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Xii. Habeas Corpus And Prisoners' Rights

Since Rule 803(3) is an exception, the court should examine the consequences of admitting evidence under the rule more carefully and offer the protection of the hearsay rule to the defendant unless the proffered evidence clearly satisfies the conditions of a hearsay exception.

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XII. HABEAS CORPUS AND PRISONERS' RIGHTS

A. Federal Habeas Corpus

Federal courts may issue writs of habeas corpus[1] to protect federal prisoners' constitutional rights.[2] Gradually, the scope of federal habeas corpus review has been expanded[3] from a limited inquiry into the proper jurisdiction of the sentencing tribunal[4] to post conviction review of a judg-

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[1] The phrase "habeas corpus" refers to the common law writ of *habeas corpus ad subjiciendum*, known as the "Great Writ." Stone v. Powell, 428 U.S. 465, 474 n.6 (1976).

[2] State courts and federal courts share the responsibility of administering federal constitutional law. The doctrine of federal-state comity requires federal courts to defer consideration of federal constitutional questions raised in prosecutions under state law until state courts have fully considered those questions. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1048 (1970) [hereinafter cited as *Developments—Habeas Corpus*]. *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) [hereinafter cited as Bator].

[3] Congress extended federal habeas corpus jurisdiction to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. . . ." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Although the Act extended federal habeas corpus to persons in custody pursuant to state court judgments, the federal courts continued to limit consideration of the writ to the jurisdiction of the sentencing court. Stone v. Powell, 428 U.S. 465, 475 (1976); *see, e.g.*, Pettibone v. Nichols, 203 U.S. 192 (1906); Bergemann v. Backer, 157 U.S. 655 (1895). Federal courts may inquire into the legality of the confinement of any state prisoner, 28 U.S.C. § 2254(a) (1976), or any federal prisoner, 28 U.S.C. § 2255 (1976), who falls within the custody requirement of 28 U.S.C. § 2241(c)(3) (1976). *See, e.g.*, Peyton v. Rowe, 391 U.S. 54 (1968). *See generally Fourth Circuit Review*, 35 WASH. & LEE L. REV. 433, 564-84 (1978); *see also* Kaufman v. United States, 394 U.S. 217, 221 (1969) (habeas corpus extended to all constitutional claims of state prisoners); Fay v. Noia, 372 U.S. 391, 398-99 (1963) (adequate and independent state ground no longer precluded review of constitutional claim on habeas corpus); Townsend v. Sain, 372 U.S. 293, 312-18 (1963) (outlined circumstances necessitating fact-finding hearings on habeas corpus); Brown v. Allen, 344 U.S. 443, 471-76 (1953) (federal constitutional rights extended to states through fourteenth amendment are cognizable on habeas corpus); Moore v. Dempsey, 261 U.S. 86, 92 (1923) (habeas corpus extended to due process claims); *Ex parte* Siebold, 100 U.S. 371, 376-77 (1879) (habeas corpus appropriate to inquire into legality of imprisonment for violation of constitutionally questioned statute). Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE. L. J. 895 (1966); Note, *Applying* Stone v. Powell: *Full and Fair Litigation of a Fourth Amendment Habeas Corpus Claim*, 35 WASH. & LEE L. REV. 319, 320-23 (1978) [hereinafter cited as *Full and Fair Litigation*].

[4] At common law, the writ was used to insure that prisoners were properly charged and brought to trial within a specific time. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243-, 244-45 (1965); *see* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 341-61 (1952). The original grant of habeas

ment, focusing on whether constitutional rights were violated.[5] In *Stone v. Powell*,[6] the Supreme Court reversed this expansionary trend by limiting the substantive claims cognizable on federal habeas corpus review.[7] The *Stone* Court held that if a state provided a prisoner with an "opportunity for full and fair litigation"[8] of his fourth amendment claim,[9] he was not

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corpus jurisdiction to the federal courts was included in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 81-82, with the limitation that the writ only extend to prisoners held in custody by the United States. Early cases limited the use of the writ to testing the jurisdiction of the trial court. *Ex parte* Parks, 93 U.S. 18, 22 (1876).

[5] Bator, *supra* note 2, at 444-45. In Waley v. Johnston, 316 U.S. 101, 104-05 (1942), the Supreme Court abandoned the restraint of jurisdiction on habeas corpus, recognizing that the writ was available to consider the constitutionality of the conviction as well as the sentencing court's jurisdiction. *See* McFeely, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 535 (1976). *See generally* Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L. J. 50 (1956); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

[6] 428 U.S. 465 (1976). In *Stone*, the petitioner was arrested for violating a vagrancy ordinance, but was later charged with murder and convicted on the basis of evidence seized during a search incident to the vagrancy arrest. *Id.* at 469-70. The petitioner alleged that the evidence should have been excluded because the vagrancy ordinance was unconstitutional and therefore his arrest was illegal. *Id.* at 470. The federal district court denied his petition for habeas corpus, concluding that even if the vagrancy ordinance was unconstitutional, the deterrent purpose of the exclusionary rule did not require its application to bar the admission of evidence obtained incident to a valid arrest. *Id.* The Ninth Circuit reversed the district court's ruling, Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), concluding that the vagrancy ordinance was unconstitutionally vague, that the petitioner's arrest was therefore illegal, and that although the exclusion of the evidence would serve no deterrent purpose with regard to police officers who were enforcing statutes in good faith, exclusion would serve the public interest by deterring legislators from enacting unconstitutional statutes. *Id.* at 98.

[7] 428 U.S. 494. The Supreme Court restricted the scope of federal habeas corpus review by denying federal habeas corpus relief when a state had provided an opportunity for full and fair litigation of a petitioner's fourth amendment claim. *Id.* After considering the burden imposed on the federal judicial system by habeas corpus proceedings, the Court concluded that since application of the exclusionary rule, *see* note 9 *infra*, was not literally required by the fourth amendment, *see, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976), the reconsideration of fourth amendment claims on collateral review was not constitutionally compelled. *Id.* at 481. *See generally Full and Fair Litigation, supra* note 3, at 327. The Supreme Court's previous treatment of federal habeas corpus affected only isolated procedural areas, *e.g.*, Tollet v. Henderson, 411 U.S. 258 (1973) (inadequacy of counsel in case involving guilty plea renders case cognizable on habeas corpus).

[8] *See* notes 11, 26, 28 & 33, *infra*; text accompanying note 37 *infra*. *See generally* Comment, *Circuits Split over Application of* Stone v. Powell's *"Opportunity for Full and Fair Litigation,"* 30 VAND. L. REV. 881 (1977) [hereinafter cited as *Circuits Split*]; *Full and Fair Litigation, supra* note 3, at 330.

[9] The constitution provides that "[t]he 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. The exclusionary rule is the judicially created remedy for violations of this constitutional right. 428 U.S. at 486, *citing* United States v. Calandra, 414 U.S. 338 (1974). Implementation of the exclusionary rule enforces the fourth amendment proscription against illegal search and seizure by prohibiting the introduction of evidence gained as a result of a fourth amendment violation. *Id.* at 482. However, application of the exclusionary rule had been partially limited prior to *Stone*. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348-52 (1974) (fourth amendment does not preclude presentation of illegally

entitled to habeas corpus relief.[10] The *Stone* opinion, however, provided few guidelines on the proper application of the opportunity for full and fair litigation standard in habeas corpus proceedings.[11] The Court's failure to clearly define this standard has left the task of construing the "opportunity for full and fair litigation" standard to the lower federal courts.

The Fourth Circuit addressed the "opportunity for full and fair litigation" standard for the first time in *Doleman v. Muncy*,[12] and denied federal habeas corpus relief since the applicable state practice afforded petitioner an opportunity to raise his fourth amendment claims.[13] In *Doleman*, the petitioner was arrested for armed robbery[14] after he and two companions were stopped and ordered out of their vehicle by police.[15] A witness[16] who

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seized evidence in grand jury proceedings). *See generally* Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974) (due process requires exclusionary rule be deemed personal constitutional right); Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484 (propriety of entertaining fourth amendment claims on habeas corpus).

[10] 428 U.S. at 494. *See generally* Boyte, *Federal Habeas Corpus after* Stone v. Powell: *A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291 (1977); Note, *Recent Developments*—Stone v. Powell—*Federal Habeas Corpus and Fourth Amendment Claims*, 41 ALB. L. REV. 172 (1977).

[11] Although the Court did not define the full and fair litigation standard, it indicated that Townsend v. Sain, 372 U.S. 293 (1963), was relevant in determining when full and fair litigation had been provided. 428 U.S. at 494 n.36. In *Townsend*, the Court outlined circumstances in which a federal court must grant an evidentiary hearing to a habeas corpus petitioner. 372 U.S. at 313. *See also* 28 U.S.C. § 2254(d) (1976). The *Townsend* criteria provided a definition of adequacy for state fact finding proceedings. The "adequacy" of the proceedings depended on the procedures and opportunities available to the petitioner at trial and on direct review as well as the extent to which the petitioner took advantage of those opportunities. *Developments—Habeas Corpus, supra* note 2, at 1123 n.47. Under *Townsend*, "fullness" and "fairness" can be equated with procedural due process. The *Townsend* decision outlines the criteria required in fact finding hearings to meet the "full and fair" standard and thus comply with procedural due process. Because the *Townsend* definition of fullness and fairness is relevant to *Stone*, 428 U.S. at 494 n.36, the "opportunity for full and fair litigation" standard would require habeas corpus review of a fourth amendment claim whenever procedural due process had been denied in the state system. "Full" and "fair," when used by the Supreme Court, have been interpreted to require a procedure which satisfies the minimum constitutional requirements of procedural due process. M. FORKOSCH, CONSTITUTIONAL LAW 183, 202 n.48 (2d ed. 1969).

[12] 579 F.2d 1258 (4th Cir. 1978).

[13] *Id.* at 1265. Since Doleman lacked the benefit of the Fourth Circuit interpretation of the full and fair litigation standard, the court remanded the case to allow Doleman to file a second amended petition for a writ of habeas corpus. *Id.* at 1266.

[14] Doleman was sentenced by a Virginia state court, following a trial without a jury, to serve a term of twelve years for armed robbery. *Id.* at 1261.

[15] *Id.* at 1260. The Fourth Circuit relied exclusively on the statement of facts appearing in Doleman's two *pro se* petitions and inferences drawn therefrom. No answer was required from the state, and no part of the state record was before the court. Therefore, the Fourth Circuit was not certain of the validity of facts before it.

Doleman's petitions contained no explanation of why the officers stopped the car or who owned the car. Doleman contended, however, that his arrest was not based upon probable cause and that the seized evidence and the witness' identification of him should have been suppressed. *Id.* at 1260 n.3.

had seen the crime apparently identified them as the robbers.[17] The police then conducted a warrantless search of the vehicle.[18] During Doleman's trial for armed robbery, the prosecution allegedly introduced evidence obtained from that search after the court overruled Doleman's motion to suppress.[19] Doleman was subsequently convicted in state court of armed robbery and was denied review by the Supreme Court of Virginia[20] as well as by the United States Supreme Court.[21] The federal district court dismissed Doleman's federal habeas corpus petition. That court found that his fourth amendment claims[22] were barred by the Supreme Court holding in *Stone v. Powell,* and that he had not pleaded sufficient facts in his petition to demonstrate that the witness' pretrial identification of him was unconstitutionally prejudicial.[23]

On appeal to the Fourth Circuit, Doleman argued that *Stone* required a two-step procedural analysis, regardless of the court's substantive interpretation of *Stone.* Doleman contended that the court should first consider whether the state prisoner was given a full and fair hearing on his fourth amendment claim.[24] If he was not given such a hearing, Doleman contended that the court should then consider whether he was given the opportunity for one.[25] Doleman offered two substantive interpretations of *Stone's* "opportunity for full and fair litigation" standard. Doleman's first interpretation required a district court to review thoroughly the state court record to determine if all required procedural steps were taken.[26] If the

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[18] The Fourth Circuit was unable to ascertain whether the witness was an eyewitness to the armed robber or a victim. *Id.* at 1260.

[17] *Id.; see* note 15 *supra.*

[18] 579 F.2d at 1260; *see* note 15 *supra.*

[19] 579 F.2d at 1260; *see* note 15 *supra.* Doleman alleged that the arresting officers obtained evidence by illegally searching defendant's car without permission, a search warrant, or probable cause to look for weapons. *Id.*

[20] Doleman v. Virginia, 216 Va. lxv (1976).

[21] Doleman v. Virginia, 429 U.S. 929 (1976).

[22] Doleman's fourth amendment claims concerned the introduction of evidence allegedly obtained during the search following his illegal arrest. However, Doleman's petition did not specify what evidence he referred to. 579 F.2d at 1260 n.8; *see* text accompanying notes 14-19 *supra.*

[23] Doleman contended that the suggestive nature of the pretrial show up violated his due process rights under the fifth and fourteenth amendments. The Fourth Circuit held that the admissability test outlined in Stovall v. Denno, 388 U.S. 293 (1967) (due process violations in pretrial identification proceedings to be judged by totality of the circumstances), should be applied to the identification issue to ascertain if an issue of constitutional magnitude was presented. 579 F.2d at 1266, 1267. The court remanded the identification issue, instructing the district court to allow Doleman to detail the facts which support his assertion that the show up was unconstitutional. *Id.*

[24] 579 F.2d at 1263.

[25] *Id.*

[26] Doleman's first interpretation was based on the Fifth Circuit's interpretation of *Stone* in Graves v. Estelle, 556 F.2d 743 (5th Cir. 1977). The *Graves* court rejected a literal application of *Townsend* as the sole measure of full and fair consideration when legal rather than factual questions were at issue, *id.* at 476, since *Stone* mandated only an opportunity for full and fair adjudication in state court, and did not require actual adjudication. *Id.* at 746. The court did agree, however, that *Townsend* was of some help in defining the full and fair

state had adhered to the proper procedure, the state prisoner would not be entitled to an inquiry into the substantive merits of his fourth amendment claim.[27] The second substantive interpretation urged by Doleman also required a thorough review of the state record, but focused on whether the proceedings allowed a full and fair resolution of the fourth amendment claim.[28] Thus, the district court would be permitted to examine the merits of the petitioner's claim to determine if they were fully and fairly litigated. If the record revealed that they were not, the district court would decide whether the state provided an opportunity for full and fair litigation. If the court found that such an opportunity was not afforded, it may then consider the merits of the claim.[29]

The state contended that the district court correctly interpreted *Stone* and properly dismissed Doleman's petition.[30] The state argued that the *Stone* Court was concerned with the adequacy of state procedures, not with the results of the hearing on the fourth amendment claim.[31] Thus, the state reasoned that federal courts should not review state court convictions unless the petitioner shows that he was denied an opportunity to fully and fairly litigate his fourth amendment claims in the state court.[32] If an adequate procedural vehicle was provided by the state, *Stone* would require the district court to deny the petition for habeas corpus relief.[33]

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standard. *Id., citing* O'Berry v. Wainwright, 546 F.2d 1204, 1211 (5th Cir. 1977), *cert. denied,* 433 U.S. 911 (1978). The *Graves* court concluded that to allow a federal district court to overrule a state court's resolution of whether there was probable cause to admit evidence obtained in a particular search conflicts with *Stone's* declaration that federal courts are to regard state judges as being as capable as federal judges to uphold the fourth amendment values. 556 F.2d at 746.

[27] 556 F.2d at 746.

[28] Doleman's second interpretation was based on the Second Circuit's decision in Simmons v. Clemente, 552 F.2d 65 (2d Cir. 1977). In *Simmons,* the state supreme court refused to hear testimony on petitioner's fourth amendment claim after holding that the state trial court's findings were fairly supported by the record. *Id.* at 68-69. Because no "serious procedural errors" were found in the state supreme court's refusal to consider Simmons' fourth amendment claims, the Second Circuit denied habeas corpus relief, holding that the state courts had provided the opportunity for full and fair litigation where the petitioner's claim was decided on the merits in the trial court and no inadequacies were found in the state appellate procedures. *Id.* at 69. Thus, the *Simmons* court seemed to require that the claim be considered on the merits by the state courts either at trial or on direct review.

[29] 579 F.2d at 1263.

[30] *Id.* at 1264.

[31] *Id.*

[32] *Id.*

[33] The state relied on decisions in other circuits to support its conclusion that the district court should focus on the opportunity portion of the standard. Gates v. Henderson, 568 F.2d 830, 833 (2d Cir. 1977), *cert. denied,* 434 U.S. 1038 (1978); Dupont v. Hall, 555 F.2d 15 (1st Cir. 1977). In *Dupont,* the petitioner contended that he was denied an opportunity for full and fair litigation because the state court erred in its decision by finding the existence of probable cause in a highly arguable situation. The First Circuit held, however, that since the state court found probable cause and the conviction was affirmed on appeal, *Stone* precluded the court from considering the claim on habeas corpus. 555 F.2d at 17. The state also relied on the en banc decision of Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977), to support its interpretation that *Stone* required "opportunity" to be analyzed before "full and fair hear-

The Fourth Circuit affirmed the district court, adopting the state's construction of the "opportunity for full and fair litigation" standard.[34] The court specifically held that a district court, facing allegations presenting fourth amendment claims[35] on habeas corpus petition under 28 U.S.C. § 2254[36] should first consider whether or not the petitioner was afforded an opportunity to raise those claims under the applicable state practice.[37] Noting that the state practice applicable to Doleman's case provided him with a mechanism for raising his fourth amendment claim,[38] the Fourth Circuit concluded that Doleman's petition was properly denied.[39] Moreover, the court held that the district court need not inquire further into the merits of a petitioner's case unless he alleged in his petition that his opportunity for a full and fair litigation had been impaired.[40] The Fourth Circuit concluded that the burden is on the defendant to plead and prove[41] the facts which support his contention that he did not receive an opportunity for a full and fair litigation of his fourth amendment claim.[42]

The *Doleman* court's interpretation of the "opportunity for full and fair litigation" standard is consistent with the reasoning in *Stone*.[43] By focusing

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ing." In *Gates*, the Second Circuit focused on the "opportunity" aspect, noting that Gates had not argued that New York statutes failed to provide the requisite procedural devices which were necessary to afford him an opportunity to raise his fourth amendment claims. *Id.* at 837. In fact, New York statutes expressly provided a mechanism for the suppression of evidence which was allegedly obtained in violation of the fourth amendment. *Id.* Thus, Gates had the opportunity at trial to raise his fourth amendment claims. The *Gates* court did indicate two instances in which *Stone* would not preclude federal habeas corpus review. Habeas corpus review is available if the state does not provide corrective procedures to redress fourth amendment violations, *id.* at 840; *see* United States *ex rel.* Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976), *rev'd*, 562 F.2d 903 (3d Cir. 1977), and where the state provides a corrective process which the defendant is precluded from utilizing because of an unconscionable breakdown in the state process. 568 F.2d at 840; *see* Frank v. Mangum, 237 U.S. 309 (1915); Bator, *supra* note 2, at 456-57.

[34] 579 F.2d at 1265. The court specifically stated that it agreed with Second Circuit's decision in *Gates*. *Id.*; *see* note 33 *supra*.

[35] Since *Stone's* restriction on the scope of habeas corpus relief was based on the diminishing value of the exclusionary rule, *see* note 7 *supra*, and the increasing costs of its application in collateral review, the *Stone* rationale cannot be extended to restrict habeas corpus claims based on other constitutional rights. *See* Boyte, *supra* note 10, at 298.

[36] 28 U.S.C. § 2254(a) (1976) allows federal courts to inquire into the legality of the confinement of a state prisoner.

[37] 579 F.2d at 1265. The Fourth Circuit stated that the applicable state court practice should be determined from applicable state court decisions, relevant state statutes and from judicial notice of state practice by the district court. *Id.*

[38] *Id.*; *see* VA. CODE § 19.2-60 (1950); VA. S. CT. R. 3A:28 (Supp. 1971).

[39] 579 F.2d at 1265.

[40] *Id.* Impairment of the "opportunity" could result from the absence of a state procedure for considering fourth amendment violations. *Id.* at n.14. Impairment could also arise where the defendant is unable to utilize the corrective process because that process malfunctions. However, the defendant may not allege impairment of his opportunity to fully and fairly litigate if he deliberately by-passes the state's procedure. *Id.*

[41] The burden placed on the petitioner to plead the impairment is consistent with Stone v. Powell, 428 U.S. 465, 494 n.37 (1976).

[42] 579 F.2d at 1265.

[43] *See* note 7 *supra*.

on the opportunity to raise a fourth amendment claim, the court limited the inquiry required in habeas corpus proceedings to an analysis of the state procedures for raising fourth amendment claims.[44] Thus, even if fourth amendment claims are never litigated in state court proceedings, a prisoner is precluded from habeas corpus relief if he had the opportunity to raise those claims unless that opportunity was impaired for some reason other than a deliberate bypass of the procedure provided by the state.[45] This interpretation of the opportunity for full and fair litigation standard also comports with decisions in other circuits which have interpreted the standard.[46] Although other circuit courts have focused on different criteria,[47] the majority of the decisions have concluded that the opportunity for full and fair litigation is satisfied when state procedures are adequate for raising fourth amendment claims.[48]

By interpreting the "opportunity for full and fair litigation" standard to limit the scope of habeas corpus relief in this manner,[49] the Fourth Circuit has placed a significant burden on the state courts to insure that a state prisoner's federal constitutional rights are protected. The *Doleman* court's decision effectively forecloses federal habeas corpus remedies from state prisoners where state procedures afford the prisoner the opportunity to raise his fourth amendment claim. This decision may encourage state courts to assume a more active role in protecting individual rights[50] by developing more adequate post conviction proceedings. Such developments would help to relieve the burden habeas corpus proceedings placed

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[44] *See* note 37 *supra.*

[45] *See* note 40 *supra.*

[46] *See, e.g.,* Tisnado v. United States, 547 F.2d 452, 455 (9th Cir. 1976) (fourth amendment claims raised at state habeas corpus proceedings fulfill full and fair litigation requirement); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977) (full and fair litigation requires consideration of disputed facts relating to fourth amendment claims at trial court and availability of meaningful appellate review). *See* notes 26, 28 & 33 *supra. See generally Circuits Split, supra* note 8, at 881; *Full and Fair Litigation, supra* note 3, at 330.

[47] *See, e.g.,* Simmons v. Clemente, 552 F.2d 65 (2d Cir. 1977).

[48] *See* Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977); Graves v. Estelle, 556 F.2d 743 (5th Cir. 1977); Sandoval v. Aaron, 562 F.2d 13 (10th Cir. 1977); Dupont v. Hall, 555 F.2d 15 (1st Cir. 1977); Simmons v. Clemente, 552 F.2d 65 (2d Cir. 1977); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976); Rigsbee v. Parkinson, 545 F.2d 56 (8th Cir. 1976).

[49] For a discussion of the policy judgments of courts in restricting availability of federal habeas corpus review, see Note, Stone v. Powell *and New Federalism: A Challenge to Congress,* 14 HARV. J. LEGIS. 152 (1976).

[50] *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977). Some state courts have construed state constitutional provisions to guarantee more protection that the federal constitution's counterparts. *See, e.g.,* State v. Sklar, 317 A.2d 160 (Me. 1974) (right to trial by jury exists even for petty offense); People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974) (suspect is entitled to assistance of counsel at any pretrial lineup or photographic identification procedure); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (consent to custodial search must be tested by waiver standard).

on federal district courts and eliminate a major source of friction in federal-state relations,[51] and thus implement the *Stone* rationale.

SUSAN M. YODER

B. Prisoners' Rights

Duty of Court to Assist Prisoner Pro Se Litigant

Historically, courts treated inmates as forfeiting not only their liberty, but also their constitutional rights.[1] Prisoners now, however, retain most of their constitutional rights upon incarceration[2] including the right of access to the courts.[3] Although several remedies are available to inmates who have been denied their constitutional rights,[4] the most frequently employed means of redress is an action in federal courts under the Civil

[51] Burger, *The State of the Judiciary—1970,* 56 A.B.A.J. 929, 931 (1970); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L.J. 895, 901 n.21 (1966); Note, *State Criminal Procedure and Federal Habeas Corpus,* 80 HARV. L. REV. 442, 428-38 (1966).

[1] *See, e.g.,* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 792, 796 (1871) (the Bill of Rights governs freemen and not convicted felons; a prisoner is a mere slave of the state).

[2] The modern view gives the prisoner most of his preincarceration privileges. *See* Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Many privileges, however, are necessarily limited during imprisonment. *See, e.g.,* Price v. Johnston, 334 U.S. 266, 285-86 (1948) (otherwise unqualified right of parties to conduct their oral arguments personally before appellate court must be modified in its application to prisoners). Furthermore, inmates may not be afforded complete constitutional protection in every prison setting. *See, e.g.,* Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (prisoner facing possible sanctions in disciplinary hearing is not entitled to appointed counsel even though alleged offense may result in criminal prosecution).

[3] *See Ex parte* Hull, 312 U.S. 546, 549 (1941) (state prison regulation requiring approval of habeas corpus petitions by prison authorities invalid since it impaired inmates' right of access to federal courts). Since *Hull,* the Supreme Court has expanded the right of access to insure that prisoner access is adequate, effective, and meaningful. *See* Bounds v. Smith, 430 U.S. 817, 822 (1977); Alpert, *Prisoners' Right of Access to Courts: Planning for Legal Aid,* 51 WASH. L. REV. 653, 655-64 (1976); Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?,* 53 IND. L.J. 207 (1978).

[4] *See generally* KERPER & KERPER, LEGAL RIGHTS OF CONVICTED 318 (1974); Zagaris, *Recent Developments in Prison Litigation: Procedural Issues and Remedies,* 14 SANTA CLARA LAW. 810, 811-21 (1974) [hereinafter cited as Zagaris]. One legal remedy available to wronged prisoners is a civil tort suit in state court against prison officials. *See* Zagaris, *supra* at 812. Also, prisoners may seek a writ of mandamus to compel prison authorities to take affirmative action to redress violations of constitutional rights occurring within the penal institution. *See* Goldfarb & Singer, *Redressing Prisoners' Grievances,* 39 GEO. WASH. L. REV. 175, 265-67 (1970) [hereinafter cited as Goldfarb & Singer]. This type of relief, however, is difficult to obtain. *Id.* at 266. Another remedy frequently employed in the past for attacking the legal basis of incarceration and conditions of confinement was the habeas corpus petition. *Id.* at 267. In Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973), the Supreme Court limited the use of the habeas corpus petition to actions challenging the fact of confinement, holding that those complaints seeking relief from the conditions of incarceration were properly characterized as civil rights claims. *See* Zagaris, *supra* at 823.

Rights Act of 1871.[5] In the past, federal courts were reluctant to review state prisoner complaints[6] when the plaintiff had not exhausted all state remedies,[7] but the modern view allows greater prisoner access to federal courts.[8]

Since many prisoners are indigent, inmate claims for civil rights violations are often brought in forma pauperis[9] and litigated pro se.[10] The Su-

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[5] 42 U.S.C. § 1983 (1976). The Civil Rights Act of 1871 was originally enacted as Act of April 20, 1871, Ch. 22, § 1, 17 Stat. 13 (Ku Klux Klan Act) and provides that any person whose constitutional rights have been violated by anyone acting under color of state law may sue in law or equity for relief. Section 1983 contains no jurisdictional provision and most civil rights litigants rely on 28 U.S.C. § 1343(3) (1976). *See* Note, *A Review of Prisoners' Rights Litigation under 42 U.S.C. § 1983,* 11 U. RICH. L. REV. 803, 810-11 (1977) [hereinafter cited as *Review of Prisoners' Rights*]. Section 1343(3) grants original jurisdiction to federal courts for civil actions brought for deprivation of a federally protected right. Although the Supreme Court has never expressly decided whether state courts also may exercise jurisdiction in § 1983 claims, the majority of federal courts hold that concurrent jurisdiction exists. *See, e.g.,* Spence v. Latting, 512 F.2d 93, 98 (10th Cir. 1973), *cert. denied,* 423 U.S. 896 (1975); *Review of Prisoners' Rights, supra* at 812.

To present a valid § 1983 claim, a plaintiff must prove he was deprived of a federally protected right by a person acting under color of state authority. In prisoner cases, the "action under color of state law" requirement is not difficult to prove because all prison officials derive their authority from state law. *See Review of Prisoners' Rights, supra* at 815.

[6] The reluctance of the federal judiciary to entertain state inmate actions was termed the "hands-off" doctrine. *See* Wagner v. Ragen, 213 F.2d 294, 295 (7th Cir.), *cert. denied,* 348 U.S. 846 (1954) (federal courts do not have the power to regulate the internal management and discipline of prisons operated by the state); Goldfarb & Singer, *supra* note 4, at 181. *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1962).

[7] Section 1983 plaintiffs are not required to exhaust state judicial or administrative remedies before bringing suit in federal court. Ellis v. Dyson, 421 U.S. 426, 427 (1975); McNeese v. Board of Education, 373 U.S. 668, 671-73 (1963). Thus, though the majority of federal courts do not require exhaustion of state administrative remedies, *see, e.g.,* McCray v. Burrell, 516 F.2d 364-65 (4th Cir. 1975), *cert. dismissed as improvid. granted* 426 U.S. 471 (1976), a minority of jurisdictions have found that Supreme Court references to the no-exhaustion of state administrative remedies rule are mere dicta. Therefore, these jurisdictions require some type of administrative decision at the state level. *See, e.g.,* Raper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973). *See generally* Note, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies,* 7 SETON HALL L. REV. 366 (1976).

[8] *See* Goldfarb & Singer, *supra* note 4, at 183; *see, e.g.,* Procunier v. Martinez, 416 U.S. 396, 405 (1974) (". . . a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution"). Despite the modern view of the courts in allowing prisoners greater access to federal court, a new trend in restricting prisoner access is beginning to emerge. *See* note 56 *infra.*

[9] 28 U.S.C. § 1915 (1976) allows federal courts to authorize any suit without prepayment of court costs by a person who produces an affidavit showing that by paying the costs he would be unable to provide himself and his dependants with the necessities of life. *See* Adkins v. Dupont Co., 335 U.S. 331, 339 (1948); Willging, *Financial Barriers and the Access of Indigents to the Courts,* 57 GEO. L.J. 253, 257 n.26 (1968). Thus, many prisoner complaints are filed in forma pauperis. *See* Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey of the Northern District of Illinois,* 6 LOY. L.J. 527, 530 (1975); Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts,* 47 N.Y.U.L. REV. 159, 187 n.112 (1972) (93.3% of prisoners in one survey filed in forma pauperis).

[10] *See* Flannery & Robbins, *The Misunderstood* Pro Se *Litigant: More Than a Pawn in*

preme Court requires trial courts to examine pro se prisoner complaints less stringently than pleadings prepared by attorneys and to refrain from summary dismissals.[11] In ascertaining whether a prisoner's claim is valid, federal district courts should not dismiss a pro se pleading unless a federal claim cannot possibly be extracted from the pleading.[12] Nevertheless, the question of whether a trial court owes an affirmative duty to aid a pro se litigant in the preparation of a claim is unsettled.[13] In a recent Fourth Circuit decision, *Gordon v. Leeke,*[14] the court discussed a trial court's duty to assist a prisoner proceeding without counsel.

In *Gordon,* the Fourth Circuit consolidated two similar cases for appellate argument. The first case involved a pro se complaint by a state prisoner against the warden of the South Carolina prison wherein he was confined and the Commissioner of the State Department of Corrections. The inmate claimed that certain prison guards had acquiesced in an attack by other inmates on the complainant.[15] Gordon asserted that he was brutally beaten, robbed and homosexually raped by fellow prisoners while guards watched passively. The plaintiff sought both damages[16] and injunctive relief[17] under 42 U.S.C. section 1983.

The district court found the pleading "hopelessly inadequate"[18] to allege a cause of action. As initially filed, Gordon's complaint failed to allege any specific facts, such as the date and place of the attack, the identity of the attacking prisoners or the guards who witnessed the assault.[19] After considering the defendant's motion to dismiss,[20] the court held that insufficient facts were present to determine whether Gordon had a colorable

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the Game, 41 BROOKLYN L. REV. 769 (1975); Robbins & Herman, *Litigating Without Counsel:* Faretta *or For Worse,* 42 BROOKLYN L. REV. 629 (1976).

[11] *See* Haines v. Kerner, 404 U.S. 519, 520 (1972).

[12] *See id.* at 521, *quoting* Conley v. Gibson, 335 U.S. 41, 45-46 (1957).

[13] For a discussion of the inherent problems and duties of a federal judge in dealing with prisoner litigation, see Doyle, *The Court's Responsibility to the Inmate Litigant,* 56 JUD. 406 (1973).

[14] 574 F.2d 1147 (4th Cir.), *cert. denied,* 99 S. Ct. 464 (1978).

[15] *Id.* at 1149.

[16] *Id.* Under § 1983, plaintiffs may seek either legal or equitable relief. 42 U.S.C. § 1983 (1976); *see* note 5 *supra.* In awarding damages as legal relief, most courts presume nominal damages from a violation of constitutional rights. *See* Note, *Measuring Damages for Violations of Individuals' Constitutional Rights,* 8 VAL. L. REV. 357, 361 (1974). Compensatory damages are also recoverable under § 1983. *See* Sostre v. Rockefeller, 312 F. Supp. 863, 885 (S.D.N.Y. 1970), *rev'd in part, modified in part, aff'd in part sub. nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972). In addition, civil rights plaintiffs may be able to recover punitive damages if they can prove willfullness on the defendant's part, since such an award is based on punishment rather than compensation. *See* Note, *Prisoners' Rights Litigation: An Examination into the Appurtenant Procedural Problems,* 2 HOFSTRA L. REV. 345, 371 (1974).

[17] 574 F.2d at 1149. Gordon requested the court to issue an order to "correct the administration" at his prison. *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* The defendants moved for dismissal, alleging that Gordon's claim failed to state a cause of action upon which relief could be granted. FED. R. CIV. P. 12(b)(6).

claim.[21] Accordingly, the trial judge required the defendants to supply additional information in supplemental answers and allowed plaintiff to respond.[22] Gordon's responses to the defendant's supplemental answers fixed the date of the alleged assault.[23] In addition, the affidavit of another inmate submitted by Gordon corroborated the occurrence of the attack.[24] The trial judge then directed the plaintiff to submit affidavits identifying his assailants and ordered the defendants to submit an affidavit of the prison official in charge of Gordon's cellblock.[25] Gordon filed affidavits which identified one of his attackers and one of the guards known as "Reilly."[26] Subsequently, the defendants filed documents asserting that Officer Riley did not work on the date of the alleged attack.[27] Acknowledging that it was unconvinced that some type of assault had not occurred, the court nevertheless dismissed the complaint, finding that the plaintiff had failed to allege a cause of action because the named defendants, the warden and the Commissioner, could not be held liable under section 1983.[28]

The second case consolidated in *Gordon* involved a section 1983 claim by a Maryland state prisoner against his warden for damages resulting from loss of the prisoner's personal property. Complainant Young asserted that while he was absent from his cell during a shakedown search his watch and watchband disappeared.[29] He contended that the guards were the only ones present during the search, thereby insinuating that they were responsible for his loss of property.[30] The district court granted the defendant's

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[21] 574 F.2d at 1149.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 1150.

[26] *Id.*

[27] *Id.*

[28] *Id.* The court concluded that the officials were not liable on the theory of respondeat superior. The majority of federal courts have held that respondeat superior is inapplicable to supervisory officials under § 1983 when damages are sought. *See* Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977); Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973); Jennings v. Davis, 476 F.2d 1271, 1274 (8th Cir. 1973); Adams v. Pate, 445 F.2d 105, 107 n.2 (7th Cir. 1971); Schirott & Drew, *The Vicarious Liability of Public Officials under the Civil Rights Act,* 8 AKRON L. REV. 69, 70-71 (1974) [hereinafter cited as Schirott & Drew]. To withstand a motion to dismiss based on the nonapplicability of respondeat superior, the plaintiff must allege direct participation or personal knowledge of the defendant. *See* Schirott & Drew, *supra* at 72. The requirement of direct involvement has been satisfied when the defendant prison warden ordered the conduct claimed to have violated the plaintiff's civil rights. *See* Martinez v. Mancusi, 443 F.2d 921, 924-25 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971). Also, where a supervisory official has actual knowledge of illegal conduct and acquiesces it in by failing to take corrective steps, he may be liable under § 1983. *See* Patterson v. MacDougall, 506 F.2d 1, 5 (5th Cir. 1975). Occasionally, courts will hold a supervisory official liable under respondeat superior when he is negligent in the hiring of his subordinates. *See* Roberts v. Williams, 456 F.2d 819, 823 (5th Cir.), *cert. denied,* 404 U.S. 866 (1971); *accord,* Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

[29] 574 F.2d at 1150.

[30] *Id.*

motion to dismiss the pro se complaint, noting that Young not only had failed to allege the requisite personal involvement by the warden,[31] but he failed to allege that the warden even knew of the search.[32] The trial judge also denied the plaintiff's subsequent motion to allow amendment of the complaint.[33]

The Fourth Circuit reversed the lower courts' dismissals, holding that the courts should have advised the plaintiffs of the correct persons to sue and given the plaintiffs the opportunity to amend their pleadings accordingly.[34] The majority stated that the district court in the South Carolina case properly concluded that a cognizable claim for damages against the warden and Commissioner was not presented.[35] Recognizing, however, that the prisoner had alleged a valid cause of action that might permit recovery against the guards,[36] the Fourth Circuit held that the district court should have advised the plaintiff to amend his complaint to join the identified guard[37] as a defendant.[38] Relying on similar reasoning, the Fourth Circuit held that the Maryland prisoner had no cognizable claim against the warden.[39] The *Gordon* majority, however, found that Young might have a valid claim against the guards.[40] Accordingly, the Fourth Circuit held that the

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[31] In order for the doctrine of respondeat superior to apply, Young should have alleged participation or knowledge by the warden. *See* note 28 *supra.*

[32] 574 F.2d at 1150.

[33] *Id.*

[34] *Id.* at 1152-53.

[35] *Id.* at 1152. In response to Gordon's claim for injunctive relief, *see* note 17 *supra,* the Fourth Circuit reasoned that since Gordon did not claim the attack was anything other than an isolated incident or that it resulted from any administrative policy of the warden, no injunctive relief was in order. 574 F.2d at 1152.

[36] 574 F.2d at 1152. The eighth amendment prohibits cruel or unusual punishment. U.S. CONST. amend. VIII. This amendment has been invoked to give prisoners protection against assaults by fellow inmates. *See* Penn v. Oliver, 351 F. Supp. 1292, 1294 (E.D. Va. 1972) (inmates have a constitutional right to some degree of protection against attacks by other inmates). *See also* Note, *Eighth Amendment Rights of Prisoners: Adequate Medical Care and Protection from the Violence of Fellow Inmates,* 49 NOTRE DAME LAW. 454, 465-69 (1973). Though an isolated attack may not constitute an actionable claim, *see* Williams v. Field, 416 F.2d 483, 485 (9th Cir. 1969), *cert. denied,* 397 U.S. 1016 (1970), where prison guards manifest a deliberate indifference toward a newly incarcerated prisoner being abused nearby and make no effort to rescue him, at least one court has imposed liability on the prison officials. *See* VanHorn v. Lukhard, 392 F. Supp. 384, 387 (E.D. Va. 1975); *cf.* Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974) (prison guard not liable where his failure to aid the attacked inmate was a split-second decision to jump back in self-defense and plaintiff failed to allege that the guard stood by and allowed further violence after the initial blow).

[37] *See* text accompanying notes 26-27 *supra.*

[38] 574 F.2d at 1152. The court admitted that, on remand after the addition of guard Riley as a defendant, Gordon may have a weak case with little chance of recovery. The claim, however, could withstand initial challenges by the defendant since the presence of Riley was a material fact in dispute and would preclude summary judgment against Gordon. *Id.; see* text accompanying notes 26-27 *supra. See also* Smith v. Blackledge, 451 F.2d 1201, 1202 (4th Cir. 1971).

[39] 574 F.2d at 1152; *see* note 31 *supra.*

[40] 574 F.2d at 1162. Suits by prisoners for loss of property during incarceration are based on the fourteenth amendment, which prohibits deprivation of life, liberty, or property without due process of law. U.S. CONST. amend. XIV; *see* Diamond v. Thompson, 523 F.2d 1201, 1203

lower court should have allowed Young to discover the guards' identities and advised him to amend his complaint to include them.[41]

The Fourth Circuit followed Supreme Court mandates that pleadings should not be scrutinized so technically as to defeat a valid claim and that an insufficient claim may be amended to achieve justice.[42] The *Gordon* majority also relied on the policy of liberality announced in *Haines v. Kerner*[43] regarding the treatment of prisoner complaints filed pro se. In *Haines,* the Supreme Court held that pro se complaints should be scrutinized less stringently than attorney-drafted pleadings.[44] The *Haines* court invoked a high standard for dismissal purposes, emphasizing that a pro se complaint should not be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[45] In addition to its reliance on *Haines,* the Fourth Circuit underscored its previous concern for civil rights plaintiffs[46] and pro se litigants.[47]

Since the Fourth Circuit has traditionally been solicitous of civil rights plaintiffs and pro se litigants, its leniency toward section 1983 prisoners proceeding without counsel is not surprising. Even before the Supreme Court's decision in *Haines v. Kerner,*[48] the circuit was careful to protect civil rights actions brought by unrepresented inmates. The court has reversed certain lower court dismissals, stating that even though the claims may be vague, they should not be forfeited due to a failure to state the cause of action with technical precision.[49] The Fourth Circuit also has

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(5th Cir. 1975); Hansen v. May, 502 F.2d 728, 729-30 (9th Cir. 1974); Note, *Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment,* 52 IND. L.J. 257, 258 (1976) (although many courts sustain actions by prisoners for loss of property, such actions may not be proper issues for federal litigation).

[41] 574 F.2d at 1152.

[42] *Id.* at 1151; *see* Rice v. Olson, 324 U.S. 786, 792 (1945); Holliday v. Johnston, 313 U.S. 342, 350 (1941).

[43] 404 U.S. 519 (1972).

[44] *Id.* at 520.

[45] *Id.* at 521, *quoting* Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[46] 574 F.2d at 1151; *see* Burris v. State Dep't of Pub. Welfare, 491 F.2d 762, 763 (4th Cir. 1974) (district court should have advised the plaintiff's counsel of the availability of § 1983); Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969) (district court dismissal of § 1983 is error unless it appears certain that plaintiff can prove no set of facts which would entitle him to relief).

[47] 574 F.2d at 1151; *see* Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975); Canty v. City of Richmond, 383 F. Supp. 1396, 1399-1400 (E.D..Va. 1974), *aff'd sub nom.* Canty v. Brown, 526 F.2d 587 (4th Cir. 1975), *cert. denied,* 423 U.S. 1062 (1976), *cited in* Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978) ("although the Court of Appeals cannot mean that it expects the district courts to assume the role of advocate for the *pro se* plaintiff, . . ." district court should construe pro se complaints liberally with a view towards vindicating civil rights deprivations).

[48] 404 U.S. 519 (1972).

[49] *See* Coleman v. Peyton, 340 F.2d 603, 604 (4th Cir. 1965). *See also* Wooten v. Shook, 527 F.2d 976, 978 (4th Cir. 1975) (although evidentiary hearings are not required in every case, district courts ordinarily should require that dismissal motions by defendant be supported by affidavits rather than predicated on bald denials of plaintiff's assertions).

rejected summary judgments rendered by district courts when it could ascertain any possible factual dispute, often remanding such cases to the lower court for an evidentiary hearing.[50] Furthermore, the Fourth Circuit has required that the assertions of a multiple claim pleading be viewed as a unit rather than separately.[51] The circuit's leniency towards the incarcerated also has been reflected in its treatment of pretrial detainees proceeding pro se.[52]

In furthering its policy of liberality, the Fourth Circuit has affirmed district court decisions in cases where the court advised unassisted plaintiffs in procedural matters.[53] Yet, prior to *Gordon v. Leeke,* this liberality had not resulted in the imposition of an affirmative duty on courts to assist pro se litigants by advising them of the correct parties to sue. Likewise, although other federal circuits have been lenient in dealing with prisoner complaints filed pro se,[54] none has imposed a responsibility on a district court to assist inmates to the extent required by *Gordon.*

The most recent trend in prisoner litigation is a limitation of district court action in state prison administration.[55] Courts increasingly are requiring exhaustion of state administrative grievance procedures before entertaining section 1983 claims of prisoners. Such a requirement is based on policies of comity, the facilitation of subsequent judicial review after a state administrative agency has exercised its expertise, the development of a factual record, and saving of judicial time if administrative relief is

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[50] *See* Smith v. Blackledge, 451 F.2d 1202-03 (4th Cir. 1971). *But cf.* Wester v. Jones, 554 F.2d 1285, 1286 (4th Cir. 1977) (grant of summary judgment upheld even though some factual disputes existed).

[51] *See* Russell v. Oliver, 552 F.2d 115, 116 (4th Cir. 1977) (though each of several claims of harassment might not amount to a denial of constitutional rights, lower court should view claims as unit to determine if prisoner's right of access to courts has been violated).

[52] *See* Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978) (claim of pre-trial detainee for inadequate medical care dismissed without requiring answer must be reversed).

[53] *See* Wooten v. Shook, 527 F.2d 976, 977 (4th Cir. 1975) (district court's action of advising a pro se plaintiff that he should file a counter-affidavit opposing defendant's motion for summary judgment was proper); *accord,* Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (summary judgment improper where plaintiff had not been notified that his failure to file a counter-affidavit might result in summary judgment against him).

[54] *See* Meredith v. Arizona, 523 F.2d 481, 484 (9th Cir. 1975) (case dismissed by district court remanded to determine whether plaintiff could prove § 1983 claim against warden for assault by prison guard); Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975) (civil rights action by prisoner for inadequate medical care was improperly dismissed where facts not fully developed); Campbell v. Beto, 460 F.2d 765, 769 (5th Cir. 1972) (district court refusal to docket prisoner complaint was error where plaintiff was not given opportunity to present evidence); Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972) (lower court dismissal without requiring defendant's answer was reversible error; plaintiff was entitled to evidentiary hearing on his claim); Hudson v. Hardy, 412 F.2d 1091, 1095 (D.C. Cir. 1968) (summary judgment improper where plaintiff did not have chance to present evidence). However, once the facts are developed and the plaintiff has failed to present facts showing the supervisory official was personally involved or knew of the violation, it is proper for the district court to dismiss the action. *See* note 28 *supra.*

[55] *See* Estelle v. Gamble, 429 U.S. 97 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Note, *Limitation of State Prisoners' Civil Rights Suits in Federal Courts,* 27 CATH. U. L. REV. 115 (1977) [hereinafter cited as *Limitation of Suits*].

granted.[56] This recent reluctance of courts to entertain state prisoner suits is reflected by the dissent in *Gordon v. Leeke.*[57] The dissenting opinion criticized the majority for placing a duty upon trial courts to actively assist inmate litigants proceeding without counsel. The dissent read *Haines* as only requiring courts to construe prisoner pro se complaints liberally, and called for a proper balance between the undesirable extremes of advocacy and strict judicial impartiality.[58]

At the trial stage, the judicial impartiality doctrine protects both parties from the prejudicial effect on the jury caused by the judge's actions.[59] At the pleading stage, however, strict judicial impartiality typically is not required since the jury is not present.[60] Accordingly, the *Haines* decision mandates that courts liberally construe prisoner pro se complaints in the pretrial proceedings. Yet, trial courts must be careful not to act as advocates for either party, an obviously undesirable role for judges in our adversary system. While a trial judge should be more than a mere moderator and should intervene when necessary,[61] this intervention has never been extended to encompass the advising of the complainant of the proper parties to name in order to state a valid cause of action.

Undertaking to advise the plaintiff of the correct parties to sue is dangerously close to being unduly prejudicial towards the plaintiff and is an improper extension of the *Haines* rule. The Fourth Circuit majority in *Gordon* was willing to extend *Haines* due to the nature of the case involved. The suit was a civil one, where the defendant had fewer constitutional protections, such as the right to counsel.[62] The civil rights character of the suit, however, made the Fourth Circuit more willing to help the plaintiff since such cases are often treated leniently in order to promote the policies

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[56] *See Limitations of Suits, supra* note 55, at 122-24, n.51. *See also* FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES OF HANDLING CIVIL RIGHTS CASES IN FEDERAL DISTRICT COURTS (Tent. Standards 1974), *reprinted in* Remington, *State Prisoner Litigation and the Federal Courts,* 1974 ARIZ. ST. L.J. 549, 557-63.

[57] 574 F.2d at 1153-56 (Hall, J., dissenting).

[58] *Id.*

[59] *See* United States v. McCord, 509 F.2d 334, 348 (D.C. Cir. 1974), *cert. denied,* 423 U.S. 833 (1975); Anderson v. Great Lakes Dredge & Dock Co., 509 F.2d 1119, 1131 (2d Cir. 1974); Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality,* 61 VA. L. REV. 1266, 1268 (1975); Note, *Judicial Intervention in Trials,* 1973 WASH. U.L.Q. 843.

[60] *See* note 54 *supra.*

[61] *See* Quercia v. United States, 289 U.S. 466, 469 (1933) (trial judge may comment on the evidence if the jury understands it is not bound by his opinion); *accord,* Geders v. United States, 425 U.S. 80, 86 (1976). Judicial interference claims arise most frequently following court interrogation of witnesses, which is allowable under certain restrictions. *See* United States v. Cassiagnol, 420 F.2d 868, 877-78 (4th Cir.), *cert. denied,* 397 U.S. 1044 (1970) (where purpose of trial court's questioning was to clarify a factual dispute, such interrogation was not fatally prejudicial); United States v. Barbour, 420 F.2d 1319, 1321 (D.C. Cir. 1969) (though trial judge must remain objective, he may participate in the examination of alibi witnesses where the testimonial presentation promotes uncertainty). *See also* Gitelson & Gitelson, *A Trial Judge's Credo Must Include His Affirmative Duty to be an Instrumentality of Justice,* 7 SANTA CLARA LAW. 7 (1966).

[62] *See* note 67 *infra.*

of the legislation and vindicate constitutional rights deprivations.[63] But, even taking into consideration the policy of leniency of civil rights and pro se plaintiffs, the *Gordon* decision is without precedent. Though the decision's requirement of a duty to assist may be imposed for a desirable end, it is unwarranted in view of other possible solutions.

One possible alternative, suggested in the dissenting opinion, is conditional dismissal.[64] Under the alternative, the district court may conditionally dismiss the case until the plaintiff is able to cure the defective pleading by amendment.[65] Another viable alternative to the court undertaking to assist the pro se litigant in framing his case is the use of questionnaire forms to ascertain if the plaintiff has a valid claim. Forms which require the prisoner to recite the facts of his case have been upheld as a useful aid to courts.[66]

In order to avoid the problems of judicial advocacy, a more practical solution is the appointment of counsel. Although civil litigants have no constitutional rights to an attorney,[67] federal courts have the discretion to appoint counsel in appropriate cases.[68] A poll of federal judges indicates that prisoner civil rights litigation could be improved if counsel were routinely appointed.[69] Appointment of counsel in cases such as *Gordon* would assure that procedural technicalities do not prevent a prisoner from protecting his constitutional rights. Also, an attorney would recognize a patently frivolous claim and would discourage litigation of the claim,

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[63] *See, e.g.*, Green v. Dumke, 480 F.2d 624, 628 n.7 (9th Cir. 1973) (civil rights legislation should not be interpreted narrowly; § 1983 was designed as comprehensive remedial legislation); *see* note 46 *supra*.

[64] 574 F.2d at 1154 n.1.

[65] *Id.*

[66] *See* Watson v. Ault, 525 F.2d 886 (5th Cir. 1976). While recognizing the usefulness of questionnaires, the Fifth Circuit noted that the most difficult problem with questionnaires is framing one that is simple enough for prisoners to understand and pertinent to the claim asserted. *Id.* at 892. The *Watson* court approved the questionnaire recommended by a Federal Judiciary Center Committee. *See* FEDERAL JUDICIAL CENTER, *Model Form for Prisoner Civil Rights Complaints, reprinted in* Watson v. Ault, 525 F.2d 886, 893-98 (5th Cir. 1976).

[67] The sixth amendment right to counsel applies only to criminal prosecutions. U.S. CONST. amend. VI. However, a significant amount of support has arisen for the requirement of counsel in civil litigation. *See* Johnson & Schwartz, *Beyond* Payne: *The Case For a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOY. L. A. L. REV. 249 (1978); Note, *Indigent's Right to Appointed Counsel in Civil Proceedings*, 9 MICH. J. L. REF. 554 (1976).

[68] 28 U.S.C. § 1915(d) (1976) authorizes the appointment of counsel at the discretion of the court for suits commenced in forma pauperis. Before *Gordon*, the Fourth Circuit's rule concerning appointment of counsel allowed appointment only in exceptional circumstances. *See* Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975). The court in *Gordon*, however, found that if a pro se litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel. Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir. 1978). *Contra* Alexander v. Ramsey, 539 F.2d 25, 26 (9th Cir. 1976) (counsel should be appointed to aid civil rights plaintiff only in exceptional circumstances). *See also* Heidelberg v. Hammer, 577 F.2d 429, 430-31 (7th Cir. 1978); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971); Hudson v. Hardy, 412 F.2d 1091, 1095 (D.C. Cir. 1968).

[69] *See* Remington, *State Prisoner Litigation and the Federal Courts*, 1974 ARIZ. ST. L.J. 549, 554 [hereinafter cited as Remington].

thereby removing from the crowded federal court docket complaints which eventually are characterized as frivolous.[70] Moreover, since federal courts now have the power to award attorney's fees to the prevailing party in a section 1983 suit,[71] appointed counsel may be compensated for their efforts.

Thus, there are several solutions to the problems presented by the unrepresented prisoner litigant, any of which are preferable to that invoked by *Gordon.* Accordingly, *Gordon's* imposition of an affirmative duty on the trial court to actively advise a pro se plaintiff in constructing his case is both unprecedented and unnecessary.

CHERYL I. HARRIS

Indifference to the Medical Needs of a Pretrial Detainee

In *Loe v. Armistead,*[1] the Fourth Circuit addressed the issue of whether a pretrial detainee[2] could recover damages from state and federal officers for medical mistreatment. The court held that section 1983 of Title 42 of the United States Code provided the remedy for mistreatment by state officers.[3] Federal officers were found subject to an action for damages as a result of their conduct even absent statutory authorization. The court found that the federal officers could be held liable for damages on the basis that the detainee's mistreatment was a denial of due process under the fifth amendment.[4]

While awaiting trial on federal bank robbery charges,[5] Richard Loe

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[70] *See* Remington, *supra* note 69, at 555.

[71] Civil Rights Attorney's Fees Awards Act of 1976, *codified at* 42 U.S.C. § 1988 (1976). The underlying policy of awarding attorney's fees in civil rights cases is not only to penalize the defendants, but to encourage injured individuals to seek judicial relief, thereby furthering the enforcement of federal law by private means. *See* Note, *The Civil Rights Attorney's Fees Awards Act of 1976,* 34 WASH. & LEE L. REV. 205 (1977).

[1] 582 F.2d 1291 (4th Cir. 1978).

[2] A pretrial detainee is one under arrest for commission of a crime, who, because he could not afford to post bail or because bail is denied, is being held in jail to insure his presence at trial. *See* Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976); Detainees of Brooklyn House of Det. for Men v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975). *See generally* Note, *Constitutional Law—Due Process and Equal Protection—Pre-trial Detainees Must Be Held Under the Least Restrictive Means Possible to Assure the Detainees' Presence at Trial,* 3 FORD. URB. L. J. 685 (1975).

[3] 582 F.2d at 1293.

[4] *Id.* at 1294. Although the issues in the case arose in the context of a test for pleading sufficiency in connection with a motion to dismiss, the court made definitive determinations of the substantive law involved.

[5] Prior to commencement of his suit, Loe was awaiting retrial. The defendants, federal and state officials, urged that Loe's status was not that of a typical pretrial detainee and that the court should not accord him the special status usually attached to one in jail awaiting trial. Brief for Appellees at 17, Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978). The court granted full pretrial detainee status to Loe, although noting that Loe was awaiting retrial. 582 F.2d at 1293.

injured his arm when he slipped and fell on the basketball court of a northern Virginia jail. Although he was immediately taken to the jail infirmary, where he was given pain pills, a physician did not examine Loe's arm until eleven hours later and he was not taken to a hospital until twenty-two and one-half hours after the injury.[6] X-rays revealed a fracture and the arm was placed in a full cast.

After treatment, Loe was transferred by federal marshals to a federal facility in Springfield, Missouri, for psychiatric tests.[7] The marshals insisted, for security reasons, that Loe's injured arm, although still in a cast, be handcuffed to his waist for the duration of the twenty-five hour drive from Virginia to Missouri. In his pro se complaint, Loe charged that federal marshals and various officials, guards, nurses and the doctor at the jail violated the eighth amendment prohibition against cruel and unusual punishment in failing to provide prompt and adequate medical care for the injury to his arm.[8] He also claimed that his treatment en route to Missouri violated his eighth amendment rights.[9]

The district court dismissed Loe's complaint for failure to state a claim for which relief could be granted.[10] The Fourth Circuit reversed the district court,[11] finding that Loe's mistreatment in jail was actionable and his statement of the claim sufficient.[12] The court agreed, however, that the marshals did not violate Loe's rights by handcuffing his injured arm.[13] The court affirmed the dismissal of Loe's complaint in that regard.[14] The case was remanded for a hearing on the merits.[15]

The Fourth Circuit stated that Loe's claim for mistreatment should be based on the due process clause of the fifth amendment,[16] rather than the eighth amendment prohibition against cruel and unusual punishment.[17]

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[6] 582 F.2d at 1292-93. According to jail officials, federal marshals responsible for transporting federal prisoners were notified of Loe's injury. *Id.* at 1293.

[7] *Id.* at 1293. Loe had expressed an intention to defend the federal bank robbery charges on grounds of mental incompetency and was transferred to a federal facility in Missouri for observation. *Id.*

[8] *Id.* Loe commenced suit against the city jail employees under 42 U.S.C. § 1983 (1976). *Id.* Suit against federal marshals was premised upon 28 U.S.C. §§ 1331, 1343(3) (1976). Brief for Appellant at 28, Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978). In his complaint, the appellant alleged that the federal marshals' failure to promptly respond to calls from jail officials was sufficient for his recovery of damages. 582 F.2d 1291, Joint Appendix at 44.

[9] 582 F.2d at 1293.

[10] *Id.* at 1292. The district court's dismissal of Loe's complaint was based on Federal Rule of Civil Procedure 12(b)(6).

[11] 582 F.2d at 1292.

[12] *Id.* at 1295-96.

[13] *Id.* at 1297. The court found no indication that Loe's arm was seriously injured at the time of the trip. The court determined that restraints on Loe's physical movement were appropriate since there was no demonstrated medical necessity for special treatment. *Id.*

[14] *Id.*

[15] *Id.* at 1297.

[16] U.S. CONST. amend. V. The due process clause of the fifth amendment provides: "No person shall . . . be deprived of life, liberty or property, without due process of law."

[17] 582 F.2d at 1294. The eighth amendment provides: "[e]xcessive bail shall not be

Under the terms of the fifth and fourteenth amendments, one cannot be deprived of liberty without due process of law.[18] Punishment is a deprivation of liberty.[19] Therefore, punishment prior to a full and fair hearing on the issue of guilt is a deprivation of liberty without due process which violates the fifth and fourteenth amendments.[20] The court explained that pretrial detention is not punishment,[21] but rather a means of insuring apearance of the defendant at trial.[22] Therefore, the eighth amendment prohibition against cruel and unusual punishment was inapplicable.[23] In sustaining Loe's complaint, the court held, however, that due process is minimally coextensive with the guarantees of the eighth amendment.[24] Thus, the pretrial detainee's complaint framed in eighth amendment terms was deemed sufficient as a complaint for a violation of due process.[25]

Seven circuits, including the Fourth Circuit, have considered the issue of pretrial detainee rights and all agree that unduly harsh conditions of confinement constitute an unjustifiable punishment of a detainee.[26] The circuits also agree that conditions of confinement must not be more severe

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required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[18] U.S. CONST. amend. V & XIV.

[19] BLACK'S LAW DICTIONARY 1398 (rev. 4th ed. 1968).

[20] Anderson v. Nosser, 456 F.2d 835, 841 (5th Cir.) (en banc) (modifying 438 F.2d 183) (5th Cir. 1971), *cert. denied*, 409 U.S. 848 (1972). *Nosser* was the first case in which a circuit court dealt fully with the rights of pretrial detainees. The case involved an action for damages under 42 U.S.C. § 1983 (1976) based on a claimed violation of due process under the fourteenth amendment. Unsanitary jail conditions and inhumane treatment of pretrial detainees were held to be summary punishment and therefore a violation of due process. Damages were allowed. *Id.* at 841. Although the Supreme Court has not yet discussed the status of detainees, in Malinski v. New York, 324 U.S. 401 (1945), Justice Frankfurter, in a concurring opinion, declared that due process protections apply fully even toward those charged with the most heinous offenses. 324 U.S. at 417 (Frankfurter, J., concurring).

[21] The presumption of innocence prevents the infliction of punishment prior to conviction. Stack v. Boyle, 342 U.S. 1, 4 (1951); Miller v. Carson, 563 F.2d 741, 750 (5th Cir. 1977).

[22] *See* Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir. 1971); Inmates of Suffolk County Jail v. Eisenstatdt, 360 F. Supp. 676, 685 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974); Collins v. Schoonfield, 344 F. Supp. 257, 265 (D. Md. 1972); Hamilton v Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971). Detention also is required where the accused cannot meet the standards for release on his own recognizance. Brenneman v. Madigan, 343 F. Supp. 128, 135 (N.D. Cal. 1972).

[23] 582 F.2d at 1293-94. Several courts have found the eighth amendment directly applicable to pretrial detainees. *See, e.g.*, Johnson v. Lark, 365 F. Supp. 289, 301-303 (E.D. Mo. 1973) (pretrial detainees entitled to eighth amendment protection where prison conditions inhumane); Collins v. Schoonfield, 344 F. Supp. 257, 264-65 (D. Md. 1972) (prison conditions weighed directly against eighth amendments standards); Jones v. Wittenberg, 323 F. Supp. 93, 99-100 (N.D. Ohio 1971), *aff'd sub nom*, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (eighth amendment directly applicable to pretrial detainees).

[24] 582 F.2d at 1293-94.

[25] *Id.*

[26] *See* Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978); Feely v. Sampson, 570 F.2d 364, 370 (1st Cir. 1978); Patterson v. Morrisette, 564 F.2d 1109, 1110 (4th Cir. 1977); Duran v. Elrod, 542 F.2d 998, 999 (7th Cir. 1976); United States v. Speaker, 535 F.2d 823, 827 (3d Cir. 1976); Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974); Anderson v. Nosser, 456 F.2d 835, 857-85 (5th Cir.), *cert. denied*, 409 U.S. 848 (1972).

than necessary to ensure the presence of a detainee at trial.[27] Excessive conditions of confinement, like excessive bail requirements, violate the due process rights of detainees awaiting trial.[28]

It is difficult to define what conditions of confinement are so excessive as to constitute punishment violative of due process. The District of Columbia Circuit recently described pretrial confinement itself as punishment.[29] Although confinement is to be only as severe as necessary to assure appearance of a detainee at trial,[30] there is a fine line separating conditions of confinement intended to guarantee trial appearance and those constituting punishment.[31] Therefore, a majority of circuits considering the issue have developed a bare minimum test, such as that adopted by the Fourth Circuit in *Loe*, to determine whether conditions of confinement offend due process.[32] The bare minimum test dictates that if conditions of confinement would violate the eighth amendment protections against cruel and unusual punishment if imposed on a convicted prisoner, then those conditions violate the due process rights of a pretrial detainee.[33]

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[27] *See, e.g.*, Patterson v. Morrisette, 564 F.2d 1109, 1110 (4th Cir. 1977). The pretrial detainee may be deprived of his rights in order to restrain him from endangering or disrupting the security of the institution in which he is held. *Id.*

The American Bar Association Joint Committee on the Legal Status of Prisoners recognized the special status of pretrial detainees in its recently promulgated tentative draft for the freedom of detainees. ABA Joint Comm. on the Legal Status of Prisoners, *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, 14 AM. CRIM. L. REV. 377, 565 (1977). According to the draft, restrictions on the right of movement inside a jail and on the right to communicate with free citizens should be as minimal as institutional security and order allow. *Id.*

[28] *See* Hamilton v. Love, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971).

[29] Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978) (pretrial detention itself indistinguishable from punishment). *See also* Ares, Rankin & Sturz, *The Manhattan Bail Project* in CRIME & JUSTICE 403 (1971); Note, *Constitutional Limitation on the Conditions of Pretrial Detention*, 79 YALE L. J. 941, 946 (1970).

[30] *See* text accompanying note 27 *supra.*

[31] Feely v. Sampson, 570 F.2d 364, 371 (1st Cir. 1978).

[32] *See, e.g., id.*; Miller v. Carson, 563 F.2d 741 (5th Cir. 1977); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971).

[33] In Feely v. Sampson, 570 F.2d 364 (1st Cir. 1978), the First Circuit declared that it is impossible to conceive of situations where treatment so cruel or unusual as to violate the eighth amendment if applied to a convicted prisoner would satisfy a detainee's due process. *Id.* at 370. Overcrowding and unsanitary conditions of confinement were held to constitute punishment violative of due process in Miller v. Carson, 563 F.2d 741, 750 (5th Cir. 1977). The Second Circuit in Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), found violations of due process, *id.* at 339, and equal protection. *Id.* at 338. The court stated that conditions of detention may themselves constitute punishment and thereby deny due process which requires that a detainee shall not be punished until convicted. *Id.*

Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972), was factually analogous to *Loe*. In *Fitzke*, a pretrial detainee was held for seventeen hours without attention to his medical needs. *Id.* at 1074. As a result, he had to undergo a crainiotomy. *Id.* The Sixth Circuit held that the right to medical care while incarcerated is a basic concept of due process. *Id.* at 1076. While not expressly referring to the eighth amendment prohibition against cruel and unusual punishment, the court spoke of the limits of detention for convicted prisoners. The court in

Some courts state that pretrial detainees are entitled to protections greater than those of the eighth amendment, but the standards articulated are imprecise.[34] The Fourth Circuit concluded that it need not determine the exact scope of due process protection in *Loe* since the medical mistreatment complained of would violate the eighth amendment prohibitions against cruel and unusual punishment if inflicted on a convicted prisoner.[35]

The court found Loe could recover damages from both the state and federal officers to remedy the alleged violation of his due process rights.[36] The Fourth Circuit held that state officers in *Loe* had potential damage liability under 42 U.S.C. section 1983 for violation of the plaintiff's due process rights.[37] The court also found that damage liability for federal marshals, who were not subject to an action under section 1983[38] or any other federal statute,[39] could be predicated solely on the fifth amendment.[40] The Fourth Circuit based recognition of this cause of action on the Supreme Court decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[41] In *Bivens,* the court held that a violation of the fourth amendment's guarantee against unreasonable searches and seizures could be remedied by a damage action, without any specific statu-

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Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), explicitly held that a violation of the eighth amendment standards would constitute a violation of due process. *Id.* at 189.

[34] *See, e.g.,* Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978); Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976). *Campbell* involved a class action by pretrial detainees seeking declaratory and injunctive relief. The court agreed that protection from cruel and unusual punishment is a matter of due process. 580 F.2d at 532. The court stated, however, that there are no simple tests of the constitutionality of the conditions of pretrial confinement. *Id.* at 531. The court held the presumption of innocence requires that the care afforded pretrial detainees be greater than that given convicted prisoners. *Id.* The *Duran* court explicitly declared that a standard more stringent than the eighth amendment controls the treatment of pretrial detainees. 542 F.2d at 999-1000. To show the reasonableness of its approach, the Fourth Circuit in *Loe* contrasted its due process equal to the eighth amendment test with the stricter standards. 582 F.2d at 1294.

[35] 582 F.2d at 1294.

[36] *Id.* at 1295.

[37] *Id.* at 1293. A person who deprives another of his constitutional rights under color of state law is liable in an action at law. 42 U.S.C. § 1983 (1976).

[38] Violations of the Constitution under color of federal law are not actionable under § 1983. Roots v. Calahan, 475 F.2d 751 (5th Cir. 1973); Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971).

[39] The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1976), provides no basis of recovery for constitutional violations by federal officials. The Act is couched in terms of state common law torts and allows recovery only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1976). If states do not consider constitutional violations as independent torts, the Federal Tort Claims Act provides no remedy. *See generally* Note, *Remedies for Constitutional Torts: "Special Factors Counselling Hesitation,"* 9 IND. L. REV. 441 (1976) [hereinafter *"Special Factors"*]; *see also* Torres v. Taylor, 456 F. Supp. 951 (S.D.N.Y. 1978) (prisoner denied recovery on *Bivens*-type fifth amendment claim since his suit for damages arising out of assault and battery cognizable under Federal Tort Claims Act).

[40] 582 F.2d at 1293.

[41] *Id., citing* 403 U.S. 388 (1971).

tory authorization.[42]

The Fourth Circuit recognized that *Bivens* was distinguishable from *Loe* in that *Bivens* addressed the availability of a damage remedy under the fourth amendment,[43] but concluded that there is no logical basis for limiting *Bivens* to violations of the fourth amendment.[44] The court observed that other federal courts applying the rationale of *Bivens* have created causes of action against federal officials for violations of constitutional rights other than those embodied in the fourth amendment.[45] In fact, the majority of federal courts addressing the issue of a right to damages based solely on a constitutional provision have established remedies for violations of the first, fifth, sixth, eighth, ninth and fourteenth amendments.[46]

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[42] 403 U.S. at 397. In *Bivens,* federal agents acting without probable cause arrested the plaintiff and searched him and his home. *Id.* at 389 n.1. The Supreme Court held that even absent a statutory right, a damage remedy may be sustained against federal officials who violate a plaintiff's fourth amendment rights. *Id.* at 397-98. The Court noted that state remedies were unavailable, *id.* at 394, and that an award of damages was the ordinary remedy for an invasion of personal liberty. *Id.* at 395. Moreover, the Court maintained that there were no special factors, such as a federal statutory remedy, counselling hesitation to grant such relief. *Id.* at 396. Although the decision created a "constitutional tort" under federal common law, the parameters of the new remedy were not stated. The absence of a limitation on the reach of the *Bivens* decision gives it vitality for the proposition of a similar remedy for other violations of the Constitution. *See* Dellinger, *Of Rights and Remedies: The Constitution As A Sword,* 85 HARV. L. REV. 1532 (1972); Lehmann, Bivens *and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials,* 4 HASTINGS CONST. L. Q. 531, 604 (1977); Note, *Constitutional Law—Federal Agents Conducting Unreasonable Searches and Seizures Are Liable for Damages Under the Fourth Amendment,* 50 TEX. L. REV. 798 (1972); Note, *Constitutional Law—Federal Civil Remedies—Implied Cause of Action for Fourth Amendment Violations,* 46 TUL. L. REV. 816 (1972).

[43] 582 F.2d at 1294. The Supreme Court has suggested a broad reading of its open ended remedy announced in *Bivens.* While failing to explicitly elaborate on the *Bivens* doctrine, the Court has suggested its application in cases involving the fourth and fourteenth amendments. *See* Laing v. United States, 423 U.S. 161, 209-10 n.14 (1976) (Blackmun, J., dissenting); City of Kenosha v. Bueno, 412 U.S. 507, 514 (1973); District of Columbia v. Carter, 409 U.S. 418, 432-433 (1973); O'Brien v. Brown, 409 U.S. 1, 14 n.7 (1972) (Marshall, J., dissenting).

[44] 582 F.2d at 1294. The Fourth Circuit recognized that damage remedies might not be appropriate where special factors are present. *Id.* Such factors include a congressional declaration that an action against government agents for money damages is inappropriate in light of another equally effective remedy or that money damages are not generally apropriate for an injury. *Id.* The *Bivens* court mentioned that special factors might disallow constitutional tort remedies. 403 U.S. at 395-96; *see "Special Factors," supra* note 39.

[45] 582 F.2d at 1294.

[46] *See, e.g.,* Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (allowed damages on the basis of the fourteenth amendment, endorsing broad usage of *Bivens*-type remedy); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (remedy based solely upon first amendment); Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977) (remedy based solely on fourteenth amendment); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (remedy based on fifth amendment); Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974) (remedy based on sixth and ninth amendments); Patmore v. Carlson, 392 F. Supp. 737 (E.D. Ill. 1975) (remedy based on eighth amendment). *Contra,* Moore v. Schlesinger, 384 F. Supp. 163 (D. Col. 1974) (no first amendment extension of *Bivens*); Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974) (no fourteenth amendment extension).

The Fourth Circuit previously addressed the issue of whether amendments other than the fourth amendment implied a cause of action in *States Marine Lines, Inc. v. Schultz,*[47] where it held that a damage action based solely upon the fifth amendment was appropriate.[48] In *States Marine Lines,* the plaintiff sued for damages after U.S. customs agents illegally boarded its vessel in the port of Charleston and seized cargo.[49] The plaintiff contended that the boarding and seizure violated the fifth amendment and that *Bivens* authorized a damage action based directly on the fifth amendment.[50] The court ordered that on remand the district court could award damages based solely upon the fifth amendment for the injury to the plaintiff's property.[51]

The *Bivens* Court, in allowing damages based on the fourth amendment, declared that an action for damages was the ordinary remedy for an invasion of personal interests in liberty.[52] The Supreme Court did not address the issue of a damage action for an invasion of property interests based directly on the Constitution. The Fourth Circuit in *States Marine Lines* nevertheless authorized a property damage action based solely on the fifth amendment because the Supreme Court had permitted suits for deprivation of property without due process under section 1983.[53] The court stated that it would be anamolous to deny damages under the fifth amendment for a deprivation of property without due process if a similar action could be maintained under section 1983.[54] Thus, *States Marine Lines* represents an extension of the *Bivens* reasoning both to effectuate the due process protections of the fifth amendment and to apply those protections to property interests.

The Fourth Circuit's opinion in *Loe* was less expansive than its opinion in *States Marine Lines.* Although the *Bivens* doctrine of an action based solely on the Constitution was extended in both cases to allow an action based on the fifth amendment, the *Loe* decision concerned a personal interest in liberty, the same concern of the *Bivens* court. *States Marine Lines* extended *Bivens* to allow an action for the protection of property interests. Since the Fourth Circuit in *States Marine Lines* not only extended *Bivens* to the fifth amendment but also extended it to protect property interests, the narrower holding in *Loe* is well supported by precedent in the Fourth Circuit. The case breaks no new ground in allowing an action for damages based only on the fifth amendment.[55]

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[47] 498 F.2d 1146 (4th Cir. 1974).

[48] *Id.* at 1157.

[49] *Id.* at 1147-48.

[50] *Id.* at 1156.

[51] *Id.* at 1159.

[52] 403 U.S. at 395.

[53] 498 F.2d at 1154, *citing* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

[54] 498 F.2d at 1154.

[55] The *Loe* dissent relied on a recent Fifth Circuit case, Davis v. Passman, 571 F.2d 793 (5th Cir.), *cert. granted,* 47 U.S.L.W. 3301 (1978), to argue against an action based only on the fifth amendment. In *Davis,* the Fifth Circuit denied damages in an action based solely on the fifth amendment, where a former female member of Congressman Otto Passman's

The plaintiff's ability to maintain a suit based solely on the fifth amendment required the *Loe* court to examine the plaintiff's statement of his claim.[56] The finding that the medical mistreatment claim was sufficient to prevent dismissal under Rule 12(b)(6)[57] resulted from an application of *Estelle v. Gamble*[58] in which the Supreme Court established the standard for a prisoner's statement of a cognizable medical claim. The court also adhered to the liberal rules of pleading interpretation.[59]

The Supreme Court in *Estelle* held that in order to avoid dismissal under 12(b)(6), a prisoner's complaint of medical mistreatment need only allege facts constituting deliberate indifference of authorities to the prisoner's medical needs.[60] Although the *Estelle* court dealt with a prisoner's claim of medical mistreatment violative of the eighth amendment, the *Estelle* standard is equally applicable to a complaint concerning a pretrial detainee's fifth amendment due process rights. The Fourth Circuit equates those due process rights with the protections of the eighth amendment.[61] Under the Fourth Circuit formulation, conditions which would violate a prisoner's eighth amendment rights would also violate a pretrial detainee's fifth amendment due process rights.[62] Similarly, a complaint which alleges facts sufficient to constitute an eighth amendment violation would suffice as a complaint asserting a due process violation. The Fourth Circuit's extension of the *Estelle* deliberate indifference test to claims brought under the fifth amendment establishes the same minimal pleading requirements for all prisoners.[63] Convicts and pretrial detainees with claims of

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personal staff alleged she had been dismissed solely on the basis of sex. *Id.* at 801.

The *Loe* dissent agreed with the *Davis* court's prediction that judicial recognition of a tort action based solely on the fifth amendment would inundate the court with litigants. 582 F.2d at 1298 (Hall, J., dissenting). The dissent noted that the particular plaintiff in *Loe* had filed twelve actions in federal district court and had taken seven appeals to the Fourth Circuit. *Id.* at 1298 n.1.

The *Loe* majority distinguished *Davis* on the basis that a suit against a U.S. congressman was statutorily barred, a factor counselling hestitation in granting a *Bivens*-type remedy. 582 F.2d at 1294-5 n.2; *see* text accompanying note 44 *supra.*

[56] 582 F.2d at 1295.

[57] *Id.* at 1296. The en route handcuffing was not actionable. *See* text accompanying note 12 *supra.*

[58] Estelle v. Gamble, 429 U.S. 97 (1976).

[59] *See* Haines v. Kerner, 404 U.S. 519, *reh. denied,* 405 U.S. 948 (1972); Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978), *cert. denied,* 47 U.S.L.W. 3203 (1978); Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977).

As in *Loe,* the plaintiff in *Vinnedge* was incarcerated in a municipal Northern Virginia jail. He vaguely alleged that his request for medical and psychiatric care while in jail was conditioned on withdrawal of his request for counsel and confession to the crime for which he was arrested. 550 F.2d at 928. The court declared that no matter how unskillfully pleaded, pro se complaints are to be liberally construed. *Id.* Enough was pleaded to avoid dismissal, but amendment on remand was suggested. *Id.* at 929.

[60] 429 U.S. at 104-105.

[61] *See* text accompanying note 4 *supra.*

[62] *See* 582 F.2d at 1294.

[63] The Fourth Circuit in *Loe* drew an inference of deliberate indifference from the unusual length of delay in Loe's initial treatment. 582 F.2d at 1296. According to the court, the complaint of subsequent mistreatment of the arm alleged nothing more than unsatisfactory