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pounded if a jury, not a judge sitting alone, had rendered the conviction in the original trial; or if the record, incomplete in its description of the police interrogation, had specified police misconduct similar to that in *Dravecz* and *Cockrell.* As the practical application of the adoptive admissions rule requires the defendant to elect between speech and silence without full knowledge of the ramifications of each, the courts should be extremely wary of admitting adoptive admissions in criminal cases.

M. CRAIG GARNER, JR.

CAPACITY TO SUE: THE DEVELOPING 42 U.S.C. § 1983 EXCEPTION TO THE FEDERAL RULE 17(b) DOMICILE PRINCIPLE

Rule 17(b) of the Federal Rules of Civil Procedure states that "[t]he capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile."[1] Rule 17(b), on its face, is apparently applicable to suits brought by individuals based on state law as well as suits based on federal law. However, when a state-incarcerated felon bases his suit on 42 U.S.C. § 1983,[2] the civil remedy provision of the Civil Rights Act,[3] most federal courts faced with the issue have held that the prisoner has capacity to sue, even though his state has a statute barring all suits by incarcerated felons.[4] This

[1]For the purposes of Rule 17(b) the word "domicile" has been said to mean the place where a person has his true, fixed and permanent home, a test somewhat analogous to that used for "citizenship" in measuring federal subject matter jurisdiction under the general diversity statute 28 U.S.C. § 1332. C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1560 (1971) [hereinafter cited as WRIGHT AND MILLER].

[2]42 U.S.C. § 1983 (1970) provides:

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

[3]42 U.S.C. §§ 1981-88 (1970). Section 1983 was originally enacted as section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13. Its passage represented the indignant reaction of Congress to conditions in the southern states where the Ku Klux Klan and other lawless elements were rendering life and property insecure. For a discussion of the abuses which fostered passage of the act, see Justice Douglas' opinion in Monroe v. Pape, 365 U.S. 167, 171-87 (1961). For an analysis of the legislative history and the evolution of the statute, see Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond,* 60 NW. U. L. REV. 277 (1965).

[4]Beyer v. Werner, 299 F. Supp. 967 (E.D.N.Y. 1969); McCollum v. Mayfield, 130 F.

judicially-created exception to the proposition in the first sentence of Rule 17(b) was examined and expanded by the Fourth Circuit Court of Appeals in a recent case, *Almond v. Kent.*[5]

Almond, a Virginia prisoner incarcerated under state process, brought suit in federal court under 42 U.S.C. § 1983 for deprivation of civil rights against Kent, Sheriff of Augusta County, the Augusta County Division of the Virginia State Police, and several state troopers.[6] The district court dismissed the complaint on the ground that the plaintiff had not sued by committee in accordance with Virginia law[7] made applicable to the district court by Rule 17(b) of the Federal Rules.[8] On appeal, the Fourth

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Supp. 112 (N.D. Cal. 1955). *See also* Weller v. Dickson, 314 F.2d 598 (9th Cir.), *cert. denied,* 375 U.S. 845 (1963). *Contra,* Lombardi v. Peace, 259 F. Supp. 222 (S.D.N.Y. 1966). At the present time, thirteen states have statutes which restrict the right of certain prisoners to sue or be sued while incarcerated. Note 18-19 *infra.*

[5]459 F.2d 200 (4th Cir. 1972).

[6]Almond v. Kent, 321 F. Supp. 1225 (W.D. Va. 1970). The plaintiff alleged 1) that the state police unreasonably beat him with resulting physical injuries; 2) that his shoes were taken from him at the Augusta County jail; 3) that he was placed in "isolation" and was denied visits from his family; and 4) that the $50,000 bail set for him was excessive. *Id.* at 1226. Historically, the judiciary has been extremely reluctant to review the complaints of convicts. Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963). However, in recent years, this "hands-off doctrine" has been largely discarded. Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation,* 23 STAN. L. REV. 473, 473-74 (1971).

[7]The Virginia statutory provisions in question were VA. CODE ANN. §§ 53-305 to 312.1 (Repl. vol. 1972). Section 53-305 states:

> When a person is convicted of a felony and sentenced to confinement in the penitentiary or to the State convict road force for one year or more his estate, both real and personal, if any he has, shall, on motion of any party interested, be committed by the circuit or corporation court of the county or city in which his estate, or some part thereof is, to a person selected by the court, who after giving bond before the court, in such penalty as it may prescribe, shall have charge of the estate until the convict is discharged from confinement.

Section 53-307 provides:

> Such [person serving as] committee may sue and be sued in respect to all claims or demands of every nature in favor of or against such convict, and any other of the convict's estate, and he shall have the same right of retaining for his own debt as an administrator would have. No action or suit on any such claim or demand shall [otherwise] be instituted by or against such convict after judgment of conviction, and while he is incarcerated. All actions or suits to which he is a party at the time of his conviction shall be prosecuted or defended, as the case may be, by such committee after ten days' notice of the pendency thereof, which notice shall be given by the clerk of the court in which the same are pending.

[8]Since Almond was apparently domiciled in Virginia prior to his conviction and remained in the state during imprisonment, the federal courts must look to Virginia law. Note 1 *supra.*

Circuit reversed and remanded the case, holding that to require the committee statute to be observed in suits under section 1983 would only serve to delay the assertion of federal rights.[9] The court also stated that the delay involved in requiring a committee to be appointed could result in the prisoner's remedy being completely foreclosed by operation of the Virginia statute of limitations.[10] In reaching its decision, the court relied heavily on cases which have held that the personal rights accruing to the prisoner under section 1983 superseded Rule 17(b)'s adoption of state law if the state law totally barred prisoners' suits.[11]

Capacity to Sue or be Sued

The legal concept of capacity to litigate involved in *Almond* is of ancient origin.[12] Capacity may be defined as a party's personal right to come into court.[13] When public policy requires that an individual not be allowed to sue or be sued, courts have held that the individual lacks the proper capacity to participate in the judicial process.[14]

For purposes of analysis, it is necessary to distinguish three types of disqualification to litigate.

(1) *Total Incapacity.* This concept is usually employed to bar all suits by persons whom the society finds to be unworthy possessors of legal

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The trooper defendants also raised the defense of statute of limitations, VA. CODE ANN. § 8-24 (Repl. vol. 1957). Since there is no applicable federal limitations statute applicable to a civil damage action under the federal civil rights statutes, the federal courts are to apply the state statutes of limitation. O'Sullivan v. Felix, 233 U.S. 318, 322-24 (1914). Federal courts generally have indicated that the applicable period of limitations in a section 1983 action is the one which state courts would apply if the action were brought in a state court under state law. Swan v. Board of Higher Education, 319 F.2d 56, 59 (2d Cir. 1963). The district court in *Almond* held a one year period applicable and gave this as an additional ground for dismissal. 321 F. Supp. at 1229. For a discussion of the myriad problems which have arisen due to lack of a federal statute of limitations for section 1983 actions, see Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763 (1968).

[9]*Almond v. Kent*, 459 F.2d 200, 203-04 (4th Cir. 1972).

[10]*Id.* at 203. Note 8 *supra*.

[11]459 F.2d at 203. The court also reversed the decision of the district court regarding the applicability of the one year limitations period. The court held that because section 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate or are guaranteed to the person, Virginia's two year limitation period for personal injuries should apply to all 1983 damage suits. *Id.* at 204.

[12]Kennedy, *Federal Civil Rule 17(b) and (c): Qualifying to Litigate in Federal Court*, 43 NOTRE DAME LAW. 273 (1968) [hereinafter cited as KENNEDY].

[13]WRIGHT AND MILLER at § 1559.

[14]KENNEDY at 273-75. The policy factors are briefly discussed in F. JAMES, CIVIL PROCEDURE § 9.9 n.3 (1965).

rights.[15] The Roman system of law provides the classic historical example since it generally denied legal status to those who were not citizens of Rome.[16] Although the trend in the law has been towards disappearance of such total disabilities,[17] several states retain "civil death" statutes[18] which, in stripping prisoners under life sentence of civil status, prevent them from bringing any action in court.[19]

(2) *Suspended Capacity.* Under this concept, an individual loses his

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[15]KENNEDY at 274.

[16]The Roman system recognized a series of partial capacities and resulting legal relations as a human person descended from categories of "citizen," "freeman" and "father" to their polar statuses of "noncitizen," "slave" and "son." J. MUIRHEAD, LAW OF ROME § 29 at 121-26 (2d ed. 1899).

[17]KENNEDY at 275.

[18]At common law, a person convicted of treason or another felony was subject to three principal penalties: forfeiture of property to the king; corruption of blood, which incapacitated the convict from either transmitting property to his heirs or taking property from his ancestors; and an extinction of civil rights, more or less complete, known as "civil death." Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888); Comment, *Convicts—Loss of Civil Rights—Civil Death in California,* 26 S. Cal. L. Rev. 425 (1953).

Civil death is a part of the English common law which has never been recognized in the common law of the United States. Platner v. Sherwood, 6 John Ch. (N.Y.) 118 (1822). However, at the present time, twelve states have statutes imposing the status of civil death on those serving a life sentence: ALA. CODE tit. 61, § 3 (1960); ALASKA STAT. § 11.05.080 (1970); ARIZ. REV. STAT. ANN. § 13-1653(B) (1956); IDAHO CODE ANN. § 18-311 (1947); MO. ANN. STAT. § 222.010 (1962); MONT. REV. CODES ANN. § 94-4721 (Repl. vol. 1969); N.Y. CIV. RT. LAW § 79-a (McKinney Supp. 1972); N.D. CENT. CODE § 12-06-27 (1960); OKLA. STAT. ANN. tit. 21, § 66 (1958); ORE. REV. STAT. § 137.240(1) (1969); R.I. GEN. LAWS ANN. § 13-6-1 (1970); UTAH CODE ANN. § 76-1-37 (1953). The trend is away from the original concept of strict civil death, as it is generally no longer held that the prisoner forfeits his property or loses his power to contract. What does remain of civil death, however, includes the prevention of a prisoner from bringing an action in court. Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (18888); Lynch v. Quinlan, 65 Misc. 2d 236, 317 N.Y.S.2d 216 (Sup. Ct. 1970); Note, *State Liability to Innocent Prisoners in Prison Uprisings,* 29 WASH. & LEE L. REV. 119, 120 (1972).

[19]The constitutionality of these civil death statutes, while not often questioned, has been upheld. *E.g.,* Harrell v. State, 17 Misc. 2d 950, 188 N.Y.S. 2d 683 (Ct. Cl. 1959); Quick v. Western Ry., 207 Ala. 376, 92 So. 608 (1922). *But see* Boddie v. Connecticut, 401 U.S. 371 (1971), in which the Supreme Court held that the due process clause of the fourteenth amendment prohibits a state from denying access to its courts to individuals seeking divorce who are unable to pay court fees. The Court, however, limited its holding by stating:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed [by due process] so that its exercise may not be placed beyond the reach of any individual . . . .

401 U.S. at 382-83.

However, since the Supreme Court has never ruled on the civil death statutes, their constitutionality may be considered suspect in light of *Boddie.* The Court has already recognized the prisoner's right of access to court to attack his criminal conviction. *Ex parte* Hull, 312 U.S. 546 (1944).

right to go into court for a definite or indefinite period but regains the right to bring actions at a later time. An example of this type of disability would be the statutes of those states which, as an extension of the civil death policy, prevent a prisoner serving less than a life sentence from bringing suit during the period of incarceration.[20] Generally, the statute of limitations is tolled during the period of suspended capacity.[21] Another example is the federal statute declaring a non-resident alien enemy to be without capacity to file suit in any court of the United States for the duration of a war.[22]

(3) *Formal Incapacity*. Under this concept, an individual, while not prevented from bringing suit, may litigate only through a representative regulated by fiduciary obligations. The policy of formal incapacity is generally employed to prevent individuals from representing themselves in order to protect the integrity of the judicial process or to foster the efficient administration of the judicial system.[23] Thus, minors and incompetents are not allowed to bring suit except through representatives,[24] as they are presumed to be unable to participate adequately in the adversary process.[25] The opposing litigant, by raising objections to qualifications of a minor or incompetent, represents society's interest in demanding proper representation of the ward's interest.[26]

The Virginia statute involved in *Almond*, although directed at prisoners like the civil death statutes, does not prevent prisoners from seeking a judicial remedy for alleged wrongs. Since the only qualification on the right to litigate is the appointment of a representative to bring or defend suits,[27] the Virginia statute may be classified as a formal incapacity statute.

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[20]Nine states retain such statutes: ARIZ. REV. STAT. ANN. § 13-1653(A) (1956); CAL. PENAL CODE § 2600 (West 1970); IDAHO CODE ANN. § 18-310 (1948); MO. ANN. STAT. § 222.010 (1962); MONT. REV. CODES ANN. § 94-4720 (Repl. vol. 1969); N.D. CENT. CODE § 12-06-27 (1960); OKLA. STAT. ANN. tit. 21, § 65 (1958); ORE. REV. STAT. § 137.240 (1969); UTAH CODE ANN. § 76-1-36 (1953).

[21]*E.g.*, ILL. ANN. STAT. ch. 83, § 22 (Smith-Hurd 1966); CAL. CODE CIV. PRO. § 352 (West 1954).

[22]The "Trading with the Enemy Act" § 7, 50 U.S.C. APP. § 7 (1970).

[23]*See* Note, *Federal Courts—Rule of Civil Procedure—Forum State Statute Denying Unlicensed Contractor the Right To Sue Requires Dismissal in Diversity Case Even Though Rule 17(b) Would Allow the Suit*, 82 HARV. L. REV. 708, 710 (1969).

[24]*E.g.*, VA. CODE ANN. 37.1-139 (Repl. vol. 1970) (incompetents); VA. CODE ANN. §§ 8-87 to 88 (Repl. vol. 1957) and 8-88.1 (Supp. 1972) (minors).

[25]*See, e.g.*, Doyle v. Loyd, 45 Cal. App. 2d 493, 497, 114 P.2d 398, 400 (1941) (infants).

[26]KENNEDY at 275.

[27]Scott v. Nance, 202 Va. 355, 117 S.E.2d 279 (1960); VA. CODE ANN. § 53-307 (Repl. vol. 1972), the text of which appears in note 7 *supra*.

Section 1983 and the Civil Death Statutes

The only cases involving prisoners' capacity to sue under section 1983 decided prior to *Almond* involved disqualification statutes of the civil death variety.[28] The leading case is *McCollum v. Mayfield,*[29] in which the district court was faced with a section 1983 action brought by a convicted felon against a sheriff who forced the prisoner awaiting trial to perform labor in the county jail. The prisoner became ill and was denied proper medical care, as a result of which he suffered permanent paralysis.[30] A California statute[31] suspended the capacity of all prisoners in state prisons to litigate during their incarceration. The court turned to the literal wording of section 1983 in resolving the capacity issue: "Section 1983 creates a right of action in 'any citizen of the United States *or other person within the jurisdiction thereof*. . . .' "[32]

The *McCollum* court read the above-quoted language as a sweeping statement of capacity to sue, relying in part on three earlier district court decisions which had given the quoted language of section 1983 a broad interpretation.[33] The *McCollum* court also based its conclusion on a Supreme Court decision, *Roberts v. United States District Court,*[34] which held that the California civil death statute did not prevent a prisoner from seeking permission to proceed in forma pauperis under the federal statute which provides such relief to "a citizen who makes affidavit that he is unable to pay such [court] costs. . . ."[35] The Supreme

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[28]The theory of the Federal Rules is that capacity to sue or be sued will generally be presumed. KENNEDY at 284. Thus, Rule 9(a) requires the objector to raise objections to capacity "by specific negative averment." Since the capacity issue is a threshold defense, somewhat analogous to lack of personal jurisdiction or improper venue, it is waived under Federal Rule 12(h) (1) if not made in a motion to dismiss before answer or in the answer. WRIGHT AND MILLER at § 1559. This waiver doctrine would seem to account in part for the relatively small number of federal court cases in which capacity of a prisoner to sue or be sued has been discussed.

[29]130 F. Supp. 112 (N.D. Cal. 1955).

[30]*Id.* at 113.

[31]CAL. PENAL CODE § 2600 (West 1970). The text of the statute appears in note 53 *infra.*

[32]130 F. Supp. at 116. The text of section 1983 appears in note 2 *supra.*

[33]In the first case, a district court held that the word "person" in section 1983 was broad enough to include the Jehovah's Witnesses organization. Sellers v. Johnson, 69 F. Supp. 778 (S.D. Iowa 1946). The other two cases were suits by prisoners under section 1983. In both, the court held that section 1983 gave prisoners a right of action despite civil death statutes. Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949); Gordon v. Garrson, 77 F. Supp. 477 (E.D.Ill. 1948). However, in none of these district courts cases was Rule 17(b) even mentioned. The capacity question was discussed only briefly as this was not the major issue in the cases.

[34]339 U.S. 844 (1950).

[35]*Id.* at 845. 28 U.S.C. § 1915(a) (1940), *as amended,* 28 U.S.C. § 1915(a) (1970).

Court stated that "[c]itizenship for the purpose of *in forma pauperis* proceedings in the federal courts is solely a matter of federal law."[36] The *McCollum* court found this reasoning highly persuasive because section 1983 extends a right of action to "any citizen or other person within the jurisdiction" of the United States, while the statute in *Roberts* applied only to "citizens."

However, neither the Supreme Court in its per curiam disposition of *Roberts*, nor the *McCollum* court made any attempt to formulate general federal standards regarding capacity to replace the certainty provided by Rule 17(b)'s direction to apply the law of the individual's domicile. Furthermore, the *McCollum* court failed to explain why it chose to follow the literal wording of section 1983 but not the literal wording of Rule 17(b).[37]

Analysis of the legislative history of section 1983 underscores the unsoundness of the literal wording approach of the *McCollum* court. At the time of the enactment of the federal statute, it was generally held that prisoners had forfeited all rights.[38] A congressional attempt to change the established status of prisoners would most probably have been debated at length. However, examination of the hundreds of pages of debate in the *Congressional Globe* indicates that Congress was concerned not with prisoners' rights but with the activities of the Ku Klux Klan and the status of the Negro.[39]

An additional criticism of the *McCollum* holding can be derived from a historical overview of the early congressional civil rights statutes. It has been forcefully argued that the legislation enacted after the Civil War, of which the predecessor of section 1983 was a part, was meant to alter drastically the allocation of power between the states and the federal government.[40] The Supreme Court has apparently adopted this view.[41]

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[36]339 U.S. at 845.

[37]The *McCollum* court merely stated, "[A] literal application of Rule 17(b) to the case at bar would bring about an artificial and erroneous result. Such a provision cannot be applied mechanically to every case." 130 F. Supp. at 116.

[38]The prevailing attitude towards prisoners at the time of passage of the act was succinctly stated in Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871), which denied application of the Virginia Bill of Rights to felons: "He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." This attitude towards prisoners remained prevalent until recent decades. Turner, *supra*, note 6 at 473-74; Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, at 183-85 (1970).

[39]*See* CONG. GLOBE, 42nd Cong., 1st Sess. 365-827 (1871); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277-82 (1965).

[40]*See, e.g.*, Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Note, *42 U.S.C. § 1983-Civil Remedy—Its Circumvention and Emascu-*

Thus, it would seem that recognition of an exception to Rule 17(b) for section 1983 would require recognition of an exception for actions brought under other provisions of the civil rights laws, absent a showing that section 1983 is somehow a unique provision of the United States Code.

Despite these apparent flaws in the *McCollum* opinion, commentators have noted that the outcome in the case would appear to be desirable, arguing that it would be unwise to allow state capacity concepts to inhibit an individual's ability to seek the protection of federal substantive statutes.[42] However, there are important reasons why the *McCollum* rationale should not be perpetuated.

A logical deduction from the *McCollum* holding that section 1983 contains a blanket authorization of capacity is that minors or mental incompetents have capacity to litigate under that section. Such a decision would run contrary to the established policy of the law of capacity.[43]

Moreover, by limiting its justification for an exception to Rule 17(b) to the finding of a blanket authorization of capacity in section 1983, the *McCollum* court created problems for the federal courts which would face the capacity issue in later cases. Other important federal statutes may not include the broad "person" language which a court could interpret as a direct authorization of capacity.[44] Thus, under *McCollum,* life prisoners in states retaining civil death statutes purporting to bar all suits by such prisoners might find themselves completely deprived of a federal remedy through the operation of a state statute, unless the federal statutes on which their claims are based are worded similar to 42 U.S.C. § 1983. Prisoners subject to suspended capacity statutes might be subjected to long delays in asserting their rights under federal law. Both situations might pose due process problems, in view of recent Supreme Court decisions stressing the right of access to the courts.[45] The *McCollum* opinion contains little reasoning which could aid a federal court in avoiding these undesirable and perhaps unconstitutional results.

This failure of the *McCollum* court to provide an adequate basis for

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lation, 12 How. L.J. 285 (1966). The predecessor of what is now section 1983 was labeled a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States." H.R. 320, 42 Cong., 1st Sess. 1 (1871).

[41]Mitchum v. Foster, 407 U.S. 225 (1972); *see also* Monroe v. Pape, 365 U.S. 167 (1961).

[42]WRIGHT AND MILLER at § 1560.

[43]Text accompanying notes 23-26 *supra.*

[44]*E.g.,* 42 U.S.C. 1982 (1970) ("All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.").

[45]Note 19 *supra.*

its holding created difficulties for both the district court and the Fourth Circuit in *Almond*. The two courts disagreed concerning the application of the *McCollum* precedent.

Almond v. Kent

The district court in *Almond v. Kent* based its decision regarding the applicability of the Virginia committee statutes on the distinction between formal incapacity and total or suspended capacity.[46] The *McCollum* line of cases[47] was distinguished because state statutes in those cases prevented the prisoner from presenting his contentions in any manner, while the committee statute, although barring the prisoner from personally litigating, allowed his claims to be litigated by the committee. Because the Virginia statute requires an appropriate court[48] to appoint such a committee on the motion of any interested party,[49] the district court found the statute to be a limited procedural obstacle not serious enough to justify allowing an exception to Rule 17(b).[50]

The district court in *Almond* did not discuss the specific argument in *McCollum* that section 1983 contains a blanket authorization of capacity.[51] Adoption of that position would have required a finding that the Virginia statute was inapplicable. Instead, the court apparently took a limited view of the holding of *McCollum* and the cases following it, believing that they established an exception to Rule 17(b) which would only operate when the prisoner was completely deprived of his remedy under section 1983. Although it did not discuss the issue in depth, the district court was perhaps concerned with maintaining the integrity of the literal wording of the Federal Rules.

The Fourth Circuit, however, apparently accepted the *McCollum*

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[46]Text accompanying notes 15-27 *supra.*

[47]Despite the shortcomings of the opinion, *McCollum* was relied on and cited with explicit approval in Weller v. Dickson, 314 F.2d 598, 601 (9th Cir.), *cert. denied,* 375 U.S. 845 (1963). Two New York federal district courts have reached different conclusions regarding the applicability of the New York civil death statute to prisoners' suits under the civil rights statutes. *Compare* Beyer v. Werner, 299 F. Supp. 967 (E.D.N.Y. 1969) *with* Lombardi v. Peace, 259 F. Supp. 222 (S.D.N.Y. 1966). The opinions do not add to the *McCollum* discussion.

[48]The motion must be made in the circuit or corporation court of the county or city in which any part of the prisoner's estate is located. VA. CODE ANN. § 53-305 (Repl. vol. 1972). If the prisoner has no property or estate in Virginia, the motion must be made in the county or corporation court having probate jurisdiction in the county or city wherein the offense was committed. VA. CODE ANN. § 53-306 (Repl. vol. 1972).

[49]The statutory phrase "interested party" has not yet been judicially interpreted. However, it is clear that the party opposing the prisoner in the suit is such an "interested party." Scott v. Nance, 202 Va. 355, 117 S.E.2d 279 (1960).

[50]321 F. Supp. at 1227.

[51]Text accompanying notes 32-38 *supra.*

interpretation of section 1983 and put forth two additional reasons for its finding that the prisoner in *Almond* had capacity to sue. In relying on the *McCollum* line of cases, the Fourth Circuit stated that the district court's distinction between the civil death statutes and the committee statute was "tenuous and insubstantial."[52] The only apparent basis for the Fourth Circuit's conclusion is the fact that the California civil death statute involved in *McCollum* allowed administrative officials discretion to restore a prisoner's rights.[53] From this, the court reasoned that the California statute could not be considered a complete bar to a prisoner's suit, just as the Virginia statute was not a total bar to prisoners' suits. However, the Fourth Circuit did not acknowledge the apparent distinction between a statute requiring mandatory appointment of a committee on motion of any interested party and a statute barring prisoners' suits unless penal authorities in their discretion remove the bar. It appears then that the Fourth Circuit disregarded the formal-total incapacity distinction[54] which the district court had perceived.[55] Rather than attempting to justify an extension of the section 1983 exception developed in the civil death cases to those involving formal incapacity statutes, the Fourth Circuit merely indicated that the *McCollum* line of cases was highly persuasive.

The second justification employed by the Fourth Circuit in its decision was that the underlying rationale of the Virginia statutes did not seem to involve any state interest that Rule 17(b) was designed to preserve.[56] Noting first that it had never been determined by any court whether section 53-307 of the 1950 Virginia Code was intended to apply to suits in a federal court in Virginia, the court went on to point out that the present Virginia statute was the outgrowth of an earlier statute[57] enacted to alleviate the consequences of the common law rule which permitted a person convicted of a felony to be sued but not to appear in court to defend his case.[58] The court thus viewed the statute as enacted for the

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[52]459 F.2d at 202.

[53]CAL. PENAL CODE § 2600 (West 1970) states, in relevant part:

> A sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment. But the Adult Authority may restore to said person during his imprisonment such civil rights as the authority may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney.
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> . . . .

[54]Text accompanying notes 15-27 *supra*.

[55]Text accompanying note 50 *supra*.

[56]459 F.2d at 202.

[57]Law of March 14, 1878, ch. 21 § 6-12, 1877-78 Virginia Acts of Assembly 357-58.

[58]459 F.2d at 202; Merchant's Adm'r v. Shry, 116 Va. 437, 82 S.E. 106 (1914).

prisoner's benefit. This interpretation led the court to conclude that requiring the statute to be observed in section 1983 suits could only jeopardize the prisoner's rights.[59]

While its conclusion may be appealing, the court overlooked other possible analyses of the committee statute. The fact that the Virginia legislature has chosen to reenact[60] the statute may indicate that there are state interests behind the statute which were not considered by the court. The retention of the statute may represent a legislative judgment[61] that prisoners are unable to manage their affairs[62] inasmuch as the powers given the prisoner's committee are similar to those given the committee of an insane person.[63] Additionally, the legislature may have believed, as have other state legislatures, that such statutes are necessary to maintain prison discipline in view of the vexatious litigation which might otherwise be brought by inmates against prison personnel.[64] Rather than

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[59]459 F.2d at 202. It might also be argued, in view of the historical background of the committee statute, that it was enacted to give felons the opportunity to bring ordinary contract and tort actions, but that the statute is irrelevant to the question of the capacity of felons bringing civil rights actions under 42 U.S.C. § 1983. Support for this reading of the Virginia committee statute could be derived from the fact that, at the time of its adoption, Virginia felons were generally believed to have lost all civil rights, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871), and thus the committee statute could not have been directed at suits by prisoners involving such rights. Further support for this view might be found in the languge of the statute which gives to the committee control of the prisoner's "estate." Note 7 *supra*. The Virginia courts, however, have interpreted the statute so as to be applicable to all civil actions brought by convicted felons, not merely contract or tort actions. Merchant's Adm'r. v. Shry, 116 Va. 437, 82 S.E. 106 (1914). One exception is a federal habeas corpus proceeding pursuant to 28 U.S.C. 2254-55 (1970). However, Federal Rule 81(a)(2) provides that the other federal rules are not applicable to habeas corpus actions except when the federal statute does not prescribe the procedure to be followed. The federal courts have not read Rule 17(b) into the federal habeas corpus proceedings. *See* 7 J. MOORE, FEDERAL PRACTICE § 81:05 (2d ed. 1972).

[60]The present VA. CODE ANN. § 53-307 (Repl. vol. 1972) was formerly section 4999 of the Virginia Code of 1919.

[61]*Cf.* 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 5109 (3d ed. F. Horack 1943).

[62]The vast majority of prisoners who file pleadings are laymen of deprived educational backgrounds. *See* Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343 (1968).

[63]*Compare* VA. CODE ANN. §§ 37.1-135 to 147 (Repl. vol. 1970) *with* VA. CODE ANN. §§ 53-307 (Repl. vol. 1972). This similarity was first acknowledged in Merchant's Adm'r v. Shry, 116 Va. 437, 82 S.E. 106 (1914).

[64]*Cf.* Weller v. Dickson, 314 F.2d 598, 601 (Duniway, J., concurring), *cert. denied*, 375 U.S. 845 (1963); *see also* Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397 (1965). In Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964), the court said many prisoners do not view a civil case as providing "for the redress of genuine grievances or wrongs, but rather as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy not only their jailers, but Judges, Jurors, witnesses and everyone having anything to do with their conviction." *Id.* at 21.

For the prisoners' view see Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L.

balancing all of the state interests involved against the federal policies behind section 1983 and Rule 17(b), the Fourth Circuit apparently chose only to discuss those interests which were favorable to its view of the proper result.

The third contention made by the Fourth Circuit in support of its decision was that the possibility of delay in appointing a committee or the failure of the committee to institute the suit promptly could result in complete deprivation of the prisoner's remedy through the bar of the statute of limitations.[65] The court viewed this as a possibility because the Virginia statute of limitations is not tolled during incarceration, as is the case in most states which suspend a prisoner's right to sue.[66]

However, the statute of limitations problem in *Almond* could have been avoided because of the liberal federal court policy on amended pleadings.[67] The federal courts have allowed amendments substituting a party plaintiff with proper capacity after the statute of limitations ostensibly barred the suit, relying on the policy that such amendments relate back to the original filing date of the complaint.[68] Thus, any prisoner who

REV. 343 (1968). For a study of the actual time required to dispose of prisoners' 42 U.S.C. § 1983 cases in a recent period, see Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1354 (1970).

[65]459 F.2d at 202-03.

[66]*Id.* at 203; *compare* VA. CODE ANN. § 8-30 (Repl. vol. 1957) limitations suspended for infants and insane persons only) *with* ILL. ANN. STAT. ch. 83 § 22 (1966) and CAL. CODE CIV. PRO. § 352 (West 1954).

[67]Federal Rule 15(c) states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Although Rule 15(c) does not expressly apply to a new pleading adding or dropping plaintiffs, courts have applied the same notice and identity of interest factors in allowing such changes. WRIGHT AND MILLER § 1501.

[68]Deupree v. Levinson, 186 F.2d 297 (6th Cir. 1950), *cert. denied*, 341 U.S. 915 (1951). Although there are no reported cases involving the Virginia statute, the federal court rule is that as long as the defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a statute of limitations defense. WRIGHT AND MILLER at § 1501. *Cf.* Scott v. Nance, 202 Va. 355, 117 S.E.2d 279 (1960), in which the Virginia court allowed a wrongful death action

brought suit in his own name before the statutory period of limitations had run should be allowed to avoid the problem which the court found significant. Moreover, the Fourth Circuit, in the remainder of its opinion, determined that a two-year limitation period applied to all section 1983 actions, as opposed to the one year period applied by the district court.[69] Two years would seem to be an adequate period within which to have a committee appointed and file suit. Additionally, the Virginia statutory scheme provides for relief should the person serving as committee fail to discharge his duties.[70]

The *Almond* decision is a significant extension of the *McCollum* holding in that the Fourth Circuit is the first federal court to hold that prisoners may sue under section 1983 without having to contend with a formal incapacity statute.[71] However, according to commentators involved in the drafting of the rule, the domicile principle was adopted in the belief that deference to state policy on capacity would foster uniformity of treatment of individuals[72] and would be easiest for the federal system to apply.[73] The validity of the committee statute would at least appear to be arguable,[74] and the Fourth Circuit's refusal to apply it would seem to foster uncertainty as different federal courts may disagree on the issue.

Suggested Solutions to the Capacity Problem

The federal court system will, in all probability, be called upon to

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to be commenced against a released felon after the statute of limitations had apparently run. The decedent's administrator's earlier suit brought against the incarcerated felon in his personal capacity had been dismissed.

[69]459 F.2d at 204; note 8 *supra*.

[70]VA. CODE ANN. § 53-309 (Repl. vol. 1972) states:

> The committee shall render accounts of his trust, and may be made to account therefor; shall be entitled to compensation for his services, and may forfeit his right thereto, in the same manner as if he were administrator or guardian.

§ 53-311 states:

> If any person, so appointed, refuse the trust, or fail to give bond as required, the court, on like motion, shall commit the estate to the sheriff of the county, or sergeant of the corporation, who shall be the committee, and he and the sureties on his official bond, shall be bound for the faithful performance of the trust.

[71]Text accompanying notes 23-27 *supra*.

[72]Thus a person who had capacity to sue in his home state could litigate in any federal court in the United States. Clark and Moore, *A New Federal Civil Procedure II. Parties*, 44 YALE L.J. 1291, 1312-13 (1935).

[73]PROCEEDINGS, WASHINGTON INSTITUTE ON FEDERAL RULES (1939) at 65; 3A J. MOORE, FEDERAL PRACTICE § 17.16 (2d ed. 1970).

[74]Text accompanying notes 63-66 *supra*.

decide an increasing number of capacity questions in the future. One reason for this trend is the large increase in the amount of litigation being instituted by prisoners,[75] who are often the subjects of state statutes purporting to limit their capacity to litigate.[76]

The difficulties encountered by the federal courts with Rule 17(b), illustrated by the *Almond* and *McCollum* cases, would seem to stem from the failure of the rule to distinguish between capacity of individuals in federal question cases and diversity cases. Rule 17(b) presently makes such a distinction only with regard to partnerships and unincorporated associations, which, if lacking capacity to sue under state law, are granted capacity to enforce a federal substantive right.[77] The reasons the draftsmen of the rules did not extend this principle to other parties is unclear. However, it has been noted that Rule 17(b) as presently drafted was the product of compromise.[78] One approach to remedying this apparent shortcoming in the rule is to amend Rule 17(b). A case-by-case solution involves recognition of a residual power in the federal court system to grant individuals and other parties independent capacity status for the protection of rights under federal law, where state law might deny them qualification to sue.

Support for the proposition that the federal courts may independently allow capacity to litigate in special situations may be found in the case law dealing with the capacity of corporations and representatives. Rule 17(b) provides that the capacity of a corporation shall be determined by the law under which it was organized. This approach is similar to the treatment of individuals in that a single standard for diversity and federal question cases is apparently established. However, the Supreme Court has held that, under the principle of *Erie Railroad Co. v. Tompkins*,[79]

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[75]*See* Chevigny, *supra* note 64, at 1352-54.

[76]Notes 18 and 20 *supra* and the accompanying text.

[77]Rule 17(b) states in full:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sue shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. § 754 and 959(a).

[78]3A J. MOORE, FEDERAL PRACTICE § 17.22 (2d ed. 1970).

[79]304 U.S. 64 (1938).

there may be applicable substantive state forum law denying capacity to a foreign corporation, thus barring the federal suit even though the corporation has capacity by the law under which it was organized.[80] This power of the forum state to bar a federal court diversity suit, however, apparently does not exist when the claim is based on federal law.[81] For example, in *United States ex rel. Bernadot v. Golden West Construction Co.*,[82] a contractor corporation had not qualified to do business in Utah and thus lacked capacity to sue there. When it was sued in a Utah district court under the Miller Act,[83] the corporation was allowed, nevertheless, to assert a federal law counterclaim.[84]

Rule 17(b) provides that the capacity of a representative is to be determined by the law of the forum state,[85] once again apparently setting down a single standard for both federal question and diversity cases. Nevertheless, in suits based upon some federal statutes, judges have disregarded state forum capacity restrictions. For example, Congress in the Federal Employer's Liability Act[86] created a right that can be sued upon by the "personal representative" in favor of beneficiaries. When a Pennsylvania domiciliary administratrix of the deceased brought an F.E.L.A. death action in New York, Judge Learned Hand found that there was no good reason to impose the restrictions of the forum state precluding an out-of-state administrator from suing without taking out ancillary letters. In fact, he asserted, it might be unjust where state law does not allow taking out ancillary letters.[87] The same fairness theory might be argued with regard to other federal statutes, such as 42 U.S.C. § 1983, or a court could use Judge Hand's opinion merely to support the proposition that the standards set up in Rule 17(b) are flexible rather than absolute.

However, an extensive judicial attempt to modify the first sentence of Rule 17(b) might be an undesirable approach. Amendment of the rules has been a favored method of resolving difficulties[88] which cannot be easily handled by a judicial policy of liberal rule construction alone.[89]

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[80]Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

[81]KENNEDY at 302.

[82]194 F. Supp. 371 (D. Utah 1961), *modified*, 340 F.2d 753 (10th Cir. 1962).

[83]40 U.S.C. 270 (1970). The Miller Act establishes performance and payment bonding requirements for most federal construction contracts.

[84]194 F. Supp. at 375. This holding might also be justified by the compulsory counterclaim requirement of Rule 13(a). *Id.* at 374.

[85]The text of Rule 17(b) appears in note 77 *supra.*

[86]45 U.S.C. § 51 (1970).

[87]Briggs v. Pennsylvania R.R., 153 F.2d 841, 842 (2d Cir. 1946). *Contra,* Reynolds v. Cincinnati, N. O. & T. P. Ry., 7 F.R.D. 165 (E.D. Ky. 1945).

[88]Major amendments to the Federal Rules became effective in 1948, 1961, 1963 and 1966.

[89]Rule 1 of the Federal Rules of Civil Procedure states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."