Civil Rights Litigation Against Child Welfare Workers and Child Welfare Agencies
"Nuts & Bolts Workshop"
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https://www.youtube.com/playlist?list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te
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Shawn McMillan, Why I'm Doing This

"Pain compliance… that's why we are doing this thing here is to bring in and form up an army of people out there capable, interested, and willing to make the commitment to bring that pain to the government."

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A. Parents' and Children's 4th & 14th Amendment Rights

- Federal court, state will likely talk about following state statutes-"irrelevant"
- 4th Amendment
    - "The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation**, and particularly describing the place to be searched, and the **persons or things to be seized.**"
    - The county has to have a warrant to seize PERSONS
    - As a parent, you are not seized so this is not the right that applies to parents
- 14th Amendment
    - "Section. 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction equal protection of the law."
    - Incorporates the right to not have children seized from you
- Constitutional Rights of Families
    - The interests of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests. *L v. United States Immigration & Customs Enf't, 302 F. Supp. 3d 1149, 1161 (SD Cal. 2018); Troxel, supra*, 530 U.S. at 65
        - Also a fundamental right that is to be examined under the strictest scrutiny.
    - The Constitution protects the fundamental right of parents to make decisions concerning the care, custody, upbringing, management, and control of their children. *Troxel v. Granville (2000)* 530 U.S. 57, 66
        - Starting point to every opposition/every motion to dismiss
    - The right to family association is sheltered against the government's unwarranted usurpation, disregard, or disrespect. *M.L.B. V S.L.J. (1996)* 519 U.S. 102, 116
    - In the area of child abuse, social workers are contrained by the substantive and procedural guarantees of the Consitution. Suspected child abuse does not permit a social worker to ignore a parent's constitutional rights. *Wallis v. Spencer* (9th Cir. 2000) 202 F.3d 1126, 1130
        - Or the child's constitutional rights-children have the right to be raised by their parents
    - Any notice to protect a child from abuse does not override a parent's constitutional rights. *Franz v. Lytle* (10th Cir. 1993) 997 F.2d 784, 792-793; *Calbretta v. Floyd* (9th Cir. 1999) 189 F.3d 808
    - **Go back & read all of the aforementioned cases for other statements & a general understanding of the federal courts stance**

- **A Social Worker's Duty Includes Protecting the Constitutional Rights of Children and Families**
    - Fit parents are presumed to act in the best interest of their children. *Troxel, supra, 530 U.S.* at 68; *Doe v. Heck,* 327 F.3d 492, 521 (7th Cir. 2003)
        - Even with severe/significant allegations, the agency needs to have **evidentiary *proof*** to rebut the presumption the parent is fit & therefore their child's best interest.
    - The government's interest in the welfare of children embraces not only protecting children from physical abuse but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents. *Calbretta v. Floyd* (9th Cir. 1999) 189 F.3d 808
        - When in a deposition with social workers, and you ask "What are you trying to do?" And they respond "protect the kids"-this is wrong. They have an affirmative obligation to protect the rights of the kids in the dignity in their homes and the lawfully exercised authority of the parents.

- **State or county government agencies are federally required to provide constitutional rights training to their workers. (CAPTA or ASMA)**

- **Distinctions Between the Fourth and Fourteenth Amendment Rights of Parents and Children**
  - The 4th Amendment rights of a child to not be searched/seized from the custody of its parents is a personal right. Parents have no corollary right under the 4th Amendment.
  - A parents right to continued custody of their children arises under the 1st & 14th Amendments, and is comprised of both a substantive and procedural component.
    - The 14th Amendment encompasses a substantive and procedural right-can be distinct claims under 1983.
  - A child has a corollary right-equal and identical to that of its parent(s) - in not being dislocated from the emotional attachments that derive from daily contact with family
    Anderson-Francois v. County of Sonoma, Fed Appx. 6. 9 (9th Cir. 2011); citing Wallis v. Spencer (9th Cir. 2000) 202 F.3d 1126, 1130
    - The child(ren) have a right to not have their parents lied about in attempt to separate or keep them separated from their parents.

- **The 4th and 14th Amendments Apply to Child Abuse Investigations**
  - In the area of child abuse, as with the investigation and prosecution of all crimes, state actors are constrained by the substantive and procedural guarantees of the Consitution.
    - *Wallis v. Spencer* (9th Cir. 2000) 202 F.3d 1126, 1130. The fact that the suspected child abuse may be heinous does not mean the government may ignore the rights of the accused or other parties. *Ibid*
    - "State actors" includes police
  - Any motive to protect a child from abuse does not override the Constitution.
    - *Franz v, Lytle,* 997 F.2d 784, 793 (10th Cir. 1993)
- Differences between 4th & 14th Amendments
  - While the constitutional source of the parent's and child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. The Constitution requires an official separating a child from its parents to obtain a court order separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in "imminent danger of serious bodily injury" *Jones v. County of Los Angeles* (9th Cir 2015) 802 F.3d 990, 100
    - Any violation of one/either is a corollary claim
- Searches in Child Abuse Cases
  - ENTRY IN A HOME/ INSPECTION OF HOME
  - PERSONAL PROPERTY
    - Rooms
    - Closets
    - Dressers
    - Backpacks
    - Cabinets
    - Refrigerators
  - INSPECTION OF A CHILD
    - Visual Inspection of Body
      - *Calabretta v. Floyd* (9th Cir. 1999) 189 F.3d 808, 819; "It does not require a constitutional scholar to conclude that a nude search of a thirteen year old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity.
    - Medical Examinations
      - Medical Procedures:

        - X-Rays
        - CT Scans
        - Physical exams
        - Visual exams of genitalia
        - Vaccinations
            - Vaccination against/without informed parental consent/knowledge is a Monell, 4th, and 14th claim
    - The Fourteenth Amendment right to familial association includes the right of children to have important medical decisions made by their parents, rather than the state *Wallis ex rel. Wallis v. Spencer,* 202, F.3d 1126, 1141 (9th Cir 1999) This right assumes their special significance when the procedures undertaken, at the initiative of a state official, "serve primarily an investigative function". *Van Emrik v. Chemung Cty Dep't of Soc. Svcs,* 911 F.3d 863, 867 (2d Cir 1990) (emphasis added)
        - Also see *Parham v. J.R. 442, U.S. 584, 602 (1979); Camreta v. Floyd,* 189 F.3d 808 (9th Cir. 1999); *Wallis ex rel. Wallis v. Spencer* 202 F.3d 1126, 1141 (9th Cir. 1999)
        - Any search of the child's body is a violation-their 4th amendment right
        - Again, NEED a warrant
    - A parent's due process right to notice and consent is not dependent on the particular procedures involved in the examination, or the environment in which the examinations occur, or whether the procedure is invasive, or whether the child demonstrably protests the examinations. *Mann v. Cty of San Diego* 907 F.3d 1154, 1162 (9th Cir. 2018)
        - The government cannot do ANYTHING medical without explicit consent
            - There must be exigent circumstances-which are explicitly defined in 9th Cir
            - This is the 4th case like this (as of 2019)
    - Parents also have a 14th amendment right to be present during medical examinations unless there is due cause. Even with a court order/parental consent-she has a distinct and independent right to be present during the exam or relatively nearby
        - Corollary right-4th for child and 14th for the exam
        - Procedural due process claim
        - If a child is claiming the parent is abusive, there could be good cause for exclusion-must have evidence & good reason
    - Parents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention, (or to be in a waiting room or other nearby area <u>if there is a valid reason for excluding them</u> while all or a part of the medical procedure is being conducted) Likewise, children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations. *Wallis ex rel Wallis v. Spencer* 202 F.3e 1126, 1141 (9th Cir 1999); *Greene v. Camreta,* 588 F.3d 1011, 1036 (9th Cir. 2009)
- The constitution assures parents that, in the absence of parental consent, physical examinations of their child may not be undertaken for investigative purpose at the behest of state officials unless a judicial officer has determined, upon notice to the parents, and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances. *Wallis ex. Rel*

Wallis v. Spencer 202 F.3d 1126, 1138 (9th Cir. 1999); *Mann v. County of San Diego, 907 F.3d 1154, 1161 (9th Cir. 2018)*

- Mann is really focused on external genitalia exams for sexual abuse claims
    - County will come back with "not invasive 'enough'"
    - Doesn't matter, constriction exists by the 4th & 14th amendment that parental consent/warrant is NEEDED

- Family values are a core conservative issue
    - Current supreme court is pretty conservative
- Under 1st Amendment to religious freedom
    - It is a fundamental right
        - Strict scrutiny
        - Shawn is unsure of 1st or 14th right
            - If religious practice is reason for time of seizure, that does not meet exigent circumstances
- Taking a Child into Protective Custody
    - The county is going to try to make it sound like they are doing God's work
        - In depositions, use the word "seize"
            - They will claim "no no,temporary protective custody"
                - Their training materials should have some reference to 4th & 14th Amendments and the word "seizures" because there **should** be constitutional language
                - "You see this training material. What does it mean when it says seizure?" They will likely say "Oh, that's talking about temporary protective custody" OH SO SAME THING
                - Keep using the word seizure-seizure sounds bad. Connotation is bad.
                    - They will get antsy and irritated
                    - When they say "temporary protective custody" , loop them back to "Oh, you mean when you seized the kid?"
                        - You don't play the constant battle, you just play the clips using seizure terminology
                        - The State will not resist putting them on the stand to try to rehabilitate them.
                        - When they again get on the stand & say protective custody, "Oh you mean seizure?"
- SEIZURES in Child Abuse Cases
    - Taking a Child into "Protective Custody"
        - 4th Amendment (child)
            - *Kirkpatrick v. County of Washoe* 843 F.3d 784, 789 (9th Cir 2016) Citing *Wallis v. Spencer* 2020 F.3d 1126, 1136 (9th Cir. 1999)
        - 14th Amendment (parent's) F.3d
            - *Wallis v. Spencer* 2020 F.3d 1126, 1136 (9th Cir. 1999); *Ram v. Rubin* 1306, 1310 (9th Cir. 1997)
        - Certain Child Interviews
            - *Greene v Camretta,* 588 F.3d 1011, 1023 (9th Cir 2009); but see *Camreta v. Greene,* 563 U.S. 692, 714, 131, S. Ct. 2020, 2036 (2011) vacating in part as moot, but we have a good idea which way the 9th Circuit will go on the issues
                - Specifically talking about at school interviews
                - Holding kids for hours with cops is NOT acceptable by 9th Cir
        - Analysis for certain 4th & 14th Amendment Violations are the same
            - *Kirkpatrick v. County of Washoe* 843 F.3d 784, 789 (9th Cir 2016)

- Interference with Limited Custodial Rights
  - **Treated the same as any other child seizure under the 4th and/or 14th Amendments**
    - Parents with no legal or physical custody, but merely visitation rights-have a 'liberty interest in the companionship, care, custody, and management of their children" even though such a parent's rights is unambiguously lesser in magnitude than that of a parent with full legal custody
      - *James v. Rowlands* 606 F.3d 646, 651 (9th Cir. 2010)

  - **4th Amendment (child) // 14th Amendment (parents)**
    - **4th Amendment Rights of a Child & 14th Amendment Rights of a parent are corollary-if one is violated both are violated**
    - *Kirkpatrick v. County of Washoe* 843 F.3d 784, 789 (9th Cir 2016) (Holding that in 2008 it was not clear that a hospital hold requires a warrant, consent, or extringency-after Kirkpatric, hospital holds are clearly seizures within the context of the 4th & 14th Amendments and require consent, extringency, or a warrant.
    - Immediately upon referral of concern, they are required to do a prompt & thorough investigation to determine if there is a need for removal
      - Waiting until a child is discharged & going back home DOES NOT create an exigent circumstance.
- Unwarranted Seizures-The Basic Premise
  - Unwarranted seizures are presumptively unreasonable.
    - *Welsh v. Wisconsin* (U.S. 1984) 466 U.S. 740, 750; *People v. Rogers* (Cal 2009) 46 Cal.4th 1136, 1156
    - It is supposed to be in the County's training
      - It is their burden
        - Also should be in their training
- Unwarranted Seizures of Children are Prohibited
  - A social worker may not lawfully seize a child from the custody of its parent(s) unless at the time of the seizure the social worker is in possession of reasonable and articulate evidence to show the child is in immediate danger of suffering severe bodily injury or death in the time it would take to obtain a warrant
    - ***AND***
  - There is no lesser intrusive alternative means of averting that specific injury
    - When the social worker is claiming exigent circumstances, they not only need evidence they also need a specific injury in mind that the child is likely to suffer
    - Could there be a monitor/safety person put in place?
      - You HAVE to explore alternative means
  - Who Must Be Assessed
    - The government may not interfere in the relationship between a fit parent and a child simply because of conduct, real or imagined, of the other parent. *Wallis supra,* 202 F.3d at 1142 n 14. Each parents conduct must be assessed separately
    - Simply put, any implication against one parent does not constitute "specific, articulable evidence" to justify removal from the other parent. *Wallis supra,* 202 F.3d at 1142 n 14.; *Fredenburg v. County of Santa Clara* 407 Fed Appx. 114, 115-116 (9th Cir 2010)

        - Has to do an individualized assessment for EACH CHILD AND EACH PARENT
        - If the answer is that the child is safe with either parent, they CAN NOT seize that child.
            - Address in deposition
                - This is in their training materials
        - Articulable-means capable of being expressed in words backed by specific evidence
    - Parents, even those without physical custody, have a well-established liberty interest in the companionship, care, custody, and management of their children. *James v. Rowlands* 606 F.3d 646, 651 (9th Cir 2010)
    - Failure to protect is not going to be an excuse unless there is specific evidence that it happened
- PROBABLE CAUSE:
    - MEANS KNOWLEDGE OR REASONABLY TRUSTWORTHY INFORMATION-BEYOND MERE SUSPICION-SUFFICIENT TO LEAD A PERSON OF REASONABLE CAUTION TO BELIEVE THAT A CHILD HAS SUFFERED OR WILL SUFFER PHYSICAL BODILY INJURY. *United States v. Lopez* (9th Cir 2007) 482 F.3d 1067, 1072
    - A showing of probable cause **<u>does not</u>** satisfy the conclusion that a child was in imminent danger of serious physical injury sufficient to justify a warrantless removal. *Mabe v. San Bernadino County Dept of Public Social Services* (9th Cir 2001) 237 F.3d 1101, 1108, fn. 2.
- IMMINENT DANGER:
    - MEANS IMPENDING; ABOUT TO HAPPEN; **<u>IMMEDIATE</u>**; THREATENING; READY TO TAKE PLACE; NEAR AT HAND; ALL TO THE EXTENT THAT THE EVENT IN QUESTION WILL OCCUR AT ONCE UNLESS SPEEDY, SWIFT, AND PROMPT ACTION IS TAKEN.
        - Check state laws/training on what “imminent” means
        - 9th Circuit means within 2 hours
- WHAT IS NOT IMMINENT DANGER
        - The speculative possibility of danger is insufficient to constitute imminent danger *Garver v. Washoe County* (D. Nev. 2011) 2011 U.S. Dist. LEXIS 137703, *18-19; *Bailey v. Newland* (9th Cir 2001) 263 F.3d 1022, 1033
        - A child suffering from neglect of a type that could, if their parent’s conduct was not modified within a reasonable period of time, lead to long-term harm, does not present an imminent risk of serious bodily harm. *Rogers v. County of San Joaquin (*9th Cir. Cal. 2007) 487 F.3d 1288, 1297
            - Applies directly to Failure to Thrive cases
                - If a parent is given education and support (in the absence of medical issues) the circumstances can be reversed
                - Should be filing a non-detain petition (MN has different terminology. “In-home services" etc)
        - Malnutrition is not the type of condition that will lead to serious injury if not corrected within a matter of hours *Rogers v. County of San Joaquin (*9th Cir. Cal. 2007) 487 F.3d 1288, 1297

- "One need not be a licensed physician to recognize that in the case of a child who is both alert and active neither bottle rot nor malnutrition is the type of condition that will lead to serious injury if not corrected within a matter of hours. A reasonable social worker could reach no other conclusion"
- Failure to thrive does not give rise to an exigent circumstance. *Baker v. County of Los Angeles* (C.D. September 27, 2013, No, CV 11-5550-GHK (PJWx)) 2013 U.S. Dist.LEXIS 190702, at *22)
- A social worker's opinion is not an acceptable source of medical evidence, unless the social worker acts closely under the supervision of a medical professional. *Horton v. Apfel* (9th Cir. 1999) 1999 U.S. App. LEXIS 13465, 2-3
  - Not enough for the social worker to blindly follow dr opinions
    - They have a duty to form their own opinions
- The Constitution prohibits the removal of a child without warrant based solely on allegations of emotional harm. *Moodian v. County of Alameda Soc. Services Agency* (N.D. Cal 2002) 206 F.Supp.2d 1030, 1034-1035)

- Things that Undermine Claims of Imminent Danger
  - After a child is seized, the lack of immediate medical treatment weighs against a finding of imminent danger. *Rogers v. County of San Joaquin (*9th Cir. Cal. 2007) 487 F.3d 1288. 1295 n.4 ["doctor's response [or lack thereof] is relevant to the question of how serious the children's conditions would have appeared to the reasonable social worker"]
    - You will never get a social worker to admit to wrongful seizure
      - Address it by asking the timeline of events, what specific serious bodily injury they are concerned about, "How did you take the child? In an ambulance, in your car?", "when you drove away, did you go directly to the hospital? Immediate danger? When was the child seen then?
      - "I believe you that in good faith you removed this child. What did you do to immediately address the injury?"
  - An official's prior willingness to leave the children in their home militates against a finding of exigency, as does information that the abuse occurs only on certain dates or at certain times of the day. *Rogers v. County of San Joaquin (*9th Cir. Cal. 2007) 487 F.3d 1288. 1295
    - Injured child, social workers aware, no one removes them. If they come back and seize the child at a later time, creates concern about true nature of exigency
  - Government officials, including social workers, cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been, or will be, committed. *Wallis ex. Rel. Wallis v. Spencer,* 202 F.3d 1126, 1138 (9th Cir. 1999)
    - Investigation has to be prior to seizure-prompt and complete investigation
      - Talk to reporting party
      - Talk to corroborating witnesses
      - ESPECIALLY when child is in a safe position

        - Wallis is a key case
- After Acquired Evidence Cannot Support Claims of Exigency
    - All information and evidence that would support a child's seizure without judicial authorization, must be in the possession of or personally known to the removing social worker at the time of the seizure. Any information or evidence that a social worker learned or discovered after the child was seized, cannot be used to support that unwarranted seizure. *Jones v. County of Los Angeles* (9th Cir. 2007) 487 F.3d 990, 1007; *Rogers v. County of San Joaquin* (9th Cir. 2007) 487 F.3d 1288, 1294
        - WHAT DID SOCIAL WORKER KNOW AT THE TIME OF SEIZURE
            - They will try to paint the picture with after-seizure information. IRRELEVANT on basis for motion to eliminate
                - "Later evidence" will come in from the State, but it's irrelevant. Be mindful of what is true & the overall narrative you are trying to accomplish
                - You can draw a hard line in seeking the unwarranted seizure claim & come back to other claims
                - Cost-risk assessment
    - A social worker cannot seize a child without prior judicial authorization merely in the hope that further investigation will turn up facts suggesting that child was in immediate danger of serious physical injury. *Jones v. County of Los Angeles* (9th Cir. 2007) 487 F.3d 990, 1007; *Rogers v. County of San Joaquin* (9th Cir. 2007) 487 F.3d 1288, 1294
        - Speculation doesn't count-NEED EVIDENCE
- Duty to Investigate
    - A child suspected of being abused or neglected cannot be removed "unless reasonable avenues of investigation are first pursued". *Swartwood v. County of San Diego* 84 F. Supp. 3d 1093, 1108 (S.D. Cal 2014)
        - Prompt, thorough, complete investigation PRIOR to seizure
    - A social worker has a duty to investigate information that would have clarified matters prior to separating children from their parents. *Wallis v. Spencer,* 202 F.3d 1126, 1138 (9th Cir. 1999)
        - Goes to issue of exculpatory evidence
            - They can't turn a blind eye to someone who can undermine the authenticity of an allegation
            - Deposition question-ask, "What evidence are you looking for?" SW: "I'm looking for evidence that will support the allegation." They are supposed to look for BOTH sides. Inculpatory & exculpatory
                - Judicial deception
    - When applying the Fourteenth Amendment's exigent circumstances standard, "each family member must be assessed separately" *Baker v. County of Los Angeles* (C.D. Cal. Sep 27, 2013. No. CV 11-5550-GHK (PJWx)) 2013 U.S. Dist.LEXIS 190702, at *22; citing *Wallis ex rel Wallis v. Spencer* 202 F.3d 1126, 1137, n. 8. 1140, n.10) (9th Cir. 1999)
    - What this means in practice is that each parent must be assessed separately as to each child subject to the allegations
        - Each parent in relation to each child, is there a reason to separate due to exigent circumstances
    - Interrogations of Children

- The general law of search warrants applies ot child abuse investigations, including interrogations of children. *Calbretta v. Floyd,* 189 F.3d 808, 814 (9th Cir. 1999); Greene v. Camreta, 588 F.3d 1011, 1030 (9th Cir. 2009); vacated in part as moot in *Camreta v. Greene,* 563 U.S. 692, 695

B. Causes of Action-Claims for Relief under 42 U.S.C. Sec. 1983

- Claims for Relief-Federal Court
  - Cause for Action-State Court
- Look at State Civil Rights Claims
- If you are going to file a 1983 (Tort) action, you can bring State claims into Federal Court)
- Look at Common Law Claims
  - Unwarranted seizures
    - Assault & Battery
      - Even though removing a child isn't beating them, removing them is an act of violence
        - Duke University: Storming the Castle to Save the Children
        - https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2047&context=faculty_scholarship
        - Relied on & Cited by 9th Circuit in Greene v. Camretta
  - Judicial deception
  - May have claim to Failure to adhere to mandatory statutory duty
  - General negligence against municipalities
  - False imprisonment
  - Intentional Infliction of Emotional Distress (for the parent-seizure event, lying to keep child away. Personality conflict or the parent refuses to admit they did something wrong)
  - Slander/Libel (beware of immunities under state law)
    - Anti-slap
    - Need to have evidence to back up
    - Could end up with defendant's attorney fees
    - Could have a law protecting privileged communication
  - Protections for violation of civil rights for protected classes
    - Can add additional damages
    - Under Civil Rights Act (?) Jury decides damages & then jury decides to add a multiplier for 1-3x the awarded damages amount
    - Ie.-using someone's mental health against them
      - (Ie if a parent is diagnosed and reconfirmed to have PTSD due to separation & post-partum hormones and the agency refuses to reunify due to the parents inability to agree with the agency)
      - Having the perception of a possible mental condition is enough to meet this
      - 165k + atty fees
  - APPLIES TO PRIVATE ACTORS
    - To act "under color" of state law for Section 1983 purposes does not require that the defendant be an officer of the State Private parties act "under color" of state law where

there is “significant” state involvement in the action. *Harris v. Sparks* 449 U.S. 24, 27 (1980); *Howerton v. Gabica,* 708 F.2d 380, 382 (9th Cir. 1983)

- While no specific formula for defining state action exists, courts have traditionally evaluated whether a private actor has engaged in state action by relying on four distinct-but not mutually exclusive- tests: 1) The government nexus test, 2) the joint action test, 3) the public function test, 4) the state compulsion test. *Howerton, supra* 708 F.2d 380 at 382-383
    - Typically, hospitals will be under contract w/ CPS-either under #1 or #2.
        - Can fall under #3 because they provide investigative services
- A private hospital acts “under color” of state law when it expressly contracts with the government to provide medical services. *Lopez v. Dep’t of Health Services,* 939 F.2d 881, 883 (9th Cir. 1991)
    - Shawn’s practice is to sue them all when they make claims they cannot support
    - Behavioral health is also included in this
    - Anyone contracted by gov’t is a target
- Likewise, contract services provided by “licensed private physicians” to municipal governments in the examination of persons brought into treatment facilities by government officials constitutes state action within the meaning of Section 1983. *Jensen v. Lane County,* 222 F.3d 570, 575 (9th Cir. 2000); *Elam v. Hernandez,* 2011 U.S. Dist LEXIS 77104, *10-11 (C.C. Cal. 2011)

- Judicial Deception
    - Everyone has the right to not be lied about by the government in prosecutorial proceedings
        - Including foster parents, bio parents
    - Exculpatory Evidence means: Evidence, including impeachment evidence, favorable to the accused. *United States v. Bagley* (1985) 473 U.S. 667, 676
    - Warrants Affidavits/Applications
    - In the initiating documents (Petition)
        - Some state-level tension about under penalty of perjury documents vs. other documents not under penalty of perjury
        - In federal court, a lie to the court is a lie to the court
    - The constitution guarantees the right to be free from the presentation of false, perjured, and/or fabricated evidence, and the withholding of known exculpatory evidence by government officials during judicial proceedings. (General Proposition) *Napue v. Illinois* (1959) 360 U.S. 264, 269; *Pyle v. Kansas* (1942) 317 U.S. 213, 216; *Mooney v. Holohan* (1935) 294 U.S. 103, 1, 112 (Specific to social workers) *Greene v. Camreta* (9th Cir 2009) 588 F.3d 1011, 1034-1035, vacated in part by *Camreta v. Greene* (2011) 131 S. Ct 2020, 2036; *Deveraux v. Abbey* (9th Cir 2001) 263 F.3d 1070, 1074-1075.
    - Statements in court reports-including detention report addendum reports, juris/dispo reports, last minute information reports, etc.
        - Basically any report that is relied upon by the court to render a decision
    - “Claims Based on Deception in the Presentation of Evidence” terminology >> “Judicial deception”
    - ***9th Circuit Model Instruction 9.33***
        - 8th Circuit Oral Arguments Archive: https://www.ca8.uscourts.gov/oral-arguments
    - Social workers who commit perjury, fabricate evidence, and/or withhold material exculpatory evidence subvert the juvenile court’s ability to decide removal and detention questions fairly. *Christina C. v. County of Orange (2013)* 220 Cal.App.4th 1371, 1382.
    - Due process is obstructed when government agents commit fraud on the courts. *Northern Mariana Islands v. Bowie* (9th Cir 2001) 243 F.3d 1109, 1125

- The Constitution requires that government officials not misrepresent the facts in order to obtain the removal of a child from his parent(s). *Brokaw v. Mercer County* (7th Cir, 2000) 235 F.3d 1000, 1020
- A parent has a clearly established right not to be subjected to deception in the presentation of evidence perpetrated by a child protective services worker in Juvenile Dependency proceedings.
    - "There is no such thing as a minor amount of actionable perjury or of false evidence that is somehow permissible. Why? Because government perjury and the knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts." *Hardwick v. County of Orange* 844 F.3d 112, 119 (9th Cir 2017)
        - The state will try to rebut with "Qualified immunity-there wasn't enough information at the time of the questionable conduct to know it was wrongful"
            - Lying in court documents-perjury-is NEVER okay.
            - Also could point to a lack of training-Monell claim
- Constitutional rights are violated when a government agent obtains a court order through "distortion, misrepresentation and/or omission". *Malik v. Arapahoe County Dep't of Social Services* (10th Cir. 1999) 191 F.3d 1369 1316
    - Good case for missing exculpatory evidence
    - Obligation is not on court-on prosecutor to disclose to defendant in criminal cases
    - Social workers, by statute, are supposed to be neutral eyes, arms, and ears of the court
        - Anything that the social worker knows needs to be imputed to the court
        - Affirmative obligation to disclose EVERYTHING
        - Argument from state will be "Hey the parent had an attorney-they could have told the court" the parent DOES NOT have an affirmative obligation to disclose everything and anything to the court-SOCIAL WORKERS DO
            - That argument is irrelevant as the SW violated their duty to the court
    - No absolute immunity for false testimony
        - Social workers who give sworn testimony under oath function as a complaining witness. (Note: this applies to anyone, even attorneys who may sign petitions under penalty of perjury) *Kalina v. Fletcher* (1997) 522 U.S. 118, 130-131; Miller v. Gammie (9th Cir. 2003) 335 F.3d 889, 897; Beltran v. Santa Clara County (9th Cir. 2008) 514 F.3d 906 9 908
        - **"No official with an IQ greater than room temperature in Alaska could claim that he or she did not know that the conduct at the center of this case violated both state and federal law,"** Justice Stephen Trott, *Hardwick v. County of Orange* (9th Cir. 2017) 844 F.3d 1112, 1118
    - Elements of Judicial Deception:
        - To support a 1983 cause of action based on a claim of deception in the presentation of evidence by a social worker, the plaintiff must show that the social worker deliberately or, in reckless disregard of the truth, made false statements or omitted exculpatory evidence that was material to the findings of the juvenile court. *Greene v. Camreta* (9th Cir. 2009) 588 F.3d 1011, 1035, vacated in part by *Camreta v. Greene (2011) 131 S.Ct. 2020, 2036*
            - 9th Circuit Model Instruction 9.33

- Plaintiffs need only prove Defendants knew, or reasonably should have known, their allegations were false; it is not necessary to further prove the Defendants made the allegations with the specific intent to deceive the court.. *United States v. Reilly* (2d Cir. 1996) 76 F.3d 1271, 1280; *Franks v. Delaware* (1978) 438 U.S. 154, 155-156
    - Specific intent doesn't matter-their duty is to tell the entire story & present ALL evidence to the court
- Reckless disregard means: A conscious indifference or blindness to the consequences of one's actions. This does not require an awareness of the risk of harm. A person who acts with conscious indifference to the consequences simply does not care what happens. *United States v. Burnette* (9th Cir 1988) 1988 U.S. App. LEXIS 21860; *Ammons v. State Dep't of Soc. & Health Servs.* (9th Cir. 2011) 648 F.3d 1020, 1029 n.7; *People v. Olivas* (1985) 172 Cal.App.3d 984, 988
- Reckless disregard for the truth may be inferred when a government agent (i.e. social worker) knows that important factual information exists, but omits the information. *Chism v. Wash. State* (9th Cir 2011) 661 F.3d 380, 388; *United States v. Reilly* (2d Cir. 1996) 76 F.3d 1271, 1280
- Reckless disregard for the truth may also be inferred when, cumulatively, the omissions purged the documents of any reference to the possibility that someone or something other than the Plaintiff was responsible for the alleged misconduct. *Chism v. Wash. State* (9th Cir 2011) 661 F.3d 380, 388
    - I.e. cherry picking information-"Classic Judicial Deception claim" omission of exculpatory evidence
- A social worker acts with reckless disregard for the truth when omissions and false statements contained in a document were all facts that were within that social worker's personal knowledge *Chism v. Wash. State* (9th Cir 2011) 661 F.3d 380, 388
    - Supposed to reveal all the facts they have access to
    - Parents can do that-social workers have the burden to not act in reckless disregard
- WHAT TO LOOK FOR:
    - Warrants/applications/petitions/detention reports/jurisdiction-disposition reports (anything submitted to court)
        - Is there material misrepresentation?
        - Look for 3rd party statements in quotations
            - Their favorite way of making stuff up
            - Quotes narrow down suspects to talk to
        - Look for summaries of conversations with medical providers
            - Verify there is collateral documentation
            - Verify all documentation exists for all information in court submissions
                - DEPOSITION: Ask SW about training, are you supposed to document? Also weave in "Truthful, honest, accurate, & complete".
        - **<u>Actually speak with every witness identified in the report</u>**

        - **<u>CANNOT BE STRESSED ENOUGH! MOST REPORTS ARE NOT ACCURATE IN REPRESENTING WHAT WAS ACTUALLY SAID</u>**
            - More often than not, the witness's recollection won't support CPS
    - Differentiate between fact and opinion
        - Facts can be proven by evidence-opinions cannot be proved. They have to have facts to support conduct. Opinions don't matter
    - Are known material exculpatory facts omitted?
- Technically true statements may be misleading if exculpatory evidence is omitted. *United States v. Stanert* (1985) 763 F.2d 775, 781; see e.g., *United States v. Reilly* (2d Cir. 1996) 76 F.3d 1271, 1280
- Whether the alleged judicial deception was brought about by material false statements or material omissions is of no consequence, because by "reporting less than the total story, an affiant can manipulate the inferences a [judge] will draw. *Liston v. County of Riverside* (9th Cir. 1997 120 F.3d 965, 973
    - This is an argument to weave into closing arguments
- Omission of information that implicates a witness' credibility or reliability is material. *United States v. Reeves* (9th Cir. 2000) 210 F.3d 1041, 1045; *Bettin v. Maricopa County* (D. Arizona 2007) 2007 U.S. Dist. LEXIS 42979, *46; *United States v. Hill* (N.D. Cal 2014) 2014 U.S. Dist. LEXIS 17582 *24
    - If the judge shut you down on a specific approach, you can and SHOULD try another approach if you believe you are correct
- Quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, **<u>quotations add authority to the statement and credibility to the author's work</u>**. A jury may properly find that a defendant had knowledge of the falsity of his/her statements, acted with a reckless disregard for the falsity of his/her statements, or acted with a reckless disregard for the falsity of his/her statement when a publication attributes quoted statements that were never actually made by the alleged witness. *Costanich v. Dept Soc. & Health Servs.,* 627 F.3d 1101, 1112 5 2009 U.S. App LEXIS 29321 *30-31 (9th Cir Wash. 2009); *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 4965 511 5 222 S. Ct 2419, 115 L. Ed 2d 447 (1991)
    - Training materials for SW will tell them to use quotations wherever possible because they lend credibility to their work
    - Quotations should not only be true, but supported by evidence
- Evidence of misquotation and misrepresentation of witness statements are circumstantial methods of proving deliberate fabrication. *Costanich v. Dept Soc. & Health Servs.,* 627 F.3d at 1112; *Spencer v. Peters* (W.D. Wash. 2013) 966 F. Supp. 2d 1146, 1159
- Misrepresentations about interviewing doctors is significant material evidence. *Costanich v. Dept Soc. & Health Servs.,* 627 F.3d 1101, 1112
    - ("The misrepresentations about interviewing the children's doctors were especially significant")

        - Social workers like any other government agent are required to correct any dishonesty in the evidence, and only illicit the truth. A social worker cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts *Napue v. illinois* (1959) 360 U.S. 264, 269-270; *N. Mariana Islands v. Bowie* (9th Cir 2001) 243 F.3d 1109, 1117-1118
            - Once they lie and know they are lying, or omit and know they are omitting, they are obligated to go back and correct it
            - Reporting duty is to the court not the parent
- Information on Foster Care being a For-Profit Industry: https://youtu.be/WWtc3qW40ZM?list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&t=484
    - Hard to develop that into the story of the case, but Shawn tries to do it in every case
    - Deposition of Michael Reilly: https://www.youtube.com/watch?v=1BsUXr512Ss
- Injuries to Children in Fostercare (Special Relationship)
    - A child in state care enjoys a special relationship with the state such that the 14th Amendment substantive due process clause protects a foster child's liberty interest in social worker supervision and protection from harm inflicted by a foster parent. Thus, once the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care. *Tamas v. Dept of Soc, & Health Servs* (9th Cir. 20100 630 F.3d 833, 842
        - Substantive claim
    - The state can also be held liable under the Fourteenth Amendment's Due Process clause for failing to protect an individual from harm by third parties "where the state action 'affirmatively places the plaintiff in a position of danger', that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced. *Henry A. v. Willden,* 678 F.3d 991, 1002 (9th Cir 2012)
    - To determine whether an official affirmatively placed an individual in danger, we ask: (1) whether any affirmative actions of the official placed the individual in danger he otherwise would not have faced; (2) whether the danger was known or obvious; and (3) whether the official acted with deliberate indifference to that danger. *Henry A. v. Wilden* 678 F.3d 991, 1002 (9th Cir. 2012)
    - To trigger the danger creation exception the plaintiff must prove that: 1) the state "affirmatively placed the plaintiff in a position of danger" or "effectively prevented the plaintiff from protecting himself or prevented access to outside resources of help" and 2) the state acted with "deliberate indifference" to the state-created danger. *G.C. ex rel Counts v. N Clackamas Sch. Dist.,* 654 F.Supp.2d 1226, 1247 (D.Or. 2009)
    - To establish deliberate indifference, plaintiff must show: "1) an unusually serious risk of harm, 2) defendants actual knowledge of (or at least, willful blindness to) that elevated risk, and 3) defendant's failure to take obvious steps to address that known, serious risk." *Funez,* 687 F.Supp.2d at 1228 (quoting Gribbs II, 92 F.3d at 900). "In other words, the plaintiff must show the defendant knows something is going to happen but ignores the risk and exposes someone to it."
        - It may be appropriate to plead both special relationship and state created danger.
            - All 3 pleadings can be used, both theories too

- 42 U.S.C. Sec. 1983 Municipal Liability/Monell
  - A county* is subject to liability under 42. U.S.C. 1983 when its policies, customs, and/or usages are the moving force behind the plaintiff's constitutional injury. *Monell v. Department of Social Services* (1978) 436 U.S. 658, 694
    - Social services employees are state-employees and can be sued individually
    - Private hospitals can be sued as a result of injury even when CPS starts it
      - One of Shawn's tactics is to sue the hospital for a lesser amount (if the social worker told them to do it, what else should they have done). They are more likely to settle because of the way private hourly attorney's get paid-so he will take the settlement money & put that towards the "onslaught" of depositions, expert witnesses, etc.
      - "Talk to everything that moves"
      - *county= a specific "actor" that is performing a governmental or governmental funded operation
    - A so-called Monell claim includes only two elements: (1) fault, that is, that the municipality's policy or custom is the source of the constitutional violation and (2) the policy, practice, or procedure was the moving force that caused the violation. *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690-91 (U.S. 1978); *Chew v. Gates,* 27 F.3d 1432, 1444 (1994)
      - MUST prove the underlying violation of constitutional right as a necessary component of the claim
        - Then prove failure to instill the prevention of, or failure to remedy/discipline/change the right-violating behavior/situation
      - There are many different flavors of action that give rise to a *Monell* claim.
      - Sue the line-level worker who did the deed, then sue the municipality that is operating in a governmental capacity for the conduct of that individual
        - Depending on the entity/municipality, they may succeed in claiming qualified immunity. What does that do for a Monell claim? NOTHING!
          - The evidence is that the individual violated your right.
          - The question is "was the root cause the policy or lack thereof that led to the violation/injury"?
          - For federal claims under 1983, there is absolutely NO immunity for a municipal government. Period.
          - State laws that cause constitutional injury are irrelevant
          - Shawn usually goes with "malice oppression of fraud"
            - Helps make the case for judicial deception
          - Shawn unsure of there being value in punitive damages
          - State laws that cause constitutional injury are irrelevant
    - The County policy, practice, or procedure is the moving force behind the violation, when the actions and conduct of the individual government officials were executed pursuant to and/or in accordance with the County's policies, customs, procedures, culture, practices, and/or usages. *Monell v. Dep't Soc. Servs.,* (1978) 436 U.S. 658, 691
    - The Plaintiff does not need to show that the County expressly and/or formally adopted a policy, it is sufficient if the constitutional violation occurred pursuant to a longstanding practice and/or custom. *Christi v. Lopa* (9th Cir, 1999) 176 F.3d 1231, 1235
      - You will get from line workers & supervisors

        - Higher ups may not be aware of all specific practices at the time of the violation
- The County may be liable for an established custom, regardless of whether official policy makers had actual knowledge of the practice at issue. *Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1229 1234 n.9.
    - If the policy makers don't realize that the social workers have a practice that is wrong-that is NOT a defense
- HOW TO PROVE A MONELL:
    1. Pattern of Inadequate training, instruction, or supervision.
        - *City of Canton v. Harris,* 489 U.S. 378, 388 (U.S. 1989)

    2. Actual knowledge on behalf of official policy makers and a failure to correct, address, or discipline
        - *McRorie v. Shimoda,* 795 F.2d 780, 784 (9th Cir. 1986); *Grandstaff v. City of Borger* 767 F.2d 161, 171-172 (5th Cir. 1985)
        - Send a letter/complaint to **CPS Supervisor**, **ICHHS Division leader**, **Board of Commissioners**, Mayor, City Council, **Board of Social Work**, Minnesota Department of Health & Human Services, *Ombudsman* to present as evidence to jury
            - *Bold entities have been complained to; italicized have been contacted
            - See complaint for full list of officials who received complaint.

    3. Unconstitutional conduct by a municipal agent which is ratified by an official policy maker through approval of the subordinate's decision and the basis for that decision.
        - *Gillette v. Delmore,* 979, F.2d 1342, 1346-48 (9th Cir. 1992)

    4. Sufficiently notorious misconduct so that official policy makers know or should know of the risk to people's federal rights
        - *City of Canton, Ohio v. Harris, supra,* 489 U.S. at 390; *Lee v. City of Los Angeles,* 250 F.3d 668, 681 (9th Cir. 2000)
        - Respond to media inquiries-get in the public eye
            - Argue about it "being all over the place-notorious misconduct"
            - Use in 30b6 deponents
                - "You've heard complaints from parents about social workers lying in court reports"
                - "How frequently?"
                - "How do you investigate that? Do you do anything to address it?"
                    - *"We found every allegation to be unfounded."*
                - "Through your own investigation, you found them all to be untrue. Is this why you never problegated any policy change?"

    5. Where (1) the person causing the violation has "final policy making authority"; or (2) the "final policy maker" acted with deliberate indifference to a subordinate's constitutional violations.
        - *Christie v. Lopa,* 176 F.3d 1231, 1235-1241 (9th Cir.1999); *Chew v. Gates,* 27 F.3d
        - If there is no structure in place to control the person's conduct, that social worker that seizes children is "the final policy maker" (every social worker is therefore responsible for their own actions)

6. A gap in Policy/Training in the face of a known need for such policies or training.
    - *Thomas v. Cook County Sheriff's Dep't.,* 588, F.3d, 445, 454 (7th Cir. 2009); *Long v. County of Los Angeles,* 442 F.3d 1178, 1189 (9th Cir. 2006); *Kirkpatrick v. County of Washoe,* 843 F.3d 784, 791 (9th Cir. 2016);
    - i.e . If there is training on warrants and no paperwork available for obtaining a warrant.
    - Being sued on it previously is also a known gap if no policy correction was conducted

- Regardless of whether the County has formal policies, the routine failure to follow a general policy by County social workers, can itself constitute an unconstitutional custom, practice, and/or usage. *Hunter v. County of Sacramento* (9th Cir 2011) 652 F.3d 1225, 1228
    - An expectation doesn't meet the burden-actual conduct is what is relevant
- Policy or custom may be inferred if, after constitutional violations occurred, government officials took no steps to reprimand, discipline, or or discharge the offending social workers, or if they otherwise failed to admit that the social workers' conduct was in error. *McRorie v. Shimoda* (9th Cir. 1986) 795 F.2d 780, 784; *Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1229, 1233-1234
    - If there is no enforcement mechanism, the policy again is "nice" but not relevant
- The county's failure to properly investigate constitutional violations, is evidence of and supports a finding that the violations were not only accepted, but were customary. *Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1233-1234
    - Put the county on notice, they should investigate. If not, more evidence
- A constitutional violation resulting from a gap in the county's expressed policies is sufficient to establish liability against the county under 42 U.S.C. 1983. *Thomas v. Cook County Sheriff's Dep't* (7th Cir. III 2009) 588 F.3d 4451 454
- The extent and openness of social worker's constitutional violations supports an inference that managerial level employees should have known of the need to remedy a potentially unlawful practice. *Hunter v. County of Sacramento* (9th Cir. 2011) 652, F.3d 1225, 1228-1229; *Thomas v. Cook County Sheriff's Dep't* (7th Cir. 2009) 588 F.3d 445, 454
- The county's admission that the individual defendants conduct conformed to its policies, customs, or practices is sufficient, by itself, to establish municipal liability under Monell. *Galbraith v. County of Santa Clara* (9th Cir. 2002) 307 F.3d 1119, 1127
    - You want to get "At all relevant times, social workers X, Y, & Z were operating under the regularly established policies, practices, and customs of Isanti County Health and Human Services." in a RFA immediately upon discovery opening
        - They don't see this coming-they don't know the law
            - The transcripts are available-the county never spends the time researching
        - They typically agree to that
        - Hold that in your pocket

- Prove unwarranted seizures, prove lies, present everything the VERY LAST thing you present is the RFA before resting.
- When the jury does deliberations, the jury will ask for a copy of the admission :)
    - "If they got to that point, I know we got them"
    - Monell liability comes after individual liability
    - Will take days for jury to determine compensatory damages
        - How do you put a value on time with your kids?
    - "I haven't blown it on this one yet"

- Immunity in Monell
    - Monell applies to suits against private entities under 1983. *Tsao v. Desert Palace, Inc,* 689 F.3d 1128, 113801139 (9th Cir 2012)
        - Social workers and hospitals
    - There is NO immunity for municipalities/entities targeted by Monell claims *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 166-167 (1993); *Joyce v. Town of Tewksbury,* 112 F.3d 19, 23 (1st Cir. 1997): *Kirkpatrick v. County of Washoe,* 843 F.3d 784, 793, (9th Cir. 2016) .
- Inadequate training of County social workers serves as a basis for liability against the County, where the failure to train amounts to deliberate indifference to the constitutional rights of the persons with whom the subordinate injury would have avoided had the County properly trained its social workers. *City of Canton v. Harris* (1989) 489 U.S. 378, 388; *Lee v. City of Los Angeles,* (9th Cir. 2001) 250 F.3d 668, 681
    - They need to train their workers how to not crush constitutional rights
    - Even the best training in the world doesn't matter because the enforcement is what is important

- Deliberate Indifference:
    - The conscious choice to disregard the consequences of one's acts or omissions. *Oviatt v. Pearce* (9th Cir 1992) 954 F.2d 1470, 1477-1478; *also see 9th Cir. Civ. Jury Instruction 9.7*
    - A county that is aware, or should be aware, of recurring constitutional violations, but fails to adopt a policy or implement rules to prevent those constitutional violations, is deliberately indifferent to constitutional rights. Under such circumstances, it can be inferred that PLaintiff's injury was caused by the County's failure to engage in oversight of important departmental practice. *Chew v. Gates* (9th Cir. Cal 1994) 27 F.3d 1432, 1445
        - How do you prove this?
            1. Witnesses-other parents who sued the county for this
            2. Attorneys who prosecuted suing the county
    - May be proved by showing that the county knew its failure to train adequately made it highly predictable that its social workers would engage in conduct that would deprive persons such as the plaintiff of her constitutional rights. Plaintiff is not required to prove the responsible county officials had subjective awareness of the risk of harm in order to show the officials were deliberately indifferent. *City of Canton v. Harris* (1989) 489 U.S. 378, 390; *Oviatt v. Pearce* (9th Cir. 1992) 954 F.2d. 1470, 1477-1478; *Ammons v. State Dep't of Soc Servs.* (9th Cir. 2011) 648 F.3d 1020 1029; *See 9th Cir Jury Instruction 9.7*

- Can be established through evidence showing a series or patterns of constitutional violations. *Thomas v. Cook County Sheriff's Dep't* (7th Cir III 2009) 588 F.3e 445 5 454
    - Other lawsuits can be used to show pattern of practice
-

C. Analytic Framework for Attorney's Fees

- "...based on federal law, the determination of the amount of a reasonable fee award begins with the calculation of the *lodestar*-the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart (*1983) 461 U.S. 424, 436, *McCown v. City of Fontana* (9th Cir. 2009) 565 F.3d 1907, 1102; *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1131-32"
    - Judge has to figure out what rate to assign. Experience, talent, reputation, prior judgements
        - You can get affidavits from attorney's who do similar work
    - Judge has to look at the bill for hours & decide if it was reasonable and if they will cut
        - Some judges cut a lot, some say you didn't charge enough
        - Basic rule in 9th Cir.-a judge's ruling for judgment is final & will not be considered for appeal unless egregious
            - 10%-20% will withstand scrutiny at 9th Cir. Beyond that, evidence must be given for why additional cuts are being made
            - 50%-70% almost guaranteed to be overturned
        - You (should) have an ethical duty to due diligence in fees requested
- Absent some clear exception, the Court must "(1) determine the number of hours reasonably expended in obtaining the result, (2) determine a reasonable hourly rate, (3) multiply the first figure by the second figure, and (4) adjust the result to reflect other pertinent factors. *Kerkeles v. City of San Jose* (2015) 243 Cal.App.4th 88, 100
    - The lodestar method is to be used for attorney fees even when the section 1983 case was taken on a contingency basis
        - The reasonable fees a judge assigns will not be overturned on appeal unless it is egregiously wrong.
    - The judge ultimately has the decision to make cuts to your fees even if they just think the fees are too big. 10% or 20% will withstand scrutiny in an appeal, if it's more they need to have evidence as to why. 75%-80% would be reversed on appeal.
        - No matter what, they will be astronomical to a judge making $179k a year
- When doing a declaration, be thorough and diligent on what is reasonable.
- Attorney's fees can not be split
    - They are a property right, belong to attorney who labored for them
- Attorney needs to add fee ownership in contract
    - Put in contract w/ plaintiff payable immediately to attorney
    - Attorneys fees are submitted in a motion OUTSIDE of verdict for compensatory damages for "recoverable costs" & reasonable attorney's fees
    - Fee litigation can take upwards of a year after the verdict-"frequently does"
- A *lodestar* fee is calculated by reference to "rates and practices prevailing in the relevant market. *Missouri v. Jenkins,* (1989) 491 U.S. 274, 286
- It is not unusual for the award of attorney's fees to exceed the amount of compensatory damages recovered. *Yang v. City of Chicago* (N..D.III. 1989) 29 F.Supp.2d 480, 483, *citing City of Riverside v. Rivera* (1986) 477 U.S. 561

    - With respect to the number of hours billed, and by large, "the Court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Chaudry v. City of Los Angeles* (9th Cir. 2014) 751 F.3d 1096, 111
        - If you do the work, it's like hitting these guys with a ton of bricks.
- The money is in getting the jury to feel the pain of the experience
    - You have to bring pain to the government to get them to change (See opening quote)
    - If you wanna win, you will have to make sacrifices
- Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. Regardless of the form of relief he/she actually obtains, "a successful civil rights plaintiff often secures important social benefits." Fee awards have proved "an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *Riverside v. Rivera, supra,* (1986) 477 U.S. 561, 574
    - If attorneys aren't paid, these issues won't be enforced
    - Also helps new talent to come into the field
    - Shawn recommends to keep a log of what has been done like a diary
        - You can redact certain things as long as the court can see what it was you spent time on
        - Don't give them your playbook
    - Some witnesses may be dismissed as credible
        - The county will say they don't have to pay for time spent working on that witness
            - If you can prove that their involvement is integrally related to the conduct you won on, they still have to pay
- A prevailing Plaintiff's attorneys should recover a fully compensatory fee, and "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit". *Riverside v. Rivera, supra,* (1986) 477 U.S at 569
- The reasonableness of the attorney's fees must be determined "in light of both the traditional billing practices in the profession, and the fundamental principle that the award of a "reasonable" attorney's fee under § 1988 means a fee that would be been deemed reasonable if billed to affluent plaintiff's by their own attorneys." *Riverside v. Rivera, supra,* (1986) 477 U.S at 591
    - Devote yourself to these kinds of cases, and your fee amount will increase
        - Shawn in 2019 was at $700 an hour
- Damages:
    - Economic and non-economic.
        - Sometimes you should waive the non-economic
        - Economic:
            - Fees & costs incurred as a result of the CHIPS/TPR petition
                - Paying/retaining counsel
                - Visitation where parent had to pay
                - Go to psychological counseling, classes, $ paid for that
                - Missing work due to classes and visitation
                    - If you have your own business, compensatory damages can be between where you were projected to have been and where you were due to government interference
                    - HAVE to have data
                    - Probably should have an economist explain/testify to jury
            - Date from engagement agreement-verdict is for compensation for atty
            - Also get paid for effort to secure pay
            - Responding to their defenses-you should get paid
                - Especially if it is roadblock after roadblock after roadblock

D. Discovery:

- It is easy to get mandated reporter information in federal court. State court tries to be deferential, federal court doesn't care if it is a credible witness or a defendant
- Use of Discovery at Trial
    - Request for Admissions
        - Elements of Claims
        - Adherence to Policy, Practice, Procedures
        - Acting in Course and Scope of Employment
    - Request for Production of Documents
        - Juvenile Court Records
        - Policies, Procedures, Training Materials
            - Can give GREAT material for depo questions
        - Training Transcripts
        - Disciplinary records
            - Looking for repetitive misconduct/discipline
        - Complaints of similar misconduct
            - Look for complaints of wrongful removal-call those attorneys
            - Can get 3rd party documentation from other cases behind defendant's back
    - Depositions
        - Defendants
            - Social workers: question them about training policies
        - Persons Most Knowledgeable/Qualified 30b6
        - Party Affiliated
            - Can depo police officers that are involved
                - Subpoena them for depo-when they try to get out of it, ask them to dinner & cancel depo (tell defense scheduling issue) type up their declaration, email it to them, have them make changes & get them to sign it.
                    - Use at next disclosure requirement, when it is too late for defendant to do anything about it
                - They will not deter from declaration if they testify
            - Use trial transcripts to form a foundation
                - Then you depose them
                - Then you examine them at Federal Trial-IF NEEDED
                    - Use the deposition to get their testimony in
            - Their answers will probably all be different-"they never are consistent"
                - Use varying answers to the same questions as evidence in trial
            - Depose other management, parties involved
        - All witnesses identified in underlying court reports (although sometimes it's better to get a declaration from the witness to submarine the defendant
            - **Everybody who gets quoted in court reports get deposed**
        - If the defendant is being unruly, or non-responsive, you can call the judge.
            - If the other side is exploiting bad conduct, call the judge right there on the spot
        - Create a video montage of clean clips to show jury

- Ask “What amendments have you been trained on that apply to the work that you do?”
- The state will keep looping back to “protecting the kids”-again they have an affirmative action to uphold constitutional rights
- Use deposition time thoroughly
    - You want to think about how their answers will look on video in trial so you can maximize time in trial on depo videos
        - Ask the same question differently until you get an answer that will sway a jury
        - Weave the law into every examination
            - Some will give you an answer, some will be savvy
- Also get them to admit the social worker is aware they are required under penalty of perjury that they are required to be truthful, honest, accurate, and complete.
    - Ask them what complete means
        - Including good and bad
            - Inculpatory and exculpatory
            - This is an AFFIRMED DUTY to both court & parents
    - When you play this to the jury, they will connect the dots
        - When the judge notices the jury’s shift, there will likely be more defendant’s motions granted, and they won’t let you hammer the government “too hard”
- Use video clips of depositions to line up with your narrative
    - Ie. If you are hitting the County’s need for burden of proof for a seizure, include a clip of the Dr’s deposition
        - Atty: “Did the child need emergency medical attention?” Dr: “No.”

- Pertinent Deposition Examples:
    - https://youtu.be/-D98BNmCDIE?list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&t=1523
    - Try to avoid calling witnesses during trial
        - Maintain control of the story by using deposition video clips
            - Prejudice the jury first, then they can try to piece things together after the jury is against them
            - The video clip process is tedious and time consuming
                - Not likely to be fully compensated for that time
                - The judge will want over a month to see all of the clips
                    - There will be a lot of back & forth between judge you & state
                    - More editing and changes will need to be made
    - https://www.youtube.com/watch?v=9lbGRPL1-k8&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=12
    - https://www.youtube.com/watch?v=4i3sn450MEY&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=13
    - https://www.youtube.com/watch?v=LXQwQ4bpeNE&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=14
    - https://www.youtube.com/watch?v=ZX_aXOuKnC4&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=15
    - https://www.youtube.com/watch?v=3h7EeUkM_no&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=17
        - https://www.youtube.com/watch?v=Y115MXaeLTQ&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=16

        - https://www.youtube.com/watch?v=5iLbMs_O3Ts&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=19
            - https://www.youtube.com/watch?v=yKdqiK14KMQ&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=18
        - https://www.youtube.com/watch?v=C_X65c9g1cY&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=21
            - https://www.youtube.com/watch?v=yVb8yte55qE&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=20
        - https://www.youtube.com/watch?v=eOijNqgnsQI&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=24
        - https://www.youtube.com/watch?v=9n21yNXbJ6s&list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&index=25
        -
    - Deposition Testimony Jury Instruction
        - During the trial you received deposition testimony that was [read from the deposition, transcript, other manner presented eg. shown by video]. A deposition is the testimony of a person taken before trial. At a deposition a person is sworn to tell the truth and questioned by the attorneys. <u>You must consider the deposition testimony that was given to you in the same way as you consider testimony given in court.</u>
    - Deposition Testimony Use as Trial as Substantive Evidence
        - An adverse party may use for <u>any purpose</u> the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)
            - Can be used in lieu of testimony on the stand
        - A deposition has to be conducted as at trial. *BNSF Ry. Co. v. San Joaquin R.R.Co.,* No. 1:08-cv-01086-AWI-SMS, 2009, U.S. Dist. LEXIS 111569, at *9 (e.D. Cal. Nov. 17, 2009)
- Federal Jury Instruction Use Notes Burden on Plaintiff to Prove Unreasonable Seizure
    - A plaintiff alleging a 1983 claim based on an alleged violation of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement **<u>does not</u>** apply.
        - 9th Circuit Model Instruction 9.16;
        - *Larez v. Holcomb,* 16F.3d 1513, 1517-18 (9th Cir. 1994)
        - *Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir 2012) (placing burden on plaintiff to establish an absence of imminent danger in claim of interference with parent-child relationship);
        - *Pavao v. Pagay,* 307 F.3e 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in 1983 action carries the ultimate burden of establishing each element in his or her claim, including lack of consent and/or exigency);
            - But see *Demaree v. Pederson,* 887 F.3d 870, 883 (9th Cir. 2018) "Exigent circumstances alone are insufficient as the government must also show that a warrant could not have been obtained in time."
            - There is now a question regarding what instruction the District Court is likely to give
- Tort Claims Act Does Not Apply to Federal Claims
    - Because state notice of tort claims law impair a prospective plaintiff's ability to pursue their federal claims in state courts, such laws are preempted and do not apply as a bar to the Plaintiff's Section 1983, even where the federal civil rights litigation takes place in state court. *Felder v Casey (1988) 487 U.S. 131*

        - Used to be the State's favorite claim-any state law that impairs a federal civil rights litigant's ability to pursue a federal claims preemptive.
- **State Law Immunities do NOT Bar Federal Claims**
    - A person acting under color of law, who commits a constitutional violation, cannot be immunized by state law. *Martinez v. California* (1980) 444 U.S. 277, 284; *Wallis v. Spencer* (9th Cir. 200) 202 F.3d 1126, 1144
        - State law also does not trump the federal discovery-such as in the case of the identity of a mandated reporter.
        - Any kind of impairment under state law to be able to prosecute federally is preempted
- Exhaustion of Remedies Not Required
    - The availability of state court relief does not bar a claim under 42. U.S.C. Sec 1983 *P.B. v. Kock* (9th Cir. 1996) 96 F.3d 1298, 1302.
        - This is not a common argument (in CA at least)
        - You don't have to exhaust a state claim before filing federal. It runs concurrently
- Request for Admission
    - Practical Application
    - I.E:
        - 1. In this case, Defendant XXX has admitted to the following facts:
            - 1) That Plaintiff XXX has a right to familial association protected by the United States Constitution.
            - 2) That as of DATE OF SEIZURE, DEFENDANT knew that a parent and child had a constitutional right to familial association.
            - 3) That as of DATE OF SEIZURE, DEFENDANT knew that due process requires its social workers to obtain a warrant, prior to SEIZING a child from the custody of his or her parents without their consent, unless EXIGENT CIRCUMSTANCES existed. (For purposes of this Request, "SEIZE" or "SEIZING" means to seize, take control of, remove, or take custody of a person under color of state law. For purposes of this Request, "EXIGENT CIRCUMSTANCES" means circumstances under which a child is in imminent danger of suffering severe bodily injury or death within a short period of time.)
            - 4) That on DATE OF SEIZURE, DEFENDANT SEIZED CHILDRENS INITIALS, from the custody of their MOTHER/FATHER, PLAINTIFF, without HIS/HER consent.
            - 5) That DEFENDANTS INDIVIDUAL NAMES were at all times carrying out the policies of Defendant DEFENDANT in their handling of "In the Matter of the Welfare of the Children of…. CASE NAME", case no. #####"
            - 5) That DEFENDANT INDIVIDUAL NAMES were at all times carrying out the CUSTOMS of DEFENDANT "In the Matter of the Welfare of the Children of…. CASE NAME", case no. #####"
            - 7) That DEFENDANT INDIVIDUAL NAMES were at all times acting within the course and scope of their duties as an employee of DEFENDANT ""In the Matter of the Welfare of the Children of…. CASE NAME", case no. #####"
            - 8) None of the individual defendants in this case were disciplined for fabricating evidence in the Juvenile Dependency Court proceeding "In the Matter of the Welfare of the Children of…. CASE NAME", case no. #####"

            - USE THIS AS THE VERY LAST PIECE OF EVIDENCE PRESENTED AT TRIAL.
            - Entirely discredits the agency trying to say anything

- WHY RFA:
  - Unlike other discovery devices, (e.g. interrogations, depositions, document demands) RFAs are not designed to uncover factual information, Rather, their main purpose is to set issues at rest by compelling admission of things that can not reasonably be converted.
    - They are binding w/o evidence
- Requests for Admission Jury Instruction
    - Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party accepts those matters, you must accept them as true. No further evidence is required to prove them.
    - Requests for Admissions Practical Application:: https://youtu.be/-D98BNmCDIE?list=PLbF2wK6pHaEV-WOU4aqDlgFIu6xFIL0Te&t=1097

E. Abstention Doctrines

- Rooker-Feldman Doctrine
  - The Rooker-Feldman doctrine bars district court jurisdiction over an action that (1) "contains a forbidden de facto appeal of a state court decision" and (2) "seek[s] to litigate an issue that is inextricably intertwined with the state court judicial decision from which the forbidden de facto appeal is brought" *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013)
  - A de facto appeal exists where (1) "a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court" and (2) the plaintiff "seeks relief from a state court judgment based on that decision." *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003)
  - Be careful how you structure your complaint and what relief you seek. In order to avoid Rooker-Feldman Abstention, seek only money damages or policy/training-never the decision of the juvenile court.
  - The state will argue that the judge decided against the decision of the plaintiff & now they are appealing-don't let that be true
    - If you disagree with the decision made in state court-appeal it in state court. Federal court is for unconstitutional practices. PLEAD THE CLAIM AS A TORT CLAIM
    - "The juvenile court made the correct decision based on the wrong information given by the social workers."
    - ALL YOU WANT IS MONEY (and policy/training changes)
- Younger Abstention
  - You can file a federal during the course of a juvenile case
  - This doctrine provides that in limited circumstances, federal courts may refuse to hear a plaintiff's constitutional challenges to underlying & ongoing state proceedings *Younger v. Harris* U.S. 37 (1971)
  - **All four requirements have to be met:**
    - **A state-initiated proceeding is ongoing**
    - **The proceeding implicates important state interests**
    - **The federal plaintiff is not barred from litigation federal constitutional issues in the state proceeding**
      - You can technically argue it in state court-that judge will probably listen to the social worker
      - Judge is entitled to rely on the social workers to do their job

        - If the judge goes against the social worker and are wrong, the judge will have the liability & possibly lose their job
        - Safest route is to listen to social workers
        - Entitled to rely on social worker by statute-every single case
    - **The federal court action would enjoin the proceeding or have the practical effect of doing so. *Potrero Hills Landfill Inc. v. County of Solano,* 657 F.3d 876, 882 (9th Cir. Cal 2011)**
        - It is almost a given that this condition exists
  - It isn't a great idea to file civil rights case while underlying juvenile case is pending
  - The juvenile court's point is to return the child. If you argue a constitutional violation in juvenile court, and it is denied/dismissed, you have now lost your right to a tort because it's been addressed
- Issue Preclusion
  - Under current 9th Circuit Law, issue preclusion does not apply to claims that a government agent deceived the courts
    - In *Wige* the 9th Cir determined that issue preclusion does not apply where it is alleged that an official lied or fabricated evidence in a judicial proceeding
    - The 9th Cir explained that for a claim based on deception in the presentation of evidence to the court, the identity-of-issues requirement will not be satisfied when the evidence known to the Defendants is materially different from the evidence presented in the juvenile proceedings. See *Wige v. City of L.A.* 713 F.3d 183, 1186 (9th Cir. 2013)
    - A distinction exists between a finding on the truthfulness of a submitted report or allegation, and the question of whether a social worker deliberately fabricated and/or concealed evidence. *Costanich v. Dep't of Soc. & Health Servs.,* 627 F.3d 1101, 1108 n10 (9th Cir 2009)
        - See case ^
    - If the evidence/reports of social workers was talked about/entered into in court were discussed, BUT the fabrication/credibility was not, it's a judicial deception claim

F. Absolute & Qualified Immunities

- Social workers are entirely protected from making a dependency petition decision-that decision is entitled to absolute immunity
  - Every other decision is qualified immunity
  - Knowingly inaccurate or incomplete information (perjury) in a petition is a judicial deception claim
  - "Reasonable social worker" is a standard of qualified immunity
  - Anytime they sign a document under penalty of perjury, they are a "complaining witness" & therefore NOT entitled to prosecutorial immunity
    - The county attorney is the prosecutor-qualified immunity
    - The social worker is a complaining witness-NO immunity
      - Certifying information as the witness *Miller v. Gamme & Hoffman v. Harris*
        - Hoffman v. Harris acknowledges social workers didn't exist at the time of civil rights enactment (they probably shouldn't have any immunity-according to Justice Scalia and Thomas' descents)
  - *Lisker v. Monsue* U.S. 2015 (9th Cir)
- Potential Targets:

- You need unredacted & entire records on the juvenile case. Know every fingerprint that was involved.
- Failure to Intercede
    - A government agent has a duty to intercede when his or her fellow agents violate a person's constitutional rights
        - e.g. *Cunningham v Gates* (9th Cir. 2000) 229 F.3d 1271, 1289
        - Go after all social workers/supervisors involved in the decision to detain
        - Go after police who assisted in the unwarranted or unlawful conduct
            - The presence of police is a presence of force
            - Use them to establish the environment of the home-social workers will lie
            - They should get more training of search & seizure-they don't realize the application of search & seizure to parents & children
            - The county will say they are an ancillary party "just to keep peace"-the question is was he an integral participant & as the muscle with the gun & badge-he was an integral participant (the underlined is not immune)
                1. Signing the 72 hour hold form means that they are requesting/giving authority to the social worker to detain the child(ren). This means the officer has equal responsibility in unlawful seizure as the social worker
                    a. Social workers have an affirmative duty to assess what a LEO is asking them to do-in this case to assess if the detainment is truly warranted or not. So they have equal responsibility
                    b. The officer making the request to detain is able to detain w/o the social worker anyway
        - Shawn's office will start these cases by trying to get the entire body of juvenile court records together to get a vision of the case-what can you point out to get the jury to do what you want to do-give your client a boat load of money
            - Then make a list of names, in chronological order
                1. WHAT WAS THEIR ROLE
                2. WHO DO THEY WORK FOR
                3. WHAT INVOLVEMENT DO THEY HAVE IN THE CASE
            - These cases have a lot in common with movie writing or screenplay
            - Jury trial is different because you control over who the characters are & how they come in & present themselves
            - Cut out the characters who don't fit YOUR narrative
            - https://youtu.be/7wYDB_n_HIk?list=PLbF2wK6pHaEV-WOU4aqDIgFIu6xFIL0Te&t=258
- Liability for Downstream Events
    - It is not necessary to show that a Defendant directly or personally participated in the constitutional violation rather, a Defendant is also liable for setting in motion a series of acts by others which the Defendant knows or reasonably should know would cause others to inflict a constitutional; injury.
        - *Merritt v. Mackley* (9th Cir. 1987) 827 F.2d 1368, 1371; *Johnson v. Duffy* (9th Cir 1978) 588 F.2d 740, 743-744

            - Social workers mandated reporting “concerns” on a case they are working on-that SW set in motion
    - Supervisors
        - A supervisor’s action or inaction in the training, supervision, or control of his or her subordinates may be sufficient to show a constitutional violation.
            - *Starr v. Baca* (9th Cir. 2011) 652 F.2d 1201, 1208
            - If they know there were issues, and failed to investigate/discipline, they are liable
                - Ann Stackpool-Gunderson & Penny Messer & Board of Commissioners
- Is it a Procedural or Substantive Right?
    - This affects the “story” you put together for the judge & jury
        - This can affect a win-GET THE ANALYSIS CORRECT AT ONSET
    - If the judge applies the wrong analysis-you will lose for the wrong reasons
        - Appeal will just tell you that you messed up
    - You have a substantive right to not be lied about in juvenile (any) court
    - Procedural:
        - Black & white facts of it-either it did or didn’t happen
    - Substantive:
        - Conscious-related, “gut feeling”, nuanced
        - Egregiousness of conduct
            - 9th Cir agrees that lying is egregious conduct (See Hardwick v. Vreeken)
                - "**No official with an IQ greater than room temperature in Alaska could claim that he or she did not know that the conduct at the center of this case violated both state and federal law**," Justice Stephen Trott
        - Go for the deliberate indifference standard-not intent to cause harm
            - Every social worker should know you can’t lie or mislead courts
            - They have a duty to correct things they know are wrong
            - If you are signing something under perjury or submitting something to the Court that you know the Court will rely on to make decisions, you have to be **truthful, honest, and accurate**
                - That terminology should be weaved into case
                - Part of your job is using the evidence and testimony to educate the jury about the law so they clearly see what went wrong
                    - In Depositions: “You were trained that….”
                        - You must have specific and articulate facts that at the time of removal the child was in immediate and emergency danger
                        - You must have a warrant to make a seizure
                        - Etc

Is it a Procedural or Substantive Right?

- A claim of interference with the parent/child relationship may be brought as either a procedural due process claim or a substantive due process claim (think unwarranted seizure vs. judicial deception); The substantive vs procedural determination makes a difference in which test will apply.

- **Procedural due process:** These claims typically arise when a state official removes a child from her parent's care (think unwarranted seizure). For such claims, "[t]he Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies."
  - *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007);
  - *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2001)).

- There is no scienter element – the violation is complete where the removal is done without either a court order or "reasonable cause to believe that the child is in imminent danger of serious bodily injury." Generally, this inquiry will be equivalent to an examination of the child's Fourth Amendment rights.
  - *Kirkpatrick v. County of Washoe*, 843 F.3d 784, 789 (9th Cir. 2016)
  - *Demaree v. Pederson*, 880 F.3d 1066 (9th Cir. 2018)
  - *Keates v. Koile*, 883 F.3d 1228, 1237-38 (9th Cir. 2018)

- **Substantive due process:** These claims typically involve egregious conduct – like lying in court reports. But official conduct only violates substantive due process when it "shocks the conscience."
  - *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013)
  - *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010)).

- Under the overarching test of whether the official's conduct "shocks the conscience" are two standards: the more demanding "purpose to harm" standard and the lesser "deliberate indifference" standard. Under the deliberate indifference standard, when "extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking."
  - *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)

- Deliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions. It entails something more than negligence but is satisfied by something less than acts or omission for the very purpose of causing harm or with knowledge that harm will result.
  - *Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013)

- Qualified Immunity
  - Two questions in ruling on qualified immunity: 1) whether the right violated was clearly established at the time of the violation, and 2) whether the evidence shows the government official's conduct violated that constitutional right. *Saucer v. Katz* 533, U.S. 194, 201 (2001); *Pearson v. Calihan* 555 U.S. 223, 236 (2009)
    - The first time you bring a social worker to federal court over this, they probably will be let off. But, NOW It is an established right
      - Can be avoided w/ judicial deception or failure to obtain warrant claim.
  - Defendant's burden to plead and prove the defense. *Benigni v. Hemet* 879 F.2d 473, 479-480 (9th Cir. 1988)
  - Plaintiff's burden to demonstrate the right allegedly violated was clearly established at the time of the incident. *Greene v. Camreta* 588 F.3d 1011, 1031 (2009)
    - Find a case with similar circumstances
  - The facts are viewed in the light most favorable to the Plaintiff. *Saucier v. Katz,* 533 U.S. 194, 201 (2001)
  - Whether a federal right was clearly established at a particular time, presents a question of law. *Elder v. Holloway* 510 U.S. 510, 516 (1994)
    - Jury won't get it
  - Plaintiffs need not establish that specific liability generating behavior has been previously declared unconstitutional. Officials can still be on notice that conduct violates established law in novel factual circumstances. *Hope v. Peter* 536 U.S. 730, 741 (2002)
- Absolute Immunity
  - 9th Cir is going closer to a mutual understanding that seizing a child without a warrant and then lying about it does not constitute immunity
  - Absolute immunity must be pleaded and proven by the party asserting the defense. *Greene v. James* 473 F.2d 660, 661 (9th Cir. 1973); *Polk County v. Dodson* 454 U.S. 312, 336, (1981); *Kennedy v. City of Cleveland,* 797 F.2d, 300 (6th Cir. 1986)
  - Qualified and absolute immunity are distinct defenses. *Paine v. City of Lompoc* 265 F.3d 975, 981;fn.1 (9th Cir. 2001)
  - There is a presumption that qualified, rather than absolute, immunity sufficiently protects officials in exercising their duties. *Miller v. Gammie* 335 F.3d 889, 897(9th Cir 2003)
  - The Ninth Circuit has restricted the use of absolute immunity as applied to social workers. *Beltran v. Santa Clara* 514 F.3d 906 (9th Cir. 2008) (Also *Thomas, Rogers)*
  - Absolute immunity must be pleaded and proven by the party asserting the defense. *Green v. James,* 473 F.2d 660, 661 (9th Cir. 1973); *Polk County v. Dodson* 454 US. 312, 336 (1981); *Kennedy v. City of Cleveland,* 797 F.2d 297, 300 (6th Cir. 1986)
  - Qualified and absolute immunity are distinct defenses. *Paine v. City of Lompoc,* 265 F.3d 975, 981; fn.1 (9th Cir. 2001)
    - If they fail to plead one or the other, it is NOT assumed.
    - Once you get to jury decision, they've waived that right.
  - There is a presumption that qualified, rather than absolute, immunity sufficiently protects officials in exercising their duties. *Miller v. Gammie,* 335 F.3d 889,897 (9th Cir. 2003)

- Absolute Immunity Testimony
  - **General Rule:** Witnesses, including police officers and social workers, are absolutely immune from liability for testimony at trial. *Biscoe v. LaHue,* 460, U.S. 325, 245-46 (1983)
  - Testimonial immunity does NOT encompass non-testimonial acts such as fabricating evidence. *Marsh v. San Diego County* 432 F.Supp.2d 1035, 1050 (2006); *Cunningham v. Gates* 229 F.3d 1271, 1291 (9th Cir. 2000)
  - When defendants have "dual roles as witness and fabricator" extending protection from the testimony to the fabricated evidence "would transform the immunity from a shield to ensure candor into "a sword allowing them to trample the statutory and constitutional rights of others." *Lisker v. City of L.A.,* 780 F.3d 1237, 1243 (9th Cir. 2015)
    - Worth using Lisker to use lies from the stand to enter into evidence
    -

G. Caution/Misc:

- Case law from cop cases apply to social workers because they perform VERY similar functions
- You will likely file a demure or 12v6 motion or a summary judgment motion
- If you lose something for a hokey reason in district/trial/state court, appeal it & if you are right the 9th Cir will publish it
- Do not tell them anything more than what you legally have to
  - Let them figure out your "storyline" during the trial
- Get them to sign an admission "Social worker XYZ was acting within the course of the scope of their duties"
  - As soon as discovery opens
- If a parent is terminated, they do not legally have standing to file on behalf of the child's violated rights.
  - Some form of custody is required
- Statute of limitations is 2 years
  - Starts at the child's 18th birthday or upon reunification/termination reversal
- The government does not have a legal obligation to protect you
  - They have a civic duty, but not a legal requirement.
    - This is another reason why right to carry is so important