

Liability and Immunity for Social Services

May 15, 2024

Kristi Nickodem

Robert W. Bradshaw Jr. Distinguished Term Assistant
Professor of Public Law and Government



*The information
provided in this
presentation does not
constitute legal advice.*

*Consult with your local
attorney.*



Roadmap

County
Responsibility

Who is the
Defendant?

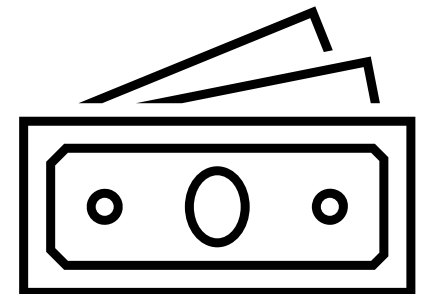
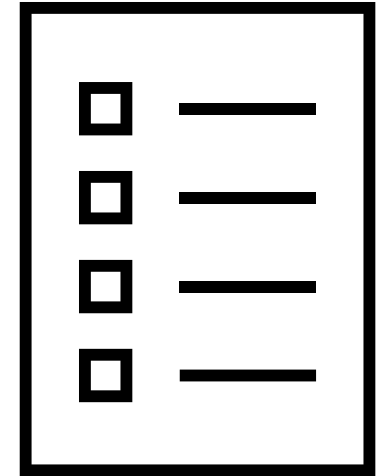
Immunity From
Liability

Types of Claims



County Responsibility

- BOCC has discretion in deciding which liabilities, claims, officials, and/or employees will be covered
- Governmental immunity is waived to the extent of county's insurance coverage



Defense and Payment

Defense of Officials and Employees (G.S. 153A-97)

- **Authorized, not required**

Paying Judgments Against Officials and Employees G.S. 160A-167(b)

- **Authorized, not required**
- **Must be acting in scope of employment**
- **Fraud, corruption, or malice = no payment**
- **Must have uniform standards in place before settlement or judgment**





Who is the Defendant?

Fundamentals of a Lawsuit

Complaint

Document filed with the court that initiates the legal proceeding

Answer

Responds to factual and legal allegations in the complaint by admitting or denying the allegations

Plaintiff

The person or entity that files the complaint and seeks relief in the lawsuit

Defendant

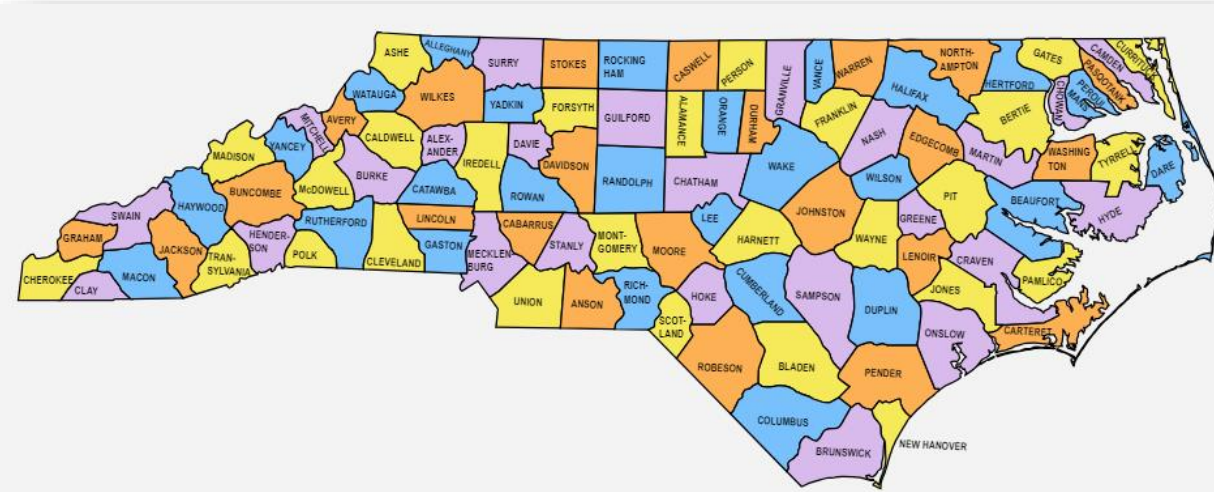
The person or entity that the lawsuit is filed against

Who is the Defendant?

The County

“An action against a county agency which directly affects the rights of the county is in fact an action against the county.”

- *Meyer v. Walls*, 347 N.C. 97, 104 (1997).



Who is the Defendant?

Public Official or Employee

- **Official capacity** = Suing the government (the county)
- **Individual capacity** = Suing a government official or employee personally



Who is Potentially Liable?

- John Doe vs. Jane Smith, Director of Smart County Social Services, in her official capacity
- John Doe vs. Jane Smith, Director of Smart County Social Services, in her individual capacity

County

Director

Who is the Defendant?

The State

Sovereign immunity:

The State is immune from liability for damages caused by tortious conduct, unless the state expressly consents to be sued.



Who is the Defendant?

State Tort Claims Act

- North Carolina has consented to be sued and potentially held liable for damages caused when employees or agents of the state are negligent.
- Industrial Commission has sole jurisdiction over these claims.
- Damages capped at \$1 million.



Who is the Defendant?

The State

DSS director acts “as agent of the Social Services Commission and DHHS in relation to work required by the Social Services Commission and DHHS in the county.”

G.S. 108A-14(a)(5)



- Why might a plaintiff sue DHHS in the Industrial Commission instead of suing the county in Superior Court?
- Why might a plaintiff sue the county in Superior Court instead of suing DHHS in the Industrial Commission?

Recent Changes to STCA in 2023 Appropriations Act

SECTION 31.1.

G.S. 143-291 is amended by adding a new subsection to read:

“(e) This Article provides the **sole and exclusive remedy** for any claim that arises as a result of the negligence of any officer, employee, involuntary servant, **or agent of the State** while acting within the scope of his office, employment, service, agency, or authority, and **the North Carolina Industrial Commission is the sole and exclusive forum for hearing any such claims.** Any such claims filed in any other forum arising out of or relating to the **same subject matter** against the officer, employee, involuntary servant, or agent of the State **is precluded.**”



Immunity



Governmental Immunity:
Counties are immune from liability for the **torts** committed by public officials and their employees while they are performing a **governmental function**, unless the county has waived immunity.

What's a Tort?

- A wrongful act or omission
- Not a criminal act or breach of contract
- Causes personal injury (physical, emotional, reputational, etc.) or damage to property; and
- State courts recognize a legal cause of action and a legal remedy.





Governmental functions

Activities performed by the government which are not ordinarily performed by private corporations.

Proprietary functions

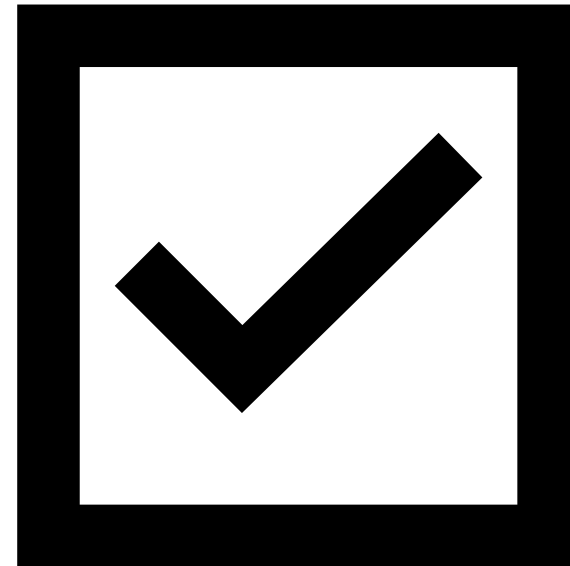
Traditionally performed by private corporations, often involves charging a fee that is above and beyond costs of providing the service.

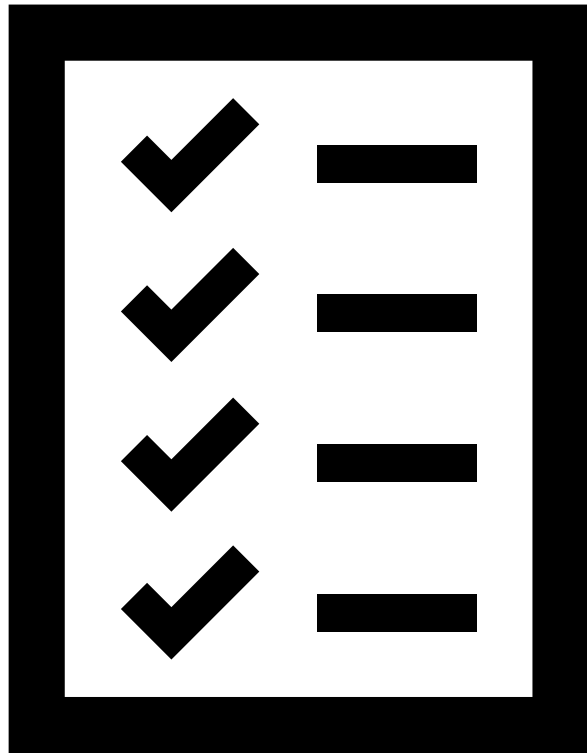


DSS

- Services provided by local Departments of Social Services are governmental functions to which governmental immunity applies.

Whitaker v. Clark, 109 N.C. App. 379 (1993).

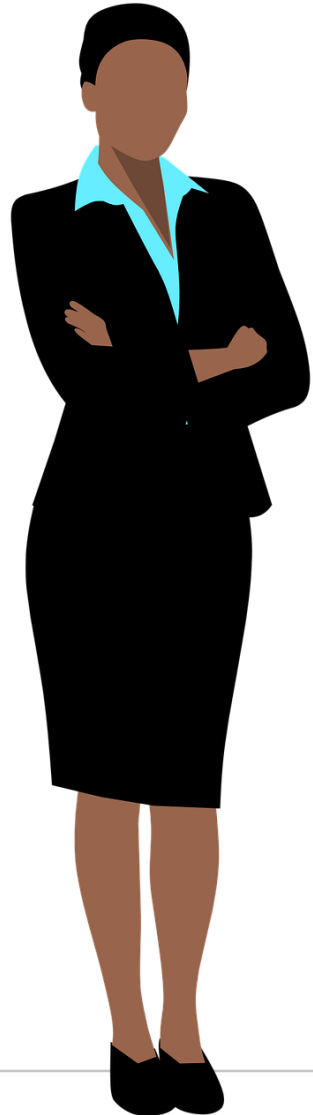




Waiver of Immunity:

- A county may waive its immunity by purchasing liability insurance covering a particular risk.
- A county's immunity is not waived if the action is explicitly **excluded** from coverage by the terms of the insurance policy.

Lawsuit Against the Individual -- Public Official Immunity



Protects **public officials** from individual liability for **negligence** in the performance of their *governmental or discretionary* duties.

Not a defense to *intentional* torts or gross negligence.

Does not apply when conduct is malicious, corrupt, or outside the scope of official authority.

Lawsuit Against the Individual -- Public Official Immunity

Malicious:

when the act is
“(1) done wantonly,
(2) contrary to the
official’s duty, and
(3) intended to be
injurious to another”

Corrupt:

when the act is done
with “a wrongful
design to acquire
some pecuniary profit
or other advantage.”

Outside the scope

“It would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward anyone who might be affected thereby.”

Miller v. Jones, 224 N.C. 783 (1945).

Who is a “Public Official”?

Three primary distinctions:

1. Holds a position created by the constitution or statutes;
2. Exercises a portion of the sovereign power; and
3. Exercises discretion (while public employees perform ministerial duties).

Isenhour v. Hutto, 350 N.C. 601 (1999).

DSS Director

Hare v. Butler,
99 N.C. App. 693 (1990)

Who is (or isn't) a "public official"?

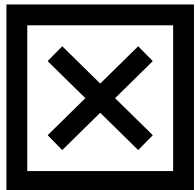


Social workers assessing reports of child abuse or neglect are almost always deemed "public officials"



Social workers performing guardianship duties

- *Dalenko v. Wake Cty. Dep't of Hum. Servs.*, 157 N.C. App. 49 (2003): Social worker involved in guardianship duties received public official immunity



DSS Supervisors/Administrators?

Hare v. Butler, 99 N.C. App. 693 (1990):

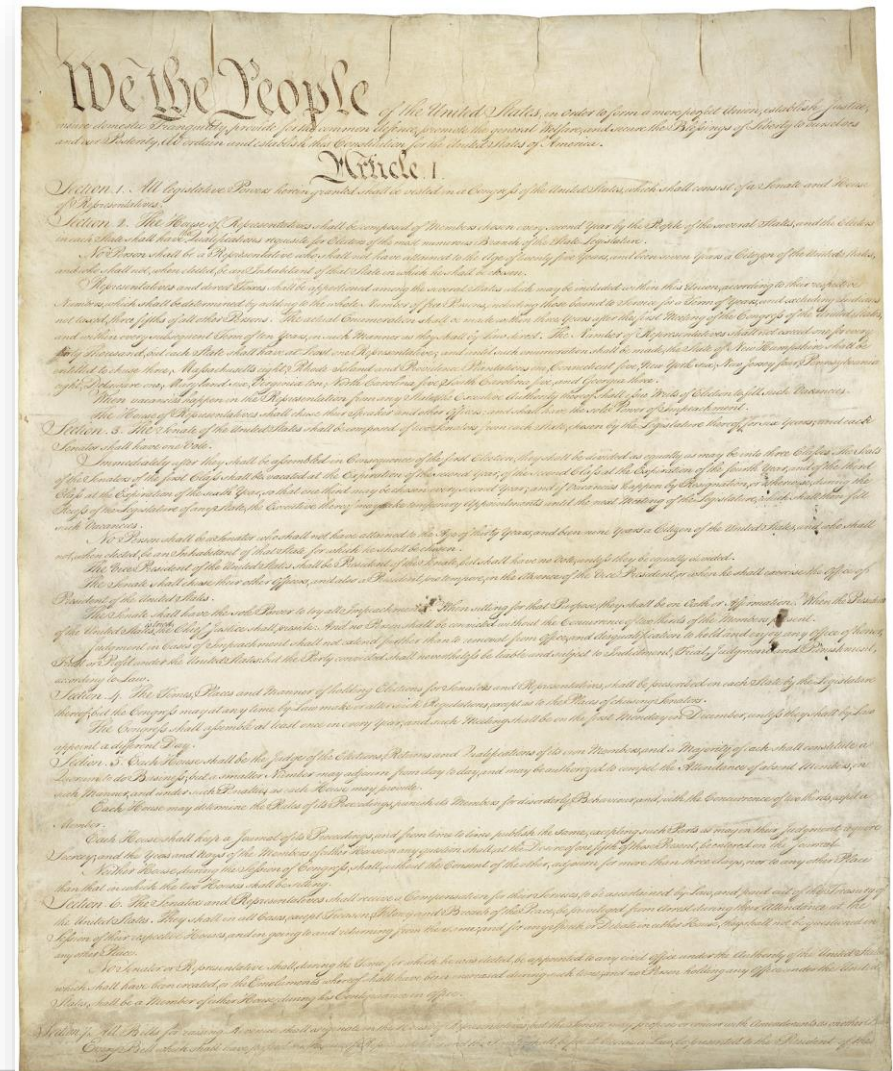
Held that CPS Investigation Supervisor, Program Administrator for Child and Family Services, and Assistant DSS Director were public employees (not officials).

Section 1983 Claims: Qualified Immunity



SCHOOL OF GOVERNMENT

Shields government officials performing discretionary functions from personal-capacity liability for civil damages, unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.



Case Study – What survived initial motion to dismiss?

- **Constitutional Claims (Section 1983)**

- Substantive Due Process
- Procedural Due Process
- Fourth Amendment

- **State Law Claims**

- Negligence
- Negligent misrepresentation
- Negligent supervision
- Negligent hiring and retention
- Fraud





Verdict: Federal jury awards millions to daughter, father separated by Cherokee County DSS

Grand jury indicts former Cherokee County DSS officials

Insurer balks at paying \$4.6 million verdict in Cherokee County case

Risk management agency for counties says its liability is limited due to dishonesty of public officials. More lawsuits over child removal

Cherokee County details \$53 million paid over 25 illegal custody DSS lawsuits

What does immunity not cover?

- Criminal conduct
- Breach of a valid contract
- Intentional torts
- Violations of state statutes
- Violations of federal laws (Title VII, ADA, ADEA, etc.)
- Violating an individual's clearly established constitutional rights





Types of Lawsuits Involving DSS

Negligent Performance of Duties:

- Negligent placement of a child in a foster home
- Negligent assessment of a report of abuse or neglect
- Negligence in performing guardianship duties

• Negligent Misrepresentation

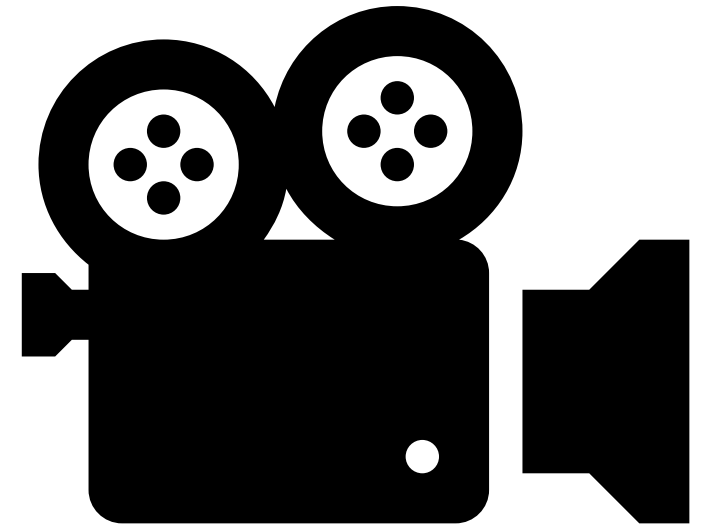
- E.g., county DSS misrepresented facts regarding a child's background when placing child in an adoptive or foster home

• Negligent:

- Hiring
- Retention
- Supervision

Hare v. Butler, 99 N.C. App. 693 (1990)

- Wife alleges husband sexually abused son, but then told social worker “maybe the whole matter was just in her head.”
- Social worker videotaped interview with child, but then DSS closed investigation w/o filing a petition.
- Husband was charged criminally and sought interview videotape, but social worker had destroyed it.
- Criminal charges against husband dismissed
- Husband sued county & various DSS officials for negligent training and supervision of social workers involved in investigation.



Does immunity apply to the county?

Does immunity apply to the employees?

**What if plaintiff sued DHHS in
the Industrial Commission
instead?**

Immunity Cheat Sheet – Tort Claims in State Court

Defendant	Possible Immunity
State (DHHS)	Sovereign Immunity (unless waived)
County	Governmental Immunity (unless waived)
Public Official (e.g., DSS Director)	Public Official Immunity (unless acting outside of scope or w/ malice)
Public Employee	None

Discrimination and Harassment

- **Americans with Disabilities Act (ADA)**
- **Age Discrimination in Employment Act (ADEA)**
- **Title VII**
 - Race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity), or religion
- **Section 1981: race**

EEOC FORM 131 (11/09) U. S. Equal Employment Opportunity Commission

PERSON FILING CHARGE

THIS PERSON (check one or both)

Claims To Be Aggrieved

Is Filing on Behalf of Other(s)

EEOC CHARGE NO.

NOTICE OF CHARGE OF DISCRIMINATION
(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

Title VII of the Civil Rights Act (Title VII) The Equal Pay Act (EPA) The Americans with Disabilities Act (ADA)

The Age Discrimination in Employment Act (ADEA) The Genetic Information Nondiscrimination Act (GINA)

The boxes checked below apply to our handling of this charge:

1. No action is required by you at this time.

2. Please call the EEOC Representative listed below concerning the further handling of this charge.

3. Please provide by _____ a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

4. Please respond fully by _____ to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

5. EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by _____ to _____.

If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

EEOC Representative
Telephone _____

Enclosure(s): Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

Race Color Sex Religion National Origin Age Disability Retaliation Genetic Information Other

See enclosed copy of charge of discrimination.

Date _____ Name / Title of Authorized Official _____ Signature _____

Does immunity apply to the county?

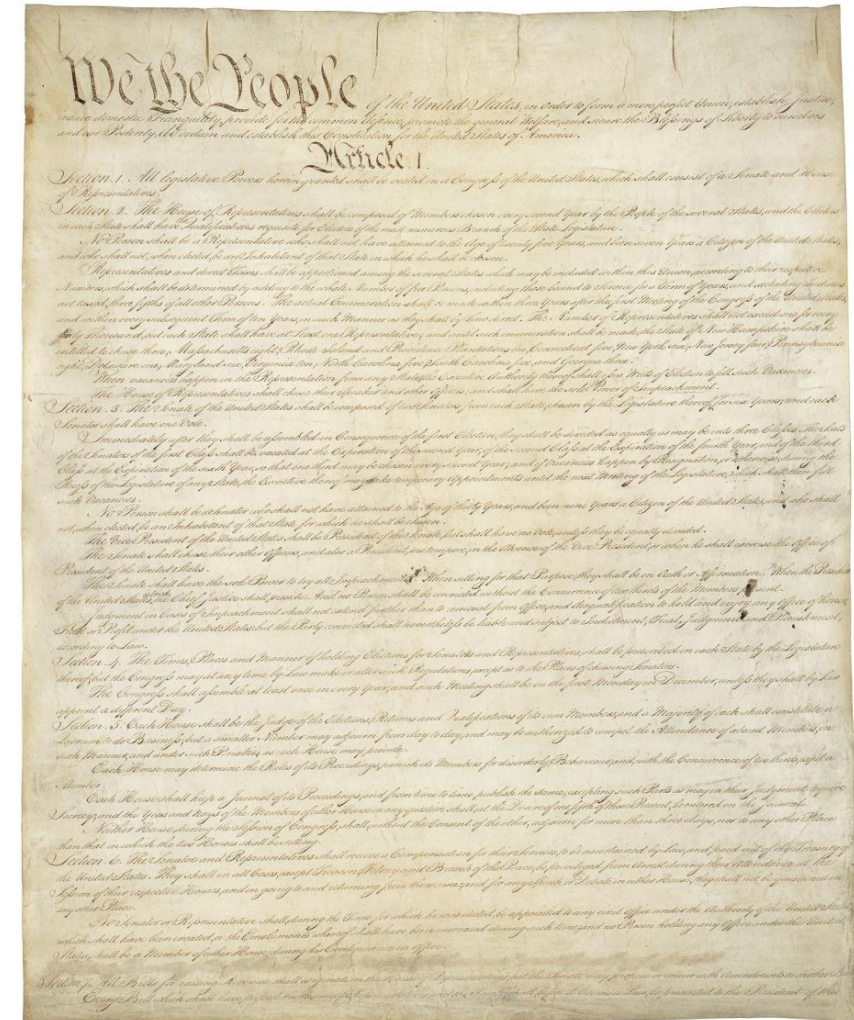
Constitutional Claims – Section 1983

42 U.S.C. § 1983

Any government agent who violates someone's federally protected rights (constitutional rights or rights under certain federal statutes) "shall be liable to the party injured."

Can be against the individual and/or the county

- If against county--plaintiff must prove the county's policy or custom caused the constitutional violations.

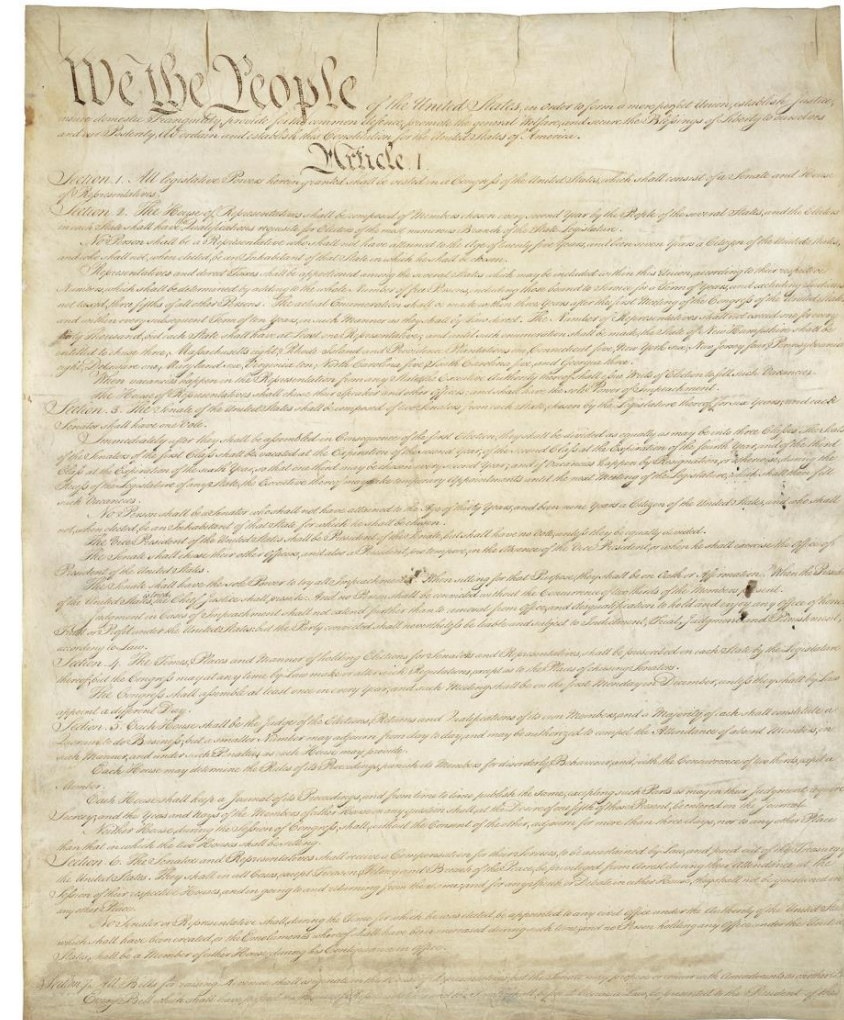


Section 1983– Is County Liable?

Policy or custom manifests:

- (1) through an **express policy**, such as a written ordinance or regulation;
- (2) through the **decisions** of a person with final policymaking authority;
- (3) through an **omission**, such as a failure to properly train employees, that “manifest[s] deliberate indifference to the rights of citizens”; or
- (4) through a practice that is so “**persistent and widespread**” as to constitute a “**custom or usage with the force of law.**”

Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003)



Does immunity apply to the individual?

Questions?

Kristi Nickodem
nickodem@sog.unc.edu

