
Scott D. Anderson
University of Richmond

Theodore I. Brenner
University of Richmond

Vera Duke
University of Richmond

James E. Gray
University of Richmond

Ronald M. Maupin
University of Richmond

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### A REVIEW OF PRISONERS' RIGHTS LITIGATION UNDER 42 U.S.C. § 1983

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I. INTRODUCTION*

Before the mid-1960's, the federal courts frequently invoked the "hands-off" doctrine, a rule of deference to state correctional administrators, when petitioned by inmates to review conditions in state jails and prisons.1 When applied, the doctrine essentially held that a state prisoner's grievance was beyond the scope of authority or competence of the federal judiciary. With an increasing realization during the late 1960's and early 1970's that federal court intervention into state prison matters would be necessary,2 the 42 U.S.C. § 19833 civil rights complaint became the leading tool for effecting change in the area of prisoners' rights. In order to gain a current perspective concerning the enormous volume of prison litigation and the changing role the federal judiciary has taken in this field during the past decade, this note will attempt to coalesce modern trends concerning the procedural as well as the substantive aspects of bringing and defending such actions. Omitted from this discussion, except where necessary, are the subjects of access to the courts and first amendment claims.

The view of the prisoner as a citizen enjoying constitutionally protected rights is a relatively new concept in the law in contrast with an earlier view of the prisoner as "the slave of the state."4 Although the imposition of imprisonment necessarily implies the limitation of many rights in deference to valid penal objectives,5 prisoners today are viewed as retaining all rights specifically granted to them by statute or judicial decision6 and all other rights not expressly or impliedly taken from them by law.7

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


In the 1960's and early 1970's, the federal courts began to exercise their jurisdiction in order to strictly scrutinize deplorable conditions and practices within state institutions. This trend caused a dramatic expansion of prisoners' rights. But the current trend is to limit the rights that a prisoner retains upon incarceration and to subject those remaining rights to administrative abridgement. The thrust of litigation is shifting from determining what processes may be due to reevaluating what rights survive incarceration.  

A convicted inmate retains his United States citizenship and many of the privileges pursuant to it. However, the courts have recognized a "fundamental distinction between the status of citizenship and the privileges of citizenship." All states have civil disability statutes for convicted offenders which are categorized as either civil death statutes or specific disability statutes. Both types of statutes apply only upon conviction for certain disabling crimes.

When convicted of a crime, the inmate usually finds his rights to vote,

See generally Toal, Recent Developments in Correctional Case Law (S.C. Dep't of Corrections 1975).


11. A civil death statute is a blanket provision which deprives an inmate of many or all of his civil rights during incarceration. Note, The Collateral Consequences of Criminal Conviction, 23 Vand. L. Rev. 929, 950 (1970) [hereinafter cited as Collateral Consequences]. In contrast, a specific disability statute only deprives an inmate of one, or several, very specific civil rights.


12. Collateral Consequences, supra note 11, at 950-60. This has created substantial problems of interpretation for the courts in determining what the word "conviction" means and which crimes are includable as "disabling." The definition "of conviction varies according to the type of state involved." Id. at 952, citing People v. Weinberger, 21 App. Div. 2d 353, 251 N.Y.S.2d 790 (1964). Conviction may mean a determination of guilt only, or a determination of guilt and pronouncement of sentence. Id. at 953.

13. Most states, despite vast diversity in their civil disability statutes, hold that a citizen convicted of a serious crime shall lose his right to vote during incarceration. See, e.g., Va. Code Ann. § 24.1-42 (Repl. Vol. 1973). Inmates, whether or not convicted of serious crimes, may also be denied the right to vote, even absent a specific statute, by not qualifying for
to hold public office\textsuperscript{14} and to serve on juries\textsuperscript{15} are at least partially abridged. In most states that have not enacted civil death statutes, an inmate may be allowed to sue either in his own name or through a representative or committee\textsuperscript{16} while incarcerated. In any event, prison inmates may always be sued.\textsuperscript{17} The prisoner has certain protected rights, however. He may initiate federal habeas corpus actions,\textsuperscript{18} appeal convictions\textsuperscript{19} and bring suit under 42 U.S.C. § 1983 in federal court. These rights apply to all state prisoners in the United States, regardless of state statute.\textsuperscript{20}

Civil disabilities may also follow an inmate after release from prison.\textsuperscript{21} The most familiar permanent penalty for conviction of a felony is disenfranchisement,\textsuperscript{22} but there are several other disabilities which may attach

\footnotesize{absentee ballots or by not being provided access to the polls. Collateral Consequences, supra note 11, at 975-79.}

Pre-trial detention, however, cannot completely bar an individual from exercising his right to vote. Cf. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808 (1969). See generally notes 28-32 and accompanying text infra.


15. Most states require jurors to be qualified electors in their communities, thereby rendering ineligible prisoners who have been disenfranchised by virtue of criminal conviction and incarceration. See, e.g., ALASKA STAT. § 09.20.050 (1973); MD. ANN. CODE art. 51, § 6 (Repl. Vol. 1972). Prisoners may similarly be ineligible to serve as administrators, executors or trustees of an estate. Collateral Consequences, supra note 11, at 1059-64.


18. See, e.g., Ex Parte Hull, 312 U.S. 546 (1941).


20. See, e.g., Almond v. Kent, 459 F.2d 200, 201-03 (4th Cir. 1972) (disregarding specific disability statute); Cancino v. Sanchez, 379 F.2d 808 (9th Cir. 1967) (disregarding civil death statute). The Almond case involved a Virginia statute which required that an inmate be represented in a suit by a court-appointed committee. The court held that, in a suit brought under 42 U.S.C. § 1983, the inmate must be allowed to sue in his own name. To follow the state statute in this case would only delay the inmate's assertion of his federal civil rights and possibly frustrate those rights if the committee was not appointed or did not initiate the action before the statute of limitations precluded suit. Compare Belorne v. Pierce Freight-lines Co., 353 F. Supp. 258 (D. Ore. 1973) (civil death statute).

21. State law governs permanent civil disabilities.

to a felon. These include the loss of the right to hold public office, loss of employment opportunities, the loss of judicial, domestic, parental and property rights, and the loss of benefits through pension and insurance plans and workmen's compensation. These rights may be restored to a convicted felon, however, by pardon, automatic restoration, expungement or annulment or other procedure.

Normally, two types of individuals—convicts and detainees—are incarcerated in local jails. When reviewing conditions of confinement in jails, the federal courts have consistently emphasized that the presumption of innocence which obtains in the American criminal justice system mandates that detainees are constitutionally entitled to a higher standard of treatment during confinement than are convicts who have been adjudicated guilty. Because the state's only legitimate purpose for detaining an individual who cannot be admitted to bail is to ensure his appearance in court for trial, these courts have held that the conditions of confinement of detainees must not exceed the least restrictive means of accomplishing that limited, nonpunitive purpose. For this reason, cases involving pre-trial detainees must be distinguished from those involving prison inmates in the field of prisoners' rights. For example, after acknowledging that detainees are subject to reasonable institutional discipline in order to preserve security, several courts have distinguished cases involving prison

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23. See Collateral Consequences, supra note 11, for an exhaustive study of civil disabilities following felony conviction.

24. Every state except Rhode Island has a procedure whereby a convicted criminal may be pardoned. Id. at 1144.

25. Thirteen states have automatic restoration statutes which cancel civil disabilities following release from prison, probation or parole. Id. at 1147.

26. Twelve states have expungement or annulment statutes which allow ex-prisoners to apply for the restoration of enumerated civil liberties. Id. at 1148.

27. Miscellaneous procedures include provisions which enable civil disabilities to be cancelled by administrative, judicial executive or legislative action. Id. at 1151. In Virginia, civil disabilities can be cancelled only by a pardon. Va. CONST. art. 5, § 12.

28. Detainees generally include individuals detained prior to trial for non-bailable offenses and those who are unable to post bond in order to be admitted to bail.


discipline in order to afford detainees the rights to confront and cross-examine adverse witnesses and to present witnesses in their defense at disciplinary hearings as elements of minimum procedural due process applicable to jail discipline.\textsuperscript{32}

Despite Justice Douglas' assertion that these actions "should be read against the background of tort liability,"\textsuperscript{33} it is clear that decisions under section 1983 may not always run parallel with the law of torts. Although many tort law rules have been extended to section 1983 actions,\textsuperscript{34} still others have undergone critical modification\textsuperscript{35} or have been found superfluous.\textsuperscript{36} Sovereign immunity and qualified executive immunity have developed to protect many defendant officials from suit.\textsuperscript{37}

By statute, a federal court may grant an injunction to stay state court proceedings only where "expressly authorized by Act of Congress" or in aid of its jurisdiction or to enforce its judgments.\textsuperscript{38} Although the Supreme Court has held that section 1983 falls under the "Act of Congress" exception contained in that statute,\textsuperscript{39} it simultaneously reiterated an earlier decision which held that, absent a showing of "bad faith, harassment or any other unusual circumstances"\textsuperscript{40} which would call for interposition of injunctive relief, a federal court may not grant an injunction to stay state court proceedings.\textsuperscript{41}


\textsuperscript{34} For example, the defense of good faith and probable cause has been extended to policemen sued under section 1983. See generally section VII.C. infra.

\textsuperscript{35} The most critical adaptations have occurred in the area of immunity from suit where so-called "qualified" immunity may amount to nothing less than absolute liability. See generally section VII.B.4 infra.

\textsuperscript{36} For example, while sovereign immunity from suit in tort is often available to states, municipalities and counties, these entities have been determined not to be "persons" within the meaning of section 1983. See generally section II.B., notes 25-31 and accompanying text infra.

\textsuperscript{37} Immunities and defenses to suit under section 1983 are discussed in section VII. infra.


\textsuperscript{40} Younger v. Harris, 401 U.S. 37, 54 (1971).

\textsuperscript{41} Id. The decision in Younger v. Harris surveyed considerations of comity, equity and federalism which have frequently received much emphasis by the Burger Court. See id. at 53-54.

Comity refers to the duty of respect, owed by federal courts to state courts, arising from the principle that state courts have the solemn responsibility, equally with the federal
In 1974, the Court held that federal declaratory relief is not precluded before the state inaugurates a criminal prosecution. This has proved to be no harbinger of development away from the earlier and more conservative decisions concerning federal nonintervention. Indeed, the earlier decisions have been expanded to embrace certain state civil proceedings and the initiation of state proceedings after the filing of a federal complaint.

Here, however, the line has been drawn. The courts have not expanded the section 1983 litigant’s access to the federal courts, nor have they further limited the access previously allowed.

II. FRAMING THE COMPLAINT

A. Jurisdiction and Venue

There is no jurisdictional provision contained in 42 U.S.C. § 1983. Federal jurisdiction for a section 1983 complaint may be derived from several other sources. If diversity of citizenship exists between the parties, 28 U.S.C. § 1332 may be available. Where the matter in controversy arises

courts, to guard, enforce, and protect every right guaranteed or secured by the Constitution . . . .' 89 Harv. L. Rev. 47, 151 n.2 (1975), quoting Steffel v. Thompson, 415 U.S. 452, 460-61 (1974). See generally section VII.G., notes 186-87 and accompanying text infra.


44. Federal courts must abstain from exercising jurisdiction if state proceedings are inaugurated after a section 1983 complaint has been filed but before proceedings of substance on the merits have begun in the federal tribunal. Hicks v. Miranda, 422 U.S. 332, 348-50 (1975).


2. 28 U.S.C. § 1332 (1970). Diversity jurisdiction is rarely used for section 1983 actions, although it is apparently available. In United States ex rel. Fear v. Rundle, 506 F.2d 331 (3d Cir. 1974), aff’d 364 F. Supp. 53 (E.D. Pa. 1973), the court affirmed a finding of negligence on the part of two prison doctors. The district court based jurisdiction on diversity. Although the cause of action was for negligence, the suit could also have been brought under section 1983.

In order to bring a section 1983 action under diversity jurisdiction, a prisoner would normally have to be a domiciliary of a state other than where he is incarcerated. Should, however, the prisoner need to establish his domicile in the state of his incarceration, he will run afoul of the common-law rule limiting citizenship to his pre-incarceration domicile. The Restatement (Second) of Conflict of Laws § 17 (1971) states that:

a person does not acquire a domicile of choice by his presence in a place under physical or legal compulsion . . . .

Under the rule of this Section, it is impossible for a person to acquire a domicile in
under the Constitution, laws or treaties of the United States, 28 U.S.C. § 1331 may be used.\(^3\) Because both of these statutes contain a $10,000 minimum jurisdictional amount limitation, however, section 1983 prisoners' rights actions are normally brought under 28 U.S.C. § 1343(3), (4) which contains no such limitation.\(^4\) This statute confers original jurisdiction upon the federal district courts to hear civil actions for the redress of deprivations of federal civil rights.\(^5\)

the jail in which he is incarcerated. To enter jail, one must first be legally committed and thereby lose all power of choice over the place of one's abode.

This rule was modified in Stifel v. Hopkins, 477 F.2d 1116 (6th Cir. 1973), which held that while there is a strong presumption that a prisoner retains his pre-incarceration domicile following conviction, rebuttal evidence that he has changed his domicile to the place of his incarceration may be introduced to establish diversity of citizenship. The court reached this conclusion through interpretation of section 1332, thereby avoiding an attack upon the common-law rule as an unconstitutional irrebuttable presumption. Under Stifel, however, a prisoner will still have a difficult time establishing citizenship where he is incarcerated for diversity purposes.


4. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (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;

- (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.


Although the Supreme Court has never expressly ruled on the question of whether state courts may exercise jurisdiction over section 1983 actions, the overwhelming majority of federal courts which have considered the question agree that concurrent jurisdiction exists. Decisions holding that state and federal courts enjoy concurrent jurisdiction for section 1983 actions are based on the principle that state courts should share in the enforcement of federal civil rights unless Congress indicates that federal jurisdiction is to be exclusive. The courts of eight states have accepted jurisdiction over section 1983 actions. Four of these courts have ruled that they are required to hear such suits. There is substantial agreement


among commentators that state courts are obligated to hear section 1983 complaints. 10

Not all section 1983 complaints, however, are entitled to be heard in federal district court. "Over the years [the Supreme Court] has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial' as to be absolutely devoid of merit." 11 If a prisoner alleges a nonfrivolous deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States, 12 and the issue has not been previously decided, 13 federal courts will exercise their jurisdiction. 14

In the past, three-judge federal district courts have been required to hear suits in which a prisoner has sought to enjoin the enforcement of a state


13. The doctrine of substantiality will normally defeat jurisdiction in a section 1983 action only where the claim's "unsoundness so clearly results from a previous decision of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Ex parte Poresky, 290 U.S. 30, 32 (1933). While most discussions of the "substantiality doctrine" are concerned with federal question jurisdiction under 28 U.S.C. § 1331, the doctrine is applicable to section 1343 because section 1983 actions, by definition, arise under the Constitution and laws of the United States. See note 20 infra.

14. Federal courts have frequently exercised jurisdiction over matters which many critics claim are "frivolous" or "insubstantial." This is altogether proper in view of the legislative history of section 1983:

It authorizes any person who is deprived of any right, privilege, or immunity secured by the Constitution of the United States, to bring an action against the wrong-doer in Federal courts, and that without any limit whatsoever as to amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.

law, executive or administrative order or practice on the grounds that such law, order or practice was unconstitutional.\textsuperscript{15} With Congress' recent repeal of 28 U.S.C. § 2281, this requirement no longer exists in such suits.\textsuperscript{16}

Since there is no special venue provision for civil rights actions,\textsuperscript{17} the general federal venue statutes will govern in a section 1983 prisoners' rights action.\textsuperscript{18} A defendant must object to an improper venue early in the proceedings or the defect will be deemed waived.\textsuperscript{19}

B. Elements of a Prima Facie Case

There are three elements in a section 1983\textsuperscript{20} cause of action. The com-

\begin{enumerate}
\item There are four major reasons for enacting [the] legislation. . . (1) to relieve the burden of three-judge court cases . . . ; (2) to remove procedural uncertainties that exist under the present ambiguous three-judge court practices; (3) because statutory and rule changes have eliminated the original reasons for the establishment of three-judge courts; and (4) because decisional law has provided its own safeguards against precipitous injunctive actions by Federal judges.

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
\item 42 U.S.C. § 1983 (1970) provides that:
\end{enumerate}
plaint must allege (1) the deprivation of a federally protected civil right, (2) by a "person," (3) acting "under color of state law, custom or usage." Within the context of most prisoner section 1983 suits, the allegation that the deprivation occurred under color of state law is normally not difficult to prove. Almost everyone who comes in contact with prison inmates does so under color of state law. Prison officials and guards, and municipal and county jailers all derive their authority from state law. Judges and prosecutors act under color of state law as do most private parties who come in contact with inmates in the prison environment.

The most troublesome element of a section 1983 complaint is the allegation that the deprivation of a civil right was committed by a "person." Municipal corporations and counties have not been construed to be "persons" within the meaning of section 1983. Governmental agen-
cies also are not section 1983 "persons." While there has been some confusion among the courts as to the amenability of individuals acting in their official capacities to suit under section 1983, it is clear that liability exists for natural persons who deprive prisoners of their civil rights.


30. A good example is Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378, 1381-82 (E.D. Va. 1974), which held that individuals acting in their official capacities are not "persons" within the meaning of section 1983. The court later reversed itself in Taliaferro v. Dyskstra, 388 F. Supp. 957, 962-63 (E.D. Va. 1975), by holding that individuals acting in their official capacities are section 1983 "persons." In Bennett v. Gravelle, 451 F.2d 1011 (4th Cir. 1971), cert. denied, 407 U.S. 917 (1972), the Court of Appeals for the Fourth Circuit held that individuals acting in their official capacities are not section 1983 "persons." However, the same court later held that such individuals are section 1983 "persons" for purposes of equitable relief. Harper v. Kloster, 586 F.2d 1134 (4th Cir. 1973). Accord, Burt v. Board of Trustees, 521 F.2d 1201, 1205 (4th Cir. 1975). Much of the confusion is the result of courts introducing the doctrine of sovereign immunity when construing the meaning of "person" as used in section 1983. It would seem more logical to hold that municipalities and individuals, acting in whatever capacity, are section 1983 "persons" and to apply the doctrine of sovereign immunity if applicable to insulate them from suits for money damages. Tribe, The Supreme Court, 1972 Term - Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 259-60 (1973).

Several serious problems may arise in suits against parties in their official capacities. It is sometimes difficult to determine which officers to sue in order to obtain equitable relief. It may be that officials not joined are not bound by an injunction. It has been held that an injunction against an individual acting in his official capacity is binding against the official's successors in office. Gates v. Collier, 501 F.2d 1291, 1321 (5th Cir. 1974). The Supreme Court has sanctioned suits against officials acting in their official capacities for equitable relief in non-section 1983 actions. Schneider v. Smith, 390 U.S. 17 (1968); Vitarelli v. Seaton, 359 U.S. 535 (1959).

When damages are sought from officials, different problems arise. Courts have questioned the amenability of officials sued in their official capacities to suits for damages where the action is really against the municipality, Great N. Life Ins. Co. v. Read, 322 U.S. 47, 50-51 (1944), and where any award would be paid from a municipal treasury. Bennett v. Gravelle, 323 F. Supp. 203, 211 (D. Md. 1971), aff'd, 451 F.2d 1011 (4th Cir. 1971) cert. denied, 407 U.S. 917 (1972). When an attempt is made to obtain both damages and equitable relief from an official the difficulties multiply. See Hogge v. Hedrick, 391 F. Supp. 91, 96-98 (E.D. Va. 1975); Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 So. Cal. L. Rev. 131 (1972); 54 N.C.L. Rev. 1082 (1976).

C. Survival; Exhaustion of Remedies; Class Actions

The survival of section 1983 claims after the death of either the defendant or the plaintiff is a matter of federal law. Since there is no survivability provision in section 1983, courts have either applied "federal common law" to the question or employed 42 U.S.C. § 1988 in order to apply


33. Normally courts use state law to determine survivability because it is more difficult to find that a section 1983 claim survives under "federal common law." In older cases, common law survivability was found to be based on whether the injury on which the cause of action was based affected property rights, or affected the person alone. In the former case the cause of action survived, while in the latter it abated. Sullivan v. Associated Billposters & Distrib., 6 F.2d 1000, 1004 (2d Cir. 1925). Under such rules, an anti-trust action was found to survive the death of a party in Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645 (4th Cir. 1942). In Nelson v. Knox, 230 F.2d 483 (6th Cir. 1956), a section 1983 action based on an injury to property was held to survive under federal common law. In Pritchard v. Smith, 289 F.2d 153 (6th Cir. 1961), the court used federal common law to hold that a section 1983 claim involving a personal injury survived. Citing two Supreme Court cases, the Pritchard court found that federal common law allowed suits for personal injuries to survive the death of the wrongdoer. The Supreme Court had refused to follow older common law survival theory in Van Beeck v. Sabine Towing Co., Inc., 300 U.S. 342, 351 (1937), because abatement of a claim upon death of a wrongdoer would result in the "perpetuation of a policy which now has had its day." In a similar case, Cox v. Roth, 348 U.S. 207, 210 (1955), the Court found that a cause of action for personal injury survived because " ... advancing civilization and social progress have brought 43 of our States to include in their general law the principle of survival of causes of action against deceased tort-feasors, and such recovery, rather than being exceptional, has now become the rule in almost every common law jurisdiction."

34. 42 U.S.C. § 1988 (1970) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, 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 case is held, so far as the same is not inconsistent with the Constitution and 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.
the survivability doctrine of the forum state.\textsuperscript{35} Either approach is justifiable.\textsuperscript{36} The Supreme Court has specifically authorized the use of section 1988 to apply state survivability doctrine to section 1983 complaints.\textsuperscript{37} In \textit{Shaw v. Garrison},\textsuperscript{38} a district court first looked to Louisiana survival statutes and found that a section 1983 claim would be extinguished by the injured party’s death. Reasoning that Congress did not intend section 1983 claims to abate upon the death of a party, the court ignored state law and found that the cause of action would survive under federal common law.\textsuperscript{39} Federal courts normally choose whatever applicable law will allow section 1983 claims to survive the death of either party.\textsuperscript{40}

In federal habeas corpus actions, a prisoner is required to exhaust state


\textsuperscript{36} In civil rights case, federal courts should use that combination of federal law, common law and state law as will be best adapted to the object of the civil rights laws and must use common law powers to facilitate and not hinder proceedings in vindication of civil rights. \textit{Brown v. City of Meridian}, 356 F.2d 602, 605 (5th Cir. 1965).

\textsuperscript{37} \textit{Moor v. County of Alameda}, 411 U.S. 693, 702 n.14 (1973). In an explanation of the applicability of 42 U.S.C. § 1988 to section 1983 actions, the Court used as an example the application of state survivability doctrine.


\textsuperscript{39} 391 F. Supp. at 1388.

\textsuperscript{40} The result of the application of federal common law in the cases cited in note 33 supra was a finding that section 1983 claims survived. In the cases cited in note 35 supra, the same result was obtained by applying state survivability law.

In light of the Supreme Court’s rulings in \textit{Cox v. Roth}, 348 U.S. 207 (1955), and \textit{Van Beeck v. Sabine Towing Co., Inc.}, 300 U.S. 342 (1937), application of federal common law resulting in abatement of the plaintiff’s cause of action upon the death of a wrongdoer seems incorrect. This, however, was the ruling in \textit{Landman v. Royster}, 354 F. Supp. 1302 (E.D. Va. 1973). There the court applied federal common law as articulated in \textit{Barnes Coal Corp. v. Retail Coal Merchants Ass’n}, 128 F.2d 645 (4th Cir. 1942), to find that a prisoner’s section 1983 cause of action did not survive the death of the defendant. From the cases cited in note 33 supra, it is clear that \textit{Barnes} is no longer within the mainstream of modern federal common law. Had the court relied on section 1988 to apply state law, however, it might have reached the same result because in Virginia actions for personal injuries are subject to a two-year statute of limitations. \textit{Insurance Co. of North America v. General Electric Co.}, 376 F. Supp. 638 (W.D. Va. 1974); \textit{Winston v. Gordon}, 115 Va. 889, 915-16, 80 S.E. 756 (1914).
judicial and, perhaps, administrative remedies\textsuperscript{41} before he can petition the district court for relief.\textsuperscript{42} For section 1983 prisoner civil rights actions, however, there is no need to exhaust nor even to seek state judicial remedies.\textsuperscript{43} A prisoner is also not required to pursue state administrative grievance procedures before filing a section 1983 complaint.\textsuperscript{44} Consequently, it is important to note any overlap which may exist between these two post-conviction remedies.

Federal courts have traditionally granted the writ of habeas corpus when a prisoner successfully attacked the legality of his adjudication of guilt.\textsuperscript{45} With the demise of the "hands-off" doctrine, the section 1983 prisoners' rights complaint emerged as a second major post-conviction remedy.\textsuperscript{46} Either through ignorance or as an express attempt to avoid the requirement of exhaustion of state court remedies, many actions which traditionally should have been brought in habeas corpus were brought under section

\textsuperscript{41} The exhaustion of state remedies requirement for federal habeas corpus petitioners is codified at 28 U.S.C. § 2254(b) (1970):

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available to him in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

It is unclear on the face of the statute whether a state prisoner is required to exhaust both judicial and administrative procedures. Until recently, few states had administrative procedures for processing prisoner complaints. Where such procedures exist, several courts have required prisoners seeking federal writs of habeas corpus to exhaust such possibilities for relief. Soyka v. Alldredge, 461 F.2d 303 (3d Cir. 1973) (restoration of "good time" procedure); Slaughter v. Henderson, 470 F.2d 743 (5th Cir. 1972) (expungement of records under Interstate Detainer Act); Cupp v. Swenson, 288 F. Supp. 1 (W.D. Mo. 1968) (prisoner grievance procedure must be exhausted before judge would allow a petition to be filed in forma pauperis); cf. Edward v. Duncan, 355 F.2d 993 (4th Cir. 1966).

\textsuperscript{42} Federal habeas corpus actions by state prisoners were first authorized by statute in 1867. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Exhaustion of state judicial remedies was first required in Ex parte Royall, 117 U.S. 241 (1886), where the Court denied the writ on the grounds that the petitioner had not been initially tried by the state court. The present exhaustion requirement was judicially reformulated in Ex parte Hawk, 321 U.S. 114 (1944), prior to enactment in 1948 as 28 U.S.C. § 2254(b) (1970).


\textsuperscript{44} Houghton v. Schafer, 392 U.S. 639 (1968); Hiney v. Wilson, 520 F.2d 589 (2d Cir. 1975); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert. dismissed as improvidently granted, 96 S. Ct. 2640 (1976).


1983. In 1973, the Supreme Court sought to halt that trend in Preiser v. Rodriguez. The Court established a remedy-oriented test by which prisoner suits should be categorized. In federal court, any action through which a prisoner challenges the fact or duration of his confinement must be brought as a petition for habeas corpus, and state remedies must be exhausted before federal jurisdiction may be exercised. If a prisoner attacks

47. Such actions would usually be dismissed on the grounds that section 1983 could not be used to avoid the exhaustion requirement of a federal habeas corpus action. This was called the "circumvention rule." See Edwards v. Schmidt, 321 F. Supp. 68 (W.D. Wis. 1971). The rule was widely invoked. Hartman v. Scott, 488 F.2d 1215 (8th Cir. 1973); Jones v. Pitchess, 469 F.2d 678 (9th Cir. 1972); Jones v. Decker, 436 F.2d 954 (5th Cir. 1970); Grayson v. Montgomery, 421 F.2d 1306 (1st Cir. 1970); Smartt v. Avery, 411 F.2d 408 (6th Cir. 1969); Bennett v. Allen, 396 F.2d 788 (9th Cir. 1968); Gaito v. Strauss, 368 F.2d 787 (3rd Cir. 1966), cert. denied, 386 U.S. 977 (1967); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963); Lowe v. Smith, 363 F. Supp. 1385 (E.D. Va. 1973); King v. Rouse, 316 F. Supp. 1039 (W.D. Va. 1970). Contra, Kalem v. Adamowski, 406 F.2d 536 (7th Cir. 1969). Following a district court's dismissal under the circumvention rule, the circuit court held that the prisoner's complaint was valid under section 1983, but that it should be dismissed for failure to state a claim upon which relief could be granted.


49. 411 U.S. at 500. The test which the Court established is not particularly illuminating. In effect, it does not appear to differ greatly from the "circumvention rule" applied previously. See cases cited in note 47 supra.

There remains some confusion concerning how prisoner actions contesting prison transfers should be treated. Several courts have held that Preiser requires such suits to be brought as habeas corpus actions. Clark v. Zimmerman, 394 F. Supp. 1166 (M.D. Pa. 1975); Leahy v. Estelle, 371 F. Supp. 851 (N.D. Tex.), aff'd, 503 F.2d 1401 (5th Cir. 1975); Lowe v. Smith, 363 F. Supp. 1385 (E.D. Va. 1973). Many courts required such suits to be brought as habeas corpus actions even before Preiser. Stearns v. Parker, 469 F.2d 1090 (9th Cir. 1972); Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967). Other courts have held that transfer is a condition of confinement and can therefore be challenged under section 1983. Tai v. Thompson, 387 F. Supp. 912 (D. Hawaii 1975) (Preiser inapplicable since the inmate was serving a life term with no possibility of parole and therefore was not challenging the duration of his confinement); Swansey v. Elrod, 386 F. Supp. 1138 (N.D. Ill. 1975) (transfer simply a remedy incidental to inmate's claim of cruel and unusual punishment). Most courts have ignored the Preiser test and treated transfer-related complaints as cognizable under section 1983. For example, none of the courts in Newkirk v. Butler, 364 F. Supp. 497 (S.D.N.Y. 1973), aff'd, 499 F.2d 1214 (2nd Cir. 1974), vacated sub nom. Preiser v. Newkirk, 422 U.S. 395 (1975), mentioned the possibility that the action should have been brought as a petition for a writ of habeas corpus. The question is perhaps most in light of the Supreme Court's recent decision in Fano v. Meachum, 96 S. Ct. 2532 (1976), which severely limits an inmate's right to
the conditions of his confinement, the federal district court may exercise jurisdiction over the complaint as a section 1983 action without regard to whether state remedies have been exhausted.

Prisoners' rights suits under section 1983 may be brought as class actions. This procedure allows for the most efficient use of scarce legal services, expands the discovery process and presents the best opportunity for large-scale improvement of prison conditions. In many instances where periods of confinement are relatively short, a class action is the only possible way to attack prison conditions without encountering problems of mootness. There are four primary prerequisites for a class action under the Federal Rules of Civil Procedure. A prisoner must be able to show that

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challenge an intrastate prison transfer. The question whether Meachum should have been brought as a habeas corpus action was also apparently overlooked by the courts.

50. Preiser v. Rodriguez, 411 U.S. 475, 499 (1973). The three prisoner complaints involved in Preiser challenged the deprivation of "good time" credits as in violation of due process. Because the actions, if successful, would require release of the inmates from custody, the Court found that they were in effect attacking the duration of their confinement and must therefore proceed in habeas corpus. This mechanical, remedy-oriented rule ignores the fact that the prisoners were contesting not the mere loss of "good time," but the process through which it was withdrawn. After Preiser, all complaints dealing with "good time" must be brought as petitions for habeas corpus because the remedy sought goes to the "core of habeas corpus." See 411 U.S. at 489.

51. Id. at 494. The ruling requires a prisoner seeking release from prison and damages to file and pursue both a habeas corpus action and a section 1983 action. As Justice Brennan pointed out in dissent, Preiser creates a "confusing, ungainly and irrational scheme" in the field of post-conviction remedies. Id. at 512.


the class which he seeks to represent is so numerous that the joinder of all the class members is impracticable;\(^{56}\) that there are questions of law or fact common to the class;\(^{57}\) that the claims of the prisoner(s) bringing the action are typical of the claims of the class;\(^{58}\) and that the prisoner(s) will fairly and adequately protect the interests of the class.\(^{59}\) Most courts which have denied motions to bring section 1983 prisoners’ rights complaints as class actions have done so on the ground that the prisoner bringing the action would not adequately protect the class which he sought to represent.\(^{60}\)


58. Fed. R. Civ. P. 23(a)(3) (1970). The fact that the defendant(s) may have defenses against other members of the class is immaterial to the requirement that the claims and defenses of the parties be typical of the class. LaReau v. Manson, 383 F. Supp. 214 (D. Conn. 1974); Rakes v. Coleman 318 F. Supp. 181, 186 (E.D. Va. 1970).

59. Fed. R. Civ. P. 23(a)(3) (1970). This is frequently the most difficult provision for a prisoners’ rights class action complaint to meet. For a discussion of the problems, see note 60 infra.

60. A prisoner bringing a class action must show that he is a member of the class which he seeks to represent. He must also show that he has been personally injured by the defendant’s conduct. Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974); Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971). Some courts have been extremely liberal in their application of this requirement that the prisoner bringing the action have “standing.” See Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Rivera v. Freeman, 469 F.2d 1159 (9th Cir. 1972); Hayes v. Secretary of Dept. of Pub. Safety, 455 F.2d 798 (4th Cir. 1972).

Mootness is generally not a problem in class actions because the time for determining the plaintiff’s representativeness is at the time of the filing of the complaint. Gerstein v. Pugh, 420 U.S. 103 (1975); Jones v. Diamond, 519 F.2d 1090 (6th Cir. 1975); Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975); LaReau v. Manson, 383 F. Supp. 214 (D. Conn. 1974); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970), citing Pruitt v. Campbell, 429 F.2d 642 (4th Cir. 1970); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1968), aff’d 390 U.S. 333 (1968). Some courts, however, have determined that a prisoner who has been released cannot adequately represent a class of incarcerated prisoners because of difficulties in determining present conditions in the institution, and because a released inmate is not sufficiently interested in the litigation. In these cases the court has dismissed the complaint without prejudice unless incarcerated members of the certified class come forward to continue the action. Norman v. Connecticut State Bd. of Parole, 458 F.2d 497 (2d Cir. 1972); LaReau v. Manson, 383 F. Supp. 214 (D. Conn. 1974).

The Court of Appeals for the Fourth Circuit has refused to consider a class action filed pro se because a judgment entered against the prisoner-plaintiff may prevent other inmates from raising the same claim. Oxedine v. Williams, 509 F.2d 1405 (4th Cir. 1975).
A prisoner seeking to maintain a class action must also meet one of four secondary requirements.\(^1\) Most prisoners' rights class actions may be maintained under the third of these requirements by a showing that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." \(^2\) Thus, if a prisoner's complaint challenges general prison conditions or policies, the court will normally allow the suit to be maintained as a class action.\(^3\)

**D. JUDICIAL CONSTRUCTION**

The Supreme Court has provided that prisoners' pro se pleadings in section 1983 suits "must be viewed with extreme generosity and not be dismissed by the trial judge when a federal claim can possibly be extracted from documents submitted to the court."\(^4\) Consequently, a district court will err by dismissing an action brought in habeas corpus where a section 1983 claim could have been discerned from the complaint.\(^5\) In *Conley v. Gibson*, the Supreme Court held that a "complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief."\(^6\) On appeal from dismissal of an action without a hearing, the appellate court is required to accept as true all allegations of fact contained in the complaint.\(^7\) Under these standards, it is frequently difficult for a district court to deny a prisoner a hearing on the merits of his complaint.\(^8\) Reviewing courts have been quick to remand cases which

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\(^2\) Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) was included specifically to facilitate the bringing of class actions to protect civil rights. 7 Wright, Miller, Federal Practice and Procedure: Civil § 1766 (1969).


\(^6\) 355 U.S. 41, 45-46 (1957).

\(^7\) The general rule is that complaints or pleadings should be given liberal construction if facts are alleged that may entitle the plaintiff to relief. United States v. Morgan, 346 U.S. 502 (1954); Darr v. Burford, 339 U.S. 200 (1950); Lockhart v. Hoenstine, 411 F.2d 455 (3d Cir.), cert. denied, 396 U.S. 941 (1969).

\(^8\) Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); Sewell v. Pegelow, 391 F.2d 196 (4th Cir. 1961); Eaton v. Bibb, 217 F.2d 446 (7th Cir.), cert. denied, 350 U.S. 915 (1955). See
have been summarily dismissed. 69

Many section 1983 prisoner actions are brought in forma pauperis as well as pro se. 70 The Court of Appeals for the Fourth Circuit has noted that "[f]ederal courts must be diligent in acting to prevent state prisoners from calling upon the support of the federal government to prosecute frivolous civil suits to harass state prison officials." 71


69. See, e.g., Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966).

70. 28 U.S.C. § 1915 (1970), the federal in forma pauperis statute, 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 . . . . An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith . . . .

. . . .

(b) 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. . . .

71. Daye v. Bounds, 509 F.2d 66, 68 (4th Cir.), cert. denied, 421 U.S. 1002 (1975); accord, Shobe v. California, 362 F.2d 545, 546 (9th Cir.), cert. denied, 385 U.S. 887 (1966). The district's court decision on whether an in forma pauperis action should be dismissed as frivolous or malicious under section 1915(d) is discretionary and is not normally subject to challenge. Irvin v. Burson, 389 F.2d 63, 64 (5th Cir. 1967); Cole v. Smith, 344 F.2d 721, 723 (8th Cir. 1965); Carey v. Settle, 351 F.2d 483 (8th Cir. 1965); Caviness v. Somers, 235 F.2d 455, 456 (4th Cir. 1956). Courts have, however, reversed such dismissals. Pennebaker v. Chamber, 437 F.2d 66, 67 (3d Cir. 1971); Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969); Diamond v. Pitchess, 411 F.2d 565, 566 (9th Cir. 1969).

In forma pauperis actions should be dismissed as frivolous if the realistic chances of ultimate success are slight. Jones v. Bales, 58 F.R.D. 453, 463 (N.D. Ga. 1972). An action brought under section 1915 may be dismissed at any point in the proceedings when the court finds that the complaint is frivolous. Hawkins v. Elliott, 385 F. Supp. 354, 357 (D.S.C. 1974). The broad dismissal power of district courts hearing in forma pauperis complaints was justified by the court in Jones. Judge Smith explained that prisoners proceeding under section 1915 are immune to the imposition of costs if they are unsuccessful, and because of their poverty are practically immune to tort actions for malicious prosecution and abuse of process. Convicted prisoners with much idle time, free paper, ink, law books and mailing privileges are tempted to file complaints that contain facts which cannot be proved. Such inmates have everything to gain and nothing to lose. See Cruz v. Beto, 405 U.S. 319 (1972) (Rehnquist, J., dissenting).

The Supreme Court has ruled that a person need not be absolutely destitute to enjoy the benefits of section 1915. Adkins v. E. I. Dupont de Nemours & Co., 335 U.S. 331, 339 (1948). Since prisoners are guaranteed the basic necessities of life, leave to proceed in forma pauperis may be denied a prisoner who has funds available to pay filing fees. The point at which an inmate should be considered too well off to take advantage of section 1915 is unclear, but it is not excessive. In Shimabuku v. Britton, 357 F. Supp. 825 (D. Kan. 1973), the court denied leave to proceed in forma pauperis to inmates with prison accounts of $315.31, $45.00, $57.27
E. Available Remedies

42 U.S.C. § 1983 provides that persons who deprive others of their federal civil rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." Remedies at law include compensatory and punitive damages. Nominal damages have also been granted where no actual damages have been proved or even and §61.41. In Ward v. Werner, 61 F.R.D. 639 (M.D. Pa. 1974), an in forma pauperis action was allowed when the inmate's balance was $7.00 but denied where there were balances of $50 and $55. A district court's denial of leave to proceed in forma pauperis when the inmate had a balance of $50.07 and received $15 every other week from his mother was reversed in Souder v. McGuire, 516 F.2d 820 (3d Cir. 1975). The court explained that the purpose of section 1915 was to provide an entre and not a barrier to indigents seeking relief in federal courts. A prisoner should not be required to abstain from the small comforts of prison life afforded by extra money in order to attempt to defend his civil rights. Id. at 823-24.


It is difficult to determine awards in successful section 1983 prisoner actions because damages are not normally reported. Known amounts awarded, however, do not appear to be excessive. A standard award for unconstitutional confinement in solitary appears to be $25 a day, plus lost wages. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), modified sub nom. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978 (1972); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569 (E.D. Pa. 1972). Where solitary confinement has lasted a considerable length of time, awards have been limited to lost wages plus a flat compensatory amount. Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973). Other compensatory damages awards include $1,500 against a prison guard for administering a beating to a prisoner who required 39 stitches in his head and $500 from the guard's superior who acquiesced to the beating in Davidson v. Dixon, 386 F. Supp. 482 (D. Del. 1974); $1,000 for unconstitutional solitary confinement in United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); and $22,993.44 for a severely injured shoulder in Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973).

alleged.75 Intentional wrongdoing is not a requirement for the recovery of damages under section 1983 although simple negligence which leads to the deprivation of a federal civil right is normally not actionable.76 In order to support a claim for punitive damages, malicious or outrageous behavior on the part of the wrongdoer must be shown.77 Such damages should be

75. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).


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 . . . . It is sufficient for the plaintiff to show either that the defendant acted . . . with actual knowledge that he was violating [civil rights], or that the defendant acted with reckless disregard of whether he was thus violating such a right.

awarded only for the purpose of deterring the defendant and others similarly situated from future unconstitutional action.\textsuperscript{38} Prisoners seeking damages under section 1983 are entitled under the seventh amendment\textsuperscript{79} to a jury trial upon demand\textsuperscript{80} even though the action sued upon is statutory.\textsuperscript{81}

Prisoners have continually requested equitable remedies under section 1983. Although declaratory relief is available to civil rights plaintiffs under 28 U.S.C. § 2201,\textsuperscript{82} injunctive relief is normally sought.\textsuperscript{83} Injunctive relief granted by courts in prisoners' rights litigation can be classified among four categories:\textsuperscript{84} (1) orders to reform prison administrative procedures which act to deprive prisoners of federally protected civil rights;\textsuperscript{85} (2) orders


\textsuperscript{79} U.S. Const. amend. VII.


to improve prison facilities where confinement in them amounts to cruel and unusual punishment;\textsuperscript{86} (3) the closing of prison facilities\textsuperscript{87} and the threatened closing of entire prison systems where conditions of confinement amount to cruel and unusual punishment;\textsuperscript{88} (4) orders to release individual prisoners from solitary confinement\textsuperscript{89} and the restoration of good time\textsuperscript{90} where the confinement or loss of good time was accomplished without due process.

Broad ranging injunctions requiring massive improvement of prison facilities\textsuperscript{91} can be criticized as an unconstitutional\textsuperscript{92} usurpation of legislative


\textsuperscript{90} Wright v. McMann, 460 F.2d 126 (2d Cir. 1972); Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972); Carothers v. Follette, 314 F. Supp. 1014, 1030 (S.D.N.Y. 1970). The Supreme court in Preiser v. Rodriguez, 411 U.S. 475 (1973), ruled that a complaint seeking the restoration of loss of good time is cognizable only as a habeas corpus action. Good time is ordinarily not accumulated while in solitary confinement. If a prisoner attacks the lack of due process in the disciplinary action which ordered solitary confinement he can bring a section 1983 action for an injunction releasing him from solitary confinement and also recover damages. In order to recover the good time lost while he was in solitary, however, he must bring a habeas action through the state courts. Preiser v. Rodriguez, 411 U.S. 475, 510 (1973) (Brennan, J., dissenting). See generally notes 41-51 and accompanying text supra.


\textsuperscript{92} By ordering such expenditures the court is in effect appropriating the state's tax revenues which the separation of powers doctrine normally recognizes to be a legislative function. For one judge's response to such criticism see Wayne County Jail Inmates v. Wayne County
authority by the judiciary since such orders require large expenditures of state funds.\textsuperscript{93} Such massive judicial remedies run the risk of setting federal courts at odds with state legislatures and executive officials, thereby possibly resulting in diminished respect for the federal judiciary. Judicial resort to contempt citations to obtain compliance with previous orders, however, has to date been seen only sparingly in section 1983 prisoners’ rights litigation.\textsuperscript{94}

Attorneys’ fees are ordinarily not recoverable in litigation in American courts in the absence of statutory or contractual authorization.\textsuperscript{95} There are three exceptions to this “American rule”: (1) where the prevailing party’s lawsuit preserves or recovers a substantial benefit for an ascertainable class in addition to himself;\textsuperscript{96} (2) where an individual is sanctioned for failure to conform to a prior court order;\textsuperscript{97} and (3) where the losing party has acted in “bad faith, vexatiously, wantonly or for oppressive purposes.”\textsuperscript{98} Until 1975, a fourth exception was developing which allowed the prevailing party to “fee-shift” where he could show that he had acted as a “private attorney-general” in bringing a suit which benefitted the public at large, but involved personal economic detriment.\textsuperscript{99} In \textit{Alyeska Pipeline Service Co. v. Wilderness Society},\textsuperscript{100} however, the Supreme Court held that recovery of attorneys’ fees under such a theory should be permitted only by enactment of federal legislation instead of in the sole discretion of


\textsuperscript{94} In Landman v. Royster, 354 F. Supp. 1292 (E.D. Va. 1973), a contempt citation for $25,000 was suspended on condition that the court’s previous injunction be observed. \textit{See also} White v. Commissioner of Alabama Bd. of Corrections, 470 F.2d 55 (5th Cir. 1972); Theriault v. Carlson, 353 F. Supp. 1061 (N.D. Ga. 1973).

\textsuperscript{95} Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967); Hauenstein v. Lynman, 100 U.S. 483, 491 (1880). \textit{See also} Note, \textit{Attorneys’ Fees and the Eleventh Amendment}, 88 Harv. L. Rev. 1875 (1975).

\textsuperscript{96} Fee shifting is allowed where there is a “common fund” produced by the litigation. \textit{See}, \textit{e.g.}, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

\textsuperscript{97} \textit{See}, \textit{e.g.}, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399; 426-28 (1923).

\textsuperscript{98} Hall v. Cole, 412 U.S. 1, 5 (1973).

federal equity courts. 101 In response to the Court’s ruling, 102 Congress recently enacted the Civil Rights Attorney’s Fees Awards Act of 1976, 103 which amends 42 U.S.C. § 1988 104 to enable federal courts to shift attorneys’ fees for prevailing parties in proper cases in suits to enforce the civil rights acts, including section 1983. 105

The recent amendment of section 1988 closely tracks language in the 1975 amendment of 42 U.S.C. § 1973 which provides for the discretionary award of attorneys’ fees in voting rights suits 106 and the Civil Rights Act of 1964 providing for fee shifting in public accommodations desegregation cases 107 and equal employment opportunity actions. 108 In light of these similarities, it may be significant to note that Congress expressly intended that the Civil Rights Attorney’s Fees Awards Act of 1976 be construed in the same manner that the courts have applied these other analogous provisions. 109 Such a construction would enable the federal courts, in their discretion, to award reasonable attorneys’ fees to plaintiffs 110 who are success-

101. Id. at 262, 269-70.
107. 42 U.S.C. § 2000a-3(b) (1970) provides: In any action commenced pursuant to [subchapter II—Public Accommodations—of the Civil Rights Act of 1964], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs, and the United States shall be liable for costs the same as a private person.
109. "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (citation omitted).
110. In most cases, parties seeking to enforce their civil rights will be plaintiffs. If, however, because of the procedural posture of the action, such parties are situated as defendants, the possibility of recovering attorneys’ fees should still exist.
ful\(^\text{111}\) in section 1983 prisoners' rights suits unless "special circumstances would render such an award unjust."\(^\text{112}\) These awards\(^\text{113}\) are available both in district courts\(^\text{114}\) and on appeal,\(^\text{115}\) in actions for damages\(^\text{116}\) and for equitable relief.\(^\text{117}\) Prison officials and guards who prevail by successfully de-

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111. Several courts have liberally construed the term "prevailing party" in applying the fee award provisions of the Civil Rights Act of 1964 and other "fee shifting" statutes. In Kopert v. Esquire Realty Co., 523 F.2d 1005, 1008 (2d Cir. 1975) (Securities Act of 1933), attorneys' fees were awarded where the plaintiff prevailed via consent judgment. Attorneys' fees were awarded in Drew v. Liberty Mut. Ins. Co., 480 F.2d 69, 74 (5th Cir. 1973), when the plaintiff's suit was dismissed and the court ordered her intervention in a suit brought by the Equal Employment Opportunity Commission which eventually succeeded. Fees have also been awarded where the named plaintiff's claim was dismissed, but relief granted to the other members of the class in a class action. Reed v. Arlington Hotel Co., Inc., 476 F.2d 721 (8th Cir. 1973) (Title VII of Civil Rights Act of 1964). Although the plaintiff was granted neither damages nor equitable relief in Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970), he was awarded attorneys' fees because his lawsuit served as a catalyst in prompting the defendant to comply with the equal employment opportunity provisions of the 1964 Act. See also Wade v. Mississippi Cooperative Extension Serv., 378 F. Supp. 1251, 1254 (N.D. Miss. 1974) (Title VII) (no need to receive all relief sought in order to recover attorneys' fees); United States v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973) (attorneys fees awarded in Title VII action where segregation connected prior to suit and no damages awarded).


fending section 1983 actions may be allowed to recover attorneys' fees where the plaintiff is shown to have brought the action in bad faith.18

III. FOURTH, FIFTH AND SIXTH AMENDMENT CLAIMS

A. SEARCH AND SEIZURE

Several recent decisions by federal courts have upheld the premise that inmates are afforded limited constitutional protection by the fourth amendment:

[T]he right to be free from unreasonable searches and seizures is one of the rights retained by prisoners subject, of course, to such curtailment as may be made necessary by the purposes of confinement and the requirements of security.3

In reality, an inmate is entitled to protection of only an extremely limited expectation of privacy while in prison, his retention of fourth amendment rights being "basically inconsistent with the correctional process in that the prisoner must be monitored as closely as possible to insure that he is complying with the directives of the institution."4 Generally, the inmate will be granted judicial relief only "upon a showing that prison officials

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118. Cf. Lee v. Chesapeake & Ohio Ry., 389 F. Supp. 84 (D. Md. 1975); Matyi v. Beer Bottlers Local 1187, 392 F. Supp. 60 (E.D. Mo. 1974). In Lee, attorneys' fees were awarded to the defendant where the plaintiff's suit was dismissed as frivolous and there had been no resort to the union's grievance procedures. In Matyi, the defendant was likewise awarded attorneys' fees because the plaintiff's complaints were frivolous and contradictory.


2. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV.


have exercised their discretionary powers [in control and management of the institution] in such a manner as to constitute clear abuse or caprice.\textsuperscript{75}

Since the Supreme Court's decision in \textit{Katz v. United States},\textsuperscript{6} the protections of the fourth amendment no longer depend upon constitutionally protected areas. These protections now turn upon (1) a reasonable subjective expectation of privacy exhibited by the person involved and (2) whether society would objectively recognize such an expectation, by one in similar circumstances, to be justifiable.\textsuperscript{7} The Court has never defined the extent of a prison inmate's constitutionally protected expectation of privacy. It is obvious, however, that an inmate may not justifiably entertain an expectation commensurate with that of a free citizen since prisons share few, if any, of the attributes of one's home or office.\textsuperscript{8} In prison, constant surveillance is "the order of the day."\textsuperscript{9} Areas of an inmate's life, considered private before incarceration, may now be exposed to "the scrutiny of prison officials who are charged with the care and custody of the prisoner."\textsuperscript{10} Thus the critical question remains: what justifiable expectation of privacy may an inmate reasonably entertain following lawful incarceration?

Practically all searches and seizures during post-conviction incarceration will be viewed as reasonable except those which "violate the dictates of reason either because of their number or their manner of perpetration."\textsuperscript{11} Judicial relief will be available under section 1983 only when the acts of prison officials constitute clear abuse or caprice, in excess of legitimate correctional goals.\textsuperscript{12}

1. \textit{Search of the Prisoner's Person and Cell}

In \textit{United States v. Edwards},\textsuperscript{13} the seizure of an arrestee's clothing was allowed "with or without probable cause."\textsuperscript{14} The Supreme Court explained

\begin{itemize}
\item 6. 389 U.S. 347 (1967).
\item 7. \textit{Id.} at 351, 353.
\item 9. \textit{Id.} at 142.
\item 12. See, e.g., Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975); Daughtery v. Harris, 476 F.2d 292, 294 (10th Cir.), cert. denied, 414 U.S. 872 (1973).
\item 13. 415 U.S. 800 (1974).
\item 14. \textit{Id.} at 804. The accused was arrested and later processed at the jail. However, no replacement clothes were at that time available and the accused was allowed to wear his own clothes until suitable replacements could be found. Later the clothes he was wearing at the
that once a citizen is lawfully arrested, the effects in his possession may be seized as evidence with or without a warrant. Upon conviction and ensuing incarceration, the inmate's expectation of privacy with respect to personal property in his possession is removed "out of the realm of protection from [search and seizure due to] police interest in weapons, means of escape, and evidence" for a reasonable time. However, inmates whose personal property has been seized and never returned for no apparent legitimate correctional purpose, either at the time of incarceration or thereafter, may state a constitutional claim for relief under section 1983.

In many circumstances, strip searches, including rectal examinations, are a "necessary and reasonable concomitance" of an inmate's incarceration. Conduct of this type of search lies within the "sound discretion" of the prison official and does not of itself violate the prohibition against unreasonable search and seizure. Courts have approved this procedure as a reasonable precaution to assure the safety of guards and prisoners alike

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time of arrest were seized and analyzed. The evidence gained from analysis was used against the accused at his trial. The Court concluded this seizure "was and is" a normal incident of arrest; the reasonable delay in taking the accused's clothes did not transform this normal routine into a violation of the fourth amendment. Id. at 804. However, the Court made it clear that it had not concluded that "[t]he Warrant Clause of the Fourth Amendment [was] never applicable to post-arrest seizures of the effects of an arrestee." Id. at 808.

15. Id. at 802. This is true even after a significant time lapse between arrest and processing, on the one hand, and seizure of the personal property as evidence, on the other. Id. at 807.

16. Id. at 808, quoting United States v. DeLeo, 422 F.2d 487, 493 (1st Cir. 1970).


19. Penn El v. Riddle, 399 F. Supp. 1059 (E.D. Va. 1975) (upholding search where contraband had been found in plaintiff's clothing and at his work area immediately prior to search in question).

by preventing the entrance of contraband into the institution. Relief from
these searches is generally denied unless there is some evidence of wanton
conduct or an attempt to humiliate or degrade an inmate on the part of
prison officials.21

Once prison officials can demonstrate a security or disciplinary justifica-
tion for the use of body-related searches, an inmate's reasonable expecta-
tion of privacy in this area is almost totally diminished. In Hodges v.
Klein,22 the court concluded that anal searches were permissible after per-
sonal contact between an inmate and visitors or where the inmate was
entering or leaving the institution.23 However, there was no significant
state interest believed to be served by anal examinations when a prisoner
was to be moved within the prison while under escort or observation or
when a prisoner was to be released from solitary confinement,24 since less
drastic alternatives were available for the detection of contraband.25

The taking of blood samples is also permissible absent a showing of
wanton conduct or undue force on the part of prison officials. Where the
samples are taken under sanitary conditions by qualified medical person-
nel, there will be no violation of an inmate's constitutional rights "since
the penal process necessarily imposes significantly upon the privacy of the
prisoner."26 As in the case of a strip search, no warrant is required for
officials to conduct this procedure.27

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Gettleman concluded that

a prison employee, upon entering the prison gate, leaves his Fourth Amendment rights
on the outside to the extent that a search warrant, or probable cause, is required to
validate a search for contraband.

Id. at 451.

The court held that where searches were conducted by trained paraprofessional medical
assistants in a designated area under sanitary conditions, the fourth amendment rights of the
inmate were not infringed.


23. Id. at 891. The court concluded that in these situations there would be an excellent
opportunity for the inmate to introduce many types of contraband into the prison community.
In order to shut off this "port of entry," resort to strip searches and anal examinations was
not unreasonable.

24. Id. The inmate in this situation would have little opportunity to obtain any contra-
band. Thus the need for anal searches was not justified in this circumstance. A visual anal
inspection of the inmate, under these circumstances, is permissible only where there is a
reasonably clear indication or suggestion that the inmate is concealing something in his anal
cavity.

25. Id. The purposes of security could be equally well served by the use of hand-held metal
detectors rather than submitting inmates to rectal searches.


27. Id.
Frequent searches of all parts of a prison for contraband are readily justified. In this respect the inmate can have little, if any, reasonable expectation of privacy with regard to searches of his cell. A search of an inmate's cell conducted without a warrant or probable cause, and without the inmate's consent, is not conclusively a violation of the inmate's fourth amendment rights. The need for prison security and discipline is ample justification for the warrantless search of a cell. Where such searches are conducted at a reasonable hour and in a reasonable manner, no deprivation of any retained fourth amendment rights will be present. Evidence discovered during such a search which implicates the inmate in a crime is admissible in a subsequent trial. However, if prison officials have allowed an inmate to possess an article in his cell which is found missing after the search, a constitutional claim against the officials may exist. In that case the prison officials will have the burden of establishing the "reasonableness" of the seizure.

31. United States v. Palmateer, 469 F.2d 273 (9th Cir. 1972). Cf. Hoitt v. Vitek, 361 F. Supp. 1238, 1255 (D.N.H. 1973). In Hoitt, the inmate's cell was searched during an emergency situation which led to a general lock-up. The court concluded that even if the cell block was a constitutionally protected area, "the 'requirements of prison security' during an emergency situation would provide sufficient justification for [a] curtailment" of the inmate's fourth amendment protections. Id.
32. The facts alleged by petitioner, of a single search 'at some time before midnight' carried out in an 'aggressive and belligerent' manner, but during which no actual assault or other abuse is stated to have taken place, do not demonstrate that the search was unnecessary and unrelated to prison security. No violation of any federal right is thereby made out to warrant interference by a federal court in the control, discipline, treatment and security of state prisoners by the state of Missouri. Burns v. Wilkinson, 333 F. Supp. 94, 96 (W.D. Mo. 1971).
33. United States v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973). Appellant's cell was searched without a warrant and documentary evidence was discovered that led to appellant's conviction for various tax offenses. The court concluded that while Hitchcock had the subjective intent to keep the documents private, his expectation of privacy in his cell was not reasonable. Therefore, the search was not in violation of the fourth amendment.
34. Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975). The inmate discovered after a search of his cell that his trial transcript was missing. The court concluded that the inmate would make out a fourth amendment claim if he could prove the officials took the transcript, "[f]or surely the term 'papers and effects' encompasses the transcript of Bonner's criminal trial."
35. Id.
2. Search of the Prisoner's Mail

While most courts have emphasized an inmate's first amendment rights with regard to his mail,\(^3\) a few courts have set forth significant fourth amendment protections in the area of prisoner mail.\(^4\) In Palmigiano v. Travisono,\(^5\) the court was of the opinion that the indiscriminate "opening and reading [of] all prisoner mail including that of unconvicted awaiting trial inmates [sic], whether the same be from the inmates or members of the free society," violated the fourth amendment.\(^6\) All outgoing mail was to be forwarded without search unless a search warrant was duly obtained.\(^7\) In addition, prison officials were prohibited from searching an inmate's incoming mail from attorneys and certain government officials.\(^8\) All other incoming mail could be searched for contraband.\(^9\) Finally, any incoming mail from citizens not on an inmate's approved addressee list could be "read and inspected" for highly inflammatory writing or pornography.\(^10\)

37. Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). See also United States v. Savage, 482 F.2d 1371 (9th Cir. 1973). In Savage, the inmate sent a letter to another inmate in a different institution containing information linking him to the robbery of a federally insured bank. The letter was intercepted by a security officer and photocopied. The court held that the letter should be excluded from evidence in the inmate's trial unless the seizure was demonstrated to be a justifiable means of ensuring prison security. No such showing was made.
38. 317 F. Supp. 776 (D.R.I. 1970). Prison officers had the authority to open, inspect and read all incoming and outgoing inmate mail. In order to receive mail privileges, an inmate was forced to sign an "Authorization for Disposition of Mail" entitling the warden or his representative to open and inspect all mail of the inmate. The court recognized that this procedure was not entirely "voluntary" and held that it could not operate as a waiver of any retained fourth amendment rights. Id. at 792.
39. Id. at 791. The intrusion into the inmate's privacy was greater than that required for security or discipline. Prison officials, in curtailing the introduction of contraband into the institution, must use the "least restrictive of the alternative methods of accomplishing the desired end." Id. at 788.
40. Id. at 791. The court pointed to the fact that the officials had not found it necessary, for example, to listen to conversations between inmates and visitors. This raised serious questions concerning the prison official's claim that it was imperative to the operation of the institution to read all outgoing correspondence. Id.
41. Id. at 788. The court concluded there was "no logical nexus between censorship of attorney-inmate mail and penal administration." Id. at 789.
42. Id. at 790.
43. Id. See also Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974) (allowing seizure of pornographic material).
3. Parolees and Probationers

The courts are in general agreement that probationers⁴⁴ and parolees⁴⁵ are entitled to some degree of protection against unreasonable searches and seizures,⁴⁶ although an “appropriate standard of reasonableness has not yet emerged.”⁴⁷ While the offender is subjected to “many restrictions not applicable to other citizens,” his constitutional rights are far less restricted than those of an incarcerated individual.⁴⁸ An offender’s fourth amendment protections are qualified by the legitimate interest of society in furthering programs designed to rehabilitate the offender and “prevent [him] from lapping back into crime.”⁴⁹

The offender is afforded the same protections against unreasonable searches and seizures as ordinary citizens when the search is conducted by law enforcement officials.⁵⁰ In addition, a supervising officer’s warrantless search of an offender at the request of law enforcement officials has been

⁴⁴. Probation is a judicial act whereby a convicted criminal offender is released into the community under the supervision of a probation officer, in lieu of incarceration. Note, Fourth Amendment Limitations on Probation and Parole Supervision, 1976 DUKE L.J. 71 n.1 [hereinafter cited as 1976 DUKE].

⁴⁵. A parolee is a convict who, after serving a portion of his judicially imposed sentence in a penal institution, is released under the supervision of a parole officer for the remainder of the sentence. 1976 DUKE, supra note 44, at 71 n.2.

There appears to be little or no significant difference between the constitutional protections afforded to probationers and parolees. See Gagnon v. Scarpelli, 411 U.S. 776, 782 n.3 (1973); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265-66 (9th Cir. 1975); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); Connelly v. Parkinson, 405 F. Supp. 811 (D.S.D. 1975).

For this reason, the term “offender” shall be used in this section to refer to both probationers and parolees. The term “supervising officer” will be used to refer to both probation and parole officers.


⁴⁷. 1976 DUKE, supra note 44, at 72.


⁵⁰. See United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975); United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163-64 (2d Cir. 1970); United States v. Lewis, 274 F. Supp. 184 (S.D.N.Y. 1967). In Consuelo-Gonzalez, the court explained that, while the probationer was subject to reasonable searches by the supervising officer, searches for probation violations conducted by law enforcement officers might become a “subterfuge for criminal investigations.” Therefore normal fourth amendment standards must be observed with respect to searches of probationers by law enforcement officers. 521 F.2d at 267.
declared a violation of the offender's fourth amendment rights. 51 However, the courts have recognized that the supervising officer has a special interest in invading the privacy of his charges in order to be able to perform his duties. The supervising officer needs more information concerning the offender's behavior than he will be able to gather from searches complying with the warrant requirement or the probable cause standard. 52 Therefore, any search conducted by a supervising officer, in good faith, to determine whether an offender has violated the conditions of his parole is reasonable per se. 53 This is true whether or not a warrant has been obtained. 54 A supervising officer's search of the offender will be deemed unreasonable "only if made too often or if made at an unreasonable hour or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the parole officer." 55

51. United States v. Hallman, 365 F.2d 289 (3d Cir. 1966). A parole officer was informed that an offender was suspected of bank robbery by police. After requesting the police to bring the offender to his office, the parole officer searched the offender and discovered evidence linking the offender to the crime. The court held the search unreasonable and the evidence was suppressed. The court explained that the police could not overcome the offender's constitutional protection by engaging the help of the parole officer in such a manner. Accord, People v. Coffman, 2 Cal. App. 3d 651, 82 Cal. Rptr. 782 (1969). But see United States ex rel. Santos v. New York State Bd. of Parole, 441 F.2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972) (search conducted by parole officer sustained even though instigated by police).

52. 1976 Duke, supra note 44, at 84, citing Latta v. Fitzharris, 521 F.2d 246, 249-50 (9th Cir.), cert. denied, 423 U.S. 897 (1975). In Latta, the supervising officer discovered the offender smoking marijuana at the home of a friend. Later the officer and the police made a full search of the offender's home, some thirty miles from the site of the arrest. A large quantity of marijuana was discovered and submitted as evidence at the offender's trial. The Ninth Circuit, in upholding the conviction, attempted to set a standard for reasonableness of a parole officer's search:

"[T]he parolee and his home are subject to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties. . . . He is therefore in a better position than anyone else to decide whether a search is necessary. His decision may be based upon specific facts, though they be less than sufficient to sustain a finding of probable cause. It may even be based on a "hunch," arising from what he has learned or observed about the behavior and attitude of the parolee.

521 F.2d 246, 250 (9th Cir. 1975).

53. United States ex rel. Randazzo v. Follette, 282 F. Supp. 10, 13 (S.D.N.Y. 1968), aff'd, 418 F.2d 1319 (2d Cir. 1969), cert. denied, 402 U.S. 984 (1971); cf. United States v. Lewis, 400 F. Supp. 1046 (S.D.N.Y. 1975). In Lewis, the offender, while living at a halfway house, was arrested by federal authorities. State authorities then searched the offender's locker and room. The offender's personal effects were turned over to the federal authorities. The court explained that the search of the offender's premises was reasonable under the circumstances and supported by the needs of a correctional facility in orderly operation.


55. United States ex rel. Randazzo v. Follette, 282 F. Supp. 10, 13 (S.D.N.Y. 1968), aff'd,
Evidence seized during a reasonable search by a supervising officer is admissible in a subsequent criminal proceeding as well as in parole or probation revocation hearings. Moreover, since the courts have refused to apply the exclusionary rule to parole or probation revocation hearings, evidence seized by police during an unlawful search, which is not admissible in a criminal proceeding, may be entered as evidence in a revocation hearing.

B. EAVESDROPPING

There is no doubt that eavesdropping of conversations under certain circumstances may amount to an unreasonable search and seizure. However, in Lanza v. New York, the Supreme Court apparently viewed the

56. See, e.g., United States ex rel. Santos v. New York State Bd. of Parole, 441 F.2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972). The court held that what may be an unreasonable search in the case of an ordinary individual may be reasonable in the case of a parolee. The parole officer was charged with supervision of the parolee. If the search was found to be a reasonable method for the officer to carry out his duties, then the search was considered reasonable. Since the search was reasonable, the parolee could not claim that his fourth amendment rights had been abridged. Therefore, the parolee could not block the evidence seized from being used in a subsequent criminal trial. Id. at 1218.
57. See Latta v. Fitzharris, 521 F.2d 246, 252 (9th Cir.), cert. denied, 423 U.S. 897 (1975).
59. See, e.g., United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975) (probation or parole); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975) (probation); United States v. Hill, 447 F.2d 817 (7th Cir. 1971) (probation or parole); United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970) (parole). The Ninth Circuit in Vandemark explained:

The judicially created remedy was designed not to compensate for the unlawful invasion of one's privacy but to deter future unlawful police conduct. . . . Where, as here, the officers are ignorant of the probationer's status, they also remain unaware of the possibility that he might be subject to sentencing after revocation. Consequently, the threat of exclusion at such a proceeding has little, if any, effect upon their conduct.
522 F.2d 1019, 1022 (9th Cir. 1975).
60. See cases cited note 59 supra.
62. 370 U.S. 139 (1962). The petitioner had paid a visit to his brother in jail and had spoken with him in a room set aside for such visits. Approximately one week later the petitioner's brother was released on parole. Due to the unusual circumstances surrounding the parole, a committee of the New York legislature held an investigation into possible corruption within the state parole system. The petitioner was called to testify. Upon refusal to answer several questions the petitioner was indicted, tried and convicted. The petitioner's conversation with his brother had been taped, a transcript of which had furnished the basis for many of the
use of electronic monitoring equipment in a jail visiting room as permissible under the fourth amendment. In limiting an inmate's expectation of privacy, the Court concluded "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." The Court, however, did go on to explain that even in a jail "the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection." Thus, the Court, in dictum, apparently believed that only certain relationships, such as those between attorney and client, and husband and wife, should be more adequately protected even in prison than other relationships with regard to conversational privacy.

committee's questions. The record showed that at least two questions which the committee asked were not related in any way to the taped conversation. The Court upheld the petitioner's conviction on the basis of the two questions not related to the transcript. The Court explained that "the ultimate constitutional claim [the petitioner's fourth amendment claim] asserted in this case, whatever its merits, is simply not tendered by the record." Id. at 147. The petitioner's brother's fourth amendment rights were not at issue in the trial. Even if that had been the case, the result would have been the same, since at the time of the trial the protections of the fourth amendment extended only to places not persons.

See also People v. Gallegos, 499 P.2d 315 (Colo. 1972). The inmate used a telephone in the jail in an effort to obtain counsel. The jailer overheard the conversation in which the inmate admitted his guilt to the lawyer. This statement was admitted as evidence. The court explained that the statement was voluntary and that the inmate had no reasonable expectation of privacy while in the jail.


64. Lanza v. New York, 370 U.S. 139, 143 (1962) (dictum). Since at the time of the case fourth amendment protections were thought of as extending to places instead of to persons, the limited expectation of privacy within a jail applied to visitors as well as inmates.


66. See Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972) (monitoring conversations with visitors is not violative of the fourth amendment); cf. United States v. White, 401 U.S. 745 (1971). The Supreme Court in White construed Katz v. United States, 389 U.S. 347 (1967), as banning eavesdropping only when an individual can anticipate no risk that his words will be disclosed. This would appear to reinforce the Lanza dictum. Christman v. Skinner, 468 F.2d 723, 729 (2d Cir. 1972) (Feinberg, J., concurring in part and dissenting in part).
The apparently prevailing view concerning eavesdropping in prisons follows the dictum in the Lanza decision. In Williams v. Nelson, the court cited Lanza in upholding an inmate's conviction of murder which was based on evidence gained by electronic eavesdropping within a jail. The court noted that, at the time of the conviction, fourth amendment protection of conversational privacy was thought to be governed by locale rather than reasonable expectation of privacy. Since the jail shared none of the attributes of privacy of a home or office, the use of information gained by electronic surveillance did not violate the inmate's fourth amendment rights. However, more recent decisions, imbued with the premise that the fourth amendment protects people instead of places, have tended to diverge from Lanza. In North v. Superior Court, the court held that the monitoring of an inmate's conversations with his wife, under circumstances where the inmate was led to believe the conversation would be private, deprived the inmate of his fourth amendment rights. However, since the decision was based in part on state law which had endowed the marital relationship with "particularized confidentiality," the case may be limited. Thus, it would appear that, even in light of Katz, a special relationship must exist before the fourth amendment will apply to conversations in prison.

Parolees and probationers, however, are more adequately protected from

67. 457 F.2d 376 (9th Cir. 1972).
68. Id. at 377. The inmate was placed in a room with a co-defendant who had earlier confessed to the murder. Prison officials monitored an incriminating conversation between the two, which was subsequently admitted as evidence in the inmate's trial.
69. Id. The court explained that Katz v. United States, 389 U.S. 347 (1967), which analyzes the protections of the fourth amendment in terms of persons instead of places, had not been made retroactive. 457 F.2d at 377.
70. 457 F.2d at 377.
72. See, e.g., People v. Santos, 26 Cal. App. 3d 397, 102 Cal. Rptr. 678 (1972) (inmate's belief that conversations were being monitored destroyed any reasonable expectation of privacy); People v. Califano, 5 Cal. App. 3d 476, 85 Cal. Rptr. 292 (1970) (prisoners' suspicions that conversations were being monitored negated any subjective or reasonable expectation of privacy as contemplated by the Katz case); People v. Hiser, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968) (dictum) (prisoner not legally capable of entertaining a reasonable expectation of privacy as described by the Katz case).
73. 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).
74. 8 Cal. 3d at 311-12, 502 P.2d at 1311, 104 Cal. Rptr. at 839. The conversation occurred in a detective's private office. The detective had surrendered his office to the inmate and his wife and had left the room and closed the door. The court concluded that these actions led the inmate to believe that his conversation would not be monitored.
75. 8 Cal. 3d at 310, 502 P.2d at 1310, 104 Cal. Rptr. at 838.
indiscriminate eavesdropping by correctional officials. A supervising officer may legitimately invade the privacy of an offender only when he has reasonable cause to believe that the offender is violating the terms of his release. The courts have consistently defeated efforts to limit protection of conversational privacy to situations involving some special relationship so as to place parolees and probationers on the same level as incarcerated inmates.

C. INTERROGATION AND THE FIFTH AMENDMENT

The privilege against compelled self-incrimination survives conviction and incarceration. In fact, this privilege may be one of the most important rights that an inmate retains. Confessions or other incriminating statements may be coerced from an inmate by the actions of prison guards or the conditions of incarceration. Such evidence may be excluded under certain circumstances from any subsequent criminal trial under the exclusionary rule. In Brooks v. Florida, an inmate suspected of participating in a prison riot was placed naked in a punishment cell with very little food or water. The Supreme Court held that the inmate's "voluntary" confession was coerced by his stay in the "hole" and reversed

76. Parolees and probationers enjoy a degree of protection under the fourth amendment that lies intermediate between that afforded to prison inmates on the one hand and free-world individuals on the other. See section III A. 3. supra.
77. See notes 53-55 and accompanying text supra.
78. See note 48 and accompanying text supra.
80. TOAL, RECENT DEVELOPMENTS IN CORRECTIONAL CASE LAW 51 (S.C. Dep't of Corrections 1975) [hereinafter cited as TOAL].
81. Holland v. Connors, 491 F.2d 539 (5th Cir. 1974). An inmate suspected of a crime was approached by two guards. They removed their shirts and began to threaten the inmate with bodily harm. The inmate implicated himself and several others in a crime for which he was subsequently prosecuted. The court concluded that if the inmate's allegations were true, he had been denied his fifth amendment privilege against self-incrimination.
82. Rodgers v. Westbrook, 362 F. Supp. 353 (E.D. Mo. 1973). See also United States ex rel. Irving v. Henderson, 371 F. Supp. 1266 (S.D.N.Y. 1974). Conversations between an inmate and government informers inside the prison will be admissible as evidence in a criminal trial unless the inmate can show that the government initiated the conversation in order to seek out the desired information. Id.
84. 389 U.S. 413 (1967).
85. Id. at 414-15. The cell, 7 feet long by 6-1/2 feet wide, contained no windows or furnishings except for a flush hole which served as a commode. The petitioner was held in the cell for fourteen days. He received a diet of pea and carrot soup three times a day. The inmate's
the criminal conviction which had resulted.  

1. Prison Disciplinary Proceedings  

An inmate who is charged with a disciplinary infraction which may also lead to criminal prosecution is placed in a dilemma at the time of the disciplinary hearing. The inmate must either forego testifying in his own behalf at the hearing or take the chance that any statements he makes will be used against him in a later criminal trial. In an effort to ameliorate this dilemma, early cases held that an inmate should be granted “use” immunity for any statement that he made during the hearing. However, the Supreme Court, in Baxter v. Palmigiano, has recently held that such an inmate faces no constitutional dilemma at a disciplinary hearing, even when he is informed that his silence will be held against him. The Court, in distinguishing a disciplinary hearing from a criminal prosecution, explained that “disciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for a crime.” The inmate’s silence alone, under state statutory law, was not sufficient evidence to allow an adverse judgment against him.

Palmigiano did not reach the crucial issue of whether an inmate’s privilege against self-incrimination would be infringed if criminal charges were also pending against him at the time of the disciplinary hearing. The
lower federal courts have held that where an inmate faces both disciplinary and criminal proceedings, he must be granted "use" immunity for any statements relevant to the disciplinary proceeding which might be used in a coordinate criminal trial. 95 *Palmigiano* did not foreclose further development in this area since the Court explained that if the state desired the petitioner's testimony over his fifth amendment objections, it could extend to him whatever "use" immunity is required by the federal constitution. 96

It should also be noted that the lower federal courts have applied the collateral estoppel component of the fifth amendment double jeopardy clause in order to bar disciplinary action based upon the same offense for which an inmate has been acquitted in a criminal prosecution. 97

2. Parole and Probation Revocation Hearings

A parolee or probationer 98 at a revocation hearing is faced with the same dilemma that confronts an inmate in a disciplinary proceeding. In *United States ex rel. Carioscia v. Meisner*, 99 the court held that any incriminating statements made at a parole revocation hearing could not be used affirmatively against the parolee in a subsequent criminal proceeding. The court explained that if a parolee was not given the "free and full ability" to testify in his own behalf, his right to a revocation hearing 100 would be meaningless. 101

An offender may face both criminal prosecution and parole revocation without suffering double jeopardy in violation of the fifth amendment. 102

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96. 425 U.S. at 318.


98. There appears to be little or no significant difference between the constitutional protections afforded a probationer or parolee. See Gagnon v. Scarpelli, 411 U.S. 778, 782 n.3 (1973). See generally note 45 supra.

99. 331 F. Supp. 635 (N.D. Ill. 1971). A parole board hearing is not an adversary proceeding. Its primary purpose is to allow the parolee to explain away or deny charges made against him. *Id.* at 642.

100. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court set forth minimum requirements of procedural due process applicable to parole revocation hearings. With slight modification these requirements were extended to probation revocation hearings in Gagnon v. Scarpelli, 411 U.S. 778 (1973). See section VI. A. 4. infra.


The revocation of parole is a continuance of the original conviction "from which parole is granted and is not a consequence of the offense on which the revocation is based." However, the doctrine of collateral estoppel bars revocation of parole following an acquittal upon identical criminal charges. The parole board may therefore not relitigate Issues of which a parolee was cleared at the previous criminal trial.

A final problem is presented when a parolee makes incriminating statements to his parole officer without that officer having given him his Miranda warnings. Although this area of the law is very unclear, some courts have held that such statements may be used as evidence against the parolee in a criminal trial. These courts have assumed that the statements were not made during an in-custody interview by a law enforcement official; therefore no Miranda warnings need be given.

D. Detainers

A detainer is a notice, sent to the warden of the prison in which an inmate is incarcerated, informing the warden of a criminal charge or unserved sentence pending against the inmate in another district or state. Its purpose is to ensure that "after the completion of [an inmate's] present sentence he will be held until turned over to the notifying authorities for prosecution or recommitment." Generally, the inmate will be consid-

103. Id.
104. Id. at 1254-55. See People v. Grayson, 58 Ill. 2d 260, 319 N.E.2d 43 (1974). The court in Standlee concluded that a revocation hearing is punitive as opposed to remedial. It is a quasi-criminal proceeding. The parolee is therefore entitled to the "rights of a defendant in a criminal trial, albeit in a modified form." 403 F. Supp. at 1254.
105. See cases cited note 104 supra.
106. Miranda v. Arizona, 384 U.S. 436 (1966). Miranda warnings must be given prior to in-custody interrogation when the person interrogated is the object of the investigation. Id. at 467. See generally 3 Wigmore, Evidence § 823 (Chadbourn rev. 1970).
108. See cases cited note 107 supra. Contra, People v. Gastelum, 237 Cal. App. 2d 205, 46 Cal. Rptr. 743 (1965); State v. Lekas, 201 Kan. 579, 442 P.2d 11 (1968); State v. Williams, 486 S.W.2d 468 (Mo. 1972); State v. Gallagher, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), vacated and remanded, 96 S. Ct. 1438 (1976), citing United States v. Deaton, 468 F.2d 541 (5th Cir. 1972), cert. denied, 410 U.S. 934 (1973). In Deaton a parolee, while incarcerated, was interrogated by his parole officer. The court held that unless the officer had given the parolee prior Miranda warnings, his statements would not be admissible as evidence.
110. Id.
Generally, the inmate is wanted for one of four reasons: (1) he has already been
ered a security risk since he faces the possibility of serving a sentence for another offense following release from his present confinement. Consequently, he may often be denied many of the privileges granted to other inmates.\textsuperscript{111} If the jurisdiction bringing the detainer delays or refuses to bring the inmate to trial, as frequently occurs,\textsuperscript{112} the inmate may seek federal judicial relief in habeas corpus to attack the underlying charge\textsuperscript{113} or under section 1983 to remove the collateral consequences of the detainer upon his present incarceration.\textsuperscript{114}

1. \textit{Interstate Criminal Detainers}\textsuperscript{115}

In Smith v. Hooey,\textsuperscript{116} the Supreme Court recognized that the sixth

\begin{itemize}
  \item convicted in the demanding state, but has not yet served the sentence imposed;
  \item he is wanted in the demanding state as a parole violator;
  \item he is charged with an offense for which he has not yet been tried in the demanding state;
  \item he is charged with another offense in the state of incarceration.
\end{itemize}

\textit{Id.} at 660.


1. deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed;
2. classified as a maximum or close security risk;
3. ineligible for initial assignments to less than maximum security prisons . . . ;
4. ineligible for trustee status;
5. ineligible for study-release programs or work release programs;
6. caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

\textit{Id.}


114. See Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973); Hawkins-El v. Hawkins, 395 F. Supp. 827, 829 (D. Md. 1975). When an inmate is challenging the fact, duration or legality of his imprisonment, his proper remedy is federal habeas corpus. However, when the inmate is “making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody,” then his proper remedy is a section 1983 action. Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973). See section II. C. supra. Here the inmate seeks immediate release from confinement or a shortening of the duration of confinement.

115. For removing an \textit{intrastate} detainer an inmate may refer to the Uniform Mandatory Disposition of Detainers Act, enacted by seven states as of 1974, or proceed in federal courts in the same manner in which he would attempt to remove an interstate detainer in states which have not adopted the Interstate Agreement on Detainers. Meyer, supra note 109, at 685. See notes 123-25 and accompanying text \textit{infra}.

The Uniform Mandatory Disposition of Detainers Act applies only to inmates incarcerated in state prisons. The warden of the prison is required to inform the inmate of any intrastate detainers placed upon him. Upon request of the inmate, the warden is required to forward the inmate’s request for disposition of the charge to the court where the charge is pending. If
amendment right to a speedy trial\textsuperscript{117} applies to prison inmates who have an untried charge filed against them. Since that decision, forty-three states, the District of Columbia and the federal government have become parties to the Interstate Agreement on Detainers.\textsuperscript{118} When the demanding state\textsuperscript{119} is a party to this agreement, the inmate’s remedies with respect to the effects of the detainer and the validity of the charge are controlled by the statute.\textsuperscript{120} Under the statute, the inmate must first make a formal request for disposition of all charges against him. Once this is accomplished, the demanding state has 180 days in which to bring the inmate to trial. By making this request the inmate waives any rights to challenge extradition which he may have. If the demanding state fails to bring the inmate to trial within 180 days or an authorized extension period thereafter, the state trial court must enter an order dismissing the charge with prejudice, thereby rendering the detainer invalid.\textsuperscript{121} The inmate may need to file an additional request after the detainer has been dropped in order to assure that an order dismissing the charge with prejudice will be entered by the court.\textsuperscript{122}

When an intrastate detainer or a detainer from a jurisdiction which has not adopted the interstate agreement is filed, the prisoner can only rely upon his sixth amendment right to a speedy trial to remove the effects of the detainer.\textsuperscript{123} After a request for trial by the prisoner, the demanding state is constitutionally obligated to make a “diligent good-faith effort” to bring the inmate to trial within a reasonable time.\textsuperscript{124} If the demanding state

\begin{itemize}
\item the warden fails to inform the prisoner of any outstanding charges within one year after the detainer is filed or, after request by the inmate, he is not brought to trial within ninety days, the charge is dismissed with prejudice.
\item 116. 393 U.S. 374 (1969). In Smith the Court held that, upon an inmate’s request, the demanding state had a sixth amendment duty to make a diligent good faith effort to bring the inmate before the appropriate court for trial. \textit{Id.} at 383. The Supreme Court had earlier held that the sixth amendment’s speedy trial guarantee is applicable to the states through the fourteenth amendment in Klopfner v. North Carolina, 386 U.S. 213, 222-23 (1967).
\item 117. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .
\item U.S. \textsc{const.} amend VI.
\item 118. Meyer, \textit{supra} note 109, at 663. See \textsc{va. code ann.} §§ 53-304.1 to 304.8 (Repl. Vol. 1974).
\item 119. The “demanding” state issues the detainer against the inmate. The inmate is incarcerated in the “holding” state.
\item 120. \textsc{va. code ann.} §§ 53-304.1 to 304.8 (Repl. Vol. 1974). See Meyer, \textit{supra} note 109, at 664-77.
\item 121. \textit{See} authorities cited in note 120 \textit{supra}.
\item 122. \textsc{toal.}, \textit{supra} note 80, at 85.
fails to do so, the prisoner may proceed against the holding state's prison officials for removal of the restrictions placed against him due to the detainer.\textsuperscript{125}

2. Parole Revocation Detainers

"A detainer may be lodged pursuant to a parole violation warrant,"\textsuperscript{126} the violation being the parolee's criminal conviction in another state or district.\textsuperscript{127} In this situation the Interstate Agreement on Detainers does not apply.\textsuperscript{128} However, parole revocation detainers have the same adverse effects upon an inmate as detainers filed upon pending criminal charges.

The Supreme Court, in Morrissey v. Brewer,\textsuperscript{129} set forth the minimum requirements of procedural due process which must be observed upon revocation of parole.\textsuperscript{130} When the revocation is based upon an intervening criminal conviction, however, only a final revocation hearing is required, the normal necessity for a preliminary probable cause hearing having been dispensed with.\textsuperscript{131} In Cooper v. Lockhart,\textsuperscript{132} the court concluded that a


Where an inmate wishes to challenge the validity of a detainer and bar prosecution of the pending charge, his proper recourse is a federal habeas corpus action. See Kane v. Virginia, 419 F.2d 1369 (4th Cir. 1970). See notes 113-14 and accompanying text supra.

\textsuperscript{126} Toal, supra note 80, at 87.

\textsuperscript{127} Meyer, supra note 109, at 688.


\textsuperscript{129} 408 U.S. 471 (1972). See section VI. A. 4. infra.

\textsuperscript{130} These requirements were later extended to probation revocation, with some modification, in Gagnon v. Scarpelli, 411 U.S. 778 (1973). See section VI. A. 4. infra.


\textsuperscript{132} 489 F.2d 308 (8th Cir. 1973). The inmate was paroled by Michigan and later imprisoned in Arkansas. Michigan then issued a parole violation warrant for the inmate which
holding state, which had incarcerated an apparent parole violator for an offense committed within its jurisdiction, could not impose restrictions attributable to an out-of-state detainer when the demanding state took no action to institute a parole revocation hearing. The court held that although the right to a speedy trial was limited to criminal prosecutions and did not apply to parole revocation hearings, procedural due process requires that a parolee be given a hearing within a reasonable time after the parole violation occurs. The court concluded that when a demanding state does nothing to institute the parole hearing upon reasonable notice, the inmate may maintain an action under section 1983 to remove any undesired effects which the detainer has upon the conditions of his present confinement.

IV. PRIVACY CLAIMS

The courts have generally discussed privacy claims in two separate and distinct contexts. The first area relates to government prohibitions against certain private personal activities or conduct, such as government intrusions into the privacy of the marital setting. These privacy rights have been held to arise from the penumbras of the Bill of Rights, rather than from any specific provision of the Constitution. Although “[t]he Due Process Clauses of the Fifth and Fourteenth Amendments provide the most likely constitutional basis” for these decisions, a great deal of litigation has arisen concerning interference with first amendment rights such as

Arkansas honored by imposing a detainer. The inmate requested that the Michigan Parole Board grant him a revocation hearing within 60 days. The Board refused, explaining that the revocation hearing could not commence until the inmate was released by the Arkansas prison and returned to Michigan.

133. Id. at 312.

134. Id.


It may be well to note, as did the court in Pavia, supra, that all the above decisions contrary to Cooper involved a federal parole warrant instead of one issued by a state.


2. See cases cited note 1 supra.

freedom of religion. A second area involving privacy concerns involves constitutional protections against actual unlawful government intrusion into the private areas of a person's life, such as the fourth amendment's protections against unreasonable searches and seizures. In the prison context, successful privacy claims, like fourth amendment claims, are notably infrequent.

A. Marital Privacy

1. Marriage Decision

While the institution of marriage is fundamental to our society, a right to marry is guaranteed neither implicitly nor explicitly by the federal constitution. Courts have generally held that the decision whether to allow an inmate to marry legitimately lies within the discretionary powers of prison authorities to regulate the management and discipline of the penal institution. In this respect prison authorities must follow their own guidelines. However, a prison warden's refusal to allow an inmate to marry does not violate the constitutional rights of either an inmate or his proposed spouse. Most states do allow prisoner marriages when certain prerequisites are met by the parties involved. On the other hand, imprisonment is

4. See cases cited note 32 infra.
5. The right of privacy is often held to include fourth amendment rights. See, e.g., Katz v. United States, 389 U.S. 347, 353 (1967).
6. The concepts of privacy and imprisonment are not easily reconciled since "the prison is, almost by definition, a place where the [inmate] has lost his privacy." Singer, Privacy, Autonomy and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons, 21 BUFFALO L. REV. 669 (1972).
7. In re Goalen, 30 Utah 2d 27, 512 P.2d 1028 (1973), appeal dismissed, 414 U.S. 1148 (1974). The court upheld the state's right to regulate the marriage decision after incarceration. The state had ample justification for denying the inmate the right to marry, including the problem of support for his wife and children.
8. Id. See also Johnson v. Rockefeller, 365 F. Supp. 377 (S.D.N.Y. 1973), aff'd sub nom. Butler v. Wilson, 415 U.S. 953 (1974). The court upheld a New York law denying prisoners serving life sentences the right to marry. This denied the inmate only the right to go through with the mere formal ceremony of marriage. The other aspects of marriage, such as cohabitation, sexual intercourse and the begetting of children, were already unavailable to the inmate due to the fact that he would serve the rest of his life in prison. The court explained that since the prisoner could not perform the duties and obligations imposed on a husband by state law (e.g., support of wife and children), the state could rely on its power over the prisons to justify its denial of marriage for life-termers.
9. Id. at 380; In re Goalen, 30 Utah 2d 27, 512 P.2d 1028 (1973).
10. Johnson v. Rockefeller, 365 F. Supp. 377, 383 (S.D.N.Y. 1973). At the time of this case, thirty-eight states provided for prisoner marriage under certain guidelines. See, e.g., Virginia Division of Adult Services Guideline No. 891, Marriage Ceremonies for Inmates (May 19, 1976). In Virginia, the inmate must demonstrate a need to be married while still incarcerated rather than waiting until his release. The inmate must file a request to the superintendent
generally grounds for an inmate's spouse to obtain a divorce.11

2. Conjugal Visitation

The desirability of permitting conjugal visitations has been extensively debated by correctional officials and other observers.12 Recently, suits have been brought by both inmates and their spouses dealing with conjugal rights.13 The courts have almost unanimously held that the denial of conjugal visitation violates neither the constitutional rights of the inmate nor the spouse.14 While the courts have acknowledged that the state cannot

of the institution who, after consulting with the chaplain, will forward a recommendation to the Director of the Division of Adult Services. The Director, after considering the request and recommendation, if inclined to recommend the proposed marriage, shall forward all supporting documents and data to the Director, Department of Corrections, who shall have the final authority to approve or disapprove all requests for marriage submitted to him. Any request which is not favorably recommended by the Director, Division of Adult Services, may be appealed to the Office of the Director, Department of Corrections.


13. Schneller, supra note 12, at 165 n.1. The first such action was Payne v. District of Columbia, 253 F.2d 867 (D.C. Cir. 1958). The wife of an inmate sought damages for loss of consortium and declaratory relief which would allow her conjugal visits with her husband during his incarceration. The case was dismissed for failure to state a claim upon which relief could be granted.

14. McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975) (prisoner); Tarlton v. Clark, 441 F.2d 384 (5th Cir.), cert. denied, 403 U.S. 934 (1971) (prisoner); Payne v. District of Columbia, 253 F.2d 867 (D.C. Cir. 1958) (spouse); Lyons v. Gilligan, 382 F. Supp. 198 (N.D. Ohio 1974) (prisoner or spouse); Polakoff v. Henderson, 370 F. Supp. 690 (N.D. Ga. 1973), aff'd, 488 F.2d 977 (5th Cir. 1974) (prisoner or spouse); Stuart v. Heard, 359 F. Supp. 921 (S.D. Tex. 1973) (prisoner); In re Flowers, 292 F. Supp. 390 (E.D. Wis. 1968) (prisoner). In Lyons the spouses of inmates were contending that the denial of conjugal visitation punished them as well as the inmates, although they had not been adjudged guilty of a crime. They asserted that this deprivation amounted to cruel and unusual punishment. The court explained that the eighth amendment did not "reach so far as to require the state to ensure against hardships caused to third persons as a result of the incarceration of one convicted of a crime." 382 F. Supp. at 201.

In Polakoff v. Henderson, 370 F. Supp. 690 (N.D. Ga. 1973), aff'd, 488 F.2d 977 (5th Cir. 1974), the spouse of an inmate, in addition to alleging cruel and unusual punishment, also contended that the denial of conjugal visits denied her equal protection of the laws. The court answered that there was no indication she was being discriminated against since other prisoners' wives were also denied conjugal visitation.

The inmate in In re Flowers, 292 F. Supp. 390 (E.D. Wis. 1968), maintained that the denial
pass criminal laws whose enforcement would require intrusion into marital privacy, it does not follow that the state is constitutionally obligated to create places for the conduct of marital sexual relations. The granting of conjugal visits is therefore a matter of policy left to the state legislature and prison officials. Likewise, the granting of furloughs for inmates to visit their families also lies within the discretionary power of state authorities.

B. PERSONAL APPEARANCE

A great deal of litigation has recently appeared involving the right of an inmate to control his personal appearance during incarceration. The courts have almost unanimously held that no such personal right exists within the walls of a prison. Most of the challenged regulations have concerned hair length regulations or denial of the privilege to grow a beard or goatee. Inmates have attacked these regulations on various constitutional grounds including freedom of expression, freedom of religion, due process and equal protection of the laws under the fourteenth amendment. Generally, the official interests in discipline, speedy identification, safety, security and hygiene have been held to outweigh any asserted inmate interest. The

of conjugal visitation impaired the obligation of his marriage contract. The court explained that marriage was a social relation subject to the police power of the state. Therefore, it was not considered a contract within the constitutional protections against impairment. The inmate, by his own act, had impaired his ability to perform his marriage obligations, thus precluding any reliance upon constitutional provisions.

Contra, Government of the Virgin Islands v. Gereau, 3 Prison L. Rptr. 20 (D.V.I. 1973). Pre-trial detainees placed in maximum security custody following initial classification should be granted privilege of conjugal visitations subject to reasonable restrictions and regulations.


21. See, e.g., Daugherty v. Reagan, 446 F.2d 75 (9th Cir. 1971) (per curiam); Collins v. Haga, 373 F. Supp. 923 (W.D. Va. 1974) (the regulations were instituted for reasons of identification and sanitation of the inmates); Rinehart v. Brewer, 360 F. Supp. 105 (S.D. Iowa 1973), aff'd, 491 F.2d 705 (8th Cir. 1974). In Rinehart the court concluded that the problem of identification for security reasons and during emergency situations justified the regulations. The court also looked at the sanitation problem involved when large groups of people are confined to a relatively small area. In addition the court pointed to the safety factors
Correctional interests outlined above have generally outweighed any asserted inmate interest even where the court has considered the right of a free citizen to control his appearance to be protected by the Constitution. In addition, punitive action may be taken against inmates who involved when long-haired inmates are working near machinery. The court explained that while the reasons given for the regulations were not overly convincing, they did provide a sufficient rational basis for the imposition of such rules. The court compared the inmate situation with that presented in Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), where hair regulations applicable to high school students were overturned. In drawing a distinction between the two cases the court concluded that reasons which might be inadequate to justify the school regulation could nevertheless be adequate to justify a prison's regulation of inmate appearance.

See also Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971) (within the discretionary power of prison officials to prevent possession of medals worn around the neck which might become potential weapons); Winsby v. Walsh, 321 F. Supp. 523 (C.D. Cal. 1971) (prison authorities have the right to adopt reasonable restrictions governing the conduct of inmates).

22. See Massie v. Henry, 455 F.2d 779 (4th Cir. 1972). The court concluded that the right to govern the length of one's hair is a personal freedom protected by the Constitution, falling within the penumbras of the first amendment in some cases, or within the ambit of the ninth amendment or the equal protection clause of the fourteenth amendment. This right could be limited only upon the showing of some substantial countervailing governmental interest. The court held that discipline and safety were insufficient governmental interests to maintain the regulation at issue. Cf. Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970). The court held that the right to wear one's hair as one pleases is a protected right but the fact that long hair disrupted the educational process is enough to justify the regulation. Contra, King v. Saddleback Junior College District, 445 F.2d 932, 940 (9th Cir. 1971) (individual failed to establish any constitutional right to wear long hair); Wood v. Alamo Heights Independent School Dist., 433 F.2d 355 (5th Cir. 1970) (hair length regulation not arbitrary or unreasonable; sufficiently related to alleviating interference with educational process).

Most constitutional attacks on state hair regulations as applied to police officers have been rejected. In assuming that the right to control one's personal appearance is constitutionally protected, the courts have weighed the interests of the state against the interests of the individual. In asserting that the state's interests are paramount, the courts have pointed to the requirements of strict discipline among police officers, the need for ready identification by the public, and the need for esprit de corps which personal appearance regulations are said to develop within the force. Kelley v. Johnson, 425 U.S. 238 (1976). See also Stradley v. Anderson, 478 F.2d 188 (8th Cir. 1973); Ashley v. City of Macon, Georgia, 377 F. Supp. 540 (M.D. Ga. 1974), aff'd per curiam, 505 F.2d 868 (5th Cir. 1975). But see O'Doherty v. Seniuk, 390 F. Supp. 456 (E.D. N.Y. 1975) (hair regulations for correctional officers held invalid). In Kelley the Supreme Court explained that deference should be afforded to the county's choice of an organizational structure for its police force. The hair length regulation could not be viewed in isolation but rather had to be considered in the context of the county's chosen mode of organization. Viewed in this manner the regulations were not so irrational as to be branded "arbitrary." Therefore the police officer was not unconstitutionally deprived of any "liberty" interest in choosing his own hair style.

23. See Poe v. Werner, 386 F. Supp. 1014 (M.D. Pa. 1974); Howard v. Warden, 348 F. Supp. 1204 (E.D. Va. 1972), appeal dismissed, 474 F.2d 1341 (4th Cir. 1973). The court in Howard considered the right to select the length of one's hair to be a personal freedom protected by the Constitution. This right falls within the penumbras, in some instances, of the first amend-
refuse to comply with prison grooming regulations.24

1. Personal Appearance and Religious Freedom

An inmate’s freedom to exercise his religious beliefs is subject to reasonable curtailment upon incarceration.25 Even so, many inmates have argued that regulation of personal appearance is an unreasonable infringement upon their freedom of religion. These inmates have based their claims upon claimed vows and tenets of asserted religions which prohibit the cutting of hair or beards.26 In some instances the courts have questioned the sincerity of the inmate’s claims.27 However, even where it is assumed that the inmate is devout, the courts have generally held that an inmate’s religion will not be grounds for violating reasonable prison regulations.28 In Brooks v. Wainwright,29 the inmate asserted that his religious beliefs30 prevented him from cutting his hair or beard. The court explained that the source or sincerity of an inmate’s religious beliefs were not the controlling factor. The court declined to interfere with an internal matter of prison administration since the state regulation, which applied to all prisoners, was neither unreasonable nor arbitrary.31

Two courts,32 however, have upheld attacks on prisoner hair length regu-

24. Rinehart v. Brewer, 360 F. Supp. 105 (S.D. Iowa 1973), aff'd, 491 F.2d 705 (8th Cir. 1974). The court held that the regulations furthered an important and substantial government interest. Consequently any hinderances of the inmate’s constitutional rights were merely incidental to the purpose of the regulation.


28. Id. at 4.

29. 428 F.2d 652 (5th Cir. 1970). The inmate claimed that he had received a “divine revelation” from the “Lord God of Israel” commanding him to follow the laws “as given to Moses for the children of Israel.” Id. at 653.

30. Ye shall not round the corners of your head, neither shalt thou mar the corners of thy beard.

Leviticus 19:27, Numbers 6:5, cited in id. at 653.

31. 428 F.2d at 653.

32. Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), aff’d sub nom. Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). The inmate, an Indian, was held entitled to wear his hair in traditional Plains Indian style due to religious beliefs. Accord, Crowe v. Erickson, 17
lations as infringements of an inmate’s retained first amendment right of free exercise of religion. These courts explained that any limitation of the first amendment must be no greater than is necessary or essential to the protection of the particular government interest involved.32 Under the circumstances of each case, these courts concluded that the hair regulation was unnecessarily broad in its sweep.34 Officials were required to employ less restrictive alternatives which would better accommodate both the constitutional rights of the inmate and the institutional needs of the prison.35

2. Pre-trial Detainees

In contrast, the rights of pre-trial detainees to control their personal appearance have been vigorously upheld. The courts have generally found some protection of a citizen’s right to determine his own hair style within the fourteenth amendment.36 Since the state’s only asserted interest with respect to detainees is to ensure their appearance at trial, any limitations upon their constitutional rights “must find justification in the legitimate advancement of that interest. . . . Moreover, the difference in the legitimate state interests in convicts and detainees suggests that detainees be treated better.”37 On this basis, the courts have concluded that jail officials

Crim. L. Rptr. 2093 (D.S.D. 1975); cf. People ex rel. Rockey v. Kreuger, 306 N.Y.S.2d 359 (Sup. Ct. 1969) (proscribing religious discrimination in application of rule concerning beards). See also Maguire v. Wilkinson, 405 F. Supp. 637 (D. Conn. 1975). In Maguire, the prison administration allowed those who had beards due to religious beliefs at the time of incarceration to retain them. However, inmates were prohibited from growing beards once they entered prison, even for religious reasons. In overturning the regulation the court stated that there was no indication that a beard grown after incarceration would produce any more security, identification or hygienic problems than one grown before imprisonment. Id. at 641.


34. Teterud v. Gillman, 385 F. Supp. 153, 159-60 (S.D. Iowa 1974). The problems of sanitation and safety could be rectified by the use of hairnets. The problem of identification could be solved by having the inmate’s picture retaken if he let his hair or beard grow. Since the inmate is more likely to conceal contraband in his clothing than in his hair, a simple hair search conducted at the same time as the body search would resolve any security problems. Accord, Crowe v. Erickson, 17 Crim. L. Rptr. 2093 (D.S.D. 1975).

35. See note 34 supra.

36. See, e.g., Howard v. Warden, 348 F. Supp. 1204 (E.D. Va. 1972), appeal dismissed, 474 F.2d 1342 (4th Cir. 1973); Seale v. Manson, 326 F. Supp. 1375, 1380 (D. Conn. 1971), citing Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970) (individual facial and head hair styles are not sufficiently communicative to be protected by the first amendment, but do constitute a personal liberty protected by the fourteenth amendment).

must adopt less restrictive methods of promoting institutional goals which do not infringe upon the detainee's liberty to control his appearance.\(^{38}\)

**C. Prison Records**

There are many instances when an inmate may wish to have access to his prison files. In this respect, the federal Freedom of Information Act\(^{39}\) will generally be of no help.\(^{40}\) However, an inmate will usually be able to gain access to his files and certain other prison records if he brings suit against the prison officials.\(^{41}\) When this occurs, prison officials may assert that certain materials are privileged and place these specific materials before the court for *in camera* review.\(^{42}\) This will allow an inmate access to the documents that he needs for his case and also provide for a denial of access to those materials that are irrelevant.\(^{43}\)

An inmate may also wish to have access to his classification files which are used by the Board of Parole in making parole decisions. In *Franklin v. Shields*,\(^{44}\) the court perceived the advantage of allowing inmates access to

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the presumption of innocence enjoyed by the latter. In *Smith*, pre-trial detainees forcibly resisted having their hair and beards cut. While the courts recognized the jail's legitimate concern over security, hygiene and identification problems, it explained that under the circumstances those concerns did not justify infringement upon the detainee's constitutional rights. 349 F. Supp. at 272.

38. Smith v. Sampson, 349 F. Supp. 268 (D.N.H. 1972). The sanitation problem can be eliminated by the allowance of more frequent showers. The security concern could be eliminated with the periodic use of simple hair searches. Since there were only twenty detainees who were confined in a separate section of the jail, the problem of identification did not appear to be significant. *Id. at 272.* See also Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971).


40. Kerr v. United States District Court, 511 F.2d-192, 197 (9th Cir. 1975), *aff'd*, 96 S. Ct. 2119 (1976). Prison authorities were seeking a writ of prohibition to prevent court-ordered discovery of the files of the Parole Board in a prisoner's suit for alleged constitutional violations in determining the length of detention and conditions of punishment for convicted offenders. The Supreme Court held that when inmates request documents that prison authorities claim are privileged, these documents should be placed before the court for *in camera* review before being made available to the inmates. In addition the Court held that the Freedom of Information Act was not intended to "create evidentiary privileges for civil discovery." *But see* Tennessean Newspapers, Inc. v. Levi, 403 F. Supp. 1318 (M.D. Tenn. 1975) (Freedom of Information Act covers arrest records and certain background information requiring release).


42. *Id.* at 2125-26.

43. *Id.* at 2125.

their classification files in order to enable correction of any errors and adequate preparation in order to explain adverse information contained therein. The court explained that the advantages to be gained from the correction of the files outweighed the disadvantages to the prison authorities in making the files available. 45 The law is rather unclear on whether or not an inmate has a right to inspect these files before his parole hearing. Some courts have held that due process requires that the inmate be given access to his files for a reasonable time prior to the hearing. 46 Other courts, although conceding that such access may be a good idea, have denied that the inmate has a constitutional right to inspection. 47 These courts have concluded that allowing inmates access to the files would not "add so appreciably to the fairness of the hearing procedure" that it could be said that such access was mandated by the fourteenth amendment. 48 Where an inmate is allowed access to his files, he may have a cause of action against an official who has made a false entry on the inmate’s records. 49

V. EIGHTH AMENDMENT CLAIMS

A. INTRODUCTION

The degree of civilization in a society can be judged by entering its prisons. 1 Applying such a test to the stature of American civilization would yield a fairly bleak determination. 2 In 1870, the National Prison Association set forth as its goal reformation rather than vindictive treatment of inmates. Tragically, this still remains a goal and not an achievement: 3

Life in many institutions is at best barren and futile, at worst unspeakably brutal and degrading. To be sure, the offenders in such institutions are incapacitated from committing further crimes while serving their sentences, but the conditions in which they live are the poorest possible preparation for their

45. Id. at 316-17.
49. Thomas v. Shaw, 497 F.2d 123 (5th Cir. 1974).

successful reentry into society, and often merely reinforce in them a pattern of manipulation or destructiveness.4

As late as 1967, thousands of inmates were kept in "grim impersonal fortress-like structures" built over a century ago. Few systems keep the violent inmates from the nonviolent or the hardened criminals from the first offender.5 These institutions, by physically and psychologically isolating inmates from society, cause indelible scars to be left upon the offender.

The eighth amendment6 has become a leading vehicle for prison reform. The Supreme Court has stated three separate tests for determining whether a claim has reached eighth amendment proportions. The first, formulated in Trop v. Dulles,7 calls for discerning and applying socially accepted standards of decency. Weems v. United States8 expressed the second test. In this case the Court held that punishments are cruel and unusual when their "excessive length or severity" is totally out of proportion to the offense.9 Third, punishment rendered unnecessary in light of legitimate penal goals may violate the eighth amendment.10 Thus cruel and unusual punishment can be defined in terms of "evolving standards of decency," nonproportionality and less drastic means to achieve a lawful purpose.11 The courts, however, have traditionally been reluctant to interfere with the administration of state prisons.12 "Merely undesirable prac-

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7. 356 U.S. 86 (1958). The Trop test holds that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," which must be construed in light of the "evolving standards of decency that mark the progress of a maturing society." Id. at 100-01.
9. Id. at 371.
11. The precise wording of the eighth amendment came from the English Bill of Rights of 1688 and was first introduced to the United States in the Virginia Declaration of Rights. 1 B. Schwartz, The Bill of Rights: A Documentary History 231-36 (1971). Its flexibility, while enabling the amendment to remain relevant and responsive to changing needs, also leads to inefficient case by case applications. Despite many opportunities to do so, the Supreme Court has declined to provide a single workable definition of "cruel and unusual punishment." The tests thus far enunciated are very subjective and heavily influenced by a judge's personal values. See, e.g., Furman v. Georgia, 408 U.S. 238 (1972).
12. In Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971) (emphasis in original), the court stated that:

For a federal court . . . to place a punishment beyond the power of a state to impose
tices or regulations are, therefore, nonjusticiable unless they become so abusive as to violate constitutional rights."13 Thus, in many areas of prison life, the situation must be proven to be egregious before the judiciary will intervene.14

The eighth amendment proscription against cruel and unusual punishment was originally applied solely to temper the sentencing of criminals with decency and fairness.15 Although now applicable to prisoner complaints, a lack of clear direction from the Supreme Court has left at issue the extent to which this amendment applies to prison practices.16 Lower court decisions have consistently relied upon evolving standards of decency for guidance in all areas of inmate claims of cruelty.17 The major problem with this test, however, is its lack of objectivity. Certainly uniformity can

on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration . . . would not qualify us as a federal court to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or personally repugnant. As judges we are obliged to school ourselves in such objective sources as historical usage [cites omitted], practices in other jurisdictions [cites omitted], and public opinion [cites omitted], before we may responsibly exercise the power of judicial review to declare a punishment unconstitutional under the Eighth Amendment.

14. In Breeden v. Jackson, 457 F.2d 578, 580-81 (4th Cir. 1972) (footnotes omitted), the court noted that:

Under the guise of protecting constitutional rights . . . federal courts do not have the power to, and must be careful not to, usurp the responsibility that rests with the executive branch for the management of prisons. It is only when the deprivations of prison confinement impose conditions of such onerous burdens as to be of constitutional dimensions that courts may intervene in prison management. So long as the rules of prison management are 'not so unreasonable as to be characterized as vindictive, cruel or inhuman,' so long as they 'are necessary or reasonable concomitants of imprisonment,' so long as the regulations do not involve punishment or restraints 'intolerable in fundamental fairness,' so long as the rules are not exercised 'in such a manner to constitute clear arbitrariness or caprice,' no constitutional rights are infringed.

See also Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966).
16. The Supreme Court's most exhaustive decision concerning the eighth amendment is Furman v. Georgia, 408 U.S. 238 (1972). In nine separate opinions the Justices expressed their views on the history and scope of the amendment. Since the Supreme Court has never directly applied the eighth amendment to prison practices, the extent of its protection in that context is not known. It is clear, however, that lower courts do utilize the eighth amendment to achieve prison reform. See, e.g., Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).
be achieved in situations displaying gross inhumanity.18 It is in the gray areas, however, where reasonable men may differ over the propriety of a given practice under certain conditions, that a court must ultimately make a subjective decision.19 Claims that a punishment is excessively out of proportion to infractions or unnecessarily drastic to achieve legitimate correctional objectives have been used with less frequency and success. Here, too, the tests are largely based upon subjectivity.20

The eighth amendment has proven to be an effective tool with which to challenge conditions and practices in jails and prisons.21 However, because of the cost and time involved in litigation and because of the lenient standard of review applicable to eighth amendment claims, it can be used to remedy only the worst prison conditions.22 Other less cumbersome methods for dealing with the upgrading of prison life must be created and implemented.

Generally, eighth amendment prison cases can be divided into two major categories. The first deals with punishment beyond incarceration and in-

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18. The cruelty prohibition of the eighth amendment was originally limited to the obvious—death by torture. If this were its only function, Justice Joseph Story would be correct: "the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such government should authorize or justify such atrocious conduct." O'Neil v. Vermo, 144 U.S. 323, 339 (1892) (Field, J., dissenting), quoting Story, Commentaries on the Constitution § 1903 (4th ed. 1873).


The nebulous character of the constitutional standard itself contributes enormously to the inconsistency of decisions from one jurisdiction to another. Indeed, the very flexibility which enables the Eighth Amendment to be an instrument of penal reform in one jurisdiction may have an opposite effect elsewhere.

20. See, e.g., Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970) (death penalty excessive punishment for rape when life was not threatened). See also Note, Criminal Procedure—Eighth Amendment Proportionality Analysis In Its Infancy, 52 N.C.L. Rev. 442, 443 (1973).

21. See, e.g., Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970). In this Louisiana prison, over 800 prisoners were housed in cells which were cold in winter and hot in summer, infested with rodents, insects and vermin, foul-smelling and unsanitary, and substandard in terms of fire and health codes. The kitchen was unsanitary, hygienic facilities were nonexistent and medical attention was slight.

22. See Judicially Enforced Reform, supra note 19, at 1136:

Because the conditions required for a finding of unconstitutionality must be so severe, it is accurate to say that the Eighth Amendment is presently helpful in abating only the very worst practices. In fact, litigation in this area, even if resolved on behalf of the complaining inmates, may succeed in elevating their standard of treatment merely a level or so above that designated 'cruel and unusual punishment.'
cludes infliction of penalties over and above that prescribed by the court. The second involves those aspects of everyday incarceration which may make confinement cruel.23 Review of both types of cases has traditionally been tempered by the courts' reluctance to "meddle" with the administration of the penal system.24

Punishment within the prison has often been particularly onerous. Courts have often been asked to draw the fine line between legitimate use of penalties and abuse of such power.25 Whereas isolation cells may be needed to punish or to protect a prisoner, their excessive use,26 their use coupled with unsanitary cell conditions or other aggravating factors27 or the placing of a prisoner in such a cell capriciously or for a minor infraction28 infringes upon the inmate's constitutional rights. This is true for all types of approved punishments, physical29 and psychological.30 Whereas the courts recognize that there must be wide discretion left to prison officials to maintain discipline in order to perform their statutory duties, "[t]he law sets the outer limits of executive discretion in administering the correctional system."31

Conditions existing within the prison or jail at large may be extreme enough to warrant judicial relief. These cases focus upon overall factors rather than particular incidents affecting individual inmates.32 Sanitation and health codes have played a particularly important role in the determination of cruel conditions.33 Three major topics of concern in this area are:

23. Case history supports the notion that "unusual!" adds nothing to the cruelty proscription of the eighth amendment. See, e.g., Furman v. Georgia, 408 U.S. 238, 379 (1972) (Burger, C.J., dissenting); id. at 322 (Marshall, J., dissenting).
27. See, e.g., Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963).
28. But note:
So long as the punishment imposed for an infraction of the rules is not so unreasonable as to be characterized as vindictive, cruel, or inhuman, there is no right of judicial review of it.
Id. at 550 (emphasis added).
32. Thus, in Feazell v. Augusta County Jail, 401 F. Supp. 405 (W.D. Va. 1975), the following factors were held not sufficient, considered alone or together, to constitute cruel punishment: (1) delay in non-emergency medical attention; (2) cellmate with "revolting habits;" (3) general "harassment" by prison officials; (4) nutritious, but unappealing, food; and (5) restrictive visitation rules.
(1) inmate safety, (2) medical attention and (3) escape.

B. Punishment Beyond Confinement

1. Punitive Segregation and Isolation

One of the oldest and most feared of all internal disciplinary measures in prison is punitive segregation or "isolation." In the embryonic stages of eighth amendment prison litigation, courts noted the severity of these practices and made them special targets for judicial review. They have

1016 (E.D. La. 1970), included the unsanitary condition of the kitchen, the inadequacy of prisoner bathing facilities, fire hazards, and infestation by rats, roaches, and other vermin.

34. For a brief history of solitary confinement in the United States see Note, Solitary Confinement—Punishment Within the Letter of the Law, or Psychological Torture?, 172 Wis. L. Rev. 223.

35. Id. at 232. See also Judicially Enforced Reform, supra note 19, at 1123.

36. Punitive segregation has often been distinguished from administrative segregation. The former serves as punishment whereas the latter serves as a protective device, either protecting the inmate from harm or protecting others from the inmate. At least one court has recognized the difference as "largely one of semantics." Smoake v. Fritz, 320 F. Supp. 609, 610 (S.D.N.Y. 1970). The Fourth Circuit refused to accept the distinction when both entailed substantial deprivation of privileges. Howard v. Smyth, 365 F.2d 428 (4th Cir.), cert. denied, 385 U.S. 988 (1966). See McAninch, Penal Incarceration, supra note 26, at 580. In Breeden v. Jackson, 457 F.2d 578, 581-82 (4th Cir. 1972) (Craven, J., dissenting), Judge Craven argued against the distinction between punitive and administrative segregation:

In short, why must he [the inmate] choose between a reasonably safe life more miserable than that of other well-behaved prisoners and the risk of serious physical injury and death? I do not believe the state may constitutionally put such a choice to a prisoner, but, instead, must assume its responsibility to provide a reasonably safe place of imprisonment.

Id. at 582; accord, Berch v. Stahl, 373 F. Supp. 412, 421 (W.D.N.C. 1974) (prisoner put in solitary facilities for non-punitive reasons may not be denied regular prison privileges and amenities).

37. For the purposes of this note, segregation means lock-up in the inmate's own cell as well as detainment in a maximum security cell, accompanied by varying degrees of privation-curtailment. Isolation usually encompasses the same physical restrictions as segregation, but also deprives the inmate of all but minimal sensory stimuli. See Berch v. Stahl, 373 F. Supp. 412, 420 (W.D.N.C. 1974).

38. See, e.g., Sostre v. McGinnis, 442 F.2d 178, 193 n.24 (2d Cir. 1971) (emphasis in original):

The question, rather, is a general one: whether the Eighth Amendment absolutely forbids a state to use a means of discipline where there is no evidence of any physical or psychological injury to the health of the prisoner who complains of the measure, and also when the opinion of the experts as to the effects of the type of discipline are in conflict.


refused to declare segregation alone—or even isolation in strip cells—cruel and unusual absent any other aggravating conditions. Instead, courts have carefully reviewed the facts in inmate segregation cases with an eye toward conditions of confinement, length of confinement and proportionality of the punishment to the offense. More recent cases have emphasized the effect of punitive segregation, standing alone, on the mental health of the prisoner. The following practices have been found to be persuasive in ascertaining instances of cruel and unusual segregation: extremes in temperature within the cell (especially when clothing is denied or insufficient); lack of sanitation (including both general cell conditions and deprivation of personal hygiene materials); denial of medical care

40. E.g., McCray v. Burrell, 516 F.2d 357, 367-69 (4th Cir. 1975). Whereas removal from the general prison population does not per se amount to a denial of eighth amendment rights, under certain conditions such confinement is cruel and unusual. The circumstances in this case were as follows:

The M.O. [mental observation isolation] cell in which McCray was placed was described by Captain Burrell as a bare cell. The windows were covered with sheet metal, but the cell had an electric light. The cell had concrete walls, a concrete ceiling, and a tile floor. There was 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. He was not afforded reading or writing materials. He claimed that during the forty-six hours he spent in this confinement ‘it was impossible to sleep. . . . I stood up most of that [first] night, the floor was cold.’


42. E.g., Patterson v. Riddle, 407 F. Supp. 1035, 1038 (E.D. Va. 1976) (ten months in maximum security for suspicion of criminal conduct is excessive).


44. See Benjamin & Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 9 CLEARINGHOUSE REV. 83, 88 (1975) (“Courts are beginning . . . to examine the effects of isolation upon a prisoner's psychological functioning, and have ordered release where they find that the individual prisoner has undergone psychological distress . . . .”).

45. E.g., Wright v. McMann, 460 F.2d 126, 129 (2d Cir. 1972) (unconstitutional to deprive clothing necessary for warmth).

46. These conditions include little or no ventilation, filth, inadequate toilet facilities, vermin and unclean food preparation or service. ABA, LEGAL RESPONSIBILITY AND AUTHORITY OF CORRECTIONAL OFFICERS 33 (1974).

47. Articles considered legally required during segregation are “toilet paper, soap, change of clothes, towels, toothbrushes, etc.” Id.

48. See Section V.C.3. infra.
and severe limitation of nutritional intake. Increasing judicial sensitivity is also developing toward the following practices:

1. Less than severe limitation of food
2. Denial or limitation of clothing
3. Denial or limitation of bedding, mattress, etc.
4. Denial or limitation of exercise
5. Overcrowding (size of cells in relation to number of persons confined)
6. Limitation of correspondence

Courts which have passed upon the constitutionality of segregation based upon surrounding circumstances have relied heavily upon vague notions of human dignity.

49. [I]nadequate diet is one factor the courts will consider, but permissible limitations on diet may range from bread and water to adequate but monotonous food. While a particular diet may not be suspect on nutritional grounds, if it is prepared under unsanitary circumstances or if it is combined with other factors, it may convince the court that the conditions are illegal.

ABA, LEGAL RESPONSIBILITY AND AUTHORITY OF CORRECTIONAL OFFICERS 33 (1974).


51. E.g., Wright v. McMann, 460 F.2d 126, 129 (2d Cir. 1972).


On occasion prisoners in solitary confinement have been deprived of their mattresses and blankets as punishment for misconduct. . . . The penalty is undoubtedly harsh, but the Court is not persuaded that it is cruel and unusual. There is no evidence that it had a substantial effect upon anyone's health. If the cell is otherwise clean, and well heated, and the prisoner keeps his clothing, it should not be detrimental.


56. In Landman v. Royster, 333 F. Supp. 621, 627 (E.D. Va. 1971), the isolation experience was detailed as follows:

The meditation cells measure about 6 1/2 feet by 10 feet and contain a mattress (at night), a sink and commode. The usual C-cell diet is served, although bread and water is reserved as a selective form of additional punishment. A man may also be denied use of his mattress for up to about three days as a form of penalty, in which case he sleeps on the bare cement with a blanket.

If a penitentiary prisoner is continually obstreperous in solitary, there is no further method used to control him other than by chaining or tear gassing. On occasion a man's clothing may be taken if he appears to be a suicide risk or a menace to others.

After visiting a particularly vile isolation cell block, one judge wrote:
Courts have been reluctant to place maximum time periods on solitary confinement.57 A North Carolina court dealing with jail conditions recently grappled with this issue and held that “the Eighth Amendment must be understood to place durational limits on the use of isolation as punishment.”58 The court then established specific time limitations proportionate to the three types of solitary cells in use in the jail system.59

Early decisions had also reflected a reluctance to impose sanctions against punishments whose severity did not appear to fit the infraction.60 However, despite arguments to the contrary,61 most courts today will enforce the requirement that “punishment imposed must bear a reasonable relationship to the seriousness of the offense committed.”62 Using this proportionality test, a Virginia federal district court recently held that ten months in maximum security was excessive for suspicion of criminal conduct.63 The test has also been used in areas of prison litigation other than punitive segregation.64

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59. The use of the “box” was limited to 24 hours. The use of solid-door solitary cells was restricted to 15 days. Thirty days was the maximum established for use of barred-door solitary cells. Id. at 421. See also McCray v. Burrell, 516 F.2d 357, 368-69 (4th Cir. 1975) (“protective” measures may include isolation and nudity, but minimum safeguards must be followed).
60. See generally, Note, Criminal Procedure—Eighth Amendment Proportionality Analysis In Its Infancy, 52 N.C.L. Rev. 442 (1973).
61. The use of this [proportionality] test would seem to eliminate the presumption of validity granted the decisions of prison officials, thus involving courts more deeply in internal prison matters. More importantly, it would reduce the flexibility that prison officials need in framing individual treatment for prisoners.
64. E.g., Landman v. Royster, 333 F. Supp. 621, 647-49 (E.D. Va. 1971). The court stated that a bread and water diet, or “placing an inmate in chains or handcuffs in his cell,” could
McCray v. Burrell\textsuperscript{65} applied another limitation upon state action which has been employed in other eighth amendment suits as well as those involving punitive segregation. It is a violation of the proscription against cruel and unusual punishment to impose severe punishment when other milder and equally effective alternatives are available to achieve a legitimate correctional purpose.\textsuperscript{66} Thus, when a prisoner is kept under deplorable conditions even though administrative aims could just as easily have been met “without requiring a prisoner to live in . . . exacerbated conditions of filth and discomfort . . .”\textsuperscript{67} the practice is unconstitutional.\textsuperscript{68}

Judicial sensitivity to eighth amendment claims of mental cruelty resulting from punitive isolation has not been uniform.\textsuperscript{69} Where courts have found that physical conditions comport with the eighth amendment, allegations of mental cruelty have often either been dismissed for failure to state a claim or altogether ignored.\textsuperscript{70} However, other courts have accorded

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be “unconstitutionally excessive.” Nudity, confiscation of bedding and teargassing were also mentioned.

65. 516 F.2d 357 (4th Cir. 1975).

66. Id. at 368 n.3.

Moreover, the language in some court opinions suggests there may be a requirement that the punishment imposed be the least drastic one called for by the circumstances.

ABA, LEGAL RESPONSIBILITY AND AUTHORITY OF CORRECTIONAL OFFICIALS 34 (1974). See also Hart v. Coiner, 483 F.2d 136, 143 (4th Cir. 1973) (life sentence was “excessive and wholly disproportionate to the nature of the offenses . . . committed, and not necessary to achieve any legitimate legislative purpose”).


68. This test was first announced by Justice Goldberg in Rudolph v. Alabama, 375 U.S. 888, 891 (1963) (Goldberg, J., dissenting from denial of certiorari).


70. See, e.g., Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), cert. denied, 409 U.S. 968 (1972) (solitary cell not cruel if hygienic); United States ex rel. Miller v. Twomey, 333 F. Supp. 1352, 1354 (N.D. Ill. 1971) (although solitary confinement tended “to infuriate rather than to rehabilitate,” court would not interfere). See also Benjamin & Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 9 CLEARINGHOUSE REV. 83, 88 (1975). Even though the courts have been reluctant to hold segregation per se unconstitutional, they are starting “to examine the effects of isolation upon a prisoner’s psychological functioning” and have, as a result, begun to order releases when psychological stress is severe upon the isolated inmates.
serious attention to the mental ramifications of punitive segregation,\(^7\) although physical suffering has been emphasized in many cases where relief was granted.\(^8\) Even very early decisions recognized the impairment of mental health resulting from prolonged segregation.\(^9\) As noted in Berch v. Stahl,\(^10\) a prisoner in isolation, deprived of all sensory input, is more drastically affected than a prisoner confined, even in similar physically restricted conditions, without such sensory deprivation.\(^11\) The trend of recent court decisions indicates that evidence of psychological damage may be sufficient to restrict the use of isolation in the future.\(^12\) One commentator has gone so far as to recommend that isolation be prohibited altogether as an unconstitutional practice.\(^13\) More than seventy years ago the Supreme

\(^7\) E.g., Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (intolerable conditions in solitary cell threatens sanity of inmate); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (effect of solitary confinement on mental condition of inmate must be reviewed on individual basis). See also Benjamin & Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 9 CLEARINGHOUSE REV. 83, 87 (1975): The courts are beginning to recognize that isolation itself has devastating consequences upon a prisoner’s psychological functioning, and that, under certain circumstances, such isolation may constitute cruel and unusual treatment. See Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), rev’d in part sub nom. Sostre v. McGinnis, 442 F.2d 178 (1971), cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049 (1972); Note, Solitary Confinement—Punishment Within the Letter of the Law, or Psychological Torture? 1972 Wis. L. Rev. 223, 232 (“The psychiatric and psychological evidence documenting the debilitating effects of sensory deprivation and social isolation upon the individuals is overwhelming.”).


\(^9\) E.g., Medley, Petitioner, 134 U.S. 160, 168 (1889).


\(^11\) As a result of isolation,

[m]ental and emotional stability . . . may be impaired [citations omitted]. Jail and prison authorities are authorized to confine but not to torture and dehumanize prisoners.

Id. at 420. See LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973):

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.


\(^13\) “Psychological and psychiatric evidence supports the thesis that solitary confinement is indeed psychological torture which is excessively cruel and unusual.” Note, Solitary Con-
Court stated, with reference to the prohibition against cruel and unusual punishment:

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.\(^8\)

Enforced "meditation" was abandoned in Quaker prisons over 100 years ago because of the likelihood of insanity or serious mental deterioration.\(^9\)

Certainly modern courts can no longer close their eyes to sound psychiatric and psychological evidence which indicates that solitary confinement, absent any aggravating factors or physical abuse, can destroy a man.\(^8\)

Studies prove distortion of brain wave patterns\(^{11}\) as well as obvious emotional reactions\(^{12}\) occur in sensory deprivation situations.

2. **Use of Corporal Force and Control Chemicals**

Most of the arguments applicable to punitive segregation and isolation\(^{43}\) also apply in eighth amendment complaints against the use of bodily force and control chemicals within prison. For example, although not viewed as unconstitutional per se,\(^{44}\) most lower court decisions have held corporal punishment in the form of whipping to be cruel by eighth amendment

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\(^{11}\) See Weems v. United States, 217 U.S. 349, 373 (1910).


\(^{13}\) Prolonged exposure to a monotonous environment . . . has definitely deleterious effects. The individual's thinking is impaired; he shows childish emotional responses; his visual perception becomes disturbed; he suffers from hallucinations; his brain wave pattern changes . . . A changing sensory environment seems essential for human beings. Without it, the brain ceases to function in an adequate way, and abnormalities of behavior develop.

\(^{14}\) E.g., Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970). The case, citing the Record at 433-34, relied heavily upon the testimony of a Dr. Joseph Satten: [Solitary confinement] tends to have a harmful effect on the prisoner, in terms of increasing his resentment about the running of the prison, his suspiciousness in relationship to correctional officers, his rebelliousness towards society in general and his feeling that he is being kicked around. In addition, that kind of anger can develop into psychiatric associations to a paranoid suspicious nature.

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\(^{11}\) See section V.B.1 supra.

\(^{12}\) Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (strap outlawed because of potential for abuse).
Although most states have by statute forbidden the use of corporal punishment as official sanction for violation of institutional rules, the use of force cannot altogether be forbidden behind prison walls. Reasonable force may still be employed by correctional guards and officials in self-defense and to maintain internal discipline within the institution.

The test used for determining the reasonableness of the use of force is whether property or lives are in danger. Because of the potential for abuse, courts will carefully review allegations by guards that force was necessary in order to control the prisoner or to protect life or property. However, even in cases of clear official abuse, courts are split with regard to the threshold necessary to trigger eighth amendment sanctions. The District Court for the Eastern District of Virginia seems to adhere to the much discredited "single-incident" doctrine which holds that an isolated

   However, it is not the officially approved practices which most endanger prisoners. Rather it is the unauthorized imposition of summary force and beatings by lower echelon guards and other inmates which present the gravest threat of physical harm.
87. See Gates v. Collier, 349 F. Supp. 881, 895 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974). The court in Gates ordered the prohibition of corporal punishment of such severity as to offend present-day concepts of decency and human dignity. Specifically . . .
   (a) Beating;
   (b) Shooting;
   (c) Administering of milk of magnesia;
   (d) Stripping inmates of their clothes;
   (e) Turning fans on inmates while they are naked and wet;
   (f) Depriving inmates of mattresses, hygienic materials and/or adequate food;
   (g) Handcuffing or otherwise binding inmates to fences, bars, or other fixtures;
   (h) Using a cattle prod to keep inmates standing or moving;
   (i) Shooting at or around inmates to keep them standing or moving;
   (j) Forcing inmates to stand, sit, or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods.

Id. at 900.
88. ABA, LEGAL RESPONSIBILITY AND AUTHORITY OF CORRECTIONAL OFFICERS 32 (1974):
   Corporal punishment must be distinguished from the use of force by correctional officers in self-defense or to maintain institutional security. Corporal punishment which has been declared unconstitutional is that imposed as a specific punishment for a specific offense. It does not relate to the use of force generally. Thus an officer still retains the right to protect himself and to stop a disturbance within the institution when such force is reasonably necessary.
incident of abuse does not rise to constitutional proportions.\textsuperscript{91} This doctrine is a vestige of the traditional "hands off" policy. Certainly a single action, standing alone, could be brutal enough to shock the most hardened trier of fact.\textsuperscript{92} That more than one instance of cruelty must occur before court intervention is available is to grant one "free" abuse to prison officials.

The same test for reasonableness\textsuperscript{93} has been applied to the use of control chemicals. For example, although the use of tear gas is generally disfavored by the judiciary as a means of controlling or punishing prisoners,\textsuperscript{94} the practice has been held to be permissible in certain instances.\textsuperscript{95} This is consistent with judicial analysis that most types of punishment standing alone—unless barbarous—like the wheel or rack—are not unconstitutional. Rather, the application of the punishment, as viewed under one or more of the three constitutional tests, may be held to be cruel and unusual.

C. Conditions of Confinement

1. Generally

The most infamous case in the area of general prison conditions is \textit{Holt v. Sarver}.\textsuperscript{96} The entire Arkansas Penitentiary System was declared unconstitutionally cruel and was closed. In the aftermath of \textit{Holt}, which spot-

\begin{itemize}
  \item \textsuperscript{92} Johnson was punched by Captain Baker with a tear gas gun and then, at Baker's orders, chained to the cell bars. This endured for five days. His waist and arms were secured to the bars in such a fashion that he could just barely recline. He was not released in order to urinate or defecate.
  \item \textsuperscript{93} See Landman v. Royster, 333 F. Supp. 621, 639 (E.D. Va. 1971).
  \item \textsuperscript{94} That is, whether property or lives are in danger. See Landman v. Royster, 354 F. Supp. 1292, 1286-97 (E.D. Va. 1973) (suspicion of guards, neither confirmed nor rebutted by a hearing, is not an emergency situation).
  \item \textsuperscript{95} See Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966).
  \item \textsuperscript{96} See Greer v. Loving, 391 F. Supp. 1269 (W.D. Va. 1975) (use of tear gas was a proper security action).
lighted the deplorable conditions in prison, the federal judiciary began to recognize that

[a] large percentage of prisons, and most jails, are poorly lighted, poorly ventilated, and lacking in the most elementary levels of sanitation. Food is prepared in filthy kitchens by inmates who are seldom given medical examinations to determine whether they have any communicable diseases. Cells are usually dark and often littered with garbage. Plumbing is inadequate with buckets often substituting for toilets. In short, correctional institutions are allowed to operate under conditions which would be condemned in any other public institution. 97

But poor general living conditions are wholly insufficient to trigger eighth amendment sanctions. 8 Courts have held danger to health, life or shocking uninhabitability to be the measuring rods for judicial intervention. 99 Thus, only the extreme cases, where numerous deplorable practices and conditions exist simultaneously and continually, are susceptible to judicial review. The same factors courts use to gauge the constitutionality of solitary confinement conditions100 are also used in cases of this sort.

Because health and life may be endangered by unsanitary conditions,101 this has become a particularly sensitive area of court inquiry. Contrary to popular belief, unsanitary living conditions cannot always be blamed upon the prisoners' habits. 102 It has been said that “if cleanliness is next to godliness, most jails lie securely in the province of hell," because of inadequate plumbing and hygienic supplies and little or no supervisory motivation.103 Courts have recognized the responsibility for proper sanitation is

97. ABA, ENFORCEMENT OF SANITATION AND ENVIRONMENTAL CODES IN JAILS AND PRISONS 1 (1974).
   Although the presence of vermin in a cell can be grounds for judicial intervention . . .
   [t]he Constitution only requires that individuals not be exposed to conditions so
dangerous and uninhabitable as to be shocking.
99. Id.
100. See Section V.B.1. & notes 45-55 and accompanying text supra.
       filthy, unsanitary conditions); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (filthy
       cells and no materials for personal hygiene).
102. ABA, ENFORCEMENT OF SANITATION AND ENVIRONMENTAL CODES IN JAILS AND PRISONS 1
        (1974). The lack of sanitation cannot easily be dismissed as resulting from the habits of the
        inmates. As one commentator has stated:
       The uninformed public tends to assume that cleanliness is a matter of personal habits
       and training, and sanitation is merely a matter of good management and supervision;
       thus any prisoner who is properly motivated has the opportunity to keep clean. The
       empirical facts tend to be otherwise . . .

Id.
103. [S]uch elementary commodities as soap, towels, toothbrushes, safety razors,
squarely upon the shoulders of the government and have forced prisons to carry out their duty with diligence. Gross overcrowding of jails has become an important issue because of its inhumanity and the sanitation problems which accompany the overload of facilities. Some practices related to grossly overcrowded conditions include barracks-style housing (feared by inmates because of exposure to brutality by other prisoners), inadequate staff, and large-scale deficiencies in treatment and rehabilitation programs. The practice of confinement without adequate medical

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clean bedding, and even toilet paper are frequently in short supply or totally absent from the jail environment. Sanitation depends on hardware and plumbing, cleanliness depends on adequate supplies, responsible manpower and supervision.

*Id.*

104. The ultimate responsibility for sanitation comes back to the government. If it wishes to run correctional institutions, it must be willing to do so in a manner which conforms to the same health and safety standards which apply to schools, mental institutions, and hospitals.

*Id.* Alternatives to costly and time consuming litigation over lack of sanitation are: (1) inspections by health authorities (presently within health departments' delegated powers, but rarely exercised) and (2) employment of a "State-wide Jail Inspector." *Id.*


Outrageous, subhuman crowding must be ended swiftly. The bestial crowding of three men into one small cell, with one man sleeping on the floor is an affront to basic human decency. This intolerable, dehumanizing overcrowding is fraught with a potential for epidemics and riots. It compounds the problems of violent assaults, suicides, homosexuality and mental illness which are endemic to any jail. Three men to an undersized room has created an explosive situation which needs immediate defusing.


106. See Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I); 309 F. Supp. 362 (E.D. Ark. 1970) (Holt II). Barracks-style housing systems work by assigning large groups of prisoners to one barracks. This unit is "guarded" by prison trustees assigned to keep order. Under this system, stabbings, rapes and other violence among prisoners may often run rampant. Whereas it is virtually impossible to stop all possible violence upon inmates by fellow prisoners the failure to alleviate barracks-style housing, a known catalyst for such violence, may be unconstitutional.

107. The correctional staff can be too small in number to give reasonable protection to residents or to conduct beneficial programs. This staff might also be inadequately trained, or it could consist of too few specialists such as psychiatrists, psychologists, and counselors. Courts have strongly disapproved of using prisoners as correctional officers or in other capacities where they have influence or control over other residents.


108. Although the *Holt* cases have prohibited frustration of existing programs, most case law recognizing a right to rehabilitation and treatment programs deals with mental patients and juveniles. Even in this limited context, courts have been inconsistent in their holdings.
or rehabilitation attention has been viewed as unconstitutional in some cases.\textsuperscript{109}

Finally, the incidence of inhuman conditions in segregation cells has long been a focal point for the evaluation of prison life in general.\textsuperscript{110} Isolated occurrences of brutality, if frequent enough, may indicate a level of official neglect of inmate welfare callous enough to reach constitutional proportions.\textsuperscript{111}

In the wake of recent litigation, three prime areas of prison life have given rise to central issues in the area of prison reform. These areas are: (1) inmate safety, (2) medical care and treatment and (3) escape.

2. \textit{Inmate Safety}

In addition to the duty of providing a clean, adequately staffed and maintained facility, the state has a duty under the eighth amendment to protect its prisoners from physical abuse. This duty has two parts: inmates must be protected from fellow prisoners by guards,\textsuperscript{112} and they must be protected from guards by administrative officials. Generally, more than an "isolated incident of negligent failure to protect"\textsuperscript{113} must be established in order for a given set of facts to reach constitutional proportions.\textsuperscript{114}

\textit{Woodhous v. Virginia}\textsuperscript{115} established a two-pronged test for passing upon claims involving inmate safety:

Cases dealing with the right to treatment include Nelson v. Heyne, 355 F. Supp. 451 (D. Ind. 1973) (right to treatment for juvenile); Burchett v. Bower, 355 F. Supp. 1278 (D. Ariz. 1973) (right to treatment for prisoner if held in mental hospital); Stokes v. Institutional Bd., 357 F. Supp. 701 (D. Md. 1973) (juvenile has no right to treatment); Burnham v. Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972) (no federally protected right to treatment). Cases dealing with the right to rehabilitation include James v. Wallace, 382 F. Supp. 1117 (N.D. Ala. 1974) (no absolute right to rehabilitation); Stokes v. Institutional Bd., 357 F. Supp. 701 (D. Md. 1973) (no right to rehabilitation if finite sentence); Taylor v. Sterrett, 344 F. Supp. 411, 415 (N.D. Tex. 1972) (rehabilitation must be overriding goal). See also ABA, \textit{REPORT ON 1972 AMA SURVEY OF U.S. JAIL SYSTEM} 1 (May 1973). Only half of the jails located in the United States which were either serving a countywide area or municipalities of 25,000 or greater population provided \textit{any} medical facilities for their inmate population. Among those jails that did provide some medical care were included those with only first-aid centers or dispensary clinics.

109. But it seems that until the states announce that the foremost purpose of incarceration is rehabilitation and not punishment, the federal courts will remain reluctant to make rehabilitation a right of prisoners.


111. \textit{Id.}


113. Williams v. Field, 416 F.2d 483, 485 (9th Cir. 1969).


115. 487 F.2d 889 (4th Cir. 1973).
[T]he court should ascertain: (1) whether there is a pervasive risk of harm to inmates . . . and, if so, (2) whether the officials are exercising reasonable care to prevent . . . an unreasonable risk of harm.116

In Woodhous, a prisoner had sued prior to any actual assault upon him. He was granted relief on the grounds that a "constant threat of violence" is sufficient to obtain relief under the eighth amendment.117 This is a further expansion of the eighth amendment rights of inmates to be free from mental as well as physical cruelty118 and mirrors the prevailing sentiment that even though "[i]t may be impossible to eliminate violent inmate behavior, . . . prisons should at least take steps to do so."119

The courts have not encouraged prisoners' suits involving the subject of inmate safety.120 Indeed, most courts have established strict requirements which must be met before allowing recovery.121

No court has yet been willing to accord evidence of prison terrorism, alone, the weight needed to reach constitutional proportions.122 A few cases, however, have been concerned with specific aspects of prison terror, particularly homosexual rape.123 In response to this type of assault, at least one

116. Id. at 890.
117. Id. See Penn v. Oliver, 351 F. Supp. 1292 (E.D. Va. 1972) (incarceration in violence-filled prison "cruel and unusual").
118. See notes 69-82 and accompanying text supra.
119. Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 VA. L. REV. 841, 859 (1971). One of the most important steps a prison official can take is to properly classify all prisoners. This was recognized as an affirmative duty in Cohen v. United States, 252 F. Supp. 679, 688 (N.D. Ga. 1966).
120. In federal courts, suits of this kind face four doctrines which may bar recovery: (1) "single-incident" doctrine; (2) beatings are not per se cruel and unusual; (3) inapplicability of respondeat superior; (4) defense of "good faith and probable cause." Similar bars to relief exist in the state courts.
122. Perhaps the answer is that no court has been called upon to do so. Even under a totality of circumstances approach, with the only complaint being the general prevalence of violent assaults, the court's condemnation in Holt indicates that in the proper case a violation of the eighth amendment could be found. Note, Eighth Amendment Rights of Prisoners: Adequate Medical Care and Protection From the Violence of Fellow Inmates, 49 NOTRE DAME LAW. 454, 468 (1973).
123. It was found, that sexual assaults in the Philadelphia prison system are epidemic. As Superintendent Hendrick and three of the wardens admitted virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are repeatedly raped
court has imposed upon the state a "greater duty to provide new inmates adequate protection during their transition from civilian life to incarceration."\textsuperscript{124} Courts have long disapproved of barracks-style containment and the use of "trustees" to keep the peace because of the pervasive climate of terror nurtured by these practices.\textsuperscript{125} In balancing the consequences of the absolute power a guard wields over his wards\textsuperscript{126} against the policy that courts should not inquire into the manner in which prison officials operate their institutions absent gross violations of inmate rights,\textsuperscript{127} many courts have found negligent supervision by administrative personnel of lower echelon guards actionable under section 1983.\textsuperscript{128} Courts should take a more active role in preventing the "[s]exual assaults, fights, and stabbings" which "put some inmates in such fear that it is not unusual for them to come to the front of the barracks and cling to the bars all night."\textsuperscript{129} Certainly, when viewed in the light of modern standards of decency, although the threat of attack is "usual," it is most definitely "cruel."

3. Medical Care and Treatment

Prison administrators are also obligated to provide some degree of medical care and treatment for prisoners under their supervision since incarceration effectively deprives inmates of the means to tend to their medical needs.\textsuperscript{130} The minimum required by law, however, is very low.\textsuperscript{131} Although

\begin{itemize}
\item by gangs of inmates. Others, because of the threat of gang rape, seek protection by entering into a homosexual relationship with an individual tormentor \ldots After a young man has been raped, he is marked as a sexual victim for the duration of his confinement.
\end{itemize}


124. Van Horn v. Lukhard, 392 F. Supp. 384, 387 (E.D. Va. 1975) (gang rape on the first day of incarceration when guards ignored cries for help is "of such a serious and shocking nature as to state a violation of the eighth and fourteenth amendments").


127. \textit{See McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964).}


131. \textit{See United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970); Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970); Church v. Hegstrom, 416 F.2d 449 (2d Cir. 1969).} Usually simple negligence or medical malpractice will not give rise to a constitutional claim.
total and intentional denial of all medical care is unconstitutional, lack of attention in non-emergency situations may not state a cause of action. Mere negligence in giving or failing to give a state prison inmate medical treatment, even where the doctor's diagnosis was mistaken or negligent, does not alone state a cause of action under section 1983. Acutely aware of their lack of expertise in medical areas, courts have generally held that "[q]uestions of medical judgment are not subject to judicial review." However, courts have also realized that "neither can they ignore gross misconduct by a doctor." Thus, by analogy with other areas of concern under the eighth amendment, judicial review is limited to relatively flagrant abuses or absolute denials of medical treatment, with most situations involving disputes concerning medical judgment to be governed administratively within the institution. As the result of ad hoc development of the law in this area, the trend among the courts today is away from a conservative but readily ascertainable test to a more liberal but unstable one. For example, in Sawyer v. Sigler the court held that treatment or lack of treatment that "amounts to indifference or intentional mistreatment . . . violates . . . [a] prisoner's constitutional guarantees." Although they seem to be

136. Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970). A prisoner who had just undergone surgery was released by a prison doctor and forced to walk, contrary to a specialist's orders. Permanent damage resulted. The court held that the decision could not be ascribed to medical discretion, but instead constituted "deliberate indifference to, and defi-
ance of, explicit medical instructions, resulting in serious and obvious injuries." Id. at 925.
A prisoner cannot be the ultimate judge of what medical treatment is necessary or proper and courts must place their confidence in the reports of reputable prison physicians.
Some courts hedge upon the availability of judicial review by applying the "single-incident" doctrine even in the critical area of medical treatment. E.g., Cummins v. Ciccone, 317 F. Supp. 342 (W.D. Mo. 1970) (inmate must show continuing neglect; one incident not action-
more consonant with modern standards of decency, the more liberal standards of review have led courts far afield in their decisions concerning medical care and treatment. Some factors which courts have considered in the new trend towards higher standards of medical care include diet and dental attention. No longer will it be satisfactory to feed all prisoners the same diet if some have special medical needs. Nor will officials be allowed to starve prisoners on bread and water diets when their caloric intake is less than needed for a normal sedentary adult. The new standard of medical care seems to be based on the rationale that

[w]hen a state undertakes to imprison a person, thereby depriving him largely of his ability to seek and find medical treatment, it is incumbent upon the state to furnish at least a minimum amount of medical care for whatever conditions plague the prisoner.

A relatively new area of court scrutiny deals with a prisoner's right to refuse nonconsensual treatment. Whereas most case law deals with incarcerated mental patients, the few cases involving prison inmates indicate that chemical therapy without consent may be cruel and unusual. As more behavioral techniques are used on prison inmates, the courts will have to decide whether (1) the prisoner can truly give a non-coerced consent, (2) the prisoner can withdraw from programs at will, and (3) the prison can insist upon prisoner participation in the programs. It seems possible that if the courts do recognize a right to rehabilitation, inmates may find that their "right" actually denies them the right to refuse such programs which are personally repugnant to them.

4. Escape

There has been recent significant change of direction among reported decisions in the area of prison escape. In 1969, a prisoner was convicted of

142. Id. at 50.
143. Id. (diabetic diet).
146. See generally Note, Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients, 45 S. CAL. L. REV. 616 (1972) [hereinafter cited as Conditioning].
149. In order for rehabilitation to be regarded as a right, the courts must first recognize that the primary goal of incarceration is reformation through treatment.
escape after being given the choice by fellow inmates between submitting to sodomy or being murdered.\textsuperscript{150} Over the defendant's plea of duress,\textsuperscript{151} the court held that "submission to sodomy, abhorrent as it may be, falls short of loss of life."\textsuperscript{152} The most frequently cited reason for not liberally allowing the defense of duress in prison escapes was the fear of administrators that a rash of escapes would ensue.\textsuperscript{153} However, since the common law defense of duress was intended to preserve the opportunity to choose between death and commission of a criminal act, prisoners who are able to prove facts amounting to coercion should also be able to plead duress as a defense.\textsuperscript{154}

Another vital issue in the area of prison escape concerns the amount of force justified in preventing escape. The law has always imposed a restriction that the use of force must be commensurate with the circumstances surrounding a given situation. Common law privileges the use of the same kind of force to prevent the escape of the prisoner as used to make the original arrest.\textsuperscript{155} Most case law, however, deals with police officers, not prison guards, and analogy to prison escape cannot be made blithely. Several factors to consider include (1) the possibility of a higher escape rate of prisoners convicted of misdemeanors if it is known that deadly force is prohibited, (2) the necessity of protecting citizens in those communities where prisoners can and will escape or attempt to escape, and (3) the denial or reduction of outside recreation and work programs if methods of preventing escape other than use of force are not adopted. Because of the problems unique to prison escape, some states have enacted specific reme-

\begin{itemize}
\item \textsuperscript{150} People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597, 602 (Cir. Ct. App. 1969).
\item \textsuperscript{151} See generally Note, Conditioning, supra note 146, at 1064-68.
\item \textsuperscript{152} 269 Cal. App. 768, 774, 75 Cal. Rptr. 597, 602 (Cir. Ct. App. 1969).
\item \textsuperscript{153} [P]risoners might plot together and implement a plan which would look like one of their lives was being threatened. The 'threatened' inmate could then escape and plead duress if caught. There may also be concern about harm to society if escaping prisoners are roaming the streets.
\item \textsuperscript{154} Criteria suggested by one article to be applied to allegations of duress by inmates are: (1) The prisoner must be threatened with death and given no alternative course of action; (2) The prisoner must reasonably believe that his life is in danger; (3) The threatened harm must be reasonably connected in time with the commission of the illegal act (rather than immediate and imminent); (4) There must be a reasonable relationship between the threat made and the crime committed (but not necessarily a request to commit the crime); (5) The prisoner must cease his illegal activity and report to appropriate authorities at the earliest possible moment.
\item \textsuperscript{155} Thus a distinction may be drawn between the level of force that can legitimately be employed to prevent the escape of felons as compared to misdemeanants.
\end{itemize}
dual legislation in an effort to insulate correctional personnel from liability resulting from the use of deadly force in the prevention of escape.\textsuperscript{156}

VI. FOURTEENTH AMENDMENT CLAIMS

A. Due Process

The fourteenth amendment due process clause has proved to be one of the most fertile grounds for litigation of prison grievances under section 1983. Because so many prisoner complaints have been written or interpreted to involve due process concerns, the federal courts have been continually requested to review decision-making within prison during the past decade. This unprecedented amount of prison litigation has produced several Supreme Court decisions which mark a firm trend against expanding judicial review of prison cases. Where constitutionally protected interests have been found to be at stake, the Court has demonstrated a readiness to employ the due process clause as a vehicle for ensuring rational decision-making within the institution.\textsuperscript{1} However, once minimum procedural safeguards have been afforded the inmate by prison administrators, judicial review will rarely overturn ultimate decisions. Moreover, the Court has indicated that many deprivations occurring within prison will not offend the liberty and property guarantees of the fourteenth amendment, thereby avoiding the procedural mandates of due process within this setting.\textsuperscript{2}

1. Liberty, Property and "Grievous Loss"

Among other constitutional guarantees that have been held to survive conviction, prisoners may not be deprived of life, liberty or property without due process of law.\textsuperscript{3} Because the due process clause applies only when

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  \item[156.] E.g., 38 Ill. Ann. Stat. § 7-9(b) (1971) provides:
  A guard or other peace officer is justified in the use of force, including force likely to cause death or great bodily harm, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.


\end{itemize}

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\end{itemize}
officials engage in activities affecting these fundamental interests, the protection of the fourteenth amendment is limited to the extent that lawful incarceration is held to curtail these interests. Given the peculiar problem of determining the content of the "liberty" and "property" assurances within prison, courts have experienced considerable difficulty reaching consistent results in deciding when procedural safeguards should be required behind prison walls.\footnote{4}

In the past, courts entertaining prisoner complaints alleging deprivations without due process of law sought to determine whether the inmate had suffered or been threatened with "grievous loss."\footnote{5} In \textit{Morrissey v. Brewer},\footnote{6} the Supreme Court held that the deprivation of liberty resulting from the decision to revoke parole amounted to "grievous loss" sufficient to warrant the need for procedural due process safeguards. This term was clarified by the Court of Appeals for the Seventh Circuit in \textit{United States ex rel. Miller v. Twomey},\footnote{7} which recognized that, although to those incarcerated any loss of freedom or privileges might in the lay sense be "grievous," obviously not every adverse change in a prisoner's status, even assuming it impairs his residuum of liberty, is sufficiently 'grievous' to amount to a constitutional deprivation. ... On the other hand ... additional punishment inflicted upon an inmate may be sufficiently severe, and may represent a sufficiently drastic change from the custodial status theretofore enjoyed, that it may be classified as 'grievous loss.'\footnote{8}

\footnote{4} While in certain cases due process requirements have been required as a matter of course, Wolff v. McDonnell, 418 U.S. 539 (1974) (potential loss of guaranteed good time credits), the issue generally revolves around the legitimate "needs and exigencies of the institutional environment." \textit{Id.} at 555. This standard prescribes a degree of deference to the institutional decision-makers that leads to conflicting holdings based on similar facts. \textit{Compare}, within the context of freedom of association, National Prisoners Reform Ass'n v. Sharkey, 347 F. Supp. 1234 (D.R.I. 1972), \textit{with Paka v. Manson}, 387 F. Supp. 111 (D. Conn. 1974). \textit{Sharkey} allowed an inmate association while a comparable group was denied recognition in \textit{Paka}. The crucial distinction was the opinion of the warden in \textit{Sharkey} that he did not view the group as a potential threat to security. Prison authorities in \textit{Paka} expressed contrary opinions.

\footnote{5} The roots of this concept are found in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

\footnote{6} 408 U.S. 471 (1972). Having recognized the conditional nature of the liberty interest enjoyed by the parolee, the Court articulated a disfavor with the right-privilege distinction while holding that deprivation of this interest was sufficiently grievous to trigger the application of procedural safeguards.

\footnote{7} 479 F.2d 701 (7th Cir. 1973) (Stevens, J.).

\footnote{8} \textit{Id.} at 717. The court was faced with the question of whether procedural precautions should accompany the decision to remove the prisoner from the general prison population and place him in segregation for an infraction of the prison rules:
In Wolff v. McDonnell, the Supreme Court held that statutorily guaranteed "good time" credits constituted a cognizable liberty interest the deprivation of which requires minimum procedural due process safeguards. Lower courts have faced the question of "grievous loss" on an ad hoc basis. For example, prolonged denial of outside exercise and telephone use has been viewed as "grievous loss" while courts have split with regard to administrative segregation.

In Meachum v. Fano, a Massachusetts case involving intrastate transfer from a medium to a maximum security institution, the Supreme Court recently resolved much of the confusion that had arisen in determining what loss is sufficiently "grievous" to require procedural safeguards. In discussing this concept the Court "reject[ed] 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." The applicable test considers the nature of the interest involved rather than its weight and focuses upon the legitimate expectations of the prisoner. The majority suggests that, in order to be legitimately expected, the asserted interest must be one either conferred upon the prisoner by the state legislature or guaranteed by the Constitution and extended to prisoners by the courts.

[There is] a sufficient contrast between the privileges associated with membership in the general prison population and the severe restraints resulting from segregation to warrant the conclusion that prolonged segregated confinement is a 'grievous loss'.

Id.


11. Compare LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975) (nine-day restriction of all prisoners to cell following disturbance didn't require due process procedures), with Murphy v. Wheaton, 381 F. Supp. 1252 (N.D. Ill. 1974) (86-day confinement following riot without hearing held not to violate due process).

12. 96 S. Ct. 2532 (1976). The case involved an inmate who was suspected of setting a series of fires at the Massachusetts Correctional Institution at Norfolk, a medium security prison. A hearing was then held which complied substantially, but not totally, with the requirements established for institutional discipline in Wolff v. McDonnell. See notes 18-39 and accompanying text infra. The inmate was later transferred to Walpole prison, a maximum security institution, the living conditions of which were substantially less favorable to the prisoner.

13. Id. at 2538 (emphasis in original). The Court further stated that it did "not agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." Id. (emphasis in original). Thus, while not stating an affirmative test, the Court indicated that neither every grievous loss nor every substantial change in condition will be sufficient to require due process hearing requirements. This appears to obliterate the application of "grievous loss" as a trigger for due process safeguards. However, if read in conjunction with Twomey, Meachum may be interpreted as directing the federal courts that not every "grievous loss" (in the lay sense) will trigger due process protections. See note 6 and accompanying text supra.
Only in such cases will due process require minimum safeguards to attend potential deprivations.\textsuperscript{14}

A simple showing that the prisoner has suffered a "grievous loss" should no longer be sufficient. To be afforded procedural due process safeguards, the prisoner must now show that the nature of the interest that prison officials propose to abrogate is either statutorily guaranteed or has been declared fundamental by the courts.\textsuperscript{15} As in other cases, the courts are required in most instances to defer to the judgment of the penal authorities.\textsuperscript{16} Thus, while potential loss of statutorily guaranteed "good time" credits in Wolff offended a valid liberty expectation of the plaintiff, thereby mandating compliance with minimum due process hearing requirements, there existed in Meachum no state-created liberty interest not to be transferred, and such transfer defeated no legitimate liberty interest extended by the courts.\textsuperscript{17}

\textsuperscript{14} Id. at 2537-39. Thus Wolff v. McDonnell, 418 U.S. 539 (1974), may have been limited to its facts. Where the state has created a right and has provided that it is to be forfeited only for serious misconduct, a hearing which complies with the due process requirements set out in Wolff must be held.

In dissent, Justice Stevens charged that the decision in Meachum was too great an intrusion upon the prisoner. He agreed that a prisoner has certain state-created and constitutional rights but the majority, by drawing the line there, would deny the prisoner certain "inalienable" rights, and in so doing was reverting back to the period in which a prisoner was considered a "slave of the State." 96 S. Ct. at 2541-42.

\textsuperscript{15} If the opinion in Meachum is interpreted to mean that there is no due process "liberty" interest other than these several narrow exceptions, prisoner suits brought under section 1983 might best be premised upon some ground other than a denial of due process. This interpretation seems credible in the light of footnote 8 to the opinion answering the argument that if the record of transfer is not expunged, the prisoner's chances for parole would be prejudiced: "The granting of parole has itself not yet been deemed a function to which due process requirements are applicable." 96 S. Ct. at 2540. The consequences of this note may be illustrated by comparison with cases such as West v. Cunningham, 456 F.2d 1264 (4th Cir. 1972). West maintained that the record of his segregation without a hearing would prejudice his future chances for pardon or parole. He was subsequently returned to the general prison population after instituting a section 1983 suit. The Fourth Circuit stated: "we should not shrink from doing whatever is possible to erase any lingering prejudice to West from the allegedly unconstitutional activities of the prison administrators. To this end, plaintiff should have an opportunity to prove the allegations in the complaint and show his entitlement to appropriate relief." Id. at 1265. This reasoning would clearly fall in light of Meachum.


\textsuperscript{17} Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.

2. Institutional Discipline

Once a deprivation of rights (or a potential deprivation) has been determined to merit due process protections, the question necessarily becomes one of what processes are due the prisoner. The basic requirement has been for "some kind of hearing" before final deprivation. The essential elements of an institutional disciplinary hearing were outlined by the Supreme Court in its leading decision in Wolff v. McDonnell. The method of determining the proper procedures involved fixing the precise nature of the governmental function involved and balancing its objectives against the private interest that has been affected by governmental action.

Although the right to adequate prior notice of what constitutes an institutional offense was not addressed in Wolff, a survey of lower court decisions discloses that advance publication of prison rules and prescribed punishments is required as an element of due process. The prisoner must be afforded written notice of the claimed violation at least twenty-four hours in advance of his hearing to enable him to marshall facts in his defense in light of an accurate and precise statement of the charges against him.

Perhaps the most important requirement of due process made applicable to institutional discipline by Wolff is the right to a hearing before an impartial tribunal. No particular number of disciplinary board members is required, and those members need not be prison administrators, but "[e]ach member of a panel must . . . be free of prior involvement with the incident under examination so that he may settle the case on the basis of the evidence at the hearing." Wolff also requires a written statement

22. 418 U.S. at 564. Such a requirement had been imposed by courts prior to Wolff, but in most cases those courts had refused to fix a definite period. See Landman v. Royster, 333 F. Supp. 621, 658 (E.D. Va. 1971).
23. 418 U.S. at 570-71.
by the factfinders setting forth both the evidence relied upon in the decision to impose sanctions and the reasons for the action taken.\textsuperscript{26} This safeguard should serve to aid both prison officials and inmates. It will serve to assure prison administrators that the decision has been based upon evidence presented at the hearing.\textsuperscript{27} This safeguard should also protect the inmate "against collateral consequences based on a misunderstanding of the nature of the original proceeding."\textsuperscript{28}

Not required, but strongly suggested by Wolff, is allowing the inmate an opportunity to call witnesses and present documentary evidence in his behalf when doing so will not present a security problem either during the hearing itself or within the institution at large.\textsuperscript{29} The security problems that might result if an inmate were allowed to bring an inordinate number of witnesses into the hearing room are obvious. In this instance the courts are willing to defer to the discretion of prison officials in at least limiting the number of witnesses that may be called.\textsuperscript{30} A further suggestion, possibly advanced for policy reasons similar to those given for denoting sensitive evidence excluded from the fact-finding statement, is that the board state specific reasons for refusing to allow the inmate to introduce documents or to call witnesses.\textsuperscript{31}

The Wolff Court approached the question of cross-examination and confrontation of adverse witnesses with great skepticism.\textsuperscript{32} The primary consideration given was the need for security. It was recognized that while such procedures are essential in criminal trials,\textsuperscript{33} the potential detriment to security and inmate safety far outweighed any expected benefits.\textsuperscript{34} Dicta in the opinion, however, suggested that the Court might view the lack of

\textsuperscript{1974} (associate warden who was involved in activities leading to misconduct charges could not sit on tribunal adjudicating those charges).

\textsuperscript{26} 418 U.S. at 564.


\textsuperscript{28} 418 U.S. at 565. The Court noted that, in some cases, institutional security or personal safety may be jeopardized if certain portions of the evidence are included in the statement. In such instances the sensitive evidence may be excluded, but this omission should be noted in the statement.

\textsuperscript{29} Id. at 566-67.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id. at 567.

\textsuperscript{33} Id. See Pointer v. Texas, 380 U.S. 400 (1965).

\textsuperscript{34} The Court was particularly troubled by the possibility of reprisals against the accuser within the institution. Cross-examination and confrontation "presumes contestants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country." 418 U.S. at 568.
these procedures questioningly and may in the future review the decision with a bent toward requiring cross-examination and confrontation.35

Wolff refused to hold that inmates facing possible sanctions in disciplinary hearings were entitled to counsel, either retained or appointed.36 The Court cited language in Gagnon v. Scarpelli37 indicating that the infusion of counsel would alter the nature of the proceeding from "predictive and discretionary" to that of a "judge at a trial, which was less attuned to the rehabilitative needs of the individual. . . ."38 The delays that were likely to result and the transformation of the institutional disciplinary proceeding into an "adversary" cast were viewed as weighty factors against recognizing the availability of counsel as an element of minimum procedural due process.39

In Baxter v. Palmigiano,40 the Supreme Court faced the difficult question of whether an inmate facing disciplinary action should be entitled to the assistance of counsel, either retained or appointed, in cases where the alleged institutional offense may also result in criminal prosecution. Much of the difficulty arose from the dilemma that a prisoner faces in deciding whether to testify at a disciplinary hearing. If he admits the violation and attempts to minimize his punishment by cooperating during the hearing, he may have his statements used against him in a subsequent criminal proceeding. If he decides to remain silent, he risks that the panel may infer guilt and possibly impose a harsher punishment due to his perceived uncooperative attitude.41 Having recognized the existence of this dilemma, the Court in Baxter remained reluctant to extend a right to counsel to prisoners within this setting. Upon the facts presented in Baxter, the Supreme Court also declined to hold that "whatever immunity is required to

35. Apparently the Court is not at the present time prepared to take this course. See Baxter v. Palmigiano, 96 S. Ct. 1551, 1559 (1976), in which the language in Wolff leaving the inclusion of cross-examination and confrontation to the discretion of the prison officials was cited with approval.
36. 418 U.S. at 569-70.
38. Id. Gagnon dealt with probation revocation hearings. The Court discussed parole revocation as if the two were synonymous. See also Tobriner & Cohen, How Much Process is "Due" Parolees and Prisoners, 25 Hastings L.J. 801, 807-09 (1974).
39. See 418 U.S. at 570. Landman v. Royster, 333 F. Supp. 621, 654 (E.D. Va. 1971), had analyzed the problem from the standpoint of the severity of the deprivation. For "substantial" sanctions the inmate should be allowed to be represented by retained counsel. There is no requirement, however, that the state provide legal aid for such inmates. 333 F. Supp. at 654, citing Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971).
40. 96 S. Ct. 1551 (1976).
supplant [the inmate's fifth amendment privilege against compelled self-incrimination] must be extended if the inmate's testimony during an institutional disciplinary hearing is "compelled."

Courts have also passed upon whether inmates facing disciplinary action should be entitled to the assistance of lay counsel-substitutes. In Wolff v. McDonnell, the Supreme Court held that some inmates may in certain situations be entitled to assistance from fellow inmates, members of the prison staff or a competent inmate designated by the staff. Assistance from lay counsel-substitutes may be required where the inmate is illiterate or incapable of speaking for himself, and in cases in which the "complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case. . . ."

Three cases decided by federal district courts prior to Wolff v. McDonnell are the leading precedents concerning minimum procedural safeguards accompanying disciplinary action against pre-trial detainees. While these courts have recognized that detainees must also be amenable to reasonable institutional discipline in order to preserve security and inmate safety within jails, they have looked beyond the elements of rudimentary due process mandated by Wolff in order to require that detainees be afforded the right to confront and cross-examine adverse witnesses and the right to present documentary and testimonial evidence on their behalf.

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42. Id. at 1557, citing Lefkowitz v. Turley, 414 U.S. 70, 85 (1973). While acknowledging the possible application of use immunity, the Baxter Court noted that there were no criminal charges in fact pending against Palmigiano. Moreover, Rhode Island law provided that the defendant's silence alone could not form the basis of a disciplinary sanction. Dicta in the opinion, however, indicates that in an appropriate situation the Court would require the granting of use immunity. 96 S. Ct. at 1557-58. See Shimabuku v. Britton, 503 F.2d 38, 44-45 (10th Cir. 1974); Jones v. Manson, 393 F. Supp. 1016, 1024 (D. Conn. 1975); Fowler v. Vincent, 366 F. Supp. 1224, 1227-28 (S.D.N.Y. 1973). But see Braxton v. Carlson, 483 F.2d 933, 942 n.9 (3d Cir. 1973) (claim of use immunity was frivolous where inmates were not afraid to speak at disciplinary hearing and institutional practice was to refrain from holding a disciplinary hearing if a case warranted criminal charges).

44. Id. at 570.
at disciplinary hearings. The cases parallel Wolff, however, by recognizing only a limited right to legal counsel or lay counsel-substitutes in this setting. Although it appears that Wolff will continue to govern discipline of convicts incarcerated in jails, administrators should anticipate future expansions beyond the minimal procedures mandated by Wolff and afford detainees the disciplinary rights recognized in these earlier cases.

3. Deprivations Occurring Outside of Discipline

Although the prisoner may legitimately expect that the classification committee will not act with punitive intent, there is no constitutionally protected right to a particular classification status within prison. Initial classification following incarceration, therefore, is an area in which the federal courts have generally declined to review administrative decisions absent a showing of unusual circumstances. The courts have been willing


52. There appears to be no rational distinction between the constitutional status of a convict in jail and an inmate in prison. Both have been adjudicated guilty, thereby enabling the state to pursue its correctional interests in punishment, deterrence and rehabilitation.

53. This observation is supported upon consideration of (1) the prison context within which Wolff was decided; (2) the rationales employed in Wolff to exclude and/or limit confrontation, cross-examination, the right to present documents and witnesses on one's behalf and the right to professional counsel and lay counsel-substitutes; (3) the unanimity of the courts in recognizing the preferential constitutional status of detainees vis-à-vis convicts; and (4) the continuing vitality of pre-Wolff precedents concerning the disciplinary rights of detainees.

In addition to the cases discussed above, attention should also be directed to Batchelder v. Geary, 2 Prison L. Rep. 283, 284 (N.D. Cal. 1973), affording jail inmates the opportunity to have volunteer professional counsel and/or lay counsel-substitutes (e.g., law students) represent them at disciplinary hearings, and Smith v. Hongisto, 2 Prison L. Rep. 284, 288 (N.D. Cal. 1973), requiring administrative review by an official senior to the hearing body within a reasonable time following punishment for infractions of jail rules.


56. The references to "except in extreme cases" are numerous, but the decisions rarely suggest the bounds of this exception. See, e.g., Flint v. Wainwright, 433 F.2d 961, 962 (5th Cir. 1970); Granville v. Hunt, 411 F.2d 9, 12 (5th Cir. 1969); Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967). But cf. Brenneman v. Madigan, 343 F. Supp. 128, 130-31 (N.D. Cal. 1972) (pre-trial detainees).
largely to defer to correctional officials' expertise in determining treatment, custody and privilege classifications.

There has been more controversy when the proceeding under consideration is a reclassification hearing. Courts have strained to distinguish such a hearing from a disciplinary hearing. However, if the proceeding is determined to be disciplinary in nature, the Wolff standards must necessarily apply. The procedures that must be followed in a classification hearing are flexible. Thus, courts have required a hearing, witnesses to be sworn, a statement of the evidence relied upon and a "record . . . to show that the action taken is such as would reasonably be calculated to remedy the problem involved." A minority of courts have required the full range of Wolff procedures to be followed.

Prisoners have few rights attending temporary reclassification in connection with alleged institutional offenses that constitute crimes. Summary reclassification to a higher custody status frequently follows as a matter of course and has ordinarily been upheld by the courts. Temporary sum-

57. It is not always easy to distinguish discipline from treatment, since the goal of each is to induce the inmate to refrain from further infractions of the rules. The distinguishing feature of punishment, however, is that it is a consequence of specific past conduct.

Daigle v. Hall, 387 F. Supp. 652, 659 (D. Mass. 1975). See also section VI.A.2 supra. Thus an analysis of a classification hearing becomes a two-step process. The initial inquiry determines if the procedure is truly a classification hearing. If so, the court must determine whether adequate procedures were followed. See notes 58-62 and accompanying text infra.


63. Cardoropoli v. Norton, 525 F.2d 990, 996 (2d Cir. 1975); Catalano v. United States, 383 F. Supp. 346 (D. Conn. 1974). In Cardoropoli, the court found that the classification of "Special Offender" visited "grievous loss" upon the prisoner and required: (1) 10-day written notice; (2) the reason or reasons for the action to be specified; (3) the evidence to be described; (4) a personal appearance by the inmate; (5) a disinterested decisionmaker; (6) the ability to call witnesses; and (7) the ability to present documentary evidence. Counsel, confrontation and cross-examination of adverse witnesses were expressly excluded. Nor was there a requirement that the proceedings be recorded or transcribed.

With the recent Supreme Court rulings in Meachum v. Fano, 96 S. Ct. 2532 (1976), and Montanye v. Haymes, 96 S. Ct. 2543 (1976), it is doubtful that Cardoropoli would be considered sound today.

64. Alamanza v. Oliver, 368 F. Supp. 981, 984 (E.D. Va. 1973). The prisoner had been found with marijuana and had been reclassified into the maximum security section during the pendency of the charges. "[W]here there is reason to suspect that an inmate has engaged
mary reclassification based upon pending criminal charges against an inmate may continue until such charges are finally resolved. A long-term increase in security classification may follow final disposition of the criminal prosecution

either on the basis of a determination of guilt in the criminal proceedings or on the basis of an independent ICC [Institutional Classification Committee] inquiry into the factual issues, coupled with a consideration of whatever other factors are committed to ICC discretion.

Long-term security reclassification may also occur during the course of the criminal proceedings, "provided that any decision to take such action is based on grounds independent of the criminal charges which are pending." 67

The area of work assignments has also been largely reserved for official discretion. Courts have not recognized any vested interest of prisoners to retain a particular work assignment. Thus, job transfers usually are not required to be preceded by a hearing. 69 As in the case with initial classification, judicial review under section 1983 is generally limited to ensuring that the official decision is not arbitrary or made with punitive intent. 70

In Meachum v. Fano, 71 the Supreme Court recently resolved much of the speculation that had earlier surrounded the applicability of the Wolff safeguards to prison transfer. The Court has held that, because the prisoner has no recognizable liberty interest in remaining at his present location, no process is constitutionally due upon transfer to another institution in criminal conduct, a temporary change in security status . . . is justified on that basis alone."

65. Id.
66. Id. (footnote omitted).
67. Id. at 985.
69. Toal, Recent Developments in Correctional Case Law 77 (S.C. Dep't of Corrections 1975) [hereinafter cited as Toal]. The key in all decisions involving initial work assignment or future assignments is that the decision must not be arbitrary or capricious. All attacks on such assignments should focus on this requirement.
72. Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections . . . .

Id. at 2540.
within the same correctional system.\textsuperscript{73} Earlier cases involving emergency transfers had reached an analogous result.\textsuperscript{74} Several cases did hold, however, that once the emergency had passed, the prisoner must be afforded a hearing if normally provided in nonemergency situations.\textsuperscript{75}

There is substantial authority antedating \textit{Meachum} to support recognition of a right to procedural due process if the prisoner is being transferred interstate. The full range of \textit{Wolff} safeguards has been applied\textsuperscript{76} with a minority of courts also allowing professional counsel or lay counsel-substitutes, cross-examination and confrontation.\textsuperscript{77} Future decisions may, of course, extend the holding of \textit{Meachum} to interstate transfers. Certainly some of the same considerations applicable to intrastate transfer equally apply when the prisoner is transferred across state lines. Present cases, however, speak in terms of "grievous loss,"\textsuperscript{78} and may have been effectively overruled by \textit{Meachum}.\textsuperscript{79}

4. \textit{Parole and Probation Decisions}

Courts have consistently distinguished between the applicability of due process safeguards to decisions to revoke as opposed to decisions to grant parole and probation. Early cases agreed that the due process clause of the fourteenth amendment should have no application to parole release decisions.\textsuperscript{80} The rather brusque conclusions of these cases, however, stand in contrast to later decisions holding that prisoners eligible for release on parole or probation are entitled to certain minimum procedural safeguards to ensure fairness.\textsuperscript{81} The Supreme Court has twice granted centiorari con-

\textsuperscript{73} Id. See also McLaughlin v. Hall, 520 F.2d 382, 385-86 (1st Cir. 1975) (Campbell, J., concurring). The court did "not agree that an inmate's stake in avoiding transfer between the correctional institutions of a single state gives rise to a 'liberty' or 'property' interest protected by the fourteenth amendment."

\textsuperscript{74} E.g., Hoitt v. Vitek, 361 F. Supp. 1238, 1253-54 (D.N.H. 1973), aff'd, 497 F.2d 568 (1st Cir. 1974).


\textsuperscript{78} E.g., Gomes v. Travisono, 490 F.2d 1209, 1212 (1st Cir. 1973), modified, 510 F.2d 537 (1st Cir. 1974).

\textsuperscript{79} See section VI.A. 1 supra.

\textsuperscript{80} Farries v. United States Bd. of Parole, 484 F.2d 948, 949 (7th Cir. 1973); Manechino v. Oswald, 430 F.2d 403, 407-10 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971).

\textsuperscript{81} In Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975), the prisoner asked for disclosure of release criteria used by the New York State Parole Board. After considering the balance between the inmate's interest in the proceedings and the need for and usefulness of the
cerning this problem, but in one instance remanded the case without deciding the due process question and, in the other, vacated the case as moot. In states such as Virginia where parole eligibility is governed by statute, release decisions unaccompanied by rudimentary procedural safeguards will not stand if the statute is interpreted to involve a state-created liberty interest within the meaning of *Meachum v. Fano*.

Having decided that due process does apply to parole release decisions, the United States District Court for the Western District of Virginia required published standards of criteria governing parole determinations, a personal hearing, access to information upon which the board relies in reaching its decision and a statement of reasons for denial of parole. The confidentiality, the court determined that a statement of reasons for denial would satisfy the basic due process requirement that parole release decisions not be arbitrary or capricious. See also *McGee v. Aaron*, 523 F.2d 826, 826-27 (7th Cir. 1975) ("[D]ue process does not require what would amount to a rehearing once the prisoner has been given written reasons for denial following a hearing"), implicitly overruling *Farries v. United States Bd. of Parole*, 484 F.2d 948 (7th Cir. 1973), which held that the prisoner had no due process right to a hearing or statement of reasons for denial of parole, and *Scarpa v. United States Bd. of Parole*, 477 F.2d 278, 281 (5th Cir.), vacated and remanded for mootness determination, 414 U.S. 809 (1973).


> [E]very person convicted of a felony . . . shall be eligible for parole after serving one fourth of the term of imprisonment imposed, or after serving twelve years of the term of imprisonment imposed if one fourth [sic] of the term of imprisonment imposed is more than twelve years . . .


> The Probation and Parole Board shall review the case of each prisoner as he becomes eligible for parole and at least annually thereafter until he is released on parole or otherwise . . .

87. *Id.* at 315 ("Without such notice of the standards against which they will be judged for parole, inmates cannot rationally attempt to meet the requirements for parole and may be denied parole simply because they are unaware of what is required of them.").
88. *Id.* at 316 ("A personal confrontation protects an individual from suffering a ‘grievous loss’ . . . ."). It appears that the conventional "grievous loss" rationale is no longer viable in light of *Meachum v. Fano*, 96 S. Ct. 2532 (1976). See section VI.A.1 supra. See also *Bradford v. Weinstein*, 519 F.2d 728, 732 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975).
89. This right is qualified by the authorities' right to remove material which could jeopardize security and other material such as psychiatric evaluations.
90. 399 F. Supp. at 318-19. "[A] detailed narrative justifying the denial of parole is [not] constitutionally required;" a simple statement will suffice.
right to call and cross-examine witnesses\(^91\) and the right to counsel\(^92\) were denied.

Two of these requirements—access to information and statement of reasons for denial of parole—have been the subject of much litigation. In regard to the latter,\(^93\) courts have generally held that, while the statement of reasons for denying parole should contain concrete reasons and demonstrate that the denial is not arbitrary or capricious, "the court will not second-guess the Board's analysis of the myriad factors bearing on whether the individual inmate gets parole."\(^94\) In light of this judicial hesitance, statements containing very vague reasons for denial have been held to comply with due process.\(^95\)

Reasonable care must be taken that the denial of parole is based on the proper facts. In one case,\(^96\) officials denied the inmate parole because of the "seriousness" of his offense, believing him to have been serving a sentence for extortion. The board's vague statement concealed its oversight that the inmate had instead been convicted of conspiracy. "It does no good to tell a prisoner he is being denied parole because he is a danger to society unless he is told why he is so regarded, and whether there is anything he can do to convince the Board otherwise."\(^97\)

In \emph{Morrissey v. Brewer},\(^98\) the Supreme Court was faced with the question of what procedures must accompany revocation of parole. The Court viewed the potential loss of liberty as "grievous loss," a phrase in disfavor today,\(^99\) and held that the parolee must be given a preliminary hearing (to

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91. \emph{Id.} at 317.
92. \emph{Id.} at 318.
95. United States \emph{ex rel.} Richerson v. Wolff, 525 F.2d 797 (7th Cir.), \emph{cert. denied}, 96 S. Ct. 1511 (1976) (granting of parole "would deprecate the seriousness of such an offense"); Williams v. Virginia Probation and Parole Bd., 401 F. Supp. 1371 (W.D. Va. 1975) ("Your long record of law violations makes it desirable that you prove yourself for a longer period of time.").
98. 405 U.S. 471 (1972).
99. \emph{Id.} at 481. \emph{See section VI.A.1 supra.}
determine whether there is probable cause to believe he has committed a parole violation) followed by a final revocation hearing within a reasonable time after being taken into custody. The preliminary hearing must follow three procedural safeguards: (1) notice that the hearing will take place and its purpose; (2) opportunity for the parolee to appear and speak in his own behalf and (3) upon request of the parolee and in the discretion of the hearing officer, an opportunity for the parolee to confront and cross-examine witnesses. At the final revocation hearing, the parolee is entitled to (1) written notice of the claimed violations of parole; (2) disclosure of the evidence against him; (3) an opportunity to testify and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses, as qualified by good cause for not allowing these procedures; (5) a neutral and detached hearing body and (6) a written statement by the factfinders as to the evidence relied upon and the reasons for revoking parole.

Gagnon v. Scarpelli applied the foregoing principles to probation revocation. In addressing the probationer's argument for the right to counsel (not recognized in Morrissey), the Court found that such a requirement would transform the probation revocation hearing into an adversary proceeding in conflict with the predictive and rehabilitative nature of the hearing. The Court did hold, however, that

[p]resumptively, 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 should also consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

B. Equal Protection

Comparatively few cases have been requested to apply the equal protec-

100. 408 U.S. at 485, 487-88. The discretion given to the hearing officer is that necessary to ensure the safety of the informant by maintaining his anonymity.
101. Id. at 486-87.
102. Id. at 490.
104. Id. at 787-88.
105. Id. at 790-91.
tion clause to prisoners' rights. The fourteenth amendment's proscription against denial of equal protection of the laws may be read to require that those similarly situated in prison be classified and treated similarly.\textsuperscript{106} Although in prison, perhaps more than in any other setting, various classifications must be drawn to facilitate institutional objectives of security and rehabilitation, the state may still be required, if challenged, to demonstrate legitimate interests weighty enough to meet traditional equal protection analysis.

The initial encounter most prisoners have with administrative line-drawing involves classification procedures. Decisions made during initial classification do much to dictate an inmate's day-to-day activities during the period of his incarceration. The prison administration ordinarily views initial classification as an opportunity to evaluate an inmate's past conduct and potential for rehabilitation.\textsuperscript{107} Although some courts have found an affirmative duty to classify,\textsuperscript{108} administrators retain broad discretion in making this admittedly subjective decision. Courts will not second-guess the primacy of heavily weighted factors and will accept any reasonable classification.\textsuperscript{109}

While those similarly situated should ordinarily be treated similarly,

\begin{itemize}
\item \textsuperscript{106} People v. Von Diezleski, 78 Misc. 2d 69, 355 N.Y.S.2d 556 (1974); Becton v. State, 506 S.W.2d 137 (Tenn. 1974).
\item \textsuperscript{107} ToAL, supra note 69, at 74. Initial classification is purely predictive in nature. It has been noted that even in the absence of such a procedure, given time the inmate population would eventually classify itself, \textit{i.e.}, the troublemakers would be placed in maximum security sections and others would be given more responsibility and freedom of action. \textit{SOUTH CAROLINA DEPT OF CORRECTIONS, THE RIGHTS OF THE CONFINED 176 (1972).} It has also been recognized that, due to the predictive nature of classification, the prisoner does not even have the right to an error-free classification, just one that is reasonable. Palmigiano v. Mullin, 491 F.2d 978, 980 (lst Cir. 1974).
\item \textsuperscript{108} \textit{[T]he government has a duty of protection and safekeeping. In the discharge of that duty the government must exercise ordinary care in (1) the classification of prisoners and in (2) the custody of prisoners properly classified. Thus upon admission of an inmate, a reasonable assignment to a proper custody category . . . must be made. . . .}
\item \textsuperscript{109} See McGinnis v. Royster, 410 U.S. 263 (1973). The Court was addressing a statutory formula which denied state prisoners who were in county jails "good time" credits. In addressing the equal protection issue it was held that primacy of purpose would not be required, but the decision must rationally promote a legitimate purpose. The same could be said for classification proceedings. If the prison officials can show a rational reason for the classification, it should be upheld. \textit{See} Mabra v. Schmidt, 356 F. Supp. 620, 626-26 (W.D. Wis. 1973); Cohen v. United States, 252 F. Supp. 679, 688 (N.D. Ga. 1966).
\end{itemize}
they do not have the right to be treated identically.\textsuperscript{110} Thus, there is no federally protected right to a particular classification upon conviction and incarceration. The prisoner may, however, legitimately expect not to be classified punitively or arbitrarily.\textsuperscript{111} There is also no constitutional right to be held in a particular facility.\textsuperscript{112} In general, the prisoner will be deemed to have been afforded equal protection of the laws if the classification has been done in a rational manner.\textsuperscript{113}

Suits claiming discrimination in daily work assignments have usually failed.\textsuperscript{114} A closer question may be presented when an inmate loses his seniority status upon transfer from one institution to another, thereby resulting in a less favorable work assignment and lower compensation.\textsuperscript{115}

\textsuperscript{110} Chesney v. Adams, 377 F. Supp. 887, 893 (D. Conn. 1974), aff'd, 506 F.2d 836 (2d Cir. 1975). The basic requirement is that the "distinctions must have some relevance to the purpose for which the classification is made." The prisoner was transferred from the prison to a hospital for the mentally ill without a hearing. The court rejected the prison administrators' argument that the hearing would be burdensome and noted that the only exception for a procedureless removal to a mental hospital would be in an "emergency" situation.

\textsuperscript{111} Palmigiano v. Mullin, 491 F.2d 978, 980 (1st Cir. 1974). In order to succeed, the court held that the prisoner must show that he was classified as maximum security "for reasons utterly beyond the scope of any legitimate authority granted to [the prison administrators]."


\textsuperscript{113} The burdens of proof that have been applied vary widely. In Palmigiano v. Mullin, 491 F.2d 978, 980 (1st. Cir. 1974), the prisoner was required to show that the classification was "utterly beyond the scope of any legitimate authority" while in Mabra v. Schmidt, 356 F. Supp. 620, 636 (W.D. Wis. 1973), the burden was placed upon the prison officials to "show that this particular differential in treatment is rationally related to, or is reasonably necessary for, the advancement of a justifiable state purpose."

\textsuperscript{114} Chapman v. Reynolds, 378 F. Supp. 1137 (W.D. Va. 1974). The case had racial overtones because a group of white inmates charged that the black inmates of the Rustberg Correctional Unit received preferential initial work assignments and higher pay. The court, after demonstrating statistically that such discrimination did not in fact exist, held that "absent some factual evidence [it would] not look behind the determinations of the prison officials. . . ." Id. at 1140. In the usual case the court will simply find that "an inmate's work classification does not ordinarily present a justifiable federal question." Cradle v. Superintendent, Correctional Field Unit #7, 370 F. Supp. 79, 81 (W.D. Va. 1974).

\textsuperscript{115} Beatham v. Manson, 369 F. Supp. 783 (D. Conn. 1973). The court found that the new institution was generally more desirable than had been the previous prison and that this fact alone should be deemed adequate compensation. Budgetary reasons and the lack of a showing that the new treatment was generally or capricious were also cited in the opinion. Id. at 789. But see United States ex rel. Motley v. Rundle, 340 F. Supp. 807 (E.D. Pa. 1972), in which the prisoner was temporarily transferred pending his habeas corpus hearing and upon his return was assigned a job which paid $ .15 per day. His previous assignment had paid $ .69
Controversy has also surrounded admission to work release programs. Inmates have argued that allowing certain prisoners to procure outside employment while paying others characteristically low prison wages is inherently discriminatory, and that their opportunity to be rehabilitated is being thwarted by their inability to participate in a work release program. Courts have held that there is no constitutional right to be granted work release.

Equal protection problems are also presented upon allegations that prison rules are being enforced sporadically. Prisoners have complained when visitation rules were enforced discriminatively and punitively, and when one prisoner was refused enrollment in a college program while others were allowed to continue in the program. Similar problems arise when inmates with longer sentences receive treatment or work assignments more favorable than those accorded to other inmates with shorter sentences. Absent some evidence of impermissible purpose, courts will generally defer to the conceded expertise of prison officials in determining the most effective rehabilitative program for each prisoner.

Prison officials are frequently alleged to have committed racial discrimination in the administration of their institutions. Upon satisfactory evi-

per day. He alleged racial discrimination citing the case of a white inmate who had been reinstated at the same rate of pay after a similar temporary transfer. The defendant prison administrators failed to answer the complaint and judgment by default was entered. On appeal an award of $1,461.70 was ordered as compensatory and nominal damages.


119. Underwood v. Loving, 391 F. Supp. 1214, 1215 (W.D. Va. 1975). A fellow inmate had submitted an affidavit stating that, "although the prison does have a visitation list, the prison policy is not to enforce the regulations unless a particular guard 'has a beef with you, then you can expect to get hassled [sic] and treated unequal.'"

122. Underwood v. Loving, 391 F. Supp. 1214, 1215-16 (W.D. Va. 1975). See Howard v. Smythe, 365 F.2d 428 (4th Cir. 1965), where the prisoner expressed a desire to hold a Black Muslim prayer meeting and was placed in maximum security for his refusal to reveal the names of those who were desirous of participating in the religious services along with him. The court noted that "[i]f a Protestant or Catholic or Jewish inmate had expressed [these feelings] . . . there can be little doubt that the prison officials would have been disposed to honor the request." Id. at 431. The case was remanded on other grounds and Howard was ordered released from maximum security confinement.
dence, courts have required officials to overcome a heavy burden of justification in order for discrimination on the basis of race to be upheld. In *Lee v. Washington*, the Supreme Court invalidated an Alabama statute requiring segregation of the races within prison. In a brief concurring opinion, however, three justices intimated that the requisite burden of proof could be surmounted if the state could show good faith and "particularized circumstances" necessitating the discrimination. Although various attempts have been made to employ the language of the concurring opinion in *Lee* as a wedge in order to sustain racial segregation in prison, the federal courts have firmly held that racial classification cannot stand even here, absent a showing of "compelling" circumstances. As in the case of first amendment freedoms, courts will respect official discretion only after compelling evidence supporting the need for racial classifications has been presented. Mere belief that segregation of the races will "protect individuals against personal abuses of violence" is insufficient. Judicial deference is not warranted when "neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace [is] demonstrated at trial to be anything more than personal speculations or vague disquietudes of officials."

The standard of review employed in cases not involving racial discrimination is the "minimum rationality" analysis adopted by the Supreme Court in *McGinnis v. Royster*. A New York statute denied "good time," credit for presentence incarceration in county jails, but allowed credit if the time was served in a county penitentiary. The plaintiff prisoner received "jail time" credit, but had he also received "good time," he could have appeared before the parole board four months earlier. The Supreme

123. Saunders v. Sumner, 366 F. Supp. 217 (W.D. Va. 1973). Black inmates brought suit claiming that there was a pattern of arbitrarily favoring white inmates in work assignments. The defendant moved for summary judgment and submitted an affidavit setting forth opinions as to why the prisoners' allegations should be dismissed. The court held this was not enough and that the prisoner must be given an adequate explanation for the actions taken. In so doing, the court recognized that the assignment of jobs is a discretionary act with which it would not interfere, but racial discrimination presents a clear constitutional issue.
125. Id. at 334, (Black, Harlan and Stewart, JJ., concurring).
126. See, e.g., United States v. Wyandotte County, 480 F.2d 969 (10th Cir. 1973).
128. United States v. Wyandotte County, 480 F.2d 969, 970 (10th Cir. 1973).
Court upheld the classification on the grounds that the legislature could have rationally concluded that county jails and correctional institutions were engaged in different functions. Although the Court indicated that it would not be willing to "conjure" a rational basis in order to meet traditional minimum equal protection scrutiny, it also asserted that a rational basis sufficient to sustain the classification need not be the legislature's primary objective.

Officials have encountered the greatest degree of difficulty in satisfying equal protection scrutiny in situations involving pre-trial detainees. The state failed to meet its burden where detainees were confined before trial in overcrowded maximum security "dungeons" due to the lack of a classification system. Whenever the "condition of pre-trial detention derives from punishment rationales, such as retribution, deterrence or even involuntary rehabilitation, then those conditions ... must fall unless ... clearly justified by the limited ... purpose and objective of pre-trial detention."

Although many cases appear to present equal protection issues for consideration, the courts have almost always rested their decisions upon due

131. Id. at 273-74.
132. The legislature could have concluded rationally that county penitentiary inmates, who are nonfelons with less than one-year sentences, required quantitatively and qualitatively less rehabilitation - with fewer risks of miscalculation - than inmates confined to state prisons for more serious crimes. And the legislature could rationally have distinguished between the minimum parole date and the statutory release date. . . .
Id. at 274 (emphasis in original).
So long as the state purpose upholding a statutory class is legitimate and non-illusory, its lack of primacy is not disqualifying.
Id. at 276.
We have supplied no imaginary basis or purpose for this statutory scheme, but we likewise refuse to discard a clear and legitimate purpose because the court below perceived another to be primary.
Id. at 277.
136. A common cause of unconstitutional conditions affecting detainees in local jails is the crowded conditions of correctional institutions which create a backlog of convicts awaiting transfer from jail to prison. In addition to worsening conditions with respect to persons detained for trial, this situation also creates tension among convicts seeking transfer into the state correctional system where better conditions and treatment and rehabilitative programs
process grounds. \textsuperscript{137} Perhaps when the full force of the Supreme Court's recent decision in *Meachum v. Fano* \textsuperscript{138} is recognized, the courts will begin to address important problems of prisoners' rights in terms of equal protection of the laws. *Meachum* may, however, foreshadow a retreat by the federal courts from involvement in state prison matters generally.

VII. IMMUNITIES, DEFENSES AND OTHER RESPONSES TO THE COMPLAINT

A. INTRODUCTION

Until a decade ago, prison officials rarely had to defend civil rights cases on the merits because almost every court subscribed to the deferential "hands-off" doctrine. \textsuperscript{1} Today, however, courts will carefully attend to these complaints to determine whether relief against a proper defendant is warranted under section 1983. Since *Monroe v. Pape*, \textsuperscript{2} section 1983 has been viewed as a federal remedy for constitutional torts committed under color of state law. \textsuperscript{3} The jurisprudence of section 1983 has followed the common law of torts from the defendant's as well as the plaintiff's standpoint since the Warren Court noted in *Monroe v. Pape* that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." \textsuperscript{4} It is against this background of common law tort liability that immunities, defenses and other responses to a section 1983 prisoners' rights complaint will be discussed below.

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\textsuperscript{137} See, e.g., Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio), \textit{extended and modified}, 330 F. Supp. 707 (N.D. Ohio 1971), \textit{aff'd sub nom.}, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). See also Baxter v. Palmigiano, 96 S. Ct. 1551 (1976) (suit was brought on due process and equal protection grounds but the decision and discussion of prison disciplinary hearings was based solely on due process grounds).

\textsuperscript{138} 96 S. Ct. 2532 (1976). \textit{See generally} section VI.A.1 \textit{supra}.

1. \textit{See} section I \textit{supra}.
3. \textit{Id.} at 172.
4. \textit{Id.} at 187.
It should be emphasized here that pro se prisoner complaints are held to "less stringent standards than formal pleadings drafted by lawyers," and that a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted should be sustained only where lack of a justiciable claim is clear "on the face of the complaint and is obviously not curable." "The purpose of [the] motion . . . is to test the formal sufficiency of the statement of the claim for relief," and therefore must be read in conjunction with Rule 8(a) of the Federal Rules of Civil Procedure which establishes pleading requirements generally. The motion shall be granted where the allegations in the plaintiff's complaint reveal some insuperable bar to relief or the existence of an affirmative defense. Since dismissal generally is not on the merits, the court will normally allow the plaintiff to file an amended complaint. "Amendment should be refused only if it appears to a certainty that plaintiff cannot state a claim."

An affirmative defense may be raised by a section 1983 defendant in his answer, under Rule 8(c) of the Federal Rules. In addition to the defenses specifically enumerated in Rule 8(c), the defendant may raise an affirmative defense where the plaintiff has failed to allege that he has been deprived of a federal right. Such is the case where the plaintiff has failed to allege that the defendant acted under color of state law, or where the plaintiff has failed to set forth the nature of the federal right claimed to

7. 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356, at 590 (1971) [hereinafter cited as WRIGHT & MILLER].
8. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).
10. 5 WRIGHT & MILLER, supra note 7, § 1357.
11. 5 WRIGHT & MILLER, supra note 7, § 1357, at 613. See also Bonano v. Thomas, 309 F.2d 320, 322 (9th Cir. 1962); Lone Star Motor Import, Inc. v. Citroen Cars Corp., 286 F.2d 69, 74-75 (5th Cir. 1961).

Rule 15(a) gives plaintiff the freedom to amend his complaint once as a matter of course before the filing of a 'responsive pleading.' The motion to dismiss [is] not a responsive pleading for the purpose of Rule 15(a), and thus the plaintiff could still amend without leave of the court after the motion to dismiss [has] been made.

have been abridged.\textsuperscript{13} Although plaintiffs are required to set forth their federal claims with specificity,\textsuperscript{14} pro se prisoner complaints are generally construed liberally.\textsuperscript{15} However, the courts will require something more than broad and conclusory statements\textsuperscript{16} and are not required to make unreasonable constructions.\textsuperscript{17}

Since the plaintiffs in section 1983 prisoners' rights actions are almost always indigents proceeding pro se, the courts also tend to hesitate before granting motions for summary judgment made by defendants.\textsuperscript{18} Facts alleged in the complaint must be interpreted "in the light most favorable to the party opposing the motion."\textsuperscript{19} Summary disposition is proper only where the defendant makes an affirmative showing of personal knowledge of specific facts stated in an affidavit in support of a motion for summary judgment.\textsuperscript{20} In ruling on the motion, the court may rely upon operations records submitted by the defendant,\textsuperscript{21} but only "to determine whether issues of fact exist and not to decide the fact issues themselves."\textsuperscript{22}

\textsuperscript{16} See Esser v. Weller, 467 F.2d 949, 950 (3rd Cir. 1972); Kauffman v. Moss, 420 F.2d 1270, 1272 (3rd Cir. 1970); accord, Negrich v. Höhn, 379 F.2d 213, 215 (3rd Cir. 1967).
\textsuperscript{19} Id. at 220.
B. IMMUNITIES

1. Generally

Defendants in prisoners' rights actions are frequently able to avoid liability, or even amenability to suit altogether, by invoking one of the immunities recognized by the federal courts as part of the jurisprudence of section 1983. The concepts to be discussed below, however, are complex and have often been confused by the courts.23

This is so because the legal principles emerge from attempts to strike a balance between two important, but often conflicting public policies. On the one hand there is the public interest in vindicating individual rights sought to be protected by the Civil Rights Act. On the other hand, there exists a strong public policy in promoting spirited service by public servants, a goal thought to be placed in jeopardy by the threat of private damage suits for official actions.24

Thus, it is important to understand the distinctions between sovereign immunity, as constitutionalized in the eleventh amendment,25 and the common-law principles of absolute and qualified executive immunity which have been followed in litigation under section 1983. It is also important, at least for analytical purposes, to distinguish between qualified executive immunity from suit and the defense of good faith and probable cause.26

2. Sovereign Immunity and the Eleventh Amendment

Under the doctrine of sovereign immunity, any entity to which the doc-

23. See, e.g., Claybrone v. Thompson, 368 F. Supp. 324 (M.D. Ala. 1973), where the court used the standard of the defense of good faith and probable cause to define the concept of qualified executive immunity. Note also that although Scheuer v. Rhodes, 416 U.S. 232 (1974), came to the Supreme Court essentially as a sovereign immunity case, the Court of Appeals for the Sixth Circuit had based its holding alternatively upon the defense of good faith and probable cause.


25. 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.

U.S. Const. amend. XI.

26. The doctrine of official immunity protects administrators from liability for good faith policy decisions, while the defense of good faith and probable cause protects all government employees from liability for acts which they reasonably believed were in accordance with valid policies and procedures. The former applies to discretionary decisions, while the latter applies to ministerial duties, but since they both involve a showing of good faith, the courts often speak of them in the same terms.

trine applies may avoid liability for its tortious conduct or, more accurately, for the tortious conduct of its agents and employees, unless it consents to suit. The origins of the doctrine appear to lie in the sixteenth-century English concept that "the King can do no wrong." 27 Its earliest application in the United States was in Cohens v. Virginia, 28 decided by the Supreme Court in 1821. Although Chief Justice Marshall’s reasoning for applying the doctrine in that case was obscure, 29 a rationale underlying the doctrine was later expressed by Justice Holmes:

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. 30

The application of the doctrine to the states has been limited judicially or by statute in most states. 31 Virginia is among the minority of states which has retained sovereign immunity from suit in state courts. 32 The immunity applies to counties, 33 but not to municipal corporations performing proprietary, as opposed to governmental, functions. 34 In Virginia the

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29. Marshall spoke of the concept of national sovereign immunity from suits as "[t]he universally received opinion." 19 U.S. at 411.
31. For a comprehensive list indicating which states have and which states have not abrogated the immunity, see RESTATEMENT (SECOND) OF TORTS § 895A (Tent. Draft No. 19, 1973).
34. See, e.g., Fry v. Albemarle County, 86 Va. 195, 199, 9 S.E. 1004, 1006 (1889).
doctrine acts to bar tort actions which are brought against agents of the state in name, but which in effect would require relief forthcoming from the state. However, state employees will not be shielded by sovereign immunity where they act unlawfully under color of state office. Nor are state employees immune from personal liability if they exceed their authority. The plaintiff may maintain a cause of action in a Virginia court upon proof (and allegation) of some act done by the state's employee outside the scope of his authority but performed so negligently that it can be said that its negligent performance takes him who did it outside the protection of his employment.

In 1793 the United States Supreme Court refused to recognize the state of Georgia's sovereign immunity from suit by a citizen of another state. The decision in *Chisolm v. Georgia* created such an uproar that the new nation took only five years to ratify the eleventh amendment to the United States Constitution. The amendment 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 of any Foreign State.

Cities and counties have not been extended sovereign immunity under the eleventh amendment. In section 1983 cases, however, they need not raise

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39. Chisolm v. Georgia, 2 U.S. (Dall.) 419 (1793). Chisolm was a citizen of South Carolina.

40. Id.


42. Moor v. County of Alameda, 411 U.S. 693, 718 (1973); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 579 (1946); Lincoln County v. Luning, 133 U.S. 529, 530 (1890).
the issue of sovereign immunity for they have been determined not to be "persons" within the meaning of section 1983.\footnote{43}

Although the eleventh amendment does not by its own terms bar suits by citizens against their own state, the Supreme Court has consistently applied the amendment in order to bar such actions in federal court.\footnote{44} The rationale for this extension was initially set forth in \textit{Hans v. Louisiana}.\footnote{45} Particular emphasis was placed upon the speed with which the eleventh amendment had been proposed and ratified following the Court's decision in \textit{Chisolm}.\footnote{46} That citizens could sue their own states but not other states seemed an absurdity to Justice Bradley. He noted that "suitability of a State without its consent was a thing unknown to the law . . ."\footnote{47} before the founding of the nation. Perhaps the best explanation for the doctrine's application to the states in these circumstances is that offered by Justice Holmes as an explanation for the application of sovereign immunity in state forums.\footnote{48} Regardless of its rationale, there appears little chance that \textit{Hans} will be overturned in the near future.\footnote{49}

Despite the apparent barrier posed by the eleventh amendment, an individual may gain relief in certain cases by bringing an action against a state official in his individual capacity. In \textit{Ex parte Young},\footnote{50} the Supreme Court held that the eleventh amendment would not bar a suit to enjoin a state official's enforcement of an unconstitutional statute. Under these circumstances, the court entertains the fiction that no authorization by the state exists,\footnote{51} thereby stripping the defendant of his immunity from suit in federal court.\footnote{52} For the \textit{Ex parte Young} fiction to apply, the plaintiff must allege that the act was unconstitutional\footnote{53} and that the defendant official "ha[s] some connection with the enforcement of the act."\footnote{54}

\begin{footnotes}
\footnote[43]{See Monroe v. Pape, 365 U.S. 167, 188-92 (1961). See also Broadway v. City of Montgomery, 530 F.2d 657, 661 n.7 (5th Cir. 1976); Cox v. Stanton, 529 F.2d 47, 50-51 (4th Cir. 1975). See also cases cited at section II.B., notes 26-27, supra.}
\footnote[45]{134 U.S. 1, 11-16 (1890).}
\footnote[46]{Id. at 11. See notes 39-41 and accompanying text supra.}
\footnote[47]{134 U.S. at 16.}
\footnote[48]{See note 30 and accompanying text supra.}
\footnote[49]{See cases cited at note 44 supra.}
\footnote[50]{209 U.S. 123 (1908).}
\footnote[51]{Id. at 159.}
\footnote[52]{Id. at 159-60.}
\footnote[53]{Id. at 159.}
\footnote[54]{Id. at 157.}
\end{footnotes}
Since the point at issue on the merits in most civil rights cases is whether a given act is within or without an official's constitutional authority, the existence or nonexistence of immunity under *Ex parte Young* is made coterminous with the court's view of the merits. 55

In any event, many section 1983 plaintiffs have succeeded in obtaining prospective injunctive relief 56 or damages payable personally by state officials 57 by resorting to the vital distinction recognized in *Ex parte Young*.

The eleventh amendment may still operate to preclude a suit against state officials, however, with regard to the type of relief which the plaintiff requests. In *Edelman v. Jordan* 58 the Supreme Court recently indicated that retrospective damage awards, and injunctive relief in the nature of damages, may be viewed as "indistinguishable in many ways from an award of damages against the state." 59 If the state may be identified as the real party in interest, for example, in an action seeking monetary recovery, 60 the eleventh amendment will remain an effective barrier despite the plaintiff's invitation for the court to invoke the *Ex parte Young* "fiction."

Several other important exceptions to the eleventh amendment should also be noted. Immunity from suit under the eleventh amendment is not available where Congress enacts legislation pursuant to section 5 of the fourteenth amendment 61 rendering the states amenable to suit in federal

56. See, e.g., Neal v. Georgia, 469 F.2d 446, 448 (5th Cir. 1972).
59. Id. at 668.
60. Id. at 663; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 575-76 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Matter of Crisp, 521 F.2d 172, 178 (2d Cir. 1975); May v. Supreme Court, 508 F.2d 136, 140 (10th Cir. 1974) (Barrett, C.J., concurring).
61. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
U.S. Const. amend. XIV, § 5.

When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. 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.

court. Of course, the immunity may also be waived, either expressly or impliedly. The bounds of an implied consent to suit will be narrowly construed. The eleventh amendment has been held to be inapplicable to awards of costs and contempt citations in order to obtain compliance with federal decrees. Its inapplicability to awards of attorneys' fees, at least in actions brought under section 1983, seems to have been ensured by Congress' recent enactment of the Civil Rights Attorney's Fees Awards Act of 1976.

65. The origins of the implied consent doctrine may be found in Parden v. Terminal Ry., 377 U.S. 184 (1964). Parden "broke with past judicial history by finding an implied waiver of eleventh amendment protection rather than requiring an express waiver measured by state law standards." Comment, Implied Waiver of a State's Eleventh Amendment Immunity, 1974 DUKE L.J. 925, 931. The broad language of Parden—"when a state leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or a corporation"—lends itself to findings of implied waiver whenever the state enters an area subject to present or potential congressional legislation.
66. 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.'

67. See Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 73-77 (1927); accord, Thonen v. Jenkins, 517 F.2d 3, 7 (4th Cir. 1975); NAACP v. Beecher, 504 F.2d 1017, 1028-29 (1st Cir. 1974); Jordan v. Fusari, 486 F.2d 646, 651 (2d Cir. 1974); Utah v. United States, 304 F.2d 23, 27 (10th Cir. 1962).
68. See Class v. Norton, 505 F.2d 123, 127 (2d Cir. 1974); Rodriguez v. Swank, 496 F.2d 1110, 1113 (7th Cir. 1974).

As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, [the] defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

3. Absolute Immunity

The Supreme Court has specifically extended an absolute common-law tort immunity⁷⁰ from section 1983 actions seeking pecuniary damages arising from official⁷¹ activities of state and national judges,⁷² legislators⁷³ and prosecuting attorneys.⁷⁴ The leading case involving absolute common-law tort immunity was decided by the Second Circuit in Yaselli v. Goff, an

Prior to Congress's enactment of this legislation, five courts of appeals had held that the eleventh amendment posed no bar. Thonen v. Jenkins, 517 F.2d 3, 7, 8 (4th Cir. 1975); United States v. Board of School Comm'rs, 503 F.2d 68, 86 (7th Cir. 1974); Jordan v. Fusari, 496 F.2d 646, 650-51 (2d Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974); Gates v. Collier, 489 F.2d 298, 302-03 (6th Cir. 1973). Three circuits had held that Edelman did pose a bar in civil rights cases. Taylor v. Perini, 503 F.2d 899, 901 (6th Cir. 1974); Skehan v. Board of Trustees, 501 F.2d 41, 44 (3d Cir. 1974); San Antonio Conservation Soc. v. Texas Hwy. Dep't, 496 F.2d 1017, 1026 (5th Cir. 1974).


71. See Gravel v. United States, 408 U.S. 606, 624-25 (1972) (scope of immunity limited to legislative acts); Littleton v. Berbling, 468 F.2d 389, 410 (7th Cir. 1972), rev'd on other grounds sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974) (state prosecutor's quasi-judicial immunity does not apply in situations where he is acting as a police investigator); Doe v. Lake County, 399 F. Supp. 553, 556 (N.D. Ind. 1975) (no judicial immunity where the suit is directed solely at administrative and ministerial duties); Wade v. Bethesda Hospital, 356 F. Supp. 380, 382-83 (S.D. Ohio 1973) (no judicial immunity where the judge has acted in absence of all jurisdiction).


74. See Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Considerations supporting this policy "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Id. at 423. The prosecutor's immunity extends to initiation of the prosecution and presentation of the state's case. The majority of courts facing the question anticipated the holding in Imbler by extending the immunity to prosecutors. See, e.g., Tyler v. Witkowski, 511 F.2d 449, 450-51 (7th Cir. 1975); Barnes v. Dorsey, 480 F.2d 1057, 1060 (8th Cir. 1973); Fanale v. Sheehy, 385 F.2d 866, 868 (2d Cir. 1967); Carmack v. Gibson, 363 F.2d 862, 864 (6th Cir. 1966); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967).
action for malicious prosecution. The policy underlying the immunity was expressed as follows:

The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions.

Although the court was immediately concerned with the immunity of a special assistant to the Attorney General of the United States, the same policy is applicable to other judicial and quasi-judicial officers. This immunity extends only to actions for damages, there being no public policy to be served by federal courts withholding injunctive relief from continuing deprivations of constitutional rights.

Judges have long enjoyed absolute immunity from common-law damage liability for tortious acts committed within their judicial capacity, "even when the conduct has been corrupt, or malicious and intended to do injury." As a general rule, quasi-judicial public officials are also immune from tort liability for acts committed while performing a discretionary function. This immunity is not extended, however, where the official exceeds his delegated authority. Thus, parole board members may be immune from suit under section 1983 for damages.

75. 12 F.2d 396 (2d Cir.), aff'd per curiam, 275 U.S. 503 (1926).
76. Id. at 405.
77. Id.
78. See McGuire v. Todd, 198 F.2d 60, 63 (5th Cir. 1952) (city attorneys and corporation court judge); cf. Papagianakis v. The Samos, 186 F.2d 257, 260 (4th Cir. 1950) (immigration inspector); Cooper v. O'Connor, 99 F.2d 135, 141 (D.C. Cir. 1938) (United States District Attorney).
83. McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972); Silver v. Dickson, 408 F.2d 642, 648 (9th Cir. 1968); Bricker v. Parole Board, 405 F. Supp. 1340, 1345 (E.D. Mich. 1975); Franklin v. Shields, 399 F. Supp. 309, 319 (W.D. Va. 1975). This immunity does not extend to witnesses at parole release or revocation hearings, however, who nonetheless escape liabil-
Only the Third and Fourth Circuits have extended absolute immunity to court-appointed attorneys.84 Other courts have denied immunity but have withheld liability by holding that, whether the attorney is an employee of a public defender's office85 or a private attorney representing a defendant by employment or by appointment,86 he too is not, in that capacity, acting "under color of state law."87

Absolute immunity from suit under section 1983 also has been extended by most courts to court clerks.88 It has not been extended, however, by the Fourth Circuit. In McCray v. Maryland,89 the clerk was accused of negligence impeding the plaintiff's filing of a petition for post-conviction relief. The court attempted to distinguish its holding from two other cases90 where clerks were granted immunity because their "actions were taken in discharge of [their] lawful duties as court clerk—not in neglect of those duties."91 However, the case cannot be similarly distinguished from Davis v. McAteer92 where the clerk was granted immunity even though he had

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(a) the need to recruit and hold able lawyers to represent clients . . . , and (b) the need to encourage counsel in the full exercise of professionalism, i.e., the unfettered discretion in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests might be advanced.


87. See generally section II.B., notes 20-24 and accompanying text supra.


91. McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972).

92. 431 F.2d 81, 82 (8th Cir. 1970).
lost the plaintiff's files. Two factors appear to have been given controlling weight by the court in McCray. First, "too wide a scope of protection to state officials would effect a judicial repeal of section 1983's congressional purpose". Secondly, the defendant's performance already was subject under state law to a $200 forfeiture for "'neglectfully or willfully' failing to perform such ministerial duties as making 'proper entries of all proceedings in the court of which he is clerk.'" The defendant's liability for damages under state law upon the facts of this case may have caused the second factor above to be determinative.

4. Qualified Executive Immunity

As in the case of absolute immunity for judges, legislators and prosecutors, qualified executive immunity is a common-law tort principle which the courts have applied by analogy in civil rights litigation under section 1983. At least for the purposes of analysis and proper pleading, this immunity from suit must be distinguished from the defense of good faith and probable cause. Although both have a requirement of good faith, the former applies to actions seeking relief from the discretionary activities of administrative personnel while the latter applies to actions involving the ministerial activities of lower-echelon personnel. Finally, it should be noted that this immunity, as is the case with sovereign immunity under the eleventh amendment, will not bar an action for injunctive relief in any event. It may only serve to bar actions for damages where its elements have been met by the defendant official.

Before 1974, the Supreme Court had set no specific standard for immunities available to state administrative officials facing suit in section 1983 actions. As a consequence, the immunities recognized among the lower courts varied widely, some granting no immunity whatsoever, some granting a limited immunity and others granting a broad immunity.

93. 456 F.2d at 3.
94. Id. at 4.
97. See, e.g., Sostre v. McGinnis, 442 F.2d 178, 205 n.51 (2d Cir. 1971) (en banc) ("As state administrative officials, defendants are not entitled to protective immunity from a judgment for damages that has been extended to judges... and legislators... "); cf. Whirl v. Kern, 407 F.2d 781, 793 (5th Cir. 1969).
98. See, e.g., Skinner v. Spellman, 480 F.2d 539 (4th Cir. 1973), where a good faith reliance test was applied to a prison official.
99. See, e.g., Johnson v. Alldredge, 488 F.2d 820, 824, 826 (3d Cir. 1973), where the court
The conflict of standards may be attributed to two opposing policy considerations which the courts may have had difficulty balancing: (1) officials should not be liable for honest mistakes in judgment; (2) absolute immunity from damages would deny damage recoveries otherwise recoverable by persons who had clearly been wrongfully deprived of their constitutional rights.

During its 1974 term, the Supreme Court had occasion to reconcile these conflicting standards in Scheuer v. Rhodes and Wood v. Strickland. In Scheuer the Court held that a governor and his subordinates were immune from an award of damages in a section 1983 action for acts committed within the bounds of their lawfully delegated discretionary authority, provided the action was taken in good faith and with a reasonable belief of its constitutionality. This broad formula was restricted in Wood, which also applied a two-prong test. Under the Wood test, a school administration official would lose his immunity from damages liability 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.

The Wood test is more restrictive than Scheuer because it tends to equate infringement of settled indisputable law with malice. That is, by holding the defendant vulnerable to damage suits for actions which he "reasonably should have known" would offend settled constitutional rights, Wood treats both the intentional and unintentional wrongdoer alike. Courts will disagree, however, concerning what rights retained by prisoners are so settled as not to be beyond dispute within the context of varying factual

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applied the test first announced in Barr v. Matteo, 360 U.S. 564 (1959), to a prison warden. Under Barr, an administrative official is immune from liability for damages liability if (1) his actions have a "policy-making or judgmental element" and (2) his allegedly wrongful acts "within the outer perimeter" of his official duties. 360 U.S. at 573-76.

102. 416 U.S. at 248.
103. Id. at 247-48. The Court required consideration of an additional variable: "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." Id. at 247.
105. 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.

Id. at 321.
situations.\textsuperscript{106} The knowledge requirement does not extend to "predicting the future of constitutional law."\textsuperscript{107}

Although the Supreme Court expressly limited its test in \textit{Wood} to "the specific context of school discipline,"\textsuperscript{108} the Court has already extended the test's application to mental hospital superintendents.\textsuperscript{109} Moreover, \textit{Wood} has also been extended to prison officials by both the Fourth\textsuperscript{110} and Seventh Circuits.\textsuperscript{111} The Third Circuit applies the \textit{Scheuer} test,\textsuperscript{112} but still uses \textit{Barr v. Matteo}\textsuperscript{113} for guidance as it had previously.\textsuperscript{114} Because the \textit{Scheuer} test addressed itself to the broad category of "officers of the executive branch of government"\textsuperscript{115} while \textit{Wood} limited itself to a smaller category, \textit{Scheuer} may be said to apply in the other circuits until those courts hold otherwise.

\section*{C. Good Faith and Probable Cause}

The defense of good faith and probable cause is properly applicable only to damage actions brought against lower-echelon personnel performing ministerial duties. The largest categories of defendants for which the defense is available are police officers,\textsuperscript{116} followed by legislative clerks\textsuperscript{117} and prison officials.\textsuperscript{118} Just as with sovereign, absolute and qualified executive

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\item \textsuperscript{107} 420 U.S. at 322, \textit{quoting} Pierson v. Ray, 386 U.S. 547, 557 (1967).
\item \textsuperscript{108} 420 U.S. at 322.
\item \textsuperscript{109} See O'Connor v. Donaldson, 422 U.S. 563, 577 (1975).
\item \textsuperscript{110} See Gray v. Swinson, No. 74-1752, slip op. at 6 (4th Cir. 1975).
\item \textsuperscript{111} See Knell v. Bensinger, 522 F.2d 720, 724-25 (7th Cir. 1975).
\item \textsuperscript{112} See Fidler v. Rundle, 497 F.2d 794, 798 (3d Cir. 1974).
\item \textsuperscript{113} 360 U.S. 564, 573 (1959).
\item \textsuperscript{114} Johnson v. Aldredge, 486 F.2d 820, 824, 826 (3d Cir. 1973).
\item \textsuperscript{115} 416 U.S. at 246-47.
\item \textsuperscript{116} \textit{See generally} Pierson v. Ray, 386 U.S. 547, 556-57 (1967); Pritchard v. Perry, 508 F.2d 423, 426 (4th Cir. 1975); Street v. Surdyka, 492 F.2d 368, 373-74 (4th Cir. 1974); Hill v. Rowland, 474 F.2d 1374, 1376-77 (4th Cir 1973). In \textit{Pierson v. Ray}, the Supreme Court extended the police officer's common-law defense of good faith and probable cause to a section 1983 action. 386 U.S. at 556-57. The Court held that a police officer might be "excused . . . from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional. . . ." \textit{Id.} at 555.
\item \textsuperscript{117} \textit{See, e.g.}, Eslinger v. Thomas, 476 F.2d 225, 228-30 (4th Cir. 1973).
\item \textsuperscript{118} \textit{See generally}, McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975); Skinner v. Spell-
immunity, it would seem the defense should not extend to claims for injunctive or declaratory relief. Furthermore, the defense is not one which must be dispelled by the plaintiff, but one which the defendant must plead and prove affirmatively.

In the Fourth Circuit there appears to be little or no difference between the defense applied to lower-echelon personnel performing ministerial duties and the "immunity" applied to executive personnel. Indeed, only Gray v. Swinson suggests that even a semantic distinction should be made when prison officials are involved. Instead of a dichotomy of tests, it appears that only one test is being applied. The test is one of reasonable good faith reliance on governing standards. Those standards may be statutes, existing operating procedures or regulations which are valid at the time of the defendant's action or even, in certain instances, customs.

Defendants pleading a reasonable good faith reliance defense must make a satisfactory explanation of their actions. The defendant must prove that he subjectively believed that his conduct was constitutionally permissible at the time of the action "and that such belief, given the state of the law at the time of the incidents, was reasonable." However, certain conduct may be "of such a shocking nature that no reasonable man could have believed that [it was] constitutional."

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120. See McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975); Pritchard v. Perry, 508 F.2d 423, 426 (4th Cir. 1975); accord, Cohen v. Norris, 300 F.2d 24, 32 (9th Cir. 1962).

121. No. 74-1752, slip op. at 6 (4th Cir. 1975).


123. See Gray v. Swinson, No. 74-1752, slip op. p. 3 (4th Cir. 1975) McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975); Skinner v. Spellman, 480 F.2d 539, 540 (4th Cir. 1973); Nix v. Paderick, 407 F. Supp. 844, 846 (E.D. Va. 1976); Landman v. Royster, 354 F. Supp. 1302, 1317-18 (E.D. Va. 1973). In Landman v. Royster, the same defense applied to police in Pierson was applied to the Director of the Virginia Division of Corrections whose liability arose from discretionary rather than ministerial activity. Id. In McCray the defendant was a prison guard. The same defense was held applicable in his case.


127. Id. at 1318. Among the practices the Landman court found "of such a shocking nature" were the imposition of bread and water diets, extended periods of solitary confinement and placing prisoners in hot roach-infested cells.
D. Improper Parties

The majority of the federal circuit courts have held that the doctrine of respondeat superior is inapplicable to supervisory officials sued for money damages in section 1983 actions.\textsuperscript{128} A number of courts have imposed vicarious liability, however, where such liability is imposed by state law.\textsuperscript{129} Vicarious liability has also been applied where the defendant has failed to exercise command responsibilities\textsuperscript{130} and where the defendant has committed repeated acts of negligence.\textsuperscript{131} If the plaintiff should allege that the defendant is liable under the doctrine, the defendant usually may raise the general rule of non-applicability of respondeat superior by a motion to dismiss.\textsuperscript{132}

Personal involvement usually is required of an official before he can be held liable for the acts of his subordinates.\textsuperscript{133} But this requirement may be met "not only when the superior personally directs his subordinates to do acts, but also when he has actual knowledge of their acts and acquires in them."\textsuperscript{134} It may also be met if the plaintiff asserts nonfeasance on the superior's part to oversee enforcement of the laws and regulations "which, if found to be true and to have proximately caused or contributed to the injuries claimed, may sustain liability therefor."\textsuperscript{135} The burden of proof is on the plaintiff to prove these allegations.\textsuperscript{136} But even if the plaintiff should


The Supreme Court has not . . . directly considered the issue of whether a claim under § 1983 may be predicated upon the creation or codification of a state right to sue an individual on the theory of vicarious liability. . . . [T]he application of [the] state statute in this case for the purpose of determining the scope of liability established in § 1983 would expand rather than supplement the provisions of § 1983 and would be inconsistent with the Congressional intent in enacting that legislation.

\textit{Id.} at 785 (footnote omitted).

130. See, e.g., Burton v. Waller, 502 F.2d 1261, 1285 (5th Cir. 1974).

131. See, e.g., Taylor v. Perini, 503 F.2d 899, 903 (6th Cir. 1974).


134. \textit{Id.}


136. \textit{Id.}
fail to produce sufficient facts to support his allegations, the court may still be reluctant to dismiss the action.\textsuperscript{137}

E. \textbf{Statute of Limitations}

A motion to dismiss will be granted if the action is barred by the statute of limitations. Since Congress specified no statutory period for section 1983 claims, the courts have had to look elsewhere. In these circumstances, the courts usually apply the limitations statute of the state in which the claim arose.\textsuperscript{138} The Supreme Court upheld this practice in \textit{O'Sullivan v. Felix}.\textsuperscript{139} However, the local statute will not be applied if it is so unusually short as to operate to burden the assertion of federally created rights.\textsuperscript{140} Nor should the statute be applied if it discriminates against the federal cause of action by applying a substantially shorter limitations period than that applied by state law to an analogous state cause of action.\textsuperscript{141}

In \textit{Almond v. Kent},\textsuperscript{142} the Court of Appeals for the Fourth Circuit applied Virginia's two-year personal injuries limitation statute\textsuperscript{143} to a state prisoner's section 1983 action. However, the court was careful to emphasize that the statute applied "not because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten."\textsuperscript{144} That is, although the court applied the same limitations provision which the state applied to personal injury actions, it asserted that a constitutional deprivation is of singular importance. The court suggested that Virginia enact a separate section 1983 statute of limitations,\textsuperscript{145} emphasizing that "a Section 1983 action is . . . 'more serious than a violation of a state right . . . even though the same act may constitute both a state tort and the deprivation of a constitutional right.'"\textsuperscript{146} The Virginia legislature chose not to recognize a section 1983 action as so serious, and instead expressly provided for only a one-year limitations period for such

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} See Annot., 98 A.L.R.2d 1160, 1161 (1964).

\textsuperscript{139} 233 U.S. 318, 322 (1914). "That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the State . . . ." \textit{Id.}


\textsuperscript{142} 459 F.2d 200 (4th Cir. 1972).


\textsuperscript{145} 459 F.2d at 203 n.3.

actions.\textsuperscript{147} The federal district courts in Virginia have held the one-year limitation statute unconstitutional,\textsuperscript{148} one of them noting that "a state limitation period which evidences hostility or discrimination toward a federal cause of action will not be adopted by federal courts."\textsuperscript{149} The two-year limitations period applied in Almond, therefore, remains intact.\textsuperscript{150}

F. MOOTNESS

The federal courts have no power "to decide questions that cannot affect the rights of litigants in the case before them."\textsuperscript{151} Thus, questions of mootness must be resolved before a federal court may exercise jurisdiction.\textsuperscript{152} Courts encountering mootness questions, however, have drawn distinctions between actions brought by individual plaintiffs suing on their own behalf and actions brought by individuals suing on behalf of a class. When a plaintiff suing on his own behalf has obtained remedial relief before the court has had the opportunity to review his complaint, the court must not approach the merits because "[t]he controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'"\textsuperscript{153} However, under the "continuing circumstances" doctrine, the court may find jurisdiction to proceed to the merits if the defendant's activities are held to raise constitutional questions capable of repetition between the parties, but evasive of review.\textsuperscript{154} The Supreme Court declined to make such a

\begin{footnotesize}
\begin{enumerate}
\item The Fourth Circuit recently had the opportunity to rule on the constitutionality of the Virginia statute, but chose not to do so. See Vinnedge v. Gibbs, No. 74-2021, slip op. at 9 (4th Cir. Jan. 6, 1977).
\item North Carolina v. Rice, 404 U.S. 244, 246 (1971).
\item Id.
\item See Super-Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 122-23 (1974); Rosario v. Rockefeller, 410 U.S. 752, 758 n.5 (1973); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972). It has been suggested that this exception to the mootness doctrine parallels the overbreadth doctrine in that both constitute an abandonment of rigid Article III constraints on judicial review . . . beyond the confines of the [Marbury v. Madison] model.
\end{enumerate}
\end{footnotesize}
finding in *Preiser v. Newkirk.* A state prisoner who had been transferred without a hearing or explanation from a medium-security to a maximum-security institution brought suit under section 1983 against prison officials for declaratory and injunctive relief. The officials instituted corrective procedures before the district court heard the case. The Supreme Court affirmed the district court's finding that the matter was moot, holding that although there might be a remote possibility that the corrections officials would disregard their earlier corrective measures, "such speculative contingencies afford no basis for our passing on the substantive issues [Newkirk] would have us decide." 

If the plaintiff has brought a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, the court may proceed to the merits even if at the time of review the named plaintiff no longer has a personal stake in the outcome, provided he satisfies certain criteria established by the Supreme Court in *Sosna v. Iowa.* It is thus important that the district court apply special measures to protect members of the class not before the court. Rule 23(d), which relates to notice, and Rule 23(e), which requires court approval for the dismissal or compromise of a class action, provide the district court with such special discretionary powers. The latter is especially crucial to the maintenance of the action.

One of the criteria established in *Sosna,* that the named plaintiff must have a case or controversy at the time of certification in order to comply with article III of the Constitution, was qualified to the extent that, in cases where the named plaintiff's controversy has been rendered moot before certification, "whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the

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155. See supra. 343 U.S. 326, 333 (1952); accord, Gates v. Collier, 501 F.2d 1291, 1321 (5th Cir. 1974). But even where the particular activity complained of is not capable of repetition, a claim for money damages may not be rendered moot. See, e.g., Cruz v. Estelle, 497 F.2d 496, 499 (5th Cir. 1974); Morris v. Weinberger, 401 F. Supp. 1071, 1075-76 (D. Md. 1975).


159. 419 U.S. 393, 402-03 (1976).


161. Id. 23(e).

issue would evade review." The "reality of the claim" requirement might be satisfied in those cases where the claim could rarely be certified before the action was rendered moot. The Supreme Court has not yet indicated the proportions of this qualifying statement. In such instances, it should be assumed during the interim between filing and certification that there is a "class action for purposes of dismissal or compromise under 23(e) unless and until a contrary determination is made under 23(c)(1)." However, intervention was employed prior to Sosna and has been employed since in order to circumvent the problem.

G. Res Judicata and Collateral Estoppel

Convicts are not civilly dead in Virginia. However, actions on their behalf must be brought by a court-appointed committee unless the suit was instituted by or against the convict prior to his conviction. Appointment of a committee is not required in section 1983 actions. Because the Supreme Court has expressed itself only in dicta on the question, the lower federal courts have developed differing approaches to the issue of whether res judicata effects should attach to prior state judicial proceedings in a subsequent action brought under section 1983. Three approaches have been suggested. One is to apply traditional notions of claim preclusion. In Goodrich v. Supreme Court, for example, the petitioner was barred from federal court litigation because he had raised identical consti-

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163. 419 U.S. at 402 n.11.
165. See Fed. R. Civ. P. 24. Intervention may be permissive or as a matter of right. See generally 5 WRIGHT & MILLER, supra note 7, at §§ 1906-13.
173. See Dorsey, Bender & Neuborne, 1 Political and Civil Rights in the United States 1617-18 (4th ed. 1976), from which the analysis below was borrowed.
tutional issues as a defense in a prior state court proceeding. In
*International Prisoners' Union v. Rizzo*,175 the petitioners were precluded
from raising any claim which could have been raised in a prior class action
suit tried in the state court.

A second approach was followed in *Moran v. Mitchell*.176 Although the
court recognized that "state criminal adjudication . . . of constitutional
rights act[s] to collaterally estop a § 1983 action based on the same
allegations,"177 it also recognized that estoppel might not be appropriate
"where the criminal defendant is unable to secure federal consideration of
his constitutional claims through federal habeas corpus."178 This approach
has been applied, then, where the section 1983 plaintiff was an
"involuntary party" in a previous state proceeding.179

A third approach is to apply collateral estoppel notions of issue rather
than claim preclusion.180 That is, "[a]ny issue which was actually litiga-
ted, or the resolution of which was necessary for decision in a previous
action between the same parties or their representatives, [would be] fore-
closed in a later suit on a different cause of action."181 The result in civil
rights actions would be the foreclosure of "questions of fact or conclusions
of law that were necessarily resolved in the course of a previous state
proceeding."182 The argument against claim preclusion may be expressed
as follows: (1) the federal remedy being a supplementary one, claim preclu-
sion would overrule the essence of section 1983; (2) the plaintiff should not
be forced to seek constitutional redress in a state court or statutory con-
struction in a federal court.183

The trend appears to be toward stricter application of the doctrines of
res judicata and collateral estoppel to section 1983 plaintiffs. For example,
the Fourth Circuit has held that issues raised by a petitioner in state court

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346 F.2d 219, 222 (5th Cir. 1965); C. Wright, LAW OF FEDERAL COURTS § 78 (2d ed. 1970).
177. Id. at 88.
178. Id.
179. See Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971). See also Jenson v. Olson,
353 F.2d 825, 827 (8th Cir. 1965).
180. See Lombard v. Board of Educ., 502 F.2d 631, 635-36 (2d Cir. 1974); Thistlethwaite
v. City of New York, 497 F.2d 339, 343-46 (2d Cir.) (Oakes, J., dissenting), cert. denied, 419
181. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of
FEDERAL PRACTICE ¶ 0.410 (Supp. 1976); see also Cromwell v. County of Sac, 94 U.S. 351, 353
(1876).
182. McCormack, supra note 181.
may be res judicata in a later section 1983 action. Elsewhere, the First Circuit has held that res judicata may apply to a section 1983 action to bar all grounds that might have been raised in an earlier case. It must be recognized, then, that res judicata and collateral estoppel may provide a very effective bar to section 1983 actions. The plaintiff must be very careful in selecting his forum. He must be particularly careful in light of the application of the nonintervention doctrine of Younger v. Harris to some civil cases, for its application might "bar any lower court federal review, since the primary vehicle for such review—a § 1983 action—would be barred by res judicata."

185. Lovely v. Laliberte, 498 F.2d 1261, 1263 (1st Cir. 1974).
186. In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court held that a federal court must refrain from enjoining pending state prosecutions absent a showing of bad faith or harassment by the federal defendant or other extraordinary circumstances. Id. at 54. "Pending state prosecutions" has been held to include the initiation of state proceedings before "proceedings of substance" on the merits in the federal courts have begun. Hicks v. Miranda, 422 U.S. 332, 349 (1975). Younger has also been held applicable to state civil proceedings in which state appellate remedies have not been exhausted, where those proceedings are "both in aid of and closely related to criminal statutes." Huffman v. Pursue, Ltd., 420 U.S. 592, 604, 609 (1975). The same requirement has also been held applicable to actions for federal declaratory relief. Samuels v. Mackell, 401 U.S. 66, 72-73 (1971). Such relief is appropriate, however, where no state prosecution is pending and a genuine threat of enforcement of the challenged statute is demonstrated. Steffel v. Thompson, 416 U.S. 452, 475 (1974). Finally, when both a state and a federal proceeding of substance on the merits are ongoing, federalism concerns may require the federal court to defer to the state court. Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975). For a thorough discussion of the Younger line of cases, see Note, Federal Equitable Restraint: A Younger Analysis in New Settings, 35 Md. L. Rev. 483 (1976).

Because the Younger doctrine, operating in conjunction with common-law principles of claim or issue preclusion, might well bar any subsequent federal trial court review of civil proceedings, it has been suggested that "either Younger should be held inapplicable to civil proceedings or res judicata should not apply to § 1983 litigation." DORSEN, BENDER & NEUBORNE, 1 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1618 (4th ed. 1976).