

## ENFORCING CONSTITUTIONAL RIGHTS

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### 1. Police Brutality

42 U.S.C. sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

#### Elements:

A. Overview. Deprivation of rights, privileges, or immunities secured by U.S. Constitution or laws by a governmental official or someone operating "under color of law." No specific intent is needed.

B. What is "color of law"? Persons operate under color of law when they act with the appearance of authority and use governmental power to deprive a protected right. Even if officials operate outside their scope of authority, they can be liable if they acted under the cloak of governmental authority.

C. Who can be sued? Suits can be brought against officials in their "individual" or "official" capacities. If sued in their official capacity, their office, in essence, is being sued, and the plaintiff must show that the action was part of a policy of custom supported by the office.

D. Conduct must be unreasonable. Governmental officials have "qualified immunity" from being sued in their individual capacities if their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

E. Remedies. If the plaintiff is successful, courts may award declaratory relief, issue an injunction, and/or award monetary damages. Punitive damages can be awarded to punish defendants when their "conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30 (1983). Government bodies are immune from punitive damages.

F. Attorney Fees. Attorney fees can be awarded to a plaintiff who prevails "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Defendants are rarely awarded attorney fees, and are likely to receive them only if the plaintiff's action "was frivolous, unreasonable, or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

G. Tort Liability Generally. Injured plaintiffs may also bring actions under standard tort theories such as battery and false imprisonment. Government officials will be immune from such actions if they are carrying out discretionary actions within their scope of authority and in good faith.

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## 2. Arbitrary Denial of Government Benefits

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit governmental bodies from depriving "any person of life, liberty, or property, without due process of law."

What types of procedural protections are citizens entitled to?

A balancing process: The court must weight the following factors:

First, the private interest that will be affected by the official action;

second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319 (1976).

A. The more important the interest at stake, the more procedural protections will have to be provided.

- \* Property interests:
  - \* Physical property
  - \* "New property"--statutory entitlements--franchises, licenses (to practice law), governmental jobs, hospital privileges (for doctors), admission to a public university, etc.
  - \* What about an applicant for a property interest
- \* Liberty interests
  - \* Political freedoms
  - \* Economic freedoms--housing, subsistence, welfare
  - \* Reputational interests

B. The range of procedural protections.

- \* Right to a clear rule
- \* Notice of charges or basis of government's decision
- \* Hearing -- opportunity to present oral and written evidence
- \* Right to counsel
- \* Impartial decisionmaker
- \* Right to confront and cross-examination opposing witnesses
- \* Right to subpoena evidence
- \* Right to engage in discovery
- \* Is hearsay evidence admissible?
- \* What about circumstantial evidence?
- \* What is the standard of proof?
- \* Who has the burden of proof?
- \* Right to a written decision
- \* Right to a transcript (or tape) of the hearing
- \* Right to appeal

## Anti-smoking activists have uphill battle in China

Toronto Globe and Mail

**BEIJING** — In a country with about as many smokers as the United States has people, anti-smoking activity may be more of a crime than smoking.

Two Chinese anti-smoking activists discovered that this year when they tried to carry their non-smoking message to the cigarette counter at a local department store.

Wearing anti-smoking armbands, He Cai, 67, and Zhuo Xiangbiao, 64, sought to have their picture taken in front of a large display advertisement for foreign cigarettes. Instead of winning plaudits for trying to stamp out a habit shared by 300 million Chinese, the two men were hustled away by police and thrown in jail for 18 days, unable even to make a phone call.

Their crime: "Disturbing the social order in the name of anti-smoking publicity and coming to Beijing for publicity purposes without relevant police approval."

The two had been invited to Beijing by the National Smoking and Health Association, after their well-publicized 3,000-mile "long

march" against smoking last year.

But the tough Beijing police may have met their match when they decided to arrest the anti-smoking campaigners. They subsequently decided to sue the police for wrongful arrest. This week it was disclosed that they won. Police agreed to apologize and cough up more than \$600 in compensation.

"They have acknowledged their error and apologized to the two old men," NSHA representative Zhang Yifang said.

He, from central Hunan province, and Zhuo, from northern Shanxi province, had been invited to Beijing by the NSHA to help publicize the city's playing host to the 10th World Conference on Tobacco or Health in 1997.

Currently, more than 60 percent of all Chinese males over 15 smoke regularly, making China by far the largest tobacco market in the world. Last year, 1,720 billion individual cigarettes were sold in the country, accounting for 30 percent of the world-wide total.

Cigarette taxes are the largest single source of revenue for the Chinese government, having yielded nearly \$5 billion in 1993.