Compendium of the Law on **PRISONERS' RIGHTS**

Federal Judicial Center

This publication is a product of work undertaken in connection with the Federal Judicial Center's Committee on Prisoner Civil Rights. The opinions, conclusions, and analyses are those of the author. As explained in the Committee's Foreword, it has been reviewed within the Committee, and publication signifies that the Committee and the Center regard it as responsible and valuable. It should be noted, however, that on matters of policy, the Center speaks only through its Board.

The reader will of course be aware that developing case law in this area may date the material. The compendium's loose-leaf format is intended to accommodate insertions by the individual user.

COMPENDIUM OF THE LAW ON PRISONERS' RIGHTS

By Ila Jeanne Sensenich
United States Magistrate

Federal Judicial Center
April, 1979

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To my parents,
Louis E. and the
late Evelyn H.
Sensenich

PREFACE

During the last decade the increasing volume of pro se prisoner civil rights actions on the dockets of the district courts has caused extreme frustration for most of those dealing with them. The district judges and magistrates, burdened with heavy caseloads and accustomed to the well drafted pleadings and briefs of federal practitioners, have been struggling to comprehend vague, verbose, rambling pleadings prepared by pro se prisoners and to keep abreast of the rapidly evolving case law. They have sometimes been perplexed to find their dismissals abruptly and critically reversed by the courts of appeals. At times, the circuit judges have been dismayed by the lower courts' hasty dismissals and the inadequacy of the records brought to them on appeal. Pro se prisoners subjected to unconstitutional conditions of confinement have groped in the confusing maze of federal and local rules, pleadings, motions, and decisional law. Conscientious prison officials, with limited funds and outdated facilities, have had to defend themselves from frivolous claims for money damages brought against them by their charges. Over-worked deputy attorneys general and municipal and county solicitors have struggled to respond to incomprehensible pleadings and to understand the developing case law. It is hoped that this volume will offer some small measure of relief to all these participants. It will not make these cases easy to handle, but hopefully it will shorten the preliminary research time for the members of the federal judiciary, affording them more time for thoughtful consideration of the important issues presented in each case, and help the prisoners, prison officials and defense attorneys understand the extent and limits of the basic rights guaranteed to prisoners under the United States Constitution.

I am indebted to many people for their support and help. First are the other members of the Aldisert committee and our chairman, the Honorable Ruggero J. Aldisert, United States Circuit Judge, who have advised and counseled me and given me editorial assistance. As a United States Magistrate handling a high volume of pro se prisoner civil rights cases the opportunity to

discuss the unique problems encountered in these cases with a small, thoughtful group composed of distinguished circuit and district judges and law professors has been invaluable. In addition to the members of the committee I am indebted to Frank J. Remington, Professor of Law, University of Wisconsin, our reporter, and attorney Alan Chaset, Assistant Director of Research, Federal Judicial Center.

This project had its inception in March 1975 when the United States district judges for the Western District of Pennsylvania authorized me to handle all the pro se prisoner civil rights actions filed in our district. I am indebted to them for their continuing support of my work.

I am further indebted to my secretary, Susan M. Ratica, who meticulously and graciously retyped each "final" revision in addition to her myriad other duties. Vicki Thompson, Editor in chief of the Duquesne Law Review, 1978-79, assisted me with editing and wrote the difficult chapter on medical care. I also received editorial assistance from Betsy McKnight and William L. Lafferty and typing assistance from Beverly Ridge, Pat Buddemeyer and Barbara Peterson.

Other works on prisoner civil rights cases which the reader may find helpful include a two volume paperback set, Prisoners' Rights 1979 (Course Handbook Series Number 105) produced by the staff of the National Prison Project of the American Civil Liberties Union Foundation and published by the Practicing Law Institute, New York City; a casebook by Hillel Hoffman, Prisoners' Rights -- Treatment of Prisoners and Post-Conviction Remedies, published by Matthew Bender, 1976; and an extensive unpublished outline of cases on the rights of pretrial detainees, Index to the Law of Conditions and Practices of Pre-Trial Detention, prepared by the staff of the Prisoners' Rights Project of the Criminal Appeals Bureau of the Legal Aid Society of the City of New York.

It is my hope that this volume will expedite the speedy dismissal of frivolous and malicious claims and the prompt and thoughtful hearing and disposition of meritorious ones.

Ila Jeanne Sensenich

April 1979
Pittsburgh, Pennsylvania

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FOREWORD

The Prisoner Civil Rights Committee of the Federal Judicial Center is pleased to make available to the federal judiciary, through the Center, this compendium of prisoner civil rights law compiled by Ila Jeanne Sensenich, U. S. Magistrate, Western District of Pennsylvania. The compendium is the product of research initiated by Magistrate Sensenich in the performance of her official duties and later expanded by her at our request for the committee's ongoing study of the problems confronting federal courts in prisoner cases.

The committee's purpose is threefold:

> First, to evaluate the handling of prisoner conditions-of-confinement cases in order to recommend procedures that would increase judicial capacity to give prompt relief to meritorious prisoner cases.
>
> Second, to help federal judges and magistrates and staff personnel to deal effectively and efficiently with those difficult-to-handle cases.
>
> Third, to contribute to the proper apportionment of responsibility between federal and state courts with respect to such litigation.

The preparation of this compendium by Magistrate Sensenich has greatly assisted the committee's work. Although this work is an individual effort, and does not purport to be an official committee document, we believe that it may serve as an effective research tool for members of the federal judiciary in an important facet of litigation; a troublesome aspect of litigation where the plaintiff usually appears without counsel, thus placing upon the court the important and sensitive task of analyzing pleadings and performing research ordinarily available to the court by means of professionally prepared pleadings and supporting memoranda.

Magistrate Sensenich has selected the cases for the compendium and has interpreted them. Thus the work does not reflect an official view of the Federal Judicial Center or a committee thereof. We are distributing the compendium only for the possible value it may afford the federal judiciary as a beginning point for research. Although lengthy, the work is not presented as a comprehensive treatise on prisoner case law; the cases set forth are designed to be illustrative only. Moreover, although the committee's efforts have concentrated on conditions-of-confinement cases, Magistrate Sensenich's work covers a wider range of cases brought under the Civil Rights Act, 42 U.S.C. § 1983, which have demanded the attention of federal judges and magistrates.

The response to the committee's tentative reports in 1976 and 1977 on recommended procedures for processing prisoner cases has been gratifying. We plan to issue a final report upon the completion of our study. The committee distributes the Sensenich compendium with the hope that it may prove useful and we continue to solicit your comments and recommendations.

Ruggero J. Aldisert
U.S. Circuit Judge, Chairman

Robert C. Belloni
U.S. District Judge

Robert J. Kelleher
U.S. District Judge

Frank J. McGarr
U.S. District Judge

John H. Wood
U.S. District Judge

Ila Jeanne Sensenich
U.S. Magistrate

Professor Bruce S. Rogow

INTRODUCTION

When a state prisoner has a complaint about conditions of confinement in a state institution, the preferred method of seeking relief is to by-pass the state administrative apparatus and the state judicial system and to file a claim in the federal district court alleging a deprivation of federal constitutional rights. The federal remedy may be sought even though the prisoner was sentenced to a state institution by a state judge.

The result is to place a disproportionate amount of responsibility upon the federal judiciary.

Prisoner rights cases occupy a significant percentage of the time of federal courts, particularly of the United States district judges. The Administrative Office of the United States Courts has been keeping statistics on prisoner cases for the past few years. "Civil rights" cases have been tabulated separately for seven years. Those statistics show that state prisoner civil rights cases totaled 3,348 in the fiscal year ending June 30, 1972; 4,174 in 1973; 5,236 in 1974; 6,128 in 1975; 6,958 in 1976; 7,752 in 1977; and 9,730 in 1978.[1] The numbers are large and continue to increase. Civil rights petitions from state inmates have increased by 379.3 percent since 1970.

But sheer numbers do not tell the complete story; for it is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the narrowest definition of frivolity. The Freund Report[2]

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1. Annual Report of the Director of the Administrative Office of the United States Courts, 1978.

2. Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972), popularly known as the Freund Report, named for its chairman, the distinguished Professor Paul Freund of Harvard University.

concluded that: "The number of these petitions found to have merit is very small, both proportionately and absolutely."[3] This is reflected in the fact that 5,355 of 5,858 or 91 percent of the cases brought in federal court in fiscal year 1976 were dismissed or terminated prior to pretrial.[4]

The stresses that produce these complaints are extreme and, to some extent, predictable. What to most people would be a very insignificant matter becomes, because of the nature of prison life, of real concern to the prison inmate. Most of the money damage claims, realistically evaluated, could be handled by a small claims court at the state level. Most requests for injunctive relief involve issues which would seem to many people to be quite trivial.

The fact that the volume of conditions-of-confinement cases is large and the fact that many are frivolous make it difficult to ensure that the meritorious complaint is found and given careful attention. Therefore, the federal judiciary must be especially alert to recognize the meritorious case and grant appropriate relief. The Freund Commission concluded: " . . . [I]t is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with."[5]

The cases sometimes raise constitutional questions of great significance to prisoners and to the nation's correctional systems. Because lawyers are typically not involved, a very difficult task confronts the judiciary, particularly at the early stages of this class of pro se litigation.

It becomes absolutely necessary for the federal judiciary to understand the factual basis of the complaint and then to relate the facts to developing legal precepts in federal constitutional law. This compendium of cases is illustrative of the difficult issues being presented by the prisoner complaints.

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3. Id. at 587.

4. Annual Report of the Director of the Administrative Office of the United States Courts, 1976.

5. Freund Report, supra note 2, at 587.

SECTION I: CIVIL RIGHTS STATUTES; JURISDICTION

There are several different civil rights statutes, each having different requirements, but mostly civil rights actions by prisoners are brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subject, 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.

Some other possible sources of causes of action are 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.[6]

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6. Municipal corporations are not immune under section 1981. Mahone v. Waddle, 564 F.2d 1018, 1032 (2d Cir. 1977). Suits under sections 1981 and 1982 require plaintiff to allege racial discrimination. Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1976); Save Our Cemetaries v. Archdiocese of New Orleans, 568 F.2d 1074, 1078

42 U.S.C. § 1985(2):

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.[7]

42 U.S.C. § 1985(3):

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the prem-

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(5th Cir. 1978). Section 1981 is not confined to contractual matters and includes racially motivated misuse of government power. Hall v. Pennsylvania State Police, 570 F.2d 86, 91 (3d Cir. 1978). See generally Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978) for a discussion of immunity of a municipality.

7. See Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976) (section 1985(2) requires class-based invidious discriminatory animus); Jones v. U.S., 536 F.2d 269, 271 (8th Cir. 1976) (must allege racial or class-based animus).

> ises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.[7a]

The court has jurisdiction over section 1983 cases alleging constitutional deprivations[8] under 28 U.S.C. § 1343(3) and over section 1985(2) and (3) cases under U.S.C. § 1343(1). 28 U.S.C. § 1343 provides:

7a. See Section IX infra.

8. However, section 1343(3) does not grant jurisdiction of actions alleging deprivation of a right secured by the laws of the United States except acts of Congress providing for equal rights of citizens. Gonzalez v. Young, 560 F.2d 160, 166 (3d Cir. 1977). But see Chase v. McMasters, 573 F.2d 1011, 1017 (8th Cir. 1978).

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Civil rights actions by prisoners against federal officials may be brought under 28 U.S.C. § 1331[9] and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).[9a] These actions are usually brought in mandamus under 28 U.S.C. § 1361. Section 1331 provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States ex-

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9. Lynch v. Household Finance, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) held that in cases brought under § 1983 no jurisdictional amount is required.

9a. See Section X infra.

> cept that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agancy thereof to perform a duty owed to the plaintiff.

Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978) cert. granted ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1978) 47 U.S.L.W. 3221 (1978) held that the district court did not have jurisdiction to oversee the operation of federal jails and prisons under the Administrative Procedures Act since the act specifically exempts from judicial review "agency action [which is] committed to agency discretion by law." The court found it unnecessary in that case to decide whether the act would apply if the breach of a specific statutory mandate by federal prison officials were established.

Two other causes of action by prisoners which pose many of the same problems as civil rights actions are Federal Tort Claims Act actions[10] and diversity actions for personal injuries.[11] In diversity actions the court's jurisdiction is based upon 28 U.S.C. § 1332, and the plaintiff must satisfy the jurisdictional amount requirement in addition to showing diversity.

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10. 28 U.S.C. § 1346(b). See, e.g., Edwards v. United States, 519 F.2d 1137 (5th Cir. 1975), cert. denied, 425 U.S. 972, 96 S.Ct. 2170, 48 L.Ed.2d 795; Jones v. United States, 534 F.2d 53 (5th Cir. 1976), cert. denied, 429 U.S. 978, 97 S.Ct. 487, 50 L.Ed.2d 586; Crump v. United States, 534 F.2d 72 (5th Cir. 1976); Plummer v. United States, ____ F.2d ____, No. 76-114 (3d Cir. May 26, 1978).

11. See Reeves v. City of Jackson, Mississippi, 532 F.2d 491 (5th Cir. 1976); U.S. ex rel. Fear v. Rundle, 506 F.2d 331 (3d Cir. 1974), cert. denied, 421 U.S. 1012 (1975).

SECTION II: GENERAL CONSIDERATIONS: CIVIL RIGHTS AND HABEAS CORPUS COMPARED

Prisoner civil rights actions and habeas corpus actions tend to be grouped together under the general title "Prisoner Petitions." This generates considerable confusion since their similarities are generally limited to the plaintiffs' status as prisoners, the fact that many of both such actions are filed without the assistance of counsel,[12] and the fact that both such actions involve claims that prisoners have been deprived of their federal constitutional rights. A civil rights action differs from a habeas corpus action in the following respects:

A. Determination Whether an Action is Habeas Corpus or Civil Rights

In prisoner civil rights actions, the prisoner is generally asserting that his federal constitutional rights have been or are being violated in that his conditions of confinement violate the United States Constitution, or that the defendants violated his federal constitutional rights in his arrest and criminal trial proceedings. State prisoners are generally seeking a declaratory judgment under 28 U.S.C. §§ 2201 and 2202; injunctive relief under Rule 65 of the Federal Rules of Civil Procedure; and compensatory and punitive damages. Federal prisoners are usually seeking mandamus relief.

In habeas corpus actions, on the other hand, the prisoner is asserting that the violation of his federal constitutional rights in his criminal trial proceedings requires his release from custody. The federal courts have jurisdiction of habeas corpus actions under 28 U.S.C. § 2241. Federal habeas corpus actions brought by state prisoners are subject to the requirements of 28 U.S.C. § 2254.

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12. See, e.g., Cruz v. Estelle, 497 F.2d 496 (5th Cir. 1974) (complaint written on toilet paper).

If the plaintiff in a civil rights action is a state prisoner and is actually seeking release from custody, his action must be treated as habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). However, this does not apply to claims for money damages: Preiser at 411 U.S. 494, 93 S.Ct. at 1838, 36 L.Ed.2d at 453; and habeas corpus may be available to challenge conditions of confinement, Id. at 499, 93 S.Ct. at 1841, 36 L.Ed.2d at 456. Preiser is not applicable to federal prisoners. Geraghty v. U.S. Parole Commission, 579 F.2d 238 (3d Cir. 1978).

The significance of Preiser is that the habeas petitioner must exhaust state remedies prior to bringing his action in federal court, while there is no exhaustion requirement in civil rights actions.[13]

When the prisoner seeks both release from custody and money damages, the civil rights action for damages can go forward in federal court while the prisoner is exhausting state remedies as to the habeas issues. Wolff v. McDonnell, 418 U.S. 539, 554, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935, 950 (1974).[14] However, in these circumstances the Court noted that normal principles of res judicata would apply. Id. at 554 n. 12, 94 S.Ct. at 2974 n. 12, 41 L.Ed.2d at 950 n. 12.

Grundstrom v. Darnell, 531 F.2d 272 (5th Cir. 1976) held that the district court had properly dismissed a civil rights action as untimely until state remedies had been exhausted as to the habeas relief, although damages were also sought.[15] In that case, the damage claim and the habeas relief were both based upon the same occurrences in the state criminal trial proceedings. In Meadows v. Evans, 529 F.2d 385

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13. See Section II, C infra.

14. A declaratory judgment as a predicate to a damages award would not be barred by Preiser, nor would an otherwise proper injunction. Wolff at 554, 94 S.Ct. at 2974, 41 L.Ed.2d at 950.

15. However, if the statute of limitations might bar a later action, the court should stay rather than dismiss the civil rights action. Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976).

(5th Cir. 1976), cert. denied, where the plaintiff sought damages for both his allegedly involuntarily induced guilty pleas and unconstitutional conditions of confinement, the court determined that the action could proceed as to the claims based upon allegedly unlawful conditions of confinement although the claims related to the guilty pleas should be dismissed or held in abeyance.

The determination of whether an action is habeas corpus or civil rights can be difficult. Williams v. Ward, 556 F.2d 1143 (3d Cir. 1977) held that the district court had properly treated the action as civil rights rather than habeas corpus since the plaintiff was challenging the manner of parole decision-making rather than its outcome. Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977) held that an action challenging the terms of probation was habeas corpus rather than civil rights.

Watson v. Briscoe, 554 F.2d 650 (5th Cir. 1977) applied the doctrine of Preiser and concluded:

> Under Preiser, clearly, an injunction restoring good time and mandating immediate parole review is a habeas matter and therefore the district court correctly determined that it should not hear this issue prior to exhaustion of state remedies.

554 F.2d at 652.

An action seeking conditional release for furloughs and work or educational release programs is habeas corpus rather than civil rights. Parson v. Keve, 413 F.Supp 111 (D. Del. 1976).

Robinson v. Richardson, 556 F.2d 332 (5th Cir. 1977) held that plaintiff's action was habeas corpus even though the relief sought was an injunction against the continued discriminatory use of peremptory jury challenges by the district attorney. This was based on the fact that a resolution of plaintiff's claims in his favor would result in a finding that his conviction was constitutionally invalid, and release from prison would necessarily follow from such a finding.

The district courts have a heavy responsibility to determine whether an action is habeas corpus or civil rights. Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978) was a habeas corpus action in which the petitioner alleged that his North Carolina sentence was enhanced by uncounseled Virginia convictions. He sought both release from custody and removal of the convictions from consideration by the North Carolina parole board in its determination of his eligibility for parole. The district court denied the writ. The court of appeals noted that in his claim against the parole board petitioner did not assert that he was entitled to parole and that he should be released. He argued only that the parole board should consider his eligibility for parole without regard to the Virginia convictions:

> He also does not assert that if the four convictions are not considered he will be entitled to parole, now or ever. Thus, on the authority of Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), we think this aspect of Strader's claim for relief must be treated as a suit under 42 U.S.C. Section 1983 and not as a petition for a writ of habeas corpus.

571 F.2d at 1269. In that case the court of appeals determined that plaintiff's claim should be treated as civil rights rather than habeas corpus although in the district court the plaintiff had made no effort to proceed under section 1983.

B. Function of Court

Habeas corpus actions usually involve reviewing a state or federal trial record, while a prisoner civil rights action is usually a new action, not involving the review of a prior case (unless the plaintiff is seeking damages for the alleged violation of his civil rights during his criminal trial proceedings).

The pretrial proceedings are generally much more extensive in civil rights actions than habeas corpus. They may include motions for default judgment filed by

the prisoner when the defendant has failed to answer the complaint within twenty (20) days, motions for class action certification, motions to dismiss, motions for summary judgment, motions for protective orders, motions to compel discovery, motions to strike pleadings, and motions for a temporary restraining order.

C. Exhaustion of Remedies[16]

A large percentage of habeas corpus actions challenging convictions in the state courts are dismissed for failure of the petitioner to exhaust state court remedies as required by 28 U.S.C. §§ 2254(b) and (c). However, state prisoners bringing civil rights actions are not required to exhaust state court rememdies.[17] See Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492, 503 (1961); Wilwording v. Swenson, 404 U.S. 249, 251, 92 S.Ct. 407, 409, 30 L.Ed.2d 418, 421 (1971) (conditions of confinement case); Preiser v. Rodriguez, 411 U.S. 475, 494, 93 S.Ct. 1827, 1838, 36 L.Ed.2d 439, 453 (1973).

State prisoners are not required to exhaust administrative remedies. See United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1229 (3d Cir. 1977); Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978); Hardwick v. Ault, supra. See also McNeese v. Board of Education, 373 U.S. 668, 672, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Damico v. California, 389 U.S. 416, 417

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16. For an excellent discussion of the exhaustion requirement, see Note, State Prisoners' Suits Brought on Issues Dispositive of Confinement: The Aftermath of Preiser v. Rodriguez and Wolff v. McDonnell, 77 Colum. L. Rev. 742 (1977); Comment, State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies, 7 Seton Hall L. Rev. 366 (1976).

17. See also Allee v. Medrano, 416 U.S. 802, 814, 94 S.Ct. 2191, 2200, 40 L.Ed.2d 566, 580 (1974); Ellis v. Dyson, 421 U.S. 426, 432, 95 S.Ct. 1691, 1695, 44 L.Ed.2d 274, 281 (1975); Steffel v. Thompson, 415 U.S. 452, 472, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505, 522 (1974); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert. dismissed as improvidently granted, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975).

88 S.Ct. 526, 527, 19 L.Ed.2d 647, 649 (1967); Steffel v. Thompson, supra at 472; Carter v. Stanton, 405 U.S. 669, 670-71, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569, 572 (1972).

Federal prisoners are required to exhaust administrative remedies. See Waddell v. Alldridge, 480 F.2d 1078 (3d Cir. 1973); Jones v. Carlson, 495 F.2d 209 (5th Cir. 1974); Willis v. Ciccone, 506 F.2d 1011, 1015 (8th Cir. 1974).

The Supreme Court cases commenting on exhaustion of state remedies can be interpreted as ambiguous or as unnecessary dicta, U.S. ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1229 (3d Cir. 1977), and a few courts have imposed a limited exhaustion requirement in cases in which the plaintiff is asserting the violation of his constitutional rights in state court criminal proceedings[18] or when he alleges that his personal property of no great monetary value was unlawfully confiscated without due process of law.[19]

D. Representation by Counsel; Attorney's Fees Awards Act of 1976

The court can appoint counsel for habeas petitioners when necessary and counsel can be compensated in accordance with the Criminal Justice Act, 18 U.S.C. § 3006A(g).

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18. See Guerro v. Mulhearn, 498 F.2d 1249, 1251 (1st Cir. 1974); Fulford v. Klein, 529 F.2d 377, 378 (5th Cir. 1976); Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976); Conner v. Pickett, 552 F.2d 585, 587 (5th Cir. 1977); Grundstrom v. Darnell, 531 F.2d 272 (5th Cir. 1976); Robinson v. Richardson, 556 F.2d 332 (5th Cir. 1977); Edwards v. Joyner, 566 F.2d 960 (5th Cir. 1978); Watson v. Briscoe, 554 F.2d 650 (5th Cir. 1977); Foster v. Zeeko, 540 F.2d 1310 (7th Cir. 1976).

19. Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978).

Securing counsel for plaintiffs in civil rights actions is more difficult. There is no right to counsel in Section 1983 cases. Hardwick v. Ault, 517 F.2d 295, 298 (5th Cir. 1975).[20] The Comptroller General of the United States, in a decision dated February 28, 1974, 39 Comp. Gen. 133, File No. B-139703, took the position that he cannot pay counsel fees in civil rights cases under the Criminal Justice Act. He specifically disagreed with McClain v. Manson, 343 F.Supp. 382 (D.C. Conn. 1972), a case cited repeatedly by prisoners. The decision in McClain may be better understood by realizing that it preceded Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), which held that actions seeking release from custody must be handled as habeas corpus rather than civil rights. Prior to Preiser, the distinction between habeas corpus and civil rights was less clear and courts may have treated civil rights actions as habeas for purposes of appointment of counsel. However, it now appears that while a court could enter an order "appointing" an attorney, the fact is that the Comptroller General would ultimately refuse to pay the attorney's fee.

Under 28 U.S.C. § 1915(d) the court may request an attorney to represent a party who is proceeding in forma pauperis in a civil case but that section contains no provision for compensation of counsel.

In Heidelberg v. Hammer, 577 F.2d 429 (7th Cir. 1978), the court recognized that the question of whether to request an attorney to represent a plaintiff in accordance with 28 U.S.C. § 1915(d) rests in the sound discretion of the district court "unless denial would result in fundamental unfairness impinging on due process rights," 577 F.2d 431. The court did note that it is extremely helpful to the court to have the plaintiff represented by counsel when a hearing is required.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988,[21] authorizes the court to allow

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20. Wimberly v. Rogers, 557 F.2d 671 (9th Cir. 1977) held that the district court had not abused its discretion in denying a request for appointment of counsel. But see Gordon v. Leeke, 574 F.2d 1147, 1154 (4th Cir. 1978).

21. See Lipson, Beyond Alyeska - Judicial Response to the Civil Rights Attorneys' Fees Act, 23 St. Louis U.L.R. 243 (1978).

the prevailing party a reasonable attorney's fee as part of the costs in a civil rights action. The act does not authorize the court to appoint counsel and it is questionable whether a judge or magistrate should request a particular attorney to accept a case involving a possible fee.[22] Further, since the act does not become applicable until a party has "prevailed," it is usually not helpful to the court in the initial stages of the lawsuit when the plaintiff is seeking the assistance of counsel.

Identification of the "prevailing" party is not always easy. Black and female residents of a Georgia county instituted a class action suit seeking injunctive relief to correct the allegedly unconstitutional composition of grand and traverse juries in Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977). During a hearing defendants admitted the unconstitutional composition and subsequently prepared new lists which were approved by the court. The district court denied plaintiffs' motion for award of attorneys' fees, noting that the unconstitutional state of affairs resulted from negligence rather than intentional misconduct or bad faith. Although defendants argued on appeal that plaintiffs were not "prevailing" parties within the meaning of the Civil Rights Attorney's Fees Awards Act since the parties settled the litigation by voluntary agreement, the court of appeals reversed and awarded attorneys' fees, finding that the plaintiffs were prevailing parties and concluding that the settlement did not prevent award of counsel fees. The court noted that under Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3 (b) and 2000e-5(k), defendant's conduct was irrelevant to award of attorneys' fees and held that the same standards should apply to awards under section 1988.

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22. In Miller v. Carson, 563 F.2d 741, 756 n. 28 (5th Cir. 1977), the court stated:

> The fact that a trial judge appointed an attorney and later awarded him a fee is not relevant to the question whether a trial court has the power to award such a fee, although it may be relevant to the question whether the judge abused his discretion. At any rate, we find no abuse in this case.

In Inmates of Neb. Penal and Correctional v. Greenholtz, 567 F.2d 1381 (8th Cir. 1977), inmates brought an action against the members of the board of parole seeking injunctive relief and damages for the board's policy of refusing to consider otherwise eligible inmates for discretionary parole if they had actions pending in court. While the action was pending the board abolished its policy, admitting that it interfered with the inmates' right to seek redress of grievances in the courts. After conducting a hearing and finding that the policy was no longer being applied and would not be applied in the future, the district court denied injunctive relief since there was no threat of future irreparable injury. The district court did, however, award plaintiffs some of their costs. In affirming, the court of appeals quoted from the district court opinion:

> In effect, the Board's policy would have been held unconstitutional but, as noted above, the policy was discontinued. Under these circumstances, the Court will consider the plaintiffs as prevailing parties for the purposes of awarding costs.[23]

567 F.2d at 1384.

The Eighth Circuit recognized in Intern. Soc. for Krishna Consc. v. Anderson, 569 F.2d 1027, 1029 (8th Cir. 1978), that under the act, attorneys' fees are to be awarded to the prevailing party absent unusual circumstances. Since the district court had denied plaintiff's application for attorneys' fees, the court of appeals remanded for determination whether any unusual circumstances existed which would render an award of attorneys' fees to the plaintiff unjust and for determination of the amount of the award if any was to be made. However, in Franklin v. Shields, 569 F.2d 784, 801 (4th Cir. 1977), the court determined that the prisoner plaintiffs should not be awarded attorney fees

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23. See also Kimbrough v. Arkansas Activities Ass'n., 574 F.2d 423 (8th Cir. 1978).

and costs because they had not "substantially" prevailed. In Henderson v. Fort Worth Ind. School Dist., 574 F.2d 1210 (5th Cir. 1978), the court approved the district court's refusal to award counsel fees to the prevailing plaintiffs on the ground that such an award would be unjust.

Huntley v. Community Sch. Bd. of Brooklyn, 579 F.2d 738 (2d Cir. 1978) affirmed the trial court's refusal to award attorney's fees although the plaintiff had received an award of nominal damages. The court stated: "We find no abuse of discretion in Judge Weinstein's conclusion that appellant at most had won a 'moral' victory of insufficient magnitude to award an award under Section 1988." 579 F.2d at 742.

Pickett v. Milam, 579 F.2d 1118 (8th Cir. 1978) held that although the district court had properly refused to award plaintiff's attorney's fees against the defendants in their individual capacity upon its finding that there was no indication that they had acted in bad faith, it should have awarded attorney's fees against the defendants in their individual capacities under Hutto v. Finney, ____ U.S. ____, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

In Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978), the district court, without a hearing, had improperly refused to award prevailing plaintiffs attorney's fees. The sole reason for the court's refusal was that counsel had already received a portion of the recovery as determined by a consent decree, as a contingent fee. Although the court did not require a formal evidentiary hearing in each case, the motion for attorney's fees here was disposed of in a summary fashion without an adequate statement of the reasons for the order. The appellate court recognized that the district court does have broad discretion to make the initial determination of whether to allow an award of fees, but the district judge had failed to express his reasons for following the general principle that a successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 579 F.2d at 647. The court's determination of whether to award an attorney's fee should be divorced from the fact that the attorney had already received a fee under a private fee agreement:

> . . . [I]f the Court finds that an agreement provides for an unethically excessive fee, it may sparingly exercise its supervisory powers over the bar to limit the amount the attorney may actually receive. If, however, the court's concern is merely that granting such fees would result in overcompensation to counsel because it would be in addition to fees received by virtue of a fee agreement, it can exercise its supervisory powers to fashion its order to ensure that the award goes to compensate the client.

579 F.2d at 648.

Referring to the legislative history of the Attorney's Fees Awards Act the court stated: "Should it be determined that counsel is entitled to fees here, the amount of the award must be adequate to provide an incentive 'to attract competent counsel.'" Id. at 648. The court remanded for a decision as to whether the plaintiff should be awarded attorney's fees under the guidelines it had set forth.

In Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978), an action under 42 U.S.C. § 2000e-16, the court determined that where more than one attorney represents the prevailing party, the contribution of all attorneys must be taken into consideration and the fees awarded should reflect the efforts of all, at least to the extent that the time reported did not reflect duplication of work or effort, or work that could be performed by non-lawyers. Further, these fees were to be awarded to attorneys employed by a public interest firm or organization on the same basis as awards to private practitioners. See also Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978).

The Third Circuit in Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977), held that in an action under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), it was proper for the district court to refuse to award a referral fee to an attorney based upon a percentage referral arrangement, rather than on work performed. However, since that attorney did submit a claim based

upon hourly charges, the court should have passed on it.

An award of counsel fees which will be paid out of the state treasury is not barred by the Eleventh Amendment. Hutto v. Finney, ____ U.S. ____, 98 S.Ct. 2566, 57 L.Ed.2d _____ (1978); Rodriguez v. Jimenez, 551 F.2d 877 (1st Cir. 1977). In Hutto, supra, the Court stated:

> As this Court made clear in Fitzpatrick v. Bitzer, 427 U.S. 445, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically to restrain state action. See, e.g., 42 U.S.C. § 1983.

____ U.S. at ____, 98 S.Ct. at 2575, 57 L.Ed.2d at 536. Fitzpatrick v. Bitzer, 427 U.S. 445, 447, 96 S.Ct. 2666, 2669, 49 L.Ed.2d 614, 620 (1976), referred to in Hutto, supra, was an action brought under Title VII of the Civil Rights Act of 1964. The district court in Fitzpatrick held that the Connecticut State Employees' Retirement Act violated Title VII's prohibition against sex-based employment discrimination and granted prospective injunctive relief against the defendant state officials. However, the claim for attorneys' fees was denied since the district judge believed paying them from the state treasury was precluded by the Eleventh Amendment. The court of appeals reversed and the Supreme Court affirmed, finding that the payment of

attorneys' fees from the state treasury is not barred by the Eleventh Amendment. The Supreme Court found the immunity of the state under the Eleventh Amendment was limited by Section V of the Fourteenth Amendment of the United States Constitution which provides, "The Congress shall have power to enforce by appropriate legislation, the provisions of this article." The court stated in Fitzpatrick:

> We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 459, 96 S.Ct. at 2671, 49 L.Ed.2d at 622. Although Fitzpatrick was a Title VII action, the First Circuit in Martinez,[23a] and the Eighth Circuit in Finney, supra, applied its holdings to section 1983 actions and found that an award of attorneys' fees was not barred by the Eleventh Amendment. See also Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977); King v. Greenblatt, 560 F.2d 1024, 1025 n. 2 (1st Cir. 1977).

Counsel fees may be awarded against the state or governmental units which are not named as parties to the action. Hutto v. Finney, ____ U.S. ____, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) stated:

> Although section 1983 provides no cause of action against local governments because they are not "persons" within the meaning of that statute, . . . it creates no immunity for them. Congress was free to pass another statute without the restrictive language of § 1983. Because we find that the intention of Congress in passing the 1976 Act was to allow fee awards against local governments, Muzquiz and Monroe do not control.
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> . . . .
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> We recognize that the state's eleventh amendment immunity is different in nature from the omission of lesser

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23a. Martinez Rodriguez v. Jimenez, 551 F.2d 877 (1st Cir. 1977).

> governmental bodies in Section 1983. It would be anomalous, however, to hold that while state governments and state entities may be compelled to pay fees under the Act, local governments and their agencies cannot. Although a constitutional amendment was required to limit the eleventh amendment's immunity, 427 U.S. at 456, 96 S.Ct. 2666, only a statutory authorization is necessary to fill the gap in section 1983 and allow the recovery of money from a local government.

563 F.2d at 755-56.

In Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977), aff'd ___ U.S. ___ , 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the court stated:

> The appellants complain that the district court erroneously forced the Department to pay the fee in view of the fact that the Department is not a named party. We disagree. The Act permits an order, as was entered in this case, requiring the award to be paid directly from the funds of a state agency, such as the Department of Correction, whether or not the agency is a named party.

548 F.2d at 742.

The Supreme Court held in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), that under Section 706(a) of Title VII of the Civil Rights Act of 1964, which authorizes the court in its discretion to allow the prevailing party a reasonable attorney's fee, a prevailing defendant is not to be awarded a fee unless the court finds that the claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. However, the defendant need not show that the plaintiff acted in bad faith. The Fifth Circuit applied Christiansburg in Lopez v. Arkansas Cty. Independent Sch. Dist., 570 F.2d 541 (5th Cir. 1978), to a claim for attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976. See also United States Steel Corp. v. United States, 519 F.2d 359 (3d

Cir. 1975) and Tillman v. Wheaton-Haven Recreation Ass'n., 580 F.2d 1222, 1225 (4th Cir. 1978).

When a party has "prevailed" and the court determines that an award of counsel fees is appropriate, the computation can be difficult.

In Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), cert. granted, 436 U.S. 547, 98 S.Ct. 52, 54 L.Ed.2d 71 (1977), rev'd on other grounds, No. 76-1484, May 31, 1978, the court observed at note 3 that the Senate Report to the Civil Rights Attorney's Fees Award Act of 1976[24] approved the standards applied by the district court in awarding counsel fees in Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974). In that case the court stated:

> This court, following the suggestion of the Ninth Circuit, intends to consider many of the factors listed in Johnson (Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)) within a modified version of the framework offered in Lindy Bros. (Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp., 487 F.2d 161 (3d Cir. 1973)). Specifically, the court will consider: the amount of time devoted by the attorneys to the litigation; the value of the time in light of billing rates and of the attorneys' experience, reputation, and ability; and the the attorneys' performance, given the novelty and the complexity of the legal issues in the litigation. This consideration will be grounded upon the court's opportunity to view the attorneys' work during the course of litigation and upon the information provided by the parties in their numerous briefs and affidavits.

64 F.R.D. at 682-83.

Lindy v. Am. Radiator, 540 F.2d 102 (3d Cir. 1976) (en banc), (Lindy II) and Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I) are the leading cases in

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24. Sen. Rep. No. 94-1011, 94 Cong., 2d Sess., 4, reprinted in (1976) U.S. Code Cong. & Ad. News 5908, 5912.

establishing standards for the determination of fees. Lindy I announced a formula that starts with a basic "lodestar" -- a calculation of time spent times the hourly rate usually charged by the lawyer. The "lodestar" can be increased by a contingency factor; it can be either increased or decreased by a quality-of-work factor. In Lindy II the court stressed that these general considerations must be affected by particular features of the case. For example, under the rubric "contingency of success," considerations might be the complexity of the case, whether there is controlling case law, whether defendant's liability is clear. 540 F.2d at 117. Under the rubric of quality-of-work, considerations might be whether "the lawyer discharged the professional burden undertaken with a degree of skill above or below that expected for lawyers of the calibre reflected in the hourly rates." 540 F.2d at 118.

King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), following a Lindy approach, determined that mechanical application of the Criminal Justice Act fee schedule was not proper. The court recognized that the fee to be awarded is a matter within the sound discretion of the district court. However, the court did identify certain general criteria it expected the district courts to follow:

> 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform the legal services; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases . . . . These criteria are similar to those in the ABA Code of Professional Responsibility and we approve them for use in Fees Act cases within this district.

The court of appeals applied the criteria to the court's award of $50 an hour for a total of eighty hours and

approved the award of $4,000.

In Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977), the court determined that although counsel had not submitted sufficiently detailed time sheets as required by King, supra, the lower court properly accepted counsel's one affidavit as to the time spent on the case since the standards set forth in King had been developed years after counsel's services were rendered. The court noted that the fees for the three attorneys, in the amounts of $19,402.50, $2,040, and $1,776, were very high but approved them. The court further determined that a district court could award counsel fees for the appellate work of the attorneys. However, since the court of appeals was in a better position to assess the importance and quality of appellate work, the court of appeals was required to give less deference to the district court's determination. The court further held that plaintiff's attorneys were not necessarily precluded from receiving a fee for time spent litigating the issues of fees. The court stated: "[T]he fact that litigation over fees only indirectly benefits the plaintiff class is a consideration of some importance in a determination of the reasonableness of a particular fee for these services." 564 F.2d at 614. The court determined that the fee awarded to one of the attorneys for his work performed on appeal was required to be reduced to no more than $50 an hour.

The Fifth Circuit, in Rainey v. Jackson State College, 551 F.2d 672, 677 (5th Cir. 1977), identified the factors to consider in awarding attorneys' fees as basically those set forth in King, supra. After considering those factors the court of appeals determined that the fee should be $35 per hour for the period through the first appeal and one half that amount for the second appeal.[25]

In Miller v. Carson, 563 F.2d 741, 756 (5th Cir. 1977), the court found no error by the trial court in setting the attorney's fee at $60 an hour for in-court time, $40 an hour for out-of-court time for primary counsel, and $30 an hour for less experienced lawyers working with him.

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25. Part of the work by counsel on the second appeal related to plaintiff's unsuccessful claims.

Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977) held that the district court had improperly denied plaintiff's request for attorneys' fees and after reviewing the affidavits of plaintiff's attorneys setting forth their experience, the number of hours spent on the case, and the suggested hourly rate, awarded counsel fees in the amount requested: $2,276.25, allowing $65 per hour for 29.25 hours for one attorney and $75 per hour for a total of five hours for the other attorney. Brown, 559 F.2d at 276 n. 4. See also Walston v. School Bd. of City of Suffolk, 566 F.2d 1201, 1205 (4th Cir. 1977) (award of counsel fees inadequate where based solely on amount of award recovered).

Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977), was a class action based upon sex discrimination in employment under the Civil Rights Act of 1964. The court stated:

> The awarding of counsel fees is a matter of discretion with the trial court, but we have provided objective standards to guide and facilitate the sound exercise of that discretion. Lindy Bros. Builders, Inc. of Phila. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I), and Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (Lindy II). The district court is required to employ the formula we devised and to articulate the values of its variable components. The total time expended and a reasonable hourly rate are the elements of the initial computation. That calculation in turn must be adjusted to reflect the quality of the work, benefit to the client, and contingency of the result in order to arrive at a reasonable value of the attorneys' services. If the district court applies this criterion to findings of fact which are not clearly erroneous, it acts within its discretion and the decision will not be disturbed.

557 F.2d at 1018. Later, the court mentions the possibility of adjustments to the fee scale:

> [W]e observe that the "quality" factor requires the court to adjust a fee on the basis of results of the work performed. Quality in this sense includes efficiency. If the attorney achieves good results with a minimum time expenditure, the total award may be increased to reflect efficiency and benefit to the client . . . . Conversely, emphasis on the objective quantity of time spent should not shield wasteful or inefficient logging of hours from scrutiny, and the court should reduce the compensation when that practice occurs. Similarly, hours spent on purely clerical matters, easily delegable to nonprofessional assistants, should not be valued at legal service rates.

557 F.2d at 1019. In that case the class action had been settled and the proposed settlement petition provided for payment of counsel fees as part of the settlement. The court noted that there was, in reality, only one fund for both the class and attorneys' fees. In such a case the defendant was interested only in disposing of the total claim asserted against it and was not interested in allocation between the attorneys' fees and payment to the members of the class. The court of appeals determined that the district court had properly required public disclosure of the basis for the fees, even though the defendant had agreed to the amount:

> A reasonable solution, we suggest, is for trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation for the attorneys begin. This would eliminate the situation found in this case of having, in practical effect, one fund divided between the attorney and client.

557 F.2d at 1021.

The Third Circuit, in Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978), reversed and remanded where the district court attempted to make recovery of counsel fees proportional to the extent plaintiff prevailed in the action. Although the number of hours of service multiplied by the hourly rate totaled $3,850, the district court reduced the award by two-thirds to $1,275 since plaintiff prevailed on only one-third of the issues involved, and further reduced the award to $700 by finding that the work was "good" but "simple". The court of appeals held that the automatic reduction was legally impermissible and remanded the case for reconsideration. In doing so the court stated that legal services fairly devoted to successful claims are compensable even though they supported the prosecution of unsuccessful claims, and that the simplicity of issues is reflected only in determination of the number of hours reasonably devoted to the successful claims.

Courts have held that the Attorney's Fees Awards Act of 1976 is applicable to cases which were pending at the time of its passage. Souza v. Southworth, 564 F.2d 609, 611 (1st Cir. 1977); Martinez Rodriguez v. Jimenez, 551 F.2d 877 (1st Cir. 1977); Miller v. Carson, 563 F.2d 741, 754 (5th Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672, 676 (5th Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977); Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977). But see Zurcher v. Stanford Daily, 550 F.2d 464 (9th Cir. 1977), cert. granted, 434 U.S. 816, 98 S.Ct. 52, 54 L.Ed.2d 71 (1977), rev'd on other grounds, 436 U.S. 547, 98 S.Ct. 1970, 58 L.Ed.2d ___ (1978) (presenting question of retroactivity of attorneys' fees amendment).

In prisoner cases in which the Civil Rights Attorney's Fees Awards Act is not applicable, the court may award counsel fees to a successful plaintiff at the conclusion of the case where (1) they are authorized by statute or enforceable contract; (2) a common benefit is conferred by the recovery of a fund or property; (3) a party has willfully disobeyed a court order; or (4) the losing party has acted in bad faith,[26] vexatiously, wantonly, or for oppressive reasons. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 257-59, 95 S.Ct. 1612, 1620-23, 44 L.Ed.2d

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26. See Carter v. Noble, 526 F.2d 677 (5th Cir. 1976) (single bad faith incident affecting one person sufficient to justify award of counsel fees to aggrieved party).

141, 153-56 (1975).

Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53, 58 (3d Cir. 1976) concluded that a fifth situation in which counsel fees could be awarded would occur where there had been prelitigation vexation or oppression in resisting a just claim. However, such an award would not be available against an immune sovereign.

E. Obtaining the Presence of Plaintiff and His Witnesses

When a hearing is required in a habeas corpus action, the witnesses are usually law enforcement officials who participated in some way in obtaining the plaintiff's conviction, and prosecution and defense attorneys. These witnesses can be summoned by subpoena. However, there are major problems in obtaining the presence in court of prisoner plaintiffs and their witnesses. In addition to the security problems presented when large numbers of prisoners must be brought to the court, further problems arise in determining the party responsible for bringing the witnesses to court and for paying the expenses. The plaintiff is usually proceeding in forma pauperis, and both the marshal and the institution officials object to being required to transport the prisoners and to paying for transportation of the plaintiff and his witnesses. The marshal takes the position that the costs cannot be imposed on the government. There is no clear cut legal precept that controls this problem. The courts have been solving it on an ad hoc basis.[27]

One court's solution -- staying all proceedings until the plaintiff was released from custody -- was rejected by the Court of Appeals for the Ninth Circuit. Wimberly v. Rogers, 557 F.2d 671 (9th Cir. 1977) stated:

> The district court's indefinite stay of all proceedings is tantamount to a denial of due process. Simply because a person is incarcerated does not mean that he is

27. See Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Tentative Report No. 2, May 20, 1977) 12-13. (Hereinafter Aldisert Report).

> stripped of free access to the courts and the use of legal process to remedy civil wrongs. The rule of this Circuit is that: "This is governed by law and not by discretion."

557 F.2d at 673.

Matter of Warden of Wisconsin State Prison, 541 F.2d 177 (7th Cir. 1976) held that prisoners do not have an absolute constitutional right to be present at their trials. In each case a discretionary decision must be made to determine whether the fulfillment of a fundamental interest of the prisoner so reasonably requires his being transported to court that it outweighs the state's interest in avoiding the risks and expense of such transportation:

> It can be granted that the right of a prisoner to file a civil action may have little meaning if success is reasonably dependent on his immediate presence in court, and such presence is denied. But we would not accord him an automatic right to be present, and thus present the state, as was done by the relief granted here, with the choice of releasing him from custody, or bringing him to court at substantial expense.
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> . . . Some of the relevant considerations would seem to be: How substantial is the matter at issue? How important is an early determination of the matter? Can the trial reasonably be delayed until the prisoner is released? Have possible dispositive questions of law been decided? Has the prisoner shown a probability of success? Is the testimony of the prisoner needed? If needed, will a deposition be reasonably adequate? Is the prisoner represented? If not, is his presence reasonably necessary to present his case?

541 F.2d at 181.

Although Stone v. Morris, 546 F.2d 730 (7th Cir. 1976) again recognized that a prisoner does not have a constitutional right to appear as a witness in his own civil rights action, it held that the district court had erred in summarily excluding the plaintiff from his trial. Factors to be considered in determining whether a prisoner should be permitted to attend the trial of his claim include cost and inconvenience of transportation; security risks; substantiality of matters at issue; the need for an early determination of the matter; possibility of delaying trial until the prisoner is released; probability of success on the merits; integrity of the correctional system; and the interests of the inmate in presenting his testimony in person rather than by deposition.[28]

Heidelberg v. Hammer, 577 F.2d 429 (7th Cir. 1978) held that the district court had improperly dismissed plaintiff's action for failure to prosecute when plaintiff, who was in custody, had failed to apply for a writ of habeas corpus ad testificandum and therefore failed to appear for his trial:

> If the question of whether a writ of habeas corpus ad testificandum should issue was considered by the court and decided in the negative, a dismissal of the action could not properly be based on the fact that the plaintiff failed to come to court, at least until other possible methods of disposing of the case on the merits, such as a bench trial in the prison if the plaintiff waived a jury, or trial by depositions, had been explored and found not to be feasible. If the reason the writ was not issued was that plaintiff did not ask for it, we think dismissal was still not justified.

577 F.2d at 431. The court referred to its two earlier opinions, Stone v. Morris, supra, and Moeck v. Zajackowski, supra, and added to the factors considered in those cases the defendant's possible interest in having a claim against him decided within a reasonable time, rather than left pending. The court noted that if it appeared that the plaintiff would be released from incarceration within a reasonable time, postponement

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28. See also Armstrong v. Rushing, 352 F.2d 836 (9th Cir. 1965) (prisoner plaintiff not entitled to personal appearance at § 1983 hearing as a matter of right).

of the trial might be a sensible alternative to requiring the plaintiff's presence in court. However, if plaintiff would be incarcerated for many more years, postponement would not be a satisfactory solution.

Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977) upheld the district court's order issuing writs of habeas corpus ad testificandum requiring the state of Florida to deliver six prisoners into the custody of the United States marshal who was directed to bring the prisoners before the court so that they might appear and testify. The marshal argued that the state of Florida should bear complete responsibility for transportation, but the court noted that since the rights involved were federal in nature and were important to the constitutional scheme, the decision was within the discretion of the district court.

As to the plaintiff's right to call witnesses, in Cook v. Bounds, 518 F.2d 779 (4th Cir. 1975), the court stated:

> In regard to Cook's request for witnesses, the district court advised him that it was necessary that he demonstrate to the court the nature and materiality of the testimony. When Cook failed to do so, the court properly declined to order such witnesses to appear at the trial.

518 F.2d at 780.

The Aldisert Report[29] suggests that the plaintiff be required to summarize in his pretrial statement his testimony and the anticipated testimony of witnesses who are incarcerated.

Marks v. Calendine, ____ F. Supp. ____ (N.D. W.Va., filed June 13, 1978) (76-283-E) required the losing pro se plaintiff to pay both his costs (although he had been granted leave to proceed in forma pauperis) and those of the defendants, who obtained a jury verdict in their favor. The court found that the plaintiff did not bring the action in good faith. The plaintiff had sought to have seven guards and prison officials subpoenaed and to have twenty-three inmates brought in

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29. Aldisert Report (supra, Section I,E, n. 27) at 70, 92 (1977 ed.).

pursuant to writs of habeas corpus ad testificandum. After the attorney who had been requested by the court to represent the plaintiff consulted with the court, the requests for prisoner witnesses were reduced to three. The court noted that persons granted leave to proceed in forma pauperis are not absolved of liability for costs. Their payment is merely delayed until final determination of the case.

F. Continuing Clashes Between Parties

Another major difference between habeas corpus and prisoner civil rights actions is that while the prisoner names the warden as the nominal defendant in habeas actions, there is usually no real conflict between the parties to the suit. However, in prisoner civil rights actions the prisoner is usually seeking money damages from the prison officials in whose custody he is being held and continual clashes between the parties are common. Prisoners frequently claim they are being punished in retaliation for filing their lawsuit. While prison officials are not permitted to punish or harass a prisoner for filing a lawsuit, they must have the power to maintain security and punish prisoners for misconduct and violations of the rules of the institution. When a prisoner is disciplined after filing a lawsuit, the court frequently becomes involved in determining whether the punishment constituted harassment for filing the lawsuit as the plaintiff contends, or whether the prisoner, as the institution contends, intentionally provoked prison officials or required disciplinary action by misconduct unrelated to the lawsuit.

Plaintiff's allegations of harassment for filing the lawsuit were found to be true by the district court in Ruiz v. Estelle, 550 F.2d 238 (5th Cir. 1977), and injunctive relief was granted. On appeal the court stated:

> A review of the record reveals that as a result of their instigation of and participation in this litigation, these named plaintiffs have indeed been treated as a special class of inmates by the officers and officials of the Texas Department of Corrections. The record discloses that in response to their participation in this litigation, these inmates have been subjected during

> its pendency to threats, intimidation, coercion, punishment, and discrimination, all in the face of protective orders to the contrary by the district court and our long-standing rule that the right of a prisoner to have access to the courts to complain of conditions of his confinement shall not be abridged.

550 F.2d at 239.

Collins v. Schoonfield, 344 F.Supp. 257 (D. Md. 1972) held that both the prisoner plaintiffs and defendant jail officials were guilty of wrongful conduct. The court stated:

> [C]ounsel for plaintiffs complained that plaintiffs, and other inmates of the Jail cooperating with them, were discriminated against by Jail officials because of the pendency of this case; and counsel for defendants stated that at least some of the plaintiffs were intentionally attempting to provoke reprisals by Jail officials so that plaintiffs could point to such reprisals, during trial, as instances of unconstitutional conduct.

344 F.Supp. at 266. The court had instructed counsel for the defendants to inform them that no inmate was to be discriminated against or be the subject of any retaliatory or disciplinary action because of his participation in the case. Counsel for plaintiffs were instructed to inform the plaintiffs that the court would expect them not to utilize the pendency of trial of the case to create problems of administration and discipline. The court found that both sides had violated the spirit of the court's instructions. Further, the court stated:

> As the trial judge in this case, I witnessed from the bench, displayed on the faces of witnesses and parties, the most deeply felt antagonisms and resentments. Nearly each time I made a ruling, even of a minor evidentiary nature, daggers of criticism, displeasure and deep emotion burst forth from the faces of the side against

whom I ruled. And that was true of those in authority as well as those confined.

Against that background, while it is not hard to recognize the factual and legal issues and sub-issues in this case, it is more difficult to provide or even to suggest solutions in connection with them, and it is most difficult for those charged with the task to establish an ongoing system which meets the minimums of federal constitutional principles and hopefully of higher standards.

[T]he tensions between those in command and those subject to command have long since passed the boiling point. While those tensions may have been exacerbated in and by this suit, nevertheless, the very pendency of this suit -- and the drama of the courtroom -- has provided, at least to some extent, an opportunity for some steam to escape from what has largely been a sealed cauldron.

344 F.Supp. at 268.

An allegation in Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974), that three incident reports were filed on plaintiff after he filed a writ of habeas corpus was held insufficient to justify habeas relief. The court noted that the question was moot since plaintiff had been transferred to another prison and the alleged harassment ceased.

G. Amendments to Complaint

Since the civil rights plaintiff and the prison officials tend to engage in continual clashes,[30] plaintiffs continually seek leave to amend their complaints to add new causes of action. Of course, the defendants must respond to each new amendment to the complaint. Sometimes the plaintiff loses interest in his original claim and is really only prosecuting the

30. See Section II,F supra.

later ones. The pleadings drafted by the prisoners are often difficult to comprehend and their continual amendments create a confusing, bulky maze of a record. Three recent Third Circuit cases have emphasized the importance of allowing plaintiffs (non-prisoners) to amend their complaints prior to dismissal: Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976); Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976); Dougherty v. Harper's Magazine Co., 537 F.2d 758 (3d Cir. 1976). The Second Circuit, on the other hand, has approved an order denying a tardy motion for leave to amend. Mukmuk v. Com'r. of Dept. of Correctional Services, 529 F.2d 272 (2d Cir. 1976), cert. denied 426 U.S. 911, 96 S.Ct. 2238, 48 L.Ed.2d 838 (1976).[31]

Where the named defendants, supervisory officials who allegedly observed the assault of plaintiff, were entitled to summary judgment, the district court should have advised plaintiff that pursuant to Rule 19(a), F. R. Civ. P., he could have joined the correctional officers as a defendant, and should have given him leave to do so. Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978):

> A district court is not required to act as an advocate for a pro se litigant; but when such a litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how

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31. See also Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970) (although civil rights complaints must be specifically pleaded to avoid a motion to dismiss, rule does not subvert liberal policy of amendment); Neal v. State of Georgia, 469 F.2d 446 (5th Cir. 1972) (district court in best interest of orderly procedure should allow state prisoner to amend pro se complaint to name additional parties); Hansen v. May, 502 F.2d 728 (9th Cir. 1974) (state prisoner had right to amend complaint to allege warden personally took active part in confiscation of property); Vinson v. Richmond Police Dept., 567 F.2d 263 (4th Cir. 1977) (court of appeals would have remanded to permit amendment to bring in as parties defendant the actual officers involved in illegal taking but this would have been fruitless since statute of limitations had expired).

> to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court.

574 F.2d at 1152. Bolding v. Holshouser, 575 F.2d 461, 465 (4th Cir. 1978) observed that the district court had properly dismissed plaintiff's claim alleging denial of procedural due process for the reason that their allegations were so general and broad that they stated conclusions of law rather than a short and plain factual statement showing they were entitled to relief. However, the court stated:

> However, any such dismissal should be with leave to amend within a reasonable period to correct the omissions and deficiencies of the pleader by supplying specific allegations concerning those practices which are claimed to violate the due process clause.

575 F.2d at 465.

H. Temporary Restraining Orders

Throughout the proceedings, civil rights prisoner plaintiffs frequently file motions for temporary restraining orders under Rule 65(b) of the Federal Rules of Civil Procedure. These motions must be disposed of promptly.

There are basically five requirements for the plaintiff to satisfy in order to obtain a temporary restraining order. First, the defendant must have been notified of the motion, or the plaintiff must certify in writing the efforts he has made to give notice, and the reasons supporting his claim that notice should not be required. Rule 65(b) of the Federal Rules of Civil Procedure. Further, the four basic elements which must be shown for the issuance of a preliminary injunction must also be shown for the issuance of a temporary restraining order.[32] The plaintiff must make a strong showing that he is likely to prevail on the merits; he must show that without such relief he will be irreparably injured; he must show that the grant of the

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32. Murphy v. Society of Real Estate Appraisers, 388 F. Supp. 1046 (E.D. Wis. 1975).

injunction will not substantially harm other parties interested in the proceedings; and the public interest must be considered.[33]

I. Jury Trial

Habeas corpus actions are disposed of by the court without a jury[34] while civil rights plaintiffs seeking damages have the right to a jury trial.[35] Rule 38 of the Federal Rules of Civil Procedure requires that a demand for trial of any issue triable of right by a jury be filed and served not later than ten days after the service of the last pleading directed to such issue. The demand may be endorsed upon a pleading of the party. Under section (d) of Rule 38, the failure of a party to file and serve a demand as required by the rule constitutes a waiver of trial by jury. By subsequently amending the complaint the plaintiff may not revive his right to jury trial on the issues formed by the original pleadings. Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977); Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978). Where a party failed to make a timely demand for a jury trial and then moved to amend the complaint by adding his wife as a plaintiff, the district court did not err in denying the wife's demand for a jury trial. Commonwealth ex rel. Feiling v. Sincavage, 439 F.2d 1133 (3d Cir. 1971).

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33. Chesimard v. Mulcahy, 570 F.2d 1184 (3rd Cir. 1978); A. O. Smith Corp., et al. v. Federal Trade Commission, 530 F.2d 515 (3d Cir. 1976). See also National Prisoners Reform Assn. v. Sharkey, 347 F.Supp. 1234 (D. R.I. 1972) (to prevail on motion for temporary restraining order plaintiff must show immediate and irreparable injury, probable success on the merits, and that possible harm to movant outweighs harm to opposing party).

34. 28 U.S.C. § 2243.

35. See McCray v. Burrell, 516 F.2d 357, 371 (4th Cir. 1975), cert. dismissed 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976) (request for jury trial denied as untimely and not in writing); Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Amburgey v. Cassady, 507 F.2d 728 (6th Cir. 1974); Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974). Jury trial on factual issues underlying declaratory judgment action, Guajardo v. Estelle, 580 F.2d 748, 752 (5th Cir. 1978).

SECTION III: ROLE OF THE MAGISTRATE

The source of magistrates' jurisdiction to handle prisoner civil rights actions is 28 U.S.C. § 636(b)(1), which provides:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment --
>
> . . . .
>
> (b) (1) Notwithstanding any provision of law to the contrary --
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial

relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master purusant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

Under § 636(b)(1) the case may be assigned to a magistrate to dispose of all pretrial matters except motions for injunctive relief, judgment on the pleadings, summary judgment, to dismiss or permit maintenance of a class action, and to involuntarily dismiss.

A magistrate may be designated to hear and submit a recommendation on the motions excepted from the magistrate's dispositive authority; and unless the plaintiff seeks money damages and one of the parties makes a timely demand for a jury trial,[36] the magistrate may be directed by the judge to conduct a hearing and submit proposed findings of fact and a recommendation for disposition of the action by a judge of the court. The parties are allowed ten (10) days from the date of service of the magistrate's recommendation to file objections and the judge is required to make a de novo determination of those portions of the report or specific proposed findings of fact or recommendations to which objections are made.

The House Report, No. 94-1609,[37] explains the "de novo determination" as follows:

> [t]he district judge in making the ultimate determination of the matter [must] . . . give fresh consideration to those issues to which specific objection has been made by a party.
>
> The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject

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36. See Section II, supra.

37. 1976 U.S. Code Cong. and Ad. News 6163.

the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings.

The approach of the Committee, as well as that of the Senate, is adopted from the decision of the United States Court of Appeals for the Ninth Circuit in Campbell v. United States District Court for the Northern District of California, 501 F.2d 196 (9th Cir.), cert. denied 419 U.S. 879 (1974).

SECTION IV: FORMA PAUPERIS PETITIONS

The authority for allowing parties to proceed in forma pauperis is found at 28 U.S.C. § 1915, which provides:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

Section 1915(d) provides for the dismissal of these cases in certain limited circumstanstances:

> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

The decision whether or not to allow the plaintiff to proceed in forma pauperis under § 1915(a) should be based solely on financial considerations and should not be based on the merits of the claim.[38] However if the

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38. See, e.g., Aldisert Report, (supra, Section II,E, n. 27) at Part IV, C(2)(1977 ed.), Sinwell v. Shapp, 536 F.2d 15,18 (3d Cir. 1976); Mitchell v. Beaubouef, 581 F.2d 412 (5th Cir. 1978); Taylor v. Gibson, 529 F.2d 709, 714 n. 6 (5th Cir. 1976); Watson v. Ault, 525 F.2d 886, 890-91 (5th Cir. 1976); Forester v. California Adult Authority, 510 F.2d 58, 60 (8th Cir. 1975); Brown v. Schneckloth, 421 F.2d 1402, 1403 (9th Cir. 1970), cert denied 400 U.S. 847, 91 S.Ct. 95, 27 L.Ed.2d 85 (1970); Bennett v.

action is frivolous, leave should be granted and then the action may be dismissed without service of process under 28 U.S.C. § 1915(d).[39]

The Aldisert Report, supra, Section II,E, n. 27 at 86 (1977), includes a form "Declaration in Support of Request to Proceed in Forma Pauperis," which enables the court to obtain basic information concerning the plaintiff's financial status. The recent act authorizing the use of unsworn declarations under penalty of perjury, 28 U.S.C. § 1746, is particularly helpful in prisoner cases since prisoners frequently complain that they have limited access to a notary public.[40]

In an appropriate case an order may be entered requiring the prison records officer to submit a certificate stating the balance in the plaintiff's prison account.[41]

The Supreme Court decision construing section 1915(a) is Adkins v. Dupont, 335 U.S. 331, 69 S.Ct. 85, 93 L.Ed. 44 (1948). In that case the district court and the court of appeals had both denied plaintiff's motion for leave to appeal in forma pauperis. The plaintiff's affidavit stated she was a seventy-four

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Passic, 545 F.2d 1260 (10th Cir. 1976); Fulwood v. Clemmer, 295 F.2d 171, 172 n. 1 (D.C. Cir. 1961); Martin v. U.S., 273 F.2d 775, 778 (D.C. Cir. 1960). See concurring opinion of Mr. Justice Douglas in Cruz v. Hauck, 404 U.S. 59, 92 S.Ct. 313, 30 L.Ed.2d 217 (1971).

39. See Sinwell, Taylor, Watson, Forester, Bennett, Martin, note 38 supra. In the Seventh Circuit, after the petitioner is granted leave to file the complaint, it cannot be dismissed until the summons has issued in accordance with Rule 4(a) of the Federal Rules of Civil Procedure. Nichols v. Schubert, 499 F.2d 946 (7th Cir. 1974). However, the court may deny leave to proceed in forma pauperis if the action is frivolous or malicious. Wartman v. Branch 7, Civ. D., Cty. Ct., Milwaukee Cty., Wis., 510 F.2d 130 (7th Cir. 1975).

40. The affidavit or declaration should be signed by the plaintiff himself. Dother v. Rodman, 361 U.S. 307, 43 S.Ct. 374, 67 L.Ed.2d 670 (1923); Covington v. Cole, 528 F.2d 1365, 1371 (5th Cir. 1976).

41. Aldisert Report (1977 ed.), supra, Section II,E, n. 27.

year old widow; her estimated costs of the appeal record would be approximately $4,000. She stated that all she had was a home appraised at $3,450; that her only source of income was rent from parts of her home; and that without such income she would not be able to purchase the necessities of life. The district court appeared to have denied her request because neither the other plaintiffs nor her lawyers had filed affidavits of poverty. The Supreme Court vacated the orders denying leave to appeal in forma pauperis. The Court recognized the role of the court's discretion in disposing of forma pauperis requests under section 1915(a) and stated:

> We know of few more appropriate occasions for use of a court's discretion than one in which a litigant, asking that the public pay costs of his litigation, either carelessly or wilfully and stubbornly endeavors to saddle the public with wholly uncalled for expense. So here, the court was not required to grant the petitioner's motion if she wrongfully persisted in including in the appeal record masses of matter plainly irrelevant to the issues raised on appeal.

335 U.S. at 337, 69 S.Ct. at 88, 93 L.Ed. at 47. In discussing the sufficiency of the affidavit, the Court noted, "[W]here the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation." 335 U.S. at 339, 69 S.Ct. at 89, 93 L.Ed. at 48. However, in that case, since the affidavit estimated that the costs would be $4,000 and that the plaintiff could not pay or secure $4,000, the Court was justified in looking further to see if the cost really should have been $4,000. The Court discussed the standard to be applied in passing upon a request under section 1915(a):

> We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for the costs . . . and still be able to provide" himself and dependents "with the necessities of life."

> To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support.

335 U.S. at 339, 69 S.Ct. at 89, 93 L.Ed. at 49. The Court further held that the refusal or inability of other plaintiffs to file forma pauperis affidavits should not prevent the plaintiff from being granted forma pauperis status:

> This does not mean that one of several claimants financially able but unwilling to pay his proportionate part of the costs could demand the benefits of an appeal perfected by another claimant under the in forma pauperis statute. But it does mean in this case that the petitioner, upon making the required affidavit of poverty, was entitled to appellate review of the issues the district court decided against her, without regard to whether other claimants filed an affidavit of poverty, or paid or secured their fair part of the costs.

335 U.S. at 340, 69 S.Ct. at 89, 93 L.Ed. at 49.

Although Souder v. McGuire, 516 F.2d 820 (3d Cir. 1975), was a habeas corpus action, the court's discussion of the standards for determining whether to grant a forma pauperis application is relevant to civil rights actions:

> [W]e do not think that prisoners must totally deprive themselves of those small amenities of life which they are permitted to acquire in a

> prison or a mental hospital beyond the food, clothing, and lodging already furnished by the state. An account of $50.07 would not purchase many such amenities; perhaps cigarettes and some occasional reading material. These need not be surrendered in order for a prisoner or a mental patient to litigate in forma pauperis in the district court.

516 F.2d at 824. The court reversed the order denying leave to proceed in forma pauperis and remanded with directions to grant leave to proceed without prepayment of fees and costs or security therefor.

Braden v. Estelle, 428 F.Supp. 597 (S.D. Tex. 1977) held that the plaintiff can be required to pay a portion of the court costs:

> As emphasized throughout this Order, the purpose of the "partial payment" requirement is to curb the indiscriminate filing of prisoner civil rights actions by prompting inmates to "confront the initial dilemma which faces most other potential civil litigants: is the merit of the claim worth the cost of pursuing it?"

428 F.Supp. at 596.

Marks v. Calendine, ___ F.Supp. ___ (N.D. W. Va., filed June 13, 1978) (76-283-E) required the losing pro se plaintiff, who had been granted leave to proceed in forma pauperis, to pay both his costs and those of the defendants who obtained a jury verdict in their favor. The court found that the plaintiff did not bring the action in good faith.

SECTION V: ALTERNATIVES - DIRECTION OF SERVICE; AMENDMENT OF COMPLAINT; DISMISSAL AS FRIVOLOUS; REQUIRING INVESTIGATION OR SPECIAL REPORT

Once it is determined that the plaintiff should be granted leave to proceed in forma pauperis, the next step is determining whether the marshal should be directed to make service upon the defendants, whether the plaintiff should be given an opportunity to amend the complaint,[42] or whether the action should be dismissed as frivolous.[43]

Title 28, United States Code, section 1915(d), provides: "The court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous and malicious." Standard D of the Aldisert Report[44] recommends:

> If the court determines that the complaint is irreparably frivolous or malicious, it should be dismissed without affording the plaintiff an opportunity to amend. If the court determines that the complaint is frivolous or malicious, but that this defect can be cured by amendment, the court should issue an order to show cause why the complaint should not be dismissed. The order should explain why the complaint is frivolous or malicious and should allow the plaintiff an opportunity to respond and to amend the complaint.

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42. See Section II,G supra.

43. See Section VI, infra.

44. See Section II,E n. 27 supra.

If the marshal is directed to make service, the order should provide "costs of service to be advanced by the United States." The plaintiff will not be prevented from commencing suit because of his lack of funds, but if it turns out that funds do become available to him, he could be required to reimburse the government for those costs. See Helwig v. Cavell, 171 F.Supp. 417 (W.D. Pa. 1959), aff'd 271 F.2d 329, cert. denied 362 U.S. 954, 80 S.Ct. 870, 4 L.Ed.2d 872, rehearing denied 362 U.S. 992, 80 S.Ct. 1080, 4 L.Ed.2d 1024. See also Marks v. Calendine, ____ F.Supp. ____ (N.D. W. Va., filed June 13, 1978) (76-283-E).

Where the plaintiff has been granted leave to proceed in forma pauperis but the court subsequently determines that the complaint is frivolous or malicious, it can be dismissed without service of process.[45]

The Aldisert Report[46] suggests that in selected cases a special order be entered requiring the defendant to investigate the case and to report the results of his investigation to the court. Form 8 of the report is a suggested order requiring a special report.[47] The uses for the special report are discussed in detail in the committee's report. This special report was commented upon by the Fifth Circuit in Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975):

> It is not clear how this 'special report' procedure interacts with the more familiar processes of pre-trial practice under the Federal Rules of Civil Procedure which ordinarily would govern Section 1983 cases. To

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45. Watson v. Ault, 525 F.2d 886 (5th Cir. 1976); Forester v. California Adult Authority, 510 F.2d 58 (8th Cir. 1975). See Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). However, this does not apply in the Seventh Circuit since after the plaintiff is granted leave to file the complaint, it cannot be dismissed until summons has issued. Nichols v. Schubert, 499 F.2d 946 (7th Cir. 1974).

For a discussion of the applicable standards for the determination of whether the complaint is frivolous or malicious, see Section VI infra.

46. See Section II,E n. 27, supra.

47. Id. at 94.

> the extent that requiring such 'special reports' does not divest the Section 1983 plaintiff of any of the rights he enjoys under the Federal Rules of Civil Procedure and the non-exhaustion doctrine, it would appear to be a worthwhile innovation. Such 'special reports' should not be devised as functional equivalents of the exhaustion of administrative remedies. Rather, if utilized, they should serve the useful functions of notifying the responsible state officials of the precise nature of the prisoner's grievance and encouraging informal settlement of it, or, at the least, of encouraging them to give the matter their immediate attention so that the case may expeditiously be shaped for adjudication.

517 F.2d at 298.

In Watson v. Ault, 525 F.2d 886 (5th Cir. 1976), the district court had improperly dismissed plaintiff's complaint as frivolous for plaintiff's failure to respond to a questionnaire prepared by the court for the purpose of developing the facts. Although the district court had erred in dismissing since the complaint alleged a cause of action, the court of appeals approved its use of the questionnaire, noting that it was a useful means for the court to develop the factual basis of the plaintiff's complaint and would aid in ferreting out instances where prisoners abused the processes of the court by multiple filings. The court noted that the form should be simple enough for the average prisoner to understand the questions. It should be concise and pertinent to the claim asserted. The answer to the questionnaire would be an integral part of the complaint, rather than a separate, independent pleading, since it would effectively amplify the original allegations of the complaint. The court also approved the withholding of service of process by the district court pending receipt of the questionnaire.

In Taylor v. Gibson, 529 F.2d 709 (5th Cir. 1976), plaintiff's complaint was assigned a docket number for record keeping purposes and then referred to a United States magistrate who entered an order, apparently prior to service of process, requiring factual responses

from the various defendants. Plaintiff submitted affidavits in response and the magistrate's recommendation that plaintiff be denied leave to proceed in forma pauperis was adopted by the district court. The court of appeals reversed, finding that the court had erred in resolving matters of credibility on the basis of affidavits without conducting a hearing. The court noted that the "factual response" required of the defendants by the magistrate appeared to be similar to the questionnaires used in Watson, supra, and the special report discussed in Hardwick, supra. After commenting on the desirability for the district courts to develop imaginative and innovative methods of dealing with the flood of prisoner complaints in suits the court stated:

> The questionnaire, special report, and request for 'factual responses' all appear to be appropriate methods by which district courts have attempted to narrow and require specification of the issues raised. They are perhaps useful and valid tools and their use is not challenged here. We mention them as examples of the approach of some courts to this problem.

529 F.2d at 717.

Bruce v. Wade, 537 F.2d 850 (5th Cir. 1976) reversed the district court's dismissal of the complaint for failure to state a claim. Plaintiff had alleged that he was ordered beaten and confined under inhumane conditions by a deputy sheriff. However, the court commented that remand would not necessarily require a trial. The court stated:

> [A] wide range of pretrial procedures is available to the district judge as tools for assessing the factual basis of the claims asserted. These include pretrial hearing, summary judgment procedure, 'special reports' to be filed by prison officials, and even questionnaires in the nature of a motion for a more definite statement, Fed. R. Civ. P. 12(e), which the court may itself direct to the plaintiff. As long as a plaintiff's rights under the Federal Rules of Civil Procedure remain inviolate, the trial judge may

> choose among these or other procedures, and we do not suggest that the facts of this case require the use of any particular device.

537 F.2d at 853 n. 5.

In Hurst v. Phelps, 579 F.2d 940 (5th Cir. 1978), the court of appeals vacated the district court's dismissal of the action which was based upon the recommendation of a magistrate who had ordered the Secretary of Corrections to file an administrative report. After receipt of the report the magistrate made factual determinations on the merits of plaintiff's claim in which he alleged he had been denied medical treatment by prison officials, and recommended that the case be dismissed. The court of appeals commented that the procedure utilized did not comport with the Federal Rules of Civil Procedure or the applicable case law. Therefore, the court remanded for further proceedings.

Similarly in Mitchell v. Beaubouef, 581 F.2d 412 (5th Cir. 1978), the court disapproved of the dismissal of the complaint based upon an unverified administrative report of the defendants filed pursuant to a magistrate's order. The court stated that the district court could have relied on the report in reaching summary judgment if it had conformed to the requirements of Rule 56 of the Federal Rules of Civil Procedure.

In Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978), the plaintiffs had alleged that their personal property was stolen and confiscated by the defendant correctional officers during a routine shakedown of their dormitory. Before the answer was filed the trial court ordered the prison officials to conduct an investigation of the incident including an interrogation of the persons concerned. The transcripts of the interrogations, which were not required to be under oath, and an explanation by the officials were to be attached to the defendants' answer. The trial court then dismissed the complaint as frivolous under 28 U.S.C. section 1915(a) and (d). The dismissal was based to some extent upon the prison officials' investigation as reported to the court. The court of appeals approved the practice, stating:

> We consider this order and practice to be not only proper but necessary for the orderly consideration of the issues

> in this case and in other cases of this nature. The order could very well require witnesses to be sworn. It comes at a stage in the proceedings when it may be more useful to all parties than would be the use of interrogatories . . . .
>
> We must also hold that if the method described above could not have been followed, and as an alternative thereto, that a 'record' could have been made by the imposition of a requirement that it be developed by the state authorities by use of administrative or grievance procedures provided for the state prison. This is, of course, not an exhaustion requirement and is especially important for the reasons alluded to above.

570 F.2d at 319.

In Martinez v. Chavez, 574 F.2d 1043 (10th Cir. 1978), the plaintiff alleged that during his four months in the county jail he had been subjected to cruel and unusual punishment in the form of suffocating conditions as a result of inadequate ventilation. The plaintiff was granted leave to proceed in forma pauperis and the defendant filed an answer arguing that plaintiff's complaint failed to allege a violation of a federal constitutional right. The district court ordered the parties to submit affidavits and counteraffidavits. The court then dismissed the complaint as frivolous under section 1915(d). The court approved the procedure utilized by the district court, noting that the affidavits revealed that the defendants had reported plaintiff's complaints regarding ventilation to the proper authorities. Therefore, it was clear that he was not deliberately indifferent to plaintiff's complaint. Accepting all of plaintiff's allegations of fact as true, it was clear that he could not establish a claim against the defendant. Therefore, the dismissal was proper. The court commented that the burden was on the district courts to develop effective and legally permissible methods of dealing with the ever increasing numbers of prisoner civil rights actions. See also Gordon v. Leeke, 574 F.2d 1147, 1150, 1152 (4th Cir. 1978).

SECTION VI: FRIVOLOUS OR MALICIOUS TEST[48]

In the context of section 1915(d), the allegations of the complaint must be accepted as true. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers.[49] The Court noted in Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[50] In Slavin v. Curry, 574 F.2d 1256, 1260 (5th Cir. 1978), the court stated that "a judge cannot allow the personal view that the allegations of a pro se complaint are implausible to temper his duty to appraise such pleadings liberally."

Bennett v. Passic, 545 F.2d 1260, 1261 (10th Cir. 1976) identified the test for frivolousness as "whether the plaintiff can make a rational argument on the law or facts in support of his claim." Watson v. Ault, 525 F.2d 886, 892 (5th Cir. 1976), adopted the test for frivolous appeal defined by the Supreme Court in Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493, 498 (1967), as being whether it was without arguable merit, both in law and in fact.

Duhart v. Carlson, 469 F.2d 471 (10th Cir. 1972) found that the district court had not erred in dismissing the complaint as frivolous and malicious where

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48. See Section V, supra.

49. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

50. Although Scheuer involved a motion to dismiss, rather than dismissal without service of process, this language was quoted by the Court in Estelle.

the plaintiffs had brought many other complaints in the district court in which they made the same allegations and asked for similar relief.[51] The court of appeals noted that a court "may take judicial notice of its own records."

An example of an exceptionally litigous prisoner plaintiff is found in Carter v. Telectron, Inc., 452 F.Supp. 944 (S.D. Tex. 1977).[52] There the court found that in a 15 year period the plaintiff had instituted at least 178 cases throughout the country, attempting to proceed in most of them as a pauper without prepayment of fees. The court found that the plaintiff had misused the section 1915 privilege in filing untrue allegations of poverty, in repeatedly suing certain defandants in different districts and divisions on the same or similar causes of action, in varying his allegations of citizenship in order to facially invoke federal diversity jurisdiction, in failing to disclose prior similar actions and their dispositions, in obtaining default judgments by use of the Texas Long Arm Statute, and failing to serve pleadings on defendants. The court also observed that the pleadings in some of the cases raised the possibility that the plaintiff filed forged answers in order to establish in personam jurisdiction over defendants and to place in the record admissions of liability for purposes of a subsequent motion for summary judgment.

There does not seem to be a meaningful distinction between the test for dismissal under section 1915(d) as frivolous and the test for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the district court dismissed the complaint sua sponte simultaneously with granting leave to file it in forma pauperis. Although the dismissal would therefore appear to be under section 1915(d), both the district court and the Supreme Court considered the proper test to be whether the complaint stated a cause of action. Estelle was followed in Smart v. Villar, 547 F.2d 112 (10th Cir. 1976), where the court affirmed a dismissal under section 1915(d), appearing to apply the "cause of action" test, rather than the "frivolous or

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51. Accord Graham v. Riddle, 554 F.2d 133 (4th Cir. 1977).

52. See also Section VII infra.

malicious" test. However, in Lewis v. State of New York, 547 F.2d 4 (2d Cir. 1976), the court held that the district court had improperly dismissed for failure to state a claim prior to service of process. The court in discussing the procedural problems presented by sua sponte dismissal stated: "Failure to afford plaintiffs an opportunity to address the court's sua sponte motion to dismiss is, by itself, grounds for reversal." 546 F.2d 6 n. 4.

In Massey v. Hutto, 545 F.2d 45 (8th Cir. 1976), the court directed the prison authorities to produce plaintiff's prison medical records and then dismissed plaintiff's three complaints. Although it is not entirely clear from the opinion, the dismissals appear to have been prior to service of process and to have been based upon each complaint's failure to state a claim. The court of appeals affirmed as to two dismissals, but reversed as to the third, appearing to apply the "statement of a claim" test.

A complaint should not be dismissed sua sponte on an objection to the complaint, such as improper venue, which would be waived if not raised by the defendant in a timely manner. Sinwell v. Shapp, 536 F.2d 15 (3d Cir. 1976).

Gordon v. Leeke, 574 F.2d 1147, 1152 (4th Cir. 1978), reversed dismissals of two actions, admitting that the plaintiffs had failed to make out claims against the named defendants:

> A district court is not required to act as an advocate for a pro se litigant; but when such a litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court.

574 F.2d at 1152.

In Wilson v. Zarhadnick, 534 F.2d 55 (5th Cir. 1976) the district court had gone too far in assisting the pro se plaintiff. The plaintiff wrote a letter to

the district judge complaining that the superintendent refused to let him have his legal materials and seeking injunctive relief. The judge drafted a complaint in the nature of a section 1983 suit and ordered the defendant superintendent to show cause why a preliminary injunction should not issue. The court improperly granted class action injunctive relief, which had not been sought by plaintiff, and required the state to furnish a legal library, further relief not sought by plaintiff.

SECTION VII: FORMA PAUPERIS ACTIONS BY REPETITIVE LITIGANTS

A few courts have found that a repetitive plaintiff has abused the right to proceed in forma pauperis and have imposed upon him an affirmative burden to show good cause and that the action is not frivolous or malicious, prior to being allowed to proceed. In Graham v. Riddle, 554 F.2d 133 (4th Cir. 1977), the court affirmed the district court's order conditioning the plaintiff's right to file complaints in forma pauperis upon "good cause shown." In affirming the issuance of the order, the court further noted:

> It is quite clear that Congress, while intending to extend to poor and meritorious suitors the privilege of having their wrongs redressed without the ordinary burdens of litigation, at the same time intended to safeguard members of the public against an abuse of the privilege by evil-minded persons who might avail themselves of the shield of immunity from costs for the purpose of harassing those with whom they were not in accord, by subjecting them to vexatious and frivolous legal proceedings.
>
> . . . .
>
> In the instant case the district court did not abuse its discretion. It had experienced a plethora of frivolous, repetitive complaints. When it entered its order of April 12, 1973, it had every reason to expect the pattern to continue, as indeed it did. The district court was not required to go through the formalities of granting leave to file, docketing the case and then dismissing on the merits, as authorized by 28 U.S.C.

> Section 1915(d). It could properly follow the procedure of pre-filing review implicit in the discretionary authority vested in it by 28 U.S.C. § 1915(a).

554 F.2d at 134.

In Carter v. Telectron, Inc., 452 F.Supp. 944 (S.D. Tex. 1977), the plaintiff had filed at least 178 cases in a fifteen year period. The court adopted a special procedure whereby any future request by plaintiff to proceed in forma pauperis would be denied unless plaintiff made a showing of good cause for bringing the particular action at public expense:

> Because of his prior pattern of abuse, which this Court has no reason to expect will abate, plaintiff henceforth should carry a stronger burden of proving that he is economically unable to pay the initial filing and service fee or some portion thereof . . . and that the action is in good faith and not 'without arguable merit' or malicious.

452 F.Supp. at 998. The plaintiff's practice of filing similar suits in different jurisdictions led the court to invoke the "All Writs" statute, 28 U.S.C. § 1651, as authority for issuing a mandatory injunction imposing special requirements for every cause of action filed by plaintiff in any federal or state court. Plaintiff was required, in addition to making service of process as required by the appropriate rules, to personally send a copy of the complaint or petition and every subsequent pleading to the defendants or defense counsel, if known, and to submit documentary evidence of such service to the respective court in a supplemental pleading. Further, plaintiff was required to verify all pleadings submitted for filing; to include in every complaint or petition filed a list of all cases previously filed on the same, similar, or related cause of action, and all actions previously filed against one or more of the defendants, including predecessors or successors in interest or office; to include in every complaint or petition a statement referring to the court's opinion; to send a copy of every complaint or petition filed to the staff law clerk, Southern District of Texas, Houston

Division; and to provide the court with a list of causes of action not included in the list set forth in the court's opinion.

Walton v. Eaton Corp., 563 F.2d 66, 71 (3d Cir. 1977) held: "[T]he court must ensure that the plaintiff does not use the incorrect procedure of filing duplicative complaints for the purpose of circumventing the rules pertaining to the amendments of complaints . . . and demand for trial by jury."

Dictum in Hardwick v. Doolittle, 558 F.2d 292, 296 (5th Cir. 1977) recognized that when necessary to prevent harassment of successful litigants, the boundaries of res judicata and collateral estoppel can be protected by an injunction. In Hardwick res judicata and collateral estoppel did not apply because the action was habeas corpus.

SECTION VIII: REQUIREMENTS FOR A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983[53]

A. Action Under Color of State Law

The plaintiff in a section 1983 action must allege that the defendant or defendants were acting under color of state law. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 n. 5, 98 S.Ct. 1729, 1734 n. 5, 56 L.Ed.2d 185, 194 n. 5 (1978) stated: "The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the police were officially authorized, or lawful."

Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 482, 5 L.Ed.2d 492, 503 (1961), in discussing the meaning of "under color of state law," noted that "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[54]

Private citizens cannot be sued under section 1983 for non state-related activities[55] unless they conspired

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53. Section 1983 is set out in Section I supra.

54. The District of Columbia is not a "state" for purposes of jurisdiction under section 1983. District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), rehearing denied, 410 U.S. 959, 93 S.Ct. 1411, 35 L.Ed.2d 694.

55. Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978) (appointed defense counsel and investigator); Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975); Steward v. Meeker, 459 F.2d 669 (3d Cir. 1972) (private counsel); Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974) (private counsel); Thomas v. Howard, 455 F.2d 228 (3d Cir. 1972) (attorney who voluntarily represented plaintiff); U.S. ex rel Simmons v. Zibillch, 542 F.2d

with state officers.[56] There is a conflict among the circuits as to the liability of private citizens who conspired with immune state officers. Most circuits hold that the immunity of the state officer bars an action against the private citizens.[57] However, the First Circuit has declined to follow them: Slotnick v. Staviskey, 560 F.2d 31, 32-33 (1st Cir. 1977); Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978); Kermit Const. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976); and the Supreme Court has not yet decided the issue.[57a]

The Fifth Circuit holds that a "detention by store employees is under color of state law if it is demonstrated that the store employees and the police were acting in concert" in detaining a customer for suspicion of shoplifting "and that the store and the police had a customary plan which resulted in the detention." Duriso v. K-Mart No. 4195, Div. of S.S. Kresge Co., 559 F.2d 1274, 1277 (5th Cir. 1977).

Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975) found the complaint failed to state a cause of action against the attorney who merely served as

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259 (5th Cir. 1976) (attorney appointed from pool of attorneys of county legal aid criminal division); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (public defender acted under color of state law but he was immune). Deas v. Potts, 547 F.2d 800 (4th Cir. 1976) (private attorney represented criminal defendant); Blevins v. Ford, 572 F.2d 1336, 1338 (9th Cir. 1978) (attorney's representation of a criminal defendant is not state action or official conduct).

56. Adickes v. Kress & Co., 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142, 151 (1970); Alexanian v. New York State Urban Development Corp., 554 F.2d 15 (2d Cir. 1977); Weisman v. Lelandais, 532 F.2d 308 (2d Cir. 1976); Phillips v. Trello, 502 F.2d 1000 (3d Cir. 1974); Taylor v. Gibson, 529 F.2d 709 (5th Cir. 1976) (physician and hospital administrator); Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977). See Briley v. State of California, 564 F.2d 849, 855-56 (9th Cir. 1977).

57. Perez v. Borchers, 567 F.2d 285 (5th Cir. 1978); Humble v. Foreman, 563 F.2d 780 (5th Cir. 1977); Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974); Kurz v. State of Michigan, 548 F.2d 172 (6th Cir. 1977); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975).

57a. See Note, "Vicarious Immunity" of Private Persons in Section 1983 Actions: "An Unexamined Assumption," 28 Case Western Reserve L. Rev. 1014 (1978).

private counsel, but that it could state a cause of action against the attorney who allegedly participated with the police officers in an unconstitutional search. The court stated that "It has been observed that the test of 'under color' of law is difficult to satisfy in the case of one other than a government official." 529 F.2d at 74.

Witnesses who testify at trial are not acting under color of state law. Taylor v. Nichols, 558 F.2d 561 (10th Cir. 1977); Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976); Triplett v. Azordegan, 570 F.2d 819 (8th Cir. 1978); Blevins v. Ford, 572 F.2d 1336, 1338 (9th Cir. 1978).

Where a federal prisoner is temporarily placed in a county jail in custody of state prison officials, the state officials are acting under color of state law for purposes of section 1983. Henderson v. Thrower, 497 F.2d 125 (5th Cir. 1974).

Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977) held that a claim for malicious abuse of process sufficiently alleged an act done under color of state law.

State action was found to be lacking in Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) en banc. The plaintiff alleged that prison guards had negligently left his cell door open after a security search. When plaintiff returned to his cell after a work assignment, his cell door was ajar and his personal belongings were strewn on the floor. A copy of his trial transcript was missing. One of plaintiff's claims was that the guard's negligence in leaving his cell door open enabled an unknown person to remove the trial transcript from his cell. The court held that state action had ended before the plaintiff suffered his loss, and stated: "Here there was no state action depriving Bonner of property under the Fourteenth Amendment because any state action ended when the guards left the cell after the security search." 545 F.2d at 567.

B. The Defendant Must Be a "Person"

One requirement under the express terms of the Civil Rights Act is that the defendant must be a "person." 42 U.S.C. § 1983.

Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978) held that a municipality is a "person", thus overruling Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), insofar as Monroe held that local governments were wholly immune from suit under section 1983:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom Section 1983 applies. Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels . . . .
>
> On the other hand, the language of Section 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature constituted a constitutional tort. In particular, we conclude that a municipality cannot be held liable

> solely because it employs a tort-feasor -- or, in other words a municipality cannot be held liable under Section 1983 on a respondeat superior theory.

436 U.S. at 690, 98 S.Ct. at 2035, 56 L.Ed.2d at 635. The Court further stated:

> Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties nor addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under Section 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under Section 1983 "be drained of meaning," Scheuer v. Rhodes, 416 U.S. 232, 248 (1974). Cf. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 389, 397-98 (1971).

436 U.S. at 701, 98 S.Ct. at 2041, 56 L.Ed.2d at 642. In footnote 55, 436 U.S. at 690, 98 S.Ct. at 2036, 56 L.Ed.2d at 635, the Court stated "local government officials sued in their official capacities are 'persons' under Section 1983 in those cases in which, as here, a local government would be suable in its own name."

Further, in footnote 54, 436 U.S. at 690, 98 S.Ct. at 2035, 56 L.Ed.2d at 635, the Court stated that its holding was limited to local government units which are not considered part of the state for Eleventh Amendment purposes. The Court concluded:

> [A] local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983 . . . .

> [W]e have no occasion to address, and do not address, what the full contours of municipal liability under Section 1983 may be.

436 U.S. at 694, 98 S.Ct. at 2038, 56 L.Ed.2d at 638.

While a state may not be a "person" under section 1983,[58] a state official is a "person." Rochester v. White, 503 F.2d 263 (3d Cir. 1974). A state agency is not a "person." Edelberg v. Illinois Racing Board, 540 F.2d 279, 281 n. 2 (7th Cir. 1976).

The parole board is not a "person." Thompson v. Burke, 556 F.2d 231 (3d Cir. 1977). This applies to claims for both money damages and injunctive relief. Bricker v. Michigan Parole Board, 405 F.Supp. 1340, 1342 (E.D. Mich. 1975). A prison board is not a "person." U.S. ex rel. Arzonica v. Scheipe, 474 F.2d 720 (3d Cir. 1973).

C. Challenges to the Conditions of Confinement as Constitutional Violations--General Considerations

The very nature of lawful incarceration "brings about the necessary withdrawal or limitation of many privileges and rights."[59] In the past, federal courts adopted a hands-off approach, realizing that they were not adequately equipped to deal with problems of prison administration and reform.[60] However, a prisoner is not stripped of all constitutional protections upon his imprisonment,[61] and courts have a duty to insure

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58. Quern v. Jordan, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 47 U.S.L.W. 4241 (March 5, 1979) held that Monell does not abrogate the Eleventh Amendment immunity of the states. See Section XI, D, 4 infra.

59. Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495, 501 (1974); Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948).

60. Procunier v. Martinez, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224, 235 (1974).

61. Wolff v. McDonnell, 418 U.S. 539, 555, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935, 950 (1974).

that a prison regulation or practice does not offend a fundamental constitutional guarantee.[62] "[T]here must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."[63] "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[64]

Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) discussed the problem of whether transfer of a prisoner to another institution stated a constitutional violation:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.

427 U.S. at 228-29, 96 S.Ct. at 2540, 49 L.Ed.2d at 461. The Court also stated:

> We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause . . . .
>
> Similarly, we cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient

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62. Procunier v. Martinez, supra note 60; Johnson v. Avery, 393 U.S. 483, 486, 89 S.Ct. 749, 21 L.Ed.2d 718 (1969).

63. Wolff, supra note 61, at 556, 94 S.Ct. at 2975, 41 L.Ed.2d at 951.

64. Id. at 560, 94 S.Ct. at 2977, 41 L.Ed.2d at 953.

> to invoke the protections of the Due Process Clause.

427 U.S. at 224, 96 S.Ct. at 2538, 49 L.Ed.2d at 458.

However, Polizzi v. Sigler, 564 F.2d 792 (8th Cir. 1977) held that the classification of prisoners as special offenders upon their entrance into the federal prison system infringed upon the prisoner's right to liberty, and procedural protections were required since the classifications were used to restrict participation in prison rehabilitation programs. The court found that the unique constraints imposed on special offenders distinguished the situation from Meachum, where the inter-prison transfers were within the normal limits of custody.

Every legally cognizable injury which may have been inflicted by a state official acting under "color of law" does not establish a violation of the Fourteenth Amendment. Paul v. Davis, 424 U.S. 693, 699, 96 S.Ct. 1156, 1159, 47 L.Ed.2d 405, 412 (1976). The plaintiff must point to a specific constitutional guarantee safeguarding the interest he asserts has been invaded. Id. at 700-01, 96 S.Ct. at 1160, 47 L.Ed.2d at 413.

Pell v. Procunier, 417 U.S. 817, 822-23, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495, 501-02 (1974), identified three important functions of a correctional system as deterrence of crime, rehabilitation of those in custody, and maintenance of internal security. It is in light of these functions that constitutional challenges to prison regulations must be assessed.

According to James v. Wallace, 406 F.Supp. 318, 328 (M.D. Ala. 1976), once it is determined that a prison policy advances one of the goals in Pell, the court must weigh the competing interests of the prisoner with the interests of the state in pursuing that goal. If no valid purpose is served by the restriction, then it may not stand.

However, the application of the "penological purpose" test in determining the constitutionality of conditions of confinement was held to be erroneous in Nadeau v. Helgemoe, 561 F.2d 411 (1st Cir. 1977). Although the district court had held,

> The fact that defendants have granted specific privileges and benefits to the general population gives rise to a presumption that those privileges and benefits serve a legitimate

> penological purpose; the wholesale denial to a few of the exact same privileges and benefits lifts the cloak of that presumption from defendants' acts.

the court of appeals stated that: "at the present stage of development of the law relating to prisoners, the test used by the district court is not required by the Constitution." 561 F.2d at 415. The court further noted that "the proceedings in the district court, dominated as they were by the 'penological purposes' test, did not focus on possible administrative or fiscal justifications for the challenged prison practices. The court must now consider such justifications to see whether they constitute a rational basis or are wholly without substance." 561 F.2d at 419.

More recently, Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) held that regulations promulgated by the North Carolina Department of Corrections were not in violation of the Constitution. The department of corrections prohibited inmates from soliciting other inmates to join a prisoners' labor union, barred all meetings of the union, and refused to deliver packets of union publications mailed in bulk to several inmates for redistribution to other prisoners. The Court stated:

> The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decision of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement . . . .
>
> Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators.

433 U.S. at 125, 97 S.Ct. at 2538, 53 L.Ed.2d at 635.

The commissioner of the department of corrections had testified that the creation of an inmate union would result in increasing existing friction between inmates and prison personnel, and union inmates and non-union inmates. The secretary of the department of corrections testified that the existence of a union could create a

divisive element within the inmate population, aggravating already existing tense conditions. The Supreme Court determined that the district court had erred in concluding that the prison officials needed to show more:

> In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order" . . . . Rather "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." . . . The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.

433 U.S. at 128, 97 S.Ct. at 2539, 53 L.Ed.2d at 636.

D. Supervisory Personnel: Respondeat Superior, Personal Involvement, Nonfeasance

1. Supreme Court Decisions

Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) determined that municipalities would not be liable for the actions of their employees under the doctrine of respondeat superior. 436 U.S. at 691, 98 S.Ct. at 1036, 56 L.Ed.2d at 636. In discussing the liability of local governments for the injuries inflicted by their employees, the Court stated:

> In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable

under Section 1983 on a respondeat superior theory.

436 U.S. at 691, 98 S.Ct. at 2036, 56 L.Ed.2d at 638. The Court further stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694, 98 S.Ct. at 2038, 56 L.Ed.2d at 638. The Court also stated:

> By our decision in Rizzo v. Goode, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised without any failure to supervise is not enough to support § 1983 liability.

436 U.S. at 694 n. 58, 98 S.Ct. at 2037, n. 58, 56 L.Ed.2d at 637 n. 58. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) reversed the court of appeals' affirmance of the district court order directing law enforcement officials to draft for the court's approval a comprehensive program establishing adequate procedures for dealing with civilian complaints alleging police misconduct. The plaintiffs had alleged a pervasive pattern of illegal and unconstitutional mistreatment of minority citizens by police officers, and charged the mayor, city managing director, and police commissioner with conduct ranging from express authorization or encouragement of the mistreatment to failure to act to prevent its future recurrence. The Court found that:

> Individual police officers not named as parties to the action were found to have violated the

> constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners -- express or otherwise -- showing their authorization or approval of such misconduct. Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them but as to the members of the classes they represented.

423 U.S. at 371, 96 S.Ct. at 604, 46 L.Ed.2d at 569. The indications of the Supreme Court in Monell and Rizzo, supra, that the doctrine of respondeat superior is not applicable in actions under section 1983, is generally in accord with the developing law in most of the circuits.

2. First Circuit

The United States Court of Appeals for the First Circuit affirmed the dismissal of an action against a police chief in Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977), where a police officer had shot plaintiff's decedent in the course of an arrest. The complaint alleged that the police chief and the town had failed to instruct, train, educate, and control the police officer in the exercise of his duties. The court held that the complaint did not state a claim against the police chief:

> Plaintiffs do not seriously contend that § 1983 authorizes damages liability where an individual had no personal role in wrongdoing. Such an actor by definition lacks the bad faith required to expose him to damages liability under § 1983 . . . .

> Although the claim based upon Connell's breach of his duty to instruct and control Hogg seemingly alleges personal involvement in the wrongdoing, analysis reveals that it suffers from the identical defect. A police chief is under no general federal constitutional duty to take positive action to reduce the incidence of unconstitutional conduct by police officers on the beat, see Rizzo v. Goode . . . . To the extent, therefore, that plaintiffs rely upon the breach of this duty alone, they fail even to plead a constitutional violation by Connell. But we do not read plaintiffs' complaint this narrowly. They seem also to suggest that Connell's failure to take positive action caused the constitutional violations and, as such, is actionable either under § 1983 or the Fourteenth Amendment. But even so interpreted, plaintiffs' complaint fails to state a claim for damages. To negative Connell's official immunity, plaintiffs would have to establish active, bad faith participation in the wrongdoing. For example, if the police chief ordered the constitutional violations or possibly, if he deployed or hired the officer under conditions which he should have known would create a threat to the constitutional rights of the citizenry, damages may well be proper.

560 F.2d at 40. The court further noted:

> Indeed, this theory strikes us as a transparent attempt to hold Connell vicariously liable under the guise of his having breached a duty owed plaintiffs' decedent. Plaintiffs seemingly have taken one of the modern justifications for the doctrine of respondeat superior -- the master's opportunity

> to select, train, and control his servants, an opportunity which makes the master the best loss-avoider -- and converted it into a constitutional duty on the part of all police chiefs. If there is a practical difference between this theory and a vicarious liability theory, we fail to perceive it.

560 F.2d at 41 n. 3.

In Dimarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978), the defendant Hall, commissioner of correction, appealed from an order by the district court mandating certain changes in the county jail and house of correction. In claiming that he could not be held responsible for denying plaintiffs their constitutional rights, the commissioner of correction construed his statutory duty narrowly. Under Massachusetts law he had supervisory responsibility for all state correctional facilities and was charged with promulgating minimum standards for the care and custody of persons committed to those facilities. Plaintiffs had alleged that by failing to promulgate and enforce proper statutory standards, defendant had caused them to suffer the unconstitutional conditions of which they complained. The court noted that the commissioner had statutory responsibility over precisely the conditions giving rise to the violations and that sporadic incidents over which the commissioner might properly claim to have no knowledge or control were not at issue. The commissioner was, therefore, a proper defendant because of his own statutory duty and subsequent failure to act and not on the basis of the acts of others.

3. Second Circuit

In the second circuit personal involvement of the defendant in the alleged constitutional deprivation is a prerequisite to a section 1983 damage award. McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977), cert. denied, 98 S.Ct. 1282.

Under Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), the doctrine of respondeat superior is inapplicable in a section 1983 suit for money damages and a showing of some personal responsibility is required. In

Johnson, the complaint had alleged only that the warden was in charge of all the correctional officers, one of whom allegedly committed an unprovoked attack on the plaintiff. "It did not allege that the warden had authorized the officer's conduct, . . . or even that there had been a history of previous episodes requiring the warden to take therapeutic action, . . . it alleged a single spontaneous incident, unforeseen and unforeseeable by higher authority." 481 F.2d at 1034. Therefore dismissal of the claim against the warden was proper.

In Diaz v. Ward, 437 F.Supp. 678 (S.D. N.Y. 1977), an action against the parole board chairman and the commissioner of correctional services, the court noted:

> Where a prisoner's § 1983 complaint against a warden arises out of "a single spontaneous incident" involving a correctional officer, "unforeseen and unforeseeable by higher authority," and there are no allegations that the warden had authorized the officer's conduct, "or even that there had been a history of previous episodes requiring the warden to take therapeutic action," the complaint is insufficient in law, since liability cannot be predicated solely upon supervisory authority. However, the presence of such factors as were absent in Johnson will sustain a claim for damages under § 1983 against supervisory personnel.

437 F.Supp. at 689. Since the complaint alleged that the supervisory defendants knew of the allegedly unconstitutional courses of action of their employees and intentionally, willfully and recklessly failed to restrain them, the motion to dismiss was denied.

The commissioner of corrections was held chargeable with knowledge of plaintiff's improper confinement in solitary in United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975). There, a New York statute required that every incident of misbehavior resulting in segregation was to be reported by the prison superintendent to the commissioner. The court, in upholding an award of money damages, noted that the personal responsibility requirement was supplied by the statute.

The statutory reporting requirements mentioned in Larkins, supra, did not become effective until 1970. Mukmuk v. Com'r. of Dept. of Correctional Services, 429 F.2d 272, 274 n. 5 (2d Cir. 1976), cert. denied, 96 S.Ct. 2238, noted that another New York correctional law which had been in effect since 1941 required the warden to keep a daily record of infractions and punishments imposed and required that the record be kept open at all times for the examination of the commissioner. The court declined to decide whether Larkins would apply to a period before 1970.

Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977) affirmed the injunctive relief ordered by the district court after finding that the institution's overall health system did not meet with constitutional requirements:

> Moreover, the testimony of the appellants' own witnesses revealed that they were either fully aware of these infirmities or, in the case of the lobby clinic, unjustifiably neglected to learn whether the condition complained of existed. Any attempts to correct these obvious and glaring flaws had been flimsy at best.

565 F.2d at 53.

In an action against the welfare bureau for taking and retaining custody of plaintiff's children without consent or a hearing, the court in Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977), observed:

> It is not necessary for § 1983 liability that the appellees directed any particular action with respect to these specific individuals, only that they affirmatively promoted a policy which sanctioned the type of action which caused the violations. In short, this is not a case of indifference, that is, a failure to act in the face of misconduct by subordinates, but is rather a case of affirmative policy-making which may have caused the misconduct.

566 F.2d at 831. The court further noted: "Where conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction." 566 F.2d at 832.

Where the plaintiff alleged that letters he gave to guards, subordinates of the defendants, for mailing, were not mailed, the district court had erred in dismissing the complaint. Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972). The court stated, "At a hearing, [the plaintiff] might be able to prove defendants' participation or acquiescence in this activity." 468 F.2d at 726.

4. Third Circuit

The diabetic plaintiff in Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972), was involved in an automobile accident and was taken into custody by police officers who believed him to be intoxicated. Upon arriving at the police station plaintiff was assaulted and beaten in the presence of six officers, two of whom were named as defendants. The district court found that there was insufficient identification of the defendants' participation in the assault of plaintiff, and the court of appeals noted that, although proof of specific intent is not required, "there must be at least proof of the 'condition usually demanded by the law for liability in an action of tort [which] is the existence of either wrongful intention or culpable negligence on the part of the defendant.'" 464 F.2d at 279. Further, the court stated:

> We have heretofore emphasized that it was necessary to prove that the conduct of the participants was intentional or purposeful. But prerequisite to a determination that one acted intentionally or purposefully is an ascertainment that the individual charged was the perpetrator of the constitutional deprivation. Mere presence of a person, when an assault and battery is committed by another, even though he mentally approves of it, but without encouragement of it by word or sign, is not sufficient of itself to charge him as a participator in the assault.

464 F.2d at 282. While the court held that mere presence was insufficient to impose liability, it is noteworthy that the defendants were not in a supervisory capacity over the officers who apparently committed the assault.

The requirement of direct participation was noted in Brown v. Sielaff,[65] 474 F.2d 826 (3d Cir. 1973), where the court stated:

> Although the only defendant in this action is Commissioner Sielaff, the sole allegation which directly implicates him is the vague accusation of "attempting to conceal abuse by his prison guards." Although mindful of the admonition of Haines v. Kerner, 404 U.S. 519, 521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), we are convinced that this allegation is not sufficiently precise to constitute an allegation of a constitutional deprivation sustained by the appellant at the hands of the named defendant. The remaining allegations do not constitute a claim against Commissioner Sielaff for which relief may be granted. There is no allegation that he participated directly or indirectly in the circumstances constituting this claim.

474 F.2d at 827.

An action was brought against the dietician, kitchen guard, head steward, superintendent and commissioner of corrections in Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973). Plaintiff alleged that he suffered permanent loss of sight in his right eye when the defendant guards failed to disarm and restrain another prisoner who attacked plaintiff and prevented him from defending himself. The court of appeals, finding that a cause of action was stated against the prison officials present at the time of the assault, reversed the district court's dismissal. However, the

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65. See also Thompson v. Montemuro, 383 F.Supp. 1200 (E.D. Pa. 1974) (personal involvement is necessary).

dismissal as to the superintendent and commissioner of corrections was affirmed. Plaintiff admitted that they were not present at the time of his injury, but alleged they breached a duty to him in failing to hire an adequate number of guards to protect the inmates, failing to inspect prisoners and cells for weapons, and knowingly allowing dangerous conditions to continue. Plaintiff specifically disclaimed reliance on respondeat superior and argued that defendants were personally liable, clearly having both a common law and statutory duty to keep the plaintiff in safe custody. The court's affirmance of the district court dismissal was predicated on the following reasons:

> Assuming that there is a duty under Pennsylvania law to make reasonable efforts to keep plaintiff in "safe custody," there is no allegation of facts indicating intentional action by these defendants "under color of" state law subjecting plaintiff or causing plaintiff to be subjected to deprivation of his civil rights . . . . The Kish case states that a clear abuse of discretion in operating a jail is necessary to make the superintendent (Russell) liable for an assault such as this. This court has repeatedly held that conclusory allegations, such as "intentionally, willfully and recklessly," without supporting facts are not sufficient to make out a complaint under 42 U.S.C. § 1983 . . . . There are no allegations that Prasse or Russell had reason to know Everette would commit such an assault or that similar assaults had taken place.

489 F.2d at 521.

A district court award of money damages against a prison official who had not participated in an assault, but was seen in the area immediately prior to the beating, was reversed in Bracey v. Grenoble, 494 F.2d 566 (3d Cir. 1974). The district court found Grenoble personally liable because he was in charge of the prison guards and had complete control of them:

> The mere fact of presence of a superior officer would not be sufficient to impose liability even under the district court's theory. Yet presence is evidentiary on the facts of actual knowledge of and acquiescence in the unlawful acts of the subordinates . . . . [T]he burden is on the plaintiff to prove the facts of actual knowledge and acquiescence.

494 F.2d at 570.

Plaintiff had testified that he had seen the defendant five or six seconds before the five minute beating; however, there was no evidence that the defendant was present during the beating or saw the plaintiff being beaten. Further, there was no proof that the defendant knew the guards who participated in the beating had engaged in similar beatings in the past. Absence of this evidence was crucial to plaintiff's case:

> We would be more constrained to find actual knowledge and acquiescence if plaintiff had proved defendant's presence throughout the entire five or six minute beating. Likewise, if plaintiff had proved that Grenoble saw him being beaten, or if there was evidence of a history of such episodes by the participating guards, we would be hard put to hold that a trial court's finding of actual knowledge was clearly erroneous.

494 F.2d at 571. The court concluded that the district court findings of actual knowledge and acquiescence were completely devoid of minimum evidentiary support and were therefore clearly erroneous.

Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974) affirmed a jury award of compensatory and punitive damages against the defendant Curtis, a lieutenant in the police department, for his role in supervising the entry by police officers into plaintiff's apartment without warrants. The defendant Curtis admitted he had ordered every door to be opened by force if necessary and each apartment searched, without giving any thought to obtaining a search warrant. 496 F.2d at 347. The court observed that the jury could reasonably have

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concluded that the order to his subordinates indicated a wanton disregard for plaintiff's rights, and that the failure to post a police guard around the apartments to prevent looting by the civilians evidenced a gross disregard for the plaintiff's property. The court observed that the defendant was not being held liable for punitive damages under respondeat superior, but for his personal action in directing the forceable entries into the apartments and failing to take minimal precautions to protect plaintiff's property.

However, the Fisher court reversed the award of $500 in punitive damages against defendant Volz, a police department captain, finding that there was no evidence upon which the jury could find sufficient involvement by Volz to support the punitive damages award. Plaintiff Clark had been shuttled between two apartments and Volz had been seen in the hallway between the apartments. On one occasion Volz was in one of the apartments with plaintiff Clark and he had ordered the handcuffs removed when Clark complained he was suffering pain in his back. The undisputed police testimony indicated that although Volz was in general charge of the operation, he had given no specific directions in advance as to the police practices to be used. Volz did not arrive at the address until after the police had allegedly abused Clark, and he never entered Clark's apartment. The court concluded this evidence did not warrant the punitive damage award:

> We need not decide at this time whether vicarious liability is ever applicable under § 1983. We hold, however, that it will not support an award for punitive damages. A superior police officer may not be subjected to punitive damages because of wrongful acts by a subordinate officer if there is no evidence that the superior officer ordered or personally participated in the acts, or knew or should have known that the acts were taking place and acquiesced in them.[66]

66. See also United States ex rel. Bennett v. Prasse, 408 F.Supp. 988 (E.D. Pa. 1976).

496 F.2d at 349.

A judgment awarding plaintiff damages in his claim against the warden and guards for their failure to provide adequate medical care was vacated in Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976):

> We need not dwell at length upon the lack of derivative liability of the warden. Even if liability had been established against the guards, there is not the slightest evidence showing that the warden had actual knowledge of the unanswered request for medical attention or that he acquiesced or participated in any denial. Moreover, in § 1983 suits liability may not be imposed on the traditional standards of respondeat superior.

546 F.2d at 1082.

City and state officials were not vicariously liable for the acts of subordinates in Santiago v. City of Philadelphia, 435 F.Supp. 136 (E.D. Pa. 1977), but the court held that respondeat superior could be applied to the city in a direct cause of action under the Fourteenth Amendment. The court felt that supervisors may not be held vicariously liable for their subordinates since they are merely fellow servants of the same master -- the city. 435 F.Supp. at 148. The court also noted that although case law suggests that participation, knowledge, or acquiescence are requisites for liability, courts have had difficulty in specifying the precise criteria for determining their existence. Santiago suggested three principles to be used in analyzing these problems: (1) The greater the duty a supervisor has to control his subordinates, the less specific knowledge is required to hold him liable. General knowledge of the situation triggers an affirmative duty to investigate.[67] (2) Existence of general policies and practices within a supervisor's department can create constructive knowledge of the constitutional deprivation; and acceptance or support of them can

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67. Fialkowski v. Shapp, 405 F.Supp. 946, 950 (E.D. Pa. 1975); Downs v. Dep't. of Public Welfare, 368 F.Supp. 454, 464-65 (E.D. Pa. 1973).

substitute for proof of acquiescence.[68] (3) The degree of participation required is less when only injunctive relief is requested.[69]

Absent proof of affirmative involvement of supervisory personnel, federal injunctive relief was denied in Lewis v. Hyland, 554 F.2d 93 (3d Cir. 1977). There, travelers on New Jersey's roads sought injunctive relief against the New Jersey state police for alleged Fourth Amendment violations. The court of appeals noted that the district court's extensive fact finding revealed callous indifference by the New Jersey state police for the rights of citizens using the roads and commented that prior to Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), they would have reversed the district court's denial of injunctive relief. However, the court stated:

> The Supreme Court, however, has recently given expression to the doctrine of federal equitable abstention as it relates to federal court intervention in local police operations. In light of Rizzo v. Goode, supra, in which the Supreme Court reversed this Court's approval of an injunction against widespread police abuses in Philadelphia, we conclude that the record of law enforcement abuses as it appears in this case -- dismaying as it is -- will not support federal injunctive relief.

554 F.2d at 95.

5. Fourth Circuit

Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977) approved the dismissal of the complaint alleging denial of medical care as to defendant Gibbs, Superintendent of Jails for the State of Virginia. By statute the sheriff, and not Gibbs, was responsible for prisoners' medical needs:

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68. Holland v. Connors, 491 F.2d 539, 541 (5th Cir. 1974).

69. Downs, supra note 55.

> Gibbs is a State administrative official, appointed by the Director of the Department of Corrections. While ultimate responsibility for setting minimum standards for the construction and equipment of local jails, and minimum requirements for the feeding, clothing, and medical attention of prisoners is vested in the State Board of Corrections, . . . the local Sheriff is the keeper of each county jail, . . . and is responsible for the procurement of food, clothing and medicine for local prisoners.

550 F.2d at 928. The court noted that the plaintiff failed to allege facts indicating Gibbs' personal involvement in the denial of medical care[70] and stated:

> Although § 1983 must be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions," Monroe v. Pape, . . . "[l]iability will only lie where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights. The doctrine of respondeat superior has no application under this section." . . . Having failed to allege any personal connection between Gibbs and any denial of Vinnedge's constitutional rights, the action against him must fail.

Id.

6. Fifth Circuit

Holland v. Connors, 491 F.2d 539 (5th Cir. 1974) vacated the district court's dismissal of a complaint

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70. See also Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978) (no claim stated against warden where personal involvement was not alleged).

without a response or a hearing. The plaintiff alleged that prison authorities coerced a false confession, placed an unwarranted statement pertaining to a homosexual offense in plaintiff's file, and improperly imposed confinement in administrative segregation. Plaintiff alleged that although the defendant prison superintendent was not present during the illegal questioning, he was legally responsible since the practices were so widespread and had been standard procedure so long he must have been aware of them. The court found that reversal was required since it could not say with assurance that the allegations of the pro se complaint proved no set of facts which would entitle him to relief. "Moreover, fundamental tenets of tort law, negligence and vicarious liability, cardinal doctrines upon which this and other circuits have invoked prophylactic application of the Civil Rights Act, are sufficiently broad to support such relief against Superintendent Connors on the basis of the bare allegations made." 491 F.2d at 541.

Money damages for medical mistreatment and neglect while incarcerated were sought in Taylor v. Gibson, 529 F.2d 709 (5th Cir. 1976). The court of appeals reversed the district court's dismissal of the action and, regarding the liability of the sheriff stated:

> Taylor's assertions of Sheriff Gibson's liability appear to have been dismissed below because they were predicated upon a theory of respondeat superior, and thus could not support a Section 1983 claim. This determination will not withstand examination. Study of the complaint shows that Sheriff Gibson is charged both with derivative liability from the actions of his deputies, and with numerous direct actions involving deprivations of plaintiff's constitutional rights. Moreover assertions of insulation from liability because Section 1983 does not permit derivative, respondeat superior, liability are questionable, and, at best, overbroad. It is true that some cases hold that absent overt acts, Section 1983 does not authorize recovery of monetary damages through respondeat superior, . . . but this

> Circuit has carved out some exceptions to this rule. A sheriff may be held liable for the actions of his appointed deputies, over whom he has control, in certain circumstances . . . . Even more to the point this Court has established in several fairly recent cases that "prison administrators may under certain circumstances be held vicariously liable for the acts of their subordinates." . . . At this stage it is simply impossible to determine whether or not Taylor's broad allegations will support derivative liability under a respondeat superior theory.

529 F.2d at 716.

Where plaintiff had been improperly held in custody under a warrant based on an indictment which had been dismissed, the court held that the jailor could be liable if he negligently established a record keeping system in which such errors could occur. Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976), cert. denied, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976).

Harris v. Chanclor, 537 F.2d 203 (5th Cir. 1976) affirmed a $12,000 jury verdict against a police officer who had beaten plaintiff up and the jailor who was present and did not attempt to object, intervene or obtain medical assistance for plaintiff. On appeal, the jailor argued that he was entitled to an instruction that "he would only be liable if he had 'willfully or culpably denied the plaintiff [medical attention] under such circumstances that it would shock the conscience of ordinarily reasonable people' and that 'a good faith error in judgment' amounting to 'mere negligence' would not support a verdict." 537 F.2d at 205. The court found it unnecessary to determine whether the jailor was entitled to such an instruction since a warden's deliberate indifference to an inmate's severe and obvious injuries is tantamount to an intentional infliction of cruel and unusual punishment. Further, the court recognized cases holding a supervisory officer liable under section 1983 for refusing to intervene in the beating of an inmate by his subordinates in his presence. Consequently, any error in the instructions on the issue of the jailor's intent was harmless.

The dismissal of a claim of unlawful arrest and physical abuse was reversed as to supervisory defendants including the mayor of Atlanta, the chief of police, and members of the police committee in Sims v. Adams, 537 F.2d 829 (5th Cir. 1976). The complaint alleged that defendants subjected Atlanta citizens to a systematic pattern of racial violence by police, that defendants knew or should have known of one officer's prior violent misconduct against blacks, and that they failed to discipline him or prevent further violence. The district court had dismissed, finding that no personal participation was alleged. However, the court of appeals found that the district court had misunderstood the nature of personal participation required to establish a section 1983 claim:

> The language of § 1983 requires a degree of causation as an element of individual liability, but it does not specifically require "personal participation." The proper question is therefore whether the complaint adequately alleges the requisite causal connection between the supervisory defendants' actions and a deprivation of plaintiff's constitutional rights. "Personal participation" is only one of several theories which can be used to establish causation.
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> Another theory which includes the requisite causation is that a supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury . . . . We have previously sustained a judgment against a Georgia police chief on the theory that his improper performance of training and supervisory duties made him liable for a physical beating administered by a subordinate policeman. Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972). We have also indicated, admittedly without reference to Georgia law, that a complaint alleging that a police supervisor has notice of past culpable conduct of his subordinates

> and has failed to prevent a recurrence of such misconduct states a § 1983 claim.

537 F.2d at 831.

The court commented that Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), did not cast any doubt on the instant case since its holding that the complaint stated a claim was not based on generalized constitutional duties to prevent future police misconduct or to act in the face of a statistical pattern of misconduct. Since the case did not involve any assertion of vicarious liability, and plaintiff did not seek equitable relief which would implicate principles of comity and federalism, the case would not interject the federal court into the supervision of a police department.

The plaintiff in Kellerman v. Askew, 541 F.2d 1089 (5th Cir. 1976), brought an action for money damages and injunctive relief against the governor and other state officials of the state of Florida and corrections division personnel for failure to furnish necessary medical treatment. The district court's grant of summary judgment in favor of defendants based upon plaintiff's failure to show they had personal knowledge was reversed by the court of appeals which stated:

> While it is undisputed that none of the named respondents personally caused the deprivation complained of, it is Kellerman's contention that they are liable for nonfeasance as well as misfeasance. Indeed, this Court has held that inaction on the part of governmental agencies can result in constitutional deprivations . . . . Thus, Kellerman's suit is founded on the respondents' knowledge of his need for medical treatment and failure to make inquiries or take affirmative steps to secure treatment for him. He alleges that this constitutes acquiescence by the respondents in the acts of their subordinates.
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> . . . .

> [B]efore they can be exonerated from § 1983 liability on summary judgment it must be shown that there is no actual controversy as to whether the system they established was not deficient in affording minimal constitutional conditions of confinement and treatment. A mere denial of knowledge is not sufficient under Wood. [Wood v. Strickland, 420 U.S. 309, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)].

541 F.2d at 1091.

The plaintiff in McCollan v. Tate, 575 F.2d 509 (5th Cir. 1978), was arrested as a result of his brother's having used his name. He was kept in custody for a period of one week until the error was noticed and he was released. The district court's directed verdict for the sheriff in plaintiff's subsequent civil rights action was reversed by the court of appeals. The sheriff's office had failed to furnish the mugshots and fingerprints of plaintiff's brother for comparison with plaintiff. Referring to Bryan v. Jones, supra, the court stated:

> Bryan made clear that in a section 1983 false imprisonment action the reasonable good faith of the sheriff comes into play only as a defense. To make out a prima facie case, a plaintiff need show only: (1) intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm . . . . Since the deputies' actions were authorized by Sheriff Baker and the same actions were in keeping with the policies of the Potter County Sheriff's Department at that time, plaintiff established his prima facie case against Sheriff Baker. . . . To incur liability under section 1983 a state official need not directly subject a person to a deprivation of his constitutional rights . . . . [H]e can be held liable if he causes the plaintiff to be subjected to a

deprivation of his constitutional rights . . . .

575 F.2d at 512.

The court found that the sheriff's failures to require his deputies to transmit the mugshots and fingerprints "caused" plaintiff's detention. Therefore, plaintiff had made out a prima facie case.

Reimer v. Short, 578 F.2d 621 (5th Cir. 1978) held that the district court had properly dismissed plaintiff's claim against the police chief since there was no evidence that he had participated in, had knowledge of, or was negligent with regard to the actions of the defendant police officers.

7. Sixth Circuit

The Sixth Circuit generally follows the other circuits in holding that the doctrine of respondeat superior is inapplicable in section 1983 actions. "Therefore, absent an allegation that a named-defendant has personally subjected the plaintiff to a deprivation of his constitutional rights or has caused the conduct complained of or participated in some manner in the allegedly unlawful actions . . . [it is] insufficient to state a claim against such defendant under § 1983." Knipp v. Weikle, 405 F.Supp. 782, 783 (N.D. Ohio 1975). The court further decided that the existence of a state statute which specifically allowed for vicarious liability recovery against a state officer could not be extended to create a federal cause of action and impose vicarious liability upon that person in a section 1983 action.

8. Seventh Circuit

The Seventh Circuit noted in Adams v. Pate, 445 F.2d 105, 107 n. 2 (7th Cir. 1971), that although respondeat superior did not apply in actions for money damages, it might apply in actions seeking equitable relief.

Little v. Walker, 552 F.2d 193 (7th Cir. 1977) reversed the district court's dismissal of an amended complaint alleging acts of physical violence, sexual assault, and other crimes by inmates. Plaintiffs sought to hold the director and former director of the department of corrections, the governor of the state,

and other supervisory officials liable for failing to protect plaintiff-inmates from other inmates. The district court's dismissal was based on a finding that defendants did not fail to apply the law as it existed at the time and were not motivated by actual malice. To this the court of appeals replied:

> Thus while an official "has, of course, no duty to anticipate unforeseeable constitutional developments" . . . he cannot hide behind a claim that the particular factual predicate in question has never appeared in haec verba in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a prison official may not take solace in ostrichism.
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> . . . .
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> Violent attacks and sexual assaults by inmates upon the plaintiff while in protective segregation are mainfestly "inconsistent with contemporary standards of decency." . . . "Deliberate indifference" to these happenings "constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." . . . Moreover, in the highly publicized landmark case of Holt v. Sarver, . . . it was held that under the Eighth Amendment prisoners are entitled to protection from the assaults of other prisoners.

552 F.2d at 197

Supervisory officials are not liable under respondeat superior. A complaint must allege personal involvement which is satisfied by an allegation that the constitutional deprivation took place at the direction of the supervisor or with his knowledge and consent.[71] Perry v. Elrod, 436 F.Supp. 229 (N.D. Ill.

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71. See also Cochran v. Rowe, 438 F.Supp. 566 (N.D. Ill. 1977) (respondeat superior inapplicable, personal involvement is required).

1977). McDonald v. Illinois, 557 F.2d 596 (7th Cir. 1977) noted:

> We are not aware of any decision which holds a local government entity liable in money damages for the constitutional deprivations committed by its agents, independently of any official policy. The principle of respondeat superior has not been applied under § 1983, although it must be noted that the opportunity to apply it to municipal bodies was foreclosed by the statutory interpretation that such bodies were not subject to § 1983 liability.[72]

557 F.2d at 604.

9. Eighth Circuit

Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973) affirmed the district court's dismissal of plaintiff's claim alleging she had received physical and emotional injuries when she was subjected to an assault and battery by a civilian police clerk after her arrest for a speeding violation. The suit as to the civilian clerk, who had been discharged by the defendant members of the board of police commissioners, was dismissed, and the chief of police and commissioners also sought dismissal, averring that each had no personal knowledge of the incident, was not present at the time, and did not direct or order the arrest or subsequent action relating to plaintiff. The patrolman stated that although he was present at the time of the incident, he had not been involved in any act directed toward plaintiff and had no supervisory authority. The desk sergeant admitted that he had been present but averred that he had not become involved in the incident and had been unable to intervene. The arresting officer admitted that he had given plaintiff a speeding summons but he had not been present during the incident of which

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72. The opportunity does now exist in light of the Supreme Court's holding in Monell, supra, that municipalities are "persons" under section 1983. However, Monell commented that municipalities will not be liable under respondeat superior in 1983 actions.

she complained and had no knowledge of it. The court of appeals expressly rejected the doctrine of respondeat superior and, in discussing the liability of the police chief and board members, stated:

> Generally, liability for negligence arises only from affirmative action. Where, however, one has an affirmative duty to act and he fails to act accordingly, he may be held liable for his nonfeasance if his omission is unreasonable under the circumstances. . . . Appellants have not alleged any affirmative conduct so their claim against the appellees obviously is grounded upon nonfeasance.

476 F.2d at 1275. The court noted that none of these defendants were present at the time of the incident and stated, "And to extend the general duty of these appellees to prudently select, educate and supervise police department employees to an isolated, spontaneous incident such as this would be beyond reason." 476 F.2d at 1275.

A jury verdict for $10,000 compensatory damages against a police officer and a directed verdict in favor of the chief of police were affirmed in Taken Alive v. Litzau, 551 F.2d 196 (8th Cir. 1977). The plaintiff had suffered a broken arm as she was being placed into a police car by the defendant city police officer. The court stated:

> It is true that Chief Quinn admitted hearing a rumor concerning one prior incident involving misconduct on the part of Officer Litzau. However, Quinn testified that he discussed the incident at length with Officer Litzau and " . . . was quite satisfied that there would not ever be a recurrence of an incident of that nature." Quinn also stated that after assuming his duties as Chief of Police, he worked "day in and day out" with Litzau for several months and was satisfied with his performance.

551 F.2d at 199. The court further noted that since the chief of police had not learned of the accident

until after it happened, and had not caused, authorized, directed, or commanded the officer to arrest plaintiff or any other person by use of unreasonable force, plaintiff failed to prove the chief's actual involvement in the misconduct.[73]

Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978) held that the district court had properly dismissed the complaint wherein the plaintiff alleged that subordinate officers of the named defendants had violated his constitutional rights. In one case plaintiff alleged that a prison guard, who was not named as a party, subjected him to a disciplinary proceeding for failure to cut a "top knot," a hair style claimed to be part of a religious purification ritual. Since the defendant warden was not alleged to have had any knowledge of or connection with the incident, the complaint did not state a claim as to him. Further, as to the other defendant, plaintiff's claim that one of defendant's subordinates had beaten plaintiff did not state a claim.

10. Ninth Circuit

In accord with the other circuits, the Ninth Circuit has held the doctrine of respondeat superior inapplicable to section 1983 claims. Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1976).

11. Tenth Circuit

Personal participation is an essential allegation in a section 1983 claim. Bennett v. Passic, 545 F.2d 1260, 1262 (10th Cir. 1976). Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976) affirmed the district court's directed verdict in favor of supervisory officials of two FBI agents who had caused plaintiff to be discharged from his employment as a result of their disclosure of investigative information. In its discussion of the applicability of respondeat superior to civil rights actions the court referred to Rizzo v. Goode:[74] "The 'affirmative link' requirement of Rizzo means to us

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73. See also Sebastian v. United States, 531 F.2d 900 (8th Cir. 1976); Ailshire v. Darnell, 508 F.2d 526 (8th Cir. 1974).

74. 423 U.S. 362, 98 S.Ct. 598, 46 L.Ed.2d 561 (1976).

that before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made." 546 F.2d at 337-38. The court felt that the affirmative link was not sufficiently established by the record to impose liability.

12. District of Columbia Circuit

Dellums v. Powell, 566 F.2d 216 (D.C. Cir. 1977), was an action by congressman Dellums and nine persons representing a class of all persons arrested on the steps of the United States Capitol on May 5, 1971, while engaged in a protest against the war in Vietnam. The claims were based on Bivens,[75] 42 U.S.C. section 1983, and the law of the District of Columbia. On appeal the circuit court found that the evidence was sufficient to support liability on the part of police chief Wilson for false arrests, but it was insufficient as to the claims for malicious prosecution. There was evidence which would support a finding that the chief collaborated on the charge upon which arrests were to be made, and further that he advised Chief Powell against taking additional steps to insure the effectiveness of dispersal orders at a time when there was some doubt that the orders had been heard. He had retained personal operational control over all metropolitan police officers on the scene and could have withdrawn them had he thought the arrests unjustified. Therefore, there was sufficient proof of his independent involvement in the arrest process to make his liability a question for the jury to decide. However, the record revealed that he participated only in the arrest decision. There was no evidence linking him to the meeting at which it was determined that informations would be filed. The court noted that the critical event triggering liability for malicious prosecution is the filing of an information. Since Chief Wilson had not been linked with that decision, the plaintiffs had not made out a prima facie case against him and the jury award had to be vacated. The court determined that under the doctrine of respondeat superior the District of Columbia could be liable in an action brought under a Bivens theory predicated on a tortious invasion of First, Fourth, and Eighth Amendment rights, as well as interests protected

75. See section X infra.

by common law. The district had argued that relief in a Bivens action should be styled on the pattern of 42 U.S.C. section 1983 and, since suit was precluded against municipalities under Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), it should not be liable under Bivens. The court rejected this argument, noting that under the 1973 amendments to the Federal Tort Claims Act the federal government is now generally responsible for the intentional torts of its law enforcement officers. Therefore, the application of respondeat superior to the District of Columbia would not be inconsistent with other federal laws. It is noted that Dellums was decided prior to Monell, supra, which held that municipalities were "persons" for purposes of section 1983, but would not be liable under respondeat superior.

E. Constitutional Violations v. Tort -- Negligence, Intent[76]

The landmark case of Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), held that a complaint stated a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, when it alleged that police officers had broken into petitioners' home in the early morning without a search or arrest warrant, rooted petitioners from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers, and then had taken one of the petitioners to the police station where he was detained on "open" charges for ten hours without being taken before a magistrate or permitted to call his family or attorney. The court of appeals affirmed the district court's dismissal for failure to state a cause of action, but the Supreme Court reversed.[77] The

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76. See Comment, Section 1983 and the New Supreme Court, Cutting the Civil Rights Act Down to Size, 15 Duq. L. Rev. 49, 64 (1976). See also Comment, Remedies for Constitutional Torts: "Special Factors Counselling Hesitation," 9 Ind. L. Rev. 441 (1976).

77. The holding in Monroe that local governments were wholly immune from suit under section 1983 was overruled in the recent decision, Monell v. New York City Dept. of Social Services, 436 U.S. 656, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Supreme Court's following language in Monroe has generated considerable confusion for the district courts and the courts of appeal:

> In the Screws case we dealt with a statute that imposed criminal penalties for acts "willfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." . . . We do not think that gloss should be placed on [Section 1983] which we have here. The word "willfully" does not appear in [Section 1983]. Moreover, [Section 1983] provides a civil remedy, while in the Screws case we dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. [emphasis added]

365 U.S. at 187, 81 S.Ct. at 484, 5 L.Ed.2d at 505. It is this reference to the law of torts and the Court's indication that liability under section 1983 does not require the defendant's actions to have been willful that has thrust the lower courts into a quagmire in their attempts to distinguish between constitutional violations and torts.

The Supreme Court has subsequently indicated that constitutional violations actionable under section 1983 are distinguishable from common law tort actions but it has not clearly defined the difference between the two. In Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the plaintiff argued that the circulation of a flyer by the police with his name and photograph, designating him as an active shoplifter, deprived him of "liberty" protected by the Fourteenth Amendment and asserted that as a result he would be inhibited from entering business establishments for fear of being suspected of shoplifting and possibly apprehended. He further felt that his future employment opportunities would be seriously impaired. The court noted that respondent's complaint appeared to state a classical claim for defamation actionable in virtually every state court. However, plaintiff did not purport to assert a defamation claim, but instead claimed that he had been deprived of rights

secured to him by the Fourteenth Amendment. The court noted:

> Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.

424 U.S. at 698, 96 S.Ct. at 1159, 47 L.Ed.2d at 412. The court rejected this argument:

> And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under Section 1983.
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> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

424 U.S. at 698, 96 S.Ct. at 1159, 47 L.Ed.2d at 412. The premise that state law tort claims and violations

of local law rise to the level of constitutional violations and section 1983 actions was not accepted by the Court:

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, . . . a fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law.

424 U.S. at 700, 96 S.Ct. at 1160, 47 L.Ed.2d at 413. The Court also found equally untenable the premise that infliction by state officials of a stigma to reputation is different from infliction by the same official of harm to other interests protected by state law:

> While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

424 U.S. at 702.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) held that ordinary negligence did not rise to a constitutional deprivation:

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.
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> This conclusion does not mean, however, that every claim by a prisoner that he had not received adequate medical treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.
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> . . . .
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> Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of

> medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

429 U.S. at 104-105, 106.

In Batista v. Weir, 340 F.2d 74 (3d Cir. 1965), the plaintiff alleged that the defendant police officers came to his home without a warrant, arrested him, and committed an assault and battery on him. The case was submitted to the jury which awarded plaintiff $1,500 punitive damages against one of the police officers, but no compensatory damages. The court of appeals affirmed the judgment as to the claims relating to the unlawful arrest and assault and battery, stating:

> [N]either specific intent nor purpose to deprive an individual of his civil rights is a prerequisite to civil liability under the civil provisions of the Civil Rights Act . . . . If Batista was forcibly taken from his home without just cause or provocation and subjected to physical abuse and unlawfully detained by Scalese, absence of motive, purpose, or intent on the part of Scalese to deprive Batista of his federally protected rights is immaterial.

340 F.2d at 81.

The court of appeals affirmed the district court's dismissal of the complaint for failure to state a claim upon which relief could be granted in Kent v. Prasse, 385 F.2d 406 (3d Cir. 1967), where the plaintiff alleged

that as a state prisoner he had been forced to work on a press which was dangerous and unfit and which the prison officials knew had been condemned. He had been injured while working on the press and had received no compensation from the state of Pennsylvania. In affirming the dismissal the court stated:

> Nor are we able to perceive that a tort committed by a state official acting under color of law is, in and of itself, sufficient to show an invasion of a person's right under the Act [Section 1983]. While not dispositive, we note that there is no allegation that defendants violated any state criminal law or acted out of bad motive. Nor it is alleged that any state law was not enforced by the defendants.

385 F.2d at 407.

An alleged denial of proper medical treatment resulting from a transfer to an institution with an inferior medical system was held insufficient to state a constitutional violation in Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970). The court of appeals found that the district court had properly dismissed the complaint:

> [A]n allegation of negligent conduct by a state public official is not sufficient, in and of itself, to bring a claim within Section 1983. More is needed than a naked averment that a tort was committed under the color of state law; the wrongdoing must amount to a deprivation of a right, privilege, or immunity secured by the Constitution and the laws of the United States. And this must be set forth with specificity; mere argumentative and conclusory allegations will not suffice.

> The requirement of some semblance of factual specificity becomes necessary if the federal courts are to exercise jurisdiction under the Civil Rights Act. Without a proper allegation of constitutional deprivation, an action requesting damages for personal injuries sounds only in common law or statutory tort and, because no federal interest is involved, is triable only under state law in a state court.

428 F.2d at 6

An action was brought under the Civil Rights Act in Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972), where plaintiff, a diabetic who demonstrated symptoms of intoxication, alleged he had been arrested and taken into custody and brutally beaten by officers at the police station. The district court directed a verdict for two of the six defendant police officers, finding insufficient identification testimony to link them to the affray. The court of appeals affirmed, and in discussing the general principles applicable to an action under section 1983 stated:

> Thus, although proof of specific intent to deprive a person of his federally protected rights is not required, there must be at least proof of the "condition usually demanded by the law for liability in an action of tort [which] is the existence of either wrongful intention or culpable negligence on the part of the defendant."

464 F.2d at 279. The court also noted that under the facts and evidence in the case it was not necessary to decide whether culpable negligence could be grounds for an Eighth Amendment violation. 464 F.2d at 279 n. 11.

Smith v. Spina, 477 F.2d 1140 (3d Cir. 1974), was an action against police officers for an allegedly brutal

assault and battery inflicted upon plaintiff without cause, justification or provocation. The court of appeals affirmed a jury verdict for the defendants and noted that although jurisdiction was invoked under section 1983, plaintiff's counsel asserted that theories of negligence, res ipsa loquitur, and intentional assault and battery were applicable to the section 1983 claim. The court noted that counsel proceeded under a fundamental misapprehension. If the case had been tried merely as a tort action, the court of appeals would have dismissed for lack of federal jurisdiction since there was no allegation of diversity of citizenship. However, the district court had treated the tort claim as an independent state claim appended to the federal claim under section 1983. The court of appeals noted that the jury charge relating to the section 1983 claim would not have withstood an objection by the defendants. The court had informed the jury that it was plaintiff's theory that the defendants had exceeded their authority in using excessive force in taking plaintiff into custody. However, the court had failed to define "excessive force" in terms of a constitutional deprivation or a violation of a right protected by federal law. The court had also referred to "unlawful acts" of the policemen without describing "unlawful acts" in the context of the Civil Rights Act. The court of appeals determined that the jury instruction was overbroad, all-encompassing, and did not relate with specificity to any deprivation under the federal constitution or federal laws. However, this error was harmless since the verdict was for the defendants.

In Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976), a pretrial detainee who had been assaulted by other inmates brought action against the warden and guards for failing to protect him from attack and for denying him medical care for six days. The court found that plaintiff had been denied medical care and awarded compensatory damages in the amount of $1,000. The court of appeals determined that the plaintiff had failed to prove the intentional conduct required for a constitutional infringement: "To establish a constitutional violation, the indifference must be deliberate and the actions intentional. Moreover, not every injury or illness invokes the constitutional protection--only those that are 'serious' have that effect. Neglect, carelessness or malpractice is more properly the subject of a tort action in state courts." 546 F.2d at 1081.

In Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978), plaintiff's decedent had committed suicide while incarcerated in a cell in the police administration building after having been arrested on a charge of drunken driving at about 4:30 a.m. while driving the wrong way on a one-way street. Decedent was given a breathalyzer test, the results of which were inconclusive. A police sergeant who examined decedent at 6:15 a.m. found that she was sober and able to operate a motor vehicle at that time. However, she was detained in a cell with two other women pending arraignment before a magistrate. She was permitted to make a telephone call sometime between 9:00 and 9:40 a.m., and then after refusing to return to her original cell was taken to a cell near the end of the cell corridor. Although police regulations called for two women per cell, if possible, she was the sole occupant of her cell. There was testimony indicating that she was placed in a cell alone because she was creating a disturbance. She began to act hysterically, shouting, flushing the toilet, and banging the bars of the cell and continued in this manner for approximately thirty minutes. At 10:00 a.m., a matron found her hanging by her belt, which had not been taken from her as required by police regulations. An autopsy indicated the presence of barbiturates in her blood, and there was testimony that she was in the habit of taking large doses of barbiturates, which can cause the same clinical symptoms as alcohol intoxication. The court affirmed a directed verdict for the police personnel:

> In order to establish a constitutional violation under the eighth amendment, it is necessary that there be a deliberate indifference to the prisoner's needs . . . . A reading of the evidence before the district court reveals that police personnel may have acted negligently, perhaps even callously; but such actions do not amount to the "intentional conduct characterizing a constitutional infringement." . . . "More is needed than a naked averment that a tort was committed under color of state law. . . .". . . On the record before us, we find that no such intentional conduct was shown.

577 F.2d at 847-48.

Plaintiff in Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977), brought an action against the police officer, several of his accomplices, the police chief, and the town itself as a result of plaintiff's decedent having been shot and killed by a police officer in the course of an arrest. The court dismissed the claims against the police chief and the town and plaintiff appealed. The court of appeals affirmed a dismissal of the complaint: "We first consider the claim against Connell [police chief]. Plaintiffs do not seriously contend that § 1983 authorizes damages liability where an individual had no personal role in the wrongdoing. Such an actor by definition lacks the bad faith required to expose him to damages liability under § 1983." 560 F.2d at 40. The court found that plaintiff had the burden of pleading facts establishing both the constitutional violation and the inapplicability of the defendant's good faith defense:

> To negative Connell's official immunity, plaintiffs would have to establish active, bad faith participation in the wrongdoing. For example, if the police chief ordered the constitutional violations or possibly, if he deployed or hired the officer under conditions which he should have known would create a threat to the constitutional rights of the citizenry, damages may well be proper . . . . Here, plaintiffs made no such allegation. Since it was their burden to plead facts establishing both the constitutional wrong and the inapplicability of defendant Connell's good faith defense, . . . the dismissal of the claim against Connell was proper.

560 F.2d at 40.

Douglas v. Muncy, 570 F.2d 499 (4th Cir. 1978)[78] stated:

> We are further of the opinion, however, that there was no basis for an award of damages against these defendants on the charge that they deprived Douglas of his right to counsel or access to the courts. The district court did not find that either of these defendants acted with any malice, and the record shows that they merely followed the procedures prescribed for temporary inmates of the Correctional Center. Since the defendants were "acting in a reasonable good faith reliance on what was standard operating procedure in the Virginia prisons, [they] should not have to respond personally for damages."

570 F.2d at 501.

Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978), held that an action may be brought against a municipality under the Fourteenth Amendment and section 1331 under a Bivens theory for actions of municipal employees which have been authorized, sanctioned, or ratified by municipal officials or bodies functioning at a policy making level. However, municipalities would not be liable under a respondeat superior theory.

The question in Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) en banc, was whether the plaintiff could recover damages under section 1983 for the loss of a copy of his trial transcript after prison officials negligently left his cell door open following a security search. Plaintiff claimed his property had been taken without due process of law within the meaning of the Fourteenth Amendment. After citing Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the court stated:

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78. See also Cruz v. Ward, 558 F.2d 658 (2d Cir. 1977) (return to prison from mental hospital without hearing failed to show cruel and unusual punishment where record did not show decision was made irrationally or in bad faith).

> Similarly here the plaintiff has pointed to no specific constitutional guarantee against the negligence of the two prison guards, even though they might be tort-feasors under Illinois law. The dissenting Justices in Paul were of the view that "intentional conduct" infringing a person's liberty or property interests without due process of law is within the reach of Section 1983 . . . . They went no further, nor need we. If Section 1983 is to be extended to cover claims based on mere negligence, the Supreme Court should lead the way.
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> . . . .
>
> Any causation between the negligence of the prison guards in leaving the cell door open and Bonner's transcript loss was insufficient to satisfy Section 1983 because it was not alleged that the guards' actions were either intentional or in reckless disregard of Bonner's constitutional rights.

545 F.2d at 567. The court noted that in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the court was dealing with facts which showed intentional conduct by police when they were legally bound to know their actions would deprive the plaintiff of constitutional rights:

> All that the "tort liability" language of Monroe really establishes is that a specific intent to violate constitutional rights of the plaintiff is not required for a Section 1983 violation. But the introduction of a general intent yardstick into the determination of whether conduct is State

> action or has been performed "under color of state law" does not mean that mere negligence is actionable under Section 1983. The guards' culpability here was not of sufficient magnitude to constitute a deprivation of rights under Section 1983.

545 F.2d at 567. The court further stated:

> The guards were acting under color of law in and about his cell and allegedly their negligence facilitated the taking of the transcript by someone else. There is no claim that the guards intended the result or even acted in reckless disregard of Bonner's constitutional rights. Given that lack of intent and lack of reckless disregard, we hold that in the context of Section 1983 the guards did not deprive him of his property and, therefore, did not cause him to be subjected to the deprivation of his Fourteenth Amendment right not to have his property taken by the State without due process.
>
> Insofar as the district court granted summary judgment for defendants with respect to plaintiff's alternative claim based on negligence under Section 1983, it is affirmed.

545 F.2d at 569.

Bonner was followed by Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976). Plaintiff alleged that upon his entering the county jail defendant Johnson, a sheriff's deputy, took a $2,500 diamond ring from him and gave him an inventory receipt. However, when he was transferred to federal custody the ring was missing from his personal property inventory envelope and the deputy signed a note indicating his failure to return the ring.

Plaintiff alleged that his ring had been confiscated by a member of the sheriff's office. The court of appeals reversed the district court's dismissal of the complaint, noting that plaintiff alleged that a state officer had intentionally taken his ring under color of state law and failed to return it upon demand. The court held this actionable:

> If Kimbrough can prove that Johnson or another employee of the sheriff's office either intentionally or with reckless disregard caused his property loss, the remedy afforded under Section 1983 may deter similar misconduct. Our conclusion that a taking with intent (or reckless disregard) of a claimant's property by a State agent violates the Due Process Clause of the Fourteenth Amendment and is actionable under Section 1983 is in harmony with the decisions in other Circuits.

545 F.2d at 1061. In footnote 4, the court stated "Under our en banc opinion in Bonner, culpability at the reckless disregard level is sufficient to maintain a Section 1983 action. While Kimbrough's complaint does not allege a reckless disregard of his constitutional rights, that may be shown by evidence at trial, in which case he could amend to conform to the proof."

In Little v. Walker, 552 F.2d 193 (7th Cir. 1977), the plaintiff alleged that he and other inmates suffered acts and threats of physical violence, sexual assaults, and other crimes by other inmates and that defendants failed to protect plaintiffs from them. The district court's grant of defendants' motion to dismiss, based upon its finding that defendants were not motivated by actual malice, was reversed by the court of appeals:

> Since constitutional developments prior to the May 1972-September 1974 period had crystallized in Little's favor, defendants should have known that their actions within the sphere of their official responsibility would violate his constitutional rights . . . . Because under the

> facts alleged defendants have not met an objective good faith standard . . . . Little need not show whether they had a malicious intent or impermissible motivations.

552 F.2d at 198.

The plaintiff in McDonald v. State of Illinois, 557 F.2d 596 (7th Cir. 1977), was arrested, convicted, and sentenced for a homicide he did not commit. The court of appeals reversed the district court's dismissal as to defendant Weil, superintendent of the county department of corrections, but affirmed the dismissal as to all the other defendants. Another individual confessed to the murder two years after plaintiff was convicted and sentenced. The state's attorney then agreed to plaintiff's release from custody and he was granted a new trial in which the state moved to nolle prosse. The governor of the state of Illinois had granted plaintiff a full pardon. The court stated:

> Pursuant to 42 U.S.C. § 1983, plaintiff seeks damages against a number of city and county officials for alleged deprivation of constitutional rights while acting under color of state law. We find the law to be clear that for plaintiff to state a cognizable claim, he must allege more than mere negligence on the part of these defendants . . . . Indeed, in the case of supervisory officials, he must allege some personal involvement in the deprivation.

557 F.2d at 601.

A Chicago fireman with a history of mental illness shot and killed plaintiff's husband in Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977). Plaintiff brought an action against police officers for their failure to take the fireman into custody after having been informed that he was behaving dangerously. The jury verdict for the defendants was affirmed on appeal where the court stated:

> Had the jury resolved disputed facts in plaintiff's favor, they could have concluded that the individual defendants negligently failed to take action to restrain O'Malley, a man they knew to be irrational and violent . . . . There is no constitutional cause of action for mere negligence on the part of police officers in a case such as this. The plaintiff must show that their misbehavior was either intentional or in reckless disregard of his constitutional rights. Bonner v. Coughlin . . . . Our holding in Bonner undermines the district court cases on which plaintiff relies, although we noted that police nonfeasance, if purposeful, might be the basis for a constitutional tort claim.

565 F.2d at 486.

In Ervin v. Ciccone, 557 F.2d 1260 (8th Cir. 1977), the plaintiff alleged he was placed in punitive solitary confinement without notice of any charges or a hearing. The court affirmed the dismissal against the defendant prison officials:

> Assuming this to be true, we do not think that it warrants an award of damages. Although Ervin alleges that he "was arbitrarily and capriciously locked in solitary confinement," he does not allege that appellees did so out of ill will or malice towards him, or that he was placed in solitary confinement for an improper reason. All of the specific allegations relate to a denial of procedural due process. In April, 1972, it was at best unclear in this circuit whether prisoners had a right to notice and hearing prior to the imposition of discipline . . . . Thus, the prison officials are entitled to the good faith immunity from monetary liability. .

557 F.2d at 1262.

Money damages may be denied when the facts indicate that none of the defendants acted in bad faith or with personal malice toward plaintiff. Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978).

In Tillman v. Wheaton-Haven Recreation Association, 580 F.2d 1222 (4th Cir. 1978), a corporate director was not liable under section 1983 when he did not participate in, and in fact opposed, the constitutional violation: "If a director does not personally participate in the corporation's tort, general corporation law does not subject him to liability simply by virtue of his office." 580 F.2d at 1224, n. 5.

F. Extradition: Article IV, Section 2, Clause 1[79]

Article IV, section 2, clause 1 of the United States Constitution provides:

> A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Failure to comply with extradition laws may be actionable under section 1983. Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977) held that a complaint alleging plaintiff had been arrested in Georgia and turned over to a South Carolina highway patrolman who transported him into South Carolina to answer pending charges, without extradition proceedings, stated a claim under section 1983 since the officer was acting under color of state

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79. See Michigan v. Doran, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 47 U.S.L.W. 4067 (1978), for the Supreme Court's latest formulation of the substantive law of extradition. In this case, the court held that if extradition papers were in prima facie good order, the receiving state could not question the sending state's determination of probable cause.

law.[80]

Siegel v. Edwards, 566 F.2d 958 (5th Cir. 1978), discussed the problem of waiver of extradition:

> Appellant first contends that the extradition papers are illegal because they were rubber stamped with the signature of state officials, instead of being personally signed. Although the extradition papers of which appellant complains were never executed, appellant's return to Louisiana was not the result of those extradition papers. Appellant was returned to Louisiana because of his voluntary waiver of extradition. Once a fugitive has been brought within custody of the demanding state, legality of extradition is no longer [a] proper subject of any legal attack by him . . . .
>
> Appellant next contends that he could not be charged with murder or armed robbery because he fought extradition on those charges. He argues that since he voluntarily waived extradition on the burglary charges, he was exempt from trial on other offenses. This contention is meritless. Rights granted under federal provisions for extradi-

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80. See also Sanders v. Conine, 506 F.2d 530, 532 (10th Cir. 1974) (complaint which charged police officer and sheriff with abuse of extradition power by noncompliance with applicable federal law stated § 1983 claim which may not be summarily dismissed as frivolous); Pierson v. Graut, 357 F.Supp. 397, 399 (N.D. Iowa 1973) (extradition is not merely a matter of comity but is also a means of protecting citizens); Brozozowski v. Randall, 281 F.Supp. 306, 311 (E.D. Pa. 1968) (section 1983 relief is available to one unlawfully kidnapped and taken from state by police officer without extradition proceedings).

tion are granted to the state rather than to fugitives who might be the subject of extradition. Such fugitives, when returned to the demanding state, are not exempt for trial for any criminal act committed in that state.

566 F.2d at 959-60.

Although the plaintiff in Maynard v. Rhodes, 580 F.2d 237 (6th Cir. 1978) appeared to be alleging that the governor of Ohio and his assistants extradited plaintiff solely at the insistence of his bondsman, the record disclosed that he had been indicted in Ohio at the time the governor's request for extradition was forwarded to California. Plaintiff had subsequently been tried, convicted and sentenced in Ohio. Therefore, the district court had properly dismissed the complaint.

G. First Amendment

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1. General Considerations

The framework for analyzing First Amendment claims was identified in Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495, 501 (1974), where the Court stated:

> [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit

> First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

The legitimate penal objectives identified in Pell were deterrence of crime by the rehabilitation process and by the confinement of criminal offenders in a facility isolated from the rest of society, and the maintenance of internal security within the institution.

The unique importance of First Amendment rights in the prison setting was emphasized by the court in Wolfish v. Levi, 573 F.2d 118, 129-30 (2d Cir. 1978), cert. granted, ___ U.S. ___, 99 S.Ct. 76, ____ L.Ed.2d ____ (1978):

> In the close and restrictive atmosphere of a prison, first amendment guarantees taken for granted in society at large assume far greater significance. The simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment. Accordingly, courts have jealously protected the inmate in his exercise of first amendment prerogatives.

The prison official's burden of justifying restrictions on prisoners' First Amendment rights was outlined in Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976):

> The First Amendment right to receive information and ideas is more limited for prisoners, however, than for other members of society. "First Amendment guarantees must be 'applied in light of the special characteristics of the . . . environment'." . . . The burden of showing such special characteristics

> justifying restrictions on First Amendment rights is on those who seek to impose the restrictions. To justify a prison censorship regulation, prison officials must show that it "furthers one or more of the substantial governmental interests of security, order, and rehabilitation." . . . In addition, "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."

534 F.2d at 755.

2. Restrictions on Mail Privileges

a. General Correspondence

i. Convicted prisoners. Censorship (actual withholding) of prisoner mail may be justified where the regulation or practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression, but the limitation must be no greater than necessary to protect the governmental interest involved. Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). Procunier found that the prison mail regulations involved were properly invalidated by the district court since they authorized "censorship of statements that 'unduly complain' or 'magnify grievances', expression of 'inflammatory political, racial, or religious or other views', and matter deemed 'defamatory' or otherwise 'inappropriate'." 416 U.S. at 415, 94 S.Ct. at 1812, 40 L.Ed.2d at 241. The regulations invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship. Upon finding a letter to be objectionable, the employee could refuse to mail or deliver it and return it to the author, or submit a disciplinary report which could lead to suspension of mail privileges or other sanctions, or he could place a copy of the letter in the prisoner's file, where it might be a factor in determining work or housing assignments or eligibility for parole. The Court specifically stated that its decision was not based upon the rights of prisoners, but included consideration of the rights of persons outside the institution to communicate with prisoners.

Wolff v. McDonnell, 418 U.S. 539, 575-576, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) noted that although Procunier was based upon First Amendment rights of correspondents with prisoners, it had not yet recognized First Amendment rights of prisoners in the context of mail censorship. The Court specifically stated: "Furthermore, freedom from censorship is not equivalent to freedom from inspection or perusal. As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from intrusion in the criminal setting." 418 U.S. at 576, 94 S.Ct. at 2984, 41 L.Ed.2d at 962. In Wolff the prison authorities conceded that they could not read mail from attorneys to inmates but contended they could open letters from attorneys as long as it was done in the presence of the prisoner. The Court stated: "The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters." 418 U.S. at 577, 94 S.Ct. at 2985, 41 L.Ed.2d at 963. Significantly, the Court also stated: "[W]e think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, has done all, and perhaps even more, than the Constitution requires." Id.

The district court's order permitting reading of incoming and outgoing general correspondence was affirmed in Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978). Further, the district court had properly stricken down the requirement that prison officials give advance approval for a person to be added to a prisoner's correspondence list, and the limitation of forty letters to persons on the list. The court reversed the district court's order striking down regulations authorizing prison officials to reject a letter that "(1) concerned plans for violation of prison rules and (2) that contained a graphic presentation of sexual behavior that is in violation of the law." 580 F.2d at 757. The rule prohibiting friends and relatives from sending packages was not unconstitutional. The district court's holding that prison officials may not withhold mail to punish inmates for misconduct was not challenged. See Guajardo v. Estelle, 432 F.Supp. 1373 (S.D. Tex. 1977) at 1384.

An eighteen hour delay in delivering mail to prisoners, however, does not constitute a constitutional violation. Fore v. Godwin, 407 F.Supp. 1145 (E.D. Va. 1976). But in Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978), the district court had improperly dismissed

a complaint alleging that the defendants had unreasonably delayed the delivery of incoming mail and the posting of outgoing mail. This applied to both general correspondence and attorney-client mail; plaintiffs further alleged that defendants sometimes failed or refused to deliver or post attorney-client mail.

Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976) held that allegations that the defendants deliberately refused to mail certain of plaintiff's letters and to send certain others by registered mail stated a cause of action. Navarette was reversed by the Supreme Court in Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), on immunity grounds. However, the Court specifically noted that it would not address the First Amendment question. 434 U.S. at 566 n. 14, 98 S.Ct. at 862 n. 14, 55 L.Ed.2d at 33-34 n. 14.

Non-privileged mail (mail not addressed to the courts, attorneys, or elected officials) is not protected from inspection. Prison officials may interfere with mail where a substantial governmental interest unrelated to the suppression of expression is involved. However, the Fourteenth Amendment requires notice if mail is censored. Prison officials may inspect and peruse non-privileged mail for contraband as long as the intrusion is as minimal as possible. Laamon v. Helgemoe, 437 F.Supp. 269 (D. N.H. 1977).

Rules and practices of a jail permitting unrestricted censorship of all incoming and outgoing correspondence are unconstitutional. Vest v. Lubbock Cty. Com'rs. Court, 444 F.Supp. 824 (N.D. Tex. 1977).[81] In that case prisoners who refused to sign a waiver permitting censorship of their mail were not permitted to send or receive any mail except legal or official mail; mail was censored regardless of whether there was a reasonable belief of contraband; incoming letters containing abusive language were arbitrarily withheld from the inmate, who was not informed; and outgoing mail with abusive language was returned to the inmate unsent.

The district court's prohibition against the random and routine reading of outgoing mail was approved

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81. See also Minnesota Civil Liberties Union v. Schoen, 448 F.Supp. 960 (D. Minn. 1978), which involved similar challenges to a prison mail system.

in Wolfish v. Levi, 573 F.2d 118, 129-30 (2d Cir. 1978). The district court had observed that mail could still be inspected for contraband, and where good cause was shown, outgoing mail could be read. 573 F.2d at 130 n. 27. The court declined to follow the ruling of Smith v. Shrimp, 562 F.2d 423 (7th Cir. 1977), which upheld the practice of reading outgoing, non-privileged mail. 573 F.2d at 131 n. 28.

ii. Pretrial detainees. Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978) applied Smith, supra, to pre-trial detainees and allowed prison officials to read outgoing non-privileged mail. Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. 1975) held that the standards for censorship and examination of mail set forth in Procunier, supra, did not apply to pre-trial detainees, but failed to specify the appropriate standards. Dillard v. Pitchess, 399 F.Supp. 1225 (C.D. Cal. 1975), another case involving pre-trial detainees, stated that "contrary to present regulations, [pre-trial detainees] should be allowed to receive from visitors, or through the mail, any newspapers, books, or magazines that may lawfully by delivered by the postal service. The obvious burden of inspection for contraband that would result is believed to be overweighed by the First Amendment . . . ." 399 F.Supp. at 1241.

Pre-trial detainees have the right to receive any publication available to the general public, whether from the mails or some other source. Opening non-legal mail to inspect for contraband does not violate the First Amendment as long as no censorship occurs after it is opened. O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582 (E.D. Mich. 1977).

Giampetruzzi v. Malcolm, 406 F.Supp. 836 (S.D. N.Y. 1975) permitted inspection of mail only in the pre-trial detainee's presence: "Thus, although a detainee must be held under the least restrictive means necessary to assure institutional security, those means may include the need to inspect a detainee's mail." 406 F.Supp. at 846.

Monitoring a pre-trial detainee's mail was prohibited in Vienneau v. Shanks, 425 F.Supp. 676 (W.D. Wis. 1977). The jail claimed that they were reading plaintiff's mail and forwarding copies to the district attorney, in order to prevent plaintiff from attempting suicide again. The court held that monitoring plaintiff's mail was not reasonably necessary to protect her from herself in light of the facts that she was in

isolation, under constant observation, subject to periodic searches and controlled visitation, and that all envelopes or packages addressed to her were subject to inspection.

Brenneman v. Madigan, 343 F.Supp. 128 (N.D. Cal. 1972) discussed the question of censorship: "While prison officials may inspect incoming correspondence for contraband . . . it is difficult to justify any restriction at all on the amount or extent of a pretrial detainee's outgoing correspondence." 343 F.Supp. at 141. Jones v. Wittenberg, 330 F.Supp. 707 (N.D. Ohio 1971) prescribed the following standards for pretrial detainees:

1. There shall be no censorship of outgoing mail.

2. There shall be no limitation on the persons to whom outgoing mail may be directed.

3. There shall be no censorship of incoming letters from the prisoner's attorney, or from any judge or elected public official.

4. Incoming parcels or letters may be inspected for contraband, but letters may not be read.

5. Proper arrangements shall be made to insure that prisoners may freely obtain writing materials and postage.

6. Indigent prisoners shall be furnished at public expense writing materials and ordinary postage for their personal use in dispatching a maximum of five (5) letters per week.

330 F.Supp. at 719. The court noted that prison officials need not apply the second and fourth standards to convicted prisoners.

It is at least clear that between the extremes of wholesale censorship and unbridled enjoyment of First Amendment rights, there are various alternative methods

of regulating prison correspondence. The defendants must choose the least restrictive of those alternatives. Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).

b. Correspondence with Courts, Attorneys, and Public Officials

Mail addressed to courts, attorneys, or elected officials is usually designated as privileged and is protected by the First Amendment from interference.

Bryan v. Werner, 516 F.2d 233 (3d Cir. 1975) involved a challenge to censorship of mail going out of the resident law clinic. The court approved the district court's conclusion that there was no constitutional violation in checking the mail sent from the clinic in order to assure that the clinic was not being used for improper purposes. However, under the facts of that case, a question was presented as to whether the prison officials were refusing to mail letters intended for the courts. The court specifically stated: "The counsellors supervising the clinic may, however, check outgoing mail to ensure that it is court-related and seeks legal relief."[82] 516 F.2d at 239. The court found that refusal to send court-directed mail was impermissible, whether or not sent through the law clinic.[83]

Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976) considered the First Amendment rights which were not answered by Wolff, supra, and Procunier, supra. The court concluded that incoming mail from the courts, attorneys, governmental agencies, and press could not be read but could be opened in the inmate's presence, when there was a reasonable possibility that contraband would be included. Outgoing mail to the courts, identifiable attorneys, and members of the press,

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82. See also Mayberry v. Robinson, 427 F.Supp. 297 (M.D. Pa. 1977) (interference by prison officials with respect to communication with attorney was permissible where attorney's name was used by prisoner with third-party address; court prohibited all mail to attorney except at business office).

83. There is no violation, however, where delayed mailings were not legal documents for the court, but mere correspondence to a federal judge, since this sort of communication is improper. Coleman v. Crisp, 444 F.Supp. 31 (W.D. Okla. 1977).

probation officers, and governmental agencies was to be free from all checks. This holding was reaffirmed in Guajardo v. Estelle, 580 F.2d 748, 757 (5th Cir. 1978) with the observation that this protection extends only to attorneys representing or being asked to represent an inmate in a criminal or civil matter.

Crowe v. Leeke, 550 F.2d 184 (4th Cir. 1977) reversed and remanded for consideration of the validity of prison mail procedures which allowed correspondence from attorneys to be opened and inspected outside the presence of inmate-addressees. The court directed the district court to conduct an evidentiary hearing and find facts with respect to:

> (1) the present practice of opening attorney mail addressed to inmates, with particular reference to whether letters are read and whether copies are made for subsequent examination; (2) whether such correspondence is handled at a place and in such a manner that it is subject to observation by others; (3) what basis, if any, there is for inmate apprehension that their correspondence from attorneys is being read; (4) whether it is reasonably practicable for the warden to permit any form of random observation of the opening procedure to quiet fears that information is being gleaned from such correspondence; and (5) whether the search for contraband can be accomplished in a less intrusive manner by use of electronic or photographic equipment or even by examination of configuration and thickness of envelopes. After resolving factual questions such as these and others that may occur to counsel or to the court, the district judge would then determine whether or not it is reasonably necessary in order to protect the inmates' Sixth Amendment right to counsel to alter the present practice of handling incoming mail from attorneys to insure that contraband is not introduced into the prison.

550 F.2d at 188-89.

Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978) found that on three occasions prison personnel had opened letters addressed to plaintiff which were plainly marked either "attorney-client" or "court-client." Prior to July 1974, inmates were not permitted to send sealed letters addressed to anyone, including judges and lawyers. This rule was changed in July 1974, and letters to courts and attorneys were permitted to be sent sealed. In early 1974 prison officials had opened letters from plaintiff marked "attorney-client," one of which was a letter addressed to a judge. Further, in July 1974, the prison staff refused to mail a letter properly marked from plaintiff to one of his attorneys. The district court determined that while some of the interceptions of plaintiff's correspondence were unjustified, no damage was sustained. The court stated that: "While the interferences with the correspondence of plaintiff were unconstitutional and unjustifiable, we agree with the district court that they did not inflict on plaintiff any damages with respect to which he would be entitled to monetary compensation." 572 F.2d at 1266.

The district court in Allen v. Aytch, 535 F.2d 817 (3d Cir. 1976), after hearing, entered judgment for the defendants, finding that even if the defendant-warden had opened the envelope addressed to the court and read the complaint, his actions would not constitute a violation of the plaintiff's federal rights. The court of appeals did not reach that issue, but observing that federal courts will not pass on a constitutional question if the issue presented in a case may be adjudicated on a non-constitutional ground, remanded for allowance to the plaintiff to amend his complaint to allege that the defendant had violated a contract between the Federal Bureau of Prisons and the City of Philadelphia (with respect to prisoners) and to allege that the defendants' actions were prohibited in the handbook of the Philadelphia prison system.

In Guajardo v. Estelle, 580 F.2d 748, 759 (5th Cir. 1978), the court affirmed the district court's order requiring that inmates be permitted to send media mail unopened and to receive media mail that has been opened only for the inspection of contraband and in the inmate's presence.

c. Published Materials

The First Amendment mailing rights of prisoners extend to receiving published materials. Woods v. Daggett, 541 F.2d 237 (10th Cir. 1976) upheld, for security reasons, a regulation banning from a maximum security institution all books except those received from a publisher. However, the court remanded for consideration of plaintiff's claim that he was not notified when books were refused. However, in Wolfish v. Levi, 573 F.2d 118, 130 (2d Cir. 1978), the court of appeals agreed with the district court that the institution's "publisher only" rule, which permitted pre-trial detainees to receive only books and other publications sent directly from a publisher or a book club, impermissibly restricted the reading material available to the inmates.

The "publisher only" rule was held unconstitutional in Zaczek v. Hutto, 448 F.Supp. 155 (W.D. Va. 1978), where the prisoner who received a package from his mother containing a book was told he could not have it since it was not sent from a publisher, even though he had received books from his mother in the past.[84] The institution justified the rule on the ground that contraband was less likely to be received in books sent directly from the publisher:

> [A] rule that allows a particular book if it is sent from the publisher and disallows the same book if it comes from a friend or relative imposes a burden on the assertion of First Amendment rights that is greater than necessary to achieve the governmental interests. Furthermore, the rule works an extra hardship on the poorer inmates because it cuts off the supply of used books. In reality, this rule allows censorship of reading material solely for administrative convenience.

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84. "Publishers only" rule upheld in Guajardo v. Estelle, 580 F.2d 748, 762 (5th Cir. 1978), together with rule prohibiting friends and relatives from sending packages to inmates, even though it placed indigent prisoners at some disadvantage.

448 F.Supp. at 155.

Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978) stated:

> We hold that TDC authorities may not censor publications on the ground that they contain criticism of prison authorities . . . . They may censor portions of publications that contain information regarding the manufacture of explosives, weapons or drugs. They may also censor portions of publications that a reasonable person would construe as written solely for the purpose of communicating information designed to achieve the breakdown of prisons through inmate disruption such as strikes or riots. They may not censor inmate publications that advocate the legitimate use of prison grievance procedures or that urge prisoners to contact public representatives about prison conditions.

580 F.2d at 761. The court of appeals found that the district court had gone too far in ruling that prison officials could not ban sexually explicit magazines unless they had been judicially declared obscene. 580 F.2d at 761-62.

Owens v. Brierley, 452 F.2d 640 (3d Cir. 1971) held that the district court had improperly dismissed the complaint alleging that although one-half of the prison population was Negro, only two Negro magazines were allowed in the prison, while 123 magazines catering to the taste of white inmates were allowed. Plaintiff alleged that his request for leave to subscribe to the national magazine Sepia had been denied because the magazine was not on the official list of approved magazines. Plaintiff alleged that the official list was a result of racial discrimination and violated the First Amendment. The court of appeals noted that plaintiff was not seeking relief merely with respect to the publication Sepia, but also seeking relief from an allegedly arbitrary, capricious, and discriminatory method of selecting approved reading materials. Therefore, the fact that the defendant had

submitted an affidavit indicating that the magazines plaintiff sought had been placed on the approved list did not render plaintiff's action moot.

Morgan v. LaVallee, 526 F.2d 221 (2d Cir. 1975) held that the district court had improperly dismissed plaintiff's complaint alleging that the prison authorities refused to permit him to receive the January 1974 issue of the Midnight Special and that they directed him to tell his correspondents not to send him postage stamps. The court observed that prison officials must give affirmative justification for withholding a given publication and further stated:

> Such justification may follow only in limited circumstances when legitimate governmental interests are involved, that is, where receipt of the publication would constitute a threat to prison security or order or the inmate's own rehabilitation. . . . The district court cannot, without close examination of the publication in question, determine whether the regulation as here applied meets the test . . . .

526 F.2d at 224. The specific test referred to by the court was that prescribed in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968):

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377, 88 S.Ct. at 1679, 20 L.Ed.2d at ____.

Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976) held that a prison regulation was too restrictive in prohibiting nude photographs and paintings unless they were

"supportive or incidental to a theme not designed primarily to arouse sexual drives." The court noted that this regulation could prohibit pictures of nudes in a collection of works of art which failed to include an accompanying text which a censor would consider a theme. The court further held that the phrase "material that seriously degrades race or religion" was not narrow enough to reach only that material which encouraged violence, and invited prison officials to apply their own personal prejudices and opinions as standards. The court also disapproved of the phrase "having a substantially inflammatory effect on inmates," noting that the phrase was similar to the prohibition of "inflammatory political, racial, religious or other views" and "defamatory" matter held overbroad in Procunier v. Martinez, 416 U.S. at 415-16. The court noted that material which may reasonably be thought to encourage violence may be prohibited by a narrowly drawn regulation. The court also disapproved of the phrase "in any way subversive of institutional discipline" which could reasonably be interpreted by prison officials as authority to suppress unwelcome criticism. The court found that the following regulation, which would exclude many of the world's great books, was too broad:

> Periodicals which deal with the details of criminal activity or behavior are not approved. This type of material includes stories, articles, or pictures glorifying criminals, discussing the modus operandi of a felon, or treating in a bizarre fashion the details or circumstances of a crime.

534 F.2d at 757.

The court commented that the state could minimize federal interference with its prison censorship regulations by including procedural rules permitting inmates to challenge censorship decisions in a prison administrative proceeding.

Thibodeaux v. State of South Dakota, 553 F.2d 558 (8th Cir. 1977) recognized that a finding that a publication is detrimental to the rehabilitative aims of the prison is a proper basis for censorship, but a finding that a publication has no rehabilitative value is not:

> The lack of a . . . finding [that release of the materials would have a detrimental effect on rehabilitation] in this case takes this case beyond the scope of Carpenter and convinces us that summary dismissal of Thibodeaux's petition was premature and unwarranted. Since we are dealing with sensitive First Amendment rights, the prison officials carry the burden of proving the need for censorship . . . and, on the basis of the present ambiguous record, they have not discharged that burden.

553 F.2d at 559-60.

Carpenter v. State of South Dakota, 536 F.2d 759 (8th Cir. 1976), cert. denied, 431 U.S. 931, 97 S.Ct. 2636, 50 L.Ed.2d ____ (1977) affirmed, with one dissent, the dismissal of an action challenging the censorship board's ban on the receipt by prisoners of mail containing sexually explicit material. The documents submitted with the complaint revealed that the plaintiffs had hearings and the Prison Board found the materials would inhibit rehabilitation. The court stated: "The decision of the board that receipt of the items described in this case would have a detrimental effect upon rehabilitation was well within the discretion of the board and requires no further review by the courts." 536 F.2d at 763.

Hopkins v. Collins, 548 F.2d 503 (4th Cir. 1977) reversed the district court, which had held that prisoners were entitled to full hearings on censorship of their magazines. The court of appeals held that under Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), the required procedures were (1) appropriate notice, (2) a reasonable opportunity to challenge the initial determination, and (3) an ultimate decision by a disinterested party not privy to the initial censorship determination.

Blue v. Hogan, 553 F.2d 960 (5th Cir. 1977) held that the district court had erred in ordering the warden to deliver certain periodicals to the plaintiff. The test applied by the district court was whether the periodicals presented a clear and present danger or

contained advocacy which incited and was likely to produce imminent lawless action. The court of appeals noted that the standard of Procunier, supra, and not the clear and present danger standard should govern. The court remanded since the wrong legal standards were applied.[85]

3. Restrictions on Visitors and Press Interviews

a. General Public and Family

> [With respect to] the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded great latitude."[86]

In Underwood v. Loving, 391 F.Supp. 1214 (W.D. Va. 1975), the plaintiff alleged that the defendant correctional officer refused to permit a female friend[87] to visit him as punishment for being intoxicated,

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85. See also Aikens v. Jenkins, 534 F.2d 751, 755 (7th Cir. 1976) where the court stated:"we pause to note, as the District Court correctly recognized, Procunier v. Martinez does not establish a clear and present danger criteria."

86. Pell v. Procunier, 417 U.S. 817, 826, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495, 503 (1974).

87. See also Hamilton v. Saxbe, 428 F.Supp. 1101, 1112 (N.D. Ga. 1976), aff'd sub nom. Hamilton v. Bell, 551 F.2d 1056 (5th Cir. 1977) (visitation rights with non-family members not absolute).

although no charges were brought against him. Plaintiff alleged that the prison's visitation regulations were being applied in a discriminatory manner. An affidavit submitted by another inmate stated that the prison policy was to refrain from enforcing the regulations unless the particular guard "has a beef with you, then you can expect to get hassleed [sic] and treated unequal." The court stated: "Although the weight of authority holds that visitation privileges are matters within the scope of internal prison administration, this does not permit discriminatory application of the regulations. However, absent extraordinary circumstances, internal concerns such as visiting regulations should be resolved by jail officials." 391 F.Supp. at 1215. Defendant's motion for summary judgment was granted after defendent produced a visiting list which indicated that the plaintiff's friend had been added to that list. The court found the issue of defendant's motivation was not of a severe enough quality to necessitate federal court intervention into an internal prison concern.

Brenneman v. Madigan, 343 F.Supp 128 (N.D. Cal. 1972) stated:

> The plaintiff class also has a constitutional right, protected by the First Amendment, to communicate with friends, relatives, attorneys and public officials by means of visit, correspondence and telephone calls . . . . Although unrestricted visiting might constitute an intolerable interference with orderly jail administration, pre-trial detainees should be able to visit with friends and relatives for more than 15 minutes once a week . . . . No compelling reason appears to the court why a pre-trial detainee may list only five "authorized" visitors over the age of 14 as Greystone's rules of conduct now provide. As a general proposition, a pre-trial detainee should be able to visit with whomever he pleases, especially his children, for substantial periods of time each week.

> . . . While a convicted prisoner may have no right to make any telephone calls at all, . . . a pretrial detainee does.

343 F.Supp. at 141.

A proper basis for limiting plaintiff's visitors was found in United States ex rel. Raymond v. Rundle, 276 F.Supp. 637 (E.D. Pa. 1967), where plaintiff had been sentenced to death and the institution lacked sufficient personnel to supervise the visits:

> It has been held by this Court that Federal courts will not interfere with uniformly applied prison regulations designed to achieve discipline indispensable to orderly operation of state penal institutions . . . . [W]hile discipline is essential and certain rights might be curtailed in order to achieve it, the circumscription must always reasonably relate to the maintenance of prison discipline and never be rather an arbitrary and capricious disregard of human rights.

276 F.Supp. at 638. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) stated:

> The District Court directed that inmates should be allowed to receive visitors on at least a weekly basis. Under our decision in McCray v. Sullivan, we feel that visitation regulations should be left to the prison authorities, wisely adapted to individual circumstances if their sound discretion should so dictate, or included in general rules which will allow prisoners reasonable visitation.
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> . . . Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm other prisoners.

559 F.2d at 291.

It was held improper to dismiss a case as frivolous where the plaintiff alleged that he was Black and that he had been denied a visit from a friend by prison officials in an effort to harass and discourage the friend from ever attempting to visit him. Thomas v. Brierley, 481 F.2d 660 (3d Cir. 1973). The court held that "A refusal to allow a prisoner visitors because of his race would violate the equal protection clause of the Fourteenth Amendment . . . . And it is conceivable that the denial of visitation privileges without a reasonable justification might amount to cruel and unusual punishment." 481 F.2d at 661.[88]

A complaint alleging that inmates were denied physical contact with their families failed to state a cause of action. Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975). Similarly, contact visits were held not to be constitutionally compelled in Feeley v. Sampson, 570 F.2d 364, 373 (1st Cir. 1978).[89]

Rules governing visitation privileges were ordered by the court in James v. Wallace, 406 F.Supp. 318 (M.D. Ala. 1976):

> Each institution shall provide a comfortable, sheltered area for visitation. The visiting area must not, except for security purposes that have been documented, physically separate visitors from inmates. Visitation policies must permit an inmate to receive visitors on at least a weekly basis, and rules governing visitation must allow

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88. But see Henry v. State of Delaware, 368 F.Supp. 286, 288 (D. Del. 1973) (there is no federal constitutional or statutory right to visitation privileges). See also White v. Keller, 438 F.Supp. 110, 118 (D. Md. 1977) ("whether visitation is a right or not, it is at best a non-fundamental right, and hence may not only be restricted, but may be restricted by other than the least drastic means.").

89. See subsection d infra.

> reasonable time and space for each visit. Visitors shall not be subjected to any unreasonable searches. Inmates undergoing initial classification shall not be denied visitation privileges.

406 F.Supp. at 334.

Evening hours of visitation for regular prisoners should be made available to facilitate visits by those who attend school or must work during the day. Dillard v. Pitchess, 399 F.Supp. 1225, 1240 (C.D. Cal. 1975).[90]

There was no error in the failure of a district court to submit to the jury plaintiff's complaint that visitation was allowed only in the visiting facilities at the segregation unit of the institution and that visitation was not permitted over a weekend. Dorrough v. Milliken, 563 F.2d 187 (5th Cir. 1977).

Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972) stated:

> Plaintiff alleged in his fourth cause of action that defendants violated his right of privacy by monitoring his conversations with visitors. The district court was correct in dismissing this cause of action, for plaintiff's claim is foreclosed by Lanza v. New York, 370 U.S. 139, 143, 82 S.Ct. 1218, 1221, 8 L.Ed.2d

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90. "Every effort should be made to allow visitations by children, and the length of the visit should be extended to allow the inmates the benefits of visiting friends and family." Lovern v. Cox, 374 F.Supp. 32, 36 (W.D. Va. 1974). See also Hughes, J., Play of Children In a Visiting Room of a Maximum Security Prison: A Comparison of Behavior Before Play Materials Were Available and After a Play Situation Was Provided. (Doctoral dissertation, University of Pittsburgh) Ann Arbor, Michigan: Univ. Microfilm, 1975, No. 75-13193.

384 (1962), where the Supreme Court indicated "that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room."

468 F.2d at 726.

A district court's dismissal of plaintiff's request for conjugal visits was affirmed in McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975), cert. denied, 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86.

b. Interviews with Attorney's Aides and Investigators

Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) held that a rule which provided that an attorney of record could utilize no more than two investigators who were required to be licensed by the state or members of the state bar constituted an unconstitutional burden on the right to access to the courts:

> The constitutional guarantee of due process of law has a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

416 U.S. at 419, 94 S.Ct. at 1814, 40 L.Ed.2d at 243.

In Taylor v. Sterret, 532 F.2d 462, 482 (5th Cir. 1976), a district court order requiring the sheriff to limit visits of district attorney's representatives to those who asked or consented to see them was held to be overly restrictive.

c. Press Interviews

Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) held that the right to free speech under the First and Fourteenth Amendments to the United States Constitution does not afford prisoners the right to interviews with members of the press where the prisoners have alternative channels of communication, such as communication by mail and visits from members of their families, the clergy, attorneys, and friends of prior acquaintance. The Court stated that "So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the 'appropriate rules and regulations' to which 'prisoners necessarily are subject' . . . and does not abridge any First Amendment freedoms retained by prison inmates." 417 U.S. at 828, 94 S.Ct. at 2807, 41 L.Ed.2d at 505. Further, the Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." Id. at 834, 94 S.Ct. at 2810, 41 L.Ed.2d at 508.[91] The Court observed that under a prior practice members of the press had free access to interview any individual inmate. As a result, press attention was concentrated "on a relatively small number of inmates who, as a result, became virtual 'public figures' within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems."[92] Therefore, the regulation was adopted prohibiting press and other media interviews with specific individual inmates. Newsmen were permitted to visit both the maximum and minimum security sections of the institutions, to stop and speak about any subject to any inmates whom they might encounter, and to enter the prisons to interview inmates selected at random by the corrections officials. The Court upheld the regulation. Accord, Saxbe v. Washington

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91. This holding was reaffirmed in Houchins v. KQED, Inc., ____ U.S. ____, 98 S.Ct. 2588, ____ L.Ed.2d ____ (1978).

92. See also Seattle-Tacoma Newspaper Guild, Local #82 v. Parker, 480 F.2d 1062 (9th Cir. 1973), where the court held a ban on interviewing prison strike leaders was reasonable since the interviews tended to increase disciplinary problems and make some inmates celebrities.

Post Co., 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974).

When pre-trial detainees are permitted some press interviews, the determination must be based upon pre-determined regulations which delineate precise and objective tests. Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975).[93] Further, due process requires a procedure for administrative review of a denial in order to assure the implementation of the standards:

> Even if the prisoners held pending trial have no constitutional right to meet with reporters, the First Amendment precludes Aytch from regulating, through the grant or denial of permissions for prisoners to talk with reporters, the content of speech which reaches the news media, unless the restriction bears a substantial relationship to a significant governmental interest.
>
> . . . [W]hen the government makes an avenue of communication available to the proponents of some views, the same opportunity must, absent exceptional circumstances, be afforded to others who wish to express their ideas in that manner, whether or not the governmental officials endorse or sanction the thoughts to be expressed.

522 F.2d at 1086-87.

> Although the scope of a prisoner's First Amendment rights is not unaffected by the fact of his incarceration, an inmate's interest in communicating with the press through face to face encounters is, like his interest in sending and receiving mail,

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93. The opinion in Main Road is criticized in Note, Main Road v. Aytch, 44 Geo. Wash. L. Rev. 453 (1976).

> 'grounded . . . in the First Amendment' and therefore is encompassed within the interests in 'liberty' protected by the Fourteenth Amendment. The nature of the procedures sufficient to satisfy due process depends upon a balancing of the individual rights and the governmental interests affected.

522 F.2d at 1090.

Subsequently Main Road v. Aytch, 565 F.2d 54 (3d Cir. 1977) affirmed the district court's finding that the new regulations did not violate due process, but remanded for entry of declaratory judgment in favor of the plaintiffs. "We agree with the district court's conclusion that prison inmates have no constitutional rights to hold group press conferences where other means of communication are available." 565 F.2d at 56.

Following remand of Main Road v. Aytch, 522 F.2d 1080, the defendant had adopted regulations banning group press conferences and regulating individual interviews. The regulations required that an inmate who wished to meet with a reporter must give the warden certain information in writing about the proposed discussion. Requests could be denied by the warden, or his designee, if the superintendent of the Philadelphia prisons, or his designee, determined that the interview would present a clear and present danger to the safety or security of the institution, the inmates, the personnel, or the visitors. Within five days the inmate could request a hearing before a special board composed of the deputy superintendent, director of inmate services, and a warden other than the one denying the request. The hearing was to be held within ten days of the request. The board acted as a fact finder and was required to prepare written findings of fact as well as a disposition. Its action was administratively final. The court held that "Plaintiffs here have failed to demonstrate that the prison officials' prohibition of group press conferences does not have a legitimate relationship to security within the prisons. The fact that many of the inmates have not been convicted does not reduce the importance of security considerations." 565 F.2d at 57. While the possibility of review of the warden's decision by his subordinates

was not endorsed, the court found that it did not violate due process.

d. Pretrial Detainees

i. Visitation privileges. Although contact visits were held not constitutionally compelled in the case of convicted prisoners in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978) (subsection a, supra), the court reversed the district court to the extent that it required that pretrial detainees have physical contact and communication with their visitors. "The question is simply whether consideration of jail security and order make it reasonable for the authorities to refuse visits of this nature." The fact that contact visits were allowed at the state prison, although a relevant consideration, was not conclusive since the state prison could have been constructed in such a way that contact visits would be more manageable:

> Unless the denial of contact visits on security grounds can be found, on the basis of evidence of record, and with reasonable deference to the expertise of Jail authorities, to be an "exaggerated" response by Jail officials, . . . the district court should not have substituted its judgment as to security needs for that of the officials.[94]

570 F.2d at 373.

Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) affirmed the district judge's order requiring that plaintiffs, pretrial detainees, be permitted contact visits. "We have said that for convicted prisoners 'visitation privileges are a matter subject to the discretion of prison officials.' . . . We reserved, however, the question whether convicted prisoners have a constitutional right to visitation in some form." 563 F.2d at 748. The court noted that the defendants had failed

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94. Accord, Owens-El v. Robinson, 442 F.Supp. 1368, 1389 (W.D. Pa. 1978); Collins v. Schoonfield, 344 F. Supp. 257, 279 (D. Md. 1972) (no constitutional violation to deny contact visits).

to present evidence of threats to institutional security, but added: "Of course, prison authorities are under a duty to adopt reasonable measures to prevent visitors from smuggling weapons or contraband to prisoners, whether the prisoners are convicted or unconvicted and whether they are classified as maximum or minimum security risks."[95] 563 F.2d at 749.

Similarly, Rhem v. Malcolm, 507 F.2d 333, 338 (2d Cir. 1974) affirmed the district court's order requiring the prison officials to permit pretrial detainees who were shown not to require maximum security custody to have contact visits. See also Forts v. Malcolm, 426 F.Supp. 464 (S.D. N.Y. 1977); Dillard v. Pitchess, 399 F.Supp. 1225 (C.D. Cal. 1975).

ii. Press interviews. When pretrial detainees are permitted press interviews, the determination must be based upon predetermined regulations which delineate precise and objective tests. See the discussion of Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975) in subsection c, supra.

4. Freedom of Religion[96]

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

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95. See also Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976) (error to dismiss complaint alleging infrequency of visits and limited visiting hours); Jordon v. Walker, 450 F.Supp. 213 (E.D. Wisc. 1978) (court ordered contact visitation and modification of physical facilities to accomplish it); Ambrose v. Malcolm, 440 F.Supp. 51, 52 (S.D. N.Y. 1977) ("Except where security of the institution is at stake, all visits to inmates shall be contact visits."); O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582, 589 (E.D. Mich. 1977) (denial of contact visit unconstitutional as matter of law unless security reasons justify); Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978) (Prison officials required to establish a classification system which would enable them to determine which pre-trial detainees could enjoy contact visits without jeopardizing the security of the facility. However, the court did not mandate contact visits.)

96. For a complete discussion of prisoners and freedom of religion, see Comment, The Religious Rights of the Incarcerated, 125 U. Pa. L. Rev. 812 (1977).

The First Amendment right to free exercise of religion[97] and the Fourteenth Amendment Equal Protection Clause are the sources of causes of action relating to prisoners' rights to practice their religion.

Cruz v. Beto, 405 U.S. 319, 96 S.Ct. 1079, 31 L.Ed.2d 263 (1972) reversed a judgment dismissing the complaint for failure to state a cause of action. The plaintiff alleged that he was a Buddhist and was not permitted to use the prison chapel although other prisoners, who were members of other religious sects, were permitted to use the chapel; that he was punished for sharing Buddhist religious material with other prisoners; that he was prohibited from corresponding with his religious advisor; that inmates were encouraged to participate in other religious programs, which were provided at state expense; and that prisoners were able to get points of good merit as rewards for attending orthodox religious services. The Court stated: "We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations." 405 U.S. at 321, 98 S.Ct. at 1081, 31 L.Ed.2d at 267. The Court further noted:

> If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era.

405 U.S. at 322, 92 S.Ct. at 1081, 31 L.Ed.2d at 268. However, the Court noted:

> We do not suggest, of course, that every religious sect or group within a prison -- however few in numbers -- must have identical facilities or personnel. A special chapel or

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97. Applied to the states through the Fourteenth Amendment, Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972).

> place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty.

405 U.S. at 322 n. 2, 92 S.Ct. at 1081 n. 2, 31 L.Ed.2d at 268 n. 2.

After trial on the merits, Lareau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), cert. denied, 414 U.S. 878, 94 S.Ct. 49, 38 L.Ed.2d 123 (1973) found that the prison authorities had a substantial reason for denying segregated prisoners the right to attend Mass. The Catholic chaplain made himself available to administer the sacraments in the segregation unit and testified that he had taken care of plaintiff's spiritual needs adequately and "to the best of (his) ability."[98]

A federal prisoner brought a mandamus action seeking an order requiring the prison administrator to conform the conditions of his incarceration to the plaintiff's Orthodox Jewish religious beliefs concerning diet and prayer in Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1976). The court of appeals found that the relief granted by the district court was broader than required and ordered that plaintiff be provided with a diet sufficient to sustain him in good health without violating the Jewish dietary laws. The court declined to mandate specific items of diet.

In Mukmuk v. Com'r. of Dept. of Correctional Services, 529 F.2d 272, 275 (2d Cir. 1976), cert. denied, 426 U.S. 911, 96 S.Ct. 2238, 48 L.Ed.2d 838, the plaintiff claimed that he had been placed in solitary confinement for twelve days for possessing religious literature and setting up a school for Muslims.

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98. Accord, Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854, 863 (4th Cir. 1975) (refusal to allow attendance at Mass is reasonable judgment where individual ministration by chaplain is permitted).

The court reversed the district court's summary judgment for the defendants as to this claim, observing that if the literature involved was religious in character, the warden could be liable in damages for punishing the plaintiff for possessing it.

The plaintiffs in Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976) alleged that defendants had interfered with their free exercise of religion by preventing them from wearing beards, prayer caps or praying in the manner prescribed by their religion. The district court's dismissal of the complaint was reversed and the action was remanded for further proceedings. The court noted that the complaint raised serious issues:

> At the very least, a record must be made as to what the no-beard rule is; how it is applied; whether any beards are allowed; whether, as plaintiffs allege, there is no hygienic problem; and whether the need for identification requires total prohibition of beards, rather than some narrower limitation.
>
> What has been said substantially disposes of the rest of the case. As to prayer hats, plaintiffs claim a right of personal liberty, apparently buttressed by a religious claim. Moreover, they appear to allege that other inmates are allowed to wear head coverings. The claimed rights, of course, are not absolute, particularly in a prison setting, and plaintiffs' interest must be weighed against the state's concern that weapons can be concealed under a hat. But if a factual record is necessary to decide whether the state's interest in hygiene and identification outweighs the prisoner's interest in growing a beard as required by his religion, the same treatment is required to determine whether a rule barring

> all hats -- of whatever size, style, or religious significance -- is necessary to prevent hiding weapons.[99]

536 F.2d at 504.

In Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976), the plaintiff alleged that he was denied access to religious services while he was in punitive segregation. The court stated:

> Four years ago, this court held that restrictions on religious freedom are permissible only "if the state regulation has an important objective and the restraint on religious liberty is reasonably adapted to achieving that objective." LaReau v. MacDougall, 473 F.2d 974, 979 (2d Cir. 1972), cert. denied, 414 U.S. 878 . . . . In LaReau, we further noted that not every prisoner in segregation can be excluded from chapel services; because not all segregated prisoners are potential troublemakers, the prison authorities must make some discrimination among them . . . . [A]n evidentiary hearing will establish what policies concerning religious practices exist at Auburn and whether officials had a reasonable basis for limiting appellant's participation at group services.[100]

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99. See also Moskowitz v. Wilkinson, 432 F.Supp. 947 (D. Conn. 1977) (prison "no-beard" rule unconstitutional if applied to those Orthodox Jewish prisoners with a sincerely held religious belief).

100. A rule restricting attendance at religious services to those with a bond of $5,000 or less was found to be arbitrary and a denial of First Amendment rights in O'Bryan v. County of Saginaw, Mich., 437 F.Supp. 582 (E.D. Mich. 1977). Where only short-term prisoners (60 days or less) were involved and religious services were provided, the institution's failure to provide a chapel where members of the same faith could congregate was not unconstitutional. Wolfish v. Levi, 439 F.Supp. 114 (S.D. N.Y. 1977), aff'd 573 F.2d 118 (2d Cir. 1978).

542 F.2d at 3.

Denial of permission to exercise religious beliefs in any manner was alleged in Wilson v. Prasse, 404 F.2d 1380 (3d Cir. 1968). Further, plaintiff alleged the denial of the opportunity to correspond with his spiritual leader, minister, or "brothers and sisters of his faith"; the denial of permission to purchase publications of his faith; that institution officials restricted the prison religious program to three major faiths, excluding plaintiff's faith (Islamic); that he was forced to eat foods forbidden by his sacred laws;[101] and that he was forced to submit to identity under the Catholic faith. The district court dismissed the complaint for failure to state a cause of action, but the court of appeals reversed, finding that the allegations of the complaint, which included specific examples of the denial of permission to exercise religion, stated a proper section 1983 cause of action.

Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970) affirmed the district court's summary judgment in favor of the defendant. The plaintiff had alleged that prison officials discriminated against him because he was a Jew by denying him the services of a rabbi. The court found that plaintiff's allegations of discrimination were not substantiated in fact since the prison superintendent's affidavit explained that arrangements would not be made for a full-time Jewish rabbi to serve as chaplain at the institution because there were usually only two or three Jewish inmates. However, the superintendent was attempting to make arrangements for a rabbi to come to the institution on a fee basis. The affidavit effectively and conclusively refuted plaintiff's claim of religious discrimination, hence summary judgment was appropriate.

However, Kauffman v. Johnston, 454 F.2d 264 (3d Cir. 1972) vacated the judgment granting defendant's motion for summary judgment. There the plaintiff alleged that the defendant superintendent acted unlawfully and with malice in prohibiting him from worshiping in accordance with the Jewish religion and observing Jewish religious holidays. The court of appeals found that the complaint stated a cause of

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101. But see Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (no special diet required for Black Muslims).

action cognizable under the Civil Rights Act and that there were unresolved and disputed questions of fact.[102]

United States ex rel. Jones v. Rundle, 453 F.2d 147 (3d Cir. 1971) reversed the district court's summary judgment entered against a pre-trial detainee who was routinely placed in a maximum security cell although he was never a disciplinary problem and who was denied the right to attend congregate Catholic religious services. The court of appeals found that the district court had correctly ruled that the complaint stated a cause of action under the Civil Rights Act, but then stated:

> This, however, does not mean that a prisoner's right to practice his religion is absolute. Such right may be reasonably restricted in order to facilitate the maintenance of proper discipline in the prison. . . . But where religious freedoms are curtailed by prison officials, the Government must show compelling justification for such deprivations.

453 F.2d at 149-50. The court found it erroneous to allow summary judgment when the plaintiff might be able to show that the prison regulations were overbroad; that they were not reasonably related to the maintenance of proper order in the prison; or that they were unreasonably applied to him.

Wilson v. Prasse, 463 F.2d 109 (3d Cir. 1972) affirmed a jury verdict for the defendants. The plaintiffs claimed their correspondence with and visits by Muslim ministers were restricted although such restrictions were not imposed on other faiths; that they were prevented from obtaining Muslim literature; and that they were denied an adequate diet without pork. In his charge the trial judge told the jury that the prison authorities had the right to make reasonable

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102. But see Ron v. Lennane, 445 F.Supp. 98 (D. Conn. 1977), where a member of an Orthodox Jewish sect was prohibited from making his required prayers at sunrise since it would interfere with the institution's head count. The court held that no constitutional right was violated because plaintiff's religious beliefs lacked the good faith necessary to trigger the First Amendment.

rules and regulations for the operation of the prison and that they had wide discretion in matters of prison operation and discipline. The subject of reasonable maintenance of discipline was not subject to the supervision of a federal court. On the other hand, plaintiffs were entitled to the free exercise of their religion as long as it did not interfere with the reasonable rules and regulations of the institution. The prison officials were not required to have special rules and regulations tailored to meet the needs of every group in the prison. While the officials should not impose unreasonable barriers to the free exercise of an inmate's religion, they did not have a duty to supply every inmate with a clergyman or religious services of his choice. The court's charge further stated:

> The question which will be before you to decide is whether the rules and regulations of this institution, as applied to this plaintiff, were unreasonable and unjustified with respect to the needs of prison restraints and discipline . . . .
>
> . . . .
>
> However, to justify the prohibition of religious literature and the practices of a religion, prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution.

The court of appeals found that the charge correctly set forth the law of the Third Circuit and further stated:

> In Gittlemacker (428 F.2d 1), we explicitly referred to the test as: "The requirement that a state interpose no unreasonable barrier to the free exercise of an inmate's religion." . . . "Where . . . the charge is made that the regulations restricting religious practices fall

> more harshly on adherents of one faith than another, the courts will scrutinize the reasonableness of such regulations."

463 F.2d at 113-14. The court of appeals noted that plaintiff objected to the "unreasonable and unjustified" test applied by the district court and stated: "'[S]ubstantial interest' or 'compelling need' are, in the context submitted by appellant, solely standards of law, for use by the court to determine preliminarily before the reasonableness issue is submitted to the jury." 463 F.2d at 114. The reasonableness of the regulations was a jury question and the district court had instructed the jury fairly and accurately.[103]

O'Malley v. Brierley, 477 F.2d 785 (3d Cir. 1973) was an action brought by prisoners and Catholic priests, claiming the abridgement of First Amendment rights when state prison officials withdrew the priests' privileges to conduct religious services and counsel prisoners. The court affirmed the summary judgment for the defendants as to the claim of the priests, but reversed as to the claim of the prisoner plaintiffs. Although the court held that the priests did not have a constitutional right to enter the prison, nevertheless, prison officials were to be prevented from unreasonably attempting to curtail the practice of religion by prison inmates:

> [W]here a state does afford prison inmates the opportunity of practicing a religion, it may not, without reasonable justification, curtail the practice of religion by one sect.
>
> The inmates' complaint that the curtailment of the visitation privileges of Fathers O'Malley and

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103. See also Cochran v. Rowe, 438 F.Supp. 566 (N.D. Ill. 1977). The court held that a First Amendment claim was stated when prison officials unreasonably restricted the practice of Islamic religion by (1) disproportionate funding, (2) failing to provide access to religious material, (3) prohibiting Islamic activities, and (4) establishing more stringent procedures to attend religious services than required for other religions.

> Taylor constituted religious discrimination with racial overtones fits the classic mold of a claim cognizable under § 1983 for which relief may be granted. Thus, it was improper to dismiss the complaint of these plaintiffs on the ground stated by the district court.

477 F.2d at 795. The conflicts in the opposing affidavits required that the reasonableness of the regulation be determined by a fact finder; therefore, a remand was required:

> [W]e emphasize that the state may not interpose an unreasonable barrier to the free exercise of an inmate's religion. The test for the fact finder, therefore, is simply whether under all of the circumstances, the state has sustained its burden of proof that it was reasonable for the prison authorities to prevent the two priests from engaging in any activities within the prison. In arriving at its "reasonableness" determination, the fact finder shall find the regulation to be reasonable only if the alternative chosen (complete exclusion) resulted in the least possible "regulation" of the constitutional right consistent with the maintenance of prison discipline. The state authorities are held to the reasonableness test only, and are not required to prove as a condition precedent to the imposition of the regulation that the presence of the priests constituted a "clear and present danger" to the prison.

477 F.2d at 796.

Two plaintiffs alleged that they had been transferred to other institutions as punishment for their religious activities in Fajeriak v. McGinnis, 493 F.2d

468 (9th Cir. 1974). The court of appeals reversed the district court's dismissal of the complaint for failure to state a claim on which relief could be granted. One of the plaintiffs was allegedly suspected of teaching the Black Muslim religion to fellow prisoners, and the other plaintiff alleged that he believed his transfer resulted from his activities as a Christian Scientist. The court found that if the transfers were for the sole purpose of penalizing the plaintiffs for their religious beliefs, they were unconstitutional.

The district court in Kennedy v. Meachum, 540 F.2d 1057 (10th Cir. 1976) had dismissed the action without service of process. The court of appeals remanded for further proceedings. The plaintiffs alleged that their practice of the Satanic religion was restricted by defendants in violation of the First Amendment. Plaintiffs alleged that they were denied the right to possess the necessary ritual items in their cells, such as candles, robes, a holy water sprinkler, parchment, a gong, a chalice, incense, and a bell; that they were prohibited from posting religious information on the inmate bulletin board; that disciplinary measures were initiated against one of the plaintiffs for abuse of a "legal paper" he had attempted to post containing religious information; that one of the plaintiffs was subjected to disciplinary measures in retaliation for his beliefs; that the officials had not permitted plaintiffs to have a religious study group of the Satanic religion; and that Satanic inmates had been discriminated against in prison employment and had been generally harassed because of their religious practices. The court observed that the allegations claiming that "religion" was involved could not be dismissed in the absence of a responsive pleading or affidavits. Further, there was no basis for the finding that defendants' actions were merely lawful limitations on the practice of religious belief and that no infringement of rights under the free exercise clause had occurred:

> We are persuaded that the asserted justification of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to outweigh the inmates' First Amendment rights. . . . If it is determined that the practice of a religious belief is involved, and that there are

> restrictions imposed on its exercise, then the court should further determine whether any incidental burden on fundamental First Amendment rights is justified by a compelling state interest in the regulation of prison affairs, within the State's constitutional power . . . . For ". . . only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

540 F.2d at 1061.

Similarly, in Theriault v. Silber, 547 F.2d 1279 (5th Cir. 1977) the court of appeals remanded for a determination whether plaintiff's church, the "Church of the New Song," was a religion within the scope of the First Amendment. The court directed the district court as follows: "When reconsidering what constitutes a religion, a thorough study of the existing case law should be accompanied by appropriate evidentiary exploration of philosophical, theological, and other related literature and resources on this issue." 547 F.2d at 1281. On remand the district court determined that "The Church of the New Song" was not entitled to First Amendment protection as a religion. Theriault v. Silber, 453 F.Supp. 254 (W.D. Texas 1978). The plaintiff's second attempt to appeal was dismissed with prejudice because both notices of appeal contained vile and insulting references to the trial judge. Theriault v. Silber, 579 F.2d 302 (5th Cir. 1978).

5. Other Cases on Freedom of Speech, Expression of Beliefs, and Association and Assembly

A prisoner may not be punished for his beliefs or for the mere written expression of them. Sostre v. McGinnis, 442 F.2d 178, 202 (2d Cir. 1971), cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972), and Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972). However, institution officials may confiscate a prisoner's writings expressing his beliefs where they have reason to believe that the writings may be

circulated among other prisoners and may subvert prison discipline.[104]

United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975) affirmed a judgment entered on a jury verdict granting the plaintiff an award of $1,000 against the commissioner of corrections and the warden for the plaintiff's placement in isolation as punishment for having inflammatory and revolutionary papers in his possession.

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) held that regulations promulgated by the state department of corrections prohibiting inmates from soliciting other inmates to join an inmate labor union and which barred all meetings of the union did not violate inmates' First Amendment rights: "[T]he inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates." 433 U.S. at 126, 97 S.Ct. at 2538, 53 L.Ed.2d at 638. The Court further stated:

> First Amendment associational rights, while perhaps more directly implicated by the regulatory prohibitions, likewise must give way to the reasonable considerations of penal management. As already noted, numerous associational rights are necessarily curtailed by the realities of confinement. They may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment.

433 U.S. at 132, 97 S.Ct. at 2541, 53 L.Ed.2d at 642.

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104. See also Remmers v. Brewer, 475 F.2d 52 (8th Cir. 1973).

French v. Heyne, 547 F.2d 994 (7th Cir. 1976) held that a First Amendment violation was stated by plaintiffs' allegation that they were prohibited from soliciting funds for the implementation of educational studies.[105]

H. Fourth Amendment

The Fourth Amendment provides:

> 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.

1. Arrest or Search

a. Private Citizens

Under the Fourth Amendment, a private citizen may bring a section 1983 action against state or federal officials for an arrest or search without a warrant or without probable cause.[106]

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105. See also Berrigan v. Norton, 451 F.2d 790 (2d Cir. 1971), where the court found the plaintiffs had failed to show any infringement of their First Amendment rights.

106. See Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); Gilker v. Baker, 576 F.2d 245 (9th Cir. 1978); Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978); Gillard v. Schmidt, 570 F.2d 825 (3d Cir. 1978); Alexanian v. N.Y.S. Urban Development, 554 F.2d 15 (2d Cir. 1977); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (Dellums I); Duriso v. K-Mart No. 4195, Div. of S.S. Kresge Co., 559 F.2d 1274 (5th Cir. 1977); Covington v. Cole, 528 F.2d 1365 (5th Cir. 1976); Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976); Reeves v. City of Jackson, Mississippi, 532 F.2d 491 (5th Cir. 1976); Fisher v. Volz, 496 F.2d 333 (3d Cir.

b. Persons in Custody -- Search of Persons and Body Cavities[107]

There is an increasing number of cases considering the reasonableness of body cavity searches. Generally, the courts are holding that prison officials have the burden of establishing the reasonableness of such searches. Such searches are usually permitted when the prisoner has had an opportunity to receive contraband from other persons, such as when he has left the prison or met inside the prison with visitors. However, such searches are generally prohibited when the prisoner is not shown to have had an opportunity to come into possession of contraband, unless the prison officials have reason to believe the prisoner is concealing contraband in a body cavity. In Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir. 1978), cert. granted, ____ U.S. ____, 99 S.Ct. 76, 57 L.Ed.2d ____ (1978), the court of appeals affirmed the district court's order prohibiting prison officials from inspecting the genitals and anus of both convicted prisoners and pre-trial detainees unless they had probable cause to believe that the inmate was concealing contraband. The court noted that the "strip search" was the most humiliating and degrading procedure at the federal prison. Each inmate was subjected to a strip search after receiving a visitor. Males were required to lift their genitals and bend over to spread their buttocks for visual inspection. Vaginal and anal cavities of female inmates were also scrutinized. District Judge Frankel had found that the anal and genital searches were not warranted by the record. The court of appeals noted that the defendants had shown only one instance over a period of several years when contraband was found during a body cavity inspection. The court noted

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1974); Paton v. LaPrade, 524 F.2d 862, 871 (3d Cir. 1975); Conner v. Pickett, 552 F.2d 585, 587 (3d Cir. 1977).

107. For cases involving parolees rather than prisoners see Diaz v. Ward, 437 F.Supp. 678 (S.D. N.Y. 1977), where the court held more than a hunch and parole status was required to search residences of parolees and family members; and U.S. v. Bradley, 571 F.2d 787 (5th Cir. 1978) which rejected the theory of Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975) cert. denied, 423 U.S. 897, 96 S.Ct. 200, 46 L.Ed.2d 130 (1975) that a parolee is in constructive custody and held that a warrantless search of a parolee's room by a parole officer violates the Fourth Amendment.

that other courts had permitted searches of body cavities where a substantial security justification had been demonstrated. However, the court stated:

> The gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility. To speak plainly, in the circumstances presented by this record, the procedure shocks one's conscience.

573 F.2d at 131.

Frazier v. Ward, 426 F.Supp. 1354 (N.D. N.Y. 1977) was an action by prisoners incarcerated in unit fourteen, described as a prison within a prison, which was used for prisoners who were confined in segregation for disciplinary purposes at the Clinton Correctional Facility in Dannemora, New York. Each inmate in unit fourteen was required to undergo a rectal and testicle examination before and after each personal or legal visit, each medical or educational examination, and each court appearance. The court quoted from the description of the examination by one of the prisoners:

> Every time I came out, just about every time I came out it was always anywhere from six to eight, and there has been occasions where there was approximately twelve officers . . . . And one particular officer directs you to lift your arms to examine your arm pits. He asks you to open your mouth, wag your tongue, run your fingers through your hair, lift your testicles, skin back your penis, then you are directed to turn around, lift your feet, left and right foot, and bend over, and that's the most humiliating part of the whole procedure in the sense there would be a lot of oohs and aahs and good show . . . .

426 F.Supp at 1363. The court noted that the prisoner's testimony was corroborated by the testimony of another

inmate and was not contradicted by the defendants. The court found that the sexually degrading comments testified to by the inmate were made by correctional officers during the strip search. Plaintiffs called five expert witnesses, each of whom testified that under the circumstances present in unit fourteen there was no justification for the routine rectal search. One of the correction officers further testified that nothing had ever been discovered during the rectal searches of inmates leaving or returning to the unit. The court found that the routine anal cavity inspection violated the unreasonable search and seizure provisions of the Fourth Amendment. The court enjoined visual or digital inspection of an inmate's anal cavity except before entering or leaving the institution, after a personal contact visit with a friend or relative, or whenever a prison guard with a rank not lower than sergeant was satisfied there was a reasonably clear indication that the inmate was concealing an item in his anal cavity.

Hodges v. Klein, 412 F.Supp. 896 (N.J. 1976) permitted the prison officials to conduct anal inspections of inmates when they entered or left the institution and after personal contact visits with friends and relatives. However, anal inspections were enjoined when an inmate entered or temporarily left disciplinary segregation (solitary confinement), administrative segregation, or the management control unit (M.C.U.), a maximum security area within a maximum security prison unless there was a reasonably clear indication or suggestion that the inmate was concealing something in his anal cavity. The district court had issued a temporary restraining order enjoining anal examinations performed on M.C.U. inmates, except in certain circumstances. The court noted that the order had resulted in a great deal of misunderstanding by both inmates and guards.

In Penn El v. Riddle, 399 F.Supp. 1059 (E.D. Va. 1975), a body cavity search of plaintiff, conducted after guards had seized a paper bag containing a quantity of match heads from plaintiff's clothing and a section of a pipe from a nearby tool shack, produced a flashlight bulb, with tape and copper wire attached to it. The court noted that the conduct of body cavity searches lies within the sound discretion of prison officials. Since contraband had been found on plaintiff's clothing and in his work area immediately prior to the search in question, the court would not say that the defendants abused their discretion or that the search was unreasonable.

Daugherty v. Harris, 476 F.2d 292 (10th Cir. 1973) refused to enjoin rectal searches which were conducted by officials of the United States Penitentiary at Leavenworth, Kansas, prior to the prisoners being transferred to the custody of the marshal for transportation to a court appearance. These examinations were carried out by trained para-professional medical assistants in a designated area under sanitary conditions. There was no attempt to humiliate or degrade the prisoners. The court noted that Leavenworth is a maximum security institution containing many dangerous inmates. There were many known incidents of concealed contraband being carried by prison inmates in the rectal cavity. There had been several serious episodes, including an incident wherein a court officer was wounded, which were attributable to the ability of inmates to smuggle weapons out of prison. Considering this evidence, together with the need to assure the safety of law enforcement and court officials, the court found that the policy of allowing rectal searches was reasonable unless contradicted by a showing of wanton conduct. The court stated: "To hold that known cause comparable to that required for a search warrant in private life must precede such a search would be completely unrealistic. It is usually the totally unexpected that disrupts prison security." 476 F.2d at 294.

The two defendants in United States v. Lilly, 576 F.2d 1240 (5th Cir. 1978), were subjected to productive body cavity searches when they returned to the prison following unsupervised absences. Defendant Gallegos was subjected to a body cavity search after her return to the prison from classes at a local beauty college. The record revealed no particular reason for the search. The female nurse who was going to conduct the search offered to let plaintiff remove the contraband and plaintiff removed a plastic bag containing marijuana from her vagina. The court found that prisoners are protected from unreasonable searches and seizures by the Fourth Amendment. Although a warrant is not required to conduct a search or seizure in a prison, the government still bears the burden of proving the search was reasonable. "[T]he court must balance the public interest in conducting the search against the individual's Fourth Amendment interests." 576 F.2d 1245. The court declined to hold that body cavity searches are unreasonable, per se. However, the government must show that the search and seizure in question was reasonable under all the facts and circumstances. In that case the government had demonstrated its legitimate

need for conducting body cavity searches. Substantial amounts of contraband were being smuggled into the prison despite frequent random strip searches that were conducted on inmates returning from unsupervised absences. However, in that case the court found that the seizure of contraband from the defendant was unreasonable because she had not been notified that her voluntary absences from the prison would potentially subject her to completely random body cavity searches. The court, however, declined to hold that notice was an essential element of reasonableness in every fact situation.

Defendant Lilly had been searched upon her return from a voluntary weekend furlough because two or three persons in the prison had told a correctional supervisor that she had bragged about smuggling marijuana into the prison after her last furlough. The supervisor received authorization from the warden to conduct a body cavity search upon the defendant when she returned to the prison. When an initial strip search did not uncover any contraband, a body cavity search was conducted by a female medical officer. A cellophane envelope containing marijuana and a quaalude pill were removed from the defendant's rectum. The court found that prior notice to the prisoner of the possibility of a body cavity search was not necessary where prison officials had reason to believe that the prisoner was actually hiding contraband in a body cavity. The court noted that the search was conducted by a female medical officer in the prison clinic. Therefore, the search was reasonable and the contraband was properly admitted into evidence.

Similarly, United States v. York, 578 F.2d 1036 (5th Cir. 1978) upheld the body cavity search which revealed a balloon containing marijuana protruding from defendant's rectum. The search was conducted after an orange balloon containing marijuana dropped from plaintiff's brother's pants leg while they were on the visitor's patio. The brothers were separated and both were searched. Nothing was found on plaintiff's brother who was visiting him, but the balloon carrying marijuana was found on plaintiff. The court held that prison officials need not show probable cause to validate a search of a prisoner. Although prisoners retain some degree of protection under the Fourth Amendment, the prison officials need only show reasonableness. The circumstances of a balloon containing marijuana having fallen from plaintiff's brother's pants leg justified the search of plaintiff.

In Hurley v. Ward, 584 F.2d 609 (2d Cir. 1978), the district court had properly granted a preliminary injunction prohibiting prison officials from requiring prisoners during strip search procedures to lift their genitals and to bend over and spread their buttocks to display their anus, unless there was cause to believe that contraband was being smuggled into the institution, in which case the officials were required to make a record of the strip search and set forth the reasons why they felt it was necessary. Although that action was brought on an individual basis, the district court improperly applied its order to all inmates of state correctional facilities. The court stated: "Finally, at this preliminary stage it is particularly inappropriate that an injunction in such sweeping terms should issue since it represents a serious intrusion upon the exercise of informed judgment by those officials charged with the 'complex and difficult' task of operating state penal institutions." 584 F.2d at 612.

Hurley v. Ward, 541 F.Supp. 930 (S.D. N.Y. 1978) denied defendant's motion for summary judgment on the issue of liability for damages.

Bell v. Manson, 427 F.Supp. 450 (D. Tenn. 1976) denied plaintiffs' request for a preliminary injunction enjoining the practice of subjecting them to anal examinations upon their return from court appearances. The plaintiffs were pre-trial detainees. The court found that the correctional officials did not touch the inmates during the examinations and that they did not subject the inmates to verbal humiliation or abuse. Under the circumstances of that case the court found that the strip and rectal searches were not unreasonable. The court noted that the detainee's knowledge that the searches were conducted had a beneficial deterrent effect. The prison officials' interest in maintaining proper security outweighed the inmate's rights to be free from the embarrassing submission to strip searches upon their return from court appearances and outside visits. Plaintiffs had failed to demonstrate a clear showing of likelihood of success at trial and irreparable injury and their request for a preliminary injunction was denied.

c. Search of Prison Cells

The courts have not yet clearly defined the degree of privacy available to prisoners in their cells. The two relevant Supreme Court decisions appear to be Lanza

v. New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962), and United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). In Lanza petitioner had been convicted of refusing to answer questions directed to him by a committee of the New York legislature which was investigating possible corruption in the state parole system. Petitioner refused to answer the questions, claiming they were based upon a conversation he had with his brother when he visited him in a New York jail and which had been illegally electronically intercepted and recorded by state officials. The Court noted that the question presented did not relate to the use of the intercepted conversation in a criminal prosecution. Rather, it related to plaintiff's refusal to answer questions. The Court noted that the record conclusively showed that at least two of the questions the committee had asked petitioner were not related in any way to the intercepted conversation. Refusal to answer either of those questions fully supported the judgment. In dictum the Court stated:

> But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument . . . . [W]ithout attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here.

370 U.S. at 143-44, 82 S.Ct. at 1220, 8 L.Ed.2d at 387.

United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974) held that the defendant's Fourth Amendment rights were not violated by the removal and seizure of his clothing the morning after his arrest and over his objection. Examination of the clothing revealed paint chips matching the samples taken from the window defendant had been charged with breaking into. The Court noted that since warrantless searches can be made incident to custodial arrests, such searches may also be legally conducted after the arrest, when the accused arrives at the place of detention. The Court noted that petitioner's clothing could have been taken from him when he was taken into custody. However, since it had been late at night and no substitute clothing was available, the actions of the prison officials in purchasing new clothing for him the following morning and then taking the clothing he had been wearing and subjecting it to a laboratory analysis constituted no Fourth Amendment violation. The Court stated:

> Holding the Warrant Clause inapplicable in the circumstances present here does not leave law enforcement officials subject to no restraints . . . . We thus have no occasion to express a view concerning those circumstances surrounding custodial searches incident to incarceration which might "violate the dictates of reason either because of their number or their manner of perpetration."

415 U.S. at 808 n. 9, 94 S.Ct. at 1239 n. 9, 39 L.Ed.2d at 778 n. 9.

The Ninth Circuit holds that prisoners have no expectation of privacy in their cells and, therefore, the warrantless search of a cell does not violate the Fourth Amendment. In United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), cert. denied, 410 U.S. 916, 93 S.Ct. 973, 35 L.Ed.2d at 279 (1973), appellant was appealing his conviction for presenting fraudulent income tax refund claims to the Internal Revenue Service. At the time of the offense he had been serving a prison sentence for murder. His prison cell had been searched without a warrant and documentary

evidence found therein had been admitted into evidence in his criminal trial. The court stated:

> The protection of the Fourth Amendment no longer depends upon "constitutionally protected" places. Instead, we must consider first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as "reasonable." . . .
>
> While Hitchcock plainly had the requisite subjective intent to keep the documents private, we do not think that his expectation was reasonable. . . . "[I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day." . . . We do not feel that it is reasonable for a prisoner to consider his cell private. Therefore, the search did not violate the limitations of the Fourth Amendment.

467 F.2d at 1108. Subsequently, in United States v. Palmateer, 469 F.2d 273 (9th Cir. 1972), the evidence that formed the basis for the petitioner's conviction had been discovered during a warrantless search of his prison cell. The court found that petitioner's failure to move for suppression of the evidence was a conscious part of his trial strategy and he had thereby waived his Fourth Amendment claim. However, the court noted that even if the merits of his Fourth Amendment claim were reached, his conviction would be affirmed, referring to the holding in Hitchcock, supra, that a warrantless search of a prisoner's cell is reasonable within the meaning of the Fourth Amendment. The court added that the need to maintain security and discipline provides another basis for dispensing with the warrant requirement.

United States v. Ready, 574 F.2d 1009 (10th Cir. 1978) upheld a conviction in which documents taken during a search of the defendant's room at the Leavenworth Penitentiary Honor Camp were admitted into evidence. The court, in referring to Lanza, Hitchcock, and Palmateer, supra, stated:

> Certainly in a federal prison the authorities must be able to search the prisoners' cells without a warrant, without notice and at any time, for concealed weapons and contraband of the type which threatens the security or legitimate purposes of the institution . . . .
>
> It is virtually impossible for the court to ascertain motives of prison officials, e.g., here whether the transfer back inside prison was to impede an escape which the prisoner might attempt if he would learn of the investigation, or whether it was to provide an excuse to look through his papers. If the search procedure is routine and reasonably designed to promote the discipline of the institution, we will not require a search warrant.

574 F.2d at 1014.

Saunders v. Packel, 436 F.Supp. 618 (E.D. Pa. 1977) was an action for money damages and injunctive relief by inmates against the commissioner, the bureau of correction and the superintendent of the prison. One of plaintiffs' claims related to the manner in which their cells were searched during two separate prison-wide lockups. Referring to Edwards, supra, the court expressed its opinion that prisoners retain a residue of protected privacy interests which are shielded by the Fourth Amendment. The court stated:

> We need not decide on this record the precise protection afforded by the Fourth Amendment to an inmate in a maximum security

> institution. It is enough to state that while on the one hand the prison authorities need not have probable cause to conduct a cell search, . . . a prisoner has a reasonable expectation that items of personal property which he legitimately possesses will not be wantonly destroyed or seized by prison guards absent some legitimate state interest in doing so . . . . Although prison authorities are free to conduct cell searches when they please and they have much discretion in determining how to conduct the searches, we believe that proof at trial that personal property lawfully possessed by plaintiffs was damaged or destroyed or that their cells were subjected to purposeful and unnecessary disruption, would establish a Fourth Amendment violation.

436 F.Supp. at 626.

The plaintiffs in Thornton v. Redman, 435 F.Supp. 876 (D. Del. 1977) sought return of certain personal property seized from them during shakedown searches at the maximum security prison where they were incarcerated. After conducting a non-jury trial the court determined that plaintiffs' Fourth Amendment rights had not been violated. However, the court commented that there is an emerging body of case law acknowledging that prisoners have at least minimal rights under the Fourth Amendment prohibition against unreasonable searches and seizures, and that the Constitution protects prisoners from arbitrary seizure of their personal property. The court determined that under the circumstances of the shakedown, the procedures the defendants adopted were reasonable and the searches were carried out in a reasonable manner. In reaching this conclusion the court had considered the nature of the institution, the reason for and the scope of the search, the instructions and supervision given to those who carried out the search, and the means provided for the return of any mistakenly seized property.

Unconvicted detainees housed in an administrative segregation unit designed for persons who posed security risks sought declaratory and injunctive relief in addition to money damages in Giampetruzzi v. Malcolm, 406 F.Supp. 836 (S.D. N.Y. 1975). Following a non-jury trial the court determined that the searches of plaintiffs' cells were reasonable with the exception of the requirement that prisoners stand with their backs to the cell while the search was conducted. The court required the prison officials to permit the inmates to watch the searchers during the search. Since the plaintiffs were classified as security risks, it could not be said that the number or circumstances of the searches of their cells were unreasonable, and thus there was no Fourth Amendment violation.

In Hoitt v. Vitek, 361 F.Supp. 1238 (D. N.H. 1973), the plaintiffs complained that their Fourth Amendment rights were violated during a lockup when they were searched and their personal property was seized without a prior hearing. After a non-jury trial the court determined that no constitutional question was raised by the searches and seizures and dismissed the claim. The court stated that the cell block was not a constitutionally protected area, and even if it were, the requirements of prison security during an emergency situation would provide sufficient justification for curtailment of plaintiffs' Fourth Amendment rights.

Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir. 1978) recognized that although prisoners relinquish some of the rights to privacy and protection from unreasonable searches and seizures possessed by unincarcerated members of society, there is a realm in which privacy is safeguarded. The district court ordered that pretrial detainees be permitted to observe the searches of their rooms. The court stated: "We see no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance . . . . And, of course, any detainee who becomes obstructive may be removed from the vicinity of his room." 573 F.2d at 132. The court also noted:

> Judge Frankel also required that receipts be given for seized property, and that certain minimal procedures be provided for enabling an inmate to challenge a seizure. The basic principles of due process which require the

institution to account for such property are so well-established that we need not dwell long in affirming this aspect of Judge Frankel's order.

573 F.2d at 131 n. 29.

While the authorities seem to agree that prison officials need not obtain a search warrant in order to search a prisoner's cell, they do recognize that prisoners are protected from unreasonable searches by the Fourth Amendment.

d. False Imprisonment

Facts constituting state tort claims of false imprisonment and false arrest can be the basis of constitutional claims under section 1983. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) held that an arrestee has the right to a judicial determination of probable cause prior to extended restraint of liberty. The Court recognized that "[A] policeman's on-the-scene assessment of probable cause provides a legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." 420 U.S. at 113-14, 95 S.Ct. at 863, 43 L.Ed.2d at 65. However, the Fourth Amendment does not require an adversary hearing.

Plaintiffs in Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (Dellums I) alleged that they were arrested without probable cause and were imprisoned for periods ranging from several hours to several days without being afforded due process of law as a result of their participation in a protest on the steps of the United States Capitol against the war in Vietnam. The jury's verdict for the plaintiffs as to their claims for false arrest and false imprisonment was affirmed:

> A plaintiff suing at common law must show that he has suffered an imprisonment and that the imprisonment was unlawful. The former issue is one of fact, potentially for the jury. Under the law of the District of Columbia, the unlawfulness of a

> detention is presumed once "an allegation [is made] that a plaintiff was arrested and imprisoned without process." . . . The burden then shifts to the defendant to justify the arrest . . . . Justification can be established by showing that there was probable cause for arrest of the plaintiff on the grounds charged . . . . A lesser showing can also be made, namely that the arresting officer had reasonable grounds to believe a crime had been committed and that plaintiff's arrest was made for the purpose of securing the administration of the law (i.e., that the officer acted in good faith).
>
> . . . .
>
> The mechanics of pleading and proof in a Bivens action for false arrest are in our judgment identical to those sketched above . . . . The rule recognized in the District that an allegation of arrest and imprisonment without warrant shifts to the defendant the burden of justifying the arrest is the majority rule in this country and we see no identifiable purpose that would be served by adopting a different or more stringent definition of a prima facie case in constitutional litigation.

566 F.2d at 175-76. The court noted that in the instant case since plaintiffs were arrested without a warrant, the unlawfulness of the imprisonment would be presumed as a matter of law, without the necessity of showing that the police chief acted without probable cause.

An arrest for drunken driving at 4:30 a.m. on a Saturday, followed by five hours confinement before arraignment, without more, does not constitute a

deprivation of due process rights. Patzig v. O'Neill, 577 F.2d 841 (3d Cir. 1978). However, imprisonment following a lawful arrest may give rise to a constitutional claim. The plaintiff in Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976), cert. denied, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145, was detained in jail by the defendant sheriff after the dismissal of charges because the warrant under which he was being held had never been properly cross-indexed. The court noted that in Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), cert. denied, 396 U.S. 901, 90 S.Ct. 210, 24 L.Ed.2d 177 (1969), it had previously identified the elements of a prima facie case of false imprisonment as "(1) intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm." 530 F.2d at 1213. The court observed that a prima facie case could be made out against a jailer even though he believed he had legal authority to detain the prisoner. The question of his good faith was a matter of defense. See also Stephenson v. Gaskins, 539 F.2d 1066 (5th Cir. 1976).

McCollan v. Tate, 575 F.2d 509 (5th Cir. 1978) stated:

> We are not saying that a sheriff is under a duty to make an independent investigation as to the guilt or innocence of a person wanted under a warrant. If a warrant has issued for the arrest of an individual and the individual actually wanted under that warrant is arrested, the arresting officer has fulfilled his duty, and he will not be liable for false arrest or false imprisonment merely because the person arrested is later found to be innocent of the charges against him . . . . We are saying that the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name.

575 F.2d at 513.

e. Malicious Prosecution, Malicious Abuse of Process

The Eighth Circuit declined to determine whether a malicious prosecution infringes on protected constitutional rights in Sartin v. Commissioner of Public Safety of State of Minn., 535 F.2d 430,433 (8th Cir. 1976).

The Third Circuit, in Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977), found that facts giving rise to claims of malicious use of process (malicious prosecution) and malicious abuse of process could be the bases for section 1983 claims based on the Fourteenth Amendment right to due process:

> "An abuse is where the party employs it for some unlawful object; not the purpose which it is intended by the law to effect; in other words, a perversion of it . . . . It is evident that when such a wrong has been perpetrated, it is entirely immaterial whether the proceeding itself was baseless or otherwise."

567 F.2d at 1217. The court later compared malicious use of process with malicious abuse of process:

> "[M]alicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it is issued." Therefore, if a process is wrongfully initiated and thereafter perverted, both torts lie. Hence, the torts are not mutually exclusive.

567 F.2d at 1218. The court also noted that the presence or absence of probable cause is irrelevant in an action for malicious abuse of process. 567 F.2d at 1217.

The elements of the common law tort of malicious prosecution were described as follows in Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (Dellums I):

> Malicious prosecution has four elements: (1) The defendant must be found to have instituted a criminal

> action against the plaintiff; (2) that prosecution must have ended in the plaintiff's favor; (3) there must have been no probable cause to initiate the criminal proceeding; and (4) the defendant must have acted maliciously. A defendant is also allowed to submit to the jury that the plaintiff was guilty of the offense charged even though he was acquitted . . . .

566 F.2d at 191 n. 65. In that case the plaintiff's claim for malicious prosecution appeared to be based upon the common law tort rather than the Constitution. Since there was evidence that defendant had knowingly misrepresented material facts in his meeting with the assistant United States attorneys when the decision to file informations was made, there was evidence to support the verdict against the defendant. However, the defendant was entitled to a new trial since the trial judge failed to sufficiently charge the jury that the defendant would not be liable if the decision by the assistant United States attorney to file the informations was independent of any pressure or influence exerted by the defendant. 566 F.2d at 193.

f. Defense of Good Faith

Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) established the good faith defense available to law enforcement officers charged with making an illegal search or seizure. The Court stated:

> Under the prevailing view in this country a police officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved . . . . Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied.

386 U.S. at 555, 87 S.Ct. at 1218, 18 L.Ed.2d at 295. The Court later stated:

> We hold that the defense good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983. The holding does not, however, mean that the count based thereon should be dismissed . . . . We agree that a police officer is not charged with predicting the future course of constitutional law.
>
> [I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow, even though the arrest was in fact unconstitutional.

386 U.S. at 557, 87 S.Ct. at 1219, 18 L.Ed.2d at 296.

The law relating to a possible defense of good faith interposed by law enforcement officials percolated in the districts and in the circuits as the Supreme Court decided Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), and Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).[108] Procunier v. Navarette, a 1978 case involving prison officials, summarized the development of the common law immunity afforded government officials:

> Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending whole-

108. See Section XI, D, 2 infra.

> sale revocation of the common-law immunity afforded government officials. Legislators, judges, and prosecutors have been held absolutely immune from liability for damages under § 1983. Tenney v. Brandhove, 341 U.S. 367 (1951); Pierson v. Ray, 386 U.S. 547 (1967); Imbler v. Pachtman, 424 U.S. 409 (1976). Only a qualified immunity from damages is available to a state Governor, a president of a state university, and officers and members of a state National Guard. Scheuer v. Rhodes, supra. The same is true of local school board members, Wood v. Strickland, supra; of the superintendent of a state hospital, O'Connor v. Donaldson, 422 U.S. 563 (1975); and of policemen, Pierson v. Ray, supra; see Imbler v. Pachtman, supra, at 418-419.

434 U.S. 555 at 561-63; 98 S.Ct. 855 at 859-60, 55 L.Ed.2d 24 at 30-31 (1978).

When a law enforcement officer makes a search pursuant to a warrant issued by a judicial officer, he is entitled to a judgment. Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977). Law enforcement officers are not liable for making negligent errors of law in seeking or executing a search warrant. Stadium Films, Inc. v. Baillargeon, 542 F.2d 577 (1st Cir. 1976) (affirmed directed verdict for police officers). A law enforcement officer who acts in good faith and in a reasonable manner in executing a search warrant issued by a judicial officer is not liable in damages upon a showing that the judicial officer erred. Commonwealth of Pa. ex rel. Feiling v. Sincavage, 439 F.2d 1133 (3d Cir. 1971).[109] Law enforcement officers may rely upon a finding by a judge that probable cause exists, Kipps v. Ewell, 538 F.2d 564, 567 (4th Cir. 1976); however, this does not apply when the plaintiff alleges that the warrant was obtained by the defendant in bad faith and as a result of perjured testimony. Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974) (wiretap order).

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109. See also LaBar v. Royer, 528 F.2d 548 (5th Cir. 1976).

In Foster v. Zeeko, 540 F.2d 1310 (7th Cir. 1976), the court of appeals reversed a judgment for the plaintiffs in which they had been awarded $500 in damages against the defendant police officers. The officers had entered an apartment with a search warrant for the search of a certain individual. Upon their arrival they searched all persons present, including the plaintiffs. They found a small quantity of marijuana in the pocket of the person for whom they had obtained a search warrant. In addition to arresting him, they also arrested plaintiffs and charged them with patronizing a disorderly house by being on the premises where narcotics were found. The district judge held as a matter of law that the defendant police officers could not reasonably have believed that they could constitutionally arrest the plaintiffs under the disorderly house ordinance when their only alleged misconduct was their presence on the premises where narcotics were found. The court of appeals noted that the principle issue in the case was whether police officers should be held personally liable in monetary damages as a matter of law when purporting to enforce an ordinance which itself had not been declared invalid at the time.

The court noted that the affirmative defense of good faith is composed of two elements: The officer must first allege and prove that he believed, in good faith, that his conduct was lawful; second, he must show that his belief was reasonable. The court applied the approach prescribed in Scheuer v. Rhodes, 416 U.S. 232, 247, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974), wherein the defendant's qualified immunity is dependent upon the scope of discretion and responsibility of the officer, in addition to all the circumstances as they reasonably appeared at the time of the action. The court recognized that the law does not expect police officers to be sophisticated constitutional or criminal lawyers, although it is not unreasonable to expect them to have some knowledge of the law they enforce. At the time of the arrest in question, the municipal code had never been declared unconstitutional; in fact, it had been upheld in a 1935 decision. The court further observed that the defendants had apparently demonstrated probable cause to obtain a search warrant for the principle occupant of the apartment. The court then stated:

> We are not indicating that the officers may not have overreacted as to the other occupants. We do not, however,

> believe that moderate over reaction in the light of the necessities for effective law enforcement in the growing crime situation of this decade is an automatic basis for the assessment of damages against a police officer.

540 F.2d at 1319. The court reversed the summary judgment and remanded. As to one of the plaintiffs, the court of appeals indicated that the district court should consider whether he had neglected to pursue all state appellate remedies as required by Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972), the sequel to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), on remand, the court stated:

> We have concluded and now decide and hold that it is a principle of federal law that Agents of the Federal Bureau of Narcotics, and other federal police officers such as Agents of the FBI performing similar functions, while in the act of pursuing alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights. We further hold, however, that it is a valid defense to such charges to allege and prove that the federal agent or other federal police officer acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.

456 F.2d at 1341. The court further stated:

> Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think, as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection.

456 F.2d at 1348.

Gilker v. Baker, 576 F.2d 245 (9th Cir. 1978) referring to Bivens, supra, stated:

> Although we must agree with the Second Circuit in Bivens . . . that law enforcement officials perform functions indispensable to the preservation of public safety and that they must not be left defenseless, . . . it does not follow that an unreasonable ignorance of the law or an entirely subjective "good faith" belief is always a defense in section 1983 damage actions. A defendant can establish a defense by showing that he had no reasonable basis for

> knowing that his conduct would result in the overriding of another person's constitutional rights and that he acted in good faith.

576 F.2d at 247.

Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974) affirmed the district court's grant of defendants' motion for summary judgment, finding that the affidavits established defendants had acted reasonably and in good faith. The court stated: "Presumably if there was no basis for securing an arrest warrant, good faith would properly be subject to challenge. However, the affidavits clearly show that the individual identified as Tasi, while not physically handing the machine gun to the purchaser, did aid and abet in its transfer." 501 F.2d at 1023.

The district court's grant of defendants' motion for summary judgment was affirmed in Burgwin v. Mattson, 522 F.2d 1213 (9th Cir. 1975), cert. denied, 423 U.S. 1087, 96 S.Ct. 879, 47 L.Ed.2d 98 (1976), where the court of appeals determined that defendants' affidavits, to which plaintiffs had failed to respond, established probable cause and good faith. Similarly, in Bartlett v. Wheeler, 360 F.Supp. 1051 (W.D. Va. 1973), the court granted defendants' motion to dismiss, apparently treating it as a motion for summary judgment and finding that the affidavits established that defendant had probable cause for swearing out a warrent against the plaintiff who had subsequently been acquitted at trial. The court noted that where probable cause for an arrest exists, civil rights are not violated by the arrest even though the defendant's innocence is subsequently established.

Hunter v. Clardy, 558 F.2d 290 (5th Cir. 1977) reversed a judgment entered against a law enforcement officer, finding that the evidence presented at the non-jury trial established that the officer had probable cause to arrest the plaintiff. In this case, the criminal offense of simple battery had been committed in the presence of the officer. The court held that the constitutional requirement for probable cause is met when an arrest is made for an offense committed in the officer's presence. 558 F.2d at 291.

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Brubaker v. King, 505 F.2d 534 (7th Cir. 1974) found that in a section 1983 action the test is not whether there was probable cause, but whether the officers believed in good faith they had probable cause and whether their belief was reasonable. The court reviewed the defendants' affidavits, found that all of the circumstances of the case supported no other conclusion but that all of the officers had acted in good faith, and affirmed the judgment granting defendants' motion for summary judgment.

While Brubaker found the test to be good faith rather than probable cause, the finding of probable cause would be relevant. If the arrest or search was challenged in state court criminal proceedings and upheld, the doctrine of collateral estoppel would appear to establish that the defendants had probable cause and that their belief was reasonable.[110] In most cases a finding of probable cause would appear to establish the law enforcement officers' good faith. If, on the other hand, the state court found that the officers lacked probable cause for their searches, the defense of good faith would still be available to them, provided that their belief was reasonable.

Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976), finding that the affidavits contained only conclusory assertions of ultimate fact which were entitled to little weight on a motion for summary judgment, reversed the district court's grant of summary judgment. The court stated: "Numerous facts set out in the material properly before the district court cast considerable doubt on the defendants' claims that they were acting reasonably and in good faith." 548 F.2d at 679.

Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977) stated:

> A reasonable good faith belief that probable cause existed when an arrest or

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110. See Jones v. Bales, 58 F.R.D. 453, 460 (N.D. Ga. 1972), aff'd 480 F.2d 805 (5th Cir. 1973), cited with approval in Covington v. Cole, 528 F.2d 1365, 1371 n. 10 (5th Cir. 1976). See also Jackson v. Official Representatives and Employees of Los Angeles Police Dept., 487 F.2d 885 (9th Cir. 1973).

> search was made, however, is an adequate defense to a Bivens claim . . . . The question whether the defendants acted reasonably and in good faith is ultimately factual and, as such, one to be finally determined by the jury.

563 F.2d at 348.

Good faith is no defense to an injunctive action. Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, Zurcher v. Stanford Daily, ____ U.S. ____, 98 S.Ct. 1970, ____ L.Ed.2d ____ (1978).

Allred v. Scarczkopf, 573 F.2d 1146 (10th Cir. 1978) held that the district court had improperly excluded evidence that the defendant police officer's actions were predicated upon ordinances, statutes, and instructions given to him by his superiors and that he acted in good faith. The court reversed and remanded for a new trial.

Reimer v. Short, 578 F.2d 621 (5th Cir. 1978) found that the district court had properly charged the jury that the defendant police officers would not be liable to plaintiff for their alleged harassment and searches of his business premises if they established they had a reasonable good faith belief that their actions were lawful and within the scope of their authority. Further, there was evidence to support the jury's finding of good faith after that date. It was on that date that the district court granted plaintiff's motion for return of his truck. Plaintiff took the order to the police department where he was told that "they couldn't read the judge's signature" and that they were not going to honor it. Plaintiff was made to wait in the hall for five hours after which time he was told the truck would not be released. It was then necessary for him to serve the defendants with a motion to show cause why they should not be held in contempt. Ten days after he presented them with the order the truck was released. However, they did not release plaintiff's vehicle identification plate, with the result that plaintiff's possession of the truck without the plate was technically illegal. The plate was not given to him until the date scheduled for argument on his second contempt motion

concerning the plate. The court stated:

> Until confronted with the court order, the jury could reasonably find that they had acted in good faith, subjectively and objectively. After that order was served, while their actions may still have been from good motives, that good faith could not have been reasonable. All the evidence leads to the conclusion that this continued barrier to Reimer's possession of the truck was an unreasonable deprivation of his property.

578 F.2d at 629. Therefore, the court remanded for determination of damages.

2. Unnecessary Force used in Making an Arrest[111]

The courts appear to agree that the use of unnecessary force by a law enforcement officer in making an arrest can constitute a constitutional violation giving rise to a cause of action under section 1983. However, it is not clear which specific constitutional provision applies to these actions. Some courts find a Fourth Amendment[112] violation while others find Eighth[113]

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111. For cases discussing the use of deadly force in making an arrest see Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir. 1977), cert. denied; Mattis v. Schnorr, 547 F.2d 1007 (8th Cir. 1976), vacated sub nom.; Ashcraft v. Mattis, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975); Russ v. Ratliff, 538 F.2d 799 (8th Cir. 1976), cert. denied 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753 (1976); Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978); Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977).

112. Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds sub nom. District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977).

113. Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972).

(cruel and unusual punishment) and Fourteenth Amendment (due process) violations.[114] In some cases the court has not identified the specific constitutional provision applicable.[115]

I. Eighth Amendment - General Considerations[116]

The Eighth Amendment provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Eighth Amendment is applicable to the states through the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Estelle v. Gamble stated:

> The [Eighth] Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" . . . against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," . . . or which "involve the unnecessary and wanton infliction of pain." . . .

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114. Collum v. Butler, 421 F.2d 1257 (7th Cir. 1970); U.S. v. Delerme, 457 F.2d 156 (3d Cir. 1972); Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977).

115. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); Linn v. Garcia, 531 F.2d 855 (8th Cir. 1976); Taken Alive v. Litzau, 551 F.2d 196 (8th Cir. 1977); Smith v. Spina, 477 F.2d 1540 (3d Cir. 1973). See also Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974).

116. See generally I. Robbins and M. Buser, Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 Stanford L. Rev. 893 (1977); Comment, Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform, 12 Harv. Civil Rights - Civil Liberties L. Rev. 367, 372-404 (1977).

429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251, 259 (1976). Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971)[116a] defined cruel and unusual punishment as that which is "barbarous" or "shocking to the conscience."

Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1976), involving corporal punishment in schools, traced the history of the Eighth Amendment and its treatment in the courts, concluding that the amendment was intended to protect persons convicted of crimes, but not others:

> In light of this history, it is not surprising to find that every decision of this Court considering whether a punishment is "cruel and unusual" within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment. See Estelle v. Gamble, 429 U.S. 97 (1976) (incarceration without medical care); Gregg v. Georgia, 428 U.S. 153 (1976) (execution for murder); Furman v. Georgia, supra (execution for murder); Powell v. Texas, 392 U.S. 514 (1968) ($20 fine for public drunkenness); Robinson v. California, 370 U.S. 660 (1962) (incarceration as a criminal for addiction to narcotics); Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) (expatriation for desertion) . . . .
>
> These decisions recognize that the Cruel and Unusual

116a. Cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, and Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

> Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes, e.g., Estelle v. Gamble, supra; Trop v. Dulles, supra; second, it proscribes punishment grossly disproportionate to the severity of the crime, e.g., Weems V. United States, supra; and third, it imposes substantive limits on what can be made criminal and punished as such, e.g., Robinson v. California, supra. We have recognized the last limitation as one to be applied sparingly. "The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . . "Powell v. Texas, supra, at 531-532 (plurality opinion).
>
> In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable. Thus, in Fong Yue Ting v. United States, 149 U.S. 698 (1893), the Court held the Eighth Amendment inapplicable to the deportation of aliens on the ground that "deportation is not a punishment for crime." Id., at 730. . . .

430 U.S. at 666-68, 97 S.Ct. at 1410-11, 51 L.Ed.2d at 727-28.

The Court then described in greater detail the situation of a person convicted of a crime:

> The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life." Morrissey v. Brewer, 408 U.S. 471, 482 (1972); see Meachum v. Fano, 427 U.S. 215, 224-225 (1976). Prison brutality, as the Court of Appeals observed in this case, is "part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny." 525 F.2d at 915. Even so, the protection afforded by the Eighth Amendment is limited. After incarceration, only the " 'unnecessary and wanton infliction of pain,' " Estelle v. Gamble, 429 U.S. at 103, quoting Gregg v. Georgia, 428 U.S. at 173, constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

430 U.S. at 669-70, 97 S.Ct. at 1411-12, 51 L.Ed.2d at 729.

Wolfish v. Levi, 573 F.2d at 118 (2d Cir. 1978) described the limited responsibility of prison officials:

> An institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety. The Constitution does not require that sentenced prisoners be provided with every amenity which one might find desirable.

573 F.2d at 125. In that case the court found that although the district court's judgment provided necessary remedies for unconstitutional conditions, it also wandered into administrative matters which the court of appeals described as trivial. 573 F.2d at 125-26.

The district court's application of the "legitimate penological purpose" test to determine whether the conditions of confinement violated the Eighth Amendment was disapproved on appeal in Nadeau v. Helgemoe, 561 F.2d 411 (1st Cir. 1977). The court stated: "We are not without sympathy for the approach pursued by the district court . . . . But we are constrained to say that at the present stage of development of the law relating to prisoners, the test used by the district court is not required by the Constitution." 561 F.2d at 415.

An attempt has been made in the following sections to categorize the conditions most frequently challenged by prisoners. However, in each particular case the combined effect of all of the conditions challenged must be considered. Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977) quoted from Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974):

> Each factor separately, i.e., overcrowding dormitory barracks, lack of classification according to severity of offense, untrained inmates with weapons, lack of supervision by civilian guards, absence of a procedure for confiscation of weapons, may not rise to constitutional dimensions; however, the effect of the totality of these circumstances is the infliction of punishment on inmates violative of the Eighth Amendment, as determined by the trial court.

553 F.2d at 378. The court also quoted from Williams v. Edwards, 547 F.2d 1206, 1301 (5th Cir. 1977):

> The prohibition against cruel and unusual punishment "is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison." . . . The equitable discretion of the District Judge is sufficiently broad to provide relief for all that is shown by the proof.

Id.

1. Unsanitary Conditions: Lack of Sufficient Heat, Clothing, Blankets, Mattresses, Water, Light, Toilet Facilities, Shower Privileges, Articles of Hygiene, Ventilation, Privacy

McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert. dismissed, 423 U.S. 923, 96 S.Ct. 264, 46 L.Ed.2d 249 (1976) reversed the district judge's dismissal of the action following a non-jury trial and held that the conditions of plaintiff's confinement in two different cells subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The court remanded for consideration of the personal liability, for money damages, of the prison guard and officer who were responsible for plaintiff's placement in the two cells. The court noted that plaintiff's actions evidencing mental derangement--screaming, tearing a locker off the cell wall and banging it against the wall, smearing feces over himself and the cell wall, and possibly starting a fire in his cell--justified his removal from the prison population until his condition could be evaluated. However, the conditions in the two isolation cells were so barbaric that unless medical help was forthcoming within a reasonable period of time, the conditions would constitute cruel and unusual punishment.

Plaintiff had been placed nude in both cells. In the first cell his bed consisted of a concrete slab without blankets or other bedding. During the night a prison guard gave him a mattress and plaintiff testified he dug a channel in the cotton so he could sleep nestled in the mattress. He was disciplined for destroying the mattress. The cell contained a toilet and a sink; plaintiff was given no materials to clean himself or the cell, was fed in plastic cups, and was deprived of reading and writing materials. Plaintiff remained in this cell for about forty-eight hours. The court stated:

> What is clear, however, is that if McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant, if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment.

516 F.2d at 368. The mental observation cell in which plaintiff was placed naked, for approximately forty-eight hours, had "no sink, and the only sanitary facility was an 'oriental toilet'--a hole in the floor, six to eight inches across, covered by a removable metal grate which was encrusted with the excrement of previous occupants. The 'toilet' flushed automatically once every three to five minutes. McCray was not permitted to bathe, shave or have or use articles of personal hygiene, including toilet paper." 516 F.2d at 367. He had no blanket or mattress and was not afforded reading or writing materials. The court stated: "[T]he record reveals that the conditions of confinement in the mental observation (M.O.) cell in which McCray was kept fall far short of the current standards of decency of present-day society . . . . The conditions of this confinement constitute a per se violation of the eighth amendment." 516 F.2d at 369.

LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), cert. denied, 414 U.S. 878, 94 S.Ct. 49, 38 L.Ed.2d 123 (1973) found that plaintiff's placement in a strip cell for five days as a disciplinary measure after contraband materials were found in his cell constituted cruel and unusual punishment in violation of the Eighth Amendment. Plaintiff's cell had no windows. There was a 100 watt light outside the cell which shone through a hole at the rear of the cell and which could be turned on and off only by the guard. The light was turned on for plaintiff only at meal times and when he was allowed to write, and plaintiff was in almost total darkness and total silence for substantial periods of time. There was no sink, water fountain, or commode. The only facility for disposing of human waste was a Chinese toilet--a hole in the floor which was flushed manually from outside the cell. A prisoner in the strip cell received three meals a day, at least two glasses of water daily, a mattress between 3:00 p.m. and 8:00 a.m., and blankets when required by the room temperature. He could have no reading materials, except a Bible, and had no opportunity to exercise. The court stated:

> We hold the conditions to which LaReau was subjected in the strip cell fall below the irreducible minimum of decency required by the Eighth Amendment. Enforced isolation and boredom are permissible methods of discipline, although they

might not remain so if extended over a long period of time. But the conditions here went beyond mere coerced stagnation. We cannot approve of threatening an inmate's sanity and severing his contacts with reality by placing him in a dark cell almost continuously day and night. Nor can we find any justification for denying a man the ability to maintain his personal cleanliness. What is most offensive to this Court was the use of the "Chinese toilet" Causing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted. The indecent conditions that existed in this Somers prison strip cell seriously threatened the physical and mental soundness of its unfortunate occupant. In order to preserve the human dignity of inmates and the standards of humanity embraced by our society, we cannot sanction such punishment.[117]

473 F.2d at 978.

Kirby v. Blackledge, 530 F.2d 583 (4th Cir. 1976) commented on similar conditions in another case:

> The combination of conditions alleged by the prisoners and which, for the purposes of this decision, we must take as true, have the cumulative effect of being cruel and unusual punishment as well as deprivation of due process. Many of the circumstances taken alone reach the level of cruel and unusual

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117. See also Poindexter v. Woodson, 510 F.2d 464 (10th Cir. 1975), cert. denied, 423 U.S. 846, 96 S.Ct. 85, 46 L.Ed.2d 68 (1975); Ahrens v. Thomas, 434 F.Supp. 873 (W.D. Mo. 1977) (failure to comply with standards set by National Sheriff's Association is relevant and material to finding an Eighth Amendment violation).

punishment, such as the Chinese cell, inadequate exercise and medical treatment, inadequate heating and ventilation, and lack of access to the prison library.

53 F.2d at 587.

However, Lovern v. Cox, 374 F.Supp. 32, 35 (W.D. Va. 1974) held that "[T]he contentions regarding unsanitary maintenance and upkeep do not constitute conditions so hazardous to life, health or safety as to warrant the intervention of a federal court."

Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976) found that plaintiff's allegation that he was placed in the "drunk tank," when in an intoxicated condition, for approximately three hours, failed to state a cause of action and that the complaint was properly dismissed as frivolous. The complaint alleged that "[T]he drunk tank cell consistently smells of vomit and urine and it is maintained in such filthy and unsanitary conditions so as to create a shocking and debased atmosphere and set of surroundings." 545 F.2d at 1262.

Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)[118] reversed the district judge who had granted the plaintiff punitive and compensatory damages, in addition to injunctive relief. The court found that the plaintiff was not subjected to cruel and unusual punishment by his confinement in punitive segregation for twelve months and eight days. Plaintiff remained in his cell at all times except for a brief period once each week when he was permitted to shave and shower. He was permitted one hour of exercise each day and his cell included a toilet and a face bowl with running cold water, soap, and a towel. He could not buy or receive books, magazines, or newspapers, and his access to the prison's library collection was limited to approximately thirty-five volumes chosen by the prison guards. Light was adequate for reading. In finding that plaintiff's condition of confinement did not violate the Eighth Amendment, the court stated:

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118. Cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, and Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

> In arriving at this conclusion, we have considered Sostre's diet, the availability in his cell of at least rudimentary implements of personal hygiene, the opportunity for exercise and participation in group therapy, the provision of at least some general reading matter from the prison library and of unlimited numbers of law books, and the constant possibility of communication with other segregated prisoners. These factors in combination raised the quality of Sostre's segregated environment several notches above those truly barbarous and inhumane conditions heretofore condemned by ourselves and by other courts as "cruel and unusual."

442 F.2d at 193.

The plaintiff in Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975) was asking for, inter alia, at least three showers a week. The court directed the district court to determine whether plaintiff's health was adversely affected by his lack of showers and whether it was practical for the prison to permit him to take more showers.

James v. Wallace, 406 F.Supp. 318 (M.D. Ala. 1976) mandated that each prisoner be given adequate articles of hygiene, towels, bed linen, household cleaning supplies, heat, light, and ventilation, a bed off the floor, a clean mattress, blankets, access to one toilet per fifteen inmates, one shower per twenty inmates, and one lavatory per ten inmates.

The district court's order requiring that pretrial detainees be given clean clothing, bed linen and towels at least once a week was affirmed in Campbell v. McGruder, 580 F.2d 521, 544 (D.C. Cir. 1978). However, the court of appeals found that prison officials should not be required to provide clean underwear as long as the inmates had access to hot water and detergent.

The district court improperly dismissed for failure to state a claim upon which relief could be granted, a complaint which complained of overcrowded cell conditions,

denial of showers and basic sanitary items, denial of miscellaneous items such as shoes and tobacco, and a diet consisting entirely of cold and possibly inadequate food. Shapley v. Wolff, 568 F.2d 1310 (9th Cir. 1978).

Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977) stated:

> The District Court's order must be limited by deleting the requirement of maintaining a specific temperature range. If the proof shows the occurrence of extremes of temperature that are likely to be injurious to inmates' health relief should be granted, but beyond these limits a federal court may not issue commands in the name of the Constitution.

553 F.2d at 381.

Allegations of suffocating conditions resulting from inadequate ventilation state a cause of action. Martinez v. Chavez, 574 F.2d 1043 (10th Cir. 1978).

Forts v. Ward, 566 F.2d 849 (2d Cir. 1977) reversed the district court's grant of a preliminary injunction, enjoining state and union officials from assigning male correction officers to parts of the housing and hospital units of a women's prison and remanded for full evidentiary hearing. The plaintiffs alleged that their privacy rights were being violated by male guards who would observe them when they were on the toilet, as they were drying themselves after showering, and upon being awakened at 6:30 a.m. The defendants argued that the inmates could prevent such invasions of privacy by requesting that their cell doors be closed while they attended to their personal needs and by dressing and drying themselves in the curtained shower stalls. The court found that the briefs and affidavits presented disputed issues of fact and a hearing was required.

2. Inadequate Meals

Cunningham v. Jones, 567 F.2d 653 (6th Cir. 1977) remanded for determination of whether the one meal a

day the plaintiff was receiving was sufficient to maintain normal health. The plaintiff was placed in solitary confinement after allegedly attempting a jailbreak and stabbing a deputy jailer. He alleged that he was completely deprived of food for the first four days and that for the next sixteen days he received only one full meal, consisting of watery soup or boiled potatoes, every third day. The district judge found that he had been allowed one meal a day for eleven days. However, there was conflict as to whether he received any food during the preceeding four days. The limited diet was imposed as punishment for the attempted jailbreak. The district court had found:

> Under all the circumstances, the Court is unable to say that the furnishing of one meal a day for a short period of 15 days constitutes cruel and unusual treatment, although the Court certainly does not approve of the practice and would find little reason for not finding it to be a violation of the Eighth Amendment were it continued over a prolonged period of time.

567 F.2d at 654. On appeal, the court recognized that a number of courts had held that deliberate and unnecessary withholding of food essential to normal health could violate the Eighth Amendment and quoted from Finney v. Arkansas Board of Correction, 505 F.2d 194 (8th Cir. 1974): "There exists a fundamental difference between depriving a prisoner of privileges he may enjoy and depriving him of the basic necessities of human existance. We think this is the minimal line separating cruel and unusual punishment from conduct that is not." 567 F.2d at 656. The court also quoted from another case, Landman v. Royster, 333 F.Supp. 621, 647 (E.D. Va. 1971), which prohibited a bread and water diet:

> The practice is therefore both generally disapproved and obsolescent even within this penal system. It is not seriously defended as essential to security. It amounts therefore to an unnecessary infliction of pain. Furthermore,

> as a technique designed to break a man's spirit not just by denial of physical comforts but of necessities, to the end that his powers of resistance diminish, the bread and water diet is inconsistent with current minimum standards of respect for human dignity. The Court has no difficulty in determining that it is a violation of the eighth amendment.

567 F.2d at 657.

The Cunningham court discussed the burden of proof as follows:

> The prisoners, of course, could have no access to proofs as to calorie count in the meals actually furnished. Once the evidence established a substantial deprivation of jail food normally served (here a deprivation of two meals a day), the burden of proof as to the adequacy of the one meal actually furnished to maintain normal health must fall upon Defendants since such knowledge is peculiarly within their possession . . . .
>
> What we cannot ascertain from the record currently presented and the current findings of fact of the District Judge is whether the one meal actually provided the plaintiff was sufficient to maintain normal health.

567 F.2d at 660. The court clarified its remarks by stating:

> [W]e should make clear what this case does not involve. First, it does not involve any claim that the deprivation of food complained of was due to any administrative problems or caused by any emergency or exigent circumstances. Second,

> this is not a complaint about the preparation or quality of prison food. Such complaints would generally be far removed from Eighth Amendment concerns. . . . Third, it is not purely a "one meal a day case."

567 F.2d at 659.

Prisoners who were suffering from heart disease or diabetes were to be afforded regular and reasonably nourishing meals prepared without salt and without saturated fats in Steward v. Henderson, 364 F.Supp. 283 (N.D. Ga. 1973). The court declined, however, to enter an order concerning sugar in the diet since there was insufficient evidence to find that diabetics could not eat safely from the prison diet.[119] The court stated: "It borders on the cruel and unusual to instruct a man that he must not eat certain foods on peril of damaging his health and then provide him with a menu where the only foods offered are the very ones proscribed." 364 F.Supp. at 285. The court further stated:

> To prevent misunderstanding, the court is not directing the prison officials to provide a full panoply of dietary foods, desserts, soft drinks, and the like. It is requiring only that petitioners and others similarly situated be afforded food of the type now regularly appearing on the prison menu prepared without salt and without saturated fats.

364 F.Supp. at 286.

Collins v. Schoonfield, 344 F.Supp. 257 (D. Md. 1972) stated:

> Bad quality of prison food and the lack of appropriate dietary balance can add up to a level of constitutional deficiency . . . . The expert

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119. See also Owens-El v. Robinson, 442 F.Supp. 1368, 1391 (W.D. Pa. 1978) (possible for diabetic to maintain diet by choosing less starchy items).

> testimony in this case that food should not be denied or curtailed as a punishment tool is noted. As to inmates convicted and serving sentences, the provision or denial of certain foods, provided there is in any event no denial of that quantity and quality of food required for appropriate nutrition, may not be unconstitutional regardless of whether it is advisable. As to pretrial detainees, there may be special situations, such as when a pretrial detainee persists in throwing his food in a guard's face, when use of food curtailment is justified, again provided that appropriate basic nutritional requirements are met. But it is only in extreme situations that food curtailment may take place with regard to a pre-trial detainee.[120]

344 F.Supp. at 278-79.

A district court requirement that prisoners be served at least one fresh green vegetable, one fresh yellow vegetable and one serving of meat or protein was found to be too restrictive in Smith v. Sullivan, 553 F.2d 373, 379 (5th Cir. 1977). The court stated: "A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required."[121] 553 F.2d at 380.

Lovern v. Cox, 374 F.Supp. 32 (W.D. Va. 1974), dealt with the problem of alleged contamination of food:

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120. See also Shapley v. Wolff, 568 F.2d 1310 (9th Cir. 1978) (cold and possibly inadequate food). However, allegations of bad food and miserable living conditions did not state a claim in Marnin v. Pinto, 463 F.2d 583 (3d Cir. 1972).

121. See Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975) (court found plaintiff failed to furnish factual support to his claim that diet was inadequate).

> Petitioners complain about the quality of the food they are served and that on various occasions hairs from respondents' dogs have been found on the food. The extensive documentation of the meals provided inmates, contained in petitioners' complaint, establishes that a sufficient diet is provided and, absent a showing of resulting illness, no constitutional infringement is evident . . . . Nor does an occasional incident of a foreign object discovered in the prison food raise a question of constitutional proportions.[122]

374 F.Supp. at 35.

An allegation by a prisoner in punitive segregation that he was denied the dessert available to the general population did not state a constitutional violation. Sostre v. McGinnis, 442 F.2d 178, 186 (2d Cir. 1971).[123]

There was no foundation in the record for the district court's order requiring the defendants to provide medical examinations of all food handlers, inmate and civilian employees, at the jail at least once every thirty days and more often if medically required in Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978). The court remanded for clarification.

3. Lack of Sufficient Exercise

Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975) decided that under certain conditions lack of exercise violates a prisoner's

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122. See also Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978) (improper to dismiss complaint alleging defendants failed to provide adequate sanitary food facilities); James v. Wallace, 406 F.Supp. 318, 334 (M.D. Ala. 1976).

123. Cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, and Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

constitutional rights:

> While a restriction of two exercise periods of one hour each during a week, as allowed the plaintiff, may not ordinarily transgress the constitutional standard as fixed by the Eighth Amendment if confined to a relatively short period of maximum confinement, the rule may be quite different when, as here, the restriction has extended already over a period of years and is likely to extend indefinitely for the balance of plaintiff's confinement. Such indefinite limitation on exercise may be harmful to a prisoner's health, and, if so, would amount to "cruel and unusual" punishment. This issue was apparently not addressed either by the parties or by the Court. We accordingly feel constrained because of the extended period of plaintiff's confinement in maximum security to remand the cause to the District Court in order that it may take additional testimony and consider in greater detail whether the health of the plaintiff may be adversely affected by the restricted exercise rights accorded him and whether it is not practical for the prison authorities to provide him with more exercise opportunities. If the prisoner's health is being affected or it is practical for the prison authorities to grant additional exercise time to the plaintiff, without unduly imperilling security or without making unreasonable administrative difficulties for the prison authorities, the prisoner's constitutional rights, it would seem, are implicated.

529 F.2d at 866.

Kirby v. Blackledge, 530 F.2d 583, 586-87 (4th Cir. 1976) found that plaintiffs' allegation that they were allowed only two hours per week for recreation reached

the level of cruel and unusual punishment when combined with the other conditions.

No constitutional violation was found in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971),[124] where the prisoners were permitted one hour of exercise daily. The plaintiff had refused to participate in the exercise period because he objected to the strip search which was required each time a prisoner entered the exercise yard.

Smith v. Sullivan, 553 F.2d 373, 379 (5th Cir. 1977) affirmed the district court's order that each prisoner be taken into sunlight and fresh air at least once each day and that each prisoner be given an opportunity to engage in physical exercise and recreation at least once each day. However, the court observed that the decision was not based solely on the Eighth Amendment since the state commission on jail standards had promulgated rules which contemplated that inmates must be provided adequate opportunities for outdoor exercise and recreation.

An order requiring that daily outdoor recreation be available for the plaintiffs was affirmed in Miller v. Carson, 563 F.2d 741, 749-50 (5th Cir. 1977). The court found that both pretrial detainees[125] and convicted inmates must be allowed reasonable recreational facilities:

> We find that the remedy ordered by the district court, daily outdoor recreation, is an appropriate goal toward which jail authorities should work. That goal may not be immediately obtainable because of lack of resources. . . . Or it may not

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124. Cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, and Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

125. See Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), where the court affirmed the district court's finding that 50 minutes exercise per week was inadequate for pretrial detainees. See also Ahrens v. Thomas, 434 F.Supp. 873 (W.D. Mo. 1977) (confinement without exercise is Eighth Amendment violation).

> be invariably attainable because of inclement weather, an outbreak of violence within the jail, or emergency situations. It is, however, a goal toward which the jail authorities should strive. We hold that presumably innocent pretrial detainees who are not classified as security risks and who have not been shown to have violated the disciplinary rules of the jail have a fourteenth amendment and 1983 right to regular access to the outdoors.

563 F.2d at 750.

The court in Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978), remanded for a determination of the quality and kind of recreational opportunities that must be afforded plaintiff pretrial detainees in order to protect their mental and physical health. The district court had required the prison officials to provide at least one hour of outdoor recreation daily for each resident of the jail. The court of appeals commented that although the district court may have had in mind the salutary effects of exposure to fresh air and sunshine, there was no evidence about the necessity for outdoor recreation.

Dorrough v. Hogan, 563 F.2d 1259, 1264 (5th Cir. 1977) affirmed the district court's finding that plaintiffs, segregated inmates, were not subjected to cruel and unusual punishment in being limited to only two one-hour exercise periods a week. The dictrict court had stated:

> While the court believes that the exercise facilities are adequate it has some concern that the limitations on exercise periods may be inadequate to insure proper health. . . .
>
> This court tends to agree . . . that a court order requiring daily exercise is appropriate when overall conditions are found to be substandard, but than an order requiring the prison

> officials to merely change their exercise schedule might be an unwarranted intrusion into an area governed by official discretion.

563 F.2d at 1263. The district court then allowed the parties twenty days to submit additional pleadings on the questions of health and practicality. Subsequently the district court stated:

> After review of the additional pleadings, this court concludes that an order requiring a change in exercise periods from two days a week to three or five, or whatever, would be an unwarranted intrusion upon the Bureau of Prisons' discretion in this area . . . . The denial of additional exercise periods simply is not a sufficiently grave deprivation of bodily needs to trigger special injunctive relief from this court.

563 F.2d at 1264.

Nadeau v. Helgemoe, 561 F.2d 411, 420 (1st Cir. 1977) held that the district court had improperly applied the "penological purpose" test in its determination that plaintiffs were not given adequate opportunity to exercise. The plaintiffs were limited to two hours a day "tier time" and less than two hours a week outdoor exercise time. The district court's finding that these limitations posed a threat to plaintiff's health over the long run was relevant but the court of appeals questioned whether the district court had sufficient evidence to make that finding and suggested that additional evidence be taken on remand.

James v. Wallace, 406 F.Supp. 318 (M.D. Ala. 1976) mandated:

> Each institution shall employ a qualified full-time recreation director with at least bachelor's level training, or its equivalent, in recreation or physical education. Adequate equipment and facilities shall be provided to offer

recreational opportunities to every inmate. Space shall be available for inmates to engage in hobbies. Suitable vocational programs shall be provided.

406 F.Supp. at 335.

4. Isolation, Administrative Segregation, Maximum Security, Incarceration With Another Prisoner Under Psychiatric Care, Female Prisoner in Segregation in Male Prison

The question of whether a prisoner's confinement in isolation, administrative segregation, or maximum security subjects him to cruel and unusual punishment in violation of the Eighth Amendment is distinguished from his Fourteenth Amendment right to a due process hearing prior to his placement in such confinement as a disciplinary measure.[126]

The district court in Hutto v. Finney, ____ U.S. ____, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) had properly limited sentences to punitive isolation to thirty days. The Supreme Court stated:

> Read in its entirety, the District Court's opinion makes it abundantly clear that the length of isolation sentences was not considered in a vacuum. In the court's words, punitive isolation "is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof." . . . A filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months.

____ U.S. at ____, 98 S.Ct. at 2571-72, 57 L.Ed.2d at 531-32. The Court described the conditions originally found by the district court:

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126. See Section VIII, K, 4 infra.

> An average of four, and sometimes as many as 10 or 11 prisoners were crowded into windowless 8' x 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell . . . . At night the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening . . . . Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan.

____ U.S. at ____, ____ S.Ct. at ____, 57 L.Ed.2d at 529. The district court had given the department of correction several opportunities to "make a substantial start" on improving conditions and to file reports on its progress. Later, when new hearings were conducted, the district court found that conditions had seriously deteriorated:

> There were still twice as many prisoners as beds in some cells. And because inmates in punitive isolation are often violently antisocial, overcrowding led to persecution of the weaker prisoners. The "grue" diet was still in use, and practically all inmates were losing weight on it. The cells had been vandalized to a "very substantial" extent . . . . Because of their inadequate numbers, guards assigned to the punitive isolation cells frequently resorted to physical violence, using nightsticks and Mace in their efforts to maintain order. Prisoners were sometimes left in isolation for months,

their release depending on "their attitudes as appraised by prison personnel."

____ U.S. at ____, 98 S.Ct. at 2570-71, 57 L.Ed.2d at 530. The district court had placed limits on the number of men that could be confined in one cell, required that each have a bunk, discontinued the "grue" diet, and set thirty days as the maximum isolation sentence. The Supreme Court stated:

> The Eighth Amendment's ban on inflicting cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment, "proscribes more than physically barbarous punishments." . . . It prohibits penalties that are grossly disproportionate to the offense, . . . as well as those that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."

____ U.S. at ____, 98 S.Ct. at 2511, 57 L.Ed.2d at 531. The Court concluded: "We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishments." ____ U.S. at ____, 98 S.Ct. at 2572, 57 L.Ed.2d at 532.

In Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971),[127] the plaintiff had been confined in punitive segregation for twelve months and eight days. "[F]or four months only one other prisoner was confined with [plaintiff] in his small 'segment' of five cells, [although] the entire punitive segregation unit . . . housed . . . about 15 prisoners at any one time." 442 F.2d at 185. The other prisoners were confined in cells near plaintiff and he could communicate with them, although with some difficulty. He had been able to dictate a legal document to one prisoner. Plaintiff had aggravated his isolation by refusing to participate

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127. Cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, and Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

in a "group therapy" program offered to inmates in segregation. During the non-jury trial there was expert tertimony that plaintiff's segregated environment was degrading, dehumanizing, conducive to mental derangement, and constituted a gross departure from enlightened and progressive contemporary standards for the proper treatment of prison inmates. "A psychiatrist testified that the isolation from human contact in punitive segregation might cause prisoners to hallucinate and to distort reality." 442 F.2d at 190. He felt that long term isolation might destroy a person's "mentality." The court admitted that plaintiff's expert testimony was fairly representative of the perspective of adherents to the "new penology" which was directed toward corrections rather than punishment. However, the court stated: "For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes." 442 F.2d at 191. The court continued:

> Nor can we agree that Sostre's own long confinement--however contrary such prolonged segregation may be to the views of some experts--would have been "cruel and unusual" had Sostre in fact been confined for the reasons asserted by Warden Follette, rather than on account of his beliefs and litigiousness.
>
> It is undisputed on this appeal that segregated confinement does not itself violate the Constitution. . . . "[W]illful refusal to obey an order or demonstrated defiance of personnel acting in line of duty may constitute sufficient basis for placing an inmate in segregation."

442 F.2d at 192. The court noted in concluding that plaintiff's conditions of confinement did not violate the Eighth Amendment, it was taking into consideration his opportunity for participation in group therapy as well as diet, exercise and other factors. 442 F.2d at 193-94.

Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975), stated:

> But specifically, "isolation from companionship," "restriction on intellectual stimulation and prolonged activity," inescapable accompaniments of segregated confinement, will not render segregated confinement unconstitutional absent other illegitimate deprivations. Nor will the fact that the segregated confinement is prolonged and indefinite be sufficient in itself to command constitutional protection, though it is a factor to be considered, especially if the confinement is punitive rather than administrative or protective.

529 F.2d at 861. The court noted that in the federal prison system segregated confinement is for an indefinite period.[128]

Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978) commented that confinement of a prison inmate in the nude, in a cell which could be darkened, with no bedding or cover, with only a sink and commode, and without toilet articles or toilet paper today would unquestionably be held unconstitutional.[129] In that case the plaintiff, while confined in administrative segregation, had engaged in animal-like behavior,

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128. Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), rehearing denied, 456 F.2d 1303 (5th Cir. 1972), cert. denied sub nom. Sellers v. Beto, 409 U.S. 968, 93 S.Ct. 279, 34 L.Ed.2d 333 (1972) found that solitary confinement did not violate the Eighth Amendment. See also Ervin v. Ciccone, 557 F.2d 1260 (8th Cir. 1977); Gregory v. Wyse, 512 F.2d 378 (10th Cir. 1975); LeGrande v. Redman, 432 F.Supp. 1037 (D. Del. 1977).

129. 572 F.2d at 1263 n. 5. Owens-El v. Robinson, 442 F.Supp. 1368, 1384 (W.D. Pa. 1978) held it to be inhumane to strip an inmate and order confinement in a dark isolation cell with no furnishings.

including threatening guards, screaming obscenities, destroying considerable property, and throwing urine and fecal matter on guards passing by his cell. Disciplinary hearings were conducted and plaintiff was sentenced to continued confinement in administrative segregation. However, he destroyed his entire cell and was moved to a strip cell in which he tore the plumbing fixtures from the walls. He was retained in that cell until prison personnel were able to build a special cell for his confinement, with the sink and toilet embedded in concrete. His bed consisted of a concrete slab covered with a foam rubber mattress. In view of plaintiff's conduct, the denial of an award of damages against the prison officials was not improper. The court recognized that prison administrators must deal in a constitutional manner with convicts who are violent and unruly and that the contributory fault of an inmate does not necessarily deprive him of his right to relief from deprivations of constitutional dimension. However, there was nothing in the case to indicate that the defendants acted toward plaintiff in bad faith or with personal malice and the court found that they were shielded from liability for damages by the qualified executive privilege recognized in Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 885, 55 L.Ed.2d 24 (1978).

The plaintiff in Franklin v. Fortner, 541 F.2d 494 (5th Cir. 1976) alleged that he was transferred to a wing of the institution which included inmates who were under psychiatric care. Plaintiff alleged, "I was constantly subjected to physical harm and I underwent great mental pain because many of the inmates under psychiatric care constantly threw urine, excrement, glass, water, fire, other harmful objects and they hardly ever stopped screaming and hollering." 541 F.2d at 496 n. 2. The court found the complaint stated a claim and reversed the district court's dismissal.

Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) reversed the dismissal of plaintiff's complaint where he alleged that he had suffered aggravation of a preexisting foot injury and a circulatory ailment as a result of having to sleep on the floor of his solitary confinement cell with only blankets.

Where a female prisoner was temporarily placed in a solitary cell in an all male prison, for security reasons, the district court did not err in denying preliminary injunctive relief. Chesimard v. Mulcahy, 570 F.2d 1184 (3d Cir. 1978).

In discussing classification of pretrial detainees, Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978) stated: "Although the state may legitimately vary the conditions of confinement for maximum security inmates, it may not use security classifications as a license to harm pretrial detainees." The court affirmed the district court's order to the prison officials to establish a classification system which would make it possible to determine which pretrial detainees required maximum security confinement and which ones could enjoy contact visits without jeopardizing security.

5. Prisoners Placed in Segregation or Protective Custody at Their Own Request

The fact that a prisoner requests placement in administrative segregation for his own protection does not justify unconstitutional conditions of confinement. Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975). In a concurring opinion, Judge Butzner stated:

> Though Sweet's assignment to a punitive cell is labeled administrative or segregative, his treatment is tantamount to punishment. Confining him as though he has breached prison rules, when in fact he has not, is so arbitrary and capricious that it deprives him of due process of law. And placing him in the same class as lawless prisoners, though he is not lawless, denies him the equal protection of the law.[130]

529 F.2d at 868.

In Little v. Walker, 552 F.2d 193 (7th Cir. 1977), the plaintiff alleged that even when he was placed in segregation-safekeeping at his own request he was subjected to sexual assaults by gang-affiliated inmates who served him his meals. Defendants made no distinction between disciplinary and protective segregatees and plaintiff complained of the conditions of confinement

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130. But see Crowe v. Leeke, 540 F.2d 740 (4th Cir. 1976).

in segregation. The court stated:

> Violent attacks and sexual assaults by inmates upon the plaintiff while in protective segregation are manifestly "inconsistent with contemporary standards of decency" . . . . "Deliberate indifference" to these happenings "constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." . . . On remand, if Little can show that he was deliberately deprived of constitutional rights while confined in cellhouse B, he will be entitled to damages.[131]

552 F.2d at 197.

6. Medical and Dental Care[132]

a. Estelle v. Gamble

Although prisoner suits for medical treatment may be based on federal habeas corpus, the Federal Tort Claims Act,[133] or the Civil Rights Act, 42 U.S.C. § 1983, the majority of actions are brought under section 1983 and are based on a violation of the Eighth Amendment

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131. See generally Nadeau v. Helgemoe, 561 F.2d 411 (1st Cir. 1977).

132. This chapter was written by Vicki Thompson, Editor-in-Chief of Vol. 17, Duquesne Law Review, 1978-79. A more analytical discussion of prisoners' right to medical treatment will be published in an article by Ms. Thompson in Issue 3-4 of Volume 17 of the Duquesne Law Review 1979.

133. See, e.g., Plummer v. United States, 580 F.2d 72 (3d Cir. 1978). Eight federal penitentiary prisoners brought suit under the Federal Tort Claims Act to recover for the negligence of prison officials who exposed them to the active tuberculosis of a fellow inmate. The court held that the impingement of the tubercle bacilli on the prisoners' lungs and the fear of contracting or transmitting it constituted compensable mental suffering.

prohibition against cruel and unusual punishment.

The Eighth Amendment as the constitutional basis for section 1983 actions was recognized by the Supreme Court in Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Prior to Estelle, actions were usually predicated on either the Eighth or Fourteenth Amendment. In attempting to distinguish constitutional violations from torts,[134] some courts emphasized the defendants' wrongful intent,[135] while others appeared to be concerned with adequate treatment. Some cases denied relief unless a showing of exceptional circumstances could be made.[136]

In Estelle, the prisoner-plaintiff received a back injury while on his work assignment when a bale of cotton fell on him. Plaintiff was initially examined and returned to work but then was re-examined, prescribed a painkiller, and permitted to remain in his cell. During a three month span he was seen by medical personnel on seventeen occasions and was treated for his back injury, high blood pressure, and heart problems.

The Supreme Court noted that the government has an obligation to provide medical care for those it is punishing by incarceration; that denial of medical care causes pain and suffering inconsistent with contemporary standards of decency, and then concluded

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134. Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974); Kauffman v. Johnston, 454 F.2d 264 (3d Cir. 1972); Nettles v. Rundle, 453 F.2d 889 (3d Cir. 1971); Johnson v. Prasse, 450 F.2d 946 (3d Cir. 1971); Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970).

135. Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974) (refusal to order x-rays and other clinical tests coupled with insulting slur on plaintiff's race); Kauffman v. Johnston, 454 F.2d 264 (3d Cir. 1972) (allegation of malice); Newsome v. Sielaff, 374 F.Supp. 1189 (E.D. Pa. 1974) (deliberate denial of necessary medical treatment); Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974) (deliberate indifference). See also Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976) (decided after Estelle).

136. Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974); Patmore v. Carlson, 392 F.Supp. 737 (E.D. Ill. 1975); Shields v. Kunkel, 442 F.2d 409 (9th Cir. 1971).

that deliberate indifference to serious medical needs of prisoners constitutes a violation of the Eighth Amendment:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness of injury states a cause of action under § 1983.

429 U.S. at 104-05, 97 S.Ct. at 290, 50 L.Ed.2d at 260. The deliberate indifference standard, however, was clarified by the Court to include only "wanton infliction of unnecessary pain" and not an accident or inadvertent failure:

> Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

429 U.S. at 106, 97 S.Ct. at 292, 50 L.Ed.2d at 261.

In applying this standard to the facts, the Supreme Court concluded that a cognizable claim for relief was not stated. Even if liberal standards in construing the complaint were applied,[137] the majority read the complaint as one based on inadequate medical treatment: the failure to provide additional diagnostic techniques, such as x-ray. The Court noted that at most medical malpractice was being alleged against the doctor. The Court, however, remanded for a determination of whether a cause of action was stated against other prison officials. On remand, 554 F.2d 653 (5th Cir. 1977), the court of appeals subsequently determined that no claim was stated against the director and the wardens since there was no evidence indicating they showed deliberate indifference by interfering with plaintiff's treatment. The court felt that the complaint was based on the theory of respondeat superior which is not actionable under section 1983.

Justice Stevens, in his dissent, felt that the complaint did show indifference by the failure to treat the injury promptly and the conduct of the prison staff in placing him in solitary, denying him access to a doctor, and interfering with his treatment. This was sufficient, he believed, to constitute a complaint challenging the entire prison medical system. Justice Stevens also objected to the standard applied by the court, believing that the subjective motivation standard for determining whether the punishment was cruel and unusual was erroneous. He felt the violation of the constitutional standard must turn on the character of the punishment and not the motivation behind it. While this may well be appropriate in determining the type of remedy required, he reasoned, it is not relevant to the standard for determining a constitutional violation.

b. Claim of Inadequate Medical Treatment

When a prisoner alleges, as in Estelle, that medical treatment was given, but is inadequate, it is usually difficult to recover since the complaint must allege more than malpractice, negligence, or difference in professional opinion. Generally, if the records indicate that some medical treatment was given, summary judgment

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137. See Section VI supra.

will be granted for the defendant.[138]

Prior to Estelle, in the absence of exceptional circumstances, courts were reluctant to intervene in matters which they felt were within the discretion of prison officials,[139] and only a clear allegation of the abuse of this discretion would elevate the claim to constitutional proportions.[140]

As a result of Estelle, it is now clear that a prisoner is constitutionally entitled to necessary medical care for severe and obvious injuries; however, the problem of determining under what circumstances relief is appropriate was not specifically addressed by the Court. Therefore, pre-Estelle cases based on the Eighth Amendment which used the same standards as those announced in Estelle are still relevant.[141]

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138. See Section VIII, E supra.

139. Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970); Granville v. Hunt, 411 F.2d 9 (5th Cir. 1969); Haggerty v. Wainwright, 427 F.2d 1137 (5th Cir. 1970); Patmore v. Carlson, 392 F.Supp. 737 (E.D. Ill. 1975). See also note 136 supra.

140. Henderson v. Thrower, 497 F.2d 125 (5th Cir. 1974) (pro se complaint may be dismissed for failure to state a claim in absence of allegation that misconduct was an abuse of discretion); Seward v. Hutto, 525 F.2d 1024 (8th Cir. 1975) (in absence of allegations of misconduct or intentional neglect, decision as to what is necessary and proper treatment should be left to prison physician).

141. The Supreme Court noted at 429 U.S. 106 n. 14, 97 S.Ct. 292 n. 14, 50 L.Ed.2d 261 n. 14, that the following cases were in essential accord with Estelle, although terminology varied: Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) ("deliberate indifference"); Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970); Russell v. Sheffer, 528 F.2d 319 (4th Cir. 1975); Newman v. Alabama, 503 F.2d 1320, 1330 n. 14 (5th Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 ("callous indifference"); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1975), cert. denied sub nom. Thomas v. Cannon, 419 U.S. 879, 95 S.Ct. 143, 42 L.Ed.2d 119 (1974); Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975) ("deliberate indifference"); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970); Dewell v. Lawson, 489 F.2d 877, 881-82 (10th Cir. 1974). Since these cases were premised on reasoning

A complaint was held actionable in Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974), where plaintiff alleged he was given a hemorrhoidectomy without his consent and denied analgesics for pain after the operation. The district court granted summary judgment for the defendant, finding that there was only a difference in opinion as to mode of treatment. However, the court of appeals reversed, stating that the withholding of the painkillers constituted a deliberate infliction of pain.

A plaintiff who was awaiting trial claimed that the doctor misdiagnosed severe rectal pains as hemorrhoids in Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974). Three months later, the condition was diagnosed as advanced rectal cancer and a colostomy was performed. On his initial visit the plaintiff, who rejected digital examination as too painful, was refused a request for an x-ray, coupled with an insulting racial slur. The doctor provided only rectal suppositories which did not alleviate the suffering. Plaintiff claimed that he plead guilty to a murder charge in order to get out of that particular jail so he could receive treatment. The court of appeals reversed the district court which dismissed the pro se complaint without a hearing, and held that the prisoner was entitled to an evidentiary hearing.

A complaint based on inadequate medical treatment stated a claim in Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974), where the court of appeals reversed the district court's determination that no claim was stated. Plaintiff, who had a portion of his ear cut off in an altercation with a fellow inmate, brought suit against prison doctors who merely stitched the remaining stump of his ear and not the severed portion. Immediately thereafter he was placed in solitary confinement for twenty-two days without receiving any medication. He later required six plastic surgery operations.

Although the defendant argued that the complaint stated a difference of opinion over medical judgment and did not reach constitutional proportions, the court stated:

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in accord with Estelle, they are still good authority for indicating the type of factual situation which is actionable.

> [T]he allegations support the claim that it was deliberate indifference towards Williams' medical needs, rather than an exercise of professional judgment, which led prison medical officials merely to stitch the stump of his ear. Such a claim is supported by the allegation that Williams was simply told that "he did not need his ear" by doctors who then threw the severed portion away in front of him, and also by the fact that if it was possible that Williams' ear could have been saved by sewing it back on immediately at the hospital, one would expect a concerned doctor to have tried. . . . But on the basis of the allegations in the complaint, and assuming that evidence might show that sewing the severed portion of the ear back on was practicable, the possibility that deliberate indifference caused an easier and less efficacious treatment to be consciously chosen by the doctors cannot be completely foreclosed. The complaint here alleges more than what we have found insufficient in United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970) . . . .[142]

508 F.2d at 544.

Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974) ruled that the district court had improperly dismissed for failure to state a claim. Plaintiff contended that his vision was permanently impaired when he was confined with a man known to have tuberculosis. The disease had settled into his eyes and constituted a vision hazard for which surgery was advised. The surgery was denied

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142. U.S. ex rel. Hyde v. McGinnis held that the complaint was insufficient and alleged only negligence and a difference in professional judgment. The plaintiff claimed that tranquilizers given in liquid, rather than tablet form were not as effective.

and instead plaintiff was given eye drops. The court recognized that this conduct constituted deliberate indifference and held:

> From the pleadings reviewed by the district court, taken together, it may reasonably be inferred that Freeman contends that appellees, having sanctioned through negligence conditions of confinement which resulted in his illness, failed and refused to arrange for specialized treatment required to correct the damage to his eyes, with resulting physical impairment. Viewing the complaint and petition for rehearing in this light, we cannot say "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "

503 F.2d at 1017-18.

Courtney v. Adams, 529 F.2d 1056 (8th Cir. 1976) affirmed a district court dismissal of a complaint, holding that it expressed a mere disagreement as to medical treatment. The plaintiff who was scheduled for a major operation for a growth next to his heart claimed that it was enlarging. His request for an advance date of his operation was denied, and he was given only aspirin when he requested additional pain-killers. The court of appeals agreed with the district court's denial of equitable relief in the form of an advance date of operation, finding, as in cases involving monetary relief, that the claim constituted mere disagreement as to medical treatment.

Equitable relief, including a request to order an operation and excusal from field work, was sought in Cotton v. Hutto, 540 F.2d 412 (8th Cir. 1976). There the plaintiff alleged a hernia resulted from a beating given by prison officials. Plaintiff was forcefully dragged from his cell, given a fifteen second examination, and classified as capable of field labor. The district court dismissed on its own motion, concluding that the failure to perform the operation was a difference of opinion over medical judgment. The court of appeals remanded for further

proceedings, stating:

> The facts pleaded in this case do not demonstrate a disagreement between prisoner and prison administration over proper medical treatment. The facts pleaded (particularly the cursory nature of the examination), if proven, might well show such "deliberate indifference" to a request for medical treatment as to warrant § 1983 relief.

540 F.2d at 415.

Injunctive relief, however, was denied in Massey v. Hutto, 545 F.2d 45 (8th Cir. 1976). Plaintiff claimed he was suffering from a disabled right hand, his skin cancer, which was caused by exposure to the sun, was aggravated by assignment to the garden squad, and he was made to run although he suffered poor balance as a result of brain surgery. The medical records revealed that he had seen the prison medical authorities on twenty-four occasions; that his hand had been x-rayed and found fit; that he had received pain medication for his hand; that he was reclassified as having a permanent medical disability and had been removed from the garden squad and other exposure to the sun; and that he received and would continue to receive such treatment in the future. On the basis of these records, the court of appeals agreed with the district court that the plaintiff was not the victim of deliberate indifference.

In determining whether or not a claim for inadequate medical treatment has been stated, courts will usually take note of medical records submitted by the prison. Fore v. Godwin, 407 F.Supp. 1145 (E.D. Va. 1976). The court observed:

> Plaintiff's allegations relating to medical treatment are likewise meritless. Prison records submitted indicate that each inmate complaining of improper medical treatment did, in fact receive some treatment by a medical doctor or dentist. Questions

> of medical judgment are not subject to judicial review. A prisoner cannot be ultimate judge of what medical treatment is necessary or proper and courts must place their confidence in the reports of reputable prison physicians.

407 F.Supp. at 1146.

According to Walnorch v. McMonagle, 412 F.Supp. 270 (E.D. Pa. 1976), the speed with which a non-critical operation is performed is not the equivalent of grossly inadequate medical care:

> Stripped to essentials, plaintiff states nothing more than his dissatisfaction with the speed with which his non-critical knee condition is being corrected. While the court sympathizes with his desire for quicker treatment, it does not follow that he is entitled to the relief he seeks in this suit. At most his complaint constitutes a claim for negligence which is not cognizable . . . .
>
> The difference between the conduct alleged here and that described in other cases where valid Section 1983 claims involving prisoner medical treatment were set forth is significant. There is a common thread running through each case in the latter category: the conduct alleged was either deliberate neglect amounting to a total failure to provide essential medical care or care so grossly inadequate as to shock the conscience.

412 F.Supp. at 275.

Although Estelle indicated that the proper standard in determining a constitutional violation is deliberate indifference, the district court in Bass v. Sullivan, 550 F.2d 229 (5th Cir. 1977), cert. denied (1978), apparently used a "barbarous/shocks the conscience" test.

On review, the court of appeals noted that while the deliberate indifference standard is preferable, the "shocks the conscience test" may also be used. In reviewing the factual setting, the court of appeals applied the deliberate indifference test and reached the same result as the district court had reached under the "barbarous/shocks the conscience" test. The court of appeals noted: "The trial court was entirely justified, despite the tragic event, in finding that Bass suffered no barbarous or shocking neglect of basic medical needs. We conclude, on the record, that if deliberate indifference be a different standard, it has not been shown either." 550 F.2d at 233. The plaintiff suffered frostbite injuries during a prison escape and sought damages for the amputation of his legs at the knees. Upon his return he was given immediate treatment, received treatment and drugs for pain, oxygen, and was attended by three nurses. In light of these facts it was difficult for the court of appeals to find an indifference to his needs:

> It is possible on this record to argue carelessness; it is possible to argue the deliberate creation of a charade or simulacrum of treatment insiduously designed to injure rather than cure, but it is very difficult to make even a colorable showing of indifference.
>
> Whatever the course of treatment may indicate, it is not indifference. Whether it might constitute malpractice is not our concern; . . . the regimen pursued . . . is generally along standard lines for [treatment] . . . .[143]

550 F.2d at 231-32.

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143. Deliberate indifference within the meaning of Estelle was not shown in Smart v. Villar, 547 F.2d 112 (10th Cir. 1976), where the record documented a series of sick calls, examinations, diagnoses, and prescription of medication. See also Mosby v. O'Brien, 414 F.Supp. 36 (E.D. Mo. 1976) (no constitutional violation stated by prisoner who complained he received only "darvon and promises" for kidney problem).

A summary judgment was granted for defendant in Wester v. Jones, 554 F.2d 1285 (4th Cir. 1977). During a physical exam given on his initial entry into prison, plaintiff complained of an injury in his left eye. During a three month period he made several complaints concerning pain and loss of vision in his left eye, and contended that the prison doctor cursorily examined him after the initial complaint and never re-examined him. A specialist who examined the plaintiff found him suffering from a detached retina; and although he was treated for this condition, his full sight was never restored. The majority applied the standards of Estelle and found no constitutional violation: "It is undisputed that the doctor examined Wester and found no medical problem . . . . Even if the doctor were negligent in examining Wester and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs." 554 F.2d at 1286. Justice Winters, however, dissented, feeling that the plaintiff asserted more than medical malpractice. He felt it was crucial that the prison doctor never re-examined him after he repeatedly complained: "A refusal to conduct another medical examination of a prisoner who has a known pre-existing injury despite his repeated complaints of pain and fading vision is, in my view, the deliberate indifference which Estelle holds a violation of the eighth amendment." 554 F.2d at 1287.

An action against a prison superintendent and an ophthalmogist was dismissed in Parilla v. Cuyler, 447 F.Supp. 363 (E.D. Pa. 1978) for failure to state a constitutional violation. Plaintiff claimed a doctor examined his eyes and determined that his vision would be lost unless an operation was performed. The doctor later decided that nothing could be done and treated plaintiff, who lost vision in one eye, with eyedrops. The court found that one aspect of Estelle was satisfied by the showing that the medical needs were serious. However, the complaint which named the prison superintendent did not allege that he personally participated in the medical treatment or acted on it in any way. The court observed that the determinative issue was whether a claim of deliberate indifference was set forth and concluded that:

> On the face of this complaint, however, no set of facts appear which show deliberate indifference to plaintiff's medical needs

> on the part of Cuyler or Robinson. Instead, as in Estelle, . . . it appears that these supervisory officials are named "more on respondeat superior principles in line with their official capacities." The allegations therefore fail to state a claim.

447 F.Supp. at 366-67.

Although a single incident may be insufficient to state a constitutional violation, it is possible that a series of incidents which are closely related in time may show a pattern of conduct. The cumulative effect of these incidents may rise to the level of deliberate indifference. Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974).

The standards promulgated by Estelle were the subject of further elaboration in Laaman v. Helgemoe, 437 F.Supp. 269, 311 (D. N.H. 1977). The court noted that in a section 1983 action the following must be shown: a callous indifference to medical needs, that the medical needs were serious, and that the failure to treat them has resulted in considerable harm. A serious medical need was defined as one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that a lay person would recognize the need for treatment. Thus, even elective treatments may be constitutionally mandated. The court also noted that one need not wait until the harm suffered is so egregious as to shock the conscience; failure to fulfill an affirmative duty also violates the Eighth Amendment.

c. Denial of Medical Care

Many complaints which appear to allege a denial of medical care are in reality concerned with situations in which some medical care is provided but is alleged to be inadequate. When this is the case, the allegations must rise above the malpractice or difference of judgment standard which was previously discussed. This section focuses primarily on complaints which allege a total denial of medical care despite plaintiff's request. The cases are in accord that a constitutional violation exists if there has been total denial of medical care with an intent to harm the inmate, or where the injury

is so severe and obvious that medical treatment is clearly required.

A complaint against prison authorities which does not allege personal involvement in the decision to deny medical treatment or severe and obvious injuries may be dismissed for failure to state a claim. Mathis v. Pratt, 375 F.Supp. 301 (N.D. Ill. 1974). In that case, the doctor refused to renew the prisoner-plaintiff's prescription for Thorazine after he admitted he was a drug addict.[144]

A federal pretrial detainee alleged denial of medical care in Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976). The court of appeals found no constitutional violation and vacated the district court's award of damages. Plaintiff had been assaulted and suffered injuries to his jaw, head, face, and right hand. Two days after the incident he asked for medical attention, and submitted sick call slips on the following day. Five days later he saw a prison nurse, seven days after his request he saw a prison doctor, and four days later was taken to a Philadelphia hospital for out-patient treatment. The court noted that the constitutional standard was not satisfied since the record failed to support the charge that the guards deliberately or intentionally prevented plaintiff from receiving medical treatment, nor was it shown they prevented his sick call slips from proceeding through established channels. At most the court felt a pattern of neglect in providing prompt medical attention was established which was insufficient to impose tort liability on the guards.

A district court dismissal of a claim was reversed and remanded in West v. Keve, 571 F.2d 158 (3d Cir. 1978). A state prisoner who was serving a life sentence had varicose vein surgery postponed for seventeen months during which time he allegedly suffered great pain. The court stated that constitutional standards would be violated if deliberate indifference caused an easier and

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144. The requirement that there be an intent to harm or failure to treat severe and obvious injuries is imposed in Roach v. Kligman, 412 F.Supp. 521 (E.D. Pa. 1976). See also Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); Bartling v. Ciccone, 376 F.Supp. 200 (W.D. Mo. 1974); Donahue v. Maynard, 437 F.Supp. 47 (D. Kan. 1977) (medical records which showed constant care and attention refuted claim of denial of medical care).

less effective treatment to be used.[145]

A refusal to allow an inmate in solitary confinement access to medical care may be actionable depending on the nature, extent, seriousness of the injury, the need for medical treatment, and the defendant's conduct. The plaintiff in Mathis v. DiGiacinto, 430 F.Supp. 457 (E.D. Pa. 1977) alleged that repeated requests for the skin medication he was receiving prior to solitary were denied. Defendants requested a summary judgment, contending that only a minor condition was involved. The court declined to hold as a matter of law that no constitutional deprivations had taken place and noted that the claim may be actionable since a factual dispute was involved.[146]

A district court's dismissal was held erroneous in Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976), where a county jail inmate alleged he was denied a special diet and ulcer medication. Six days after his incarceration he started to vomit blood and was told he could receive no medical treatment for two days. The court noted a section 1983 claim is stated where there is a denial of an obvious need for medication and a prisoner is needlessly allowed to suffer pain when relief is readily available.[147]

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145. See also Sanabria v. Village of Monticello, 424 F.Supp. 402 (S.D. N.Y. 1976) (suit brought by arrested individual against village stated cause of action where plaintiff was paralyzed as a result of failure to allow medical treatment for broken neck).

146. See also Fitzke v. Shappel, 468 F.2d 1072 (6th Cir. 1972) (nine hour delay in receiving medical attention after arrest and incarceration where prisoner limped and complained of pain and numbness in leg actionable). But see Arroyo v. Schaefer, 548 F.2d 47 (2d Cir. 1977) (no callous or shocking disregard where inmates were forced to remain in cells for two hours without showers or other medical treatment after inmate in adjoining cell was tear-gassed).

147. See also Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); Scharfenberger v. Wingo, 542 F.2d 328, 331 (6th Cir. 1976); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir.), cert. denied sub nom. Thomas v. Cannon, 419 U.S. 879, 95 S.Ct. 143, 42 L.Ed.2d 119 (1974).

A jury verdict in favor of the prisoner plaintiff was set aside in McCracken v. Jones, 562 F.2d 22 (10th Cir. 1977). The warden and director of the department of corrections successfully argued on appeal it was error to deny their motion for judgment n. o. v. Plaintiff had injured his back and been examined by prison doctors who prescribed exercises he refused to follow. Although plaintiff did not have a constitutional right to be examined by his own doctor, his doctor later performed surgery.[148] The court stated:

> [M]uch of the trial was taken up with testimony relating to the correct diagnosis and treatment, however, defendants did not have to bear the risk arising from the variations in the views of the doctors. Again, defendants were entitled to rely on the diagnosis they received from the state medical authorities who examined plaintiff. If anything approaching malpractice had been indicated, the defendants did not have to defend such a charge.

562 F.2d at 24.

d. Denial of Prescribed Medical Treatment

Although it is difficult to satisfactorily show deliberate indifference in cases involving inadequate medical care, there is little doubt that a refusal to follow a prescribed course of medical care is actionable. Most of the cases in this area name as defendants non-medical personnel who refuse or interfere with the physician's guidelines.

The leading case dealing with interference with a prescribed course of medical treatment is Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), cert. denied, 401 U.S. 983, 91 S.Ct. 1202, 28 L.Ed.2d 335 (1971). In this action against the warden, prison doctor, and guards, plaintiff, who was suffering from infantile

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148. See also Smart v. Villar, 547 F.2d 112 (10th Cir. 1976) (deliberate indifference not shown by alleging failure to allow medical tests at facility outside prison).

paralysis, was operated on at a civilian hospital and was instructed to move his legs as little as possible. The prison guards who returned him to prison disregarded the warnings of hospital personnel, handcuffed him, and forced him to walk. On his return, he was placed in a cell without facilities to care for him and denied his prescribed medication. The court of appeals, in reversing the district court dismissal, stated that the defendants' conduct was more than mere negligence or poor medical judgment. If proven, the conduct would constitute deliberate indifference to explicit medical instructions, resulting in severe and obvious injuries.

A county jail inmate successfully alleged a constitutional violation in Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976). The plaintiff alleged that after he informed admitting personnel that he suffered from an ulcer, his request for a special diet and medication was ignored.[149] His complaints of stomach pain were unheeded, and when he began to vomit blood he was given only antacid. Although the district court dismissed since it could find no tangible residual injury, the court noted that a prisoner who is allowed to suffer when relief is readily available states a cause of action.

A complaint alleging denial of medicine to control epileptic seizures survived a motion to dismiss in Mitchell v. Chester County Farms Prison, 426 F.Supp. 271 (E.D. Pa. 1976). Upon his transfer to Chester County, plaintiff informed a sergeant and medical officer of his condition. Although they said the medication would be sent, it was not provided despite his constant requests until three days later; during an attack plaintiff hit his head and required hospital attention. Thereafter medication was provided. Since the complaint showed the behavior to be arbitrary and capricious, the court ruled that it conformed to the level required in Estelle.[150]

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149. But see Carlisle v. Scott, 357 F.Supp. 1284 (N.D. Ill. 1973) (failure to provide bland diet as ordered is not constitutional violation in absence of allegation of specific intent to harm or presence of severe injuries); Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964) (claim that special diet was discontinued is insufficient in absence of allegation of bodily injury). See note 147 supra.

150. See also Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972) (improper to dismiss claim alleging warden knew of plaintiff's heart trouble and disability classification and ordered him assigned to field work which resulted in heart attack).

In Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970), a diabetic whose disease affected his eye received treatment prior to incaraceration which substantially improved his vision. After being incarcerated in 1967, he received insulin and blood pressure medication only once a day. Doctors at the hospital were skeptical of his condition but told him he could have medication if he paid for it. However, the medication was returned for security reasons when sent by his wife and directly by the druggist. The court of appeals disagreed with the district court's reading of his complaint as a difference of opinion: "The gravamen of his claim is not that he was erroneously diagnosed by the prison doctor, but that the warden refused to allow him authorized medicine that he needed to prevent serious harm to his health. These allegations state a perfectly viable claim."[151] 434 F.2d at 626.

In Sawyer v. Sigler, 320 F.Supp. 690 (D. Neb. 1970), prison officials required all medication to be taken in crushed or liquid form to prevent narcotics addicts from hoarding. Plaintiff, who suffered from emphysema, was required to take medication three times daily. However, this caused nausea when taken in crushed form, and although the doctors specifically ordered that it should not be taken in this form, prison administrative officials overruled him. The court noted: "In the absence of . . . showing [that Sawyer has a tendency to abuse drugs] . . . I conclude that requiring Sawyer to take his medication in a form which results in nausea is sufficiently unusual, exceptional and arbitrary to constitute both cruel and inhuman punishment and a denial of adequate medical treatment." 320 F.Supp. at 694.

Where plaintiff's sinus condition was diagnosed as requiring an operation as soon as possible in Derrickson v. Keve, 390 F.Supp. 905 (D. Del. 1975), the district court disagreed with defendant's contention that the surgery was of an elective nature and not urgent or a

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151. But see Henderson v. Secretary of Corrections, 518 F.2d 694 (10th Cir. 1975) (no claim was stated for failure to fill prescription for corrective shoes).

medical emergency.[152] The court observed:

> In the instant case, failure to provide Plaintiff with treatment is made significant by one overwhelming fact: Plaintiff is serving a life sentence. This is not a case in which a prisoner seeks redress for an isolated instance of past negligence, or one in which he seeks treatment which he might elect to have performed when he is released from incarceration . . . . The surgery, then, is not elective. Unless Defendants act, it is impossible.

390 F.Supp. at 907.

e. Allegation that Medical Treatment System and Facilities are Inadequate

While isolated instances of inadequate medical treatment merely state medical malpractice claims, a series of such incidents, taken cumulatively, may indicate the inadequacy of the entire prison medical system. The courts recognize such a claim where it is shown that prison officials had actual knowledge of the conditions or failed to make evaluations and act on them. Failure to maintain a minimally adequate medical system is actionable under the deliberate indifference standard of Estelle.

Since actions involving the adequacy of the medical system usually request equitable relief, the remedies available range from a judicial order requiring the institution to prepare long range plans to specific mandates dictating the number of personnel that must be hired and the physical improvements that must be made.

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152. See also Hirons v. Director, Patuxent Institution, 351 F.2d 613 (4th Cir. 1965) (remand to develop additional facts where plaintiff alleged recommended jaw operation not performed); Wilbron v. Hutto, 509 F.2d 621 (8th Cir. 1975) (failure to perform needed surgery on injured hand and forcing plaintiff to work in fields without medical authority from prison physicians may constitute deliberate indifference).

Typically, complaints relating to the medical treatment system allege inadequate diagnostic procedures (lack of lab tests, medical procedures, or slow follow-up); lack of medical personnel (the number of doctors or medical staff members and the hours on duty); administrative procedures which result in denial of access to medical care (sick call procedures); and inadequate facilities for treatment (deficiencies in clinic facilities or lack of facilities). It is difficult to state general standards since the cases present a wide range of factual situations; sometimes the presence or absence of any one of the factors can be determinative of the adequacy of the entire system.

It is not unusual, upon a finding of an inadequate medical treatment system, for the court to order specific relief. Gates v. Collier, 390 F.Supp. 482 (N.D. Miss. 1975) found that the continued failure to provide for the physical health of the inmates violated the Eighth Amendment. In addition to requiring the formation of a timetable to correct other deficiencies, the court ordered that two additional doctors, including a psychiatrist, be employed and a new hospital built.

Similarly, in a class action alleging inadequate medical and dental care at a state institution for delinquent boys, the court in Morgan v. Sproat, 432 F.Supp. 1130 (S.D. Miss. 1977), addressed itself to specific areas which needed correction. The court required the formulation of a written timetable; the addition of an infirmary to provide overnight medical care; a registered nurse available twenty-four hours per day (instead of eight hours daily); complete intake physicals; routine innoculations; and facilities for routine care.

Minimum standards for medical, dental, and psychiatric care were specifically delineated by the court in Barnes v. Government of Virgin Islands, 415 F.Supp. 1218 (D. V.I. 1976): (1) The standard for medical, dental, and psychiatric care was required to be comparable with that offered the general public. (2) A medical doctor with regular hours known to the inmates and always available on call. (3) Provisions for twenty-four-hour emergency medical treatment. (4) Intake physicals. (5) Prescription of drugs under strict supervision by trained medical personnel. (6) Complete and accurate medical records. (7) Provision for special tests and the equipment needed to conduct them. This

was to be accomplished by medical furloughs, purchased services, or transfer to appropriate facilities. (8) Part-time dentist on call for curative and preventive treatment. (9) Psychiatrist to be provided one day per week within sixty days. (10) Psychiatric aide permanently on the staff. (11) Intake medical status exam and transfer to an appropriate facility if needed. (12) Establishment of an alcohol and drug rehabilitation program. 415 F.Supp. at 1234-35.

A claim for money damages against the warden and medical director was dismissed with prejudice in Hines v. Anderson, 439 F.Supp. 12 (D. Minn. 1977). However, an order and consent decree was entered which stated that the provisions of the Minnesota Patient's Bill of Rights (Minn. Stat. § 144.651 (1974)) would apply to medical treatment given in state prisons. All entering inmates were entitled to receive a physical exam which included psychological testing, entitled to participate in mass innoculation, and entitled to the right to be treated by private physicians (inmate to bear the costs). The staff was required to have an administrative medical chief, full-time physician, and an adequate number of nurses, daily sick call was to be provided, and personnel were prohibited from interfering with the delivery of medical care and the carrying out of treatment.

In Dillard v. Pitchess, 399 F.Supp. 1225, 1240 (C.D. Cal. 1975), the court asked a local medical association to designate a team of qualified doctors to survey the sufficiency of the medical facilities and report the findings to the court.

The proper standard for evaluation of the adequacy of a medical system was set forth in Laaman v. Helgemoe, 437 F.Supp. 269 (D. N.H. 1977). There the court stated:

> In conclusion, the measure by which defendants' medical care services and the system of access to them are to be judged is whether or not defendants' facilities, acts or omissions, overall, endanger the health of the prison community in such a manner as to evince a deliberate and calloused disregard of the serious medical needs of plaintiffs. The medical unit must be looked at as a whole because it is

> the end result, the total health care made available to and received by the plaintiff class which is subject to constitutional scrutiny by this court.

437 F.Supp. at 315. In determining the adequacy of the system, it appears that there are no set formulas which may be used.

> The courts which have ordered additional medical staff have not relied upon the ratios of staff to inmates, which, unlike here, were sometimes truly shocking. Instead, the underlying concept is that inmates are entitled to qualified medical coverage at all times, sufficient to meet both their routine and emergency health care needs.

437 F.Supp. at 312. The court was influenced by the following factors in concluding that the medical system was inadequate:

> [N]evertheless, plaintiffs have established that serious medical problems have not been treated and that some of these conditions, if untreated, may result in permanent damage or require corrective surgery. But, more importantly, plaintiffs have shown that small medical complaints are routinely ignored, that they suffer daily indignities, humiliation and pain as a result of a medical access system that is inadequate. In addition, they have established that the medical staff, equipment, facilities and budget are so insufficient as to create a time bomb in terms of endangering the inmates' health and well-being.

437 F.Supp. at 312.

A claim is stated for relief when a series of incidents closely related in time cumulatively show a pattern of deliberate indifference to medical needs, Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974), and when the prison's system of medical care is so inadequate that it causes unwarranted suffering, Cruz v. Ward, 558 F.2d 658 (2d Cir. 1977), cert. denied.[153] Constitutional standards are violated when persons with contagious or communicable diseases are incarcerated without medical attention with other inmates. There is also a constitutional right to be confined in an environment which does not threaten mental or physical well-being. Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977).

In Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977), the court of appeals found no error in the district court's determination that medical care in the state penitentiary violated constitutional rights. Most of the medical system was staffed by inmates who served as x-ray attendant, emergency room attendant, physician assistant, lab assistant, and physical therapy assistant. Two-thirds of these inmates had only an eighth grade education; none had formal medical training; and some could barely read and write. No adequate supervision was maintained, and narcotics were freely dispensed without adequate record keeping. 547 F.2d at 1216. The injunctive relief ordered by the district court was found to be valid and not barred by the Eleventh Amendment, even though compliance would require expenditure of state funds.

Improvements in the medical system were affirmed on appeal in Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977). Female prison inmates alleged denial of access to medical care by arbitrary procedures and misadministration. The district court found that the nurse responsible for initial screening and dispensing medicine spent only fifteen to twenty seconds with each patient, barely sufficient time for her to describe her symptoms. A delay of two weeks to two months in seeing a physician meant inmates suffered unnecessary pain. Patients in the sick wing were often placed in locked rooms. The nearest officer could close a solid door which prevented observation of sick patients and made it impossible to hear cries for help. Poor record keeping caused substantial delays in medically ordered follow-up

153. See also Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977).

appointments and diagnostic procedures. Repeated non-compliance with medical orders resulted in the failure to properly treat illnesses. The court recognized:

> [W]hile a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill conceived procedures.

565 F.2d at 52. The court further noted:

> [A]ll too often an inmate in need of treatment has been denied access to medical help by arbitrary procedures and misadministration so gross that it must be deemed willful. Faced with this deliberate denial of basic health care, we have little difficulty affirming the moderate remedial measures ordered by the district court.

565 F.2d at 50. The court later stated:

> Moreover, the testimony of the appellants' own witnesses revealed that they were either fully aware of these infirmities, or, in the case of the lobby clinic, unjustifiably neglected to learn whether the condition complained of existed. Any attempts to correct these obvious and glaring flaws had been flimsy at best.

565 F.2d at 53.

Not all medical systems complained of have been found to be constitutionally infirm. Lack of thorough intake exams for pretrial detainees was found not to be cruel or unusual punishment in Collins v. Schoonfield,

344 F.Supp. 257 (D. Md. 1972). A medical staff consisting of a medical doctor and nurses with semi-weekly sick call and facilities for emergency care was found adequate. Chapman v. Rhodes, 434 F.Supp. 1007 (S.D. Ohio 1977).

Six inmates who alleged particular prisoners were denied medical care on particular occasions did not sufficiently show deliberate indifference. Cotton v. Hutto, 540 F.2d 412 (8th Cir. 1976). Adequate medical services in the segregated confinement area were provided by two medical technicians who visited the cell block three times each day. Sweet v. South Carolina Department of Corrections, 529 F.2d 854 (4th Cir. 1975).

Noting that some essential medical care must be available for inmates, although there is not any consensus as to the precise amount, Coxson v. Godwin, 405 F.Supp. 1099, 1101 (W.D. Va. 1975) found that the following allegations were insufficient: (1) Doctor assigned to the unit will not examine inmates after certain hours on Monday and Thursday. (2) No sick room for recovery from illness. (3) No nurse on duty. (4) Certain non-prescription drugs are not stocked. (5) Twenty to thirty minute wait before obtaining medication. (6) No night emergency facilities.[154]

The requirements for preliminary injunctive relief were not sufficiently established in Tate v. Kassulke, 409 F.Supp. 651 (W.D. Ky. 1976). There the court found the jail maintained a sick call, available to all inmates, which was staffed by paramedics, practical nurse, and a military medic. The jail furnished at least one doctor each day and a psychiatrist and dentist one day per week. Although specific instances of denial of medical treatment were alleged by inmates, the court found that the records indicated the inmates were referred to a physician, and found testimony of the prisoner witnesses to be biased.

The Tentative Draft of Standards Relating to the Legal Status of Prisoners[155] recommends that each

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154. See Owens-El v. Robinson, 442 F.Supp. 1368, 1385, 1390 (W.D. Pa. 1978) (no claim stated by allegation that no nurses or physicians were available after midnight but absence of nurses trained in psychiatric care creates problems).

155. 14 American Criminal Law Review 387, 466-72 (1977).

institution should have an adequate plan to insure immediate emergency treatment; to permit transfer of those who cannot be adequately treated at the correctional institution; to prevent a correctional official from denying or interfering with medical treatment; that upon request a prisoner will be seen by a licensed health care provider within twenty-four hours; that prisoners need not waive a right or privilege in order to secure medical treatment. These standards also advocate periodic medical exams, intake exam for communicable diseases or emergency care, a thorough medical exam within forty-eight hours of admission, and thorough medical exams periodically and prior to release.

f. Dental and Psychiatric Care

Nearly all cases recognize the rights of a prisoner to adequate dental care; however, the most recent trend is the widespread recognition of the right to psychiatric treatment.

In Stokes v. Hurdle, 393 F.Supp. 757 (D. Md. 1975), plaintiff alleged that routine dental treatment was denied to inmates in segregation. The policy of the institution was to perform only emergency work on inmates in segregation. The court recognized the right to dental treatment, but noted that for the claim to reach constitutional dimensions, a total denial of necessary treatment or substantial harm was necessary.[156]

A convicted child molester sought a writ of habeas corpus in Fielding v. LeFevre, 548 F.2d 1102 (2d Cir. 1977). Plaintiff, who had undergone extenseive psychotherapy before trial, claimed that imprisonment would cause him to regress. He alleged that continuing psychiatric treatment was essential to maintaining his cure and that it would be impossible to receive this care in prison. The court, after noting that a section 1983 action and not habeas corpus was proper, stated that while the psychiatric care offered in the prison was not of the same quality that plaintiff now received, it did not constitute a constitutional violation.

In Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977), plaintiff complained that he was not granted psychiatric

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156. See also Blakey v. Sheriff of Albemarle County, 370 F.Supp. 814 (W.D. Va. 1974).

help although he requested it at his arrest. The court of appeals affirmed the district court dismissal as to the superintendent of jails, since the doctrine of respondeat superior is not applicable in section 1983 cases. However, the court reversed and remanded the dismissal as to the detectives who arrested plaintiff for a determination of whether he had been in their custody long enough to establish a duty to obtain medical treatment.

Prison inmates were held to be entitled to psychological and psychiatric treatment in Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). Plaintiff, who was denied parole on the basis that psychological tests showed he would be an unsuccessful candidate, sought psychiatric treatment to make him eligible for parole. The court stated that plaintiff was entitled to treatment if:

> [A] physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainity (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial. The right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable.

551 F.2d at 47-48. The court was careful to emphasize the role of professional judgment in these decisions: "For a constitutional tort to arise and for a cause of action to be stated under § 1983, the complaint must allege deliberate indifference to his continued health and well-being." 551 F.2d at 48.

These tests were followed in Laaman v. Helgemoe, 437 F.Supp. 269 (D. N.H. 1977), where the court noted: "[P]rison inmates are entitled to . . . psychiatric . . . treatment when medically necessary, and that defendants are under an affirmative duty to provide such care to inmates diagnosed as needing it in conformity with the Bowring test." 437 F.Supp. at 313.

7. Crowded Conditions

Hutto v. Finney, ____ U.S. ____, 98 S.Ct. 2565, ___ L.Ed.2d ____ (1978) affirmed the district court's order forbidding the department of corrections to sentence an inmate to more than thirty days in punitive isolation and awarding attorney fees to be paid from the department's budget. The district court had conducted multiple hearings on the conditions of confinement in the Arkansas prisons between 1969 and 1976 and had ordered the department of corrections to fashion its own remedies. Among the evils to be corrected were the "grue" diet, the crowding of prisoners into windowless cells with no furniture other than a source of water and a toilet, the use of armed "trusties" -- prisoners -- as guards who were authorized to kill escaping prisoners, the maintenance of large open sleeping areas where homosexual rape and murder were committed, the beating with leather straps and the use of electrical devices to shock prisoners, and the indeterminate length of confinement in isolation. ____ U.S. ____ at ___ n.n. 3-7, 98 S.Ct. 2656 at 2569-70 n.n. 3-7, ___ L.Ed.2d ___ at ___ n.n. 3-7. The Court found that where the district court had given the department of corrections ample opportunity to correct the conditions, but the department had failed to take adequate corrective measures, and considering the conditions as a whole, the district court correctly limited the duration of punitive isolation:

> The question before the trial court was whether past constitutional violations had been remedied. The court was entitled to consider the severity of those violations in assessing the constitutionality of conditions in the isolation cells. The court took note of the inmates' diet, the continued overcrowding, the rampant violence, the vandalized cells, and the "lack of professionalism and good judgment on the part of maximum security personnel." 410 F.Supp., at 277 and 278. The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the

prohibition against cruel and unusual punishments.

> In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the Court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

____ U.S. at ____, 98 S.Ct. at 2572, ____ L.Ed.2d at ____ (1978).

Wolfish v. Levi, 573 F.2d 118, 126 (2d Cir. 1978) affirmed the district court's order insofar as it banned the double-celling of pretrial detainees, but remanded for reconsideration of the prohibition on double-celling sentenced inmates. The district court had found that the average room afforded two inmates virtually no space for minimal privacy in which to avoid the other's presence. The court stated:

> But we find the lack of privacy inherent in double-celling in rooms intended for one individual a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete, or windows for walls. The government has simply failed to show any substantial justification for double-celling.

573 F.2d at 127. The court recognized that the standards for sentenced prisoners are lower than those for pretrial detainees and commented that on remand the court might find that double-celling in a seventy-five foot room violated the Eighth Amendment even for sentenced inmates. However, the honor unit contained rooms ranging in size from 100 to 150 square feet and

the court could not say on the record that placing two sentenced inmates in rooms so spacious constituted a per se violation on the Eighth Amendment. The court of appeals affirmed the district court's order prohibiting the practice of requiring newly arrived inmates to sleep in common areas where the balcony lights burned all night.

The dormitory unit, which had originally been designed to hold ten inmates in each of its six rooms, was housing 120 sentenced inmates at the time of the hearing before the district court which ordered that a maximum of sixty inmates be housed in the dormitory unit. The court of appeals found that the district judge should have considered whether a number of inmates in excess of the rated capacity could be suitably quartered within the dormitories. The court stated: "There is no constitutional magic to the term 'rated capacity.' Indeed, '[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space.'" 573 F.2d at 128. The court approved the approach of Judge Lasker in Ambrose v. Malcolm, 414 F.Supp. 485 (S.D. N.Y. 1976), in using the American Correctional Association's standard which provides that each inmate should be allowed a total of seventy-five square feet of living space. The court noted[157] that the American Correctional Association's Commission on Accreditation for Corrections had recommended that a minimum of sixty square feet be accorded each inmate housed in a dormitory unit. The court commented that the Fifth Circuit, in Williams v. Edwards, 547 F.2d 1206, 1215 (5th Cir. 1977), had found fifty square feet of sleeping space adequate.

Because of the design of the center, which used a series of self-contained "modular units," inmates were permitted to leave their units only to go to the roof recreation area, sick call, or to court. This lack of movement severely limited their opportunities to attend religious services and educational and recreational programs which are normally given in only a few of the units. While pretrial detainees were separated from sentenced prisoners, the institution had attempted no further classification. The court of appeals affirmed the district judge's order requiring the prison officials to create additional classification guidelines to permit greater movement within the institution.

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157. 573 F.2d at 128 n. 22.

The district court's order that each pretrial detainee be accorded at least forty-eight square feet of space was affirmed in Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978).

James v. Wallace, 406 F.Supp. 318 (M.D. Ala. 1976) found the state institutions to be horrendously crowded and enjoined institution officials from accepting any new prisoners, except escapees and parole violators, until the population in each prison was reduced to design capacity. Similar relief was ordered by the district judge in Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977). On appeal, defendants complained that the district judge's computation of overcrowding was based on an unrealistic figure of eighty square feet per inmate. The court of appeals affirmed the district judge's order forbidding additions to the inmate population. However, it stated:

> We do, however, remand this issue for a more complete record and for a recomputation of the proper inmate population at Angola. The functions and characteristics of each building should be taken into account in arriving at the capacity of each. A simple mathematical calculation of total square feet of space divided by a standard of square feet per man may not necessarily be appropriate or practicable.

547 F.2d at 1215.

Crowe v. Leeke, 540 F.2d 740 (4th Cir. 1976) held that plaintiff's allegation that he had been placed with two other inmates in a cell so small that one inmate had to sleep on the floor did not reach constitutional proportions. The court noted that plaintiff had been approved for transfer to a new institution upon completion of its construction. The court found that the cramped conditions in the cell had not resulted from prison rules which could be characterized as "vindictive, cruel or inhuman" or from an arbitrary or capricious exercise of judgment by prison officials. The court concluded: "Standing alone, Crowe's claim that, until transferred to a new facility now under construction, he is forced to sleep in an overcrowded cell is not a condition of

confinement which shocks the conscience so as to fall within the constitutional prohibition against cruel and unusual punishment." 540 F.2d at 742.

However, Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977) remanded for a more complete record and for recomputation of the proper inmate population. Subsequently, Newman v. State of Alabama, 559 F.2d 283 (5th Cir. 1977) stated:

> [W]e do not discern the constitutional basis for the requirement that Alabama State prisoners shall be housed in individual cells, nor can we agree that "design" standards, without more, amount to a per se constitutional limitation on the number of prisoners which may be housed in a particular prison facility . . . .
>
> The Court required that all new prison construction should provide sixty square feet of space per prisoner. We remand this requirement to the District Court for further consideration in the light of our opinion in Williams v. Edwards, 547 F.2d at 1215.

559 F.2d at 288.

Miller v. Carson, 563 F.2d 741, 752 (5th Cir. 1977) held that the trial court did not err in restricting the normal daily population of the county jail to 410 inmates, although the jail was originally designed to hold 432 inmates. Some of the space originally designed for housing inmates had been converted to a law library, infirmary, offices and a convalescent unit.

Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) affirmed the district court's finding that the overcrowded conditions subjected the prisoners to cruel and unusual punishment in violation of the Eighth Amendment. The district court had adopted the standards of the American Public Health Association for living space and environmental matters.

The court of appeals held in Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978) that the district court had improperly dismissed a complaint alleging that the

prison facilities did not provide adequate personal living space and that, as a result, prisoners were being attacked, raped, and suffering psychological damage from the high level of mental stress and fear. The court noted that plaintiff's allegation that the cells did not meet minimum standards of the United States Public Health Service also stated a claim.

8. Unprovoked Attack by Prison Officials and Law Enforcement Officers

An allegation that a prisoner was struck or beaten by a prison official without cause states a cause of action. Bruce v. Wade, 537 F.2d 850 (5th Cir. 1976); Aulds v. Foster, 484 F.2d 945, 946 (5th Cir. 1973).

Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 based its decision on due process considerations rather than cruel and unusual punishment. The court stated:

> [Q]uite apart from any "specific" of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law. . . . The same principle should extend to acts of brutality by correctional officers, although the notion of what constitutes brutality may not necessarily be the same.

481 F.2d at 1032. The court further stated:

> The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look

> to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

481 F.2d at 1033.

The plaintiffs in Williams v. Hoyt, 556 F.2d 1336 (5th Cir. 1977) had alleged they were wrongfully sprayed with mace, but on appeal the court held there was sufficient evidence to support the jury's verdict for the defendants. The defendants had offered evidence that mace was used only for the control of unruly prisoners and not for punishment or other purposes.

Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974) found that the district court had improperly dismissed plaintiff's section 1983 claims based upon assault and battery as barred by the statute of limitations. Dissenting to the court's remand of this claim, Judge Kalodner stated: "It is imperative to note at this point that the Supreme Court has not passed on the issue whether an assault and battery, simple or aggravated, per se, affords a § 1983 remedy, when it is committed under color of state law on one in custody." 507 F.2d at 131.

9. Protection from Attack by Other Prisoners and Officials

Allegations that prison officials failed to protect the plaintiff from attack by other prisoners or other officials may give rise to a claim based on cruel and unusual punishment under the Eighth Amendment, or denial of due process or equal protection under the Fourteenth Amendment.

An allegation that prison officials failed to protect the plaintiff from attack by another prisoner states a cause of action. Parker v. McKeithen, 488

F.2d 553 (5th Cir. 1974).[158] In that case the plaintiff claimed he was subjected to cruel and unusual punishment in violation of the Eighth Amendment and denied equal protection under the Fourteenth Amendment when a fellow inmate attacked him. The court of appeals found the district court had improperly dismissed for failure to state a claim.[159]

Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973). held that an allegation that prison officials failed to prevent plaintiff from being violently attacked by another prisoner stated a violation of due process under the Fourteenth Amendment. A prisoner has a constitutional right to be secure in his person and may not be deprived of liberty without due process of law. Since the court found that the complaint alleged a denial of due process under the Fourteenth Amendment, it did not discuss the equal protection clause of the Fourteenth Amendment or the Eighth Amendment proscription against cruel and unusual punishment.

Fox v. Sullivan, 539 F.2d 1065 (5th Cir. 1976) recognized that section 1983 gives a remedy to a state prisoner against prison officials whose negligent acts result in injury to the prisoner.[160]

Harris v. Chanclor, 537 F.2d 203 (5th Cir. 1976) affirmed the district court's entry of judgment on a jury verdict of $12,000 against a jailor and the arresting officer who had beaten plaintiff. The jailor's admission that the beating had occurred in his presence and that he had not objected to it or attempted to intervene was sufficient to sustain the verdict.[161]

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158. See also McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975), cert. denied, 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86 (homosexual attacks).

159. The court of appeals directed that summary judgment be entered for defendants based upon the doctrine of collateral estoppel. 488 F.2d at 559.

160. Compare with Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251, 261 (1976), where the court stated that a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.

161. See also Crump v. United States, 534 F.2d 72 (5th Cir.

In Little v. Walker, 553 F.2d 193, 194 (7th Cir. 1977), the plaintiff alleged that he and other inmates "repeatedly suffered acts and threats of physical violence, sexual assaults, and other crimes perpetrated by other inmates from whom plaintiffs were not reasonably protected by defendants." The plaintiff further alleged that one of the defendants ordered him and others to work in areas of the penitentiary that were controlled by gang-affiliated inmates. When they refused because of fear for their personal safety they were punished, including being placed in isolation. The plaintiff alleged that defendants ignored entreaties to remedy the situation. The court of appeals reversed the dismissal of the complaint, noting that in Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971), the Eighth Circuit had held that under the Eighth Amendment prisoners are entitled to protection from the assaults of other prisoners.

Williams v. Edwards, 547 F.2d 1206, 1213 (5th Cir. 1977) recognized that institution officials must provide enough guards to "assure a constitutional level of inmate safety," and approved an order requiring the presence of two guards in open dormitories at all times.

Where the plaintiff is able to show that inmates are being subjected to physical assaults and abuses by other inmates, the court may order injunctive relief, including the hiring of additional guards and classification of prisoners. Gates v. Collier, 501 F.2d 1291, 1308 (5th Cir. 1974); James v. Wallace, 406 F.Supp. 318 (N.D. Ala. 1976).

Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) upheld the district court's order requiring that a jail guard visit each inmate-occupied area once an hour, that one non-inmate guard be present on each jail floor at all times, and that a communications system be established whereby any prisoner could call for help from a guard at any time and receive the same within a few minutes.

The district court in Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978) had properly dismissed plaintiff's

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1976), and Jones v. United States, 534 F.2d 53 (5th Cir. 1976), cert. denied, 429 U.S. 978, 97 S.Ct. 487, 50 L.Ed.2d 586 (1976), cases brought under the Federal Tort Claims Act.

claims against the warden and commissioner of the department of correction since the plaintiff did not suggest that the incident was anything more than an isolated one or that it resulted from any administrative policy established by the warden or commissioner. However, the court should have advised plaintiff that under Rule 19(a) of the Federal Rules of Civil Procedure he could join as a defendant the correctional officer who allegedly had observed the attack and declined to intervene and who had been identified subsequent to the filing of the complaint.

Woodhous v. Commonwealth of Virginia, 487 F.2d 889 (4th Cir. 1973) stated:

> While occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment, Penn v. Oliver, 351 F.Supp. 1292 (E.D. Va. 1972), confinement in a prison where violence and terror reign is actionable. A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.

487 F.2d at 890. The court concluded that in making the determination of whether relief should be granted the court should ascertain "(1) whether there is a pervasive risk of harm to inmates from other prisoners, and, if so, (2) whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm." Id.

James v. Wallace, 406 F.Supp. 318 (N.D. Ala. 1976) found that mentally disturbed prisoners were dispersed throughout the prison population and were not receiving treatment; violent inmates were not isolated from those who were young, passive, or weak; and robbery, rape, extortion, theft, and assault were everyday occurrences among the general inmate population. Guards rarely entered the cell blocks and dormitories, especially at night when their presence was most needed. The court

ordered injunctive relief requiring that efforts be made to protect the prisoners from violence.

The district court's dismissal of plaintiff's complaint which alleged that her deceased son, who had been a state hospital inmate, had died as a result of a beating by a fellow inmate after at least twenty prior separate beatings, was reversed in Spence v. Staras, 507 F.2d 554 (7th Cir. 1974). The court stated:

> It is equally clear that the deceased had a right, under the Fourteenth Amendment, to be secure in his life and person while confined under state authority . . . . The defendants, being responsible for the decedent's care and safekeeping, had a duty to protect him from attacks by fellow inmates.[162]

507 F.2d at 557.

An allegation that a patient in a mental hospital was not protected from assault states a claim. Goodman v. Parwatikar, 570 F.2d 801, 804 (8th Cir. 1978).

10. Punishment

Generally, an allegation that punishment imposed by institution officials is disproportionate to the offense does not state a cause of action under section 1983. But see Hutto v. Finney, ____ U.S. ____, ____, 98 S.Ct. 2565, 2571, 57 L.Ed.2d 522, ____ (1978). Sostre v. McGinnis, 442 F.2d 178, 194 (2d Cir. 1971), cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, and Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 179, 30 L.Ed.2d 740 (1972).[163]

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162. See also United States ex rel. Miller v. Twomey, 479 F.2d 701, 719-21 (7th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102.

163. However, in Sostre the court did find that punishment imposed because of a prisoner's militant political ideas or his litigation, past or threatened against institution or other state officials, would constitute a violation of due process of law. 442 F.2d at 189.

Wright v. McMann, 460 F.2d 126 (2d Cir. 1972), cert. denied, 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed.2d 141 stated:

> Ordinarily we would be most reluctant to find unconstitutionally disproportionate the use of segregated confinement as punishment. Prison officials, not federal judges, are in day to day proximity or contact with the inmates and are consequently better able to determine what punishment might or might not be appropriate to a particular offense committed by a particular inmate . . . . In short, the inmate alleging disproportionate punishment will ordinarily have a heavy burden.
>
> Here, however, we think that Mosher has successfully met this burden. His offense was his refusal to sign a prison "safety sheet," a single piece of paper with a list of precautions and instructions to be followed by inmates assigned to certain shops in the prison.
>
> . . . .
>
> In short, for an act which even the warden found deserving of no punishment Mosher was disciplined with the worst punishment the prison had to offer, [segregation] and it has nowhere been suggested that such a result came about through anything other than the unfettered discretion of the deputy warden. While the area of discretion of prison officials is exceedingly broad, it is not limitless.

460 F.2d at 132.

The plaintiff in Mukmuk v. Commissioner of the Department of Correctional Services, 529 F.2d 272 (2d Cir. 1976), cert. denied, 426 U.S. 911, 96 S.Ct. 2238, 48 L.Ed.2d 838 alleged he had been placed in segregation for one year after being charged with insolence. He admitted he had also been found guilty of taking

some brown wrapping paper without authorization. The court stated:

> Although there are circumstances which might justify such an extreme punishment for such a minor offense, we are dealing with a grant of summary judgment. The appellant may prove at trial that the punishment was so discriminatory as to be constitutionally excessive. Of course, at trial, the prison authorities would be permitted to show that the seemingly harsh punishment was justified, in part because of disciplinary problems. There are issues of fact to be tried.

529 F.2d at 276.

The court in Jackson v. McLemore, 523 F.2d 838 (8th Cir. 1975) stated: "In reviewing prison disciplinary actions, the test is 'whether there exists any evidence at all, that is, whether there is any basis in fact to support the action taken by the prison officials.'" 523 F.2d at 839.

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) held that prison officials could not utilize corporal punishment consisting of slashes with the strap. Gates v. Collier, 349 F.Supp. 881, 887 (N.D. Miss. 1972), aff'd 501 F.2d 1291 (5th Cir. 1974) enjoined any form of corporal punishment of such severity as to offend the present day concepts of decency and human dignity.[164]

11. Rehabilitation

Procunier v. Martinez, 416 U.S. 396, 412, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 239 (1974), and Pell v. Procunier, 417 U.S. 817, 823, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495, 502 (1974) recognized that rehabilitation of prisoners is one of the identifiable governmental interests at stake in the maintenance of penal

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164. See the discussion of withholding food as a means of punishment in Section VIII,I,2 supra.

institutions. However, French v. Heyme, 547 F.2d 994 (7th Cir. 1976) held that the lack of rehabilitative programs does not constitute cruel and unusual punishment in violation of the Eighth Amendment. But Finney v. Arkansas Board of Correction, 505 F.2d 194, 208-09 (8th Cir. 1974) held that the lack of rehabilitation programs, in the face of other conditions, could violate the Eighth Amendment.[165] In that case the convicts were forced to labor long hours under arduous conditions and were subjected to constant threats of mental and physical abuse if their work or conduct fell below often arbitrary standards. They were left almost no time for self-advancing activities or recreation and, in fact, rehabilitation programs were generally not available. The court of appeals required the defendant officials to submit to the court an overall program for treatment and rehabilitation of the inmates.

James v. Wallace, 406 F.Supp. 318 (N.D. Ala. 1976) stated:

> While courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right, it is clear that a penal system cannot be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration.

406 F.Supp. at 330. The court required that educational, vocational work and recreational opportunities be made available to the inmates.

Rehabilitation was related to the inmate's need for medical treatment by the court in Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1974). The plaintiff sought psychological diagnosis and treatment in the hope that it might enable him to qualify for parole and argued that the failure to provide psychological diagnosis and treatment constituted cruel and unusual punishment and a denial of due process of law. The court found that the plaintiff was entitled to psychological or

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165. See also McCray v. Sullivan, 509 F.2d 1332, 1335 (5th Cir. 1975), cert. denied, 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86.

psychiatric treatment if a physician or other health care provider made certain findings, one of which was that the potential for harm to the plaintiff by reason of delay or denial of care would be substantial. The court stated:

> This limited right to treatment stems from the Eighth Amendment, whose language must be interpreted in light of "the evolving standards of decency that mark the progress of a maturing society." . . . It is also premised upon notions of rehabilitation and the desire to render inmates useful and productive citizens upon their release.

551 F.2d at 48. The court commented that it would not attempt to second-guess the propriety or adequacy of a particular course of treatment which remained a question of sound professional judgment and the courts would not intervene upon allegations of mere negligence, mistake or difference of opinion.

The plaintiff in Jackson v. McLemore, 523 F.2d 838 (8th Cir. 1975), had been disciplined for his refusal to comply with an instruction to spell certain words. The court held that a prisoner could be required to participate in a rehabilitation program and could be punished for refusing to participate. The court stated:

> It would defeat the purpose of rehabilitation if access to such programs could be at the option of the prisoner. Federal courts will not audit such programs, which are well within the administrative prerogatives of the state institution, absent a clear showing that such programs are being purposefully used to infringe upon protected constitutional rights. No such showing has been made in this case. While a prisoner may not be punished simply because he failed to learn, either through inability or lack of motivation, he may be required to participate in the program, and this necessarily includes participation in classroom

exercises when called upon by the instructor. Refusal to participate is clearly distinguishable from a stated inability to perform, and such refusal in a penal institution may properly result in disciplinary action.

523 F.2d at 838-39.

Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) stated: "Failure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment." 559 F.2d at 291. The court further stated:

> If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration.
>
> Even so, on the facts of this case, we affirm the actions of the District Court designed to provide Alabama prison inmates with reasonable recreational facilities. We do this simply because such facilities may play an important role in extirpating the effects of the conditions which undisputably prevailed in these prisons at the time the District Court entered its order.

559 F.2d at 291. The court later stated:

> We interpret those portions of the order dealing with opportunities to obtain a basic education,

> to attend vocational school, and to attend a transitional program prior to release as meaning that if the prison authorities operate such programs each prisoner shall have impartially equal access on an objective standard of basic utility to the individual. We would find it difficult to hold, and we do not now hold, that if the state has no such programs it amounts to cruel and unusual punishment within the prohibitions of the Eighth Amendment. As a matter of fact, in the operation of a good prison system, we understand that such programs are fairly standard practices, instituted and operated on the initiative of state authorities.

559 F.2d at 292.

12. Relevancy of State Codes

Although constitutional issues do not arise merely because a state prisoner has been treated at variance with state law, state codes reveal to the district judge the minimum standards by which the state itself proposes to govern itself concerning habitability. Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977). "Such a standard is a valuable reference for what is minimal for human habitation in the public view, thus serving as an indicator of 'evolving notions of decency.'" 547 F.2d at 1214. The court in Williams approved the use of state sanitation and fire codes.

13. Prison Work

Although compelling prison inmates to work does not violate the Thirteenth Amendment,[166] "[t]here are circumstances in which prison work requirements can constitute cruel and unusual punishment." Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977). The court quoted from Talley v. Stephens, 247 F.Supp. 683 (E.D. Ark. 1965):

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166. See Section VIII,J infra.

> [F]or prison officials knowingly to compel convicts to perform physical labor which is beyond their strength, or which constitutes a danger to their lives or health, or which is unduly painful constitutes an infliction of cruel and unusual punishment prohibited by the Eighth Amendment to the United States as included in the 14th Amendment.

247 F.Supp. at 687. In Ray the court commented that the plaintiff's religious claim was too conclusory to state a claim for relief. He did not allege he was a follower of a religion which prohibited working on Sunday or that his work deprived him of an opportunity to spend some part of Sunday in worship. However, since the case was being remanded the court commented that the district court could review plaintiff's religious claim at that time.

Newman v. State of Alabama, 559 F.2d 283 (5th Cir. 1977) stated:

> The District Court directed that each prisoner shall be assigned to a meaningful job on the basis of his or her abilities and interests, and according to institutional needs. While there is no federal constitutional mandate for this proviso, as phrased it should not impose any real burden on the penitentiary authorities, so, in the context of this case we allow it to stand, not, however, to enjoy any precedential status in future cases if they should arise.

559 F.2d at 292.

Bryan v. Werner, 526 F.2d 233 (3d Cir. 1975) stated: "We do not believe that an inmate's expectation of keeping a particular prison job amounts either to a 'property' or 'liberty' interest entitled to protection under the due process clause." 526 F.2d at 240. However, Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976) found that allegations that the plaintiff was removed as prison librarian solely to punish

or hamper his legal activities stated a cause of action based on interference with plaintiff's right of access to the courts.

Altizer v. Paderick, 569 F.2d 812 (4th Cir. 1978) held that the plaintiff's complaint that he had been removed as an inmate counselor by the prison officials without a fact finding hearing failed to state a claim. The court stated:

> [T]he classification and work assignments of prisoners in such institutions are matters of prison administration, within the discretion of the prison administrators, and do not require fact finding hearings as a prerequisite for the exercise of such discretion.

569 F.2d at 813.

J. Thirteenth Amendment -- Involuntary Servitude[167]

Forced labor by prisoners does not violate the Thirteenth Amendment. Holt v. Sarver, 309 F.Supp 362 (E.D. Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971); Ray v. Mabry, 556 F.2d 881 (8th Cir. 1977). James v. Wallace, 406 F.Supp. 318, 335 (N.D. Ala. 1976) required the officials to assign each inmate a meaningful job on the basis of his abilities and interests and according to institutional needs.

Davis v. Fisher, 546 F.2d 66 (5th Cir. 1977) held that plaintiff's allegation that "he worked for the defendant sheriff 'painting houses' . . . and doing other labor and that he was told he would be paid but was not paid" raised a constitutional claim. However, the court stated: "Breach of an agreement to pay wages to a validly incarcerated prisoner would not of itself necessarily constitute peonage or involuntary servitude."[168] 546 F.2d at 66 n. 1.

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167. See Section VIII,I,13 supra.

168. See Tentative Draft of Standards Relating to the Status of Prisoners, Prisoner Employment, 14 Am. Crim. L. Rev. 458-65 (1977).

In Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974), the district court found that although plaintiff, a pretrial detainee, was subjected to involuntary servitude by being compelled to work, the defendant warden was not liable in damages because of his good faith belief that plaintiff wished to work rather than to remain idle. The Eighth Circuit affirmed.

K. Fourteenth Amendment -- Due Process Clause

The Due Process Clause, Section 1, of the Fourteenth Amendment provides:

> [Nor] shall any state deprive any person of life, liberty, or property without due process of law . . . .

Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935, 951 (1974) held that prisoners are entitled to due process under the Fourteenth Amendment. However, the Court noted that the prisoner's right to due process may be subject to restrictions "imposed by the nature of the regime to which he has been lawfully committed." 418 U.S. at 556, 94 S.Ct. at 2975, 41 L.Ed.2d at 951.

1. Deprivation of Life, Liberty or Property

In recent decades the federal courts have struggled to define, with precision, the meaning of "liberty" and "property" as set forth in the due process clause. However, in 1976 the Supreme Court started to define these terms more specifically.

The procedural guarantees of the due process clause protect both interests guaranteed in the Bill of Rights and interests which attain constitutional status "by virtue of the fact that they have been initially recognized and protected by state law." Paul v. Davis, 424 U.S. 693, 710 n. 5 and text (1976). The Supreme Court stated, "[W]e have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." 424 U.S. at 710-11. Thus the Supreme Court now appears willing to distinguish an interest which the state may protect against injury by virtue of tort law from an interest that the state has recognized as a liberty or property interest. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155,

47 L.Ed.2d 405 (1976) found that a personal or private interest in reputation was neither "liberty" nor "property" which was protected against state deprivation without due process of law.

Where a prisoner alleges that he has been denied due process of law, one of the first considerations is whether he has alleged a deprivation of life, liberty, or property. This requires an inquiry into whether the Bill of Rights protects the interest in question or whether the state has elevated the interest to a protected status. Wolff, supra, involved a prisoner's loss of good time. The Court recognized that the federal Constitution does not guarantee good time credit for satisfactory behavior while in prison. But the state had created the right to good time by statute and had provided that it was to be forfeited only for serious misbehavior. Since the state had created the right and had authorized its deprivation as punishment for major misconduct, the prisoner's interest in good time constituted "liberty" and the due process clause required that the state-created right of "liberty" not be arbitrarily abrogated.

Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) indicated that the due process procedures required for the deprivation of good time are not required for the imposition of lesser penalties such as the loss of privileges. The Court stated: "[W]e are unable to consider the degree of 'liberty' at stake in loss of privileges and thus whether some sort of procedural safeguards are due when only such 'lesser penalties' are at stake." 425 U.S. at 323, 96 S.Ct. at 1560, 47 L.Ed.2d at 824.

In Paul v. Davis, supra, the plaintiff's photograph and name had appeared on a flyer distributed by the defendant chief of police to area merchants alerting them to possible shoplifters who might be operating during the Christmas season. More than a year prior to circulation of the flyer plaintiff had been arrested on a charge of shoplifting, arraigned, and had entered a plea of not guilty. Shortly after the flyer was circulated the charge was dismissed. Plaintiff's employer learned of the flyer, called plaintiff in to discuss the circumstances, and informed plaintiff that he would not be fired but that he "had best not find himself in a similar situation" in the future. The

Supreme Court observed that the complaint appeared to state a classical claim for defamation actionable in the courts of virtually every state. 424 U.S. at 696, 96 S.Ct. at 1158, 47 L.Ed.2d at 411. The Court rejected plaintiff's argument that every legally cognizable injury which may have been inflicted by a state official acting under "color of law" established a violation of the Constitution, observing that a violation of local law does not necessarily mean federal rights have been invaded. Congress was not attempting to make all torts of state officials federal crimes when it enacted the criminal provisions of the Civil Rights Act of 1871 and the plaintiff had not pointed to any specific constitutional guarantee safeguarding the interests he asserted had been invaded. The Court rejected his claim that the due process clause extended to him a right to be free of injury wherever the state could be characterized as a tortfeasor. The Court concluded that the procedural guarantees of the due process clause do not create a body of general federal tort law. "[R]eputation - alone, apart from some more tangible interests such as employment, is [not] either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."[169] 424 U.S. at 701, 96 S.Ct. at 1161, 47 L.Ed.2d at 414. The Court further stated: "[T]he weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." 424 U.S. at 702, 96 S.Ct. at 1161, 47 L.Ed.2d at 414.

Montanye v. Haymes, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976) held that where state law does not condition the discretion of officials to transfer

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169. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), involved termination of the plaintiff's employment without a hearing. The Court found that neither property nor liberty rights were involved. The due process clause protects property interests created by state law but here the state had not created a property interest in continued employment. Plaintiff's attempt to show a liberty interest, based upon the likelihood that his good name, reputation, honor, or integrity would be impaired or that other employers would be less interested in hiring him failed because the asserted reasons for his discharge were not publically released until suit was instituted, and at that time it was in connection with the suit.

inmates from one institution to another upon the occurrence of misconduct, the prisoner does not have a justifiable expectation that he will not be transferred unless found guilty of a misconduct. Therefore, the prisoner does not have a liberty interest which requires invocation of the protection of the due process clause prior to transfer.

Similarly, in Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), the Court found that where state law does not condition the authority to transfer a prisoner upon the occurrence of specific acts of misconduct or other events, a transfer to a less favorable prison does not implicate a liberty interest within the meaning of the due process clause. The Court rejected at the outset "the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause."[170] 427 U.S. at 224, 96 S.Ct. at 2532, 49 L.Ed.2d at 458. The Court later stated: "Similarly, we cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke protections of the Due Process Clause." 427 U.S. at 224, 96 S.Ct. at 2532, 49 L.Ed.2d at 458. The Court distinguished Wolff, supra, in that Wolff was rooted in rights created by state law while in Meachum the state law did not confer the right sought by the plaintiff. The Court concluded:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.

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170. See also Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 840, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14, 32 (1977).

427 U.S. at 228-29, 96 S.Ct. at 2540, 49 L.Ed.2d at 461.

Moody v. Daggett, 429 U.S. 78, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976) held that a federal parolee imprisoned for a crime committed while on parole is not entitled to a parole revocation hearing until the parole violator warrant is actually executed and he is taken into custody under it. The Court determined that the parole violator warrant did not have any present or inevitable effect upon plaintiff's liberty interests which would require a due process hearing. The Court stated: "[T]he loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant." 429 U.S. at 87, 97 S.Ct. at 278, 50 L.Ed.2d at 244. The Court found that the other injuries petitioner claimed to suffer did not involve a loss of protected liberty or did not occur by reason of the warrant and detainer.

The question of whether the effects of a parole violation detainer deprived plaintiff of a liberty interest was presented in Reddin v. Israel, 561 F.2d 715 (7th Cir. 1977). The authorities issuing the warrant upon which the detainer was based had refused to give plaintiff a parole revocation hearing. The district court had improperly granted plaintiff's motion for summary judgment since the material facts were in dispute and the court of appeals remanded for determination of the effects of the detainer.

Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977) reversed the district court, which had mandated changes in the disciplinary hearings for members of the plaintiff class who were incarcerated in a federal minimum security institution for young offenders. The court, after an extensive analysis of Supreme Court opinions, found the procedures required by the policy statements issued by the bureau of prisons were adequate. The court noted that "[t]he first question to be asked in a due process analysis is whether a life, liberty, or property interest within the meaning of the Due Process Clause is implicated." 558 F.2d at 1250. The second question for resolution is what process must be granted before the person can be deprived of the protected interest.

On appeal it was found that the district court had improperly concentrated on plaintiff's grievous loss rather than their loss of a right to which they

were entitled. The court stated:

> For at least two reasons the requirement of an entitlement for the existence of a due process liberty interest, instead of a finding of grievous loss, is the prescribed approach. First, a standard of grievous loss would measure the weight of the individual interest rather than determining its nature . . . . Second, the requirement of an entitlement provides an appropriate basis for compromise between the need for the protection of individual interests and the need for government action unhampered by procedural burdens. A standard of grievous loss would interfere more directly with government responsibilities.

558 F.2d at 1251.

The court noted that the Constitution did not grant inmates a liberty right not to be placed in a more restrictive living status, not to be transferred to maximum security penitentiaries for adult offenders, not to be subjected to significant and adverse effects on parole dates, and not to be deprived of privileges. Further, federal statutory law gave federal prison officials full discretion in the treatment of prisoners with respect to the matters in issue. 558 F.2d at 1252. However, the court found that policy statements issued by executive officers, here prison officials, could create liberty interests. The court further stated: "[L]iberty interests can be created by rules or mutually explicit understandings." 558 F.2d at 1255. The court found that although the plaintiffs did have liberty interests created by the policy statements, the interests were not as broad as those found by the district court.

Polizzi v. Sigler, 564 F.2d 792, 797-98 (8th Cir. 1977) found that classification of plaintiffs as "special" offenders upon their entrance into the federal prison system involved a deprivation of liberty and that they were entitled to due process hearings.

Another consideration in determining whether due process procedural protections are required is "the extent to which an individual will be 'condemned to suffer grievous loss.' " Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972).[171] Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976), cert. denied, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283 found that the denial of parole, as distinguished from the revocation of parole, is not a "grievous loss" and therefore due process procedures are not required.

Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) held that actions may be brought under section 1983 for deprivation of property without due process of law. Compare Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973), in which the court held that the value of property taken from a prisoner is not determinative of the federal court's jurisdiction in a Civil Rights Act case and reversed the district court's order dismissing a complaint alleging that the defendant security officer had taken seven packages of cigarettes from plaintiff's cell, with Nickens v. White, 536 F.2d 802 (8th Cir. 1976), in which the court sustained the dismissal of the complaint as to plaintiff's claim that he had been denied due process when a catalogue of office supplies had been confiscated by defendant prison officials. The court stated:

> The deprivation of property as well as injury to the person may be the basis for a civil rights action. . . . We think, however, that the property interests involved in the catalogues as pleaded are so de minimus that the confiscation in the one instance pleaded does not constitute such a taking of property that due process rights are implicated.

536 F.2d at 803. Bryan v. Werner, 516 F.2d 233 (3d Cir.

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171. But see Walker v. Hughes, 558 F.2d 1247, 1251 (6th Cir. 1977), holding that the "grievous loss" inquiry cannot be substituted for the determination of whether the plaintiff has been deprived of a right to which he is entitled.

1975) stated:

> We do not believe that an inmate's expectation of keeping a particular prison job amounts either to a "property" or "liberty" interest entitled to protection under the due process clause. . . . Similarly, since his discharge has not resulted in an increased period of confinement or in more restricted confinement, his liberty has not been impaired.

516 F.2d at 240.

The plaintiff did not have a due process right to a hearing prior to his removal as an inmate counselor by prison officials in Altizer v. Paderick, 569 F.2d 812 (4th Cir. 1978), even though the prison officials included in his file the reasons for his removal which could have later implications on his right to parole. The court stated:

> It is well settled that federal courts do not occupy "the role of super wardens of state penal institutions" . . . and "do not sit to supervise state prisons." . . . In particular, the classifications and work assignments of prisoners in such institutions are matters of prison administration, within the discretion of the prison administrators, and do not require fact-finding hearings as a prerequisite for the exercise of such discretion.

569 F.2d at 812. The question of whether the plaintiff has been denied procedural due process is not be to confused with the propriety of the final decision affecting him. The role of the federal courts is not to relitigate the proceeding in which the plaintiff alleges he was denied due process. For further discussion <u>see</u> Section VIII, K, 7, f <u>infra</u>.

2. Balancing the Interests

Although modern jurisprudence presses a myriad of "social interests" upon jurists for attention, the extent to which these interests can be balanced depends on the identification of all the interests. Judge Ruggero Aldisert has suggested that the expression "balancing interests," first so described by Justice Hugo Black, is useful, perhaps, but seriously misleading:

> The expression implies that the subject matter of the judicial process may be precisely quantified. It may not. The best that can be hoped is that all the interests at stake in a given case are identifiable. Having identified the interests at stake, a judge can at least consider them, but it is doubtful that he is ever really able to "balance" them. The judge's acccmodation of the competing interests -- his or her priority if you will -- in resolving the interest-conflicts will be durable and acceptable to the extent that a reasoned accomodation of the interests is regarded and accepted as fair.[172]

This accomodation of competing interests in prisoner cases is discussed in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974):

> Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

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172. Aldisert, Opinion Writers and Law Review Writers: A Community and Continuity of Approach, 16 Duq. L.R. 139, 154 (1977-78).

418 U.S. at 556, 94 S.Ct. at 2975, 41 L.Ed.2d at 951. The Court further stated:

> We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

418 U.S. at 560, 94 S.Ct. at 2977, 41 L.Ed.2d at 953.

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct 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.

431 U.S. at 848-49, 97 S.Ct. at 2112, 53 L.Ed.2d at 38.

Although Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) involved First Amendment and Fourteenth Amendment equal protection clause challenges to prison regulations, the balancing test it applied would appear applicable to due process analysis. First, it emphasized

that courts must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." 433 U.S. at 125, 97 S.Ct. at 2538, 53 L.Ed.2d at 638. The Court examined the regulations to determine whether they were reasonable, whether they were consistent with the inmates' status as prisoners, and whether they were consistent with the legitimate considerations of the institution. 433 U.S. at 130, 97 S.Ct. at 2540, 53 L.Ed.2d at 641.

3. Access to the Courts

The due process clause of the Fourteenth Amendment assures inmates a right of access to the courts. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Basically the reported cases have discussed the validity of regulations restricting access to the court, punishment of prisoners for exercising their right of access to the court, and the state's duty to furnish prisoners with affirmative assistance, including law libraries, counsel, or other alternatives. While the courts have not required the states to provide any particular type of assistance, the question in each case is whether the prisoners do have adequate access to the court.

Wolff v. McDonnell, supra, held that prisoners are entitled to the same right to legal assistance in civil rights actions as was assured to them in habeas corpus cases in Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969). Johnson stated: "But unless and until the state provides some alternative to assist inmates in the preparation of petitions for post conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." 393 U.S. at 490, 89 S.Ct. at 751, 21 L.Ed.2d at 718. Wolff, supra, noted: "The right of access to the courts, upon which Avery was premised, is found in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. 418 U.S. at 579, 94 S.Ct. at 2986, 41 L.Ed.2d at 964.

Plaintiff's allegation that prison officials took retaliatory action against him for preparing legal material for another inmate was held not to state a cause of action in Ervin v. Ciccone, 557 F.2d 1260 (8th Cir. 1977). The court stated:

> Ervin does not allege, however, that the prison officials failed to make available to the other inmates adequate assistance from persons trained in the law. It is no constitutional violation to prohibit Ervin from assisting other inmates so long as prison officials make available to those other inmates assistance from persons trained in the law. [Citing Bounds, supra.]

557 F.2d at 1262.

In Procunier v. Martinez, supra, the Court affirmed the district court's grant of an injunction against enforcement of a rule which restricted prisoners' access to members of the bar and licensed private investigators. The regulation banned the use by attorneys of law students and legal para-professionals to interview inmate clients. The Court stated:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

416 U.S. at 419, 94 S.Ct. at 1814, 40 L.Ed.2d at 243.

McDonald v. State of Illinois, 557 F.2d 596 (7th Cir. 1977), cert. denied, 434 U.S. 966, 98 S.Ct. 508, 54 L.Ed.2d 453 (1978) held that the complaint stated a cause of action against the former superintendent of the department of corrections who allegedly refused to allow plaintiff's counsel to photograph him shortly after his arrest in order to obtain evidence to corroborate his testimony that he had been beaten by unknown assailants. The court stated:

> A defendant's right to prepare the best defense he can and to bring to the court's attention any evidence helpful to this case is constitutionally protected. The Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) recognized the right of a defendant to have access to exculpatory evidence in the hands of the prosecutor. We believe a defendant also has the right to preserve possibly exculpatory evidence and that, to the extent the government or its agents frustrate such preservation, the defendant has a constitutional claim.

557 F.2d at 603.

Prison officials in Wycoff v. Brewer, 572 F.2d 1260, 1265 (8th Cir. 1978) had terminated a telephone call between plaintiff and an attorney after the conversation had continued for fifteen or twenty minutes. The district court determined that the termination of the telephone conversation was reasonable, and the court of appeals agreed.

Ford v. Schmidt, 577 F.2d 408 (7th Cir. 1978) held that plaintiff was not denied access to the courts when prison personnel in the mail room refused to mail plaintiff's legal papers because he had used another inmate's stamp coupons on the envelope. Possession of another inmate's property was a violation of the prison rules. The other prisoner was a friend of plaintiff's and had agreed to place his stamp coupons on the envelope because plaintiff had not believed the two coupons he had could be used since they had previously been addressed to others. The court noted that the prison had a procedure whereby inmates who did not have stamp coupons or means to purchase

them could attach an inmate order form so that mail would still be sent. The court determined that requiring inmates who had the funds to purchase stamp coupons, to account for their failure to have planned ahead, or for the emergency which prompted their need for stamps had a rational relationship to the prison's teaching responsibility and to orderly maintenance of the institution. Therefore, plaintiff had not been denied reasonable access to the courts.

Gilmore v. Lynch, 319 F.Supp. 105, 111 (N.D.Cal. 1970) found that plaintiff prisoners' access to the courts was seriously infringed by the highly restrictive nature of the exclusive list of books available for prisoners, although it was supplemented to some extent by the state library. The court defined "access to the courts":

> "Access to the courts," then, is a larger concept than that put forward by the State. It encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him. . . . Johnson v. Avery . . . makes it clear that some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.

319 F.Supp. at 110. Gilmore was affirmed by the Supreme Court in Younger v. Gilmore, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971).

A resident law clinic had been established by the institution to assist inmates in the preparation of many of their legal claims in Bryan v. Werner, 516 F.2d 233 (3d Cir. 1975). The clinic maintained a law library staffed by inmates, but the clinic could not be used for "preparation of writs, damage suits, or civil suits against the institution or personnel of the institution." Inmates were not required to use the clinic services in their legal matters. The court of appeals noted that it was unclear whether the clinic actually impeded access to the courts by prisoners. It observed that regulations prohibited the clinic from assisting inmates in suits

against the institution or prison officials. This regulation would be valid only if there were reasonable alternatives for obtaining assistance in such suits. Therefore, the court of appeals remanded for reconsideration by the district judge.

In Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), cert. denied sub nom. Andrade v. Hauck, 424 U.S. 917, 96 S.Ct. 1118, 47 L.Ed.2d 322 (1976), a magistrate had conducted an evidentiary hearing and had determined that the inmates had adequate access to the courts because they were afforded the services of court-appointed counsel. The court of appeals remanded because the findings of fact did not state clearly whether attorneys aided the inmates in habeas corpus petitions and civil rights actions challenging jail conditions. The court noted that the authorities had the burden of proof of demonstrating the prisoners had adequate access to counsel in addition to their access to legal materials. The court stated: "If all inmates do not have such access, the court should devise a plan ensuring adequate entry to the courts, either by reasonable access to attorneys, or by reasonable access to legal materials, or by any other reasonable means the district court may devise." 515 F.2d at 332. The court distinguished the need of prisoners who are incarcerated awaiting trial and those serving sentences from prisoners in short-term holding facilities awaiting transfer to another institution:

> Therefore, in determining whether all inmates have adequate access to the courts, the district court need not consider those inmates whose confinement is of a very temporary nature or for purposes of transfer to other institutions. The district judge should have little difficulty, realizing the fundamental nature of the right of access, in determining those cases where the brevity of confinement does not permit sufficient time for prisoners to petition the courts.

515 F.2d at 333.

Kirby v. Blackledge, 530 F.2d 583, 587 (4th Cir. 1976) noted that prisoners in segregated detention may not be denied access to library facilities. However,

regulations may limit the time, places, and manner in which inmates may engage in legal research. See Gittlemacker v. Prasse, 428 F.2d 1, 7 (3d Cir. 1970). Nadeau v. Helgemoe, 561 F.2d 411 (1st Cir. 1977), upheld the district judge's order requiring that prisoners in protective custody be granted more library time.

Stevenson v. Reed, 530 F.2d 1207, 1208 (5th Cir. 1976), cert. denied, 429 U.S. 944, 97 S.Ct. 365, 50 L.Ed.2d 315 (1977) held that since the inmates had access to an adequate law library and inmate writ writers, due process did not require that the state provide legal counsel. Woods v. Daggett, 541 F.2d 237 (10th Cir. 1976) found that since the state furnished a substantial law library to the inmates, regulations prohibiting inmates from receiving law books other than those sent from the original source did not deprive plaintiff of access to legal materials.[173] In Glasshofer v. Sennett, 444 F.2d 106 (3d Cir. 1971), where the plaintiff had not complained that he had been denied access to the prison library, the court held that a prisoner did not have a right to compile his own individual law library.

Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) held: "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828, 97 S.Ct. at 1498, 52 L.Ed.2d at 83. The Court emphasized that while law libraries were one constitutionally acceptable method to assure meaningful access to the courts, other methods were not foreclosed:

> Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization

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173. Since the plaintiff was a federal prisoner, the case was decided under the Fifth Amendment right to due process.

> of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services officers. . . . Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly. . . . Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.

430 U.S. at 831-32, 97 S.Ct. at 1499-1500, 52 L.Ed.2d at 84-85.

United States v. West, 557 F.2d 151 (8th Cir. 1977) found that the defendant, who was charged with bank robbery and who elected to proceed pro se, was not denied access to the courts by the denial of his request to be taken to a law library since an attorney had been appointed to assist him. The attorney visited him on separate occasions, made himself available for research, and provided him with copies of two cases he had requested.

Wilson v. Zarhadnick, 534 F.2d 55 (5th Cir. 1976), decided prior to Bounds, held that the state is not under a constitutional obligation to furnish an inmate with legal research material where he has adequate financial resources with which to employ counsel of his own choice.

Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978) stated: "[W]e can perceive no constitutional right to a typewriter as an incident to the right of access to the courts." 573 F.2d at 132.

Corpus v. Estelle, 551 F.2d 68 (5th Cir. 1977) upheld the district court's finding "that reasonable access to the courts must include access in general

civil legal matters including but not limited to divorce and small civil claims." 551 F.2d at 70. The findings and conclusions of the district court that there was no reasonable alternative to inmate mutual assistance were not clearly erroneous and the order enjoining the director of the department of corrections from "maintaining or enforcing any rule or practice prohibiting prisoners . . . from giving or receiving legal assistance with regard to civil rights matters" was affirmed. 551 F.2d at 69.

Prison officials may not refuse to notarize or mail legal papers on the basis that the form used by the prisoner was improper. Bryan v. Werner, 516 F.2d 233 (3d Cir. 1975). In Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975), the district court was required to hear on the merits plaintiff's claim that he was denied access to the courts. He claimed that legal materials were confiscated and writing supplies were not available. Since the defendant replied that inmates were allowed to use their own writing materials and that they were also given any materials they needed, there was a genuine issue of material fact on these points. 509 F.2d at 1407. The district court's grant of defendant's motion for summary judgment was vacated as to plaintiff's claim that he was denied the use of legal and writing materials.

Plaintiff's allegation that he had been placed in solitary confinement as a form of harassment for filing a lawsuit was held to state a cause of action in Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976).

A threat to withhold money if a lawsuit was instituted stated a cause of action in Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976), a non-prisoner case. The court stated:

> A public official's threats to a citizen to withhold monies due and owing, should legal proceedings on an independent matter be instituted, burdens or chills constitutional rights of access to the courts. And this is true although the threat is not actually effective. For this reason the trial court did not err in refusing to grant defendant's motion for dismissal.

529 F.2d at 163.

In Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), rev'd on other grounds, Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), allegations that the plaintiff was removed as prison librarian and that a law student visitation program was terminated solely to punish his legal activities was found to state a cause of action based on interference with plaintiff's right of access to the courts.

Russell v. Oliver, 552 F.2d 115 (4th Cir. 1977) held that the district court had improperly granted defendant's motion for summary judgment where the plaintiff alleged that his mail was delayed, that he was excluded from participation in work release and other rehabilitative programs, that he was denied a furlough, and that he was denied a visit because of his lawsuits in federal court. The district court dismissed each complaint on the grounds that the defendants had either presented an acceptable reason for their conduct or that each incident by itself did not amount to a denial of a constitutional right. On appeal, the court stated:

> The district court erred, however, in considering each allegation independently of the others. A liberal construction of Russell's pro se complaint . . . requires that the judge view all of these allegations not as isolated incidents, but rather as a unit . . . . [T]he district court should have granted Russell an evidentiary hearing on his allegation that he was harassed because of the suits that he had filed.

552 F.2d at 116.

In Christman v. Skinner, 468 F.2d 723, 725 (2d Cir. 1972), it was proper to dismiss plaintiff's claim that he had been punished by placement in isolation for three days for circulating a memorandum to other inmates informing them of his commencement of an action in the state courts to enjoin defendants from cutting the facial hair of inmates awaiting trial. Since plaintiff had alleged that he was punished for circulating the memorandum, and not for instituting the state court action, the case did not present a question of

discriminatory treatment as a result of his petitioning the state court: "Instead, defendants' actions fall within the wide discretion that courts have traditionally conceded to prison officials in matters of prison discipline and security." 468 F.2d at 725. In his dissent, Judge Feinberg stated:

> In my view, Christman's first cause of action fairly alleges harassment, by means of two separate instances of extraordinary confinement, in order to intimidate him prior to contemplated court action and to punish him for pursing efforts to obtain judicial relief. The complaint does, to be sure, allude to the memorandum to inmates as well as to violation of appellant's first amendment rights of free speech and association. But it also alleges retaliation for Christman's exercise of his right to petition the government for a redress of grievances--an allegation which, on the facts of this case, can only refer to his state court suit to enjoin cutting of the facial hair of pre-trial detainees. Construing the complaint liberally, as we must on a motion to dismiss, I would hold that the first cause of action presents the substantial federal question of interference with prisoner access to the courts.

468 F.2d at 727.

The plaintiff in Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975) had been denied mailing privileges, access to legal counsel or materials, and habeas corpus forms during his fifteen days in isolation for having written a letter to an unauthorized person and smuggling the letter out of the prison. The court of appeals affirmed the district court's finding that the defendants had sustained their burden of establishing both subjective and objective good faith, 522 F.2d at 725, and applying the standard set forth in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

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Wilson v. Prasse, 404 F.2d 1380 (3d Cir. 1968) stated:

> Insofar as appellant complains of alleged denial of his right of access to the courts, the record shows that the many civil actions instituted by appellant in the federal and state courts supported the conclusion of the District Court that the contention that appellant had been denied access to the courts was frivolous.

404 F.2d at 1381.

The district court in Douglas v. Muncy, 570 F.2d 499 (4th Cir. 1978) had awarded plaintiff money damages against the defendants for depriving plaintiff of his rights to legal assistance and access to the courts. The court of appeals reversed and remanded:

> We are further of the opinion, however, that there was no basis for an award of damages against these defendants on the charge that they deprived Douglas of his right to counsel or access to the courts. The district court did not find that either of these defendants acted with any malice, and the record shows that they merely followed the procedures prescribed for temporary inmates of the Correctional Center. Since the defendants were "acting in a reasonable good faith reliance on what was standard operating procedure in the Virginia prisons, [they] should not have to respond personally for damages."

570 F.2d at 501.

Prisoners' right of access to courts was considered in another context in Rush v. United States, 559 F.2d 455 (7th Cir. 1977). The petitioners, federal prisoners, sought a transcript of their trial proceedings for purposes of a collateral attack on their

convictions which had been affirmed on appeal. The court stated: "future requests for the preexisting record in the underlying criminal proceeding should be granted as of right by the district courts to prisoners seeking to use the record to prepare collateral attacks on their conviction." 559 F.2d at 459-60.

4. Disciplinary Hearings and Procedures

For due process purposes the Supreme Court draws an important distinction between disciplinary procedures which are required for major misconduct and those procedures which are required to impose lesser penalties, such as the loss of privileges. Wolff v. McDonnell, 418 U.S. 539, 572 n. 19, 94 S.Ct. 2977, 2982 n. 19, 41 L.Ed.2d 950, 960 n. 19 (1976); Baxter v. Palmigiano, 425 U.S. 308, 323, 96 S.Ct. 1551, 1560, 47 L.Ed.2d 810, 824 (1976).

a. Nature of Hearing for Major Misconduct

The two Supreme Court decisions which defined the due process procedures required in disciplinary proceedings for major misconduct are Wolff, supra, and Baxter, supra.

Wolff held that prisoners could not be punished for serious misbehavior without first being granted a due process disciplinary hearing. Before setting forth the minimum requirements for a hearing, the Court noted that "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 418 U.S. at 560, 94 S.Ct. at 2977, 41 L.Ed.2d at 953. The Court distinguished prison disciplinary hearings from parole revocation proceedings:

> Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. . . .

> Guards and inmates coexist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

418 U.S. at 561-62, 94 S.Ct. at 2977, 41 L.Ed.2d at 954. The Court noted that it was necessary to structure disciplinary proceedings against this background. Since disciplinary hearings "involve confrontations between inmates and authority and between inmates who are being disciplined and those who have charged or furnished evidence against them, retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates could be at stake." 418 U.S. at 562, 94 S.Ct. at 2978, 41 L.Ed.2d at 954. Another consideration is the likelihood of confrontations at hearings, escalating personal antagonisms and adversely affecting the correctional process. The Court noted that some prisoners may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. 418 U.S. at 563, 94 S.Ct. at 2978, 41 L.Ed.2d at 955.

The Court concluded that when charged with a major misconduct[174] a prisoner is entitled to advance[175]

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174. McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978), held that two weeks keeplock in which "the prisoner is confined to his own cell and is deprived of almost all contact with the rest of the prison population and participation in the normal routine of the institution," is a substantial deprivation requiring a prior hearing with minimal due process safeguards. 568 F.2d at 936.

175. At least twenty-four hours formal written notice was required prior to disciplinary hearings which could result in punishment of up to two weeks in keeplock in McKinnon, note 174, supra. However, in note 10, the court observed that this requirement would not prevent prison authorities from confining an inmate prior to the hearing where his continued presence in the general population posed a threat to his own safety or the safety of others. 568 F.2d at 939 n. 10. See also Section VIII,K,4,h, Timing of Disciplinary Hearing.

written notice of the claimed violation,[176] a written statement of the fact finders as to the evidence relied upon, and the reasons for the disciplinary action taken.[177] An inmate who faces disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense unless this would be unduly hazardous to institutional safety or correctional goals. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and refuse to call any witnesses who might creat a risk of reprisal or undermine authority, as well as limiting access to other inmates for purposes of collecting statements and compiling other documentary evidence.[178] 418 U.S. at 566, 94 S.Ct. at 2980, 41 L.Ed.2d at 957.

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176. The plaintiff was awarded $193 in damages for the defendant's failure to give him advance written notice of the charge brought against him in a prison disciplinary proceeding in Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978).

177. The statement of reasons was found inadequate in Hayes v. Walker, 555 F.2d 625, 631 (7th Cir. 1977), cert. denied, 434 U.S. 959, 98 S.Ct. 491, 54 L.Ed.2d 320 (1978).

178. In Hayes v. Walker, 555 F.2d 625 (7th Cir. 1977), cert. denied, 434 U.S. 959, 98 S.Ct. 491, 54 L.Ed.2d 320 (1978), the court held that where an accused inmate faces a severe credibility problem when trying to disprove the charges of a prison guard, some support for the denial of witnesses must appear in the record. The court must make a limited inquiry into whether the broad discretion of the prison officials has been arbitrarily exercised. In that case the reason given for refusing plaintiff's request for witnesses was "the residents requested would be placed in highly compromising positions with regards to possible retribution from other residents and to call resident witnesses could prove hazardous to both witnesses and institutional security." 555 F.2d at 628-29. The court stated:

> If we were to allow broad unsupported findings as were offered in the present case to support the Institutional Adjustment Committee's decision, a prisoner's limited right to call witnesses could be arbitrarily denied in any case and thereby be rendered meaningless. The court would be unable to exercise even limited review of such broad findings. Thus, if a proposed witness is not to be called, support for that decision and not just a broad conclusion should be

Confrontation and cross-examination are generally not required. The Court declined to hold that prisoners have the right to either retained or appointed counsel, although an illiterate inmate should be free to seek the aid of a fellow inmate or help from the staff. 418 U.S. at 570, 94 S.Ct. at 2982, 41 L.Ed.2d at 959. The Court found that the adjustment committee which conducted the required hearings at the Nebraska prison complex was sufficiently impartial to satisfy the due process clause.[179] 418 U.S. at 571, 94 S.Ct. at 2982, 41 L.Ed.2d at 959. The Court indicated that its decision would not be retroactive.

> reflected in the record. Prison officials should look at each proposed witness and determine whether or not he should be allowed to testify.

555 F.2d at 630. The plaintiff had originally submitted a list of fifty-four prisoners to be called as witnesses. At the hearing he asked that ten be called as witnesses and that the others be reviewed by the Institutional Adjustment Committee.

179. Powell v. Ward, 542 F.2d 101, 103 (2d Cir. 1976), concluded that prison officials responsible for maintaining security were not disqualified from adjudicating allegations of breaches of prison security. Defendant had not challenged the district court's order that no person who had participated in the investigation of the acts complained of or who had been a witness to such acts could be a member of the hearing body.

Winfrey v. Brewer, 570 F.2d 761 (8th Cir. 1978), held that the district court had improperly dismissed plaintiffs' complaint challenging the impartiality of their hearing committee. The two prison officials who investigated the charges against plaintiffs were members of the hearing committee which found them guilty and imposed punishment. After plaintiffs filed suit another hearing was conducted without the participation of the two investigators. Defendants' motion to dismiss asserted that the second hearing cured any defects in the first hearing. Plaintiffs responded with a claim that the second hearing was a sham. The sentences imposed at the first hearing had been reaffirmed.

Meyers v. Alldredge, 492 F.2d 296 (3d Cir. 1974) stated:

> [W]e emphasize that the requirement of an impartial tribunal prohibits only those officials who have a direct personal or otherwise substantial involvement, such as major participation in a judgmental or decision-making role,

The holding in Wolff, supra, that inmates do not have the right to retained or appointed counsel in disciplinary proceedings was reaffirmed in Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).[180] The plaintiff had been charged by correctional officials with inciting a disturbance and with disrupting prison operations. He was told that he might be prosecuted for a violation of state law and that he should consult with his attorney, although his attorney could not be present during the disciplinary hearing. He was also informed that he had the right to remain silent during the hearing but that his silence would be held against him. The disciplinary board decided to place him in "punitive segregation" for thirty days. The Court noted that inmates would have to be offered immunity before being compelled to furnish testimonial evidence which might incriminate them in later criminal proceedings. However, in Palmigiano's case no criminal proceedings were pending. His silence at the hearing in the face of incriminating evidence was merely considered along with the other evidence. The Court concluded that

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> in the circumstances underlying the charge from sitting on the disciplinary body. This would normally include only those such as the charging and the investigating staff officers who were directly involved in the incident. It would not include those who are only tangentially affected by the alleged misconduct, such as prison officials who may have some administrative connection with such misconduct prior to hearings.

492 F.2d at 306.

Main Road v. Aytch, 565 F.2d 54, 58-59 (3d Cir. 1977) held that regulations were not unconstitutional where the review board which could review the warden's decisions included his subordinates.

180. Accord, Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978). However, in Ruiz v. Estelle, 550 F.2d 238, 239 (5th Cir. 1977), the court approved the district court's preliminary injunction apparently requiring the prison officials to permit plaintiffs to have substitute counsel at disciplinary hearings during pendency of the action. As a result of their participation in the litigation the plaintiffs had been treated as a special class of inmates and had been subjected to "threats, intimidation, coercion, punishment, and discrimination."

the Fifth Amendment does not forbid adverse influences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.

As to confrontation of witnesses, the court of appeals had ordered the prison authorities to give written reasons when they refused to let inmates cross-examine or confront witnesses against them. The Supreme Court noted that although in Wolff it had characterized this practice as "useful" it had indicated that it would not be required. For the Court to mandate confrontation and cross-examination, except where prison officials can justify their denial on one or more grounds, would preempt the area Wolff left to the sound discretion of prison officials. 425 U.S. at 322, 96 S.Ct. at 1560, 47 L.Ed.2d at 824.

Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977) found that under federal statutory law federal prison officials had full discretion in the treatment of prisoners, and therefore the prisoners did not have liberty interests in not being placed in more restrictive living status and in not being deprived of privileges. However, as a result of a Milan institution policy statement, the prisoners did have liberty interests not to be placed in segregation, transferred to other prisons, or to lose good time credits or privileges except upon a finding of major misconduct by the adjustment committee. However, the district court had gone too far in ordering that inmates be given written notice of their procedural rights; in ordering that there be instituted a neutral, detached, and continuously identical panal of fact finders from which investigators, case workers, and confidants were excluded; in ordering that an inmate be given an opportunity to call witnesses and present evidence in his defense unless the record clearly indicated that to do so would present a grave threat to institutional security; in requiring the adjustment committee to provide an inmate counsel or counsel substitute when the right to call witnesses was denied; and in ordering the committee to provide a written decision based only upon the evidence presented at the hearing and that mere written accusation and rumor not be used as adequate evidence of a violation of prison rules by an inmate. These requirements went beyond the requirements of Wolff and Baxter and were not required by due process. 558 F.2d at 1259-60. The other requirements imposed by the district court were already required by the policy statements issued by the bureau of prisons

and the Milan institution and therefore there was no need for the court to order them.

Where the plaintiff admits to misconduct the denial of a hearing may not constitute a Fourteenth Amendment violation. See Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). Clardy v. Levi, 545 F.2d 1241, 1246 (9th Cir. 1976) held that the Administrative Procedure Act does not apply to federal prison disciplinary hearings.

b. Proceedings Required for Lesser Penalties Such as Loss of Privileges

Wolff, supra, stated: "We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges." 418 U.S. at 572 n. 19, 96 S.Ct. at 2982 n. 19, 47 L.Ed.2d at 960 n. 19. In Baxter, 425 U.S. at 323-24, 96 S.Ct. at 1560, 47 L.Ed.2d at 824, the Court referred to this comment in Wolff and, finding that the record before the district court did not present the issue of denial of privileges since the plaintiffs had been charged with serious misconduct, reversed the holding of the court of appeals that inmates were entitled to notice, opportunity for response, and a statement of reasons where they were deprived of privileges.

McKinnon v. Patterson, 568 F.2d 930, 957 (2d Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978) observed that the difference in nomenclature among the various forms of punitive or disciplinary confinement should not be dispositive in determining whether minimal due process is required.

c. Classification and Reclassification Proceedings, Transfer to Maximum Security

Cooper v. Riddle, 540 F.2d 731 (4th Cir. 1976) held that the requirements of Wolff, supra, did not apply to reclassification proceedings. In Cooper the plaintiffs had been transferred to maximum security by the institutional classification committee after they were allegedly involved in episodes of prison violence. The district court's grant of defendant's motion for summary judgment was affirmed on appeal.

Hodges v. Klein, 562 F.2d 276 (3d Cir. 1977) affirmed the district court's denial of an injunction ordering that the management control unit of the Trenton state prison, to which prisoners deemed in need of close supervision were assigned, be closed or operated differently. The court noted that under Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976), and Montanye v. Haymes, 427 U.S. 236, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), inmate transfers are not subject to a hearing requirement, even when the transfer is to a less desirable confinement situation:

> The presence in this case of procedures for periodic hearings to review an inmate's assignment to the MCU leads us to conclude that appellants' due process rights were adequately safeguarded.
>
> Appellants further claim that assignment to the Management Control Unit violates the equal protection clause by depriving them of certain freedoms and privileges enjoyed by the general inmate population. If the challenged classification furthers some legitimate state interest, however, it will withstand an equal protection challenge. Given the district court's factual findings regarding the considerable tension and unusual number of discipline problems within the prison, it is clear that classifications among prisoners maintained the discipline and security in the prison and thus furthered a legitimate state interest.

562 F.2d at 278.

Polizzi v. Sigler, 564 F.2d 792 (8th Cir. 1977) found that federal prisoners were entitled to a due process hearing prior to their classification as "special" offenders upon their entrance into the federal prison system. Holmes v. United States Board of Parole, 541 F.2d 1243, 1249 (7th Cir. 1976) held that classification as a special offender constituted "grievous loss" and thus required due process

considerations, but the Seventh Circuit overruled Holmes in Solomon v. Benson, 563 F.2d 339, 343 (7th Cir. 1977), holding that due process was not required for reclassification as a special offender.

d. Loss of Good Time

Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) held that an action seeking an injunction to restore good time credit must be brought as habeas corpus rather than a civil rights action under section 1983.[181] Wolff v. McDonnell stated: "Preiser expressly contemplated that claims properly brought under Section 1983 could go forward while actual restoration of good time credit is sought in state proceedings." 418 U.S. 539, 554, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935, 950 (1974). The court could determine the validity of the procedures employed for imposing sanctions such as loss of good time and could enter a declaratory judgment as a predicate to a damage award. The Court noted that some injunctive relief, such as an injunction against enforcement of invalid prison regulations, could be granted. Only an injunction restoring good time credits is foreclosed by Preiser. Wolff held that the loss of good time credits is a sufficient loss of "liberty" to entitle the prisoner to a due process hearing.

McGinnis v. Royster, 410 U.S. 263, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973) held that a prisoner is not denied equal protection under the Fourteenth Amendment where he is denied good time credit for the period he was incarcerated in a county jail before he was sentenced. The fact that the jails do not have a significant rehabilitation program provided a rational basis for declining to give prisoners good time credit for their pretrial jail detention period.

The warden was not required in Rusher v. Arnold to restore to plaintiff the sixty-two days of good time that had been ordered forfeited upon his acquittal of the escape charge which was the basis of the forefeiture. 550 F.2d 896 (3d Cir. 1977). Since the plaintiff was a federal prisoner, the court was considering the Fifth Amendment due process clause, rather than the Fourteenth Amendment. The court based its

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181. See also Section II, A supra and Section VIII,K,1 supra.

decision on two grounds. First, the due process clause does not impose upon prison disciplinary proceedings the burden of proof beyond a reasonable doubt which applies to criminal cases, and the government's failure to meet its burden of persuasion in a criminal case does not bar other non-criminal sanctions. Further, the evidentiary rules are much broader in disciplinary hearings than they are in criminal actions since the exclusionary rules do not apply. Therefore, the district court had erred in ordering the warden to restore to plaintiff the good time which had been forfeited. Bell v. Putnam, 548 F.2d 749 (8th Cir. 1977), cert. denied, 431 U.S. 958, 97 S.Ct. 2684, 53 L.Ed.2d 277 held that the automatic forfeiture of plaintiff's good time when his parole was revoked did not require a separate evidentiary hearing in addition to his parole revocation hearing.

e. Prisoner Charged With a Criminal Offense While Incarcerated

Wolff, supra, did not address the situation when the prisoner is alleged to have engaged in conduct which constitutes a criminal offense under state law. However, in Baxter, supra, the Court reversed the court of appeals' holding that where the charges at the disciplinary hearing involve conduct punishable as a crime under state law the prisoner is entitled to representation by counsel. The Court quoted from Wolff that inmates do not "have a right to either retained or appointed counsel in disciplinary hearings." 425 U.S. at 315, 96 S.Ct. at 1556, 47 L.Ed.2d at 819. Further, the Court held that the prison officials did not act improperly in advising plaintiff that he was not required to testify at his disciplinary hearing and that he could remain silent but that his silence could be used against him.

Wycoff v. Brewer, 572 F.2d 1260, 1264 n. 6 (8th Cir. 1978) discussed the policy decision presented to prison officials when an inmate commits an act or a series of acts which may constitute not only a breach of prison discipline, but also a violation of substantive state law. The officials must decide whether they should follow prison disciplinary procedures or leave the matter to local prosecutive officials. In Wycoff the plaintiff had been placed in administrative segregation after he ran amuck, engaged in assaultive conduct and destroyed or damaged state property. He

had been placed in administrative segregation pending determination by the county attorney as to whether he should be charged with substantive offenses under state law. He had never been given a hearing with respect to the episode that led up to his initial confinement. It appeared that the county attorney finally decided not to prosecute plaintiff, but may have failed to communicate his decision to prison authorities. Although plaintiff should have been given a hearing soon after his initial confinement in administrative segregation, the court of appeals approved the district court's finding that he was not entitled to money damages. The court noted "that plaintiff would never have been placed in administrative segregation if he had not conducted himself as he did on July 2, 1973." 572 F.2d at 1267. The court did recognize that prison administrators are required to deal with violent and unruly convicts in a constitutional manner and that the contributory fault of an inmate does not necessarily deprive him of his right to relief from deprivations of unconstitutional dimension. However, the court determined that the defendants were shielded from liability for damages by the qualified executive privilege recognized in Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). There was nothing to indicate that any of the defendants had acted toward plaintiff in bad faith or with personal malice and the judgment of the district court was affirmed.

The Tentative Draft of Standards Relating to the Legal Status of Prisoners published by the American Bar Association Section of Criminal Justice, recommends that in such cases "the prosecutor, in consultation with the chief executive officer, should promptly determine whether to file criminal charges against the prisoner." 3 American Criminal L. Rev. 453-54 (1977). If charges are brought, all institutional proceedings against the prisoner should be halted. The prisoner "may be confined in his assigned quarter or in a more secure housing unit for no more than ninety days" pending the filing of an indictment or information. If charges are filed, he "may be confined during the pendency of the criminal prosecution. After disposition of the criminal charge he may be reclassified but should not be subjected to further disciplinary proceedings."

f. Necessity for Federal Court Hearing

In Willis v. Ciccone, 506 F.2d 1011, 1018 (8th Cir. 1974), where the plaintiff claimed that the disciplinary actions taken against him were based on a false report, the court held that Wolff required a determination as to whether procedural due process had been afforded in the disciplinary proceedings. In most cases in which the records of the disciplinary proceedings are available it should not be necessary for the district court to hold an evidentiary hearing. The role of the district court was not to afford a de novo review of the disciplinary board's factual findings, but merely to determine whether the decision was supported by some facts. The district court was not to assume the task of retrying all prison disciplinary disputes.

Similarly, in Wood v. Strickland, 420 U.S. 308, 326, 95 S.Ct. 992, 1003, 43 L.Ed.2d 214, 227 (1975), where the issue was whether the defendant school board members had deprived plaintiff students of their right to due process prior to their expulsion from school, the Court stated:

> But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

420 U.S. at 326, 95 S.Ct. at 1003, 43 L.Ed.2d at 227.

Under Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), prison officials have as much, if not more, discretion than school administrators and school board members.

g. Acquittal of Criminal Charge - Effect on Disciplinary Action

Rusher v. Arnold, 550 F.2d 896, 898 (3d Cir. 1977) held that acquittal of criminal charges does not prevent prison officials from disciplining a prisoner for an infraction of the prison rules, even though the indictment and the prison disciplinary action arose from the same incident. The court concluded that "the inability of the Government to meet its burden of persuasion in criminal cases is no bar to other non-criminal sanctions based upon a less stringent burden [of proof]." 550 F.2d at 899.

h. Timing of Disciplinary Hearing, Exigent Circumstances

Powell v. Ward, 542 F.2d 101 (2d Cir. 1976) considered the timing of the Wolff hearing. The district judge had ordered that hearings for inmates confined to special housing or segregation pending investigation of charges must be held within seven days of confinement. The order was approved by the court of appeals which added that in unusual or emergency situations the seven day requirement could be extended with the permission of the commissioner of correctional services or his designee. It is noted that Wolff, supra, required that the prisoner be given at least twenty-four hours advance notice of the claimed violation. The court did not address the question of whether the plaintiff could be placed in segregation prior to the hearing. However, in Finney v. Arkansas Board of Corrections, 505 F.2d 194, 207 (8th Cir. 1974), the court held that it was not unreasonable to keep a prisoner in segregation for three days pending disciplinary action. Similarly, in McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978), the court observed that its requirement of twenty-four hours formal written notice prior to the hearing would not prevent prison authorities from confining an inmate prior to the hearing where his continued presence in the general population posed a threat to his own safety or to the safety of others.

Several courts have recognized that exigent circumstances may justify the temporary suspension of due process hearing procedures. Morris v. Travisono, 509 F.2d 1358 (1st Cir. 1975) recognized that exigent circumstances could justify the temporary suspension of

due process hearing procedures prior to disciplinary action.[182] However, due process safeguards must be provided as soon as possible after the emergency has ended. 509 F.2d at 1360. Braxton v. Carlson, 483 F.2d 933 (3d Cir. 1973) held that segregated confinement for three days pending a hearing was not unreasonable under the circumstances. United States ex rel. Arzonica v. Scheipe, 474 F.2d 720 (3d Cir. 1973) preceded Wolff, but the United States Court of Appeals for the Third Circuit, in Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972), had required that prisoners be given notice of charges or a hearing before transfer to solitary confinement. However, the court stated:

> The rule of reason still prevails; the exigencies of acute and critical situations in prison may require swift and decisive administrative action without the fear of exposing prison officials to the threat of subsequent liability for money damages arising out of decisions made in the good faith exercise of administrative discretion.

474 F.2d at 722. In Gray v. Creamer the court stated: "[T]his is not to say, of course, that this notice or hearing must in all cases precede the transfer to solitary confinement; in some cases, as, for example, during a prison riot, notice and hearing must be delayed a reasonable period of time." 465 F.2d at 185 n. 6.

The entire prison population had been placed on restricted status following an altercation of disputed character and magnitude in LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975). For nine days prisoners were confined to their cells and were subjected to restrictions on exercise, association, and normal vocational and educational activity. The court found that the conditions imposed did subject the prisoners to a "grievous loss," but commented that the due process clause provides an elastic, flexible standard which varies with the attendant circumstances:

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182. See also Powell v. Ward, supra.

> In situations such as the present, where prison authorities are allegedly reacting to emergency situations in an effort to preserve the safety and integrity of the institution, the state's interest in decisive action clearly outweighs the inmates' interest in a prior procedural safeguard. "[T]he possibility of widespread violence is a continuous condition of prison life. A good faith determination that immediate action is necessary to forestall a riot outweighs the interest in accurate determination of individual culpability before taking precautionary steps."

513 F.2d at 645. The court noted that "Prison officials reacting in good faith to perceived emergency situations must not be unduly hindered by overbroad federal judicial scrutiny, on the basis of hindsight, of the factual basis underlying their actions." 513 F.2d at 647. The court noted that "the standard of review of a challenge to the sufficiency of the basis for emergency response must be generous to the administration." 513 F.2d at 647. The complaints failed to reveal any allegations of bad faith and, although the affidavits revealed conflicts of fact concerning the nature and seriousness of the prisoner misconduct and the threat of disorder, they did not indicate the existence of any genuine issue of bad faith. Therefore, the court affirmed the district court's grant of summary judgment as to that issue.

An award of money damages to three plaintiffs who were placed in special housing units without prior hearing and notice of the charges after the superintendent declared a state of emergency was reversed in Gilliard v. Oswald, 552 F.2d 456 (2d Cir. 1977). The district court's finding that no emergency situation existed was reversed by the court of appeals. In discussing the problems faced by the superintendent following a series of assaults by inmates upon inmates the court stated:

> These problems should not be analyzed in a legalistic way more than three years after the events in issue by judges who did not have to cope with the situation presented to the

> Superintendent at the time. Rather, if justice is to be accomplished, we must try to look through the Superintendent's eyes at what he saw and into his mind as to his reaction thereto.
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> . . . .
>
> [W]e should look to the actual situation which confronted the man charged with the responsibility of the safety of some 1600 inmates, a man possessed of years of practical experience in prison management, to decide whether his judgment in handling the situation then before him failed to comport with permissible standards.

552 F.2d at 457-58. The court noted "that the Superintendent's acts were entirely administrative and the proceedings purely investigatory. . . . [A] hearing for each prisoner would have been virtually impossible. . . . [Further the] situation was not ripe for definite charges." 552 F.2d at 459. The court observed that charges should not be made until facts justifying them are obtained.

Hayes v. Walker, 555 F.2d 625, 633 (7th Cir. 1977), cert. denied, 434 U.S. 959, 98 S.Ct. 491, 54 L.Ed.2d 320 (1978) held that an allegation that the prison authorities acted in bad faith in declaring an emergency situation required judicial review. The court stated that "[a]bsent an allegation of bad faith, 'the underlying basis of decision must be deemed to be fully within [the] expertise and discretion [of prison officials] and, accordingly, is insulated from subsequent judicial review.'" 555 F.2d at 633.

i. A Prisoner Can Be Kept in Segregation Until He Agrees to Abide by the Rules of the Institution

Mukmuk v. Commissioner of the Department of Correctional Services, 529 F.2d 272 (2d Cir. 1976), cert. denied, 426 U.S. 911, 96 S.Ct. 2238, 48 L.Ed.2d 838 stated: "We have held it permissible to keep a prisoner in segregation until he agrees to abide by the rules of the institution." 529 F.2d at 277, citing Sostre v.

McGinnis, 442 F.2d 178 at 187, 192 (2d Cir. 1971) en banc, cert. denied, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

5. Transfer to Another Institution

Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) and Montanye v. Haymes, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976) held that a prisoner is not entitled to a due process hearing prior to a transfer to another institution even though the conditions in the second institution may be more disagreeable, where state law does not condition the right to transfer upon the occurrence of misconduct. When state officials possess the authority to make discretionary transfers, the prisoner does not have a "liberty" interest in remaining in a particular institution and, therefore, he does not have the right to a due process hearing. On remand, the court of appeals held that the complaint in Montanye stated a cause of action and a hearing was required since the plaintiff had alleged that his transfer was in reprisal for exercising his First Amendment rights and his right to help other prisoners prepare habeas corpus petitions. 547 F.2d 188 (2d Cir. 1976).[183]

Gray v. Creamer, 465 F.2d 179, 187 (3d Cir. 1972) had noted that a state prisoner does not have a constitutional right to remain in any particular prison.[184]

The plaintiff in Lombardo v. Meachum, 548 F.2d 13 (1st Cir. 1977), complained that his transfer hearing did not satisfy due process requirements. The court, applying Meachum v. Fano, found that the plaintiff did not have the right to a hearing prior to this transfer; therefore, his rights were not violated when he was excluded from the room during the testimony concerning an informant.

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183. See also Fajeriak v. McGinnis, 493 F.2d 468 (9th Cir. 1974), decided prior to Meachum and Montanye, where plaintiffs alleged they were transferred as punishment.

184. The court in Four Certain Unnamed Inmates of Massachusetts Correctional Institution v. Hall, 550 F.2d 1291 (1st Cir. 1977), used Meachum as the basis for its holding that freedom from transfer is not a "liberty interest" to which due process attached.

Meachum and Montanye were held applicable to pretrial detainees in Feeley v. Sampson, 570 F.2d 364, 376 (1st Cir. 1978), where the court held they were not entitled to a hearing prior to transfer.[185]

No reason for transfer of a federal prisoner was required in Robinson v. Benson, 570 F.2d 920 (10th Cir. 1978), where the court stated: "[I]t is clear that the Attorney General pursuant to 18 U.S.C. § 4082(b) has authority to transfer a prisoner from one place of confinement to another for any reason whatsoever or for no reason at all." 570 F.2d at 923.

Where plaintiff was transferred out of the state after a hearing as provided by state law, there was sufficient evidence to support the transfer decision since plaintiff, a life prisoner, was a security risk for whom the state had no suitable treatment program. Therefore, the district court's grant of defendants' motion for summary judgment was affirmed. Rebideau v. Stoneman, 575 F.2d 31 (2d Cir. 1978).

The district court in Bruce v. Wade, 537 F.2d 850 (5th Cir. 1976) had improperly dismissed plaintiff's complaint insofar as it alleged that defendants intentionally and improperly transferred plaintiff to another jail where he was subjected to inhumane conditions of confinement. Plaintiff's allegation that the transfer was made as a disciplinary measure distinguished the case from Meachum and Montanye. Referring to these two cases the court stated:

> Thus the Court left undisturbed the indication in Wolff that disciplinary measures which represent a change in the conditions of confinement and are normally imposed by the institution only for particular acts of misconduct give rise to procedural due process requirements. Liberally reading Bruce's allegations as Haines requires, we cannot say he will be unable to show that the transfer

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185. Meachum and Montanye were followed in Franklin v. Fortner, 541 F.2d 494 (5th Cir. 1976), where the court held that transfer from a minimum to a medium security institution did not require notice or a hearing.

to the Tarrant County cell amounted to such a disciplinary measure.

537 F.2d at 854 n. 9.

A three-judge district court had enjoined the transfer of any state prisoner from a penal facility to a mental institution without a due process hearing, including effective and timely notice of his rights and, in the case of an indigent inmate, with legal counsel in Vitek v. Miller, ____ U.S. ____, 98 S.Ct. 2276, 56 L.Ed.2d 381 (1978). A state statute authorized the transfer of a state prisoner, without his consent, to a state mental hospital upon a finding by a physician or psychologist that the prisoner suffered from a mental disease or defect and that he could not be given proper treatment within the facility in which he was confined. The Supreme Court had noted probable jurisdiction in 434 U.S. 1060, 98 S.Ct. 1230, 55 L.Ed.2d 760 (1978); however, it was learned that the plaintiff had been granted parole for the purpose of allowing him to receive inpatient psychiatric care at the vererans hospital. Therefore, the Court vacated the judgment of the district court and remanded for consideration of mootness.[186]

Cruz v. Ward, 558 F.2d 658 (2d Cir. 1977), cert. denied, 434 U.S. 1018, 98 S.Ct. 740, 54 L.Ed.2d 765 (1978) reversed the district court which held that the state had been violating the Fourteenth Amendment by returning mental patients from the hospital to prison without adequate procedural protections. The court stated:

> Although the hospital has no formal written or oral guidelines on when a patient should be returned to prison, the doctors testifying seemed to be in general agreement about the principal criteria. They identified the crucial questions as whether the patient is in contact with reality and reacts to the world in a rational manner, and whether his condition may be improved through further hospitalization.

558 F.2d at 660.

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186. See Note, Transfer of Prisoners to Mental Institutions, 69 Journal of Criminal Law and Criminology 337 (1978).

6. Parole Release and Parole Rescission Hearings

While most actions challenging parole release proceedings are brought in habeas corpus, prisoners may challenge these procedures under section 1983 if they are not seeking release on parole. Strader v. Troy, 571 F.2d 1263, 1269 (4th Cir. 1978); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). However, the question of whether the action is habeas corpus or civil rights is not always easy to answer.[187] In Watson v. Briscoe, 554 F.2d 650 (5th Cir. 1977), the court stated:

> Under Preiser, clearly, an injunction restoring good time and mandating immediate parole review is a habeas matter and therefore the district court correctly determined that it should not hear this issue prior to exhaustion of state remedies. . . . [Fulford v. Klein and Meadows v. Evans] also bar a declaratory judgment on these issues at this time, as well as a declaratory judgment stating that the decision of the parole board violated due process both in matters of procedure and in the matter of consideration of invalid disciplinary reports.

554 F.2d at 652.

Kelsey v. State of Minnesota, 565 F.2d 503 (8th Cir. 1977) held that plaintiff's claims attacking the validity of the parole guidelines and procedures applied by the state parole board were claims that would result in speedier release from the state penitentiary if the allegations proved true. Since plaintiff had not exhausted his state remedies the claims should have been dismissed. The court noted that the district court retained jurisdiction over the damage claims. However, in Williams v. Ward, 556 F.2d 1143 (2d Cir. 1977), cert. dismissed, 434 U.S. 944, 97 S.Ct. 128, 54 L.Ed.2d 323 (1978), the court determined that the case could properly be treated as civil rights rather than habeas corpus

187. See Section II,A supra.

since it concerned the manner of parole decision making rather than its outcome.

At the present time the circuits are divided over the question of whether due process applies to parole release hearings. The Supreme Court declined to resolve the conflict in Scott v. Kentucky Parole Board, 429 U.S. 60, 97 S.Ct. 342, 50 L.Ed.2d 218 (1976), and remanded for consideration of mootness after finding that the petitioner had died. In a dissenting opinion Justice Stevens noted the conflict in the circuits and the importance of the question, and the fact that the issue was one which was capable of repetition yet repeatedly evading review:

> The Court granted certiorari to decide whether any constitutionally mandated procedural safeguards apply to parole release hearings. At such a hearing a prisoner may be denied parole, or he may be released subject to specified conditions. The constitutional issue is whether either the outright denial, or the imposition of parole conditions, has the kind of impact on liberty that must be preceded by "due process." The question is extremely important, it has been fully briefed and argued and, in my opinion, should now be decided.

429 U.S. at 60, 97 S.Ct. at 343, 50 L.Ed.2d at 220. In a footnote Justice Stevens stated:

> Its manifest importance is demonstrated by (a) the vast number of parole release decisions that are made every year; (b) the importance of each such decision to the person affected by it; and (c) the extensive litigation, with varying results, which has developed in the federal courts.

429 U.S. at 61 n. 1, 97 S.Ct. 343 n. 1, 50 L.Ed.2d 220 n. 1. In an unpublished opinion the Sixth Circuit had held that the requirements of due process did not apply to parole release hearings.

Basically, the Fifth and Sixth Circuits have determined that due process does not apply, while the D.C. Circuit, the Second, the Fourth, and the Seventh Circuits have determined that it applies to the extent that it requires written reasons for the decision. The Third Circuit requires judicial review to determine whether the board has abused its discretion and the Eighth Circuit holds that due process applies and prisoners must receive reasonable notice of the time of hearing, a right to appear in person and a written explanation of the decision.

In Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976), cert. denied, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283, a habeas corpus action, the court held that the standards required by Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) for parole revocation hearings are not required for parole release proceedings. The court drew a distinction between the loss of a statutory privilege once obtained and the original denial of the same privilege. The court determined that denial of parole is not equivalent to revocation and does not require due process protection.[188] The petitioner was a federal prisoner and the court noted that some circuits have found that the Administrative Procedure Act requires the board to give the prisoner reasons for denial of parole. The court concluded that under the Administrative Procedure Act, the merits of the parole denial decision are subject to judicial review only where the decision is alleged to be so arbitrary and capricious as to be beyond the board's discretion. On the other hand, the courts can more readily review the board's compliance with the Administrative Procedure Act[189] and its own rules. The court found that a prisoner challenging either the decision of the parole board

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188. In King v. Warden, United States Penitentiary, 551 F.2d 996, 1000 (5th Cir. 1977), the court followed Brown v. Lundgren and held that the district court's requirement that the examiner in a parole release hearing be objective hearing officers not previously acquainted with the prisoner was unwarranted.

189. Such as the requirement that written reasons be given, based on 5 U.S.C. § 555 (e).

or the process by which that decision was made must show that the action of the board was so unlawful as to make his custody in violation of the laws of the United States. The plaintiff had not made such a showing and the dismissal of his petition was affirmed.

The Court of Appeals for the Fifth Circuit had earlier held, in an en banc decision, that due process rights do not attach to parole release proceedings.[190] Scarpa v. U. S. Board of Parole, 477 F.2d 278 (5th Cir. 1973), vacated and remanded to consider mootness, 414 U.S. 809, 94 S.Ct. 79, 38 L.Ed.2d 44 (1973), dismissed as moot, 501 F.2d 992 (5th Cir. 1973). Four of the sixteen judges dissented from that opinion. In that case the plaintiff sought declaratory relief and challenged the internal practices and procedures of the board which he alleged denied him due process. The court stated: "Due process rights do not attach at such proceedings. In the absence of flagrant, unwarranted, or unauthorized action by the Board, it is not the function of the courts to review such proceedings." 477 F.2d at 283. In his dissenting opinion Judge Tuttle argued that plaintiff had alleged that the board's actions were arbitrary, fraudulent, unlawful or without reason since he alleged that he had not been granted a hearing at which the relevant factors were considered but had been denied parole solely on the basis of his past criminal record. 477 F.2d at 284.

Craft v. Texas Board of Pardons and Paroles, 550 F.2d 1054 (5th Cir. 1977), cert. denied, 434 U.S. 926, 98 S.Ct. 408, 54 L.Ed.2d 285 (1978) affirmed the district court's dismissal of the complaint, holding that the alleged refusal of the parole board to allow the plaintiff to see his papers on file did not state a cause of action; that the plaintiff failed to present facts in support of his general allegation that the board's guidelines were vague and arbitrary; and that a printed form which indicated several reasons for the denial was sufficient "to comply with whatever due process rights a prisoner may have to be informed as to why he was denied parole."

Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978)

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190. In Cruz v. Skelton, 543 F.2d 86, 94 n. 7 (5th Cir. 1976), the court held that the granting or withholding of parole is not a criminal proceeding or part of a criminal prosecution. Therefore, there is no right to counsel at a parole release proceeding.

affirmed the district court's dismissal for failure to state a claim and stated:

> [T]he mere statement in a complaint that the Parole Board has taken arbitrary and capricious action is not sufficient to state a claim upon which relief can be granted under 42 U.S.C. § 1983. The applicant must set forth specific facts that would, if proved, warrant the relief he seeks. . . . This court has already held that the refusal to allow a Texas state prisoner a hearing before the Parole Board, and the lack of a written statement of the reasons for the Board's decision, do not amount to the deprivation of constitutional rights. . . . The printed form used by the Texas State Parole Board to notify a prisoner of the reasons for his parole denial has been held to be sufficient to comply with whatever due process rights a prisoner may have to be informed concerning why he was denied parole. . . .
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> . . . In making its parole eligibility determinations, the Parole Board may properly consider the length and seriousness of an inmate's prior criminal record.
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> . . . .
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> Parole Board standards in deciding parole applications are of concern only where arbitrary action results in the denial of a constitutionally protected liberty or property interest . . . . The expectancy of release upon parole is not such an interest.

556 F.2d at 1017-18.

Long v. Briscoe, 568 F.2d 1119, 1120 (5th Cir. 1978), relying on Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976), cert. denied, 429 U.S. 917, 97 S.Ct.

308, 50 L.Ed.2d 283 held that a showing of abuse of discretion or arbitrariness is necessary before a federal court will review the factors used to determine federal parole.

A state is not required in every case to award good time credit for pretrial detention. Paprskar v. Estelle, 566 F.2d 1277, 1279 (5th Cir. 1978).

The court in Deveny v. U. S. Board of Parole, 565 F.2d 875 (5th Cir. 1978) held that a federal parolee was not entitled to credit for time spent in a state institution while on parole although his original federal sentence was concurrent with an earlier state sentence.

The habeas petitioner in Burton v. Ciccone, 484 F.2d 1322 (8th Cir. 1973) alleged that when it denied parole the board did not have before it all of the data required by the Rules of the United States Board of Parole, 1971. The court stated: "[T]he Parole Board must substantially comply with its own rules and regulations in reaching its decisions." 484 F.2d at 1324. The court remanded for a determination as to whether or not the hearing had been conducted in accordance with the parole board's rules and regulations and cited the concurring opinion of Judges Clark and Simpson in Scarpa, supra, as authority for its decision. In that opinion the judges had commented that the majority, which held that due process did not attach, agreed with the dissenters that parole hearings must comply with the regulations promulgated by the board. However, in the majority's view, the complaint revealed that the board had complied with its regulations.

Most recently the Eighth Circuit has held that due process applies to parole release hearings. In Inmates of Nebraska Penal and Correctional Complex, 576 F.2d 1274, 1285 (8th Cir. 1978), the court set forth the minimum due process requirements. (1) Every inmate was to receive a formal parole hearing upon first becoming eligible for parole with subsequent hearings discretionary with the board. (2) Each inmate was to receive written advance notice of the hearing date and time, as well as a list of the factors the board would use. (3) Subject to security considerations, every inmate could appear in person and present documentary evidence. (4) A record of the proceedings must be maintained. (5) Each inmate was

entitled to a full and fair written explanation of the decision, including the reasons for the denial and the factors relied upon.

Kelsey v. State of Minnesota, 565 F.2d 503 (8th Cir. 1977) stated:

> An inmate may prevail in a suit seeking reconsideration of parole, or an attack on the parole board's manner of decision making only if the board's action was "flagrant, unwarranted and unauthorized," . . . or if the board failed to substantially comply with the guidelines it has established for itself.
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> . . . There was no evidence before the District Court that supports a determination that the parole board acted in a "flagrant, unwarranted, or unauthorized" manner, . . . or failed to comply with its own guidelines. Absent such a showing the court properly granted the defendants' motion for summary judgment on the damage claim.

565 F.2d at 506-07.

United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015, 95 S.Ct. 488, 42 L.Ed.2d 289 (1974) held that the Due Process Clause of the Fourteenth Amendment requires the state board of parole to provide a state prison inmate with a written statement of reasons when he is denied release on parole. The court reaffirmed its earlier decision in Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023, 91 S.Ct. 588, 27 L.Ed.2d 635 (1971), in which it held that a prisoner desiring parole was not entitled to the entire gamut of due process rights. In Menechino the petitioner was particularly seeking the right to representation by counsel and to cross-examine witnesses. The Johnson court indicated that its decision in Menechino may have been somewhat undercut by

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), which held that parolees are entitled to due process revocation hearings. The court determined, contrary to the Fifth Circuit in Brown, supra, that a prisoner's interest in prospective parole was not distinguishable from his interest in continuing on parole. In requiring that the board provide a written statement of its reasons for denying parole the court stated:

> We do not question the Board's right, within constitutional limits, "to make policy, establish procedures, and to decide particular cases with a minimum of interference." . . . Nor do we suggest that the courts should serve as "super-Parole Boards." But judicial review should be available where the Board has arrogated to itself decisions properly made only by the legislature, when the Board's decision in a case is inconsistent with statutory directives, when improper criteria are used, or when its decision has no basis in the prisoner's file.

500 F.2d at 930. The court found that a statement of reasons requirement would facilitate judicial review, promote "thought by the decider," and promote rehabilitation by letting the prisoner know how he could improve his prison behavior to better his chances for release.

Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975) held that the due process clause does not require the parole board to disclose its release criteria. However, Cicero v. Ogliati, 410 F.Supp. 1080 (S.D. N.Y. 1976) held that a cause of action was stated by an allegation that the state statute which prescribed the basis for parole release granted the board uncontrolled power and caused decision making on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application. The court noted that this assertion, if correct, violated the due process clause. Further: "It is a basic tenet of due process that a statute set forth a comprehensible, even if imprecise, standard of conduct. Language which is so vague that it provides no standard at all offends the notions of fairness

embodied in the due process clause." 410 F.Supp. at 1093.

Zurak v. Regan, 550 F.2d 86 (2d Cir. 1977), cert. denied, 433 U.S. 914, 97 S.Ct. 2988, 53 L.Ed.2d 1101 affirmed the order of the district judge insofar as it required that inmates at Rikers Island be processed for consideration for conditional release within sixty to ninety days of their arrival and that each inmate whose application was denied or deferred be given a written statement of the reasons for the board's action, together with the facts relied upon in reaching the decision. The court reversed the district court insofar as it required the board to grant each prisoner a personal appearance.

Williams v. Ward, 556 F.2d 1143 (2d Cir. 1977) reversed the district court and held that plaintiff was entitled to review documents contained in his parole file. The district court had improperly held that the plaintiff had failed to show that he had been prejudiced by his lack of access to his files. His complaint demonstrated that he knew his mental health had been placed in issue by at least some materials in his institutional files. Similarly, in Coralluzzo v. New York State Parole Board, 566 F.2d 375 (2d Cir. 1977), the court affirmed the district court's holding which required the parole board to give plaintiff access to the evidence in his file. The court held that the minimum period of imprisonment (MPI) hearing conducted pursuant to New York law was subject to the due process clause of the Fourteenth Amendment and that the parole board was required to provide a statement of reasons when it determined a minimum period of imprisonment which exceeded the statutory minimum. In requiring the board to grant plaintiff access to his file the court noted that he asserted a substantial claim that the board had relied upon erroneous information that he was involved with organized crime, which had been stricken from his probation report by a state court order.

The Third Circuit held in Zannino v. Arnold, 531 F.2d 687, 690 (3d Cir. 1976) that due process required the availability of judicial review for consideration of whether "the board has followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious, nor based on impermissible considerations." The court concluded: "In other words, the function of judicial

review is to determine whether the board abused its discretion. This function cannot be fulfilled without making some inquiry into the evidence relied on by the board to support its expressed reasons for denying parole."[191] 531 F.2d at 690.

Parole guidelines promulgated by the United States Parole Commission can be challenged by declaratory judgment action. Geraghty v. U S. Parole Commission, 579 F.2d 238 (3d Cir. 1978).

In Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975), the court found that where the state adopts legislation affording prisoners the right to be eligible for release prior to service of their full sentence, the application of the due process clause is triggered. The court declined to determine how much process is "due" and remanded for consideration by the district court.

Franklin v. Shields, 569 F.2d 784 (4th Cir. 1978), cert. denied, 435 U.S. 1003, 98 S.Ct. 1659, 56 L.Ed.2d 92 held that the minimum requirements of procedural due process apply to parole release proceedings in the state of Virginia. However, there was no constitutional requirement that each prisoner receive a personal hearing, have access to his files, or be entitled to call witnesses in his behalf to appear before the board. The court stated:

> These are all matters which are better left to the discretion of the parole authorities.
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> We agree with the panel dissent that at the present time the only explicit constitutional requisite is that the Board furnish to the prisoner a statement

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191. But see Mosley v. Ashby, 459 F.2d 477 (3d Cir. 1972), decided before Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In Fischer v. Cahill, 474 F.2d 991 (3d Cir. 1973), the court held that an allegation that the plaintiff was denied a statement of reasons alleges a denial of equal protection and dismissal was proper.

of its reasons for denial of parole.

569 F.2d at 800-01.

The parole board may not consider prior uncounseled convictions in its parole release decision, Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978), although it can consider prior criminal records. Wyatt v. United States Parole Commission, 571 F.2d 1089 (9th Cir. 1977).

A state statute which denied credit for parole or probation time against a prison sentence did not violate due process. Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, 425 U.S. 954, 96 S.Ct. 1733, 48 L.Ed.2d 199 (1976).

In United States ex rel. Richerson v. Wolff, 525 F.2d 797, 800 (7th Cir. 1975), cert. denied, 425 U.S. 914, 96 S.Ct. 1511, 47 L.Ed.2d 764 (1976), the court held that due process requires, at the minimum, that reasons be given for denial of parole release. However, the court further held that "a brief statement of the grounds for denial" is sufficient. In Richerson the grounds given were that the grant of parole would deprecate the seriousness of the offense and would not deter others from committing such crimes. The prisoner had been told that it was the seriousness of his commission of the crime which was delaying parole, not the seriousness of attempted murder generally, and he was told to continue his "excellent institutional adjustment and well conceived parole plans." State law required the board to deny parole if release would deprecate the seriousness of the prisoner's offense or promote disrespect for the law. The court found the board's statement of reasons satisfied the minimum due process requirements and affirmed the dismissal of the petition. In Bailey v. Holley, 530 F.2d 169 (7th Cir. 1976), cert. denied, 429 U.S. 845, 97 S.Ct. 125, 50 L.Ed.2d 115, the court held that Richerson would not be applied retroactively.

Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974) found that the board's exercise of its discretion in the parole release decision resulted in the prisoner either suffering a "grievous loss" or gaining a conditional liberty. The prisoner's interest was substantial; therefore, the parole decision was required to be guided by minimal standards of due process. This required that the applicant be given a

written statement of the reasons for denial of his application.

Robinson v. Benson, 570 F.2d 920 (10th Cir. 1978) considered rescission of federal parole which had been approved prior to the petitioner's release. While residing in a federal correctional institution awaiting his release on parole petitioner was arrested on state charges of attempting to pass a bad check. His parole grant was rescinded although the state charges were dismissed due to the inability to locate essential witnesses. The court found that since his parole date had been set the petitioner had more than a mere anticipation of freedom; he had a concrete expectation contingent upon his good behavior. Therefore, he was entitled to the minimum due process procedures outlined in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974), for prison disciplinary proceedings for major misconduct. However, since the petitioner was not yet enjoying his liberty he was not entitled to the type of due process hearing to which parolees are entitled prior to revocation of parole as prescribed in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).[192] The court found that the petitioner was not denied due process when his parole was rescinded after dismissal of the state charge, when he was denied appointment of counsel, when he was not permitted to confront and cross-examine adverse witnesses, and apparently when he was permitted to call only his wife as a witness in his own behalf. The court stated: "[W]e hold that the opportunity to call and cross-examine witnesses is not absolutely essential in a parole rescission proceeding to satisfy due process." 570 F.2d at 923.

7. Parole and Probation Revocation Hearings

a. Due Process Requirements

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) held that the due process clause of the Fourteenth Amendment applies to parole revocation proceedings. Both habeas petitioners had been arrested on parole violator warrants and committed to custody until parole was revoked.

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192. See Section VIII, K,7 infra.

The Court first noted that revocation of parole is not part of a criminal prosecution and the full panoply of rights afforded a defendant in such a proceeding does not apply to parole revocations. "Whether any procedural protections are due depends on the extent to which . . . [the parolees] will be 'condemned to suffer grievous loss.'" 408 U.S. at 481, 92 S.Ct. at 2600, 33 L.Ed.2d at 494.[193] The Court found that the termination of a parolee's liberty does inflict a grievous loss and requires due process proceedings. The Court then recognized two important stages in the typical process of parole revocation--the initial arrest of the parolee and the decision whether to hold him for a final parole revocation decision, and the second stage, the final revocation decision. 408 U.S. at 485, 92 S.Ct. at 2602, 33 L.Ed.2d at 496. The Court found that at the initial arrest stage due process requires that a prompt[194] preliminary hearing before someone not directly involved in the case[195] be conducted at, or reasonably near, the place of the alleged parole violation or arrest[196] to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of

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193. But see cases discussed in Section VIII, K, 1 supra requiring consideration of whether the plaintiff has been deprived of life, liberty or property prior to consideration of grievous loss.

194. See discussion of Moody v. Daggett, infra, Section VIII, K, 7, b.

195. The preliminary hearing must be conducted before someone who is independent but not necessarily a judicial officer. 408 U.S. at 485-86, 92 S.Ct. at 2602, 33 L.Ed.2d at 497.

196. No prejudice was shown by the failure to conduct the preliminary hearing near the place of the alleged violation. The hearing was conducted near the place of the arrest and the probationer was released on bond from the time of his arrest until the final hearing. Kartman v. Parratt, 535 F.2d 450 (8th Cir. 1976). In Mack v. McCune, 551 F.2d 251 (10th Cir. 1977), the court found that the parolee, with assistance of counsel, had waived his right to a local hearing.

parole conditions.[197] The parolee should be given notice that the hearing will take place, that its purpose is to determine whether there is probable cause to believe he has violated parole, and the notice should describe the parole violations alleged.[198] 408 U.S. at 486-87, 92 S.Ct. at 2603, 33 L.Ed.2d at 497.

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197. Where the parolee has been convicted and incarcerated on a subsequent offense there is no need for the preliminary hearing, Moody v. Daggett, 429 U.S. 78, 86 n. 7, 97 S.Ct. 274, 278 n. 7, 50 L.Ed.2d 236, 243 n. 7. The subsequent conviction gives the parole authority probable cause. However, a bond forfeiture is not a conviction for purposes of determining whether the parolee is entitled to a preliminary hearing, Wolfel v. Sanborn, 555 F.2d 583 (6th Cir. 1977). Where one condition of parole prohibited the parolee from leaving the state without permission and he was arrested in another state, no preliminary probable cause hearing was required. Stidham v. Wyrick, 567 F.2d 836 (8th Cir. 1977).

198. In Kartman v. Parratt, 535 F.2d 450 (8th Cir. 1976), the court found that the description of one of the three charges was impermissibly vague but the error was harmless beyond a reasonable doubt. In U.S. v. Evers, 534 F.2d 1186 (5th Cir. 1976), cert. denied, 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626, the court found the notice was sufficient in stating that the basis of revocation was "arrest and possession of marihuana on November 24, 1974." However, in United States ex rel. Carson v. Taylor, 540 F.2d 1156, 1159-60 (2d Cir. 1976), the petitioner was denied due process where revocation was based partially on grounds not included in the notice. The court observed that the board had been aware of the violations well in advance of the hearing and could have given written notice that they would be considered. However, the court stated:

> We do not intend this decision to be viewed as establishing a rule to the effect that in the absence of prior notice to the parolee the Parole Board may never rely upon a parolee's admission of violations as a basis for revoking parole. . . . [S]uch an ironclad rule could prove too impractical, since it would in effect compel the Board, each time an unexpected admission surfaced during the course of a hearing, to adjourn the proceeding to permit the giving of written notice of the violation admitted.

540 F.2d at 1160.

At the preliminary hearing "the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer." 408 U.S. at 487, 92 S.Ct. at 2603, 33 L.Ed.2d at 497. He may confront and cross-examine witnesses unless the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed.[199] The hearing officer must make "a summary, or digest; of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position." 408 U.S. at 487, 92 S.Ct. at 2603, 33 L.Ed.2d at 498. Although the officer is not required to make formal findings of fact or conclusions of law, he should state the reasons for his determination and indicate on which evidence he relied. The officer's determination that there is probable cause to hold the parolee for the final decision of the parole board justifies the parolee's continued detention and return to the correctional institution pending the final decision.[200]

Prior to the final revocation decision the parolee is entitled to a prompt[201] second hearing at which contested facts will be determined and consideration given to whether the facts warrant revocation. The parolee has the right to be heard, to show that he did not violate the conditions of parole, or that revocation is not warranted because of mitigating circumstances. Evidence may be considered which is not admissible in an adversary trial. The Court stated: "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." 408 U.S. at 490, 92 S.Ct. at 2605, 33 L.Ed.2d at 499.

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199. No error was made in refusing to call the two parole officers who prepared the parole violation report which was considered as evidence at the hearing, without finding that an informant would be subjected to risk of harm. Stidham v. Wyrick, 567 F.2d 836, 838 (8th Cir. 1977).

200. 408 U.S. at 487, 92 S.Ct. at 2603, 33 L.Ed.2d at 498. The opinion does not discuss consideration of release on bond.

201. A delay of two months is not unreasonable. 408 U.S. at 488, 92 S.Ct. at 2604, 33 L.Ed.2d at 498.

The Court summarized the minimum requirements of due process as including:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him;[202] (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 499.

Morrissey was followed by Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), which held that probationers facing possible

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202. In United States ex rel. Carson v. Taylor, 540 F.2d 1156, 1161 (2d Cir. 1976), the court held that a parolee must be permitted to see the actual documents considered by the hearing examiners unless there is a showing of good cause for nondisclosure. However, in Stidham v. Wyrick, 567 F.2d 836 (8th Cir. 1977), the court stated: "Although he did not receive copies of (some of) the documents relied upon at the hearing, he was party to the incidents reported in each of them and none of them presented evidence of which he had no prior knowledge. . . . Under these circumstances we find no due process violation." 567 F.2d at 838.

revocation were entitled to preliminary and final revocation hearings as prescribed for parolees in Morrissey. However, Gagnon answered a question left open in Morrissey--whether an indigent probationer or parolee has a due process right to representation by appointed counsel. The court noted that in most cases the probationer or parolee has been convicted of committing another crime or has admitted the charges against him. The introduction of counsel into a revocation proceeding would significantly alter the nature of the proceeding. The state would provide its own counsel and the hearing could become an adversary proceeding rather than an inquiry into the rehabilitation needs of the probationer or parolee. The decision-making process would be prolonged and the financial costs to the state would be substantial. The court determined that the need for counsel must be made on a case by case basis in the exercise of sound discretion:

> Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness--the touchstone of due process--will require that the State provide at its expense counsel for indigent probationers or parolees.
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> . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to

> be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds should be stated succinctly in the record.

411 U.S. at 790, 93 S.Ct. at 1763, 36 L.Ed.2d at 666. The Court noted that the probationer's admission that he committed another serious crime created the type of situation in which counsel need not ordinarily be provided. However, since the probationer claimed his statement had been made under duress and was false, the district court was directed to reexamine the request for assistance of counsel.

Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) held that a probationer was entitled to be represented by counsel at his probation revocation hearing which resulted in the imposition of a ten year prison sentence. Under state law the judge was required to impose the maximum sentence provided by law but was also required to make a recommendation to the parole board of the time the defendant should serve. The actual sentence was determined by the parole board. In Mempa the judge had recommended that the probationer be required to serve only a year. The probationer's original offense was "joyriding." His alleged probation violation was involvement in a burglary for which he was not charged, although he admitted his participation. Another probationer had been placed on probation for three years after his plea to burglary in the second degree. After he was charged with forgery and grand larceny, his probation was revoked and he was sentenced to fifteen years imprisonment on the original burglary conviction. In Gagnon, supra, the Court distinguished Mempa as a case in which probation revocation was combined with a sentence hearing. 411 U.S. at 781, 93 S.Ct. at 1759, 36 L.Ed.2d at 661.

Gill v. Estelle, 530 F.2d 1152 (5th Cir. 1976), cert. denied, 431 U.S. 924, 97 S.Ct. 2199, 53 L.Ed.2d 239 held that it was constitutional error to introduce into evidence, during the punishment stage of a later trial, the defendant's counselless probation revocation. The record does not reveal whether the probation revocation proceeding included resentencing. Citing Mempa, supra, the court stated: "Constitutional law

clearly requires that counsel be afforded to a defendant in a probation revocation proceeding." 530 F.2d at 1153. The court did not discuss Gagnon, supra. Therefore, it is not clear whether the Gill court combined the probation revocation hearing with a resentencing hearing, whether the court held that a counselless revocation of probation cannot be used against the probationer in later proceedings even though under Gagnon the probationer does not have the right to counsel, or whether the court failed to consider Gagnon.

United States ex rel. Martinez v. Alldredge, 468 F.2d 684 (3d Cir. 1972), cert. denied, 412 U.S. 920, 93 S.Ct. 2737, 37 L.Ed.2d 146 (1973) held that a parolee does not have the right to counsel at a mandatory release revocation hearing when the factual grounds for revocation are uncontroverted.

United States v. Evers, 534 F.2d 1186 (5th Cir. 1976), cert. denied, 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 held that where the alleged violation constitutes a criminal offense, probation can be revoked on evidence which is not sufficient to sustain a criminal conviction. The court stated: "All that is required is enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of the probation." 534 F.2d at 1188. Similarly, Mack v. McCune, 551 F.2d 251 (10th Cir. 1977) held that the reversal of a state conviction based upon the same facts as the alleged parole violation did not affect the revocation unless the acquittal removed all factual support from the parole revocation:

> As with probation revocation, all that is required is that the evidence and facts reasonably demonstrate that the person's conduct has not been as good as required by the terms and conditions of the release. . . . Consequently it does not matter that Mack's state conviction was subsequently overturned. . . . Due process requires only that a parolee be permitted to present his mitigating circumstances to the Board, which in this case Mack was.

551 F.2d at 254.

United States v. Manuszak, 532 F.2d 311 (3d Cir. 1976) held that probation can be revoked although the probationer has been acquitted of the criminal charge based upon the same facts as the alleged probation violation. "[T]o revoke probation it is not necessary that the probationer be adjudged guilty of a crime, but only that the court be reasonably satisfied that he has violated one of the conditions of his probation."[203] 532 F.2d at 317.

Robinson v. Benson, 570 F.2d 920 (10th Cir. 1978) stated:

> Furthermore, there is no merit to Robinson's argument that the dismissal of state charges against him removed any basis for the Parole Board's decision to rescind parole. In parole revocation all that is required is that the evidence and facts reasonably demonstrate that the person's conduct has not been as good as required by the terms of his release. Only if as a matter of law the dismissal of state charges removes all factual support from revocation can a parolee be successful.

570 F.2d at 923.

Graves v. Ogliati, 550 F.2d 1327 (2d Cir. 1977) decided that a sentence can be held in abeyance from the initial date of parole delinquency until the parolee is returned to custody for the violation.

Skipworth v. United States, 508 F.2d 598 (3d Cir. 1975) held that the court can extend a probationer's period of probation without notice, hearing, and presence of the probationer.

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203. See also Standlee v. Rhay, 557 F.2d 1303, 1307 (9th Cir. 1977) (parole revocation permissible even though acquitted of criminal charges).

b. Timing of Hearings

Moody v. Daggett, 429 U.S. 78, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976) resolved a conflict among the circuits as to the timing of preliminary and final revocation proceedings. In Moody the federal parolee had pled guilty to federal charges of manslaughter and second degree murder and had received concurrent ten year sentences. The United States Board of Parole issued but did not execute a parole violator warrant which was lodged with prison officials as a "detainer." The board declined the parolee's request to execute the detainer immediately and advised him it would not execute the warrant until he was released from his intervening sentence. The Court upheld the right of the board to delay the hearing until the parolee was taken into custody as a parole violator. The Court stated: "With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which Morrissey sought to protect." 429 U.S. at 87, 97 S.Ct. at 278, 50 L.Ed.2d at 244.

Moody was held applicable to a federal parolee convicted of a state crime while on parole in U.S. ex rel. Caruso v. U. S. Board of Parole, 570 F.2d 1150 (3d Cir. 1978). The court stated: "Whether a different case would be presented if there were a substantial claim of mitigating evidence, we need not decide here." 570 F.2d at 1154. The court suggested that circumstances might require the Parole Commission to hold an immediate hearing to enable the parolee to preserve evidence.[204] 570 F.2d at 1154 n. 9.

In a footnote[205] the Moody Court commented that there was no need for the preliminary hearing required

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204. See also United States ex rel. Hahn v. Revis, 560 F.2d 264 (7th Cir. 1977); Hicks v. United States Board of Paroles and Pardons, 550 F.2d 401 (8th Cir. 1977); Larson v. McKenzie, 554 F.2d 131 (4th Cir. 1977).

205. 429 U.S. at 86 n. 7, 97 S.Ct. at 278 n. 7, 50 L.Ed.2d at 236, n. 7.

by Morrissey[206] when the petitioner had already been convicted of and incarcerated on the subsequent offense. The Court did not discuss the status of the parolee during the period between his arrest and conviction on the intervening charge. Apparently in Moody the parolee was incarcerated on the intervening charge and the parole violator warrant was lodged as a detainer. A different situation would be presented if the parolee was released on bond on the intervening charge and then was arrested on the parole violator's warrant. The parolee would not yet have been convicted and the arrest would appear to constitute the custody required to trigger due process proceedings and the parolee would then appear to have a right to a preliminary, probable cause hearing. It is uncertain whether a preliminary hearing on the state charge would obviate the need for a preliminary parole violation hearing. Still another question arises when the parolee is incarcerated on the intervening charge but would be able to secure his release but for the parole violator warrant. Is he in custody on the parole violator warrant?

Shelton v. Taylor, 550 F.2d 98 (2d Cir. 1977), cert. denied, 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 held there was no error in delaying the federal revocation hearing until the parolee was released on parole on the intervening state sentence although the presence of the federal detainer may have delayed his parole on the state charge and prevented his participation in an education release program.

In Reddin v. Israel, 561 F2d 715 (7th Cir. 1977), the parole board refused to withdraw a detainer placed against the plaintiff and refused to grant him a prompt

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206. McNeal v. United States, 553 F.2d 66, 68 (10th Cir. 1977) observed that a Morrissey revocation hearing is not required until after the execution of the violator warrant when the parolee is taken into federal custody. No due process rights attach while a parolee is imprisoned on the intervening state conviction. However, once a federal parolee is returned to federal custody, a Morrissey type revocation hearing is required within a reasonable time.

parole revocation hearing.[207] Thereupon the plaintiff brought an action against the warden asserting that the detainer had adverse effects on the condition of his confinement in violation of the Fourteenth Amendment. The court of appeals reversed the district court's grant of summary judgment for plaintiff and remanded for resolution of genuine issues of material facts. The court stated:

> The facts in dispute are material to the issue in this case, as the relevant inquiry for the district court is whether the prison officials have deprived Reddin of a protected liberty interest without due process. . . . The warden should have been permitted to offer proof showing that the filing of the detainer deprived Reddin of no greater liberty interest than he would have experienced in any event because of other circumstances attending the character of his particular status as a prisoner.

561 F.2d at 718. However, the court commented on some of plaintiff's claims:

> Reddin's ineligibility for the mutual agreement programming, an experimental and discretionary program which might later be extended to him anyway, is too speculative to be declared a grievous loss to which process is due. . . . The bald assertion that the existence of the detainer resulted in Reddin's being deemed a poor parole risk simply is not supported in the record.

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207. See also United States ex rel. Sims v. Sielaff, 563 F.2d 821 (7th Cir. 1977) (claim that delay preceding final parole revocation hearing violated due process is to be judged by the standards of Barker v. Wingo, 407 U.S. 514, 523 (1972)); Moss v. Patterson, 555 F.2d 137, 139 (6th Cir. 1977) (parolee convicted of a subsequent crime is entitled to a revocation hearing within a reasonable time on his request).

> Reddin [contends] that he suffers a "detrimental psychological effect" because of the detainer . . . . [T]he state need not avoid conduct which may result in "detrimental psychological effects" unless the state acts in a torturous or barbarous manner or with a wanton intent to inflict pain.

561 F.2d at 718.

See Section XI, infra for a discussion of the personal liability of probation and parole officers under section 1983. The board of parole is not a "person" for purposes of section 1983. See Section VIII, B supra.

c. Work Release

The district court in Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978) had improperly dismissed plaintiff's complaint alleging that his work-release status was revoked without a due process hearing such as was given to other prisoners. Plaintiff alleged that prison authorities customarily did not interfere with a prisoner's work-release status unless the prisoner violated some rule of the program or of his work-release contract. The court stated: "If the allegation is established, the plaintiff has been denied his right to due process of law." 579 F.2d at 1371. The court found strong similarities between work release and parole. 579 F.2d at 1371.

8. Loss or Confiscation of Prisoner's Property by Prison Officials

The holding in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), that actions may be brought under section 1983 for deprivation of property without due process of law has resulted in frequent claims by prisoners that institution officials have withheld or confiscated their personal property. In his article, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, Circuit Judge Ruggero J. Aldisert stated: "Lynch, unfortunately, has made the federal court a nickel and dime court. A litigant now has a passport

to federal court if he has a 5-dollar property claim and can find some state action."[208] 3 Arizona State Univ. L. J. 557, 569 (1973).

The court vacated the district court's order dismissing the complaint prior to service for failure to state a cause of action in Lewis v. State of New York, 547 F.2d 4 (2d Cir. 1976). The plaintiff alleged that seventy dollars had been taken from his commissary account to satisfy a ninety-six dollar debt incurred while he was incarcerated at a different prison. There was no indication that the plaintiff was given an opportunity to contest the debt and confiscation of his funds. In a footnote the court stated: "We would note in passing, however, that confiscation of a prisoner's property without due process is generally a cognizable claim under 42 U.S.C. § 1983. 547 F.2d 6 n. 5.

Alexanian v. New York State Urban Development Corp., 554 F.2d 15 (2d Cir. 1977) held that an allegation that the warden had confiscated plaintiff's money and personal possessions and had refused to return them when he was released stated a claim against the warden.

In Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973), the district court had improperly dismissed as frivolous a complaint alleging that the defendant prison guard entered plaintiff's cell and took seven packages of cigarettes. The defendant had first entered the plaintiff's cell and had taken some food. When the plaintiff objected, the defendant told him that he was an officer of justice and "his authority lay in the social positions." When plaintiff threatened to institute action against the defendant if he ever entered the cell again without authority, the defendant responded that the plaintiff had no remedy to prevent him from taking whatever he wanted out of the cell. The defendant said, "I'll prove it to you," and took seven packages of plaintiff's cigarettes. 489 F.2d at 281. The plaintiff's requests to the warden for relief were not answered.

One of the plaintiffs in Wooten v. Shook, 527 F.2d 976 (4th Cir. 1975), alleged that when he was recaptured after an escape his billford containing

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208. But see Nickens v. White, 536 F.2d 802 (8th Cir. 1976), discussed infra.

thirty-three dollars in cash together with some personal pictures and papers was seized by the defendant correctional officer. The cash had been placed in his prison trust fund account but the billford and its remaining contents had not been returned to him. The defendant filed an affidavit in which he admitted he had taken plaintiff into custody and had taken possession of his wallet. The cash was deposited in the prison trust fund account and the wallet and personal papers were later placed on the transfer bus to be sent to Central Prison in Raleigh where the plaintiff was incarcerated. The plaintiff filed a responsive affidavit in which he admitted the money had been credited to his account but stated he had not received the wallet. The court stated:

> We agree with the district court that the seizure of the plaintiff's wallet by the defendant was neither unreasonable nor arbitrary, and since the statement in the defendant's affidavit relative to placing the wallet on the prison bus was uncontroverted there was no triable factual issue and summary disposition of the case was appropriate.

527 F.2d at 977.

An action was brought against the Director of the Texas Department of Corrections in Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975). Plaintiff sought compensatory damages in the amount of $427.75 for lost articles and $1,000 in punitive damages. He alleged that prison guards had confiscated his radio and had negligently left his watches, wedding ring, electric fan, and other articles in a place exposed to thieves. The articles were subsequently stolen. The opinion reveals that plaintiff's demand for punitive damages was supported by allegations of malice and criminal intent, apparently on the part of the guards who were not named as defendants.

The court held that the district court had acted improvidently in dismissing the complaint without hearing and without requiring a responsive pleading and stated:

> It is established law that prison administrators may under

> certain circumstances be held vicariously liable for the acts of their subordinates. . . . It is also now clear that a civil rights action lies for wrongful confiscation or loss by prison officials of an inmate's property.

519 F.2d at 1136.

Carter would appear to conflict with Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), discussed infra, in which the court required more than negligence to impose liability upon a defendant, and Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1976), in which the court noted that respondeat superior was not applicable to impose liability upon supervisory personnel for confiscation of a prisoner's property by others. The allegation of malice and criminal intent, apparently on the part of the guards who were not defendants in Carter, which is absent in Milton, would not appear to be a relevant distinction between the cases, although under Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), and Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976), malice or lack of malice on the part of the defendant is relevant.

In Fox v. Sullivan, 539 F.2d 1065 (5th Cir. 1976), the plaintiff alleged that while he was in the prison hospital one of the defendants, a prison official, had taken possession of his money and personal effects and had not returned them. The district judge conducted an evidentiary hearing and then granted defendant's motion for summary judgment. The court of appeals reversed and remanded, stating: "The claim of the appellant that a prison official should have but did not return his money and other personal property to him also asserts a protected right which may be determined under Section 1983." 539 F.2d at 1066.

An allegation by a prisoner in Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), that he lost a copy of his trial transcript because guards negligently left his cell door open after a security search, did not allege a deprivation of property without due process of law in violation of the Fourteenth Amendment. The court found that the plaintiff alleged no more than negligent conduct on the part of the guards and decided that negligence constituted neither a state deprivation

of property without due process of law nor action under color of state law:

> Here there was no state action depriving Bonner of property under the Fourteenth Amendment because any state action ended when the guards left the cell after the security search. The loss of the transcript did not occur until after state action had terminated. Similarly, the taking of the transcript was not under color of state law because it was neither encouraged nor condoned by state agents. Any causation between the negligence of the prison guards in leaving the cell door open and Bonner's transcript loss was insufficient to satisfy Section 1983 because it was not alleged that the guards' actions were either intentional or in reckless disregard of Bonner's constitutional rights.

545 F.2d at 567. The court affirmed the summary judgment entered for defendants. That opinion was by the court en banc and followed an earlier opinion by a panel, dated June 2, 1975, 517 F.2d 1311 (7th Cir. 1975), passing on other issues, in addition to plaintiff's claim that he was deprived of property without due process of law in violation of the Fourteenth Amendment. In a footnote the court stated: "[W]e reaffirm the panel's prior judgment as to the remaining claims." 545 F.2d at 569 n. 9. Three claims were determined in the panel decision: (1) plaintiff alleged that the transcript was taken by one of the guards during the conduct of the search which violated the Fourth Amendment; (2) the taking of the transcript was a deprivation of property prohibited by the due process clause of the Fourteenth Amendment; and (3) the defendants interfered with plaintiff's access to the courts protected by the Sixth and Fourteenth Amendments. 545 F.2d at 570. The en banc decision considered only the second claim and the decision was based upon the distinction between negligence and intentional conduct. The opinion does not discuss the theory propounded by the panel--that the availability of an adequate state remedy for a simple property damage claim

avoids any constitutional violation. 517 F.2d at 1319-20. As to the first claim--that the transcript was taken by one of the guards during the conduct of the search which violated the Fourth Amendment--the panel found that a prisoner enjoys the protection of the Fourth Amendment against unreasonable searches to some minimal extent which is less than that possessed by the unincarcerated members of society. If plaintiff can prove the taking of his property by one of the guards, the defendants would have the burden of establishing the "reasonableness" of the seizure. 517 F.2d at 1317. Therefore, the summary judgment as to this claim was vacated and the case was remanded. The panel further held that plaintiff's complaint stated a cause of action in alleging that in taking his transcript the defendants had interfered with his access to the courts protected by the Sixth and Fourteenth Amendments. The court noted that the defendants may have owed the plaintiff a higher degree of care to avoid the loss of his trial transcript than the duty they owed to him with respect to other items of personal property.

Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976), which was decided the day following the en banc opinion of Bonner, supra, held that plaintiff's allegations that a deputy sheriff intentionally took his diamond ring and failed to return it on demand stated a claim for violation of the due process clause. The court stated: "Because defendant Johnson assertedly acted within the sphere of his official responsibility with the malicious intention of causing a deprivation of Kimbrough's constitutional rights, plaintiff had adequately stated a claim under 42 U.S.C. § 1983. As in Monroe and Bonner, it is immaterial that Kimbrough might have an adequate remedy in the Illinois courts." 545 F.2d at 1061. The court noted that "reckless disregard" is sufficient to maintain a section 1983 action. Id.

Secret v. Brierton, ____ F.2d ____, No. 77-1653 (7th Cir. October 13, 1978) required that a prisoner exhaust adequate administrative remedies when he alleges the deprivation without due process of intangible items of personal property of no great monetary value. The court stated:

> [B]ecause the plaintiff has the unfettered right to file his claim in federal court after exhausting

> those procedures, a strict due process analysis does not apply to the adequacy of those procedures. Although we have found no case law guidance in this area, we are of the opinion that the prison procedures will be considered adequate if they satisfy the following broad requirements. They must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally they must not be so inherently unfair that utilization of them would be futile.
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> ____ F.2d at ____.

Sell v. Parratt, 548 F.2d 753 (8th Cir. 1977), cert. denied, 434 U.S. 873, 98 S.Ct. 220, 54 L.Ed.2d 152 affirmed the district court, which had granted plaintiff's motion for summary judgment. The two inmate plaintiffs had been found to be in possession of currency, possession of which was prohibited by the regulations. The money was immediately seized and confiscated by prison officials. While the regulations prohibited inmates from possessing currency, they did not authorize the forfeiture of currency illegally possessed. The district court ordered that the money be returned to the plaintiff who was no longer incarcerated and be credited to the account of the plaintiff who was incarcerated.

The court of appeals recognized that there was no question that the state could forbid its convicts to have money in their possession while undergoing confinement and could take away from them money found in their possession. The court commented that the district court could have decided the case without reaching the constitutional question since the department of correctional services was not authorized by statute to confiscate currency of prisoners. The court stated:

> And we do not hold that a state legislature may not constitutionally provide by statute that such money shall be permanently confiscated, provided that the forfeiture proceedings are surrounded by adequate procedural safeguards, and provided that inmates who are found with money in their possession are given some opportunity to justify their possession notwithstanding their apparent violation of prison rules.

548 F.2d at 759.

In Nickens v. White, 536 F.2d 802 (8th Cir. 1976), the plaintiff alleged that the defendant institution officials had confiscated a catalogue of office supplies which had been mailed to him at the institution. He complained that the confiscation had deprived him of property without due process of law. The court recognized that under Lynch v. Household Finance Corp., supra, the deprivation of property may be the basis for a civil rights action but stated: "We think, however, that the property interests involved in the catalogue as pleaded are so de minimus that the confiscation in the one instance pleaded does not constitute such a taking of property that due process rights are implicated." 536 F.2d at 803. However, the court found that the complaint could allege a deprivation of freedom of speech under the First Amendment, and reversed the dismissal.

The plaintiff in Cruz v. Cardwell, 486 F.2d 550 (8th Cir. 1973) alleged that the defendant sheriff had seized $206 from him in connection with his arrest and had failed and refused to return the money to him upon his transfer to another institution. The plaintiff further alleged that the defendant had failed to follow customary procedures in not transferring plaintiff's personal property when he was transferred to the state institution. The plaintiff had also included copies of correspondence with the defendant in which he stated he had not found a means to pay plaintiff the money. The court reversed the district court's order dismissing the case:

> In this case, we do not view the correspondence from Sheriff Cardwell,

> incorporated in the complaint, as facially rebutting other factual allegations that the sheriff, under color of state law, deprived the appellant of his property in violation of his constitutional rights. It may be that upon the development of a more complete record, there will be a basis for a summary determination. . . . Dismissal on the pleadings, however, was premature.

486 F.2d at 552.

The court affirmed the district court's dismissal of plaintiff's complaint for failure to state a claim in Tyler v. "Ron" Deputy Sheriff, 574 F.2d 427 (8th Cir. 1978). The plaintiff alleged that while he was being held in a holdover cell pending his appearance in court for arraignment, the jailor took from him the legal papers he was carrying. However, the papers were returned to plaintiff later in the day, before he appeared for his arraignment. Plaintiff failed to allege any facts which would support a finding that the taking of his papers interfered with or infringed his right of access to the court. There was no claim that his ability to represent himself at the arraignment or any other future proceeding was impaired or prejudiced. Therefore, the complaint was properly dismissed for failure to state a claim.

The plaintiff in Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1976) had acquired sixty-three paperback books while he was incarcerated at San Quentin. After he was transferred to Deuel Vocational Institute, where the regulations provided that each prisoner was allowed only ten paperback books, all but ten of his books were confiscated. The court noted that respondeat superior was not available to impose liability upon the supervisory personnel and the remaining two individual defendants had acted pursuant to department of correction regulations. The court stated:

> Once it is established that a defendant was acting pursuant to official regulations, the burden shifts to the plaintiff to assert that the defendant was not acting in good faith.

> No such showing has been made by appellant. Even if the regulations are subsequently found to be invalid, a defendant's good faith enforcement of these regulations can still be a defense to a section 1983 suit.

527 F.2d at 1160. The opinion did not discuss whether the regulations merely prohibited possession of more than ten books or whether they specifically authorized the confiscation of any books exceeding the number permitted; nor did it discuss the procedures utilized in the confiscation. An important distinction between Sell, supra, and Milton is that in Sell the plaintiffs sought only the return of their money while in Milton the plaintiff sought money damages equal to the value of the confiscated books.

In an earlier case, Hansen v. May, 502 F.2d 728 (9th Cir. 1974), the plaintiff alleged that his personal property had been confiscated when he was placed in maximum security confinement and that over half of it was not returned to him when he was released. The court reversed the dismissal of the complaint, finding possible violations of both the Fourth Amendment's proscription against unreasonable searches and seizures and the Fourteenth Amendment's right to due process of law. Although the complaint did not allege the defendant's personal involvement in the confiscation of the property, the court noted that if the state imposed liability upon the warden for the misconduct of his subordinates he could be liable under section 1983. 502 F.2d at 730. Further, even if the named defendant could not properly be held personally liable plaintiff could amend his complaint by adding as defendants those prison officials who did gather and hold his personal property.

9. Prison Regulations - Hair Length, Grooming, Dress, Telephone Privileges

a. Convicted Prisoners

In upholding regulations promulgated by the North Carolina department of correction, the Supreme Court, in Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) emphasized

that courts must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." 433 U.S. at 125, 97 S.Ct. at 2538, 53 L.Ed.2d at 638. In that case the test applied by the Court to determine the validity of the regulations was whether they were reasonable, whether they were consistent with the inmates' status as prisoners, and whether they were consistent with the legitimate considerations of the institution. 433 U.S. at 130, 97 S.Ct. at 2540, 53 L.Ed.2d at 641.

Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) involved challenges to a prison regulation which provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." The court upheld the regulation after analyzing it in terms of the legitimate policies and goals of the corrections system. These policies and goals it identified as internal security within the institution itself and deterrence of crime by confining criminal offenders in a facility where they are isolated from the rest of society, and giving the rehabilitative processes of the corrections system the opportunity to correct the offender's demonstrated criminal proclivity. The Court concluded: "It is in light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." 417 U.S. at 823, 94 S.Ct. at 2804, 41 L.Ed.2d at 502.

Prison regulations may be challenged on the ground that they are over-broad, they are not reasonably related to the maintenance of proper order in the prison, or they were unreasonably applied to the plaintiff. United States ex rel. Jones v. Rundle, 453 F.2d 147 (3d Cir. 1971). In Rundle, the plaintiff was placed in maximum security as a matter of routine procedure because he was a pretrial detainee. He was not permitted to attend congregate religious services and alleged he was denied his constitutional right to practice his religion freely.

Ford v. Schmidt, 577 F.2d 408 (7th Cir. 1978) upheld prison regulations preventing inmates from passing property to each other without authorization. The plaintiffs claimed that they retained property interests which could only be curtailed upon a showing

that the regulation was justified by legitimate interests of penal administration. Plaintiffs claimed that the "no passing" rule was broader than necessary and denied them their constitutional right to possession of property. The court found that the prison officials could establish rules and regulations concerning the possession of property by inmates. The "no passing" rule was rationally related to the security of the institution and did not violate the plaintiffs' constitutional rights.

The plaintiffs in Hill v. Estelle, 537 F.2d 214 (5th Cir. 1976) challenged regulations requiring them to wear their hair short, prohibiting beards and mustaches and allowing only minimal sideburns. The regulations also prohibited phone calls from the prison, and the decoration of cells. These restrictions were not applicable to female inmates. The court stated:

> [W]here prisoner regulations are neither unreasonable nor arbitrary, the Federal Courts will not interfere with the administration of state prisons. . . . [W]e have not yet reached a point where the Federal Courts should second-guess state prison officials on the length of prisoners' hair. The same is true of prison regulations pertaining to making phone calls (plaintiffs have not complained of inability to communicate with courts, counsel, or their families and friends) and decorating their cells. Such regulations do not constitute an abuse of the discretion enjoyed by prison authorities.

537 F.2d at 215. The court further held the failure to apply the regulations to women prisoners did not deny plaintiffs equal protection:

> The regulations impinge on no fundamental right and create no suspect classification. The disparity between the regulations for male and female inmates is not so grievous as to make them arbitrary or unreasonable,

> cruel or unusual, and the wisdom of the disparate regulations will be left to the judgment of state penologists.

537 F.2d at 216.

A prisoner's allegation that the prison officials failed to follow their own regulations in their treatment of him states a cause of action. Finley v. Staton, 542 F.2d 250 (5th Cir. 1976) stated:

> Finley makes an alternative argument that the Board of Corrections arbitrarily failed to follow its own regulations in its treatment of his application. The district court held that the complaint did not state a claim for relief regardless of the extensive factual substantiation presented by plaintiff because a prisoner has no constitutional right to work release status. While this may be so, the complaint clearly contains substantial allegations of denial of procedural due process, and seeks to compel the state corrections officials simply to duly administer the "procedural amenities believed to have been arbitrarily withheld."

542 F.2d at 251. However, in Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert. denied, 434 U.S. 873, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978), the court stated: "The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension." 560 F.2d at 34.

b. Pretrial Detainees

In Dillard v. Pitchess, 399 F.Supp. 1225 (C.D. Cal. 1975), a case involving pretrial detainees, the court stated:

> The Sheriff necessarily has developed a list of rules of conduct that prisoners are obliged to obey. These rules should be posted in a more legible and widespread manner, and amendments thereto should be promptly and more thoroughly publicized, in order to insure that the inmates understand clearly what is expected of them.

339 F.Supp. at 1241.

In Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), the court of appeals disapproved the district court's involvement in the emotion-laden controversy concerning prisoners' telephone services. The court stated: "Although pretrial detainees enjoy a first amendment right to communicate by telephone with persons outside the prison, that right has never been construed to mandate a special level of telephone service." 573 F.2d at 126.

There was evidence in Williams v. Hoyt, 556 F.2d 1336, 1338 (5th Cir. 1977) to support the jury's verdict that plaintiffs' rights were not violated when their hair was sheared after their arrest. The defendants had claimed that plaintiffs' hair had been "filthy and insect-infested" and that it was sheared under the sheriff's jail regulations in the interest of "health, sanitation, and the maintenance of a clean, disease-free jail."

The district court in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978) had improperly ordered that pretrial detainees were to have the same full and free access to telephones as persons freed on bail--the opportunity to "call anyone to discuss any matter without having to account for the reasons for the call." 570 F.2d at 373:

> This standard is incorrect both because the court wrongly compared the freedom of those on bail and of detainees, and because the court wrongly placed the burden of justification entirely upon the state. By applying too demanding a standard to the actions of the Jail authorities, the court failed to

> consider whether limitations on telephone use reasonably reflected legitimate apprehensions about the security and order of the Jail.

Id.

The court in Dillard v. Pitchess, 399 F.Supp. 1225 (C.D. Cal. 1975) discussed the right of pretrial detainees to have access to telephone communications.

> Under present regulations, prisoners may make outgoing telephone calls only pursuant to court order and in emergency situations as authorized by the watch commander. Nothing in the need to detain a prisoner pending trial requires that he be substantially restricted in his ability to be in telephone communication with the outside world. Pay telephones should be installed in such numbers and at such locations that all prisoners can have reasonable access to them at all reasonable times.

399 F.Supp. at 1240.

In Brenneman v. Madigan, 343 F.Supp. 128 (N.D. Cal. 1972), the court noted that "[w]hile a convicted prisoner may have no right to make any telephone calls at all, . . . a pretrial detainee does."[209] 343 F.Supp. at 141.

Wolfish v. Levi, 573 F.2d 118, 132-33 (2d Cir. 1978) held that the district court had improperly required prison officials to permit pretrial detainees to wear their own clothes unless they volunteered to wear correctional uniforms. Although the jumpsuits were "aesthetically obnoxious" to some inmates, the institution had demonstrated a legitimate security interest in readily identifying inmates that outweighed the inmates' desire to control their own appearance.

Seale v. Manson, 326 F.Supp. 1375 (D. Conn. 1971) held that the regulations prohibiting beards and goatees could not be applied to plaintiff Seale, a pretrial detainee, but that the restrictions on dress complained of by plaintiff Huggins were reasonable.

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209. See also Collins v. Schoonfield, 344 F.Supp. 257, 259 (D. Md. 1972).

10. Pretrial Detainees[209a]

Detainees are protected from unconstitutional conditions of confinement by the due process and equal protection clauses of the Fourteenth Amendment. Some circuits apply the Eighth Amendment's proscription against cruel and unusual punishment although pretrial detainees have not been convicted of a crime and their incarceration is therefore not punitive.

In this section the guiding principles discussed by the circuits will be reviewed. However, since pretrial detainees generally complain of the same conditions challenged by convicted prisoners under the Eighth Amendment, cases by pretrail detainees complaining of specific conditions of confinement are discussed in the previous sections on specific Eighth Amendment violations.

Campbell v. McGruder, 580 F.2d 521, 527 (D.C. Cir. 1978) observed that a consideration of the conditions of confinement of pretrial detainees must begin with the premise that they are presumed innocent. Since they are not convicted of a crime they cannot be punished. The court stated:

> [E]ach restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration. To evaluate these necessities we will look to the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pretrial detention at a feasible cost.
>
> Second, the presumption of innocence requires that, to as great an extent as practically possible, the pretrial detainee leave jail no worse off than he entered it . . . . Therefore, conditions of confinement that are likely to impair a detainee's mental or physical health should be subjected to the closest scrutiny and can be justified only by the most compelling necessity.

209a. The Criminal Appeals Bureau of the Legal Aid Society of the City of New York has prepared an exhaustive outline, "Index to the Law of Conditions and Practices of Pre-Trial Detention."

> Third, pretrial detention occurs in the important interval directly preceding trial. The conditions of pretrial confinement cannot be permitted negatively to affect the outcome of the criminal process.
>
> Fourth, the responsibilities of the jail increase as the period of the detainee's incarceration grows longer. Conditions that might be tolerable for ten days, might be unacceptable if imposed for a month or longer.
>
> Finally, we will not engage in balancing to determine the constitutionality of conditions of pretrial confinement if they are otherwise violative of the Constitution.

580 F.2d at 531-32. The court agreed with the Second Circuit that pretrial detainees are entitled to protection from cruel and unusual punishment as a matter of due process.

The First Circuit, in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978), observed that other circuits had ruled that states may deprive pretrial detainees of liberty only to the extent necessary to insure their presence at trial. However, jail order and security are entitled to great weight when balancing the state's interest against the liberty interest of detainees. The court determined that the constitutional provision which most appropriately protects pretrial detainees is the due process clause of the Fourteenth Amendment. The court stated: "Restrictions on conditions of confinement that are without reasonable relation to the state's purpose in confining a detainee -- his production at trial -- violate due process." 570 F.2d at 369. The court further observed that the detainee's presumption of innocence does not require his jailors to act as if he were not a security risk. 570 F.2d at 369 n. 4. Commenting on the relevance of cases decided under the Eighth Amendment, the court stated:

> The due process clause requires a state to play its limited custodial role in a reasonable, and hence a

> humane, manner. It is impossible to conceive of situations where treatment so cruel or barbaric as to violate the eighth amendment if visited upon a sentenced prisoner would satisfy a detainee's due process rights.

570 F.2d at 370. The court questioned the applicability of the equal protection clause in detainee cases and noted that other courts which had utilized an equal protection analysis had usually adopted a "strict scrutiny" approach under which the state carried the burden of justifying every restriction imposed upon an inmate on the basis of "compelling interest," and demonstrating that each measure taken was the "least restrictive alternative." The court rejected this analysis, referring to Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2531, 53 L.Ed.2d 619 (1977), which held that the district court had improperly placed upon the prison officials the burden of showing affirmatively that the prisoners' union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order." The court described its test as follows:

> We believe that the proper standard by which to review the actions of those lawfully entrusted with the custody of detainees is that normally employed in reviewing administrative actions: whether the actions of jail authorities are arbitrary or capricious; whether they are lacking in a reasonable relationship to the limited purpose of the confinement; and whether they are otherwise not in accordance with law.

570 F.2d at 371. The court noted that the "strict scrutiny" test would substitute the values and judgments of the court for the values and judgment of the legislature and prison administration.

The district court had improperly adopted a presumptive rule under which it would be unconstitutional to treat a detainee less well in any particular instance than a sentenced inmate. The court noted

that while the treatment of other prisoners was relevant, it was not conclusive. Facilities for short term jail prisoners need not be as comprehensive in all respects as those provided for prisoners serving terms of years. Similarly, a detainee with a serious felony criminal record would not be entitled to as lenient security measures as a prisoner serving a misdemeanor sentence. 570 F.2d at 371.[210]

Seale v. Manson, 326 F.Supp. 1375 (D. Conn. 1971) stated: "Unconvicted detainees may be treated as convicts only to the extent the security, internal order, health, and discipline of the prison demand; considerations of rehabilitation, deterrence, or punishment are not material.[211] 326 F.Supp. at 1379.

The Second Circuit in Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), stated:

> [P]retrial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration." . . . This standard of compelling necessity is neither rhetoric nor dicta. And we have made it clear that deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity, . . . administrative convenience, . . . or by the cold comfort that conditions in other jails are worse.

573 F.2d at 124. However, the court further recognized

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210. Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978) stated: "[D]ifferences in the conditions of the two institutions [jail for pretrial detainees and penitentiary for convicted prisoners] would not, on their face, be sufficient to establish a constitutional violation, since such differences might be attributable to the distinct nature and functions of the two institutions." 580 F.2d at 532.

211. See also Inmates of the Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973), aff'd 494 F.2d 1196 (1st Cir. 1974), cert. denied sub nom. Hall v. Inmates

that courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform:

> [O]nce it has been determined that the mere fact of confinement of the detainee justifies the restrictions, the institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded. We may disagree with the choice of means, but it is not wise for us to second-guess the expert administrators on matters on which they are better informed . . . . Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?

573 F.2d at 124. The court noted that judicial intervention is more restricted in the case of sentenced prisoners than pretrial detainees. "An institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety. The Constitution does not require that sentenced prisoners be provided with every amenity which one might find desirable." 573 F.2d at 125. The court further stated: "[A]dministrative inconvenience can never excuse the deprivation of the constitutional rights of pretrial detainees."[212] 573 F.2d at 127.

Rhems v. Malcolm, 507 F.2d 333 (2d Cir. 1974) upheld the findings of the district court that the conditions of confinement at the Manhattan House of Detention for Men, occupied primarily by pretrial

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of Suffolk County Jail, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189.

212. See also Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975) (inadequate resources of finances may never be an excuse for depriving detainees of constitutional rights).

detainees, constituted a denial of due process. Noting that the "cruel and unusual punishment" test was not applicable to pretrial detainees, the court held that it was enough if the "very uncomfortable" conditions were unnecessary or, if compared with convicted inmates in other institutions, constituted a denial of equal protection of the laws:

> The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail; and the same constitutional provisions prevent unjustifiable confinement of detainees under worse conditions than convicted prisoners.

507 F.2d at 336. The court further stated: "[W]e . . . adopt the approach taken by the district judge here that a detainee is entitled to protection from cruel and unusual punishment as a matter of due process and, where relevant, equal protection." 507 F.2d at 337. The conditions found to be unconstitutional were the following: all detainees were kept in maximum security because there was no classification system to winnow out the approximately twenty percent for whom maximum security might be necessary; inmates were denied contact visits; inmates were allowed only fifty minutes per week for exercise; the extremes of heat and noise, poor ventilation, and the inability to see the sun in the sky "in some instances threaten, and in all cases unnecessarily burden the health of the detainees." 507 F.2d at 337.

In the Third Circuit it is the due process clause, and, on some occasions the equal protection clause of the Fourteenth Amendment, which protect pretrial detainees, rather than the Eighth Amendment's prohibition against cruel and unusual punishment. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079-80 (3d Cir. 1976); Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978). In U.S. ex rel. Tyrrell v. Speaker, 535 F.2d 823 (3d Cir. 1976), the court commented: "[T]he only legitimate state interest in the detention of an accused who cannot raise bail is in guaranteeing his presence at trial." 535 F.2d at 827. In that case the plaintiff had been placed in administrative segregation because of his status as

an untried and unconvicted prisoner. However, Main Road v. Aytch, 565 F.2d 54 (3d Cir. 1977) recognized that security is a relevant concern of prison officials and justifies limitations of rights normally accorded other citizens. Patzig, supra, recognized that decisions applying the cruel and unusual punishment clause to convicted prisoners are useful analogies in considering the rights of pretrial detainees. Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975) stated:

> [T]he federal courts should be reluctant to interfere in matters regarding the internal administration of the states' pretrial detention systems . . . . Furthermore, though there may be differences in the rights enjoyed by pretrial as contrasted with sentenced prisoners, lawful imprisonment by its nature requires a dilution of the rights and privileges normally enjoyed by the general public outside the prison walls.

522 F.2d at 1085-86. That case challenged the superintendent's policy of denying prisoners' requests for press conferences on the basis of their expected content.

Collins v. Schoonfield, 363 F.Supp. 1152 (D. Md. 1973) stated:

> [P]rison officials quite obviously must have full power and authority to discipline pretrial as well as post-trial detainees in order to maintain the order and security of an institution . . . . Similarly, inmates who, like plaintiffs, endanger the lives and safety of prison guards or violate Jail rules are subject to discipline and punishment, even though they may be pre-trial detainees.

363 F.Supp. at 1169.

Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972), cert. denied, 409 U.S. 848, 93 S.Ct. 53, 34 L.Ed.2d 89 (1972) found that plaintiffs had shown they were

deprived of due process through the infliction of summary punishment. Plaintiffs had been arrested while engaged in a civil rights march without a parade permit. There was insufficient space in the jail to accommodate the arrestees who did not make bond and they were taken by bus to the state penitentiary without any prior appearance before a magistrate to have bond set. The district court should have directed a verdict against the chief of police who had decided, contrary to the requirements of a state statute, that no one would be taken before a magistrate who had not posted bond. At the state prison the plaintiffs were placed in a section of the prison reserved for felons who were required to be in maximum security. (The felons had been removed to another section of the prison.) Each person was compelled to take a laxative and many of them were stripped of their clothing. Four to eight persons were placed in cells designed to accommodate two persons with two bunk beds, one lavatory, and one commode in each cell. They were given no mattresses, pillows, or covers. They slept on the bare steel beds or on the floor. The temperature ranged from sixty to seventy degrees and they huddled together for warmth. Toilet paper was in short supply. The court concluded that these facts made out a case of summary punishment without any semblance of due process. 456 F.2d at 841.

The Seventh Circuit in Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976) stated:

> We hold that as a matter of due process, pretrial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial . . . . Since they are convicted of no crime for which they may presently be punished, the state must justify any conditions of their confinement solely on the basis of ensuring their presence at trial. Any restriction or condition that is not reasonably related to this sole stated purpose of confinement would deprive a detainee of liberty or property without due

process, in contravention of the Fourteenth Amendment.

542 F.2d at 999-1000. The court directed that, upon remand, the plaintiffs should be permitted to introduce evidence that they were denied the opportunity to work inside the institution on jobs or projects not necessarily provided by the state.

Dillard v. Pitchess, 399 F.Supp. 1225 (C.D. Cal. 1975) applied the balancing test as follows:

> Any deprivation of liberty is, of course, very substantial punishment. But the punishment imposed upon a man by confining him in the Hall of Justice jail in order to insure his presence at trial is far more onerous than the legitimate purpose of such confinement can justify.
>
> . . . .
>
> [I]f public safety and the effective enforcement of the criminal laws are deemed to require the pretrial incarceration of selected defendants, the public must be prepared to pay the cost of keeping them under the reasonably humane conditions that their constitutional rights demand. . . . "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . . ."

399 F.Supp. at 1234-35.

11. Failure to Comply with State Law.

Failure to comply with state procedural law does not, without more, give rise to a claim under section 1983. Martin v. Blackburn, 581 F.2d 94 (5th Cir. 1978).

L. Fourteenth Amendment -- Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

State statutes which require segregation of the races in prisons and jails violate the Fourteenth Amendment. Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968). In a concurring opinion, Justice Black, joined by Justices Harlan and Stewart, stated:

> [P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination.

390 U.S. at 334, 88 S.Ct. at 994, 19 L.Ed.2d at 1213.

Gates v. Collier, 349 F.Supp. 881, 887 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974) found that the prison facilities were segregated by race and that black inmates were subjected to disparate and unequal treatment. The court ordered desegregation of inmate housing and termination of racially discriminatory practices and procedures.

McCray v. Sullivan, 559 F.2d 292 (5th Cir. 1977) stated:

> [P]laintiff's pleadings may reasonably be read as asserting, in addition to those ascertained by the court below, claims that black prisoners are subjected to discriminatory parole criteria as compared to whites, that the parole board was intentionally constituted of racially prejudiced persons, and that prisoners such as he

were administratively segregated for racial reasons and for filing writs. Such claims, however difficult they may be for plaintiff to prove, are ones upon which, if proved, relief can be granted. They should not have been dismissed on a barebones basis.

559 F.2d at 293-94.

A complaint alleging that the plaintiff has been denied visitors because of his race states a claim. Thomas v. Brierley, 481 F.2d 660 (3d Cir. 1973). A complaint alleging that plaintiff was denied permission to purchase certain religious publications and was denied other privileges enjoyed by other prisoners, solely because of his religious beliefs also states a claim. Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964).

The district court in Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) improperly struck down the prison officials' regulations prohibiting meetings of the prisoners' labor union and refusing to deliver packets of union publications that had been mailed in bulk to several inmates for redistribution among other prisoners. The district court had determined that members of the union were being denied equal protection because bulk mailing and meeting rights had been extended to other prisoner organizations, such as the Jaycees, Alcoholics Anonymous, and the Boy Scouts. The district court reasoned that:

> [J]ust as outside the prison, a "government may not pick and choose depending upon its approval or disapproval of the message or purpose of the group," . . . so too, [the prison officials] could not choose among groups without first demonstrating that the activity prescribed is "detrimental to proper penological objectives, subversive to good discipline, or otherwise harmful."

433 U.S. at 133, 97 S.Ct. at 2542, 53 L.Ed.2d at 643. The Supreme Court noted that the district court had improperly treated the case as if the prison

environment were essentially a "public forum." Prison officials "need only demonstrate a rational basis for their distinction between organizational groups." 433 U.S. at 134, 97 S.Ct. at 2543, 53 L.Ed.2d at 643. The Court further stated:

> The District Court's further requirement of a demonstrable showing that the Union was in fact harmful is inconsistent with the deference federal courts should pay to the informed discretion of prison officials. Procunier v. Martinez, 416 U.S. at 405. It is precisely in matters such as this, the decision as to which of many groups should be allowed to operate within the prison walls, where, confronted with claims based on the Equal Protection Clause, the courts should allow the prison administrators the full latitude of discretion, unless it can be firmly stated that the two groups are so similar that discretion has been abused.

433 U.S. at 136, 97 S.Ct. at 2543, 53 L.Ed.2d at 644.

McGinnis v. Royster, 410 U.S. 263, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973) held that a prisoner is not denied equal protection by being denied good time credit for the period he was incarcerated in a county jail before he was sentenced. The fact that jails do not have a significant rehabilitation program provided a rational basis for not giving prisoners good time credit for their pretrial jail detention period.

The district court in French v. Heyne, 547 F.2d 994 (7th Cir. 1976) improperly dismissed plaintiff's claims based upon denial of equal protection. Plaintiffs alleged that the vocational training programs were offered only to inmates with short indeterminate sentences and were never provided to inmates with longer indeterminate and determinate sentences. Further, plaintiffs alleged that educational and vocational programs were provided only to inmates who did not possess a high school degree or a vocational trade. In finding that the complaint stated a claim, the court of appeals stated:

> It is well settled that equal protection does not require absolute equality or precisely equal advantages . . . . Rather, in the absence of fundamental rights or a suspect classification, equal protection requires only that a classification which results in unequal treatment bear some rational relationship to a legitimate state purpose . . . . The requirements of the equal protection clause apply to administrative as well as legislative classifications.
>
> Defendants' contention that equal protection is violated only when a classification deprives a group of rights otherwise secured by the Constitution is erroneous. An examination of equal protection cases reveals that although the involvement of certain fundamental rights invokes the more stringent "compelling interest" test it is by no means essential that the benefits deprived or burdens bestowed by the different treatment be otherwise guaranteed by the Constitution.

547 F.2d at 997. The court found that since a rational basis for the classification was not apparent on the face of the classification itself, the district court had erred in dismissing the claim.

Plaintiffs in LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975) alleged they were denied equal protection in that they were retained in a restricted status institutional dead-lock which had been imposed on the entire prison after an altercation, after other prisoners were released. Defendant's affidavit submitted with their motion for summary judgment stated that some prisoners were released early for the purpose of maintaining critical services and functions of the institution. Granting defendants' motion for summary judgment as to the plaintiff who merely purported to identify certain inmates who were released and whose job assignments and duties were alleged to be nonvital and of a similar nature to those of plaintiffs was proper The court stated: "The equal

protection clause does not take from the state the power to make classifications for a reasonable purpose which do not create invidious discrimination or invade some fundamental interest." 513 F.2d at 649. However, dismissal was improper as to the plaintiff who alleged that he and others were not chosen for release because they had exercised their First Amendment right to criticize the warden and his prison administration. The court stated: "[I]t is clear that the affidavits before the district court raise the issue of whether prisoners similarly situated to plaintiffs, except for First Amendment related activity, have been treated more favorably in the granting of early release from deadlock." 513 F.2d at 649.

In Hodges v. Klein, 562 F.2d 277 (3d Cir. 1977), the plaintiffs who were assigned to the management control unit of the Trenton state prison claimed they were being denied equal protection in that they were denied freedoms and privileges enjoyed by the general inmate population. The court stated:

> If the challenged classification furthers some legitimate state interest, however, it will withstand an equal protection challenge. . . . Given the district court's factual findings regarding the considerable tension and an unusual number of discipline problems within the prison, it is clear that classifications among prisoners maintained the discipline and security in the prisons and thus furthered a legitimate state interest.

552 F.2d at 278.

The district court in Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978) erred in dismissing the complaint for failure to state a claim. The plaintiff alleged that his work-release status was revoked without the same kind of hearing given to other participants in the program. The court stated:

> A state prisoner need not allege the presence of a suspect classification or the infringement of a fundamental right in order to

> state a claim under the Equal Protection Clause. The lack of a fundamental constitutional right or the absence of a suspect class merely affects the court's standard of review; it does not destroy the cause of action. "[I]n the absence of fundamental rights or a suspect classification, equal protection requires only that a classification which results in unequal treatment bear some rational relationship to a legitimate state purpose."

579 F.2d at 1372.

A complaint alleging that plaintiff, a black male, was photographed in accordance with a directive from state officials to banks and other financial institutions to photograph suspicious black males or females coming on the premises stated a claim which had been improperly dismissed by the district court in Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978). The court stated:

> A governmental measure explicitly affecting a single racial group is constitutionally "suspect" . . . . Because the care of the Fourteenth Amendment is the prevention of unjustified official distinctions based on race, . . . racial classifications bear a far "heavier burden of justification" than others . . . . In order to justify the use of a suspect classification, a state must show that its use of the scheme is "necessary . . . to the accomplishment of its purpose or the safeguarding of its interest."

570 F.2d at 90.

Butler v. Cooper, 554 F.2d 645 (4th Cir. 1977) stated:

> The fourteenth amendment equal protection clause embraces a right to be free from racially discriminatory enforcement of a state's criminal laws. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) . . . . The plaintiff correctly stated that in alleging discrimination, one must do more than allege and prove that others have violated the law and are not being prosecuted . . . . Before a claim of unlawful discrimination in the enforcement of criminal laws can be established, the plaintiff must allege and prove a deliberate selective process of enforcement based upon race (or other arbitrary classification).

544 F.2d at 646.

SECTION IX: REQUIREMENTS FOR A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1985 AND 1986

Unlike actions brought under 42 U.S.C. section 1983, section 1985 and 1986 actions do not require state involvement. Section 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. (Emphasis added)

The subdivision of section 1985 which is most frequently cited in prisoner civil rights actions is clause (3) which provides in relevant part:

> If two or more persons in any State or Territory conspire . . .

> for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The requirements for a cause of action under this section are a conspiracy to violate the plaintiff's constitutional rights and racial or some other type of class-based discrimination.[213] Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); Jennings v. Shuman, 567 F.2d 1213, 1220-21 (3d Cir. 1977); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975). The Griffin Court explained this requirement as follows:

> That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others . . . . The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose -- by requiring as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim

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213. See also Note, McLellan v. Mississippi Power and Light Co., 9 Rutgers-Camden L. Rev. 187 (1977); Comment, Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power and Light Co., 90 Harv. L. Rev. 1721 (1977); Note, The Scope of Section 1985(3) since Griffin v. Breckenridge, 45 Geo. Wash. L. Rev. 239 (1977).

> at a deprivation of the equal enjoyment of rights secured by the law to all.[214]

403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 348.

Jones v. United States, 536 F.2d 269, 271 (8th Cir. 1976), cert. denied, 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 750 approved the district court's application of this requirement to an action under section 1985(2)[215] and further approved the conclusion of the district court in Jones v. United States, 401 F.Supp. 168 (E.D. Ark. 1975), that the requirement of racial or class-based discrimination applies equally to all clauses of section 1985.

In Blevins v. Ford, 575 F.2d 1336 (9th Cir. 1978), an action by a non-lawyer against three lawyers, the complaint did not adequately charge class-based animus and was properly dismissed by the district court. The plaintiffs in Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir. 1976) failed to show a class "Based on race, ethnic origin, sex, religion, [or] political loyalty" that could support a section 1985(3) claim.

The requirement of a conspiracy by two or more persons cannot be satisfied by showing acts of two or more persons who are members of a single corporate entity, Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66 (2d Cir. 1976), cert. denied, 425 U.S. 974, 96 S.Ct. 2173, 48 L.Ed.2d 798 (1977).

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214. The Third Circuit most recently interpreted section 1985(3) in Novotony v. Great American Federal Savings and Loan, 584 F.2d 1235 (3d Cir. 1978), cert. granted, 47 U.S.L.W. 3463 (Jan. 9, 1979). In that case the court held that sex discrimination is within the category of invidious class-based animus condemned by section 1985; an individual need not be a member of that class to bring suit; and concerted action among corporate officers and directors to deprive women of equal employment opportunities can constitute a conspiracy in violation of section 1985(3).

215. See also Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976), which found that a "class-based, invidiously discriminatory animus" is required for a cause of action under the second part of section 1985(2) but is not required for a cause of action under the first part of that section.

McNally v. Pulitzer Publishing Co., 532 F.2d 69, 74 (8th Cir. 1976), cert. denied, 429 U.S. 855, 96 S.Ct. 2173, 50 L.Ed.2d 131 (1976) stated: "[I]t must be determined in each Section 1985(3) action whether a constitutional source of congressional power to reach the private conspiracy alleged in the complaint exists," citing Griffin, 403 U.S. at 104, 91 S.Ct. at 1799, 29 L.Ed.2d at 349.

State action is not required in actions under section 1985 as it is required in actions under section 1983. Griffin, 403 U.S. at 99, 91 S.Ct. at 1797, 29 L.Ed.2d at 346.

The requirements for a claim under section 1985 also apply to a claim under section 1986. Taylor v. Nichols, 558 F.2d 561 (10th Cir. 1977).

SECTION X: THE REQUIREMENTS FOR A CAUSE OF ACTION UNDER 28 U.S.C. SECTION 1331 (SUPP. 1978)

When a plaintiff asserts a claim alleging violation of his constitutional rights for which relief is not available under section 1983, it is important to determine whether jurisdiction is available under the general federal question statute, 28 U.S.C. section 1331. Unlike claims under 28 U.S.C. section 1343(3), where no required amount in controversy need be proved, Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 30 L.Ed.2d 424 (1972), a claim that is predicated on 28 U.S.C. section 1331 requires proof that the amount in controversy exceeds $10,000 with the exception of claims against the United States and federal officials. Prior to Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which opened the door to liability of municipalities under section 1983, actions were often brought under section 1331 because prior to Monell municipalities were immune to liability under section 1983 as a result of the Court's decision in Monroe v. Pape, 365 U.S. 167 (1961).

28 U.S.C. section 1331 provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

In cases in which the plaintiff alleges a violation of his federal constitutional rights but fails to satisfy the requirements for a cause of action under section

1983 or 1985(3), consideration should be given to whether he has stated a claim under this section. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) held that a complaint alleging that federal agents violated plaintiff's rights under the Fourth Amendment to the United States Constitution in searching his home and arresting him without a warrant and without probable cause stated a cause of action over which the court had jurisdiction under 28 U.S.C. § 1331. Two important questions raised by Bivens have not yet been answered by the Supreme Court: whether actions can be brought under section 1331 for violations of constitutional provisions other than the Fourth Amendment,[216] and whether the limitations of section 1983 are applicable to actions under section 1331.[217]

The District of Columbia Circuit[218] and the Third Circuit[219] have upheld Bivens claims based upon violations of the First Amendment.

The Third[220] and Fourth[221] Circuits have upheld Bivens claims for violation of the Fifth Amendment.

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216. In the recent case Butz v. Economou, ____ U.S. ____, ____ n. 8, 98 S.Ct. 2894, 2900 n. 8, 57 L.Ed.2d 895, 903 n. 8 (1978), the Court stated, "The Court's opinion in Bivens concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution. We do not consider that issue here."

217. Section 1983 requires that the defendant be a person and that the acts or conduct causing the deprivation must be under color of state or local law.

218. Dellums v. Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977) (Dellums I).

219. Paton v. LaPrade, 524 F.2d 862, 869-70 (3d Cir. 1975).

220. United States ex rel. Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972).

221. State Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156 (4th Cir. 1974).

The Fifth Circuit had upheld a Bivens claim for a Fifth Amendment violation in Davis v. Passman, 544 F.2d 865, 874 (5th Cir. 1977); however, this panel opinion was reversed en banc in Davis v. Passman, 571 F.2d 793 (5th Cir. 1978). The Second Circuit has held there is no authority under Bivens for a claim of money damages against the United States for a violation of the Fifth Amendment. Duarte v. United States, 532 F.2d 850, 852 (2d Cir. 1976).

In City of Kenosha v. Bruno, 412 U.S. 507, 514, 93 S.Ct. 2222, 2227, 37 L.Ed.2d 109, 117 (1973), by remanding for consideration of whether the jurisdictional amount had been met, the Supreme Court implied that actions could be brought under section 1331 for violations of the Fourteenth Amendment.[222] Consequently, the Second,[223] Fourth,[224] Fifth,[225] Seventh,[226] Eighth[227] and Ninth[228] Circuits have recognized that Bivens claims can be based on Fourteenth Amendment violations. The Third Circuit has declined to decide the issue, Patzig v. O'Neil, 577 F.2d 841 (1978). In Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), the court stated:

> Bivens teaches that the existence of an effective and substantial federal statutory remedy for the

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222. See generally Hunt, Suing Municipalities Directly Under the Fourteenth Amendment, 70 N.W. L. Rev. 770 (1975).

223. Gentile v. Wallen, 562 F.2d 193, 196-97 (2d Cir. 1977); see Brault v. Town of Milton, 527 F.2d 730, 734 (2d Cir. 1975), rev'd en banc on other grounds, 527 F.2d 736 (2d Cir. 1975).

224. Cox v. Stanton, 529 F.2d 47, 50-51 (4th Cir. 1975).

225. Reeves v. City of Jackson, Mississippi, 532 F.2d 491, 495 (5th Cir. 1976); Roane v. Callisburg Independent School District, 511 F.2d 633, 640 (5th Cir. 1975).

226. Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 718-19 n. 7 (7th Cir. 1975), cert. denied, 425 U.S. 916, 96 S.Ct. 1518, 47 L.Ed.2d 768 (1976).

227. Owen v. City of Independence, Missouri, 560 F.2d 925, 932 (8th Cir. 1977).

228. Gray v. Union County Intermediate Education District, 520 F.2d 803, 805 (9th Cir. 1975).

> plaintiffs obviates the need to imply a constitutional remedy on plaintiffs' behalf, . . . and we will therefore affirm the district court's dismissal of the fourteenth amendment claims. We express no opinion, of course, on the issue whether a fourteenth amendment remedy may or should be implied in other cases where the plaintiffs have no effective federal statutory remedy.

564 F.2d at 1024-25.

As a result of the holding in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that municipalities are not "persons" for purposes of section 1983, plaintiffs have sought to bring actions against them under section 1331 and Bivens for actions of their employees.[229] The recent overruling of this aspect of Monroe in Monnell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), holding that local governments are "persons" for purposes of section 1983, leaves open the question whether the extent of liability of local governments differs under the two sections. In Monell the Court clearly decreed that municipalities would not be liable under section 1983 on a respondeat superior theory. 436 U.S. at 692, 98 S.Ct. at 2036, 56 L.Ed.2d at 637. The Court indicated that a municipality would be liable only where the unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690, 98 S.Ct. at 2036, 56 L.Ed.2d at 635.[230]

The circuits have been proceeding with caution in imposing municipal liability under section 1331, although the District of Columbia has applied the

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229. See Note, Damage Remedies Agsinst Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922 (1976).

230. See Section VIII,B supra for further discussion of Monell.

doctrine of respondeat superior.[231] The effect of Monell on municipality liability under section 1331 remains to be determined.

The Supreme Court had indicated that standards applicable to state officials in actions under section 1983 are applicable to federal officials in actions under Bivens and section 1331. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) stated:

> If respondent is correct in his contention that defamation by a state official is actionable under the Fourteenth Amendment, it would of course follow that defamation by a federal official should likewise be actionable under the cognate Due Process Clause of the Fifth Amendment. Surely the Fourteenth Amendment imposes no more stringent requirements upon state officials than does the Fifth upon their federal counterparts. We thus consider this Court's decision interpreting either Clause as relevant to our examination of respondent's claim.

424 U.S. at 702 n. 3, 96 S.Ct. at 1161 n. 3, 47 L.Ed.2d at 414 n. 3. Butz v. Economou, ____ U.S. ____, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) stated: "[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."[232]

On the other hand, the Court has declined to decide whether the limitations imposed by section 1983 are applicable to actions under section 1331. Mt.

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231. Dellums v. Powell, 566 F.2d 216 (D.C. Cir. 1977).

232. Accord, Brawer v. Horowitz, 535 F.2d 830, 834 (3d Cir. 1976) (immunity of state prosecutor under section 1983 available to federal prosecutor under Bivens); Ervin v. Ciccone, 557 F.2d 1260, 1262 (8th Cir. 1977) (good faith immunity of Wood v. Strickland, 420 U.S. 308 (1975) for state officials available to federal officials).

Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) stated:

> [W]here an action is brought under Section 1331, the catch all federal question provision requiring in excess of $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction."

429 U.S. at 279, 97 S.Ct. at 572, 50 L.Ed.2d at 478. The Court declined to decide whether the limitations contained in section 1983[233] are applicable to actions under Bivens and section 1331 since this issue had not been timely raised by the defendant. The Court noted that it had been the view of the district court that the limitations contained in section 1983 did not apply. The Court stated: "[W]e assume, without deciding, that the respondent could sue under § 1331 without regard to the limitations imposed by 42 U.S.C. § 1983." 429 U.S. at 279, 97 S.Ct. at 572, 50 L.Ed.2d at 479.

Bivens stated: "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396, 91 S.Ct. at 2004, 29 L.Ed.2d at 626. Brault v. Town of Milton, 527 F.2d 730, 734-35 (2d Cir. 1975), rev'd en banc on other grounds, 527 F.2d 736 (2d Cir. 1975) found that the defendant's status as a municipality was not such a special factor which would counsel hesitation.

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233. Including the requirement that the defendant be a "person." The Third and Fifth Circuits have held that the defendant need not be a "person." Reeves v. City of Jackson, Mississippi, 532 F.2d 491, 495 (5th Cir. 1976); Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31, 44 (3d Cir. 1974), vacated and remanded on other grounds, 421 U.S. 983 (1975), on remand, 538 F.2d 53 (3d Cir. 1976) en banc, cert. denied, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976).

The First Circuit has declined to impose vicarious municipal liability under Bivens and section 1331. Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977) affirmed dismissal of plaintiff's claim against the defendant town based upon the action of a police officer in shooting and killing plaintiff's decedent in the course of an arrest. The court explained its approach to the question as follows:

> When there is a request for the judicial creation of a supplemental damages remedy arising directly under a constitutional provision, Bivens, we think, teaches that a federal court should proceed with caution . . . . It should carefully assess the existing remedies and consider the extent of which there has been a Congressional or other determination that the supplemental remedy should not be available . . . . If the proposed remedy is inconsistent with an act of Congress or constitutional provision, it should not be judicially created if the existing remedies adequately protect the constitutional guarantee in question.

560 F.2d at 42. The court found the existence of a statutory remedy, section 1983, for claims against the persons directly responsible for the plaintiff's injury to be adequate. The court also considered the "Congressional determination that political subdivisions are not to be held liable in damages for violations of constitutional rights" as interpreted in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), to be relevant. 560 F.2d at 39. However, the court emphasized the limits to its holding:

> We emphasize the narrowness of our holding today. Were we faced with a case in which the municipality had ordered the constitutional violation, the application of the constitutional test could be different. Similarly, we express no opinion as to whether specific guarantees, e.g., the taking clause, might require a direct damages action against a policital subdivision.

> . . . Finally, we are not indicating an opinion as to whether the Fourteenth Amendment could authorize suits against political subdivisions for equitable relief only.

560 F.2d at 45. Although the Third Circuit has declined to decide whether a city may be liable under section 1331 and Bivens for a Fourteenth Amendment claim,[234] it has held that a Fourteenth Amendment issue is a sufficiently substantial federal question to vest the court with jurisdiction under 28 U.S.C. § 1331 and thereby empower it to hear the pendent state claims before deciding the federal constitutional question. Pitrone v. Mercadante, 572 F.2d 98 (3d Cir. 1978); Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977), cert. denied, ____ U.S. ____, 98 S.Ct. 3122, 57 L.Ed.2d 1147 (1978). In Pitrone, supra, Judge Gibbons stated in his concurring opinion:

> It is equally sensible for federal courts, in the exercise of their pendent jurisdiction, to rely first on a state tort cause of action and state law respondeat superior liability of municipalities, rather than on a federal constitutional cause of action and a respondeat superior liability implied from the fourteenth amendment. Moreover, even if a particular plaintiff has failed to plead the state cause of action, he should be permitted to amend his complaint in order to incorporate such a theory.
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> . . . .
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> But once the agent has been found liable for a constitutional violation, the state law imposing respondeat superior liability on

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234. Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977) (since the complaint stated a cause of action against the city under 42 U.S.C. § 1981, the court declined to consider a claim under Bivens and the Fourteenth Amendment); Patzig v. O'Neil, 577 F.2d 841 (1978) (case remanded for consideration of pendent jurisdiction over state law claims).

> the municipality must apply. When a state makes the decision to provide in its courts of general jurisdiction for a respondeat superior remedy against municipalities, it cannot discriminate in the application of that remedy simply because the conduct complained of is made illegal by federal law . . . . Thus, in this circuit at least, the establishment of the agent's liability under the Constitution will necessarily establish the respondeat superior liability of his municipal employer.

572 F.2d at 101.

The Seventh Circuit has declined to impose liability upon a city under Bivens and section 1331 on the basis of respondeat superior. See Sterling v. Village of Maywood, 579 F.2d 1350, 1357 n. 16 (7th Cir. 1978). In Jamison v. McCurrie, 565 F.2d 483, 485 (7th Cir. 1977), the court stated:

> In any event, the individual officers' omissions in this case are not of the kind which would warrant holding the City liable for monetary damages. In McDonald v. State of Illinois, 557 F.2d 596 (7th Cir. 1976), we found that it would be inappropriate to apply the respondeat superior principle to hold a county liable where no official policy required its employee to deprive the plaintiff of his constitutional rights. Similarly, there was no evidence here that any rule, regulation or stated policy of the Chicago Police Department required its officers to ignore Daniel O'Malley's pleas that they take his father into custody.

565 F.2d at 485.

The Eighth Circuit holds that municipalities may be liable under Bivens and section 1331 for equitable relief. Owen v. City of Independence, Missouri, 560 F.2d 925 (8th Cir. 1977). However, it declined to

decide whether a municipality would be liable under respondeat superior. The court stated:

> We emphasize that given the facts of this case, we discuss only an equitable remedy, which may include backpay, for an illegally discharged public employee. We do not intend to imply that municipalities are monetarily liable for each and every constitutional violation committed by their agents. For example, cases . . . which refused to hold cities liable on a Bivens theory for brutality, false arrest and imprisonment, and unlawful search and seizure committed by individual police officers, absent proof that the cities' policy-making agencies or officials knowingly encouraged or tolerated such conduct, involve considerations of vicarious liability not present in this case where the conduct of the city's highest ranking officials allegedly resulted in the constitutional violation.

560 F.2d at 933 n. 9.

In actions under section 1331 and Bivens against non-federal defendants,[235] the plaintiff must satisfy the $10,000 amount in controversy requirement.[236] St. Paul Indemnity Co. v. Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938) stated: "[U]nless the law gives a different rule, the sum claimed by

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235. Cervase v. Office of the Federal Register, 580 F.2d 1166 (3d Cir. 1978).

236. See Kenosha v. Bruno, 412 U.S. 507, 514, 93 S.Ct. 2222, 2227, 37 L.Ed.2d 109, 117 (1973); Lynch v. Household Finance Corp., 405 U.S. 538, 546, 92 S.Ct. 1113, 1119, 31 L.Ed.2d 424 (1972); Grant v. Hogan, 505 F.2d 1220 (3d Cir. 1974). See generally 1 Moore's Federal Practice ¶ 0.90.

the plaintiff controls if the claim is apparently made in good faith." 303 U.S. at 288, 58 S.Ct. at 590, 82 L.Ed.2d at 848.[237]

Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978) held that the fact that the plaintiff had been awarded only $65.75 compensatory damages against each of the defendants for their unlawful arrest of him did not establish lack of the requisite $10,000 jurisdictional amount. The court noted that the sum claimed by the plaintiff controls if the claim is apparently made in good faith. The defendant city had not demonstrated or even alleged when the trial began that such a small recovery was inevitable. The court noted that the determination of the amount in controversy is made at the time of suit.

Where the plaintiff does not seek money damages but instead seeks an injunction against allegedly unconstitutional conduct, the determination of whether the amount in controversy exceeds $10,000 is difficult. In Calvin v. Conlisk, 520 F.2d 1 (7th Cir. 1975), vacated and remanded, 424 U.S. 902, 96 S.Ct. 1093, 47 L.Ed.2d 307 (1976), for further consideration in light of Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the Court observed that the jurisdictional amount essential to the federal question jurisdiction is a necessary element. However, the court further observed: "If, as plaintiff contends, the sum or value cannot be alleged because of the priceless rights involved, how can this court infer that essential element?" 520 F.2d at 8. The court also stated:

> [U]nless the law gives a different rule, the sum claimed by the plaintiff in good faith at the time of filing controls . . . . A monetary value is difficult to assess in cases where the violation of fundamental constitutional rights is alleged, and it does not appear that the

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237. See also Mt. Health City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Where the plaintiff seeks unliquidated damages, his demand controls unless the amount claimed is "merely colorable and beyond a reasonable expectation of recovery." 1 Moore's Federal Practice ¶ 93[3].

allegation is not made in good faith.

520 F.2d at 9.

City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976) stated: "The vacation of the judgment by the Supreme Court led to Calvin v. Conlisk, 534 F.2d 1251 (7th Cir. 1976) (Calvin II), which affirmed and remanded the order appealed from. Although Calvin I has no technical precedential value, the opinion therein rendered does provide some assistance in approaching the valuation question present in this case." 546 F.2d at 701 n. 5. The court commented that the "good faith" test of St. Paul, supra is not applicable in an action seeking an injunction. When jurisdictional amount is challenged the plaintiff must prove it is sufficient. 546 F.2d at 702. The court recognized two approaches taken to the valuation:

> Some courts compute the amount on the basis of the value to the plaintiff of the right he seeks to protect . . . . Others look to the pecuniary result to either party which the judgment would produce. . . . This is the preference of Professor Wright, see C. Wright, Federal Courts § 34, at 119, (2d ed. 1970).

546 F.2d at 701. The Seventh Circuit chose to measure the amount in controversy by the value of the right to be protected and found the plaintiff city had not sustained its burden of showing that the right it sought to protect -- to be free from discriminatory prosecution -- was worth more than $10,000.

In Nguyen Da Yen v. Kissinger, 528 F.2d 1191 (9th Cir. 1975), the district found that some children involved in the Vietnamese Orphan "Babylift" were not orphans and had not validly been released into the custody of the adoption agencies. The ultimate objective of the suit was the reunion of these children with their parents. However, jurisdiction under section 1331 was not established. The court stated:

> Plaintiffs seek injunctive relief, not money damages. While all that is required is that the matter in

> controversy be $10,000 in value (not that $10,000 be sought), it is very much an unresolved question in this circuit whether an intangible right of the sort at issue here can be valued to confer § 1331 jurisdiction . . . . We think resolution of that issue here must await the plaintiffs' decision whether or not to amend their complaint properly to allege § 1331 jurisdictional facts.

528 F.2d at 1201 n. 10.

Spock v. David, 469 F.2d 1047 (3d Cir. 1972)[238] stated:

> Section 1331 refers both to sum and to value. In cases in which there is an adequate remedy at law, the recovery of damages, the jurisdictional amount must be determined by reference to the sum of those damages. In cases where there is no adequate remedy at law, the measure of jurisdiction is the value of the right sought to be protected by injunctive relief. In some situations the line between the two types of cases tends to blur, as in an action for damages for infringement of fourth amendment rights.

469 F.2d at 1052. However, Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976) held: "Plaintiff's claim of a 'right' to continue to live in their 'unique,' Arab Moslem majority, neighborhood, even if a 'common and undivided interest,' cannot aid them in meeting the jurisdictional amount required. Such right, clearly 'incapable of monetary valuation' cannot support section 1331 jurisdiction." 532 F.2d at 559.

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238. See same case at 502 F.2d 953 (3d Cir. 1974), rev'd on merits, Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).

Grant v. Hogan, 505 F.2d 1220 (3d Cir. 1974) was an action by a federal prisoner seeking relief from a detainer lodged against him by the state. The court held that he was required to exhaust state remedies before proceeding through federal habeas corpus. There was no jurisdiction under section 1983 since the defendant warden was a federal official. The court stated:

> While he might be able to sue under 28 U.S.C. § 1331, which provides for a general federal question jurisdiction, he would have to satisfy the $10,000 jurisdictional amount requirement, a difficult though not insurmountable problem where injunctive relief is sought with respect to alleged deprivations of constitutional rights. The Petitioner here, of course, has made no attempt to satisfy the jurisdictional amount requirement.

505 F.2d at 1225.

Briggs v. Godwin, 569 F.2d 1 (D.C. Cir. 1977) held that under 28 U.S.C. section 1391(e), the United States District Court for the District of Columbia had proper venue of a civil rights action for money damages against an attorney for the Department of Justice who resided in the District of Columbia and two other prosecutors and an FBI agent who resided in Florida. Plaintiff's claim for money damages against the federal officials did not deprive the court of venue.

SECTION XI: DEFENSES

A. Statute of Limitations

Since there is no federal statute of limitations for civil rights actions under section 1983, the state statute of limitations for analogous actions applies.[239] Walden III, Inc. v. State of Rhode Island, 576 F.2d 945 (1st Cir. 1978); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978); Ammlung v. City of Chester, 494 F.2d 811, 815 (3d Cir. 1974). However, the time of accrual of the cause of action is determined by federal law.[240]

Although the statute of limitations is an affirmative defense, it can be the basis for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure when the bar of the statute clearly appears on the face of the complaint. White v. Padgett, 475 F.2d 79, 82 (5th Cir. 1973), cert. denied, 414 U.S. 861, 94 S.Ct. 78, 38 L.Ed.2d 112 (1973); Burkhardt v. Liberty, 394 F.Supp. 1296, 1298 (W.D. Pa. 1975), aff'd 530 F.2d 693 (3d Cir. 1976).[241] Vinson v. Richmond Police Dept., 567 F.2d 263 (4th Cir. 1977) stated:

> [W]hen new parties-defendant are added by amendment, the commencement of the action as against such defendants, for purposes of assessing the bar of the statute of limitations, does not relate back to the initial filing of the action but is governed by the date of the amendment itself.

567 F.2d at 265.

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239. The same applies to Bivens actions. Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977).

240. Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975).

241. See also Bethel v. Jedoco Construction Corp., 570 F.2d 1168, 1174 (3d Cir. 1978).

In some instances a court must segregate the plaintiff's various civil rights claims and apply a separate statute of limitations to each. Chambers v. Omaha Public School District, 536 F.2d 222, 227 (8th Cir. 1976); Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974).[242]

Where the plaintiff alleges a conspiracy to violate his civil rights he must allege and prove that each defendant to be charged committed an action constituting a civil rights violation in furtherance of the conspiracy within the limitation period. Gual Morales v. Hernandez Vega, 579 F.2d 667, 681 (1st Cir. 1978).

B. Res Judicata and Collateral Estoppel[243]

When the plaintiff is challenging matters which may have been determined against him in the course of his criminal prosecution, has action may be barred by collateral estoppel or res judicata. Under the doctrine of res judicata a final, valid judgment on the merits precludes further litigation of the same cause of action between the same parties or those in privity with them. Where the cause of action is different but some of the issues are the same, the doctrine of collateral estoppel bars reconsideration of those matters which were actually determined in the earlier case. An important distinction between the application of the two doctrines is that res judicata bars reconsideration of both matters which were actually determined in the prior case and those which could or should have been litigated. Collateral estoppel, on the other hand, bars only issues which

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242. See also Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977); Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977).

243. See Currie, Res Judicata: The Neglected Defense, 45 Univ. of Chi. L. Rev. 317 (1978). See also Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 N.W. L. Rev. 859 (1976); Comment, The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions, 1975 U. Ill. L.F. 95 (1975).

were actually finally determined.[244] See Parklane Hosiery Co., Inc. v. Shore, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1979) (47 U.S.L.W. 4079, Jan. 9, 1979). The doctrines of res judicata and collateral estoppel are applicable to section 1983 actions.[245]

Since civil and criminal proceedings, even when based upon the same facts, do not involve the same cause of action, the applicable doctrine in prisoner civil rights actions challenging state court criminal proceedings is usually collateral estoppel.[246] However, res judicata may apply when the plaintiff is challenging the constitutionality of the law he was convicted of violating.[247]

The primary inquiry in the determination of whether collateral estoppel is applicable is whether the issue was actually determined in the prior case. In most cases this requires a review of the record of the state court proceedings.[248] The party

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244. See also Newman v. Board of Education of City School District of New York, 508 F.2d 277 (2d Cir. 1975); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974); see Brault v. Town of Milton, 527 F.2d 730 n. 5 (2d Cir. 1975); see generally 1B Moore's Federal Practice, ¶ 0.401, at 12, ¶ 0.405[1], at 622, [3], at 631; ¶ 0.441[1], at 3772 (2d ed. 1974).

245. See Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n. 18, 95 S.Ct. 1200, 1209 n. 18, 43 L.Ed.2d 482, 493 n. 18 (1975); Preiser v. Rodriguez, 411 U.S. 475, 497, 93 S.Ct. 1827, 1840, 36 L.Ed.2d 439, 454 (1973).

246. Mastracchio, note 244 supra; see 1B Moore's Federal Practice, ¶ 0.418[1], at 2701 (2d ed. 1974). The holding in Mastracchio that res judicata is applicable to section 1983 actions was adopted by the Fourth Circuit in Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977). Rimmer was cited with approval in Wiggins v. Murphy, 576 F.2d 572 (4th Cir. 1978) (per curiam).

247. Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir. 1974), cert. denied, 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686.

248. Cardillo v. Zyla, 486 F.2d 473 (1st Cir. 1973); Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir. 1970), cert. denied, 400 U.S. 846, 91 S.Ct. 93, 27 L.Ed.2d 84. (While

asserting collateral estoppel has the burden of providing the court with an appropriate record of the state proceedings, demonstrating that the same issues and the same evidence were presented at both proceedings, and establishing that the issue was actually determined in the prior proceedings.[249] If there is reasonable doubt as to what was decided by the prior judgment, collateral estoppel should not be applied.[250]

In both Cardillo v. Zyla, 486 F.2d 473 (1st Cir. 1973), and Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909, 95 S.Ct. 828, 42 L.Ed.2d 838, each plaintiff asserted that the defendants had given perjured testimony during the plaintiff's criminal trial. In each case the court of appeals found that the district court had properly dismissed the action under the doctrine of collateral estoppel.

In Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973), cert. denied, 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90, the plaintiff alleged that the defendant, a retired assistant chief inspector of police, had, during the criminal proceedings against plaintiff, "deliberately fed the news media false information 'to slander and influence the court, people and general public against [him].'" 478 F.2d at 522. In his appeal from the state court conviction, the plaintiff claimed that his constitutional rights had been violated because of the prejudicial publicity. The court of appeals found that plaintiff's constitutional rights had not been violated and the Supreme Court denied

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Cardillo was actually a diversity action rather than civil rights, it was later specifically applied to civil rights cases in Mastracchio, note 244, supra.)

249. United States v. Manuszak, 532 F.2d 311, 315 (3d Cir. 1976).

250. Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909, 95 S.Ct. 828, 42 L.Ed.2d 838; Kauffman v. Moss, note 248, supra, at 1274. The Second Circuit noted in Ornstein v. Regan, 574 F.2d 115, 117 (2d Cir. 1978): "This court, however, for policy reasons, has declined in civil rights cases to give res judicata effect as to constitutional issues which might have been, but were not, litigated in an earlier state court action."

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certiorari. Plaintiff had then filed a habeas corpus action based upon his claim that the pretrial publicity had denied him a fair trial. That petition was dismissed without an evidentiary hearing and the dismissal was affirmed on appeal. In the subsequent civil rights action the district judge had permitted the case to go to the jury, which had returned a general verdict of $7,500. The United States Court of Appeals for the Second Circuit observed that both the state court and the federal habeas court had found that the pretrial publicity did not deprive plaintiff of his constitutionally guaranteed right to a fair trial. 478 F.2d at 525. Those determinations precluded reconsideration of a denial of plaintiff's constitutional rights through pretrial publicity and the judgment was reversed with instructions to dismiss the complaint.

In Parker v. McKeithen, 488 F.2d 552 (5th Cir. 1974), cert. denied, 419 U.S. 838, 95 S.Ct. 67, 42 L.Ed.2d 65, the plaintiff brought a section 1983 civil rights action against state officials, charging them with gross negligence in failing to protect him from attack by another prisoner.[251] The plaintiff had filed an action in the state courts which was similar to the federal action except that it had not alleged the violations of federal law. The court of appeals found that the district court had erred in dismissing the case for failure to state a claim, but held that the action should have been dismissed under the doctrine of collateral estoppel since the state court litigation had determined that the prison officials had taken reasonable measures to prevent harm to plaintiff. The doctrine of collateral estoppel by judgment prevented plaintiff from relitigating the negligence issue in the federal courts. 448 F.2d at 559.

Jones v. Bales, 58 F.R.D. 453, 460 (N.D. Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973) held that a Civil Rights Act claim based upon allegations of an unlawful arrest and search relating to the charges upon which plaintiff had been convicted was barred by the

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251. Plaintiff asserted that defendants' gross negligence resulted in a violation of plaintiff's Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right to equal protection of the laws, 488 F.2d at 554.

doctrine of collateral estoppel while the claim relating to another unlawful search which had not been used in either of plaintiff's criminal trials was not barred.[252] This case was cited with approval by the Fifth Circuit in Covington v. Cole, 528 F.2d 1365, 1371 n. 10 (5th Cir. 1976).

Brubaker v. King, 505 F.2d 534, 538 (7th Cir. 1974) found that collateral estoppel would not bar a civil rights action challenging the plaintiff's arrest, even though a state court judge had found probable cause for the arrest. In a civil rights action the test is not whether there was probable cause but whether the officer believed in good faith that the arrest was made with probable cause and whether that belief was reasonable. 505 F.2d at 536-37. The court reviewed defendant's affidavits and found that all the circumstances of the case supported no other conclusion but that all of the officers acted in good faith. The judgment granting defendant's motion for summary judgment was affirmed. 505 F.2d at 539.

While the court in Brubaker found the test to be good faith rather than probable cause, the finding of probable cause would be relevant. If the arrest or search was challenged in the state court criminal proceedings, the doctrine of collateral estoppel would appear to establish that the defendants had probable cause and that their belief was reasonable, leaving only the good faith issue for resolution. If, on the other hand, the state court had found that the officers lacked probable cause for their searches, the defense of good faith might still be available to them as long as their belief was reasonable.

Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971) held that the civil rights plaintiff's conviction for mayhem and assault with a deadly weapon did not bar plaintiff's civil rights action which claimed that the defendant chief of police questioned him after his surrender without advising him of his rights, disregarded his request to consult counsel, and obtained damaging admissions by asserting a desire to be "helpful." 439 F.2d at 1287. In finding that the action was not barred by res judicata, the court of appeals observed that

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252. The evidence seized in the latter search had been suppressed.

plaintiff's claims relating to his interrogation had not been determined in the criminal proceeding because that evidence had been excluded by agreement between the prosecutor, plaintiff's counsel, and the court. Further, the court opined that, as a matter of policy, civil rights actions should not be barred by successful state court prosecutions. 439 F.2d at 1288.

Similarly, in Jackson v. Official Representatives and Employees of Los Angeles Police Dept., 487 F.2d 885, 886 (9th Cir. 1973), the court held that collateral estoppel did not bar a civil rights action challenging the plaintiff's arrest and the search of his car since the records of his trial and unsuccessful federal habeas corpus action revealed those issues had not been considered on their merits.

The Supreme Court held that collateral estoppel prevented the trial of the defendant for armed robbery where he had already been tried and acquitted of the armed robbery of another victim at the same time and place in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Three or four masked men had committed an armed robbery of six men engaged in a poker game. The defendant's trial and acquittal of the robbery of one of the men barred his trial for the robbery of the others. In the context of criminal proceedings collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. The Court stated:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

397 U.S. at 444, 90 S.Ct. at 1194, 25 L.Ed.2d at 475.

The district court did not err in revoking probation based upon probationer's gambling activities although he had been acquitted of gambling charges in the state courts in United States v. Manuszak, 532

F.2d 311 (3d Cir. 1976). Although the police officer who had testified at probationer's state court criminal trial had also testified at his probation hearing in federal court, additional evidence had been presented at his probation revocation hearing. Further, the court stated:

> Iannece completely failed to sustain his burden of: (1) providing the court with an appropriate record of the state proceedings, and (2) demonstrating that the same issues and the same evidence were presented at both proceedings, and (3) establishing that a rational state jury could not have grounded its verdict or acquittal upon an issue or evidence other than that which he now seeks to foreclose.

532 F.2d at 315.

Traditionally res judicata and collateral estoppel have applied only between persons who were parties to the original action or in privity with them[253] and only if the litigant seeking to invoke the doctrine would have been bound if the judgment had gone the other way.[254] However, the courts appear to be relaxing these requirements. Gamboc v. Yelencsics, 468 F.2d 837 (3d Cir. 1972) held that the earlier dismissal of a civil case was a bar to a later case based upon the same cause of action, with additional defendants added. The court found that the relationship of the additional parties to the second complaint was so close to parties to the first complaint that the second complaint was merely a repetition of the first cause of action and therefore was barred. 468 F.2d at 842. The new defendants were able to obtain dismissal as to them although they were not in privity with the defendants in the first action.

In Moran v. Mitchell, 354 F.Supp. 86 (E.D. Va. 1973), the court found that if, as defendants claimed,

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253. See 1B Moore's Federal Practice, ¶ 0.4111[1], at 1251; ¶ 0.441[3], at 3781 (2d ed. 1974).

254. Referred to as the doctrine of mutuality. See 1B Moore's Federal Practice, ¶ 0.412[1], at 1801; ¶ 0.441[3], at 3781 (2d ed. 1974).

the issues which were the bases of plaintiff's claim (that defendants had subjected him to an unconstitutional arrest and search of his vehicle) were the grounds for his motion to suppress in his pending criminal case, the action would be barred by the doctrine of collateral estoppel. In discussing the "mutuality of parties" requirement the court observed that the defendants in the civil rights action were witnesses rather than parties to the criminal proceedings. However, the court found that when a criminal action is brought in the name of the state, all of the law enforcement officers who worked toward the prosecution are, in essence, parties to the action. 354 F.Supp at 89. Therefore, the mutuality of parties requirement would not bar the application of collateral estoppel. However, since the issues were being considered in the state habeas corpus action the court stayed the civil rights action pending the outcome of the habeas corpus action. 354 F.Supp. at 90.

The court affirmed the dismissal of a diversity action alleging that the defendants had participated in giving perjured testimony against plaintiff in the course of his criminal trial in Cardillo v. Zyla, 468 F.2d 473 (1st Cir. 1973). The court of appeals, observing that collateral estoppel operates only as to matters actually litigated and decided at the prior trial, noted that it had examined the record of the criminal case to determine the issues decided by that judgment. The court found that since the defendant's credibility had been determined in the criminal prosecution the civil claim was barred. 486 F.2d at 475. Observing that the civil action was against individuals who were not "parties" at the criminal trial, the court noted that "mutuality of estoppel" was no longer required in most cases, citing as support Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). The court observed: "What is required is that the party against whom the plea of estoppel is asserted [Cardillo] have been a party or in privity with the party to the prior adjudication." 486 F.2d at 475. Similarly in Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973), cert. denied, 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90, the court stated: "[u]nder modern notions with respect to issue preclusion, it is of no moment that the adverse party in the criminal case was the State rather than the police officer who is the defendant here." 478 F.2d at 525.

It has already been observed that res judicata and collateral estoppel apply only to final judgments.[255] However, the failure of a party to take an appeal does not preclude the operation of res judicata or collateral estoppel.[256] Roy v. Jones, 484 F.2d 96 (3d Cir. 1973) observed that, rather than bringing their federal civil rights action under section 1983 urging that their suspensions from office as justices of the peace by the Supreme Court of Pennsylvania were effected without notice and hearing, the plaintiffs could have obtained federal review of the state court's determination by filing an application for a writ of certiorari from the Supreme Court of the United States. Having failed to pursue that course, they were barred by the principles of res judicata from obtaining such review in the lower federal courts. 484 F.2d at 98. Similarly, a plea of guilty admitting the elements of the charged crime precludes a subsequent civil rights action challenging any of the facts which were necessary to the conviction.[257]

In Ellis v. Dyson, 421 U.S. 426, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975), the plaintiffs sought a declaratory judgment that the city loitering ordinance under which they were convicted was unconstitutional. The Supreme Court remanded for a determination as to whether there was a case or controversy within the federal Constitution and the Declaratory Judgment Act. 421 U.S. at 434, 95 S.Ct. at 1696, 44 L.Ed.2d at 282. The majority opinion did not consider the collateral estoppel issue; however, Justice Powell, dissenting to the remand, joined by Justice Stewart, stated: "The court has never expressly decided whether and in what circumstances § 1983 can be invoked to attack collaterally the state criminal convictions." 421 U.S. at 440, 95 S.Ct. at 1699, 44 L.Ed.2d at 286. Justice Stewart further stated: "I would hold that § 1983 does not allow such deliberate circumvention of the state judicial processes, and that when a state defendant knowingly pleads guilty or fails to invoke state appellate remedies his conviction is not subject to

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255. See 1B Moore's Federal Practice, ¶ 409[1], at 1001 (2d ed. 1974).

256. 1B Moore's Federal Practice, ¶ 0.416[5], at 2305 (2d ed. 1974).

257. Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974).

impeachment in a § 1983 action." 421 U.S. at 443, 95 S.Ct. at 1700, 44 L.Ed.2d at 287. Justice Rehnquist, in a concurring opinion, expressed his view that the Court was correct in leaving to the district court on remand the issue treated in Justice Powell's dissenting opinion. 421 U.S. at 435, 95 S.Ct. at 1696, 44 L.Ed.2d at 283.

Guerro v. Mulhearn, 498 F.2d 1249, 1255 (1st Cir. 1974) suggested that when the state court action has not yet run its course the federal civil rights action should be dismissed or held in abeyance until the state proceedings are completed.[258]

Res judicata was held inapplicable to a fact situation involving a continuing series of acts because generally each act gives rise to a new cause of action in Crowe v. Leeke, 550 F.2d 184, 187 (4th Cir. 1977). The court further found that collateral estoppel did not bar the instant action challenging prison mail procedures which allowed correspondence from attorneys to be opened and inspected outside the presence of the inmate-addressee, although a former class action had challenged the mail regulations. The judge's opinion in the earlier case did not discuss the precise issue presented, although the mail regulations generally had been found valid.

If a plaintiff raises an issue which is the subject of another action and defendants are members of that class, the court may refuse to consider the issue if identical factual and legal issues are raised.[259]

Dictum in Hardwick v. Doolittle, 558 F.2d 292, cert. denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978) suggested that res judicata and collateral estoppel could be protected by injunction when necessary to prevent harassment of successful litigants.

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258. See also Mastracchio v. Ricci, note 244 supra; Moran v. Mitchell, 354 F.Supp. (E.D. Va. 1973).

259. Bryan v. Werner, 516 F.2d 233, 239 (3d Cir. 1975); Smart v. Jones, 530 F.2d 64, 65 (5th Cir. 1976), cert. denied, 429 U.S. 887, 97 S.Ct. 240, 50 L.Ed.2d 168.

C. Case in Controversy Problems; Mootness[260]

Article III §2 of the Constitution imposes a threshold requirement that those who seek to invoke the power of a federal court must allege and show the existence of an actual case or controversy. O'Shea v. Littleton, 414 U.S. 488 (1974); Flast v. Cohen, 392 U.S. 83 (1968). The case or controversy must be a continuing one and must be "live" at all stages of the proceedings. Roe v. Wade, 410 U.S. 113 (1973).

A case which presents a case or controversy may become moot due to the passage of time or because of some occurrence affecting the status of the parties. If time or events moot the controversy, the federal courts will not decide the substantive issues unless some exception to the mootness doctrine is present. Those exceptions are:

1. A remaining live issue. If one of several issues becomes moot, any remaining live issue may supply the constitutional case or controversy requirement. Powell v. McCormack, 395 U.S. 486, 497 (1969); Memphis Light, Gas and Water Division v. Kraft, 434 U.S. 919 (1978). For instance, if a claim for injunctive relief and monetary damages is made, the damage claim may provide the necessary controversy if the need for the injunction has passed. Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). A claim for declaratory relief may provide the requisite controversy if an accompanying claim for injunctive relief is moot. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974); Preiser v. Newkirk, 422 U.S. 395 (1975).

2. The class action exception. A named party may maintain an action for a class of persons even if the named party's personal claims become moot. However, in order to take advantage of this exception, the named party must be a member of the class at the time it is certified by the court to be a class action, and his or her claims must have been "live" at that time. Sosna v. Iowa, 419 U.S. 393, 402-403 (1975).

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260. I acknowledge assistance in the revision of this chapter from Professor Bruce Rogow, Nova University Center for the Study of Law, Ft. Lauderdale, Florida [Ed.].

However, this exception can be rendered useless if a change in events removes the actual controversy between the unnamed class members and the defendant. Kremens v. Bartley, 431 U.S. 119 (1977).

3. Class action (uncertified) exception. Even if not a member of the class when the class is certified, the named class member can make a case survive the mootness doctrine in exceptional cases where the named party was a member of the class when the action was filed; the claim is one which has a very temporary life; it is certain that a constant class of persons will continue to suffer the complaint of deprivation; and the lawyers representing the plaintiff have other clients with a continuing live interest in the outcome of the case. Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975).

4. The capable of repetition yet evading review exception. A case presenting an occurrence which (1) was too short in duration to be fully litigated before its cessation and (2) will cause injury to the complaining party in the future is saved from the mootness doctrine because the claim is "capable of repetition yet evading review." Southern Pacific Terminal Co., v. Interstate Commerce Commission, 219 U.S. 498 (1911); Weinstein v. Bradford, 423 U.S. 147, 148-49 (1975); Gerstein v. Pugh, supra.

5. The voluntary cessation exception. Voluntary cessation of unlawful conduct by defendants does not necessarily moot a claim where (1) the challenged illegal practice is deeply rooted and longstanding, Gray v. Sanders, 372 U.S. 368 (1963) or a controversy remains, United States v. W. T. Grant, 345 U.S. 639 (1953); (2) there is a danger of recurring violations. It is the defendant's burden to show that the repetition will not occur. United States v. W. T. Grant, supra.

These principles and the discussion of some of the cases embodying them are set forth below.

Tawwab v. Metz, 554 F.2d 22 (2d Cir. 1977) held that where prison policy allowing only one prisoner at a time to see his attorney had been changed, plaintiffs' claim challenging the policy and requesting injunctive relief was moot. Further, plaintiffs'

claim challenging the prison policy limiting the number of inmates who could participate in classes in religious instruction and Arabic to fifteen and requesting injunctive relief, was also moot since none of the plaintiffs were still incarcerated at the prison. 554 F.2d at 24. In a footnote the court commented that "Any award of damages on the facts of this case, as alleged in the complaint, would be so remote and speculative that it could not stand." 554 F.2d at 24 n. 4.

Preiser v. Newkirk, 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) directed that plaintiff's complaint be dismissed by the district court for failure to present a case or controversy. The plaintiff had been transferred to a less favorable prison without notice of the reasons or opportunity to be heard after he had been identified as one of the inmates who had been canvassing for a prisoner's union. Plaintiff had eventually been returned to the original prison and a memorandum had been placed in his file explaining that his transfer was not for disciplinary reasons and was not to have any bearing on his eligibility for parole or the decisions of the time allowance committee. 422 U.S. at 399, 95 S.Ct. at 2333, 45 L.Ed.2d at 276. The district court held that plaintiff's transfer violated the due process clause of the Fourteenth Amendment and granted declaratory relief although injunctive relief was denied because plaintiff had not shown sufficient threat of another transfer in the future. The Court stated:

> Any subjective fear Newkirk might entertain of being again transferred, under circumstances similar to those alleged in the complaint, or of suffering adverse consequences as a result of the 1972 transfer, is indeed remote and speculative and hardly casts that "continuing and brooding presence" over him that concerned the Court in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974).

422 U.S. at 403, 95 S.Ct. at 2335, 45 L.Ed.2d at 278.

Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350, 352 (1975) determined that plaintiff's action was not rescued from mootness by the

doctrine of "capable of repetition, yet evading review." Plaintiff sought procedural rights in his application for parole. The district court refused to certify the action as a class action and dismissed the complaint. The court of appeals reversed, holding that plaintiff was entitled to procedural rights in connection with the consideration of his application. 423 U.S. at 147, 96 S.Ct. at 348, 46 L.Ed.2d at 352. After the case was set for oral argument before the Supreme Court the parole board filed a suggestion of mootness. Plaintiff had first been granted temporary parole and then had been released from supervision. Therefore, it was clear that plaintiff had no interest in the procedures followed by the parole board in granting parole. In discussing the "capable of repetition but evading review" doctrine, the Court stated:

> Sosna decided that in the absence of a class action the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The instant case, not a class action, clearly does not satisfy the latter element. While petitioners will continue to administer the North Carolina parole system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number.

423 U.S. at 149, 96 S.Ct. at 349, 46 L.Ed.2d at 353.

Although termination of a class representative's claim usually moots the claims of the unnamed members of the class, the Supreme Court recognized an exception

to this in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The plaintiffs were challenging their pretrial restraint of liberty without a judicial determination of probable cause. At oral argument counsel informed the Court that the named plaintiffs had been convicted. The Court stated:

> Their pretrial detention therefore has ended. This class belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See Sosna v. Iowa, 419 U.S. 393 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."
>
> The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

420 U.S. at 110, n. 11, 95 S.Ct. at 861, n. 11, 431 L.Ed.2d at 63, n. 11.

Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. 1975) found that the short average period of confinement of pretrial detainees in the county jail would likely moot each of the plaintiffs' claims for injunctive relief before the district court could rule on a class certification motion. This would result in the issue forever evading review. Therefore, the court

held that "[F]or the purposes of this case, the ultimate 'certification [of a class action] can be said to 'relate back' to the filing of the complaint.'" 528 F.2d at 956.

Similarly, Zurak v. Regan, 550 F.2d 86, 91 (2d Cir. 1977), cert. denied, 433 U.S. 914, 97 S.Ct. 2988, 53 L.Ed.2d 1101, held that the release of all of the named plaintiffs prior to argument before the court of appeals did not moot the class action. The court stated:

> Although a litigant must ordinarily be a member of the class that he seeks to represent at the time the class is certified . . . this case is a "suitable exception" to that requirement. . . . Because of the relatively short periods of incarceration involved and the possibility of conditional release there was a significant possibility that any single named plaintiff would be released prior to certification, although this possibility was less substantial than it was in Gerstein. As in Gerstein, however, the constant existence of a class of persons suffering the alleged deprivation is certain and the court may safely assume that counsel has other clients with a continuing live interest in the issues.

550 F.2d at 91-92.

Spomer v. Littleton, 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974) remanded for consideration of mootness. The plaintiffs sought injunctive relief against the defendant, state's attorney, who allegedly engaged in a broad range of racially discriminatory patterns and practices in the administration of the criminal justice system. After the court of appeals rendered its decision a new state's attorney was elected and was substituted as a party for the original defendant. There was no basis in the record for a conclusion that a controversy existed between plaintiffs and the substituted defendant. There was no

allegation that the new state's attorney would follow the practices of the original defendant.

Justice Stevens, joined by Justices Brennan and Powell, dissented to the Court's remand to the court of appeals for consideration of mootness in Scott v. Kentucky Parole Board, 429 U.S. 60, 97 S.Ct. 342, 50 L.Ed.2d 218 (1976).[261] Certiorari had been granted to decide whether any constitutionally mandated procedural safeguards applied to parole release hearings. Petitioner had been granted parole. Justice Stevens noted that plaintiff claimed he was subject to significant restraints that might not have been imposed if he had received the kind of hearing he claimed the Constitution required. Since the Court would have power to order the objectionable condition removed unless petitioner was accorded an appropriate hearing, the petitioner retained a direct and immediate interest in the outcome of the litigation and Justice Stevens felt the Court retained the power to decide the case on its merits:

> Although I have no doubt that the mootness issue will be correctly decided after the proceedings on remand have run their course, the remand is nevertheless unfortunate. As dispositions in each of the last three years demonstrate, the underlying issue is one that is capable of repetition yet review is repeatedly evaded. Delay in deciding the merits will affect not only these litigants, but also other pending litigation and parole procedures in every jurisdiction in the country. A suggestion of mootness which this Court can readily decide should not be permitted to have such far reaching consequences.[262]

429 U.S. at 63-64, 97 S.Ct. at 344, 50 L.Ed.2d at 221.

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261. See also Section VIII, K, 6 supra.

262. On remand, 556 F.2d 805, 806 (6th Cir. 1977), the court determined that since there was a probability that appellant

The Court remanded to the district court for consideration of the question of mootness in Vitek v. Miller, ____ U.S. ____, 98 S.Ct. 2276, 56 L.Ed.2d 381 (1978), where the plaintiff was challenging on due process grounds a state statute which authorized the transfer of a prisoner, without his consent, to a state mental hospital upon a finding by a physician or psychologist that he suffered from a mental disease or defect and that he could not be given proper treatment within the facility in which he was confined. The plaintiff had been granted parole for the purpose of allowing him to receive in-patient psychiatric care at the veterans hospital. He had accepted the parole and had agreed to treatment at the hospital. Justice Stevens dissented to the remand, noting that plaintiff was on limited parole and was still in the custody of the state. Justice Stevens noted that if plaintiff refused treatment at the hospital, the state asserted the right to transfer him, involuntarily and without a hearing, to another mental hospital. Therefore, the action was moot.

Where plaintiff sought injunctive relief relating to the conditions of confinement in a prison from which he had been transferred prior to filing suit, his action should have been dismissed as moot. Holland v. Purdy, 457 F.2d 802 (5th Cir. 1972). The court stated: "Since Holland was no longer subjected to the complained of conditions at the time this litigation was instituted, nor is he at the present time, the petition should have been dismissed on the ground of mootness." 457 F.2d at 803.

While plaintiff's transfer from the prison moots his claim for injunctive relief relating to conditions of confinement, it does not moot his claim for damages. Wycoff v. Brewer, 572 F.2d 1260, 1262 (8th Cir. 1978); Rhodes v. Bureau of Prisons, 477 F.2d 347 (5th Cir. 1973); United States ex rel. Jones v. Rundle, 453 F.2d 147, 150 (3d Cir. 1971). Transfer also moots a claim for declaratory relief. Inmates v. Owens, 561 F.2d 560 (4th Cir. 1977). Where one of the plaintiffs who had been released had been rearrested and again incarcerated in the prison, his failure to join in the

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Scott would again be subjected to the parole system of Kentucky, his parole was not moot.

appeal prevented his rearrest from saving the action from mootness. 561 F.2d at 562.

An action for release from the maximum security wing was not mooted by plaintiff's return to general population since the notation on his prison record that he was placed in administrative segregation for over two years could prejudice his future chances for pardon or parole and the state law forbade accumulation of time off for good behavior while a prisoner was undergoing discipline for violation of prison rules. West v. Cunningham, 456 F.2d 1264 (4th Cir. 1972).

Wilson v. Prasse, 325 F.Supp. 9 (W.D. Pa. 1971) dismissed as moot plaintiff's request for injunctive relief because he had been transferred to another institution and the case proceeded to jury trial on the question of damages. Prior to trial plaintiff was returned to the original institution and renewed his prayer for injunctive relief. The court submitted the issues to the jury for an advisory verdict. Two of the six interrogatories submitted to the jury were unanswered. By the time the court disposed of the action the plaintiff had been paroled and his request for injunctive relief was again moot.

Where the plaintiff, who brought action against police officers challenging the wiretap of his telephone and the interception of oral communications, had failed to appear for sentencing, jumped bail, and became a fugitive from justice, his action was properly dismissed. Broadway v. City of Montgomery, Alabama, 530 F.2d 657 (5th Cir. 1976).

The plaintiff in Owens v. Brierley, 462 F.2d 125 (3d Cir. 1972) sought to have the defendant warden enjoined from refusing to permit plaintiff to consult privately with his attorney and from continuing to examine incoming mail from the attorney. Plaintiff sought an injunction until his pending criminal charges were disposed of. The court of appeals determined that the action was moot since plaintiff had pled guilty and been sentenced on the charges.

Where plaintiff sought an injunction restraining the defendant superintendent of the institution from interfering with the ordering of kosher food for the

celebration of Jewish holidays which had passed by the time the court of appeals heard the case, the case was moot. Kauffman v. Johnston, 454 F.2d 267 (3d Cir. 1972).

Plaintiff's claims for compensatory damages and injunctive relief were moot in his action challenging his alleged wrongful discharge from employment since he had collected through an arbitration proceeding his back pay and had been credited with his lost time for annual leave purposes. Cochette v. Desmond, 572 F.2d 102, 105 (3d Cir. 1978). Only his claim for punitive damages was not moot and the court determined that plaintiff would not have been awarded punitive damages. See also Thompson v. United States, 453 F.2d 887 (3d Cir. 1971) (defendant had voluntarily given plaintiff the relief he sought in his mandamus action).

Payment of the judgment entered by the district court by defendant's insurance carrier moots the case although it deprives the defendant of the opportunity to vindicate his good name. Phillips v. Cheltenham Township, 575 F.2d 72 (3d Cir. 1978). The court stated: "Our dismissal of this case should not be construed as addressing in any way the finding of liability by the district court, a finding and conclusion which if we were to review on the merits would give us grave concern." 575 F.2d at 73.

Ship v. Todd, 568 F.2d 133 (9th Cir. 1978) held that the plaintiff could bring a civil rights action to expunge his conviction although he had already served his sentence. The court noted that the maintenance of plaintiff's criminal records continued to operate to his detriment.[263]

If only the declaratory judgment is sought, the passage of time may affect its availability. Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) is a case in point. In Steffel the plaintiff alleged that he and others had been told by the police that they would be arrested unless they stopped distributing handbills protesting American involvement in Vietnam on the exterior sidewalk of a shopping

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263. But see Cavett v. Ellis, 578 F.2d 567 (5th Cir. 1978). [Editor's Note: the next footnote will be 267.]

center. Plaintiff left but his companion stayed and was arrested. The arrest of plaintiff's companion demonstrated an actual controversy at the time the complaint was filed. However, the Court noted the developments in the intervening three years reducing the nation's involvement in Vietnam and stated:

> [I]t will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents "a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgement."

415 U.S. at 460, 94 S.Ct. at 1216, 39 L.Ed.2d at 515.

In another case, Ellis v. Dyson, 421 U.S. 426, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975), the plaintiffs had been arrested and charged with violating the city's loitering ordinance. After pleading nolo contendere the plaintiffs brought an action under §1983 seeking a declaratory judgment that the loitering ordinance was unconstitutional. They did not seek injunctive relief against any future application of the statute to them. In discussing the case or controversy requirement the court stated:

> It is appropriate to observe in passing, however, that we possess greater reservations here than we did in Steffel as to whether a case or controversy exists today. First, at oral argument counsel for petitioners acknowledged that they had not been in touch with their clients for approximately a year and were unaware of their clients' whereabouts. . . . Petitioners, apparently, are not even apprised of the progress of this litigation. Unless petitioners have been found by the time the District Court considers this

> case on remand, it is highly doubtful that a case or controversy could be held to exist; it is elemental that there must be parties before there is a case or controversy. Further, if petitioners no longer frequent Dallas, it is most unlikely that a sufficiently genuine threat of prosecution for possible future violations of the Dallas ordinance could be established.

421 U.S. at 434, 95 S.Ct. at 1696, 44 L.Ed.2d at 282.

The lack of a "case or controversy" barred declaratory relief in Ashcroft v. Mattis, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977). The district judge found that the defendant's police officer had acted in good faith when he shot and killed plaintiff's son as he was attempting to escape arrest. He denied both money damages and declaratory relief. Subsequently, the court of appeals determined that the statutes under which the police officer was acting were unconsitutional and the plaintiff was entitled to declaratory relief. The Supreme Court vacated the judgment of the court of appeals and remanded with instructions to direct the district court to dismiss the complaint, based upon its finding that the case did not present a live "case or controversy." The good faith finding barred a damage claim. As to the request for a declaratory judgment the Court stated: "Nor is there any possible basis for a declaratory judgment. For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'" 431 U.S. at 172, 97 S.Ct. at 1740, 52 L.Ed.2d at 222. Further, the Court stated:

> Here, the District Court was asked to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith. No "present right" of appellee was at stake. Indeed, appellee's primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son's death was

> wrongful. . . . Emotional involvement in a lawsuit is not enough to meet the case or controversy requirement; were the rule otherwise, few cases could ever become moot.

Id.

Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), was an action against a state court judge and other officials for conspiring to bring criminal charges against plaintiff. Plaintiff alleged that the judge cancelled plaintiff's original bond and directed the court reporters to alter the trial transcript. Since the judge would be immune from damages, plaintiff sought a declaratory judgment that his actions were unconstitutional and a violation of section 1983. The court of appeals found that the district judge had erred in dismissing the action upon his finding that there was no longer an active controversy between the parties. Although the state appellate court had vacated the conviction and directed a retrial, the record did not reveal the outcome of any subsequent state proceedings against plaintiff. The court stated:

> It is true that courts will grant declaratory relief only if there is "a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests." . . . In this case, whether there is such a substantial controversy will depend upon Slavin's current condition. If he has not been retried on the same charges, these defendants may continue to infringe his constitutionally guaranteed rights. If that possibility were proved, the district court is not foreclosed from enjoining the judge and others from continuing their conduct. It may be, however, that Slavin has been retried and found innocent. If that be true, the district court

> will probably conclude that equitable relief would be inappropriate. If Slavin is presently in prison after having been convicted, whatever controversy may exist would be between Slavin and the state official responsible for continuing his imprisonment. Under those circumstances, there would be no controversy between the judge and Slavin. Because we do not know which of those conditions is true, we remand the claim against Judge Lindsey to the district court for further proceedings.

574 F.2d at 1264.

The district court in Main Road v. Aytch, 565 F.2d 54 (3d Cir. 1977), should have entered a declaratory judgment for the plaintiffs rather than dismissing their complaint. After a remand from the court of appeals the superintendent of Philadelphia prisons had adopted new regulations relating to press conferences. The new regulations eliminated consideration of content as a basis for denial of a press interview and instituted an administrative review program. The district court approved the new regulations and dismissed the complaint. The court of appeals determined that the district court should have entered a declaratory judgment in favor of the plaintiffs. The court stated:

> As a result of the litigation, defendant has been required to eliminate consideration of content as a basis for denial of a press interview, to promulgate regulations and to institute an administrative review procedure. These steps have been taken, not merely as a settlement, but in response to directions of this court and with the approval of the district court. Plaintiffs, therefore, are entitled to entry of a judgment with the benefits of res judicata or collateral estoppel.

> In the absence of definitive court action, the plaintiffs' case would produce nothing binding upon the defendant and his successors. There has been no agreement between the parties and therefore a consent decree would not be appropriate. However, a declaratory judgment in favor of the plaintiffs is in order. It should indicate that the plaintiffs are entitled to prevail to the extent provided in our earlier opinion and on this appeal. Moreover, the judgment should declare that the regulations as submitted and amended by the defendant are acceptable compliance with directions of the court.

565 F.2d at 59.

Where the plaintiffs are not proceeding as a class, a declaratory judgment in their favor may not be applied to other prisoners. McKinnon v. Patterson, 568 F.2d 930, 940 (2d Cir. 1977), cert. denied, ___ U.S. ___, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). In McKinnon the district court found the three plaintiffs were not given adequate disciplinary hearings and ordered:

> "[I]n future adjustment committee proceedings involving keeplock, 1) formal written notification of the charges must be given to the inmate at least 24 hours before the hearing and 2) no one with direct, personal involvement in the incident upon which the complaint against the inmate is based may sit on that case."

568 F.2d at 933. The parties raised questions as to whether the order was injunctive in character rather than merely declaratory. The court of appeals construed it as declaratory only.

While the declaratory judgment applies only to the plaintiffs, it may have stare decisis effect as to other prisoners. Young Women's Christian Ass'n. of Princeton, N.J. v. Kugler, 463 F.2d 203 (3d Cir. 1972).

D. Immunities

The courts have developed two very different types of immunities for officials -- absolute immunity and qualified good faith immunity. The absolute immunity is a complete defense to all actions taken by the official within the scope of his jurisdiction. The qualified good faith immunity more closely resembles a good faith defense than a true immunity and shields an official from claims for money damages if he has followed the applicable law and acted in good faith.

The immunities usually apply only to claims for damages and do not bar claims for injunctive relief. Wood v. Strickland, 420 U.S. 308, 314 n. 6, 95 S.Ct. 992, 997 n. 6, 43 L.Ed.2d 214, 221 n. 6 (1975); Briggs v. Goodwin, 569 F.2d 10, 15 n. 4 (D.C. Cir. 1977) (federal prosecutor); Timmerman v. Brown, 528 F.2d 811, 812 (4th Cir. 1975) (magistrate and prosecutor); Slavin v. Curry, 574 F.2d 1256, 1264 (5th Cir. 1978) (judge and prosecutor); Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978) (clerk of court).

Rud v. Dahl, 578 F.2d 674 (9th Cir. 1978) noted that judges are not immune when the plaintiff is seeking declaratory and injunctive relief without money damages.

The Third Circuit holds that prosecutors are immune from claims for equitable relief. Helstoski v. Goldstein, 552 F.2d 564, 566 n. 9 (3d Cir. 1977); Brawer v. Horowitz, 535 F.2d 830, 834 (3d Cir. 1976). However, it has declined to decide whether state court judges are immune from actions for injunctive relief. Conover v. Montemuro, 477 F.2d 1073, 1093-94 (3d Cir. 1973).

1. Absolute Immunities

a. Judicial Immunity[267]

Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) held that the common law immunity of judges from liability for damages for acts committed

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267. See Comment, Immunity of Federal and State Judges from Civil Suit--Time for a Qualified Immunity?, 27 Case Western Res. L. Rev. 727 (1977).

within their jurisdiction extends to section 1983 actions. The Court stated:

> This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

386 U.S. at 554. This holding was reaffirmed in the recent case of Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). In Stump the court of appeals had determined, contrary to the holding of the district judge, that Judge Stump was not immune from damages liability because he was not acting within his jurisdiction in approving the petition by plaintiff's mother to have her sterilized. Plaintiff's mother's petition stated that plaintiff was fifteen years of age, was somewhat retarded, and had been "associating with 'older youth or young men' and had stayed out overnight with them on several occasions." 435 U.S. at 351, 98 S.Ct. at 1102, 55 L.Ed.2d at 336. Plaintiff entered the hospital believing she was to have her appendix removed and did not discover until approximately two years later when she was married that she had instead been sterilized. She and her husband brought an action against her mother and the attorney who had represented her, Judge Stump, the doctors who had performed and assisted in the surgery, and the hospital in which the surgery was performed. The Supreme Court commented that when judicial immunity is in issue, the scope of the judge's jurisdiction must be construed broadly. 435 U.S. at 356, 98 S.Ct. at 1105, 55 L.Ed.2d at 339. The Court noted that the statutory grant of general jurisdiction to the Indiana circuit courts did not itemize types of cases the courts could hear and did not expressly mention sterilization petitions presented by the parents of a minor. The Court stated: "But in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump." 435 U.S. at 358, 98 S.Ct. at 1105, 55 L.Ed.2d at 340. The court of appeals had suggested that Judge Stump's

failure to comply with elementary principles of procedural due process deprived him of immunity. The Supreme Court commented that the court of appeals misconceived the doctrine of judicial immunity and concluded: "Because the court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable in damages for the consequences of his actions." 435 U.S. at 359, 98 S.Ct. at 1106, 55 L.Ed.2d at 341. The Court further stated:

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

435 U.S. at 362, 98 S.Ct. at 1107, 55 L.Ed.2d at 342.

Judicial immunity is available to magistrates, Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975), and justices of the peace, Perez v. Borchers, 567 F.2d 285 (5th Cir. 1978); Keeton v. Guedry, 544 F.2d 199 (5th Cir. 1976); Grundstrom v. Darnell, 531 F.2d 272 (5th Cir. 1976).

When a judicial officer is sued for money damages his immunity depends upon whether his challenged acts were within the scope of his jurisdiction. Briley v. State of California, 564 F.2d 849 (9th Cir. 1977) held that a judge's alleged participation in a plea bargain whereby the plaintiff, who was charged with child molestation, was allowed to plead guilty to a lesser charge with sentence suspended provided that he consent to a castration, might be outside the scope of his jurisdiction. His immunity depended upon whether his act was authorized by common law or statute. In suggesting that in order to have jurisdiction to order the extreme remedy of sterilization, the court must have specific legislative or common law authority, in addition to general jurisdiction, the court relied to some extent on the court of appeals' decision in Sparkman, 572 F.2d 172, 175 (7th Cir. 1977), which was subsequently reversed by the Supreme Court.

An attorney in Dean v. Shirer, 547 F.2d 227 (4th Cir. 1976) alleged that the defendant, a municipal judge who was also mayor, had deprived him of his constitutional rights in berating him with a long stream of offensive and threatening epithets, including aspersions as to his ancestry and threatening him with physical abuse and incarceration after hearing plaintiff comment to a crowd outside the courtroom that they should know they could not get a fair trial in the town. 547 F.2d at 228. The court of appeals found that defendant was protected by judicial immunity although plaintiff's statements were made outside the courtroom and while the court was not in session.[268] The judge retained subject matter jurisdiction over the case for a five day period following judgment and, since the acts about which plaintiff complained occurred within this period, the judge was not acting with a clear absence of jurisdiction. The court determined that Judge Shirer had performed a "judicial act." 547 F.2d at 231.

Similarly, McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), affirmed the district court's dismissal of plaintiffs' claim against the defendant judge who became angry when plaintiffs came to his office to find out when their son's criminal trial would start. He threatened to have them sent to jail if they did not leave his office. When the elderly couple did not leave quickly enough, he ordered a deputy sheriff to arrest the husband plaintiff and commit him to jail. He was taken into custody where he remained until about 4:00 p.m. when the judge ordered him to be released. A little less than two months later the judge formally adjudged husband plaintiff to be in contempt of court nunc pro tunc and sentenced him to time in prison. The court of appeals found that Judge Brown was acting "in his judicial jurisdiction" although he was not in his judge's robe, and was not in the courtroom, and may well have violated state and/or federal procedural requirements regarding contempt citations. This finding was based upon the following factors:

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268. See also Smith v. Martin, 542 F.2d 688, 690 (6th Cir. 1976) (judge did not lose judicial immunity by conducting settlement conference in the office of a defendant who had served as plaintiff's attorney).

> (1) the precise act complained of, use of the contempt power, is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

469 F.2d at 1282.

Judicial immunity of a justice of the peace was upheld in Keeton v. Guedry, 544 F.2d 199 (5th Cir. 1976), wherein the defendant allegedly had issued a warrant for plaintiff's arrest, knowing that plaintiff's offense, stopping payment on a check after discovering defects in the vehicle he had purchased, was a civil matter rather than a criminal matter for which a warrant could issue. The court found that although the defendant understood it to be the district attorney's policy not to prosecute such charges, he still believed that plaintiff's conduct could give rise to a criminal theft charge. 544 F.2d at 200.

No judicial immunity was found for a member of the Fayette County Fiscal Court in Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). Defendant was not entitled to judicial immunity since in Kentucky a county "fiscal court" is not an ordinary judicial tribunal, but is one exercising legislative and administrative powers. 420 F.2d at 820. The court noted that at trial the defendant might be able to show he was entitled to legislative immunity which is less encompassing than judicial immunity.

However, in Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), the jury verdict for money damages against the defendant, a justice of the peace, for subjecting plaintiff to an assault and battery in his courtroom was affirmed. When the judge told plaintiff to leave his courtroom plaintiff had replied, "O.K., you throw me out." The judge had left his desk, forced plaintiff out of the door, thrown him to the floor, jumped on him, and beaten him. Two deputy sheriffs came to plaintiff's rescue. The court stated:

> The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached. A judicial act within the meaning of the doctrine may normally be corrected on appeal . . . . But when a judge exercises physical force in a courtroom, his decision is not amenable to appellate correction. More importantly, we cannot believe that the purpose of the judicial immunity doctrine--to promote "principled and fearless decision-making"--will suffer in the slightest if it is held that judges who physically assault persons in their courtrooms have no automatic immunity.

500 F.2d at 64.

The judicial immunity of the judge of the circuit court of Jefferson County who presided over plaintiff's criminal trial in the circuit court of Washington County, and, after he was convicted, sentenced him to prison was upheld in Wiggins v. Hess, 531 F.2d 920 (8th Cir. 1976). Plaintiff alleged that since he had been convicted in Washington County the judge had been without jurisdiction to issue an order for his commitment under the seal of the circuit court of Jefferson County. The court of appeals found that the complaint had failed to allege sufficiently that the defendant judge was acting in the clear absence of jurisdiction. 531 F.2d at 921.

While judicial immunity to claims for money damages is clearly established, it is not so clear that judges are immune from liability for equitable relief.[269] Slavin v. Curry, 574 F.2d 1256, 1264 (5th Cir. 1978) held that the district court

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269. See, e.g., Drollinger v. Milligan, 552 F.2d 1220, 1226 (7th Cir. 1977) (judges not immune in section 1983 actions seeking equitable relief).

had improperly dismissed the complaint against the defendant judge, noting that judicial immunity would not protect the judge from a suit for declaratory relief..

Timmerman v. Brown, 528 F.2d 811, 812 (4th Cir. 1975) held that the court had properly dismissed plaintiff's claim against a magistrate insofar as it sought money damages, but had erred in dismissing it insofar as plaintiff sought declaratory and injunctive relief.

The court declined in Conover v. Montemuro, 477 F.2d 1073, 1093 (3d Cir. 1973), to decide whether judicial immunity is a bar in a section 1983 action for injunctive relief against a state court judge.

Kelsey v. Fitzgerald, 574 F.2d 443 (8th Cir. 1978) affirmed the district court's dismissal for failure to state a claim in a complaint against a county judge who had summarily denied plaintiff's successive petition for post-conviction relief. Since the Minnesota law vested in the judge the power to entertain and act upon plaintiff's petition, the judge was immune from damage liability. Plaintiff's claim for declaratory or injunctive relief was found to be frivolous.

In Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978), a jury award of $80,000 compensatory damages against the defendant judge and the sheriff and an additional $60,000 punitive damages against the judge who had directed the deputy sheriff to bring the plaintiff, a coffee vendor, before him in handcuffs because the coffee tasted "putrid" was affirmed. With the plaintiff standing in front of him in handcuffs, the judge conducted an inquisition, screaming at him, threatening him and his livelihood, and scaring him. The occurrence led to the judge's removal from the bench. The court of appeals found that the award of punitive damages was proper and was not excessive.

The Supreme Court held in Butz v. Economou, ____ U.S. ____, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), that persons performing adjudicatory functions within a federal agency are entitled to absolute judicial immunity from damages for their judicial acts.

b. Prosecutorial Immunity

The Supreme Court held in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) that prosecutors have absolute immunity for their prosecutorial actions in actions for money damages. The Court declined to decide whether a prosecutor would be immune when acting as an administrator or investigator:

> We have no occasion to consider whether like or similar results require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer, rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under Section 1983.

424 U.S. at 430, 96 S.Ct. at 995, 47 L.Ed.2d at 143.

Imbler immunity was held to be available to a special prosecutor in Taylor v. Nichols, 558 F.2d 561, 566 (10th Cir. 1977), where the court found no reason to make a distinction between a permanent prosecutor and a special one.

Briggs v. Godwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 98 S.Ct. 3089 (1978) held that a prosecutor is not entitled to absolute immunity for investigative functions. In Briggs the attorneys for witnesses subpoenaed to testify before the grant jury asked the court to direct the defendant and his associates to disclose any agents or informers among the witnesses subpoenaed. During argument of the motion the judge directed the defendant prosecutor to take the witness stand and be sworn. In response to the judge's question, the defendant testified that none of the witnesses represented by counsel were agents or informants of the United States. 569 F.2d

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270. See Note, Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits, 52 N.Y.U. L. Rev. 173 (1977); Boyer, Civil Liability for Prejudicial Pre-Trial Statements by Prosecutors, 15 American Criminal L. Rev. 231 (1978).

at 13. In their subsequent civil rights action plaintiffs alleged that this testimony was false. The court determined that the district court had properly characterized defendant's allegedly false statement on the witness stand as an act of investigation rather than advocacy. 569 F.2d at 16. Therefore, the defendant was entitled only to qualified good faith immunity for his actions.

In Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), cert. denied, 431 U.S. 937, 97 S.Ct. 2649, 53 L.Ed.2d 255 (1977), an action by a former assistant district attorney against the district attorney for discharging him after he disputed the truth of public statements made by the district attorney, the court in dictum stated: "We note that [prosecutorial] immunity has not yet been extended to 'those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate.'" 546 F.2d at 564. The court disposed of the case on other grounds.

Heidelberg v. Hammer, 577 F.2d 429, 432 (7th Cir. 1978) held that the district court properly dismissed on the basis of Imbler, supra, allegations that prosecutors destroyed and falsified a line-up report and police tapes of incoming phone calls, induced witnesses to commit perjury and improperly conducted the prosecution.

The district court in Helstoski v. Goldstein, 552 F.2d 564 (3d Cir. 1977) erred in dismissing plaintiff's complaint against defendant United States attorney and his staff on the ground of absolute prosecutorial immunity under Imbler, supra. The plaintiff, a former congressman, alleged that the United States attorney for several years had been engaged in a systematic effort to discredit him and to destroy his political career. He alleged that members of the United States attorney's office abused the grand jury process, deliberately leaked false information to the press, and illegally seized bank records. The court noted that Imbler had declined to resolve the question whether prosecutors were entitled to absolute immunity when they function as administrators or investigative officers. However, the court found that even if absolute prosecutorial immunity extended to these functions, plaintiff's complaint averred conduct which went beyond the proper performance of these aspects of the prosecutor's job.

The court particularly noted the allegations of deliberate leaks of false information concerning plaintiff in order to damage his political prospects. If such activity occurred it would lie outside the rationale for absolute immunity set forth in Imbler. Only qualified good faith immunity would be available for such activities. 552 F.2d at 566. Therefore, the district court had erred in dismissing the complaint.

Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977) was decided on the applicability of the statute of limitations, but since the action was being remanded for further proceedings as to the claim which had been improperly dismissed, the court commented upon the immunity claims of defendants district attorney and assistant special prosecutor. The court stated:

> [Prior to Helstoski, supra,] in United States ex rel. Rauch v. Deutsch, 456 F.2d 1301 (3d Cir. 1972), we held that where a prosecutor was alleged to have arrested and prosecuted the plaintiff as part of a scheme to extort money, he was entitled to absolute immunity. In light of Helstoski, we read Rauch as standing for the principle that a prosecutor is entitled to absolute immunity "while performing his official duties," . . . as an officer of the court, even if, in the performance of those duties, he is motivated by a corrupt or illegal intention.

567 F.2d at 1221-22. The court implied in Atkins v. Lanning, 556 F.2d 485, 489 (10th Cir. 1977) that the staff and investigators of the prosecutor are entitled to the prosecutor's absolute immunity.

The district court properly dismissed plaintiff's claims against a federal prosecutor and a cooperating witness in Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976). The court applied Imbler immunity to an action against a federal prosecutor and a cooperating witness who plaintiff alleged had conspired to use perjured testimony and to conceal exculpatory evidence in order to convict plaintiff. The plaintiffs did not

seek money damages, but sought to have their convictions set aside. The district court had properly dismissed the complaint as to the assistant United States attorney for failure to state a claim. 535 F.2d at 834.

Flood v. Harrington, 532 F.2d 1248, 1251 (9th Cir. 1976) applied Imbler to federal prosecutors. The Fourth Circuit in Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir. 1975), and the Fifth Circuit in Slavin v. Curry, 574 F.2d 1256, 1264 (5th Cir. 1978) held that prosecutors are not immune from actions for equitable relief. However, the Third Circuit holds to the contrary. Helstoski v. Goldstein, 552 F.2d 564 (3d Cir. 1977) involved plaintiffs who sought an injunction to enjoin the allegedly illegal activities of the office of the United States attorney, removal of all electronic surveillance, discharge of the grand jury which was investigating plaintiff, and the removal of the defendant United States attorney and his associates from office, in addition to money damages. The court held that the district court had improperly dismissed the complaint for failure to state a claim. The court stated: "Although Imbler spoke only to immunity from damage suits, this court in Brawer held that such immunity also applies in suits seeking equitable relief." 552 F.2d at 566 n. 9.

The Supreme Court held in Butz v. Economou, ____ U.S. ____, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) that federal officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages for their parts in that decision and agency attorneys who arrange for the presentation of evidence on the record in the course of an adjudication are absolutely immune from suits based on the introduction of such evidence.

Similarly, Kissell v. Breskow, 579 F.2d 425 (7th Cir. 1978) held that an officer of a state body charged with disciplining attorneys is entitled to the same immunity available to prosecutors under Imbler, supra. The Third Circuit declined to decide the issue in a case against members of the advisory committee on professional ethics of the state supreme court which had issued an advisory opinion to which plaintiffs objected. The court found that the depositions,

interrogatories, and affidavits established that the defendants acted in good faith and therefore had established the qualified good faith immunity available under Wood v. Strickland, 420 U.S. 308, 321-22, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), and Scheuer v. Rhodes, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir. 1978).

c. Immunity of Public Defenders and Private Defense Counsel[271]

Public defenders have the same judicial immunity as prosecutors, but where private counsel are involved, the courts generally do not reach the immunity issue since private counsel are not recognized as state actors within the meaning of section 1983.

In both Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), cert. denied, 412 U.S. 950, 93 S.Ct. 3015, 37 L.Ed.2d 1003, and Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975), the Third Circuit held that public defenders are immune from liability under section 1983. In Waits, supra, the court further held that an investigator employed by the public defender was also immune from suit. Similarly, Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977), and Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978),[272] held that a public defender is entitled to absolute immunity from section 1983 damage claims for acts done in the performance of his judicial function as a public defender.

The district court had properly dismissed plaintiff's claim against the defendant public defender for his activities as a public defender in Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), since he was not acting under color of state law. However, the district court had erred in dismissing plaintiff's claim that the public defender participated in a conspiracy by assisting in the alteration of the transcript of plaintiff's

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271. See Nakles, Criminal Defense Lawyer, The Case for Absolute Immunity from Civil Liability, 81 Dick. L. Rev. 229 (1977).

272. Counsel failed to file appellate brief until five and one-half years after conviction.

trial to reflect a stronger case for the prosecution and to delete testimony in favor of plaintiff. The court stated: "He would not be immune from liability for his vicarious responsibility for the actions of other conspirators. The district court should have determined whether Gandy had participated in any conspiracy." 574 F.2d at 1265.

Court-appointed attorneys were entitled to absolute immunity in Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976), cert. denied, 429 U.S. 1102, 97 S.Ct. 1127, 51 L.Ed.2d 552. To some extent this decision was based on the absolute immunity granted to prosecutors by Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The Fifth Circuit took a somewhat different approach in United States ex rel. Simmons v. Zibilich, 542 F.2d 259 (5th Cir. 1976), and held that appointed counsel does not act under color of state law and therefore is not liable under section 1983. The court noted that the court-appointed attorney serves his client rather than the state. The fact that the court makes the appointment does not alter the attorney-client relationship. 554 F.2d at 261. Similarly, Thomas v. Howard, 455 F.2d 228, 229 (3d Cir. 1972) held that an attorney representing a defendant voluntarily by assignment from a pool of attorneys of the county legal aid--criminal division was not acting under color of state law.

Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978), Deas v. Potts, 547 F.2d 800 (4th Cir. 1976), and Steward v. Meeker, 459 F.2d 669 (3d Cir. 1972) held that private counsel representing a defendant in a criminal case does not act under color of state law and therefore is not subjected to liability under section 1983. Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974) held that a private attorney who represented plaintiff's wife in a divorce, child custody, and property settlement action against him was not acting under color of state law and therefore was not subjected to liability under section 1983.

The Ninth Circuit has held that a public defender is absolutely immune from section 1983 liability in Miller v. Barilla, 549 F.2d 648, 649 (9th Cir. 1977). The court held that a public defender acts in a manner similar to that of a prosecutor representing the state and should therefore be absolutely immune.

d. Immunity of Witnesses

Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976) held that witnesses are immune from liability in a Bivens action.[273] In Brawer, the court noted that several courts had shielded witnesses from liability under section 1983 by finding that they had not acted under color of state law. Although it was not clear that a Bivens action would lie against a witness at a federal trial, the court assumed that such an action would lie and proceeded to the immunity issue. 535 F.2d at 836. The witnesses and the prosecutor were alleged to have conspired to use perjured testimony and to have exculpatory evidence concealed in order to convict plaintiff. Plaintiff objected to the United States attorney's representation of the witness in the action. The court found representation by the government to be proper since the interests of the United States were at stake. The witness had cooperated with the government in obtaining plaintiff's conviction and the government had relocated him and given him a new identity. The witness had expressed his opinion that the action was instituted in order to obtain his new identity and to seek revenge upon him by the use of physical violence. The court concluded that in these circumstances the interests of the United States were involved and the United States attorney properly represented the witness. 535 F.2d at 836. Similarly, Blevins v. Ford, 572 F.2d 1336, 1338 (9th Cir. 1978) held that witnesses are absolutely immune from civil suits based upon their words, whether they are perjurious or not.[274]

Dictum in Briggs v. Goodwin, 569 F.2d 12 (D.C. Cir. 1977) stated that the prosecuting attorney, who allegedly committed perjury when called to the witness stand by the court to state whether any of the subpoenaed witnesses were informants of the United States, was not entitled to the common law witness immunity since he was functioning as a prosecutor rather than as a witness. 569 F.2d at 26. In response to the dissent's argument that the prosecutor should be entitled to absolute immunity, the court criticized the opinion in Brawer, supra, commenting that in Brawer the court merely applied the state common law

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273. See Section X supra.

274. Accord, Burke v. Miller, 580 F.2d 108 (4th Cir. 1978).

immunity and failed to determine whether witness immunity should be different under federal common law. 569 F.2d at 28 n. 15. Dictum in Triplett v. Azordegan, 570 F.2d 819 (8th Cir. 1978) appears to be contrary to Briggs.

In Triplett, the defendant, a county prosecuting attorney, had learned that plaintiff's tape-recorded confession to murder had been obtained while he was under the influence of drugs. The prosecutor obtained the taped confession by means of a court order. Subsequently it was learned that the murder had taken place in another county and responsibility for the prosecution was transferred to the other county. Plaintiff was tried and convicted in the other county. During the trial, in which defendant was not involved, the tape-recorded confession was introduced into evidence. Plaintiff's habeas corpus action was successful and, after his release, the charges against him were dismissed, the prosecuting attorney for the county in which the case was tried having stated that charges would have not been brought if he had known the confession had been obtained while plaintiff was under the influence of drugs. Plaintiff then brought an action against defendant, the prosecuting attorney in the first county, together with other individuals, alleging that he had violated plaintiff's constitutional rights in concealing his knowledge of the facts surrounding plaintiff's confession. Dismissal of the claim was proper since the defendant had not been personally involved in the use of the confession at trial, and further, since his failure to take affirmative action after the case had been transferred to another county did not constitute state action. In dictum the court stated that even if the defendant had been called as a witness and perjured himself concerning his knowledge of plaintiff's confession, his act of perjury would not have been performed under color of state law. 570 F.2d at 823.

Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976) held that the district court had properly denied plaintiff's motion to proceed in forma pauperis on the ground that the action was frivolous. Plaintiff complained that police officers testified at his trial concerning a confession he had given without having been advised of his Miranda rights. The court noted that witnesses who testify at trial are not acting under color of state law. 545 F.2d at 1264. Similarly, in Taylor v. Nichols, 558 F.2d 561, 564 (10th Cir. 1977), the court commented that testifying at trial does not constitute state action which can be a basis

for a claim under section 1983.

Heidelberg v. Hammer, 577 F.2d 429, 432 (7th Cir. 1978) commented that broadside unspecific allegations of inducing perjury by numerous witnesses are insufficent to state a claim, even under Haines v. Kerner, 404 U.S. 519, reh. denied, 405 U.S. 948 (1972). However, in that case the court directed that the plaintiff be given an opportunity to file an amended pleading specifically setting forth any alleged perjurious statements which he contended were made by a witness and any conduct by the defendant, the captain of the sheriff's police, which induced such statements. The court noted that if the issue had been disposed of adversely to plaintiff in the state criminal proceedings, the defendant may be entitled to invoke the doctrine of collateral estoppel. However, this could not be determined until the state court records were produced and examined.

2. Qualified Good Faith Immunity of Officials

a. General Discussion

In six recent cases, the Supreme Court has defined the qualified good faith immunity available to officials in actions under section 1983. The first case, Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), held that the defense of good faith and probable cause is available to police officers in actions under section 1983.[275] The Court stated:

> Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of that suspect is later proved. . . . A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty

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275. See Section VIII, H, 1, f, supra, for cases discussing the good faith immunity of police officers. See also the recent case of Foley v. Connelie, ____ U.S. ____, 98 S.Ct. 1067, ____ L.Ed.2d ____ (1978) for a discussion of police exercise of judgment and discretion.

> if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.

386 U.S. at 555, 87 S.Ct. at 1218, 18 L.Ed.2d at 295. The Court further stated:

> We agree that a police officer is not charged with predicting the future course of constitutional law. . . . [I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.

386 U.S. at 557, 87 S.Ct. at 1219, 18 L.Ed.2d at 296.

Next, in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), the personal representatives of the estates of three students who died during civil disorder on the campus of Kent State University in Ohio during May, 1970, brought actions under section 1983 against the governor and other officials of the state of Ohio and the president of Kent State University. The plaintiffs alleged that the defendants "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the National Guard and ordered the members of the National Guard to perform illegal acts which resulted in the death of plaintiff's decedents. 416 U.S. at 235, 94 S.Ct. at 1685, 40 L.Ed.2d at 95. Plaintiffs alleged that the decedents were deprived of their lives and rights without due process of law. One of the grounds relied upon by the district court in dismissing the complaint for failure to state a claim was the defendants' absolute executive immunity. The Supreme Court noted that higher officers of the executive branch are required to make an infinite range of decisions and choices and often must act swiftly and firmly. The

Court stated:

> In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. . . .
>
> These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

416 U.S. at 247, 94 S.Ct. at 1692, 40 L.Ed.2d at 103. In dismissing the complaints the district court had erroneously accepted as a fact the good faith of the governor. The plaintiffs had no opportunity to contest the assumed facts and there was no evidence before the court from which such a finding could be made. The absence of a factual record prevented the court from determining the applicability of the general principles it had expounded to the facts of the cases before it. Therefore, the action was remanded for further proceedings. 416 U.S. at 250, 94 S.Ct. at 1693, 40 L.Ed.2d at 104.

Two high school students brought an action against members of the board of education in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Plaintiffs sought injunctive relief, in addition to compensatory and punitive damages, for defendants' failure to afford plaintiffs due process prior

to expelling them from school. The district court directed a verdict in favor of the defendants on the ground that they were immune from damages absent proof of malice or ill will toward plaintiffs. The court of appeals reversed for a new trial on the question of damages, directing the district court to apply an objective good faith test to the conduct of the defendants. The Supreme Court reversed and remanded and adopted a test which included both subjective and objective criteria. The Court stated:

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

420 U.S. at 321, 95 S.Ct. at 1000, 43 L.Ed.2d at 224. The Court further stated:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." Pierson v. Ray, 386 U.S. at 557. A compensatory

> award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

420 U.S. at 322, 95 S.Ct. at 1000, 43 L.Ed.2d at 224. The Court noted that at different times school board members may function as legislators and adjudicators in the school disciplinary process. 420 U.S. at 319, 95 S.Ct. at 999, 43 L.Ed.2d at 223. These functions involve the exercise of discretion, the weighing of many factors, and the formulation of long term policy.

Justice Powell, joined by the Chief Justice, Justice Blackmun, and Justice Rehnquist, dissented from the test adopted by the majority, expressing his opinion that the court was requiring a higher standard of care on the part of the school officials sued under section 1983 than required of any other official. He commented that equating ignorance of the law with "actual malice" imposed a harsh standard upon the officials and noted that the test adopted in Scheuer, supra, was considerably less demanding. 420 U.S. at 327, 95 S.Ct. at 1003, 43 L.Ed.2d at 228.

Four months after Wood, supra, O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), remanded for reconsideration of defendant's immunity under the Wood test. The plaintiff brought his action against the superintendent of a state hospital in which he had been confined against his will for nearly fifteen years as a mental patient. During the fifteen years the plaintiff had repeatedly demanded his release, claiming that he was dangerous to no one, that he was not mentally ill, and that the hospital was not treating him for illness. The defendant retired as superintendent of the hospital shortly before the suit was filed and plaintiff subsequently secured his release. The jury awarded a verdict of $38,500 against the defendant, including $10,000 in punitive damages. The district court refused defendant's request for an instruction that he would not be liable for money damages if he was acting pursuant to state law which he believed authorized plaintiff's commitment. However, the district court did instruct the jury that it could not assess

money damages against the defendant if he had believed reasonably and in good faith that plaintiff's confinement was proper. Further, it could not award punitive damages unless defendant had acted "maliciously or wantonly or oppressively." The Court noted that neither the district court nor the court of appeals had the benefit of Wood v. Strickland. Therefore, it remanded for consideration in light of the test defined therein. The Court explained that the relevant question for the jury was whether defendant "'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff].'" 422 U.S. at 577, 95 S.Ct. at 2494, 45 L.Ed.2d at 408. The Court noted that an official has no duty to anticipate unforeseeable constitutional developments.

The fourth recent Supreme Court decision concerning immunity is Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). The plaintiff, a state prisoner, brought an action against six prison officials for wrongful interference with his outgoing mail. Three of the defendants were supervisory officials and the other three were subordinate officials. In his third claim for relief plaintiff alleged that the defendants had, through their negligence, deprived him of First Amendment rights. The district court granted defendants' motion for summary judgment but the court of appeals reversed and held that the plaintiff's allegations were sufficient to encompass proof that would entitle him to money damages. The Supreme Court determined that the district court was correct in entering summary judgment and reversed the judgment of the court of appeals. Defendants had claimed the qualified immunity described in Scheuer, supra, and Wood, supra. The court of appeals appeared to agree with the immunity claims but found there were issues of fact to be resolved. The Supreme Court agreed that prison officials and officers have only the qualified immunity described in Scheuer and Wood. However, the Court found that at the time in question, 1971 and 1972, there was no established First Amendment right protecting the mailing privileges of state prisoners. Therefore, they were entitled to judgment as a matter of law. The Court explained as follows:

> Under the first part of the Wood v. Strickland rule, the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known that their conduct violated the constitutional norm.

434 U.S. at 562, 98 S.Ct. at 860, 55 L.Ed.2d at 31. The Court found that plaintiffs had no "clearly established" First and Fourteenth Amendment right with respect to their correspondence in 1971 and 1972. Further, since there was no allegation that any of the defendants acted with "malicious intention," defendants were entitled to summary judgment.

Justice Stevens, dissenting, stated:

> Today's decision, coupled with O'Connor v. Donaldson, . . . strongly implies that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability. As the immunity doctrine developed, the Court was careful to limit its holdings to specific officials, and to insist that a considered inquiry into the common law was an essential precondition to the recognition of the proper immunity for any official. These limits have now been abandoned.
> . . .
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> I have no quarrel with the extension of a qualified immunity defense to all state agents. A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability. But when the Court makes the qualified immunity available to all potential defendants, it is especially important that the contours of this affirmative defense be explained with

> care and precision. Unfortunately, I believe today's opinion significantly changes the nature of the defense and overlooks the critical importance of carefully examining the factual basis for the defense in each case in which it is asserted.

434 U.S. at 568-69, 98 S.Ct. at 863, 55 L.Ed.2d at 35.

The Supreme Court's most recent immunity decision is Butz v. Economou, ____ U.S. ____, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). In that case the Court held that federal executive officials, other than those performing adjudicatory or prosecutorial functions, are entitled to the qualified good faith immunity described in Scheuer. In Butz, the plaintiff who had been registered with the Department of Agriculture as a commodity future commission merchant, brought an action against various federal officials of the United States Department of Agriculture who participated in administrative proceedings in which the Department of Agriculture sought to revoke or suspend plaintiff's registration. Plaintiff alleged that the administrative proceedings against him had been instituted after he had been sharply critical of the staff and operations of defendants, that the defendants had furnished copies of the complaint against him to interested persons without furnishing plaintiff's answers, and that they had issued a "deceptive" press release that falsely indicated to the public that plaintiff's financial resources had deteriorated, knowing this to be untrue. Plaintiff alleged that the proceedings against him denied him due process. The district court found that defendants' alleged unconstitutional acts were within the scope of their authority and discretionary and therefore dismissed the action as to them. The court of appeals reversed, holding that the defendants were entitled only to a qualified immunity based on good faith and reasonable grounds. In commenting upon Procunier, supra, the Court stated: "We emphasized, however, that, at least in the absence of some showing of malice, an official would not be held liable in damages under Section 1983 unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." ____ U.S. at ____, 98 S.Ct. at 2907, 57 L.Ed.2d at 911. The Court determined that in the absence of congressional direction to the contrary, federal officials should not be accorded a higher degree of immunity from liability

when sued for a constitutional infringement under Bivens than is accorded to state officials sued under section 1983. The Court further stated:

> We consider here, as we did in Scheuer, the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet Scheuer and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in Scheuer, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.

____ U.S. at ____, 98 S.Ct. at 2911, 57 L.Ed.2d at 916. However, the Court further determined that executive officials performing adjudicatory and prosecutorial roles would be entitled to the absolute immunity accorded judges and prosecutors. Rather than attempting to apply these enunciated principles to the claims of the particular defendants, the Court remanded to the court of appeals with instructions to remand to the district court for further proceedings.

The district court properly found in United States ex rel. Tyrrell v. Speaker, 535 F.2d 823 (3d Cir. 1976) that the defendant warden had failed to establish either official immunity or a good faith defense. The warden admitted both in his answer and by stipulation that the plaintiff had been placed in administrative segregation solely because of his status as an untried, unconvicted prisoner. Defendant had not established his good faith immunity available under Scheuer, supra because he failed to submit evidence as to his authority.

In order to be entitled to good faith immunity a defendant must show that his action involved an exercise of judgment and was within the outer perimeter of his authority. Since the defendant failed to offer this evidence he was not entitled to the good faith immunity. Further, the defendant failed to establish the defense of good faith since he failed to offer any evidence that he relied on a state statute, court order, or general law in confining plaintiff in administrative segregation. 535 F.2d at 828-29.

In Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (3d Cir. 1976), cert. denied, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1977), the court noted that Wood, supra, significantly modified the law of immunity and that an unqualified common law immunity covering non-judicial state government officials performing adjudicatory functions no longer exists. The court stated:

> A nonjudicial adjudicating official must act without malice. But the inquiry does not end there. He can be held liable for damages if he knew or reasonably should have known that the action he took would violate the constitutional rights of the party affected. . . .
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> . . . .
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> We therefore hold that in § 1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of Wood v. Strickland, official immunity should attach. On remand the district court must determine whether the defendants met their burden of establishing (1) that they did not know and reasonably need not have known that depriving Skehan of a pretermination hearing violated due process, and (2) that they acted without malicious intention to deprive him of his constitutional rights or cause

> him to suffer other injury. Whether those determinations can be made on the present record, or can be made in a motion for summary judgment under Rule 56, Fed. R. Civ. P., are questions we leave to the district court in the first instance.

583 F.2d at 61-62. The court of appeals found it difficult to give guidance to the district court as to the criteria by which the reasonableness of each defendant's lack of knowledge of due process requirements should be measured. The court noted that the question of whether an executive branch official enjoyed judicial immunity would be determined by the nature of his functions and not by the label attached to them. 538 F.2d at 62 n. 17.

Thompson v. Burke, 556 F.2d 231, 236 (3d Cir. 1977) held that probation officers and parole board members are entitled to quasi-judicial immunity when engaged in "adjudicatory" duties. In Thompson the district court directed a verdict for the defendant parole board member upon finding that plaintiff was not denied due process in his parole revocation proceedings. The court of appeals found the district court had erred since it was obvious from the record that the court failed to comply with the procedures required by Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Since remand was necessary, the court discussed defendant's claim of immunity. The court found that if the challenged functions of the defendant were included in his quasi-judicial duties relating to the length of sentences, he would be entitled to quasi-judicial immunity. However, if the defendant's failure to grant plaintiff an adequate due process hearing was not an adjudicatory function, he would then be entitled to the good faith immunity available under Wood v. Strickland, supra, and Scheuer v. Rhodes, supra. However, he would have the burden of proving that he acted reasonably, in good faith, and without malice. 556 F.2d at 239.

Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976) reversed the district court's dismissal of the section 1983 complaint for failure to state a claim. After noting that Scheuer and Wood applied, the court stated:

"A defense of official immunity therefore raises issues of fact which cannot be resolved at the pleading stage." 545 F.2d at 1173. However, Taylor v. Nichols, 558 F.2d 561 (10th Cir. 1977) affirmed the district court's grant of summary judgment in favor of the defendant county commissioners, finding that defendants' affidavits established the qualified good faith immunity defined in Scheuer, supra. Plaintiff had not contradicted the defendants' affidavits and therefore summary judgment was properly entered. The First Circuit went even further in Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977), and approved the dismissal of a complaint for plaintiff's failure to plead facts establishing the inapplicability of the defendant police chief's "good faith defense."

Briggs v. Goodwin, 569 F.2d 10, 16 n. 7 (D.C. Cir. 1977) expressed reservations to the "ministerial-discretionary" distinction for determining whether an official is entitled to immunity, noting that the Supreme Court's recent analyses focused on the need for different levels of protection in connection with different official functions.

McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978) found that the district court did not err in declining to award money damages against the defendant prison officials although they had violated the plaintiffs' constitutional rights in failing to give them advance notice of the charges prior to their disciplinary hearings. Considering the state of the law on June 7, 1973, prior to Wolff v. McDonnell, and applying the good faith immunity described in Wood v. Strickland, supra, the defendants had shown that they acted reasonably and in good faith.

Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975) affirmed the district court's refusal to award plaintiff damages, after an evidentiary hearing, on his claim that he had been denied access to the court during a fifteen day period in isolation. During his period in isolation plaintiff's requests for three habeas corpus petition forms, a typewriter, law books, and consultation with an inmate "jailhouse lawyer" were denied pursuant to prison regulations which barred access to reading material and all mail and visiting privileges to inmates in isolation. The court determined that the Wood v. Strickland test was applicable

to correctional administrators. 522 F.2d at 724-25. Applying that test the court failed to find any evidence of subjective bad faith on the part of the defendant in enforcing the regulation. However, application of the objective test was more difficult since the right of prisoners to reasonable and effective access to the court was well established in 1971, the time in question. The court noted that in exercising their informed discretion prison officials "must be sensitive and alert to the protection afforded prisoners by the developing judicial scrutiny of prison conditions and practices." 522 F.2d at 725. The court found that although at the time in question it was clearly established that the state could not absolutely deny prisoners a reasonable and effective right of access to the courts, in light of the court's general unwillingness to interfere with prison disciplinary proceedings, the defendant could reasonably have believed that the denial of access to the courts was justified by the exigencies and considerations of prison discipline so long as the period of denial was limited and the punishment was imposed neutrally for violation of internal prison regulations. Therefore, the defendant had satisfied both the subjective and objective tests of Wood and the district court's denial of money damages was affirmed.

The district court in Little v. Walker, 552 F.2d 193 (7th Cir. 1977) granted defendants' motion to dismiss, finding that the plaintiff had not satisfied the objective standard required by Wood v. Strickland, supra, when he sought money damages against defendants for his assault by other inmates while he was being held in "segregation-safekeeping" at his own request. Plaintiff alleged that the defendants had ignored his requests for protection from other inmates. In addition to finding that the defendants were not motivated by actual malice, the district court found that case law at the time in question did not prohibit prison officials from denying prisoners who were voluntarily segregated the same rights denied to prisoners who were segregated because of their dangerous characteristics. 552 F.2d at 146. However, the court of appeals noted that the question was not whether the plaintiff was improperly denied rights which were also denied to prisoners who were not voluntarily segregated, but whether the defendants were liable for subjecting him to cruel and unusual punishment. At the time in question it had been well settled that the treatment plaintiff received was cruel and unusual punishment.

The court noted that although an official is not required to anticipate unforeseeable constitutional developments,

> . . . he cannot hide behind a claim that the particular factual predicate in question has never appeared in haec verba in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a prison official may not take solace in ostrichism.

552 F.2d at 197. The court noted that violent attacks and sexual assaults by inmates upon another inmate in protective segregation are "inconsistent with contemparary standards of decency." If plaintiff could show that he was deliberately deprived of constitutional rights while he was confined in protective segregation, he would be entitled to damages. The court defined the term "deliberate deprivation":

> In this opinion we use the term "deliberate deprivation" to denote two species of culpability: actual intent and recklessness. . . . Actual intent here encompasses both the special intent to deprive the plaintiff of his constitutional rights as well as the general intent to perform the conduct whose "natural consequence" is the deprivation of the plaintiff's constitutional rights.

552 F.2d at 197 n. 8.

Defendant prison officials were not entitled to the qualified good faith immunity where the court of appeals, in a decision two months before the officials' action, had clearly established the right of prisoners to receive advance written notice of the disciplinary charge prior to a hearing.[276] Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978).

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276. The decision was not printed in West Advance Sheets until two months after the officials' action. 575 F.2d at 595.

Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978) found that the district court had acted properly in declining to award money damages to the plaintiff, a sociopathic criminal, although his federal constitutional rights had been violated after he had engaged in several episodes of violent conduct. The court did note that prison administrators are required to deal in a constitutional manner with violent and unruly convicts and the contributory fault of an inmate does not necessarily deprive him of his right to relief from deprivations of constitutional dimension. However, there was no indication that any of the defendants had acted toward plaintiff in bad faith or with personal malice and the incorrectness of the defendant warden's ideas "was not as clearly established" at the time in question as it was at the time of the court of appeals decision. Therefore, the court found the defendants were shielded from liability for damages by the qualified executive privilege recognized by Procunier, supra.

Allred v. Svarczkopf, 573 F.2d 1146 (10th Cir. 1978) held that the district court had improperly excluded evidence that the defendant police officer's actions were predicated upon ordinances, statutes, and instructions given to him by his superiors and that he acted in good faith. The court reversed and remanded for a new trial.[277]

Wolfel v. Sanborn, 555 F.2d 583 (6th Cir. 1977) held that the defendant parole officers were entitled to the good faith innumity defined in Wood, supra. The district court should have submitted the question of the defendants' subjective good faith to the jury. Further, the district court erred in finding that the defendants' alleged reliance on the unwritten policy of the parole authorities regarding bond forfeitures

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277. See also Kacher v. Pittsburgh Nat. Bank, 545 F.2d 842 (3d Cir. 1976), and G.H.McShane Co., Inc. v. McFadden, 554 F.2d 111 (3d Cir. 1977), cert. denied:

> [T]his Court held in Kacher that parties are justified in relying on state procedures until such procedures are specifically overturned, even though a Supreme Court decision may have rendered their vitality questionable.

554 F.2d at 113.

was unreasonable as a matter of law.

A deaf mute mother of two children born out of wedlock brought an action for damages against the doctor who sterilized her, allegedly against her will, the hospital where the operation was performed, its administrator, the town manager, plaintiff's sister who had been appointed her guardian, three social workers who had approved and helped arrange the sterilization, and plaintiff's father in Downes v. Sawtelle, 574 F.2d 1 (1st Cir. 1978). Plaintiff appealed from a directed verdict at the close of her evidence for her father, her sister, the doctor, and the three social workers. The court reversed the directed verdict and remanded. As to the hospital, the court found that it was a "state actor" for the purposes of section 1983 liability. Further, since the doctor was not simply a private physician making use of the hospital's facilities, but was also chief of staff, he was also a "state actor." 574 F.2d at 6-7. Noting that the courts were extending qualified immunity to a variety of officials, the court held that the doctor should be permitted to assert a qualified immunity defense, although it further stated: "[W]e have no difficulty in holding that a member of the medical profession reasonably should be aware that irrevocably terminating a patient's ability to bear children without her consent is a deprivation of a fundamental constitutional right." 574 F.2d at 11. The court later stated: "If Doctor Curtis negligently interpreted plaintiff's communications to indicate she consented to the operation he is not liable under the standards enunciated in Wood, even if plaintiff did not intend to consent." 574 F.2d at 12. However, the court noted that if the doctor decided to sterilize plaintiff for her own good or for the good of society, ignoring indications from plaintiff that she did not consent to the operation, he would be liable under Wood. The court further stated:

> The fact that the doctor thought he had plaintiff's best interests at heart would not justify a qualified immunity for constitutional purposes any more than would the belief, if asserted by a discriminatory employer or educator, that minority group members are happier and more productive in a segregated environment.
>
> . . . .

> In evaluating the doctor's conduct we may take cognizance of the extraordinary degree of helplessness of the plaintiff. Malice for constitutional purposes includes "callous" or "wanton neglect", . . . and "'reckless indifference to the rights of the individual citizen'" . . . . Whether conduct is wanton or reckless depends in part on the context in which it occurs, and this includes the inability of the victim of protect himself.

574 F.2d at 12. The court reversed the directed verdict granted the doctor as to plaintiff's claim against him for sterilizing her, indicating that reasonable men could come to the conclusion that the doctor did not act in good faith.

The court described the analysis which must be applied by a district court in determining whether a particular official is entitled to rely upon good faith immunity. First, the district court "should consult the common law to determine whether or not the particular official sued has traditionally been accorded any sort of immunity in actions comparable to the cause of action asserted under § 1983." 574 F.2d at 13. However, if the official has not traditionally been accorded immunity, the court may still consider whether the official should be granted a qualified immunity "to avoid discouraging effective official action by public officers charged with a considerable range of responsibility and discretion." 574 F.2d at 14. The court stated:

> [I]n each instance the immunization available depends upon the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action" for which relief is sought. . . . In this context, the qualified immunity rests in part upon the idea that public policy requires that certain officials be able to perform their discretionary duties without having to fear that good faith errors in judgment may ultimately

result in damages liability.

574 F.2d at 14. The court noted that neither the Supreme Court nor the United States Court of Appeals for the First Circuit had ever held that state social workers were entitled to assert a qualified immunity. Although the Second Circuit had held that supervisory municipal welfare employees were entitled to the immunity, Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977), the court noted that the opinion in that case suffered from the lack of analysis the court was prescribing. Therefore, the court determined that the social workers should be given an opportunity to develop the relevant factual data and legal principles so that the court could make a proper decision. 574 F.2d at 14 n. 18.

The court held that a private citizen would not be entitled to the qualified immunity even when he was shown to have acted in concert with state officials:

> Private parties simply are not confronted with the pressures of office, the often split-second decision making or the constant threat of liability facing police officers, governors, and other public officials. . . .
>
> . . . .
>
> Consequently, we hold that the Wood defense is not available to Roberta Sawtelle [plaintiff's sister] and that her liability is to be determined by the jury without regard to any claim of good faith.

574 F.2d at 15-16. Therefore, in the First Circuit it would appear that private citizens do not have a good faith defense but are liable for compensatory damages upon a showing that they subjected the plaintiff to a violation of his constitutional rights.

In Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977), the court reversed the dismissal entered for the defendants in an action against municipal welfare employees and two private child caring institutions for their alleged taking and retaining custody of

plaintiff's two minor children without her consent in violation of the due process clause of the Fourteenth Amendment. The court commented that if the jury found that defendants played a significant role in causing the situation which resulted in detention of plaintiff's children, it was then required to determine whether defendants were entitled to the qualified immunity/good faith defense which under Wood, supra, contained both subjective and objective components. 566 F.2d at 832.

b. Immunity of Probation and Parole Officers

Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), cert. denied, 403 U.S. 908, 91 S.Ct. 2217, 27 L.Ed.2d 685 (1971) held that the defendant probation officer was immune from liability in an action under 42 U.S.C. § 1983(2) and that the district court had properly dismissed the complaint. The court stated: "A probation officer preparing and submitting a probation report in a criminal case is performing a 'quasi-judicial' function and is entitled to a similar, if not the same, immunity that is accorded to judges for acts done by them in the exercise of their judicial functions." 433 F.2d at 319. Similarly, Timson v. Wright, 532 F.2d 552 (6th Cir. 1976) held that the district court had properly dismissed the complaint against the defendant chief probation officer. The court in that case did not reveal whether the defendant's immunity was absolute judicial immunity or quasi-judicial immunity.

The district court in Douglas v. Muncy, 570 F.2d 499 (4th Cir. 1978) properly dismissed plaintiff's complaint against the members of the parole board and plaintiff's parole officer since these defendants were immune from liability for damages.

In Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977), cert. denied, 98 S.Ct. 1659 (1978), the court of appeals upheld the district court's grant of declaratory relief but denial of money damages against the defendant members of the parole board who allegedly denied plaintiffs due process in their parole release proceedings. The district court found that the defendants had acted in good faith and therefore were immune from damage suits. Similarly, in Johnson v. Wells, 566 F.2d 1016, 1018 (5th Cir. 1978), the court noted that parole officials are immune from actions for damages under section 1983.

The courts rejected the qualified "good faith" immunity and found that the defendants were entitled to absolute immunity in Pate v. Alabama Board of Pardons and Parole, 409 F.Supp. 478 (M.D. Ala. 1976), and Bricker v. Michigan Parole Board, 405 F.Supp. 1340 (E.D. Mich. 1975).

Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 567 F.2d 1381 (8th Cir. 1977) declined to decide whether members of the parole board enjoy absolute or only qualified immunity since the district court's finding of no evidence of bad faith was supported by the record. However, the court approved the district court's award of $125.06 to plaintiffs for legal expenses under the Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, upon finding that, since the board's policy would have been held unconstitutional, the plaintiffs were considered prevailing parties for the purpose of awarding costs. 567 F.2d at 1384.

Thompson v. Burke, 556 F.2d 231 (3d Cir. 1977) held that probation officers and parole board members are entitled to quasi-judicial immunity when engaged in "adjudicatory" duties. 556 F.2d at 236. In that case the district court had directed a verdict for the defendant, a parole board member, upon its finding that plaintiff was not denied due process in his parole revocation proceedings. The court of appeals found that the district court had erred since it was obvious from the record that the procedures required by Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) had not been complied with. Since remand was necessary, the court discussed defendant's claim of immunity. The court found that if the functions of the defendant, which were challenged, were included in his quasi-judicial duties in affecting the length of sentences, he would be entitled to quasi-judicial immunity. The court seemed to imply that this immunity would be absolute. However, if the defendant's failure to grant plaintiff an adequate due process hearing was not an adjudicatory function, he would then be entitled to the good faith immunity available under Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); and Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). However, he would have the burden of proving that he acted reasonably, in good faith, and without malice. 556 F.2d at 231.

Wolfel v. Sanborn, 555 F.2d 583, 590-91 (6th Cir. 1977) held that the defendant parole officers were entitled to the good faith immunity defined in Wood v. Strickland, supra. However, the district court should have submitted the question of the defendants' subjective good faith to the jury. Further, the district court's finding that the defendants' alleged reliance upon the unwritten policy of the parole authority regarding bond forfeiture was unreasonable as a matter of law was not supported by the record. 555 F.2d at 592-93.

Kelsey v. State of Minnesota, 565 F.2d 503 stated:

> This Court has not yet considered whether a parole board member has quasijudicial immunity and is therefore immune from suits, or whether a parole board member has qualified immunity and is liable for damages only if he did not act in good faith. Because of our decision in this case, we need not decide that issue.

565 F.2d at 507 n. 4.

Keeton v. Procunier, 468 F.2d 810 (9th Cir. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973) noted that adult authority members who were charged with denying plaintiff due process at his parole rescission hearing were immune from liability and dismissal of the complaint as to plaintiff's claim for damages against them was proper.

Joyce v. Gilligan, 383 F.Supp. 1028 (N.D. Ohio 1974), aff'd without opinion, 510 F.2d 973 (6th Cir. 1975) granted the defendant parole officer's motion to dismiss under Rule 12(b)(6), using the good faith immunity test.

The Third Circuit noted in Thompson v. Burke, 556 F.2d 231, 232 (3d Cir. 1977), and Madden v. New Jersey State Parole Board, 438 F.2d 1189, 1190 (3d Cir. 1971) that a parole board is not a "person" for purposes of liability under section 1983.

c. Immunity of Prison Officials

In Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978) the Court held that prison officials are entitled to the qualified good faith immunity described in Scheuer, supra, and Wood, supra. Although these cases emphasize the importance of the scope of discretion and responsibilities of the defendants, the Court did not appear to draw any distinction between the defendants who were supervisory officers and those who were subordinate officers. The plaintiff had alleged that the defendant subordinate officers had negligently and inadvertently misapplied the prison mail regulations in failing to mail various items of correspondence and that the supervisory officers had negligently failed to provide sufficient training and directions to their subordinates. The Court reviewed the applicable case law at the time in question and determined there was no "clearly established" First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners at the time in question. Therefore, there was no basis for rejecting the immunity defense on the ground that defendants knew or should have known that their alleged conduct violated a constitutional right. Further, since defendants were charged only with negligence, the case did not present an issue of malicious intent to harm. Therefore, it would appear that where the case law has not "clearly established" a prisoner's constitutional right, a prison official is immune from a claim for money damages unless the plaintiff can show that the official acted with malicious intent.

However, where the case law had established the right allegedly violated by the defendant, the defendant would appear to have a heavy burden to show that he acted in good faith and should not be charged with knowledge of the right established. Since Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) was an action for injunctive relief rather than money damages, the immunity issue was not raised. However, in that case the court emphasized the deference which must be accorded the decisions of prison administrators.

McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 491, 54 L.Ed.2d 320 (1978) found that the district court did not err in failing to award money damages against

the defendant prison officials although they had violated the plaintiffs' constitutional rights in failing to give them advance notice of the charges prior to their disicplinary hearings. Considering the state of the law on June 7, 1973, prior to Wolff v. McDonnell and applying the good faith immunity described in Wood v. Strickland, the defendants had shown that they acted reasonably and in good faith.

U.S. ex rel. Land v. Sielaff, 564 F.2d 153, 155 (3d Cir. 1977) held that prison officials may not be held liable in damages for actions which were not improper at the time.

Collins v. Schoonfield, 363 F.Supp. 1152 (D. Md. 1973) noted:

> It has therefore been recognized that it would contravene basic notions of fundamental fairness if prison officials were held to be liable monetarily for acts which they could not reasonably have known were unlawful. . . . While state officials may be expected to be reasonable men, they neither can nor should be expected to be "seers in the crystal ball of constitutional doctrine." nor "charged with predicting the future course of constitutional law.". . . If a prison official acts in a reasonable good faith reliance on what was standard operating procedure in his prison, he is not required to respond personally in damages.

363 F.Supp. at 1156.

Prior to Procunier, supra, Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975), held that the immunity described in Scheuer, supra, and Wood, supra, was available to prison officials. The plaintiff alleged that following a disciplinary hearing he was placed in disciplinary isolation for fifteen days for having written a letter to an unauthorized person and having smuggled it out of the prison. While he was in disciplinary

isolation his requests for three habeas corpus petition forms, a typewriter, law books, and consultation with an inmate "jailhouse lawyer" were denied pursuant to the prison regulations which were applicable at that time. The court reviewed the state of the law at the time in question and found that the right of prisoners to reasonable and effective access to the court was well established. 552 F.2d at 726. However, plaintiff's deprivation was limited to a period of fifteen days. The court found that defendants might have reasonably believed that denial of access to the courts to plaintiff was de minimis since the period of denial was limited and the punishment was imposed neutrally for violation of internal prison regulations. The judgment in favor of defendants entered by the district court after an evidentiary hearing was affirmed.

Defendant prison officials were not entitled to the qualified good faith immunity where the court of appeals' decision, two months before their action, which clearly established the right of prisoners to receive advance written notice of the disciplinary charge prior to their hearing, was not printed in West's Advance Sheets until two months after their action. Ware v. Heyne, 575 F.2d 593, 595 (7th Cir. 1978).

The court appears to have affirmed a Rule 12(b)(6) dismissal in Ervin v. Ciccone, 557 F.2d 1260 (8th Cir. 1977), finding that plaintiff's complaint failed to allege ill will or malice, and established the defendant's good faith. The plaintiff alleged that on April 25, 1972, upon his arrival at the prison, he was immediately placed in punitive solitary confinement without notice of any charges or a hearing. The court stated:

> Assuming this to be true, we do not think that it warrants an award of damages. Although Ervin alleges that he "was arbitrarily and capriciously locked in solitary confinement," he does not allege that appellees did so out of ill will or malice towards him, or that he was placed in solitary confinement for an improper reason. All of the specific

> allegations relate to a denial of procedural due process. In April 1972, it was at best unclear in this circuit whether prisoners had a right to notice and hearing prior to the imposition of discipline. See McDonnell v. Wolff, 342 F.Supp. 616, 627-28 (D. Neb. 1972), aff'd in part, rev'd in part, 483 F.2d 1059 (8th Cir. 1973), aff'd in part, rev'd in part, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 435 (1974). Thus the prison officials are entitled to the good faith immunity from monetary liability outlined in Wood v. Strickland, 420 U.S. 308, 316-22, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

557 F.2d at 1262.

Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978) held that the district court had acted properly in declining to award money damages for the plaintiff although his federal constitutional rights had been violated. There was no indication that any of the defendants had acted toward plaintiff in bad faith or with personal malice and the incorrectness of his ideas "was not as clearly established" at the time in question as it was at the time of the court of appeals decision. Therefore, the court found that the defendants were shielded from liability for damages by the qualified executive privilege recognized by Procunier, supra.

Christman v. Skinner, 468 F.2d 723, 724 (2d Cir. 1972) found that the defendants were immune from liability since they were acting pursuant to state regulations which had not been declared unconstitutional.

McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) stated:

> Sgt. Smith can hardly be held as a guarantor that the psychologist/psychiatrist whom he does not command will carry out his duties under the directive. Sgt. Smith, however, is accountable for his duty to notify, or to cause to be notified, the

psychologist/psychiatrist immediately after McCray's isolation. By his own admission, Smith did not seek expert professional help until nearly twenty-four hours after he isolated and stripped McCray.

516 F.2d at 368.

Brenneman v. Madigan, 343 F.Supp. 128 (N.D. Calif 1972) noted that a convicted prisoner is presumed to have been justly convicted and properly sentenced.

d. Immunity of Sheriff

Hazo v. Geltz, 537 F.2d 747 (3d Cir. 1976) held that the district court had improperly dismissed plaintiff's complaint alleging that defendant deputy sheriff joined in the conspiracy with the other defendants to deprive plaintiff of her property by abusing a state court procedure and writ of execution. The court found that the record was not adequate for a determination on the immunity question. If the deputy sheriff was acting under direct judicial supervision, he would be entitled to absolute judicial immunity. 537 F.2d at 750. If the sheriff was not acting under judicial discretion, he would be entitled only to the good faith immunity available under Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976), cert. denied, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976) reversed a judgment against the sheriff for his failure to release plaintiff from prison after dismissal of the charges against plaintiff because his records incorrectly indicated that plaintiff was being held on authority of another warrant. Charges against plaintiff had been dismissed on March 3, 1972, and plaintiff had been incarcerated until April 7, 1972. The court found that the trial court had erred in failing to instruct the jury that good faith was a defense to the charge. The court explained:

> In a case such as this one, where there is no discretion and relatively little time pressure, the jailer will be held to a high level of reasonableness as to his own actions. If he negligently

> establishes a record keeping system in which errors of this kind are likely, he will be held liable. But if the errors take place outside of his realm of responsibility, he cannot be found liable because he has acted reasonably and in good faith. Instructions outlining these requirements for a reasonable, good faith defense should have been given in this case, in light of defendant's timely request for such an instruction.

530 F.2d at 1215. Subsequently, Stephenson v. Gaskins, 539 F.2d 1066 (5th Cir. 1976) held that the district court had improperly dismissed plaintiff's complaint alleging that the defendant sheriff kept plaintiff incarcerated for thirty-eight days without affording him a preliminary hearing despite plaintiff's request. Plaintiff alleged that he had been denied the right to bail, that he had been denied the right to a preliminary hearing, and that he had been falsely imprisoned because of defendant's negligence. The district court had dismissed the complaint on the basis of the sheriff's absolute immunity. Referring to Bryan v. Jones, supra, the court noted that the sheriff's immunity is qualified in that he must act reasonably and in good faith. Therefore, the dismissal was improper. 539 F.2d at 1067-68.

e. Immunity of Court Officials Such as Clerks of Court and Court Reporters

With respect to the immunity of court officials, courts appear to draw a distinction between discretionary functions and ministerial functions. In Davis v. McAteer, 431 F.2d 81 (8th Cir. 1970), the clerk was charged with having lost certain court files which would corroborate plaintiff's claim that he had been kept under the influence of drugs prior to the entry of his guilty pleas. The court affirmed the district court's grant of defendant's motion to dismiss the complaint based on the doctrine of immunity:

> The Supreme Court has set at rest any doubt heretofore existing that a § 1983 case abolished or in any wise affected the doctrine of judicial immunity. Ray v. United

States, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The Court there said that immunity applies even where the judge is accused of acting maliciously and corruptly.

This court and others have specifically held that clerks of court are entitled to immunity the same as judges.

431 F.2d at 82. However, in McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974), where a court reporter had been ordered to prepare a transcript and give the plaintiff a copy without any cost, the plaintiff alleged that the defendant had denied him his right to the transcript for an unreasonable period of time, for which he was entitled to money damages. The United States Court of Appeals for the Eighth Circuit reversed the district court's dismissal on the ground of immunity:

This court has held that court functionaries such as clerks are not clothed in judicial immunity because their duties are ministerial, not discretionary in nature. Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973). Judicial immunity is only granted to non-judicial officials who, like judges, must not be unduly inhibited to exercise discretionary authority by the constant fear of personal liability for damages. Applied to non-judicial officers, judicial immunity is termed quasi-judicial immunity and examples are prosecuting attorneys and parole board members. McCray v. State of Maryland, 456 F.2d 1 (4th Cir. 1972). Reporters are like clerks, in that their duties are ministerial in nature and thus are not protected by quasi-judicial immunity.

However, this is not to say that clerks and court reporters may not have an absolute defense, sometimes referred to as a qualified immunity, to suit for damages. Such is the

> case where the clerk, or reporter can show that he was acting pursuant to his lawful authority and following in good faith the instructions or rules of the Court and was not in derogation of those instructions or rules. Barnes v. Dorsey, supra. It will be for the trial court to determine upon remand whether appellee Henderson has properly raised and established that he was acting pursuant to his lawful authority or following an order of the court.

492 F.2d at 1299. The court therefore reversed and remanded.

Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973) appears to hold that a clerk is protected by judicial immunity when he performs discretionary functions. The plaintiff alleged that the clerk failed to fix bail for plaintiff following his arrest in connection with an intrafamily custody battle, although the clerk was authorized by state law to fix bail in misdemeanor cases. The court stated: "As the plaintiff's charge relates to an act performed by the clerk within the scope of his official quasi-judicial duties, this defendant is entitled to immunity." 479 F.2d at 1098.

Where the acts complained of on the part of the clerk amounted merely to performance of his ministerial acts, the courts have approved dismissal, either on the basis of immunity or failure to state a cause of action. Smith v. Rosenbaum, 460 F.2d 1019 (3d Cir. 1972) was an action against two bail bondsmen who had issued a bail piece against plaintiff, resulting in the revocation of his bail, and the Clerk of the Court of Common Pleas who had issued the bail piece to the bondsmen. After a non-jury trial, judgment was entered in favor of the defendants. As to the defendant clerk, the court stated: "As a court clerk, Grobman performed a ministerial act mandated by statute; he has judicial immunity and cannot be sued under the provisions of the Civil Rights Act, 42 U.S.C. § 1981 et seq., Marcedes v. Barrett, [453 F.2d 391 (3d Cir. 1971)], Robinson v. McCorkle [462 F.2d 111 (3d Cir. 1972)]." 460 F.2d at 1020.

The complaint in United States v. Carson, 126 F.Supp. 137 (W.D. Pa. 1954) was dismissed for failure to state a cause of action. The plaintiff brought the

action against a state judge and the clerk of the criminal branch of the court for failure of the judge to hear and determine a habeas corpus proceeding which plaintiff had mailed to defendant clerk. The court observed that habeas corpus actions were civil rather than criminal and that the defendant clerk, as clerk of the criminal branch of the court, had no duty to file civil actions. Since the clerk could not be charged with breach of any duty he did not have, he could not be held accountable in a trespass action, and the complaint was dismissed. 126 F.Supp. at 143.

In Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973), the plaintiff claimed that the various individuals, either individually or in concert, deprived him of his federally protected rights in relation to his arrest at the scene of a burglary, his recovery at the city hospital, and his trial. As to the liability of the clerk, the court stated:

> In regards to the possible liability of Lavin, the court clerk, the plaintiff has failed to allege that the clerk was not properly performing his ministerial duties. Although Lavin has not pleaded a "good faith" defense that, if proven, would exonerate him from liability under McCray v. Maryland, 456 F.2d 1, 3-5 (4th Cir. 1972), such a plea is unnecessary due to the plaintiff's failure to allege any facts that would support relief against Lavin. Conley v. Gibson, supra. The clerk's actions were purely ministerial and there is no allegation of facts showing improper acts or how the plaintiff was injured by any illegal acts of the clerk. We affirm the District Court's dismissal as to Lavin.

480 F.2d at 1060. The plaintiff in Dotlich v. Kane, 497 F.2d 390 (8th Cir. 1974) brought a civil rights action requesting injunctive, declaratory and monetary relief against the judges, examiner of titles, the private attorney, and the clerk of court, after a divorce proceeding in which he had been held in contempt for refusal to comply with a judge's order requiring him to transfer property into his wife's name. As to the dismissal of the clerk, the court

stated: "Dismissal as to the clerk and examiner of titles was also correct in that there is no allegation that either was improperly performing his ministerial duties." 497 F.2d at 391.

The Fourth and Eighth Circuits have held that judicial immunity is not available to clerks of court when they are charged with failing to perform their ministerial functions, or with performing them improperly. In McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972), the defendant clerk of court was charged with negligently impeding the filing of plaintiff's petition for state post conviction relief. The district court had dismissed the complaint, holding that the clerk was immune from suit under section 1983 because he was a "quasi-judicial" officer and as such was cloaked with judicial immunity. The court of appeals reversed and stated that the immunity of quasi-judicial officers derives from the fact that they exercise a discretion similar to that exercised by judges and, therefore, require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. However, officials who are not called upon to exercise judicial or quasi-judicial discretion are denied the protection of absolute judicial immunity. 456 F.2d at 3. The court found that the clerk, in the filing of papers, had no discretion meriting insulation by a grant of absolute immunity. Therefore, there was no basis for sheltering the clerk from liability under section 1983 for failure to perform a required ministerial act, such as properly filing papers. The court observed, however, that if the clerk was actually acting pursuant to his lawful authority, or following an order of court, such a defense would have to be raised and established before the complaint could properly be dismissed.

The Eighth Circuit in McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974), followed the Fourth Circuit's ruling in McCray. In McLallen the court reporter had been ordered by the court to provide plaintiff with a transcript of his criminal trial without charge. The transcript had been given to plaintiff's counsel. Plaintiff then filed suit charging that the court reporter had violated his civil rights in that he had denied him his right to the transcript for an unreasonable period of time. The district court dismissed the suit on the ground that the defendant was immune from suit because of the doctrine of judicial immunity. The court of appeals reversed, stating that reporters, like

clerks, are not clothed in judicial immunity because their duties are ministerial, not discretionary, in nature. 492 F.2d at 1299. This case also recognized the availability of a defense where the clerk or court reporter can show that he was acting pursuant to his lawful authority and following in good faith the instructions or rules of the court. 492 F.2d at 1300.

Rheuark v. Shaw, 547 F.2d 1257 (5th Cir. 1977) was an action against a state court clerk and court stenographer for damages for delay in preparing the trial transcript as ordered by the state trial judge for use in plaintiff's appeal. Plaintiff also sought an injunction requiring that the transcript be prepared, filed, and forwarded to the state appellate courts. Plaintiff alleged that the defendants were unreasonably delaying the preparation and transmittal of the transcript because of his indigent status. The district court had concluded that plaintiff's action was in the nature of habeas corpus and had dismissed it for failure to exhaust state remedies. The court of appeals reversed. The court stated:

> Thus, after two years, two district court cases, and now two appellate decisions, appellant remains without a transcript ordered furnished to him by the state court two years ago, and which he must have in order to prosecute his appeal. In addition, appellant has made a variety of requests directed to the Texas state courts to no avail.

547 F.2d at 1258.

In Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), the plaintiff alleged that defendant court reporters had altered his trial transcript. The district court had improperly dismissed the complaint. The court stated:

> Whether the court reporters are entitled to raise a defense of qualified immunity depends upon whether they "can show that [they were] acting pursuant to [their] lawful authority and following in good faith the instructions or rules of the Court and [were] not

in derogation of those instructions or rules."

574 F.2d at 1265.

The United States Court of Appeals for the Third Circuit has recognized immunity for court officials acting pursuant to the directions of the court. Lockhart v. Hoenstine, 411 F.2d 455 (3d Cir. 1969), cert. denied, 396 U.S. 941, 90 S.Ct. 378, 24 L.Ed.2d 244 (1969) affirmed the grant of summary judgment on behalf of the defendant prothonotary who had been charged in the pro se civil rights action with failing to accept certain papers for filing. The defendant was the prothonotary of the Superior Court of Pennsylvania. After being granted permission to file a motion for new trial nunc pro tunc relating to his criminal conviction, and after denial of the motion by the trial court, plaintiff mailed to the defendant three documents, a "Petition to File Appeal Without Payment of Costs," a brief, and a petition for a writ of supersedeas. Within two weeks the defendant returned the documents to the plaintiff with a letter of transmittal, noting that their rejection was "at the direction of the court." 419 F.2d at 457. Plaintiff's complaint asserted that the defendant prothonotary did not present the papers to the court but arbitrarily returned them without court approval, thereby denying him his right to appellate review. The defendant prothonotary filed an affidavit stating that the return of the documents was at the direction of the court, and moved for summary judgment. Plaintiff filed a counteraffidavit denying that the prothonotary had court approval to return his documents to him. After observing that the party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact, the court stated:

> In addition to the recognized immunity enjoyed by judicial and quasi-judicial officers, including prothonotaries, there exists an equally well-grounded principle that any public official acting pursuant to court directive is also immune from suit.
>
> Accordingly, having determined that there was no genuine issue of material fact that the Prothonotary

> was acting at the direction of the court, and having concluded that in so acting he was wrapped in the cloak of immunity, we hold that the district court properly awarded summary judgment.

419 F.2d at 460. The immunity of a clerk of courts when following the directions of the court was reaffirmed in Robinson v. McCorkle, 462 F.2d 111 (3d Cir. 1972).[278]

Two cases upholding the general judicial immunity of a clerk of court are Marcedes v. Barrett, 453 F.2d 391 (3d Cir. 1971), and Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969). In Marcedes plaintiff alleged that the failure of the defendants to furnish him with a copy of the transcript of his trial resulted in delay in submitting his grievances to the courts. While the court discusses immunity generally in approving the dismissal, this case appears to be one where the plaintiff failed to allege that the clerk had either failed to perform a duty he was required to perform or had improperly performed a required duty.

In Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969), the plaintiff had sued the state of California, a court reporter, and a court clerk, complaining that they had refused to furnish him with a portion of his state criminal trial transcript. The court stated that the acts charged to the individual defendants were performed in their capacity as quasi-judicial officers and were thus clothed with judicial immunity.

While many of the cases approving dismissal of a civil rights action against a clerk of court refer to judicial immunity, upon examination most of them appear to be cases where the clerk was acting in accordance with the directions of the court or the plaintiff failed to allege or show that the clerk either failed to perform a required duty or improperly performed a required duty.

A case in which judicial immunity was found not to be available to a deputy clerk because her actions were

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278. See also United States ex rel. Johnson v. Specter, 262 F.Supp. 113 (E.D. Pa. 1967).

taken without lawful authority is McGhee v. Moyer, 60 F.R.D. 578 (W.D. Va. 1973). In that case the deputy clerk had signed summonses and detention orders authorizing the seizure of plaintiff's children upon the petition of the welfare department, although the act authorized only a judge to issue the summonses and detention orders. Shipp v. Tood, 568 F.2d 133, 134 (9th Cir. 1978) held that the quasi-judicial immunity accorded the clerk of court in the exercise of his judicial functions is limited to actions for damages and does not extend to suits for injunctive relief. In that case the plaintiff sought to have the district court declare his state conviction invalid on federal constitutional grounds and sought a mandatory injunction directing the clerk to expunge the judgment of conviction from the court records in his custody. The district court had dismissed the action, finding the clerk to be immune. The court of appeals reversed. Although plaintiff had served his sentences his criminal record continued to operate to his detriment.

3. Municipal Immunity[279]

As a result of the holding in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that municipalities are not "persons" under section 1983, the decisions on municipal immunity have been in cases brought under Bivens and 28 U.S.C. section 1331 and are discussed in Section X, supra. The recent overruling of the holding of Monroe in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), will now require the lower courts to determine the extent of immunity available to municipalities. In Monell the Court specifically stated: "[W]e express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under Section 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under Section 1983 'be drained of meaning.'" 436 U.S. at 701, 98 S.Ct. at 2041, 56 L.Ed.2d at ____. The Court did reveal that municipalities would not be liable under the doctrine

279. See Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts, 51 Temple Law Quarterly 409 (1978).

of respondeat superior, 436 U.S. at 691, 98 S.Ct. at 2036, 56 L.Ed.2d at ____.

Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978) held that the district court had properly dismissed plaintiff's claim against the defendant city since under Monell the city would not be liable under the doctrine of respondeat superior and plaintiff had not asserted that the conduct of the city police officers could be fairly said to represent the city's official policy. Further, the court rejected plaintiff's claim that the city could be held liable under section 1331 and Bivens. In reaching this conclusion the court determined that the Constitution does not require that plaintiff be granted a cause of action against the city. The court considered Monell's finding that Congress had excluded vicarious liability against municipalities from the scope of section 1983. The court also considered principles of federalism and determined that federal courts should not interject themselves too rapidly into disputes between local governments and individual citizens. However, the court determined that plaintiff had not shown that the remedy provided by section 1983 was inadequate. Therefore, the court affirmed the district court's dismissal of the claim against the defendant city.

On June 5, 1978, the day after Monell was decided, the Second Circuit held that municipalities could be liable under the Fourteenth Amendment and section 1331 on a Bivens theory for injuries resulting from the actions of its employees which were authorized, sanctioned, or ratified by municipal officials or bodies functioning at a policy making level. However, municipalities would not be liable under the doctrine of respondeat superior. Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978).

Reimer v. Short, 578 F.2d 621 (5th Cir. 1978) held that the district court had properly dismissed the complaint as to the defendant city, since under Monell it would not be liable under the doctrine of respondeat superior and in that case there was no evidence that the city had "acted" through its policies, formally or informally adopted, to deprive plaintiff of his constitutional rights.

4. Eleventh Amendment Immunity

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the Eleventh Amendment specifically bars only suits against states by citizens of other states, in Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Supreme Court held that states are also immune from suits by their own citizens. The Court noted that the Eleventh Amendment was adopted in response to its holding in Chisholm v. Georgia, 2 Dall. 419 (1793), that a state was liable to suit by a citizen of another state. In describing the reaction to that decision the Court stated:

> That decision . . . created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. . . . The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled.

134 U.S. at 11, 10 S.Ct. at 505-06, 33 L.Ed. at 846. The Court noted that the Eleventh Amendment revealed Congress' agreement with Justice Iredell's dissent in Chisholm in which he contended that the Constitution's grant of judicial power did not "create new and unheard of remedies by subjecting sovereign states to actions at the suit of individuals." 134 U.S. at 12, 10 S.Ct. at 506, 33 L.Ed. at 846. Questioning its decision in Chisholm, the Court stated:

> Looking back from our present standpoint at the decision in Chisholm v. Georgia, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people.

134 U.S. at 12, 10 S.Ct. at 506, 33 L.Ed. at 846. The Court thereupon decided that the view of Justice Iredell, that the judicial power of the United States did not extend to actions by a citizen against either his own state or another state, was correct. The Court stated: "The suability of a State without its consent was a thing unknown to the law." 134 U.S. at 16, 10 S.Ct. at 507, 33 L.Ed. at 847. It concluded: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. at 15, 10 S.Ct. at 507, 33 L.Ed. at 847.

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) held that the Eleventh Amendment does not prevent a federal court from enjoining a state official from enforcing a state statute which violates the Federal Constitution. The Court stated:

> [I]ndividuals, who as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against

> parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

209 U.S. at 155-56, 28 S.Ct. at 452, 52 L.Ed. at 727. The Court further stated:

> In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.
>
> . . . The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specifically created by the act itself, is not material so long as it exists.

209 U.S. at 157, 28 S.Ct. at 453, 52 L.Ed. at 728. The continuing validity of Ex parte Young was recognized in the more recent case of Edelman v. Jordan, 415 U.S. 651, 664, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662, 673 (1974), in which the Supreme Court distinguished the award of prospective equitable relief, such as an injunction against a state official, from a retroactive award of money damages which will of necessity be paid from state funds. The Supreme Court approved the award of prospective injunctive relief against the state officials but reversed the retroactive award of money damages.[280] The Court recognized that an action may be

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280. That case was an action challenging the state officials' administration of the federal-state programs of Aid to the Aged, Blind and Disabled in a manner inconsistent with federal regulations and the Constitution. The defendants were charged with delay in processing applications, in violation of the federal regulations, and in "improperly authorizing grants to commence

barred by the Eleventh Amendment even if the state is not named as a party to the action, if the judgment will have to be paid from public funds in the state treasury. 415 U.S. at 663, 94 S.Ct. at 1355, 39 L.Ed.2d at 673.

Moving to the question of waiver the Court found that the state had not "constructively consented" to be sued by participating in the federal program. The Court stated:

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

415 U.S. at 673, 94 S.Ct. at 1360-61, 39 L.Ed.2d at 678.

Finally, the Court found that the Eleventh Amendment is a jurisdictional bar and failure to raise it in the trial court did not constitute waiver.[281]

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only with the month in which an application was approved and not including prior eligibility months for which an applicant was entitled to aid under federal law," 415 U.S. at 655, 94 S.Ct. at 1352, 39 L.Ed.2d at 668. The Supreme Court upheld the district court's grant of a permanent injunction requiring compliance with the federal time limits but reversed the judgment ordering the state officials to "release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968, . . . and April 16, 1971." 415 U.S. at 656, 94 S.Ct. at 1352, 39 L.Ed.2d at 669.

281. Accord, McDonald v. State of Illinois, 557 F.2d 596, 601 (7th Cir. 1977), cert. denied. See also Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928 (9th Cir. 1977); Nadeau v. Helgemoe, 561 F.2d 411, 419, n. 7 (1st Cir. 1977). Procurement of appropriate liability insurance may constitute waiver. West v. Keve, 571 F.2d 158, 163-64 (3d Cir. 1978). Federal law is

Subsequently, Quern v. Jordan, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 47 U.S.L.W. 4261 (March 5, 1979) held that Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) does not abrogate the Eleventh Amendment immunity of the states, but the Eleventh Amendment was not violated by an order requiring state officials to send members of the plaintiff class an explanatory notice advising them of state administrative procedures available by which they could receive a determination of whether they were entitled to past welfare benefits.

Edelman was followed in the Third Circuit by Rochester v. White, 503 F.2d 263 (1974), in which the court reversed the district court's grant of defendant's motion for summary judgment. Plaintiffs were challenging the defendant administrator's reduction in social security benefits under Delaware's Aid to Families with Dependent Children (AFDC) public assistance program and requested both prospective declaratory and injunctive relief and retroactive money damages. The defendant moved for partial summary judgment, alleging that the Eleventh Amendment barred retroactive monetary relief. The district court granted a complete summary judgment for the defendant, holding that the defendant, as a representative of the state, was not a "person" under section 1983. The court of appeals reversed, with respect to the absence of declaratory judgment jurisdiction, holding that the defendants were "persons" within the meaning of section 1983 and that the Eleventh Amendment did not bar prospective relief. The court stated:

> Following the reasoning of Ex parte Young, 209 U.S. 123 (1908): The Eleventh Amendment does not prevent a "federal court from directing a state official to bring his conduct into conformity with federal law"
> . . . .
>
> In light of these cases, the trial court's denial of jurisdiction

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applied to determine whether there is a waiver. Jacobson, 558 F.2d at 940. A waiver was found in failure to raise Eleventh Amendment immunity before the district court and failure to appeal judgment. Vecchione v. Wohlgemuth, 558 F.2d 150, 158-59 (3d Cir. 1977), cert. denied.

to grant prospective relief must be reversed.

503 F.2d at 267. As to the award of monetary relief the court stated:

> The trial judge was correct in granting summary judgment for defendant on plaintiff's petition for retroactive monetary relief. In light of Edelman v. Jordan, decided subsequent to the district court's opinion, the Eleventh Amendment bars an award of retroactive monetary relief against a state official unless the state has waived its Eleventh Amendment objection by consenting to suit. Since consent, according to Edelman, will not be inferred from state participation in a federal program, the Eleventh Amendment bars monetary relief.

503 F.2d at 268.

The Eleventh Amendment does not bar actions against state officials who are charged with violating the plaintiff's constitutional rights under color of state law. Scheuer v. Rhodes, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90, 97 (1974). The Eleventh Amendment's applicability "'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" 416 U.S. at 237, 94 S.Ct. at 1687, 40 L.Ed.2d at 97. In that case the plaintiffs were seeking to impose individual and personal liability on the defendants for violating their constitutional rights. Therefore, the action was not barred by the Eleventh Amendment.

Congress has authority under section 5 of the Fourteenth Amendment[282] to transcend the Eleventh Amendment immunity of states and impose liability upon them for violations of the Fourteenth

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282. "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Amendment,[283] Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). The Court stated: "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456, 96 S.Ct. at 2671, 49 L.Ed.2d at 622. The Court found that in the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress had properly exercised this jurisdiction in authorizing federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of race, color, religion, sex, or national origin. Therefore, the district court's refusal to award retroactive retirement benefits to the plaintiffs was reversed and the district court's award of counsel fees to the plaintiffs was affirmed.

Hutto v. Finney, ____ U.S. ____, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) noted that federal courts may enforce injunctions against state officers through contempt proceedings by imposing either a jail term or a fine. In that case the award of attorney's fees against the state, based upon the district court's finding that the defendants had acted in bad faith, served the same purpose as a remedial fine imposed for civil contempt. Although it would have been better to assess the award against the defendants in their official capacities, rather than directing that the fees be "paid out of Department of Correction funds," the use of that language was not reversible error. Further, the Court found that even in the absence of bad faith, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes awards of attorney's fees against the states. The fact that the state is not expressly named as a defendant in the suit does not prevent an award of attorney's fees against it where the action is, for all practical purposes, against the state. ____ U.S. at

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283. "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 the equal protection of the laws."

____, 98 S.Ct. at 2578, 57 L.Ed.2d at 540.[284]

In Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the defendant board of education was found not to be entitled to Eleventh Amendment immunity. The Court noted that the Eleventh Amendment immunity does not extend to counties and municipal corporations. The Court stated:

> The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.

429 U.S. at 280, 97 S.Ct. at 572, 50 L.Ed.2d at 479. The Court noted that the answer depended upon the nature of the entity as created by state law. In that case the school districts were included as political subdivisions and political subdivisions were not included as arms of the state. Therefore, the school board was more like a county or city than an arm of the state and was not entitled to Eleventh Amendment immunity.

Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977) held that an order requiring that the state penitentiary be operated in accordance with the Constitution, thereby requiring the expenditure of state funds, did not violate the Eleventh Amendment.[285] In that case

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284. Accord, King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977). See also Miller v. Carson, 563 F.2d 741, 754 (5th Cir. 1977) (award of fee against municipality which was not named as a defendant approved).

285. In Nadeau v. Helgemoe, 561 F.2d 411, 419 n. 7 (1st Cir. 1977), the court stated: "The Eleventh Amendment bars federal courts from awarding damages against the states, but prospective relief, even costly prospective relief, is within the power of the federal courts."

the individual defendants asserted that they lacked the ability to comply with portions of the order which potentially required the expenditure of large amounts of funds. The court of appeals noted that the district court had not ordered the expenditure of funds by the defendants. He had only set the conditions under which the prison could continue in operation in compliance with the Constitution. 547 F.2d at 1212. Although compliance with the order may require as an incidental and ancillary consequence the expenditure of state funds, this was not forbidden by the Eleventh Amendment.

West v. Keve, 571 F.2d 158, 163 (3d Cir. 1978) noted that although the Eleventh Amendment bars damage suits against state officials in their official capacities when damages will have to be paid with state funds, it does not bar damage claims against state officials in their individual capacities. In that case the plaintiff alleged that defendant prison officials had shown deliberate indifference to his serious medical needs in denying him adequate medical treatment. The complaint stated a claim against the defendants in their individual capacities and therefore was not barred by the Eleventh Amendment.

In Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977), the district court enjoined the state commissioner of administration and the commissioner of finance from enforcing any provision of state law which would hinder other defendants, including the administrator of the state mental hospital, from complying with the court's orders requiring improvements in the physical plant and hiring of additional staff. The district court had further directed the defendants to seek necessary funding through regular administrative and legislative channels. Although the defendants did so, the legislature failed to appropriate sufficient funds. Thereupon further hearings were conducted and the court ultimately entered an order enjoining the defendants from enforcing the provisions of the state Constitution which prohibited expenditure of public funds except upon legal appropriations. Defendants appealed, asserting that the order violated the Eleventh Amendment. The court of appeals remanded, indicating that the district judge had taken the wrong approach. The court noted that the state, if it chose to operate hospitals for the mentally retarded, was required to meet minimal constitutional standards. This requirement would not yield to financial considerstions. There were alternatives to

operation of the state hospital system. The court stated: "[I]t is the function of the federal court to determine whether the plans and steps taken or proposed by the state satisfy constitutional requirements. We think that all concerned would do well to keep that difference in function in mind." 550 F.2d at 1132. The court of appeals vacated the district court's order and remanded for further consideration after the current legislature had completed its session.

Garner v. Giarruso, 571 F.2d 1330, 1338 (5th Cir. 1978) noted that municipalities are not entitled to immunity under the Eleventh Amendment.

Fanty v. Commonwealth of Pa., Department of Public Welfare, 551 F.2d 2 (3d Cir. 1977) held that the district court had violated the Eleventh Amendment in ordering defendant officials of the state department of public welfare to serve notice upon all identified members of subclasses of plaintiff that they had no legal obligation to reimburse the state out of their federal disability benefits for funds they had received from the state under its welfare laws, and the district court had improperly advised them that as a matter of state law they may have a cause of action against the state department of public welfare. The court stated:

> Like other recent Supreme Court decisions, Edelman indicates that the determination of whether relief is barred by the Eleventh Amendment and the doctrine of sovereign immunity depends upon two distinct inquiries: (1) whether the relief operates against the sovereign itself or only against an officer (2) whether any relief which does operate against the sovereign itself is permissible because the state has waived its general immunity from suit and its right not to be sued in federal court.

551 F.2d at 4. The court noted that it is sometimes difficult to draw the line between relief which operates against the state itself and relief which operates only against an officer. The court stated: "However, at a minimum, the relief must be a 'necessary consequence of compliance in the future with a substantive federal-

question determination,' and not a form of redress for a 'past breach of a legal duty.'" 551 F.2d at 4. Since the district court was attempting to make welfare recipients aware of their possible right to file state petitions for refunds, the order was actually granting relief rather than supervising the conduct of the litigation. Further, the order was based upon the court's view that the department's past practices were improper. The court concluded: "In sum, the court's order looks to a 'past breach of a legal duty,' and is not a 'necessary consequence of compliance in the future with a substantive federal-question determination.'" 551 F.2d at 5. But see Quern v. Jordan, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 47 U.S.L.W. 4241 (March 5, 1979).

SECTION XII: MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

In a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure the allegations of the complaint must be taken as true.[286] Further, "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) explained this preliminary review of the complaint as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

416 U.S. at 236, 94 S.Ct. at 1686, 40 L.Ed.2d at 96.

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286. Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263, 268 (1972); Reeves v. City of Jackson, Mississippi, 532 F.2d 491, 493 (5th Cir. 1976).

Statements of fact contained in the defendants' brief cannot be considered.[287] Pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). While the court may be able to dismiss a complaint for failure to state a claim on its own initiative without a motion, the plaintiff should be given notice and opportunity to respond.[288] If the defendant's motion is based upon failure of the complaint to state a claim upon which relief can be granted and is supported by an affidavit or other matters outside the pleading, then Rule 12(b) requires that it be treated as a motion for summary judgment under Rule 56.[289] However, the plaintiff must be given notice and opportunity to respond.[290] Torres v. First State Bank of Sierra County, 550 F.2d 1255 (10th Cir. 1977) stated: "We are met with a problem that recurs with more and more frequency. Trial judges receive, and do not exclude, matters outside the pleadings and then grant a motion to dismiss rather than a summary judgement." 550 F.2d at 1256-57.

In the Third Circuit "plaintiffs in civil rights cases are required to plead facts with specificity."[291]

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287. Tunnell v. Wiley, 514 F.2d 971, 975 n. 5 (3d Cir. 1975).

288. Dougherty v. Harper's Magazine Co., 537 F.2d 758, 761 (3d Cir. 1976).

289. Sprague v. Fitzpatrick, 546 F.2d 560, 563 (3d Cir. 1976), cert. denied, 431 U.S. 937; Jennings v. Davis, 475 F.2d 1271, 1273 (8th Cir. 1973).

290. Winfrey v. Brewer, 570 F.2d 761, 764 (8th Cir. 1978).

291. Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976). The Aldisert Report (Section II, E n. 27 supra) provides a complaint form for use in prisoner cases which requires the articulation of specific facts. (Aldisert Report at 83-85, 1977 ed.). The committee commented on the form as follows:

> The recommended complaint form requires the prisoner-plaintiff to furnish sufficient factual information to determine, in many cases, whether the complaint has merit without requiring a responsive pleading from the defendant.

However, the Fourth Circuit requires only the "short and plain statement of the claim showing that the pleader is entitled to relief" as required by Rule 8 of the Federal Rules of Civil Procedure.[292] The Seventh Circuit appears to be in accord.[293] In the Third Circuit a complaint which contains only vague and conclusory allegations can be dismissed, Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967),[294] although the plaintiff should first be given an opportunity to amend.[295]

Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976) observed that the Haines standard,[296]

> The decision in Estelle v. Gamble [97 S.Ct. 285 (1976)] indicates that the failure to plead the necessary facts may properly result in a dismissal. The opinion of Mr. Justice Marshall indicates that the careful and complete factual allegations in the case made speculation as to what the facts might be unnecessary. [See also Codd v. Velger, 97 S.Ct. 882 (1976).] The committee believes that the use of the recommended form may increase the situations in which frivolous complaints can properly be dismissed sua sponte under 28 U.S.C. § 1915(d).

Aldisert Report at 51-52.

292. Bolding v. Holshouser, 575 F.2d 461, 464 (4th Cir. 1978).

293. Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978) stated: "Under the Federal Rules of Civil Procedure, a plaintiff in a section 1983 action is only 'required to set forth specific illegal misconduct and resultant harm in a way which will permit an informed ruling whether the wrong complained of is of federal cognizance.'" 579 F.2d at 1371.

294. See also Gray v. Creamer, 465 F.2d 179, 182 n. 2 (3d Cir. 1972); Marnin v. Pinto, 463 F.2d 583 (3d Cir. 1972) (general allegations of bad food and miserable living conditions).

295. Dougherty v. Harper's Magazine Co., 537 F.2d 758 (3d Cir. 1976); Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976); Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976).

296. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

which requires that pro se complaints be held to less stringent standards than formal pleadings drafted by lawyers, applies to complaints in which "specific allegations of unconstitutional conduct" are made, while Negrich continues to serve as a barrier to complaints which contain only vague and conclusory allegations.

Although a conspiracy can be the basis for a claim under 42 U.S.C. § 1983, Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978),[297] conclusory allegations cannot withstand a motion to dismiss. Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert. denied. In Slotnick the court stated:

> In an effort to control frivolous conspiracy suits under 1983, federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts.

560 F.2d at 33. Similarly, in Ostrer v. Aronwald, 567 F.2d 551 (2d Cir. 1977), the court stated:

> This court has repeatedly held that complaints containing only "conclusory," "vague" or "general allegations" of a conspiracy to deprive a person of constitutional rights will be dismissed . . . . Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct . . . . In this case, appellants' unsupported

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297. See also Slavin v. Curry, 574 F.2d 1256, 1261 (5th Cir. 1978).

> allegations, which fail to specify in detail the factual basis necessary to enable appellees intelligently to prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive appellants of their constitutional rights.

567 F.2d at 553.

A general allegation of a conspiracy will not prevent dismissal as to a defendant who is named only in the caption of the complaint without any allegation of overt acts in which he engaged which were reasonably related to the promotion of the claimed conspiracy. Kadar Corp. v. Milbury, 549 F.2d 230, 232 (1st Cir. 1977).

SECTION XIII: MOTION FOR SUMMARY JUDGMENT

The determinative question on a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure is whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. While the rule specifically authorizes the consideration of affidavits, statements made by counsel in briefs are not part of the record and are not treated as such unless stipulated to or unless they are matters of public record.[298] The rule requires that affidavits be made on personal knowledge, that they set forth such facts as would be admissible into evidence, and that they show affirmatively that the affiant is competent to testify to the matters stated therein.[299] Sworn or certified copies of all papers referred to in the affidavit must be attached.

An affidavit based upon personal knowledge can overcome a responsive affidavit which amounts only to a general denial. Lockhart v. Hoenstine, 411 F.2d 455 (3d Cir. 1969). Conclusory assertions of ultimate fact are entitled to little weight. Askew v. Bloemker, 548 F.2d 673, 679 (7th Cir. 1976).

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298. Kauffman v. Johnston, 454 F.2d 264 (3d Cir. 1972). See Mitchell v. Beaubouef, ____ F.2d ____, No. 77-2656 (5th Cir. September 18, 1978), where the district court improperly dismissed the complaint based on an unverified administrative report of the defendant filed in accordance with the magistrate's order. The court noted that if the report had satisfied the requirements of Rule 56 it could have been considered in reaching summary judgment.

299. Hearsay evidence not admissible at trial cannot be used to avoid summary judgment. Broadway v. City of Montgomery, Alabama, 530 F.2d 657, 661 (5th Cir. 1976). Opinion evidence admissible at trial can be submitted by affidavit. Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975).

Rule 56(e) further provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978), citing its earlier decision in Roseboro v. Garrison, infra, stated: "[A] district court must advise a pro se litigant of his right under the summary judgment rule to file opposing affidavits to defeat a defendant's motion for summary judgment." 574 F.2d at 1151.

Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) approved of the procedure described by the District of Columbia Circuit in Hudson v. Hardy, 412 F.2d 1091 (1968):

> We hold that before entering summary judgment against appellant, the District Court, as a bare minimum, should have provided him with fair notice of the requirements of the summary judgment rule. We stress the need for a form of notice sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required.

412 F.2d at 1094.

On the question of withholding disposition of a motion for summary judgment until discovery has been completed it has been said: "[W]here the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course," Costlow v. U.S., 552 F.2d 560, 564 (3d Cir. 1977).

United States ex rel. Jones v. Rundle, 453 F.2d 147 (3d Cir. 1971) stated:

> The error of the district court resides in its granting defendant's motion for summary judgment. Summary judgment is proper only when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. Rule 56(c). "Any doubt as to the existence of a genuine issue of fact is to be resolved against the moving party . . . . Documents filed in support of a motion for summary judgment are to be used to determine whether issues of fact exist and not to decide the fact issues themselves."

453 F.2d at 150.

SECTION XIV: ABATEMENT OF ACTION UPON DEATH OF A PARTY

Neither section 1983 nor any other federal law covers abatement or survival of an action brought under section 1983 upon the death of a party. Therefore, it is necessary to resort to 42 U.S.C. § 1988 which provides:

> The jurisdiction in civil and criminal matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

In Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978), the lower courts erred in refusing to apply the state survivorship statute under which the cause of action abated upon the plaintiff's death. The district court had found the state law to be inconsistent with federal law and and created "a federal common law of survival in

civil rights actions in favor of the personal representative of the deceased." 436 U.S. at 587, 98 S.Ct. at 1994, 56 L.Ed.2d at 559. The Court noted that state statutes providing for survival of actions were intended to modify the harsh, nineteenth century common-law rule: "[A]n injured party's personal claim was [always] extinguished . . . upon the death of either the injured party himself or the alleged wrongdoer." Despite the broad scope of section 1983, the Court could find nothing in the statute or its underlying policies to indicate that a state law which caused abatement of a particular action should be ignored in favor of a rule of absolute survivorship. 436 U.S. at 590, 98 S.Ct. at 1995, 56 L.Ed.2d at 561. The Court noted:

> A different situation might well be presented, as the District Court noted, if state law "did not provide for survival of any tort actions," . . . or if it significantly restricted the types of actions that survive . . . . We intimate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death.

436 U.S. at 594, 98 S.Ct. at 1997, 56 L.Ed.2d at 563-64. The Court also noted that actions brought under 42 U.S.C. § 1985 survive under 42 U.S.C. § 1986 which provides for liability "to the party injured, or his legal representatives." 436 U.S. at ____ n. 4, 98 S.Ct. at 1995 n. 4, 56 L.Ed.2d at ____ n. 4.

SECTION XV: CLASS ACTIONS BY PRO SE PLAINTIFFS

One basic requirement for class action certification is that the representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The recent Third Circuit case of Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir. 1975), cert. denied, 421 U.S. 1011, stated: "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." 508 F.2d at 247. Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975) held it to be plain error to permit an imprisoned litigant who was unassisted by counsel to represent his fellow inmates in a class action. The court stated:

> Oxendine's request for an injunction against prison policies that affect all inmates places this class action under Fed.R.Civ.P. 23(b)(2) . . . . A judgment against him may prevent the other inmates from later raising the same claims. Fed.R.Civ.P. 23(c)(2). It follows that unless he can "fairly and adequately protect the interest of the class," he may not represent it. Fed. R.Civ.P. 23(a)(4) . . . . Ability to protect the interests of the class depends in part on the quality of counsel . . . and we consider the competence of a layman representing himself to be clearly too limited to allow him to risk the rights of others . . . . Neither Oxendine nor any other prisoner has assigned error to the class aspect of this case, but it is plain error to permit this imprisoned litigant who is unassisted by counsel to represent his fellow inmates in a class action.

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509 F.2d at 1407. Carlisle v. Sielaff, 62 F.R.D. 441 (E.D. Ill. 1974) stated:

> The Court does not feel that there is sufficient indication that this pro se plaintiff will fairly and adequately represent the interests of the class. Thus, the Court feels that it should not be considered as a class action, but will nonetheless consider Carlisle's claims as they relate to him.

64 F.R.D. at 442. Similarly, Jeffrey v. Malcolm, 353 F.Supp. 395 (S.D. N.Y. 1973) stated:

> The plaintiff herein, who sues pro se, asserts in his complaint that he can fairly and adequately represent the interests of his fellow prisoners, as required by Fed.R.Civ.P. 23(a)(4). It is settled, however, that in reviewing the adequacy of representation a Court should weigh, among other factors, the actual qualifications and experience of the self-selected champion for the proposed class . . . . Skilled representation may be crucial, for the outcome of a class suit -- whether favorable or adverse to the class -- is binding on the members of the class. Fed.R.Civ.P. 23(c)(3). The ordinary layman will generally not possess the requisite training, expertise, and experience to be able to adequately serve the interests of a proposed class. The plaintiff has not asserted or evidenced any special qualifications which might justify maintenance by him, pro se, of a class action.

353 F.Supp. at 397.

Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976) involved a class action suit in which an attorney served as representative of the class and a series of associates and partners served as counsel for the class. Even assuming that the class

representative was not the attorney in fact, that the partner's legal representation was of the highest caliber, and that the class representative had no interest in the case apart from his role as named plaintiff, the court held that it would be improper under the Code of Professional Responsibility for a partner of the lawyer-plaintiff to represent the class because of the code's requirement that lawyers avoid even the appearance of impropriety. 534 F.2d at 1089-90. The court noted that there was no serious question that it would have been improper for the lawyer-plaintiff-class-representative to have designated himself as counsel for the class. 534 F.2d at 1089.

Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978) held that the plaintiff's action challenging the conditions of confinement was barred since he was a member of a class which challenged the conditions in a separate suit. The Court stated: "A judgment in a class action suit brought under Fed.R.Civ.P. 23(b)(2) is binding on all class members unless they can show that their interests were not adequately represented by the class representatives." 557 F.2d at 454.

SECTION XVI: PENDENT JURISDICTION

The doctrine of pendent jurisdiction was formulated in United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), an action by a former mine superintendent against the UMW for alleged violations of the Labor Management Relations Act and violations of the common law of Tennessee. The Supreme Court held that the district court had properly assumed jurisdiction over the claim based upon state law, and defined pendent jurisdiction as follows:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," U.S. Const. Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court . . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

383 U.S. at 725, 86 S.Ct. at 1138, 16 L.Ed.2d at 227. The Court recognized that the exercise of pendent jurisdiction is discretionary:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.

383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

The Court further commented that if in a particular case the jury could become confused by divergent legal theories for relief, the state and federal claims should be separated and pendent jurisdiction refused. The Court commented that the propriety of pendent jurisdiction could be raised at any time throughout the litigation. If it appeared that a state claim constituted the real body of the case and that the federal claim was only an appendage, the state claim could fairly be dismissed. Under the

facts of that case the Court could not say that the district court had exceeded its discretion in proceeding to judgment on the state claim. Although the federal claim ultimately failed, the Court could not say that the federal issues were so remote or played such a minor role at the trial that in effect the state claims only were tried.

Pendent jurisdiction does not extend to an additional party with respect to whom there is no independent basis of federal jurisdiction. Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976). The plaintiff brought her action for wrongful discharge from employment against the county treasurer who hired and subsequently discharged her, the county commissioners, and the county. Plaintiff alleged that her discharge was in violation of her constitutional rights. She asserted a claim under 42 U.S.C. § 1983, over which the court had jurisdiction under 28 U.S.C. § 1343(3). At that time the county was immune from liability under section 1983 under Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).[300] The state law claim against the county was based on state statutes providing for its vicarious liability arising out of tortious conduct of county officials. The district court dismissed the pendent claim against the county since there was no independent basis of jurisdiction over it. Both the court of appeals and the Supreme Court affirmed. The Court explained:

> The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis

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300. This holding in Monroe was subsequently overruled in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

> of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact."

427 U.S. at 14, 96 S.Ct. at 2420, 49 L.Ed.2d at 286. The Court noted that it was deciding only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under sections 1343(3) and 1983, and concluded:

> If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.

427 U.S. at 18, 96 S.Ct. at 2422, 49 L.Ed.2d at 288.

Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) approved the action of the district court in deciding the pendent statutory claim and thereby obviating the necessity of deciding the constitutional question.[301]

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301. Durso v. Rowe, 579 F.2d 1365, 1372 (7th Cir. 1978) stated: "In . . . [Hagans] the Supreme Court reiterated the rule that it is generally advisable to decide a pendent state claim before addressing a federal constitutional claim."

Under authority of Hagans, in Gagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977), cert. denied, ____ U.S. ____, 98 S.Ct. 3122, 57 L.Ed.2d 1147 (1978), the Third Circuit approved the district court's trial of a state law claim against a city, based upon the state wrongful death act, as a claim pendent to a Fourteenth Amendment and section 1331 claim. A section 1983 action did not lie against the city as a result of the holding in Monroe v. Pape that a municipality is not a "person" for section 1983 purposes.[302] The next question was whether there was a cause of action against the city under the Fourteenth Amendment on a Bivens[303] theory over which the court would have jurisdiction under section 1331. The court noted that the Supreme Court had declined to decide whether a damage remedy could be implied under the Fourteenth Amendment. Further, there were circuit and district court decisions holding that a claim for damages could be brought under the Fourteenth Amendment. Therefore, plaintiff's constitutional claim was not so insubstantial as to be incapable of supporting federal jurisdiction and the district court had jurisdiction to decide the pendent state law claim. The Court had properly exercised its discretion in avoiding the difficult constitutional question of whether to imply a Fourteenth Amendment remedy in damages and proceeding to try the pendent state law claims. Subsequently, in Mahone v. Waddle, 564 F.2d 1018, 1026 (3d Cir. 1977), the court remanded for reconsideration of the possible exercise of pendent jurisdiction in light of Gagliardi.[304]

In Miller v. Carson, 563 F.2d 757 (5th Cir. 1977), the district court had properly exercised its pendent jurisdiction in deciding plaintiff's state law claims which sought an order directing the Secretary of the Department of Offender Rehabilitation to adopt rules

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302. Gagliardi was decided prior to Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which overruled this holding in Monroe v. Pape.

303. 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). See Section X supra.

304. Accord, Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978); Pitrone v. Mercadante, 572 F.2d 98 (3d Cir. 1978).

and regulations prescribing standards for the operation of detention facilities. 563 F.2d at 762. Plaintiffs were pretrial detainees who claimed that the manner in which the county jail was being operated by the defendants violated their rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution. The court found that the federal claim was substantial and that the state and federal claims were such that the plaintiff would be expected to try them all in one judicial proceeding. The claims met the Gibbs test that there be a common nucleus of operative fact. The court noted that the plaintiffs could not be expected to litigate the requirements of state law in one proceeding and the requirements of federal law on the same matter in another. In addition to the fact that a parallel state court trial would have been duplicative, it would have been meaningless if the federal court found that the Constitution required a higher duty than was required by the state law. 563 F.2d at 761.

When all of the claims arising under federal law have been dismissed, the district court is without jurisdiction over pendent state claims and they must also be dismissed. Kurz v. State of Michigan, 548 F.2d 172, 175 (6th Cir. 1977), cert. denied.

Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) stated:

> A § 1983 plaintiff's burden does not vary depending upon whether he is seeking injunctive or monetary relief; the elements of the cause of action remain precisely the same. In both instances he must prove that the defendant caused him to be subjected to a deprivation of constitutional rights. But, no greater burden is imposed on the plaintiff seeking money damages. The requested relief becomes relevant only in terms of whether or not the defendant is entitled to assert good faith as a defense.

566 F.2d at 831.

Actions seeking money damages were distinguished from actions for injunctive relief in Collins v. Schoonfield, 363 F.Supp. 1152, 1155 (D. Md. 1973). In an action seeking injunctive relief the court is concerned with the constitutionality of long term practices and procedures in the institution. However, when the plaintiff is seeking money damages the court is called upon to rule upon specific acts of allegedly unconstitutional conduct committed by the individual defendants. Judge Harvey observed that federal courts have been taking an increasingly enlightened and progressive approach in considering constitutional attacks on the conditions of confinement in state and local penal institutions. Standards formerly accepted are now rejected. However, when the plaintiff is seeking compensatory and punitive damages against an individual defendant, the defendant's liability is personal in nature, intended to be satisfied out of the individual defendant's pocket. The court stated: "It has therefore been recognized that it would contravene basic notions of fundamental fairness if prison officials were held to be liable monetarily

for acts which they could not reasonably have known were unlawful." 363 F.Supp. at 1156.

In Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978), the court stated:

> However, it is one thing to grant to prison inmates, including violent or recalcitrant ones, prospective declaratory or injunctive relief designed to protect them in the future from unconstitutional practices or conditions. It is quite another thing to expose prison personnel, including personnel in the higher echelons of prison administration and policy formulation, to personal pecuniary liability in suits brought by largely irresponsible inmates under § 1983.

572 F.2d at 1266.

A. Damages

1. Nominal Damages

In Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the Court held that where the plaintiff shows a deprivation of due process but fails to show actual injury resulting from the deprivation, he is entitled to nominal damages of one dollar. In that case the plaintiffs had been suspended from school without due process of law. The district court declined to award damages because the plaintiffs had offered no evidence of the extent of their injuries. In response to plaintiffs' argument that they should be awarded substantial damages for the deprivation of a constitutional right, whether or not any injury was caused by the deprivation, the Court stated: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." 435 U.S. at 256, 98 S.Ct. at 1048, 55 L.Ed.2d at 260. The Court recognized that it was difficult to determine damage awards under section 1983, but determined that the starting point should be the rules developed over the years through the common law of torts. 435 U.S. at 257, 98 S.Ct. at

1049, 55 L.Ed.2d at 261. The Court stated:

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question -- just as the common-law rules of damage themselves were defined by the interests protected in the various branches of tort law.

435 U.S. at 258, 98 S.Ct. at 1050, 55 L.Ed.2d at 262. Discussing the facts of plaintiffs' case the Court recognized that the purpose of the procedural due process rules is not protection from the actual deprivation but protection from mistaken or unjustified deprivation of life, liberty, or property. The Court agreed with the defendants that injury could not be presumed from a denial of due process. Plaintiffs were required to prove injury in order to recover compensatory damages. If plaintiffs' deprivations, i.e., their suspensions, were justified, they could not recover damages for their suspensions although they could recover damages for any mental and emotional distress which was actually caused by the denial of due process. The Court concluded:

> In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983 we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.

435 U.S. at 264, 98 S.Ct. at 1052, 55 L.Ed.2d at 265. Further, the Court stated: "More importantly, the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." 435 U.S. at 264, 98 S.Ct. at 1053, 55 L.Ed.2d at 265. The Court concluded:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners.

435 U.S. at 266, 98 S.Ct. at 1054, 55 L.Ed.2d at 266.

The opinion in Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978), was written before Carey but was not released until after Carey had been decided. In footnote 2, 575 F.2d at 25, the court commented that it was consistent with Carey. In that case the court approved the district court's award of $1,000 as damages for each plaintiff. The plaintiffs had been suspended from the university because of their allegedly disruptive activity during a march to the office of the chancellor. None of the students had received any form of hearing prior to their suspension and a subsequent hearing revealed that the suspensions were unwarranted and they were revoked. In explaining its award the district court stated:

> This valuation is not an "evaluation" of the constitutional rights herein found to be deprived, but a symbol of this Court's finding for plaintiffs in view of the fact that we consider that the actual damages suffered by suspension lasted, at the most, twelve days. The records will be expunged and they did not lose the academic semester.

575 F.2d at 25. The court noted that although it had suggested that a plaintiff who proved only an intangible loss of civil rights or purely mental suffering

could be awarded substantial compensatory damages, it had never indicated that such damages were required to be awarded for either intangible loss or mental distress. Plaintiffs' only evidence of actual injury were their own statements that they experienced some psychological discomfort as a result of their suspensions. The court noted that courts are not inclined to award compensatory damages for general mental distress or unexplained negative effects of violations of constitutional rights. Therefore, the court deferred to the judgment of the district court as to the appropriate damages. The court noted that the defendants had not acted out of malicious bad faith and the case did not involve repeated deprivations or harassment. Rather, it involved an isolated error in the administration of university discipline. 575 F.2d at 25.

In United States ex rel. Tyrrell v. Speaker, 535 F.2d 823, 829 (3d Cir. 1976), the district court had found that plaintiff was entitled to nominal damages only because the conditions in administrative segregation, in which he was improperly placed, were less restrictive than the conditions in the county prison from which he had been transferred. The court of appeals reduced the nominal damages from $500 to $1.00.[305] The court commented that federal courts could look to state law to determine the amount of nominal damages to be awarded.

2. Compensatory Damages

Preiser v. Rodriguez, 411 U.S. 475, 494, 93 S.Ct. 1827, 1838, 36 L.Ed.2d 439, 453 (1973) recognized in dictum that money damages are available to prisoners in actions under section 1983.

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) held that federal law enforcement officers could be held liable to plaintiff for money damages for violating

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305. Accord, Magnett v. Pelletier, 488 F.2d 33 (1st Cir. 1973). See also Thompson v. Burke, 556 F.2d 231, 240 (3d Cir. 1977), where the court stated: "[W]here nominal damages are to be awarded, the amount should be $1.00."

the Fourth Amendment in searching plaintiff's home and arresting him without a warrant and without probable cause. In response to defendants' argument that the Fourth Amendment does not provide for its enforcement by an award of money damages, the Court stated: "But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' . . . The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396, 91 S.Ct. at 2004, 29 L.Ed.2d at 626. The Court further stated: "Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment . . . we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." 403 U.S. at 397, 91 S.Ct. at 2005, 29 L.Ed.2d at 627.

Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (Dellums I) held that an action could be brought under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), for violation of First Amendment rights. The plaintiff had been arrested on the steps of the United States Capitol on May 5, 1971, while engaged in a protest against the war in Vietnam. The court discussed the question of whether damages could be awarded:

> This brings us to the question whether the quantum of damages to be awarded for First Amendment violations is administrable by the courts. We think it is in principle no less administrable than damage awards for other intangible interests protected by the Constitution or at common law. . . .
>
> Basically, what is at stake here is loss of an opportunity to express to Congress one's dissatisfaction with the laws and policies of the United States. . . .
>
> That loss of an opportunity to demonstrate constitutes loss of First Amendment rights "in their most

> pristine and classic form" does not mean, however, that monetary recompense should be extravagant. The award must be proportional to the loss involved insofar as it seeks to compensate intangible injuries. The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights. . . . [W]e find error because those instructions did not require the jury to focus on the loss actually sustained by the plaintiffs. This is not, after all, a case in which the demonstration was thwarted altogether--the program of events was virtually complete before any substantial number of arrests had been made. In these circumstances, the $7,500 judgment is totally out of proportion to any harm that has been suffered, and therefore we vacate that judgment and remand this facet of the case for a redetermination of First Amendment damages.

566 F.2d at 195.

The remainder of this section shall review selected recent cases in which the plaintiff has been awarded compensatory damages. It is not intended to be a comprehensive review, but merely a sampling of such cases.

A jury verdict of $12,000 against the police officer who had severely beaten plaintiff in the jail after plaintiff's arrest and the jailor who witnessed the beating, failed to prevent it, and failed to obtain medical attention for plaintiff's serious injuries, was affirmed in Harris v. Chanclor, 537 F.2d 203 (5th Cir. 1976). Similarly, Taken Alive v. Litzau, 551 F.2d 196 (8th Cir. 1977) affirmed a jury verdict in the amount of $10,000 against the law enforcement officer who broke plaintiff's arm while forcing her into the patrol car.

The court commented in Mukmuk v. Com'r. of Dept. of Correctional Services, 529 F.2d 272, 275 (2d Cir. 1976), cert. denied, 426 U.S. 911, 96 S.Ct. 2238, 48 L.Ed.2d 838, that the defendant warden could be

liable in damages to the plaintiff if he punished him for possession of religious literature. Similarly, a jury award of $1,000 against the commissioner of corrections and the warden for punishing plaintiff for having inflammatory and revolutionary papers in his possession was affirmed in United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975). An award of $1,000 against the jailor for having plaintiff's hair cut and causing him to be injured in the process, although he knew plaintiff was about to be released, was affirmed in Carter v. Noble, 526 F.2d 677 (5th Cir. 1976). The district court in Scharfenberger v. Wingo, 542 F.2d 328 (6th Cir. 1976), erred in granting defendant's motion for judgment n.o.v. following jury verdicts of $15,000 against the former warden and associate warden for denying plaintiff adequate medical treatment during his incarceration. Plaintiff alleged that he suffered two amputation operations to his right arm because of the denial of adequate medical treatment. The court of appeals found that in granting judgment n.o.v. the district court had resolved conflicts in the evidence which were within the province of the jury.

In United States ex rel. Neal v. Wolfe,[306] 346 F.Supp. 569, 576 (E.D. Pa. 1972), the court awarded plaintiff twenty-five dollars per day spent in solitary confinement without a prior due process hearing and an additional sixty cents per day for lost wages.

Lewis v. Hyland, 554 F.2d 93 (3d Cir. 1977) found that the district court had erred in awarding damages, after denying injunctive relief, when the plaintiffs had not asked for money damages. The phrase "and such other relief" did not include a claim for legal damages. 554 F.2d at 103.

3. Punitive Damages

The Supreme Court, in dictum, has commented that a plaintiff might be able to recover exemplary or punitive damages in an action under section 1983 where appropriate for the purpose of deterring or punishing

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306. See also Sostre v. McGinnis, 442 F.2d 178, 205 n. 52 (2d Cir. 1971), cert. denied, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972).

violations of constitutional rights. Carey v. Piphus, 435 U.S. 247, 257, n. 11, 98 S.Ct. 1042, 1049, n. 11, 55 L.Ed.2d 252, 260 n. 11 (1978).

Cochetti v. Desmond, 572 F.2d 102 (3d Cir. 1978) adopted the test propounded by Justice Brennan in his separate opinion in Adickes v. Kress & Co., 398 U.S. 144, 233, 90 S.Ct. 1598, 1642, 26 L.Ed.2d 142, 197 (1970) (Brennan, J., concurring in part and dissenting in part):

> To recover punitive damages, I believe a plaintiff must show more than a bare violation of § 1983. On the other hand, he need not show that the defendant specifically intended to deprive him of a recognized federal right, as is required by the word "willfully" in 18 U.S.C. § 242 . . . . It is sufficient for the plaintiff to show either that the defendant acted . . . with actual knowledge that he was violating a right "secured by the Constitution and laws," or that the defendant acted with reckless disregard of whether he was thus violating such a right.

572 F.2d at 106. The Third Circuit summarized: "This test, requiring that the defendant acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so, seems to us appropriate." 572 F.2d at 106. Applying that test to the facts of the case in which the plaintiff claimed he had been wrongfully discharged from employment, the court determined that an award of punitive damages would have been improper and thus affirmed the summary judgment.

Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978) upheld an award of punitive damages, stating:

> The general rule as to punitive damages, repeatedly found in the reported cases, is that they may be imposed if a defendant has acted willfully and in gross disregard for the rights of the complaining

> party. Since such damages are punitory and are assessed as an example and warning to others, they are not a favorite in law and are to be allowed only with caution and within narrow limits.
>
> . . . [T]he infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of the fact.

570 F.2d at 243.

Punitive damages may be awarded in an action brought against federal officials under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and 28 U.S.C. § 1331 under standards applied in actions under § 1983. Paton v. LaPrade, 524 F.2d 862, 871-72 (3d Cir. 1975). Punitive damages may be awarded although no compensatory damages are awarded. Fisher v. Volz, 496 F.2d 333, 348 (3d Cir. 1974); Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir. 1965).[307] However, punitive damages cannot be based on respondeat superior. Fisher, supra, at 349.

Huntley v. Community Sch. Bd. of Brooklyn, 579 F.2d 738 (2d Cir. 1978) stated:

> Assuming arguendo that punitive damages can be grounded upon reckless indifference to the rights of others as well as upon malice, Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976), and that punitive damages may be recovered in actions premised upon civil rights violations even in the absence of actual loss to the plaintiff, Stolberg v. Members of Board of Trustees, 474 F.2d 485, 489 (2d Cir. 1973), we are nevertheless convinced that no

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307. See also Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976).

> reasonable juror could have inferred the requisite bad faith from the trial record. Cf. Askew v. Bloemker, 548 F.2d 673, 679 (7th Cir. 1976).

579 F.2d at 741.

Punitive damages in the amount of $25,000 against the deputy sheriff and $10,000 against the police officer who allegedly beat plaintiff after arresting him without a warrant and without probable cause were affirmed in Vetters v. Berry, 575 F.2d 90 (6th Cir. 1978).

Jury awards of punitive damages in the amount of $60,000 against a judge and $1,000 against a deputy sheriff were affirmed in Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978).[308] The judge had directed the deputy sheriff to bring the plaintiff, a coffee vendor, before him in handcuffs because the coffee tasted "putrid." With the plaintiff standing before him in handcuffs the judge conducted an inquisition, screaming at him, threatening him and his livelihood, and scaring him. The incident led to the judge's removal from the bench. The court found that under the circumstances it could not say that the jury had acted out of "passion and prejudice" or that the verdict shocked the court's conscience. The court stated: "Given Perry's position, his relationship of power and authority to plaintiff, who was a simple coffee vendor, the handcuffing, threats and intimidation inflicted upon plaintiff, and Perry's outrageous conduct, we are not compelled to conclude that the jury acted out of 'passion and prejudice.'" 572 F.2d at 57.

B. Injunctive Relief[309]

Wolfish v. Levi, 573 F.2d 118, 120 (2d Cir. 1978) urged caution in the exercise of the court's equitable powers in conditions of confinement cases, and stated: "[A]lthough district courts are empowered with broad discretion to frame equitable remedies so long as the relief granted is commensurate with the scope of the

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308. The jury also awarded the plaintiff compensatory damages in the amount of $80,000 against both defendants.

309. The principles of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) limiting the power of federal courts to enjoin state criminal proceedings and the application of those principles to some civil proceedings are not treated in this volume. But see Aldisert, On Being Civil to Younger, 11 Conn. L. Rev. 181 (1979).

constitutional infraction, a trial judge must tread carefully in less substantial matters best left to the expertise of prison officials." 573 F.2d at 120. The court of appeals noted that the district court had intervened broadly into almost every facet of the institution and stated:

> In most instances, the able district court judge's incursion on administrative authority was well-founded, and cured serious constitutional deficiencies in the operation of the MCC. But in other cases we believe a balance more restrained should have been struck between the court's power to redress inmate grievances and deference to prison administrators. Many of the cited deficiencies, if indeed they existed, were not of a kind to require a chancellor's decree to bring about compliance.

573 F.2d at 121.

Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978) held that the district court had improperly prescribed specific standards for future construction of a new county jail. The court stated that "in prescribing specific standards for future construction and operation and in retaining jurisdiction for the purpose of insuring conformance therewith, it is our opinion that the district court has impermissibly intruded into the affairs of state prison administration." 570 F.2d at 289.

Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975), dealt with the problems faced by district courts when defendants claim inadequate finances to provide constitutionally adequate prison facilities. In that case the court stated:

> Inadequate resources of finances can never be an excuse for depriving detainees of their constitutional rights. . . . On the other hand, as the above authorities indicate, this Court is hardly in the position to order the City to raise the necessary funds to build additional facilities.

> We can, however, order the release of persons held under conditions which deprive them of rights guaranteed by the Constitution unless the conditions are corrected within a reasonable time.

520 F.2d at 399.

The court of appeals affirmed the district court's order prohibiting incarceration of pretrial detainees at the Charles Street Jail in Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cit. 1978). However, the court of appeals modified the district court's order to allow the prison officials a period of six months in which to make interim arrangements prior to closing the jail to pretrial detainees. The court stated:

> Plaintiffs are entitled to be incarcerated under constitutional conditions of confinement. We are prepared, because of practical exigencies, to allow the plaintiff class to be incarcerated under lower standards for a fixed interim period while an appropriate facility is being readied. However, there is no legal basis for our permitting unconstitutional conditions to continue interminably.

573 F.2d at 101.

The district court in Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), had found that the conditions at the Manhattan House of Dentention for Men, which housed pretrial detainees, were unconstitutional and ordered the city to submit within thirty days a comprehensive and detailed plan for the elimination of all conditions and practices declared to be in violation of the Constitution of the United States by the court's earlier opinion. The city refused to submit the required plan. Thereupon, the district judge enjoined the city from further confining anyone in the Tombs after a certain date. The judge did make it clear that he would reconsider his order if the city submitted a plan. The court of appeals found that the conditions did violate the Constitution as found by the district judge and in response

to the defendants' complaint that they were given only thirty days to comply with the order, the court of appeals noted that the order was actually entered two months after the judge had filed a thorough opinion finding the conditions of confinement to be unconstitutional. The court of appeals noted that the case was unusual in that substantial physical changes in a jail located in the heart of a large metropolitan area were required. The court stated:

> [W]e believe that the order should be framed to close the prison to detainees or to limit its use for detainees to certain narrow functions by a fixed date, unless specified standards are met. . . . Once the appropriate standards or permissible limited uses are established, the court can then determine whether there has been compliance by the specified deadline. If the City fails to satisfy these criteria in time, the district judge, in his discretion, may postpone the effective date of any order, but he should do so only if clear and convincing proof of adequate planning and funding of improvements is produced.

507 F.2d at 340. The court noted that this procedure had the practical advantage of not placing the judge in the position of trying to enforce a direct order to the city to raise and allocate large sums of money. The court commented that the district judge might require that no person awaiting trial be detained in the prison after a specified date unless conditions were upgraded to meet specific criteria, or he might order that the prison be used only for certain purposes, such as initial confinement for a fairly short period, or overnight housing of detainees scheduled to appear in court or to consult with their attorneys the following day. The court noted that the judge could order that no detainees be housed in the prison after a reasonable date if he felt certain that the city could not or would not remedy the constitutional deprivations.

The district court in Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) had found that unconstitutional practices and conditions existed at a state hospital for mentally retarded persons and had entered an order requiring improvements in the physical plant, the addition of staff members, and other changes. The defendants were directed to seek necessary funding through regular administrative and legislative channels. They did so but the legislature failed to respond and the defendants were not able to comply fully with the requirements of the court. Plaintiffs then filed a supplemental complaint seeking to enjoin state officials from enforcing the provisions of the state Constitution which prohibited expenditures of public funds except upon legal appropriations. 550 F.2d at 1127. The district court, finding it had authority, entered the injunction. On appeal the defendants argued that the order violated the Eleventh Amendment. However, the court of appeals determined that if the state chose to operate hospitals for the mentally retarded, it was required to meet minimal constitutional standards. That obligation could not yield to financial considerations. The court stated:

> There must be no mistake in the matter. The obligation of the defendants to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what the defendants may be able to accomplish with means available to them. As stated, if Minnesota is going to operate institutions like Cambridge, their operation is going to have to be consistent with the Constitution of the United States. . . .
>
> Alternatives to the operation of the existing state hospital system, including Cambridge, may appear undesirable, but alternatives do exist. Primarily, it is the function of the state to determine whether it is going to operate a system of hospitals which comply with constitutional standards, and, if so, what kind of a hospital system it is going to operate. And it is the function

> of the federal court to determine whether the plans and steps taken or proposed by the state satisfy constitutional requirements. We think that all concerned would do well to keep that difference in function in mind.

550 F.2d at 1132.

Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977) affirmed some aspects of the district judge's order requiring substantial improvements in the operation of the county jail, while reversing others. In approving most of the changes ordered by the district judge, the court stated: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 553 F.2d at 381. In response to defendants' complaint that they had insufficient funds to implement the court's order, the court stated: "This court recognizes that some of the improvements will be costly but . . . 'inadequate resources can never be an adequate justification for depriving any person of his constitutional rights.'" 553 F.2d at 378. The court quoted from Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1972): "Where state institutions have been operating under unconstitutional conditions and practices, the defense of fund shortage[s] and the inability of the district court to order appropriations by the state legislature, have been rejected by the federal courts." 553 F.2d at 378.

Dimarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978) held that the district court had properly required the defendants either to make specific improvements at the two prisons involved, or close them.

In Ruiz v. Estelle, 550 F.2d 238 (5th Cir. 1977), the district court had entered a preliminary injunction while the action was pending as a result of its finding that the plaintiffs were being treated as a special class of inmates by the officials of the department of corrections because of their instigation of and participation in the litigation. They had been subjected to threats, intimidation, coercion, punishment, and discrimination, all in the face of protective orders to the contrary by the district court. The district court's order which required that plaintiffs be

furnished with counsel substitute at disciplinary hearings and that they be given adequate food to prevent weight loss while they were confined in solitary confinement was affirmed by the court of appeals.

Newman v. State of Alabama, 559 F.2d 283 (5th Cir. 1977) held that the district court had erred in appointing a "Human Rights Committee" composed of thirty-nine individuals which was authorized to monitor implementation of the standards prescribed by the court's decree. The court stated:

> Our initial reaction is that "reviewing plans for implementation of this decree to ensure that they comport with minimum standards set forth" could more properly have been assigned to the magistrate or to a master, qualified to hold hearings, make findings of fact, and report to the Court for its approval or disapproval. Moreover, the authority to "take any action," with no accompanying standards or limitations, could amount, in practical effect, to turning the administration of the prisons over to the Committee, as, in some respects, appears to have occurred.

559 F.2d at 289.

Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) approved the establishment of a magistrate as an ombudsman to act as a middleman between the inmates and the correctional staff. However, the court found that the trial court had erred in ordering that the ombudsman have permanent office. 563 F.2d at 753. The court also commented that the ombudsman should not have authority to intervene in daily prison operations.

The plaintiffs in Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978), were twenty-nine prisoners incarcerated in thirteen penal institutions in various cities and towns in the state. Plaintiffs sought comprehensive declaratory and injunctive relief. The district court dismissed the complaint for failure to state a claim, further commenting that it was unwilling to "take under its control and management the

prison system [of North Carolina]." 575 F.2d at 463. The court of appeals reversed. The court noted that in Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the Supreme Court had cautioned against sweeping injunctions directed at state executive officials. However, the court found that Rizzo did not preclude recourse to broad injunctions when a clear pattern of unconstitutional conduct has been established. The court stated: "We agree with the holding in Newman v. Alabama, . . . that, notwithstanding Rizzo, class relief requiring sweeping changes in a state prison system may still be mandated when the proof requires such relief." 575 F.2d at 466.

Lewis v. Hyland, 554 F.2d 93 (3d Cir. 1977) affirmed the district court's denial of injunctive relief to plaintiffs, discrete classes of travelers upon New Jersey roads, who had shown they were subjected to callous indifference by the New Jersey State Police. The court noted that prior to the Supreme Court's opinion in Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), it would have reversed the district court's denial of injunctive relief in light of plaintiff's demonstration of numerous violations of their constitutional rights. The court stated:

> Rizzo's focus was on the absence of any evidence . . . of participation by the named defendants in a plan or scheme to suppress constitutional rights. Such a plan, once proved, could be enjoined in a federal court. . . .
>
> The Rizzo court refused to infer the existence of a plan of concerted action from the facts before it. A mere "failure to act [by responsible authorities] in the face of a statistical pattern" was found to provide no basis for injunctive relief.

554 F.2d at 98. The court further stated:

> Plaintiff's evidence here demonstrated at most an unfortunate insensitivity on the part

> of responsible officials toward reports of abuses by individual Troopers. The department's apparent obliviousness to citizens' complaints reinforces an impression of official indifference. Beyond these factors, however, and aside from the statistical number of incidents proved, there is no evidence of a causal link between, on the one hand, either the State Police hierarchy or any department-wide directive, and, on the other, the constitutional violations.

554 F.2d at 101.

There was no error in denying injunctive relief in Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 567 F.2d 1381, 1383 (8th Cir. 1977), where the court found no credible evidence that the defendant's former institutional policy of refusing to consider discretionary parole for an inmate with a legal action pending in the courts was being applied or would be applied in the future. However, present compliance with constitutional standards does not necessarily moot an injunction if the court determines that prior wrongful behavior is likely to recur. In Campbell v. McGruder, 580 F.2d 521, 543 (D.C. Cir. 1978), the court remanded for a determination if the anticipated overcrowding had in fact occurred. The court stated: "The decision whether defendants' illegal conduct is likely to recur lies in the equitable discretion of the District Court." 580 F.2d at 541. The court further said:

> Given the history of defendants' grudging resistance, the ineffectiveness of their previous efforts at compliance, and the "flagrant and shocking" character of their past violations, the District Court was fully justified in concluding that this case was not moot.

580 F.2d at 541.

The court of appeals in Wolff v. McDonnell, 418 U.S. 539, 573, 94 S.Ct. 2963, 2983, 41 L.Ed.2d 935, 961 (1974) erred in holding that the due process requirements in prison disciplinary proceedings were to apply retroactively and that prior prison records containing determinations of misconduct were to be expunged. The Supreme Court determined that its decision should not receive retroactive application and that prior records need not be expunged. Similarly, there was no error in refusing to expunge from plaintiff's prison records disciplinary proceedings in which their constitutional rights were violated in that they were not given advance notice of the charges prior to their hearings in McKinnon v. Patterson, 568 F.2d 930, 935 (2d Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). The court stated that "the fact that the due process rights asserted by plaintiffs were not clearly established in 1973 cautions us against applying present standards 'so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged.'" 568 F.2d at 935.

The record considered on the motion for summary judgment in Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) did not support the district court's order that plaintiff's FBI file be destroyed. Plaintiff, a sixteen-year-old high school student, had written a letter to the Socialist Labor Party seeking information about its policies as part of an assignment for a social studies course. She inadvertently addressed it to the Socialist Workers Party. The Assistant Postmaster General had placed a mail cover upon the Socialist Workers Party headquarters in New York City pursuant to a written request of the FBI. The foreman of delivery would record information appearing on the exterior of letters addressed to the Socialist Workers Party and forward the information to the FBI. The FBI was notified of plaintiff's letter and conducted an investigation which included interviews with the principal and vice-principal of plaintiff's school. Although it was subsequently recommended that the case be closed administratively, the investigation became well known in the school, the community, and the country. In ordering plaintiff's file destroyed the district court granted partial summary judgment in favor of plaintiff. The court found that plaintiff had standing to seek expungement of her file but the record compiled on the motion for summary judgment did not support the district court's order of expungement.

The court stated:

> Determination of the propriety of an order directing expungement involves a balancing of interests; the harm caused to an individual by the existence of any records must be weighed against the utility to the Government of their maintenance. . . . Factors to be weighed in balancing are the accuracy and adverse nature of the information, the availability and scope of dissemination of the records, the legality of the methods by which the information was compiled, the existence of statutes authorizing the compilation and maintenance, and prohibiting the destruction, of the recoreds, [sic] and the value of the records to the Government.

524 F.2d at 868. Since the record did not establish the scope and form of dissemination of plaintiff's file, its utility to the FBI, and the pertinent facts necessary for a determination of the legality of the mail cover the order of expungement was vacated.

Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978) stated: "'It is established that the federal courts have inherent power to expunge criminal records when necessary to preserve basic legal rights.'" 568 F.2d at 134. The court found that although the plaintiff had served the sentence imposed for his burglary conviction, the maintenance of his criminal record continued to operate to his detriment.

The Fifth Circuit reached a contrary result in Cavett v. Ellis, 578 F.2d 567 (1978). The court held that a plaintiff who has served his prison sentence may not collaterally attack his conviction by bringing an action under section 1983 for expungement and a declaratory judgment. The court of appeals affirmed the district court's dismissal for failure to state a claim on which relief could be granted. The court noted that plaintiff's action was little more than a habeas corpus action without a custody requirement. The court noted that plaintiff had had the opportunity to appeal and collaterally attack his convictions in

both state and federal court. However, after the sentences had been discharged the state had a legitimate expectation that it would not be called upon to defend the integrity of convictions that had occurred years before.

The prosecution's decision not to proceed with the prosecution of plaintiffs did not moot their action since, in addition to requesting injunctive relief against their prosecutions, they also sought expungement of their arrest records. Sullivan v. Murphy, 478 F.2d 938, 961-62 (D.C. Cir. 1973).

Where the district court granted a preliminary injunction requiring state prison officials to file a plan for "'speeding implementation' of legal services sufficient to meet the constitutional mandate of effective inmate access to the courts" in all state institutions, the district court should consider separately approving the plan in individual institutions, upon evidence demonstrating that an adequate plan has been implemented at that institution, rather than "allowing the injunction to remain in force unmodified until all inmates at all institutions are receiving what the Constitution mandates." Hooks v. Wainwright, 578 F.2d 1102 (5th Cir. 1978).

C. Declaratory Judgment[310]

Jurisdiction to grant declaratory judgments exists under 28 U.S.C. §2201 which provides as follows:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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310. See generally 6A Moore's Federal Practice, ¶ 57.01.

Case in controversy questions and mootness, which are frequently encountered when declaratory relief is sought, are discussed in Section XI,C *supra*.

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