide remedies for these types of wrongs. And I'm giving an extreme example, but if that's not actionable good luck.

**John:** In Mississippi, there are no constitutional causes of action you can bring for damages for official misconduct. So that leaves plaintiffs with tort claims, which maybe for a case like *Browder* about a fatal car collision, there would be some remedy available. But the vast majority of constitutional cases like the ones we've talked about this season, state tort law just isn't a realistic option.

**Victor Fleitas:** I've never considered filing such a case in circuit court. In Mississippi, civil rights cases are almost always – from the simplest police excessive force case to a bad stop – are intensely politically fraught. And local elected judges aren't insulated from the political repercussions of the decisions that they make in the same way that a federal judicial officer is.

**John:** State judges of course are often elected unlike federal judges who have lifetime tenure. And they may perceive that they won't get re-elected if they rule against local officials and for a plaintiff who is perhaps less popular.

**Victor Fleitas:** You're in a small county with 5,000 people and you're suing the local sheriff, who separate and aside from his role as the chief law enforcement officer is also a political being in his or her own right. That's a problem. Everybody knows everybody else.



**John:** That's Mississippi. And it's certainly representative of other jurisdictions where there is generally no possibility of remedy under state law. By contrast, there are jurisdictions like Maryland, which does recognize a limited implied right of action under the state constitution, and for which state tort law isn't a nonstarter. For example, the case of [Johnson v. Francis](#). There, in May of 2009, three Baltimore police officers grabbed a 15-year-old named Michael Johnson off the street and shoved him into a police van.

**A. Dwight Pettit:** Johnson was walking down the street and a police van pulled up.

**John:** That's A. Dwight Pettit, a civil rights lawyer in Baltimore.

**A. Dwight Pettit:** They pulled him in the van took him out to a neighboring county, Howard County, and took his shoes, socks off and left him out in the woods navigate back to Baltimore by himself.

**John:** The officers drove him around for a few hours. By the time they let him go, the sun had gone down. He didn't have any money. They had broken his phone. It was pouring rain, and it was cold. Later, the officers said they wanted to pump him for information about guns and drugs in the neighborhood and that they'd treated him roughly so the other people on the street wouldn't think he was a snitch. And they denied leaving him barefoot. Johnson, on the other hand, said that the officers accused him of looking at them the wrong way and told him they were going to teach him to show some respect. In either case, he wound up across the county line.

**A. Dwight Pettit:** He called Howard County police, who were gracious enough to bring him back to Baltimore City.

**John:** The three officers were criminally prosecuted, and two were convicted of a misdemeanor. Michael Johnson and his family also filed a civil lawsuit. And they had to decide whether to file in federal or state court.

**A. Dwight Pettit:** So if we have federal jurisdiction, we like to go into federal court. Because the main thing – there is no cap.

**John:** At the time, under Maryland's Local Government Tort Claims Act, the damages were capped at a maximum of \$200,000, and today it's \$400,000. So if you have a case where you think the damages are going to be higher than that, you might rather file a constitutional case in federal court.

**A. Dwight Pettit:** The disadvantage to that, of course, that we have to balance is that in most cases, my experience has always been over the years that you get a much more conservative jury, and probably a much more racially imbalanced jury in favor of whites rather than African Americans.

**John:** In Baltimore, the jury pool in state court is composed of Baltimore residents. But in federal court, jurors come from all over the northern district of the state, and you're substantially more likely you're going to get a juror who is disinclined to rule against the police. So if you're going to risk a less sympathetic federal jury, you have to think you're going to win a big damages award, well in excess of the damages cap in state court. And here, because the teen's physical injuries were relatively minor, that militated in favor of state court.

**A. Dwight Pettit:** And we brought the action in state court. We won.

**John:** In addition to the tort claims for false imprisonment, assault, and battery, the jury awarded damages for the violation of Article 24 of the Maryland Declaration of Rights, which says that quote: “no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or by the Law of the land.” Which is of course straight out of Magna Carta from the year 1215. And that’s pretty cool. However, even with a more sympathetic Baltimore jury, it was critical to have testimony from one person in particular: the police officer from Howard County who drove the teen home, and whose account contradicted what the Baltimore police officers testified to – that the teen wasn’t barefoot.

**A. Dwight Pettit:** We probably couldn’t have won it without him. Because he was able to observe him, when he picked him up, of not having shoes. That gave it all the credibility in the world.

**John:** So within three years of filing suit, the case went to a jury, which awarded Michael Johnson \$500,000 dollars, which a judge reduced to the cap limit of \$200,000. In federal court, of course, just getting your case past qualified immunity – or the other doctrines we’ve talked about this season – and in front of a jury is a major accomplishment. Getting to trial under Maryland law, by contrast, was more straightforward. But after getting a favorable jury verdict, the case had only just begun.

**A. Dwight Pettit:** Now part of the claim, the reason this took so long, is because the city raised the defense – eventually in appeal, didn’t raise it in trial – of scope of employment.

**John:** The city argued that it shouldn't have to pay the damages award because the officers had acted outside the scope of their employment. The officers were in a police van and were conducting a police investigation, but the city said they weren't authorized to do what they did and they'd been prosecuted for it. And therefore, according to the city's lawyers, the officers should themselves should be liable – not the city.

**A. Dwight Pettit:** Officers don't have anything. The judgment can be against the officers. But that's a worthless judgment. The tort claims act is directly on point that it puts the responsibility for payment on the municipality.

**John:** That may be what the law says. But the issue had to be litigated.

**A. Dwight Pettit:** The city was just arrogant. One of them even argued in state court before a state judge that the city wasn't going to pay because they're going to use this as an example to deter lawyers from bringing actions against the city. Because he was going to show them how difficult it was to get paid. He actually made those statements on open record.

**John:** Fast forward a few years, and in 2020, the Maryland Court of Appeals, which is the state's highest court, released a [major opinion](#) in a different case on the same question.

**WJZ News:** The city argues the officers were criminals acting against the police department's mission.

**John:** In the case, Baltimore police officers planted guns on people they had stopped, lied in police reports and at trial, and caused two innocent people to spend, respectively, 7 months and 19 months in custody.

**WJZ News:** Attorneys for Baltimore City are appearing in Maryland's highest court today arguing that taxpayers should not have to pay for the actions of the corrupt Gun Trace Task Force.

**John:** Here is the City Solicitor at the time, who is also a retired federal judge who had previously sat on the U.S Court of Appeals for the Fourth Circuit, Judge Davis.

**City Solicitor:** I'm afraid that's going to open the floodgates, as lawyers and judges say, and it's going to bring about hundreds and hundreds and hundreds of lawsuits, which the city will be hard pressed to find the money to take care of.

**John:** However, the Court of Appeals was not swayed by that argument. Its decision made clear that even though the officers broke the law and were successfully prosecuted, the city could still be liable. Nevertheless, even after that decision came down, the city refused to pay the award in Michael Johnson's case.

**A. Dwight Pettit:** The city kept saying, Well, so far we don't have any ruling that they were in scope of employment. If we get scope of employment, we will concede. They put that in writing. But all the cases came down and they still wouldn't do it. So we finally forced the judgment.

**John:** Finally last year, in 2021, over seven years after the jury's verdict, a Baltimore circuit court told the city to pay up. So that's an example of a problem you find in state court that

wouldn't happen in federal court. You may not get bogged down with federal immunity doctrines but you can be bogged down for any number of other reasons. The common law may be, as Justice Gorsuch wrote in the *Browder* case, quote "battle-tested through the centuries," but some of its contours, like the scope of employment, are still very much up in the air. But even if state law presents its own novel challenges, in some instances it can provide its own opportunities.

**Laura Schauer Ives:** If I don't have certainty, and if I need more information, which is often where we are, when we file the case often I will file a claim in state court, knowing that they don't have the same ability to stay it like they do when qualified immunity is raised. So I'm able to get discovery.

**John:** That is Laura Schauer Ives, who is a civil rights lawyer in New Mexico.

**Laura Schauer Ives:** And then I make a determination of do I think, based on this discovery that I've now done, can I get past what is coming: the immediate qualified immunity motion that they will file if I file this in federal court.

**John:** In federal court, it's harder for civil rights plaintiffs to get discovery and find out what evidence is out there because defendants can immediately raise qualified immunity before you've had a chance to depose anyone or get ahold of any documents or sometimes video. But in state court, you can sometimes get that discovery and get a better idea of how strong your case is. And once you have it, you can decide whether you want to continue in state court or federal court.

**Laura Schauer Ives:** If it's an instance of an officer killing a citizen, I do my best to get in into federal court because the damages caps.

**John:** In New Mexico, like in Maryland, damages are capped under the state tort claims act.

**Laura Schauer Ives:** Whenever I'm taking a case and trying to make a determination of whether or not I filed that in state or federal court. I am looking at is there is there a case that I can point to that I think clearly establishes whether or not a given government official's conduct was clearly established as unconstitutional at the time.

**John:** If there's not a case on point, you probably won't get past qualified immunity, and you'd rather be in state court. In either case, you have to keep in mind what the jury pool will look like.

**Laura Schauer Ives:** In New Mexico, there are some judicial jurisdictions that if I were just filing a state tort claim, even if it was a really great one, I'm just not likely to prevail. And so I prefer to be in federal court. The default is the police can do no wrong.

**John:** Another consideration apart from the jury pool is the kind of judges who are going to be presiding over your case. As we heard earlier, elected judges in small jurisdictions may be less favorable to civil rights plaintiffs. But that's not always the case.

**Hugh Eastwood:** Occasionally, having judges that are subject to a reelection is sometimes a good thing, particularly if it's an unpopular local policy allows the judge to be the hero, or at least to send it to the jury and allow the jury to be the hero speaking for the community.

**John:** That is Hugh Eastwood, a civil rights attorney in Missouri.

**Hugh Eastwood:** We had [a case](#) a couple years ago against a city in suburban St. Louis, called St. Peters. Our client was a middle class, mother working mother, she'd never been arrested in her life.

**John:** The woman had gotten a \$110 ticket for running through a red-light camera.

**Hugh Eastwood:** And the city decided to start issuing arrest warrants. Except it was doing it for an ordinance violation that didn't exist.

**John:** City officials put out a warrant for her arrest, and they did arrest her and prosecute her. But the ordinance that they said they were enforcing just clearly did not give them the authority to do that.

**Hugh Eastwood:** We just argued that this whole system was essentially a cash grab. We were able to show the revenues the city was making off these red light cameras, and then the spike in the revenue once they started issuing arrest warrants even though they were legally defective arrest warrants.

**John:** And having a local jury in this instance, as opposed to a jury from federal court from a more dispersed area, was a good thing.

**Hugh Eastwood:** There we had a local jury from St. Charles County, which is sort of an exurban county to St. Louis. It's a pretty small-c conservative, law-and-order type of jury pool. But they saw what the city was doing was lawless. And then it wasn't about public safety or justice. And I think that helped us get a verdict. So those aren't necessarily sort of legal or



doctrinal reasons to pick a state court. But they are good practice reasons. Because you have a jury pool that will really know the city, or the agency, or the issues involved because they have much more firsthand experience with it.

**John:** The jury awarded the woman \$100,000 for being prosecuted for violating a law that didn't exist. Which might not have happened under federal law.

**Hugh Eastwood:** So the Eighth Circuit, for example, there really is no 1983 malicious prosecution claim. It doesn't really exist as a tort in the Eighth Circuit. But it does at Missouri law.

**John:** The city argued that it was entitled to sovereign immunity. It said it was doing traffic enforcement, which is a governmental function, and you can't sue a local government in tort for doing something local governments do. But a Missouri appeals court rejected that argument because quote "There can be no sovereign immunity for prosecuting a person under a non-existent law...."

**Hugh Eastwood:** Now, on the flip side of that, sometimes there are really important reasons you do want to file in federal court and not be in state court. And that's particularly true when you're dealing with – how do I put it delicately? – the kind of closely knit nature of the local government system that you'll really much more get a fair shake in federal court.

**John:** For instance, maybe you want to sue a local judge.

**Hugh Eastwood:** We actually sued a state court judge who personally jailed some children.

**John:** In the case, a local judge in Missouri ordered two siblings, ages 13 and 15, to be arrested on two separate occasions when they refused to go home with their mother, who was in a custody dispute with their father.

**Hugh Eastwood:** We filed that in federal district. We weren't going to ask one of that judge's fellow judges in his very courthouse to sit there in judgment of him. They probably all would have recused anyways.

**John:** As you may remember from our episode on judicial immunity, judges enjoy absolute immunity in all but the rarest of circumstances. But last year, in December 2021, [a federal district court judge](#) said this might be one of those ultra rare circumstances of a judge acting outside his judicial capacity and outside of his jurisdiction. Because, for instance, the second time he had them jailed, there were no actual legal proceedings pending at the time – and the children were in a different state. Not surprisingly the government is appealing the denial of absolute immunity to the judge. My colleagues at IJ will be filing an amicus brief in support of Hugh's clients, the two children. One other consistent theme we heard from practitioners is that they prefer federal court to state court because state courts are just more unpredictable.

**Doug Norwood:** One time, we had a lady that had been handcuffed too tightly.

**John:** That's Doug Norwood, who is a civil rights litigator in Arkansas.

**Doug Norwood:** And she was an elderly lady. She asked the officer repeatedly to loosen them. And she took blood thinners. Well by the time they got her to the jail, all of the blood vessels in her arm had ruptured. And her arms turned almost black because of the bleeding. And we went into state court. It turned out to be a mess. And the reason is, the jury instructions. There's no

guidelines in state court for that the judges are in a situation where they have to start making up the jury instructions.

**John:** At trial, jury instructions are extremely important. A judge gives them to the jury based on the recommendations of the parties. They tell the jury about the law and what it would mean for a party to meet certain elements of that law. And if they are inaccurate, they could end up hurting your client very badly. Until recently, Arkansas did not have model jury instructions, so the parties and the judges made them up on the fly, based on relatively little experience with civil rights law. And that's what happened in this case. The court issued imprecise jury instructions, which caused the woman to lose.

**Doug Norwood:** Well, we lost, the jury didn't give the lady anything. And the jury instructions were the problem. It turned out to be a train wreck. So it didn't take me long to figure out that I didn't want to go into state court. State court is not a good solution for most people.

**John:** Another thing we heard that's related to this is that federal judges in general, not just with the jury instructions, are better equipped to hear Section 1983 cases. Because their dockets are full of them. Whereas in state court, individual rights claims just aren't as frequent. And that matters.

**Hugh Eastwood:** Official immunity is a very broad based defense. It's also more inconsistently applied at state court because unlike 1983, where I feel like every newly minted law school graduate who's clerking for a federal judge is kind of grinding their way through the docket and writing these qualified immunity opinions, state court judges are not dealing with these official immunity cases it's gonna be harder to get a body of law, where you can really point to, you know, a lot of precedent.

**Victor Fleitas:** Another reason is you have the built in expertise of the federal judiciary. Even an appointed judge that may not have had the most vigorous trial practice prior to getting on the bench, or even had much of an experience with civil rights cases, within a very short period of time is going to be dealing with a good number, and sort of develop the expertise necessary to handle these cases efficiently. There just is not – and that's not to denigrate our circuit court judges – it's just to say, they have no background in this. They have no experience, and you're dropping something pretty heavy on them that they haven't dealt with much before. And when you've got federal judges fully capable of handling it, there's no reason not to.

**Doug Norwood:** I've been here a long time. Arkansas is not set up to do these cases. They're just not familiar with the terminology and stuff. There's a language that you have related to the specialty that you practice in. And that does not exist in state court in Arkansas. In federal court, then you're talking the same language so that helps you out a lot.

**Hugh Eastwood:** Simply having a state statute that says we have all hereby abolish qualified immunity. I don't think that's going to do enough. If the goal is to have cases being brought in state court, because you just don't have otherwise the statutory and procedural infrastructure to sort of litigate and process these claims.

**John:** One important consideration when you're deciding between proceeding under state or federal law is the availability of attorneys' fees.

**Hugh Eastwood:** This is a complex area of the law. It's really hard for people to seek to vindicate rights if there's not some mechanism to get the lawyers paid.

**John:** In federal court, there is a provision for attorneys' fees if you win your case under Section 1983. In state court, that's often not the case.

**Hugh Eastwood:** The costs of mounting a 1983 case, all the way through a judgment or verdict, let alone a couple interlocutory appeals and maybe an appeal of a final judgment. I mean, that's hundreds and hundreds and hundreds of hours. If you're going to have experienced, competent counsel, it could be hundreds of thousands of dollars.

**Vic Glasberg:** I freely say this. I am not a foundation funded firm. I eat what I kill. And I need to make a living. It's all very well in good to do civil rights law and save the world. But guess what, you have to feed your family and pay your mortgage. You can't litigate a case for \$10 or \$20 or \$30,000. You simply can't given what goes into it. Given the need for expert witnesses, given the kinds of defenses that will be mounted by the other side, you're talking about a substantial investment of time, effort, energy and money.

**John:** That's Victor Glasberg, a civil rights litigator in Virginia.

**Vic Glasberg:** Congress passed the Civil Rights Attorneys' Fees Act for the particular reason that in the absence of such an act, it's very difficult to for people with righteous claims to get lawyers. So somebody will come to me and they may have a claim where \$10,000, \$20,000 \$30,000, \$50,000, or \$75,000. And the amount of work that will go into it even at – you know, I'm not talking about DC rates of \$1,000 an hour – you can't do it. You'll simply go out of business. So the availability of fees under the federal attorney's fees act is crucial.

**John:** The vast, vast majority of cases that we've talked about this season were initially brought by small law firms or solo practitioners like Victor. There are nonprofits like IJ or big law firms

that do pro bono work, but the workhorses of civil rights litigation are overwhelmingly small firms. And as far as Victor is concerned, for civil rights cases in Virginia, it's federal court or nothing.

**Vic Glasberg:** Qualified immunity is an unmitigated catastrophe in federal court, since it lets officers get away with unconstitutional conduct. But if I was sufficiently concerned about qualified immunity, so as not to bring a case in federal court, I'm not sure I would bring it in state court. Bringing a civil rights case in Virginia circuit court is an oxymoron.

**John:** Until [this year](#), for instance, there was no right of appeal in Virginia state courts.

**Vic Glasberg:** Virginia did not have an appeal of right in your basic civil case whether it's a police abuse case or an employment discrimination case, an automobile accident case, a medical malpractice case.

**John:** If you lost at the trial court, you just lost. Maybe the Virginia Supreme Court would take a look, but probably not.

**Vic Glasberg:** You have effectively a cert system. And the Virginia Supreme Court was taking I think about the same percentage of cases as the United States Supreme Court, which is negligible.

**John:** A few years ago, Victor did try to bring a state law claim in state court, but only after being booted out of federal court.

**Vic Glasberg:** My clients, who are husband and wife, who wanted to redo their kitchen, so they bought some flooring tiles at Costco – like 1000 bucks at flooring times.

**John:** A little later Costco published an ad saying there's a 20 percent sale on exactly those tiles.

**Vic Glasberg:** They hadn't yet laid tiles. They call up and say: Is there any chance that we can avail ourselves of this discount? They say, sure. Don't bring them in, that's gonna be a pain in the neck. Come to the store with your receipt. Purchase the same tiles, which will now cost you \$800. And as soon as you've purchased them, return them and return them on the original receipt.

**John:** Which they do.

**Vic Glasberg:** People at Costco get confused. And they say it these people did something inappropriate. They call the police and say they were ripped off there was credit card fraud, etc.

**John:** An arrest warrant was issued for the couple, but very soon after Costco realized they made a mistake.

**Vic Glasberg:** The next morning, they do their check of their inventory and their sales, and they realize everything is fine. They immediately call up the police and say sorry, mistake, no problem. Nothing stolen. Nothing. No fraud, everything is fine. The officer doesn't do anything. Just forgets about it. She says that she never got the call. Unfortunately, we have the telephone records. So a half a year goes by. The husband is then caught for speeding in Arlington County. And lo and behold there is an outstanding warrant for credit card fraud. So they charged him

with credit card fraud. They contact Costco. Costco says we told you half a year ago that nothing happened. They go to court. And in court – the husband's there, the wife is there, the prosecutor is there, the police officer is there – and Costco says nothing happened. They dismissed the charge.

**John:** But wait there's more.

**Vic Glasberg:** Half a year later – meaning one year after the sale – the wife is going to get her American citizenship papers. These folks were Iraqi refugees. She goes to the police department...

**John:** Across state lines in Maryland where the family had moved.

**Vic Glasberg:** ...to fill out the forms. Have you ever been arrested? No, no, no. Any trouble with the law? No, no, no. So she fills out the form, and then a police officer comes. And she thinks she's going to get her papers – says put your hands behind your back. They arrest her for the outstanding warrant. Two days before Christmas.

**John:** And nobody in her family knows what happened to her.

**Vic Glasberg:** She disappears on a 6-year-old daughter, a 4-year-old daughter, obviously her husband and – are you ready for this? – a 6-month-old child she was nursing.

**John:** Ultimately, she spent three days in jail – three very uncomfortable days – because nursing mom, no breast pump. And then she's brought back to court in Arlington where the case against her is finally dismissed.



**Vic Glasberg:** I brought a lawsuit against a police officer. And I brought a lawsuit against the prosecutor.

**John:** In federal court under the federal Constitution but also with a state tort law claim that federal court could have exercised what's called supplemental jurisdiction over. And in 2017, the case reached the U.S. Court of Appeals for the [Fourth Circuit](#). Where things went just about how you'd expect.

**Lawyer for officer:** I argue to you that the law was not clearly established

**Judge Wilkinson:** just in terms of the clearly established law

**Lawyer for prosecutor:** There is no clearly established right.

**John:** The judges clearly had some sympathy for the plaintiffs.

**Judge Wilkinson:** What happened here is pretty shabby, and it's a disquieting scenario, to put it mildly. And what I wonder is how do we assure ourselves that this doesn't become a routine matter where people who have done no wrong and they're arrested and detained and nobody does anything about it?

**Lawyer for officer:** Well, then I submit to you that that's a question for the legislature, perhaps the Virginia General Assembly.

**John:** They were sympathetic, but they wanted a case on point. And there was no prior case saying an officer has a duty to withdraw an arrest warrant when they learn that no crime has been committed. Victor argued that it was so obvious that there is such a duty that a case on point isn't necessary.

**Victor Glasberg:** I would respectfully submit that the duty not to cause the arrest of an innocent person is as clear a principle as is possible to articulate in American law. And there's abundant case law that says that if the nature of the right at issue is clearly encompassed within the known law, you don't need an on point case.

**John:** But the Fourth Circuit granted qualified immunity to the officer, and also absolute immunity to the prosecutor, on the federal constitutional claims. But that wasn't the end of the story. This is Judge J. Harvie Wilkinson, who wrote the opinion for the court.

**Judge Wilkinson:** Why does everything need to be left to Section 1983 as opposed to state legislators, as opposed to state courts? They're highly capable people on those courts and in those legislatures, and I don't understand why it's all drawn into federal court if there's no pre existing duty clearly articulated in the law. I mean everything doesn't have to be a federal claim. And more and more, we're seeing states undertake reform efforts to address malfunctions in the law enforcement.

**John:** The Fourth Circuit, said, the couple's state tort law claims would be off in state court. There is tort in Virginia called negligent investigation. But it's not a claim that's seen a lot of litigation in state court, so we in federal court don't feel comfortable interpreting Virginia law when Virginia courts haven't really fleshed it out.

**Vic Glasberg:** It exemplified legally the kinds of challenges that are posed by these cases. And state court was useless.

**John:** In state court, the case was quickly dismissed. A circuit court judge ruled that quote “the Amended Complaint is founded on an alleged duty and cause of action that Virginia law does not recognize.” So that’s a lot of work to find that this old, under-used cause of action no longer exists. The good news for the plaintiff, however, was that in this case, there was someone other than the government to sue.

**Vic Glasberg:** It was a very fine settlement with Costco. And everything else was dismissed.

**John:** Costco, since it’s neither the government nor employed by the government, couldn’t avail itself of any immunity doctrines and the claims against it would have gone to trial in federal court, but the store – which for my money was the least culpable defendant by far – decided to settle the case. So coming back to Justice Gorsuch’s suggestion that state tort law presents a viable alternative to 1983 litigation in federal court. Maybe. Sometimes. In very limited circumstances. Certainly not often enough that federal courts should feel comfortable shirking their duty to enforce the federal Constitution. But if you’re a civil rights lawyer or plaintiff, while we’re waiting for Congress or the Supreme Court to reopen the doors to federal court, there is a lot of good work that can be done in the states. We’re going to take a quick break, and when we come back we’ll talk about what state legislatures can do to ensure that where there is a right, there is a remedy.

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**BREAK 2**

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**John:** So how best to promote civil rights enforcement in the states? My friends, we at the Institute for Justice have some ideas.

**Keith Neely:** Any comprehensive effort at civil rights reform has to have two components. One, how can we hold the individual responsible for the violations that they committed. And two, how can we make the victim whole.

**John:** That is my colleague, Keith Neely. At IJ, we are hard at work helping state and local legislators craft baby Section 1983s.

**Keith Neely:** IJ has model legislation called Protecting Everyone's Constitutional Rights Act or PECRA. And what PECRA aims to do is address the qualified immunity problem from a state level by essentially providing a state analogue to Section 1983.

**John:** And we're happy to say that with our input, as well as input from lots of other folks, last year in 2021, the state of New Mexico passed a civil rights act that looks a lot like our model legislation.

**Keith Neely:** What sets it apart from a statute like Section 1983 is that instead of going after the individual government official, we go after the government employer. Because we think that the government employer is the chief entity that ought to be held responsible when government officials violate your constitutional rights.

**John:** Getting rid of qualified immunity may be the marquis attraction, but our model legislation does much more. PECRA also eliminates the increasingly difficult standard that plaintiffs face for holding municipalities liable under Section 1983 that we talked about on Episode 7.

**Keith Neely:** We try to approach this issue from from two directions, right? How can we make sure the victim is is made whole? And we do that by giving them a right to go after the government. And then how can we encourage the government to engage in better hiring, training, and firing practices moving forward?

**John:** Just because individuals won't be personally liable doesn't mean they are off the hook.

**Keith Neely:** Under PECRA, just because an individual isn't held personally liable for a court judgment, that doesn't mean that they get to turn around and wash their hands of what they did. Instead, they're going to be the defendants in the lawsuit, and they're still going to have to explain their actions and ultimately have them be examined by a court. And importantly, there is an employment termination provision in PECRA that makes it easier for the government to then turn around and fire the bad acting employee.

**John:** There's nothing in PECRA that says governments have to fire employees who have a court judgment against them. But it would simplify that process.

**Keith Neely:** Different states and different agencies have their own administrative procedures for firing different government employees. So what PECRA does is says that a court judgment against an official would count as what's called per se evidence in that subsequent administrative proceeding, that there is what's know as just cause to fire that official. Now, this doesn't mean that officials are always going to lose their job. The decision to fire the employee still stays with the employer, and an administrative law judge is still going to be in charge of reviewing that decision.

**John:** Another piece of our model legislation is attorneys' fees.

**Keith Neely:** And what that does is it ensures that one, plaintiffs attorneys are incentivized to vindicate people's constitutional rights. But perhaps more fundamentally, what attorneys' fees do is it ensures that a victim is made whole without having to then turn around and take some of those damages and use it to pay their attorney, right. It doesn't put victims in the awkward position of having to choose between being made whole and being able to pay an attorney.

**John:** And the New Mexico Civil Rights Act is the closest thing to our model legislation that's been passed into law so far.

**Keith Neely:** Now, there were some compromises made. The first major compromise was the institution of a damages cap. In New Mexico, they established a \$2 million damages cap. And that is a per occurrence, not a per claim cap.

**John:** Per occurrence, meaning that if an official commits several different rights violations during the course of a single incident, the cap is \$2 million, cumulative, for all of those violations. Not \$2 million for each violation.

**Keith Neely:** Which isn't a component of our model legislation. So in certain instances, you might imagine, and these are in cases of particularly egregious constitutional violations, you might imagine a victim who is unfortunately put in the uncomfortable position of having to choose between being made whole and paying their attorneys. But what they did do there, which was laudable, is they intentionally ensured that that cap would grow with inflation.

**John:** New Mexico's law also lacks an employment termination provision.

**Keith Neely:** New Mexico's law is not perfect. It doesn't include our model language on employment termination, for example. But there weren't any major compromises on the most important issues in our model. Unlike other civil rights acts in other states, for example, the law applies to all executive branch officials, not just police officers. And importantly, it's not limited to certain constitutional violations, which is the case in some other jurisdictions.

**Laura Schauer Ives:** I think, for me, the most exciting thing is there's a number of areas of the law that have gotten really bastardized – not just by qualified immunity but the federal constitutional analysis.

**John:** That is New Mexico civil rights lawyer Laura Schauer Ives, who says that righteous claims that are really hard to bring under federal law may now be viable under state law.

**Laura Schauer Ives:** For example, in most of the country, it is just kind of per se unlawful for guards to quote unquote have sex with inmates, because it's rape and because there's a power differential. But under under U.S. constitutional analysis, they want to go through some determination of whether or not there was real consent. The presumption is consent, in fact, and you have to prove that it wasn't. Which is pretty grotesque, given it's unlawful and guards know it. And it's unlawful for a reason. So, in those instances, to be able to pursue somebody's claims, under the New Mexico Civil Rights Act, I mean that's world shifting.

**John:** As you might imagine, when civil rights acts like these are introduced in a state legislature, there can be some pretty intense opposition.

**TX law enforcement lobbyist:** Good morning to the committee and thank you Chairman White for inviting CLEAT to speak today. I work in public affairs for CLEAT or the Combined Law Enforcement Associations of Texas.

**John:** In Texas, reform faltered last year in large part because of opposition from law enforcement.

**TX law enforcement lobbyist:** This session brings new concerns as it pertains to qualified immunity for police officers. We will not negotiate that sacred right and working condition under any circumstance.

**John:** Yes, you heard that right. According to a law enforcement lobbyist in Texas, qualified immunity is a quote “sacred right.”

**TX law enforcement lobbyist:** We will not negotiate that sacred right and working condition under any circumstance.

**John:** In New Mexico and Texas and anywhere one of these bills gets filed, you hear the same criticisms.

**FOP President Albuquerque:** I see it as an attack on not just any public employee, but especially an attack on police.

**News4Jax Reporter:** Doing away with qualified immunity would leave officers without any protection from frivolous lawsuits.

**Florida Sheriffs' Association President:** Why should a cop making \$45,000 a year have to worry every single time your making a split-second decision that you might have



to do something that affects your family and you personally that you're going to have to pay personal damages.

**Massachusetts Chiefs of Police Association:** Tell me why it is that I have to make this quick decision, use the best information I have, and if later on somebody finds that I made a mistake I may lose my house, my pension.

**Manchester, New Hampshire police chief:** Let's not disparage every police officer that acted appropriately in a split second decision.

**New Hampshire officer:** Officers often make split second life or death decision where any hesitation can result in serious injury or death. We should not expect them to put their livelihoods and the financial welfare of their families on the line every time they are forced to make a split second life or death decision.

**FOP President Albuquerque:** It slows our reaction down because people are less likely to get involved in those scary decisions where they have to defend someone's life, including their own.

**New Mexico State Senator William Sharer:** And now all of sudden, if you have a police force at all, your fire department is also at risk. Your schools are at risk. Your teachers are at risk.

**Reporter:** The Albuquerque police officer's union says New Mexicans will be footing the bill. He says this will drain budgets and take away from paying for things like sustainable homeless programs, drug rehab assistance, and new training for police reform.

**WMUR9 Reporter:** New Hampshire legislators have considered abolishing qualified immunity for police officers. the Chiefs of Police Association says if the state of New Hampshire were to abolish it, he's convinced that this state would lose lots of qualified highly trained police officers.

**John:** If you have listened to earlier episodes, most of those objections should sound familiar and they should all ring hollow. We know from empirical research by UCLA Professor Joanna Schwartz that qualified immunity does not actually play much of a role getting rid of frivolous lawsuits – there are certain rules of federal civil procedure that do that. Moreover, qualified immunity protects all defendants, not just those who had to make a split-second decision. And for that subset of cases, where an official truly did make a split-second decision, whether their actions were reasonable is already something that gets factored into the constitutional analysis. Further, and once again thanks to research by Joanna Schwartz, we know that officials don't pay out of their own pockets when they violate the Constitution, and they certainly won't under our model legislation. One bill we strongly supported last year that was based off our model legislation was filed in New Hampshire.

**Keith Neely:** My name is Keith Neely. And I wanted to testify today in support of Amendment 1244H to Senate Bill 96 because it represents the gold standard for state civil rights reform.

**Representative Paul Berch:** Our founders in New Hampshire had it exactly right – 1784 – when they wrote Part One, Article 14 of our Constitution.

**John:** That was State Representative Paul Berch, who sponsored that legislation.

**Representative Paul Berch:** Every subject of this state is entitled to a certain remedy, by having recourse to the laws for all injuries he may receive and in his person, property, or character. And it goes on from there.

**John:** In New Hampshire, there's actually a provision in the state constitution that dates back to 1784 and that is pretty much identical to our theme for this season: where there's a right, there should be a remedy.

**Representative Paul Berch:** The doors to our courts must be kept open to redress wrongs done to our citizens. That's what this legislation will accomplish. Thank you.

**Keith Neely:** As we expected from our experiences in New Mexico, there was a lot of vocal opposition from law enforcement in New Hampshire.

**NH Police Association:** Good morning, Mr. Chairman I'm here on behalf of the New Hampshire Police Association. And we are against the amendment for a variety of reasons.

**Keith Neely:** At least some of the law enforcement members who testified seemed to be under the false impression that they would be held personally liable and could be ultimately bankrupted for making an innocent mistake. Let's be clear. That's not going to happen under our model legislation. But notably they also didn't like the idea of making it easier to fire officers who are bad actors.

**NH Police Association:** Think of the unfairness of this. Because in a collective bargaining agreement, a just cause clause often is contained therein, which requires an employer to meet a seven-point test. It is now eliminates that important provision.

**Keith Neely:** It is true that PECRA alters the collective bargaining agreements between government employers and their employees. But remember, it's forward looking. And officers

who were hired under that seven-point test are grandfathered in until that collective bargaining agreement has been renegotiated. So it's not unfair.

**John:** The fiercest opposition to the bill, however, did not come from law enforcement. It came from municipalities. According to a lobbyist from the New Hampshire Municipal Association, reform based on our model was quote: “one of the [most alarming](#) bills we have ever seen.”

**NH Municipal Association:** Thank you, Mr. Chairman, Cordell Johnston, representing New Hampshire Municipal Association in opposition. This bill and makes local governments liable for innocent mistakes by good actors.

**Keith Neely:** The government's claim that the sky is falling, if you hold us responsible for what we do. We don't think that's true.

**Franklin, NH city manager:** I have the privilege of serving as the city manager for the city of Franklin. What you may not know and what I'd like to talk about today is how this amendment would devastate a community like Franklin.

**John:** And how would it devastate a community?

**Franklin, NH city manager:** Let me explain. Franklin is a mill town. We were once a thriving community. But after the last mills closed in the early 70s, we have steadily declined.

**John:** And to reverse that decline, city officials are opening up a whitewater kayaking venue.

**Franklin city manager:** This whitewater kayak park is the first of its kind in New England. It will bring a whole new outdoor recreation economy.

**John:** None of which would be possible without ...

**Franklin city manager:** Franklin simply could not afford any of this without qualified immunity. Though Franklin will take pride in keeping our amenities maintained and safe for the users there is inherent risk in any outdoor recreation activity. Qualified immunity protects us from that risk.

**Keith Neely:** Whenever you try to enact civil rights reform, and you try to hold governments responsible for the violations of their employees, the government's are going to freak out.

**John:** But, suffice it to say, we don't think the sky is going to fall.

**Keith Neely:** I think New Mexico so far has borne out that we're correct. The sky has not fallen in New Mexico. Municipalities are not filing bankruptcy. There isn't a wealth of municipalities now who can't be adequately insured.

**Laura Schauer Ives:** I think in the end the municipalities, and the states, and counties hemmed and hawed about this is going to cost a lot of money.

**John:** That is Laura Schauer Ives in New Mexico again.

**Laura Schauer Ives:** But I truly, truly believe that what has cost them a lot of money is frankly the way the law has developed and qualified immunity. And instead of training to what ~~is~~ should

be best practices, instead of training to ~~like~~ what would actually be constitutional, they have just been operating in this world where they're protected for no real good reason. And they end up doing things that I don't think they would be doing otherwise.

**John:** But Laura hopes that the reforms will encourage police departments and other agencies to train their employees to stay within the bounds of the Constitution, rather than within the bounds of what they could get away under qualified immunity and federal municipal liability standards.

**Laura Schauer Ives:** It's emboldening. It's emboldening to have a lawyer for a defendant officer stand up for years and say, what they've been doing is lawful and what they've been doing is right. My genuine hope is I'm put out of business. I would love a world where this didn't happen. That's what I that's what I would like.

**John:** If you, dear listener, are involved in a state or local effort at civil rights reform, give us a call.

**Keith Neely:** There really isn't a whole lot that you have to change to take our model and make it applicable in municipal space.

**John:** Or if you're a civil rights practitioner, and you are thinking about challenging official misconduct directly under a state constitution, also please give us a call. Or if you want to know more about the state of play in your state, please check the show notes for a study we just released called [50 Shades of Government Immunity](#). As the study makes clear, today there is no state that really has an established culture of civil rights enforcement. At the Institute for Justice, that's something we're trying to change.

## CONCLUSION

**John:** And that brings us to the end of Season 2. We are still waiting for final outcomes in many of the cases we've talked about, including the case we started off with in Episode One.

**Bystander:** Oh my god they're pounding him in the head. You need to get some officers over here right now. They're going to kill this man.

**John:** To see how James King's case and other cases are progressing and also the new cases we'll be filing, please visit [IJ.org](http://IJ.org) to sign up for our biweekly newsletter, Liberty & Law. Or give a listen to our sister podcast, which is called Short Circuit and which comes out more or less weekly. In the meantime, we will be hard at work on Season 3 of Bound By Oath, which I am happy to say has gotten the green light and which we hope will be arriving in 2023. Until then, I am John Ross and thank you for listening.

**Credits:** Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Charles Lipper and Kais Ali at Volubility Podcasting. It is produced by Anya Bidwell and John Ross. For this episode, we relied on scholarly works by our interviewees as well as those by Megan Cairns and Kendall Morton. The theme music is by Cole Deines.