CIVIL RIGHTS

Section 1983 claims have proven to be a major source of civil rights litigation in recent years. Perhaps the most important reason for the large number of section 1983 cases is the broad language of the statute which provides a civil remedy for the deprivation of federally protected rights by a person acting under color of state law. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

Thus, the jurisdictional requirements under section 1983 are twofold. First, the plaintiff must show that the defendant deprived him of a right protected by the Constitution or by federal law. Second, the plaintiff must show that the defendant acted under color of state law.[2]

During the survey period, the Eighth Circuit Court of Appeals decided several important cases brought under section 1983. The cases analyzed in this article involve the rights of pretrial detainees,[3] the right of prisoners to be free from physical and sexual attacks by other prisoners,[4] the right of prisoners to have access to their parole files,[5] and the negligent deprivation of property without due process of law.[6] It is important to remember that, in each of the cases analyzed, the threshold issue decided by the Eighth

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1. 42 U.S.C. § 1983 (1976 & Supp. III 1979).
2. *See, e.g.*, Baker v. McCollan, 443 U.S. 137, 139-40 (1979).
3. Putman v. Gerloff, 639 F.2d 415 (8th Cir. 1981).
4. Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981).
5. Williams v. Missouri Bd. of Probation and Parole, 661 F.2d 697 (8th Cir. 1981).
6. Taylor v. Parratt, 620 F.2d 307 (8th Cir. 1980), *rev'd*, 101 S. Ct. 1908 (1981). Important issues which were addressed by the Eighth Circuit during the survey period but are not covered in this article include: the award of attorneys fees in civil rights actions, Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981); Obin v. District No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers, 651 F.2d 574 (8th Cir. 1981); Ladies Center, Neb., Inc. v. Thone, 645 F.2d 645 (8th Cir. 1981); the right to counsel in civil rights cases, Chambers v. Kaplan, 648 F.2d 1193 (8th Cir. 1981); White v. Walsh, 649 F.2d 560 (8th Cir. 1981); municipal liability for acts of police officers, Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981); and the rights of prisoners to receive medical treatment, Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981).

Circuit was whether the foundational requirements of section 1983 were satisfied. Once jurisdiction under section 1983 was established, the court of appeals adjudicated the merits of each case.

PUTMAN v. GERLOFF: THE RIGHTS OF PRETRIAL DETAINEES

INTRODUCTION

Prisoner rights litigation has recently come to the forefront as one of the major areas of civil rights litigation under section 1983.[7] Prior to the 1970's, the courts did not deal extensively with prisoner rights cases due to judicial reluctance to intervene in the administration of the nation's prison systems.[8] The first of the three prisoners' rights cases to be analyzed in this survey is *Putman v. Gerloff*.[9] *Putman* represents a significant step by the Eighth Circuit in defining the constitutionally protected rights of pretrial detainees.

FACTS AND HOLDING

The controversy in *Putman* resulted from an attempted jailbreak by two pretrial detainees and the subsequent actions of the county sheriff and his deputy. On June 29, 1976, Andrew Putman and Donald Favors were being held in the Gasconade County jail in Hermann, Missouri, pending their trial on charges of armed robbery. The jail consisted of one large cell surrounding two smaller cells. In attempting their jailbreak, Putman and Favors sawed through bars of the large cell which gave them access to a twelve inch by fourteen inch door used to pass food to the prisoners.[10]

Upon hearing sawing noises coming from the cell, the sheriff and his deputy entered the cell area but remained out of sight until they heard noises indicating that someone had crawled through the door to the outside of the cell. The officers then entered into view of the cell and found Favors outside the cell and Putman, a larger man, stuck in the cell door.[11]

Testimony regarding the subsequent events conflicted, but the record indicated that the sheriff struck Putman at least once on the head with the padded butt of his shotgun and that Favors may have been thrown to the ground by the sheriff and kicked by an

7. *See* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 3.07 at 69 (1979).
8. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).
9. 639 F.2d 415 (8th Cir. 1981).
10. *Id.* at 417.
11. *Id.*

unidentified person.[12] In any event, Putman and Favors were handcuffed and chained to each other with leg iron cuffs. The prisoners were later locked in one of the smaller cells overnight.[13]

The plaintiffs alleged that they were denied due process of law as guaranteed by the fourteenth amendment and subjected to cruel and unusual punishment as prohibited by the eighth amendment. The district court directed a verdict for the deputy sheriff and entered a judgment denying damages to the plaintiffs after the jury returned a verdict in favor of the sheriff.[14]

On appeal, the Eighth Circuit reversed, ruling that the jury instructions given by the trial judge regarding the overnight chaining and handcuffing of the plaintiffs were both confusing and erroneous.[15] The court of appeals explained that the trial court erred in instructing that the burden of proof was on the plaintiffs to prove that the officer's conduct constituted cruel and unusual punishment.[16]

In reaching its decision, the court relied heavily on *Bell v. Wolfish*,[17] in which the Supreme Court held that pretrial detainees may not be punished.[18] Consequently, the court of appeals ruled that the jury instructions should have focused on the issue of whether the detainees were denied due process in being chained, handcuffed and beaten, rather than whether the defendants' actions constituted cruel and unusual punishment.[19]

The primary importance of *Putman* rests on the standards the Eighth Circuit adopted for overnight chaining and handcuffing of pretrial detainees and for prohibiting the beating of prisoners.[20] In addition, the court addressed the significant issues of whether there exists a qualified immunity for law enforcement officers for actions taken under the direction and supervision of their superiors,[21] and whether an officer is required to intervene in an assault and beating of a prisoner by a superior officer.[22]

BACKGROUND

A thorough examination of the issues raised in *Putman* re-

12. *Id.* at 417-18.
13. *Id.* at 418.
14. *Id.* at 417-18.
15. *Id.* at 418.
16. *Id.* at 418-19.
17. 441 U.S. 520 (1979).
18. *Id.* at 535.
19. 639 F.2d at 418-19.
20. *See* notes 51-53 and accompanying text *infra*.
21. *Id.* at 422-23.
22. *Id.* at 423.

quires an analysis of the judicial foundation on which the decision was based. Litigation involving the conditions of confinement for pretrial detainees and prisoners was rare until the late 1960's, primarily due to judicial reluctance to examine the internal operations of the detention system.[23] Extensive judicial examination of the conditions faced by pretrial detainees developed from a series of cases beginning with *Johnson v. Glick*.[24] In *Johnson*, the Second Circuit held that the eighth amendment is not applicable to this situation, but instead established a balancing test to determine whether the force used was excessive.[25] Not all circuits have adhered to the precedent established in *Johnson*.[26]

The conflict among the circuits precipitated the Supreme Court's ruling in *Bell v. Wolfish*.[27] The Court ruled that pretrial detainees may not be punished,[28] and that *any* punishment would constitute a violation of due process and, therefore, would not require an eighth amendment analysis.[29] Thus, the Supreme Court for the first time recognized the distinct status of pretrial detainees in litigation involving the use of force against prisoners.[30]

Campbell v. Cauthron[31] was the first case in which the Eighth Circuit analyzed the rights of pretrial detainees. *Campbell* involved the overcrowded conditions of a county jail occupied by both pretrial detainees and convicted criminals.[32] The Eighth Circuit ruled that the crowded jail conditions violated the pretrial detainees' due process rights under the fifth and fourteenth amendments.[33] The *Campbell* decision followed the reasoning in *Bell v. Wolfish* that overcrowded conditions which result in "privations and hardships over an extended period of time" amount to

23. Comment, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 941 (1970). *See also* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

24. 481 F.2d 1028 (2d Cir. 1973).

25. *Id.* at 1032-33.

26. *See, e.g.*, Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd in part, modified in part*, 563 F.2d 741 (5th Cir. 1977) (holding that both due process and cruel and unusual punishment principles are applicable in determining the constitutionality of jail conditions for pretrial detainees).

27. 441 U.S. 520 (1979).

28. *Id.* at 535.

29. *Id.* at 535 n.16.

30. *See* Lock v. Jenkins, 464 F. Supp. 541, 558 (N.D. Ind. 1978), *aff'd in part, rev'd in part*, 641 F.2d 488 (7th Cir. 1981).

31. 623 F.2d 503 (8th Cir. 1980). One other case, Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978), addressed the rights of pretrial detainees in the context of conditions of confinement. However, the analysis in *Ahrens* was limited to a discussion of the eighth amendment rights of convicted prisoners. *Id.* at 288-90.

32. 623 F.2d at 505-06.

33. *Id.* at 507.

punishment and, therefore, violate a pretrial detainee's right of due process.[34]

Campbell and most of the other early decisions were primarily concerned with whether pretrial detainees' rights should be analyzed under due process or cruel and unusual punishment principles.[35] In those early cases, the courts generally limited their discussions to issues concerning the overcrowding and the physical condition of jails.[36] Consequently, the Eighth Circuit had little precedent to rely on in deciding the new and more complex issues presented in *Putman*. However, it should be noted that two important principles evolved from those early cases pertaining to the rights of pretrial detainees.

Of foremost importance is the principle that the fourteenth amendment due process clause prohibits the punishment of pretrial detainees.[37] In some instances, the due process interest involved was based on the presumption that a pretrial detainee is innocent until proven guilty,[38] but more often it was rooted in the principle that pretrial detention insures that an accused will be present at his trial.[39] The courts generally agree that the eighth amendment is not applicable to cases involving the rights of pretrial detainees.[40] The other principle to remember in analyzing *Putman* is that although the due process clause of the fourteenth amendment prohibits the use of *excessive* force against pretrial detainees, it does not necessarily prohibit the use of *reasonable* force.[41]

ANALYSIS

In *Putman*, the plaintiffs alleged that the beating and overnight chaining violated their civil rights and, therefore, the sheriff and his deputy should be held liable for damages under section 1983.[42] At trial, the jury was instructed that the plaintiffs could not

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34. *Id.*

35. *See, e.g.*, Duran v. Elrod, 542 F.2d 998, 999-1000 (7th Cir. 1976); Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir. 1973).

36. *See, e.g.*, Miller v. Carson, 563 F.2d 741, 743 (5th Cir. 1977); Duran v. Elrod, 542 F.2d 998, 1000-01 (7th Cir. 1976); Rhem v. Malcolm, 507 F.2d 333, 336-37 (2d Cir. 1974).

37. *E.g.*, Bell v. Wolfish, 441 U.S. 520, 535 (1979); Lock v. Jenkins, 641 F.2d 488, 490-91 (7th Cir. 1981).

38. Campbell v. McGruder, 580 F.2d 521, 529 (D.C. Cir. 1978).

39. Bell v. Wolfish, 441 U.S. 520, 539 (1979); Patterson v. Morrisette, 564 F.2d 1109, 1110 (4th Cir. 1977).

40. *E.g.*, Bell v. Wolfish, 441 U.S. 520, 535 n.11 (1979); Lock v. Jenkins, 641 F.2d 488, 491 (7th Cir. 1981).

41. *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

42. 639 F.2d at 417.

recover unless the defendants' conduct was "of such base, inhumane and barbaric proportions so as to shock and offend" the jury's sensibilities.[43]

The Eighth Circuit held that this instruction placed an erroneous burden of proof on the plaintiffs because it embodied an eighth amendment standard.[44] The eighth amendment prohibition against cruel and unusual punishment applies only to those who have been found guilty and therefore can be punished.[45] In *Bell v. Wolfish*, the Supreme Court held that the proper inquiry is to determine whether the conditions of confinement amount to punishment of the detainee.[46] In order to make this determination, the court must decide whether the condition was imposed to punish or to further a legitimate regulatory purpose.[47] In *Putman*, the Eighth Circuit reasoned that the purpose of pretrial detention is to secure defendants' appearance at trial and thus the condition imposed must bear a reasonable relationship to that goal.[48] The Eighth Circuit held that the proper instruction in this situation would be to inform the jury that pretrial detainees have the right not to be punished.[49] The court held that if the goal of the officers was to punish, their actions constituted a deprivation of liberty without due process.[50]

The Eighth Circuit also discussed the standard by which conduct is to be measured in determining whether it is punitive.[51] The Eighth Circuit reasoned that a pretrial detainee's constitutional rights are not coextensive with the common law tort action for battery.[52] The court relied on *Johnson v. Glick* for factors which indicate when an assault is constitutionally impermissible:

> In determining whether the constitutional line has been crossed, the court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury

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43. *Id.* at 418.
44. *Id.* at 418-19. The court noted that the trial judge had apparently relied on eighth amendment cases in preparing the jury instructions. *Id.* at 419. *See, e.g.*, Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972).
45. 639 F.2d at 419. *See also* Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law").
46. 441 U.S. at 535.
47. *Id.* at 538.
48. 639 F.2d at 420.
49. *Id.*
50. *Id.*
51. *Id.* at 420-21.
52. *Id.* at 420.

> inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[53]

The Eighth Circuit also examined the liability of the deputy sheriff for the beating and chaining.[54] The deputy had raised the defense that he was immune from liability since he was acting under orders.[55] However, the court held that if the subordinates knew or should have known that the plaintiff's constitutional rights were being violated, mere reliance on a superior's orders does not constitute the good faith necessary for qualified immunity.[56]

The court also examined the issue of whether the deputy was under a duty to intervene in the assault.[57] The Eighth Circuit held that such a duty exists,[58] relying on *Byrd v. Brishke*.[59] In that case, the Seventh Circuit held that police officers who ignored assaults by other officers could be held liable under section 1983.[60] The Eighth Circuit expanded on the Seventh Circuit's holding in *Byrd* in ruling that a *subordinate* officer has a duty to intervene in an unlawful beating of a prisoner by a *superior* officer.[61] The court held that the trial court's failure to submit the issue of the deputy's liability for failure to fulfill this duty was in error.[62] The Eighth Circuit then vacated the district court decision and remanded for a new trial.[63]

CONCLUSION

In *Putman* the Eighth Circuit established a combined standard for adjudicating cases involving the use of force by law enforcement officials against pretrial detainees. The combined test provides that the punishment of a pretrial detainee violates his due process rights, and that any force used against a pretrial detainee must be analyzed within the scope of the excessive force standard established in *Johnson v. Glick*.[64] In addition, the court in *Putman* held that subordinate law enforcement officers have a

53. *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).
54. *Id.* at 422.
55. *Id.* See Procunier v. Navarette, 434 U.S. 562, 566-67 (1978).
56. 639 F.2d at 423.
57. *Id.*
58. *Id.*
59. 466 F.2d 6 (7th Cir. 1972).
60. *Id.* at 11.
61. 639 F.2d at 423-24.
62. *Id.* at 424.
63. *Id.*
64. *Id.* at 420-22.

duty to intervene when a superior officer applies excessive force against a pretrial detainee.[65] Consequently, the Eighth Circuit has further defined the scope of the constitutional rights of pretrial detainees. Moreover, because the deprivation of either a constitutionally or federally protected right is a prerequisite to section 1983 jurisdiction,[66] *Putman* should have a significant impact on future civil rights litigation.

WADE v. HAYNES: THE EIGHTH AMENDMENT RIGHTS OF PRISONERS

INTRODUCTION

In *Wade v. Haynes*,[67] the Eighth Circuit decided two issues: when prison officials may be held liable for the beating and sexual assault of a prison inmate by other prisoners,[68] and whether a prison official's reckless and callous disregard of known dangers to prisoners is a basis for awarding punitive damages in section 1983 actions.[69]

FACTS AND HOLDING

Daniel Wade, a reformatory inmate, brought a section 1983 action against several correctional officials, including the Director of the Missouri Board of Corrections, Edward Haynes. Wade alleged that his eighth amendment right to be free from cruel and unusual punishment was violated when he was placed in an administrative segregation cell with two other inmates who beat and sexually assaulted him.[70]

Wade was initially placed in the reformatory's special treatment unit but was later moved to the administrative segregation section of the prison for disciplinary reasons. The special treatment unit is a separate part of the reformatory where those prisoners who are susceptible to physical attack are housed. Although at least one cell was available which contained only one prisoner, Wade was placed in a cell with two other men.[71] Both of his cellmates in the administrative segregation unit were from the general prison population and one of them had been placed in the

65. *Id.* at 423-24.
66. *See* S. NAHMOD, *supra* note 7, § 2.10 at 53-57.
67. 663 F.2d 778 (8th Cir. 1981).
68. *Id.* at 780-81.
69. *Id.* at 784-85.
70. *Id.* at 780-81.
71. *Id.*

administrative unit for fighting.[72] At the time he was assaulted, Wade was eighteen years old, was five feet, eight inches tall, and weighed approximately 130 pounds.[73] Those circumstances were the basis for Wade's allegation that the reformatory officials knew or should have known that he would likely be assaulted by his cellmates. Wade sought both compensatory and punitive damages under section 1983.[74]

The district court awarded damages to Wade against only one of the corrections officers.[75] The official against whom damages were awarded had placed the third inmate, who had been segregated for fighting, in the cell with Wade.[76] On appeal, the Eighth Circuit affirmed, ruling that Wade's eighth amendment right to be free from cruel and unusual punishment had been violated.[77]

BACKGROUND

The first issue decided by the court was the appropriate standard to be applied in determining the liability of prison officials for the beating and sexual assault of Wade.[78] In such cases, two strands of analysis must be undertaken before a finding of liability can be reached. First, the court must determine whether the prison official is immune from liability under the circumstances presented.[79]

The enactment of section 1983 has not been interpreted as a complete revocation of the immunity afforded government officials at common law.[80] As a general rule, officials can only rely on a qualified immunity as a defense.[81] In *Procunier v. Navarette*,[82] the Supreme Court defined the parameters of the qualified immunity of prison officials. In that case, the prisoner claimed that prison officials violated his first amendment rights by interrupting his mail, and were therefore liable for damages under section 1983.[83]

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72. *Id.*
73. *Id.* at 780.
74. *Id.* at 780-81.
75. *Id.* at 780.
76. *Id.* at 781.
77. *Id.* at 786.
78. *Id.* at 781-82.
79. *See* Procunier v. Navarette, 434 U.S. 555, 561-62 (1978).
80. *See* Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).
81. *See* Procunier v. Navarette, 434 U.S. 555 (1978). The requirements for qualified immunity are (1) that the official have a reasonable belief in the legality of his actions under the circumstances, and (2) he must have acted in good faith. *Id.* at 562-63.
82. 434 U.S. 555 (1978).
83. *Id.* at 556-57.

The Court held that the immunity defense would be unavailable to the officials "if the constitutional right allegedly infringed by them was clearly established at the time of the challenged conduct, if they knew or should have known of that right and if they knew or should have known that their conduct violated the constitutional norm."[84] Malicious intent to deprive another of a constitutional right also renders immunity unavailable.[85]

In cases such as *Wade*, which involve a violation of the eighth amendment prohibition against cruel and unusual punishment, a second analysis of the officials' conduct must be made. Unless the prison officials' behavior constitutes "deliberate indifference" to the prisoner's plight, thereby constituting the "unnecessary and wanton infliction of pain" forbidden by the eighth amendment, the officer cannot be liable under section 1983, since no right has been violated.[86] This rule, stated by the Seventh Circuit in *Little v. Walker*,[87] requires a prisoner to show that the acts of the official were done intentionally:[88] "While mere inadvertance or negligence cannot support a Section 1983 action raising Eighth Amendment issues, deliberate indifference . . . either by actual intent or recklessness—will provide a sufficient foundation."[89] Thus, in such cases, the plaintiff must show that the officer's conduct failed to satisfy the requirements for a grant of qualified immunity and that the conduct constituted an eighth amendment violation.[90]

ANALYSIS

In *Wade*, the Eighth Circuit established a standard for deciding the section 1983 liability of prison officials for the assault and beating of a prisoner by fellow inmates.[91] An earlier Eighth Circuit case involving the issue of prison official liability for the assault and beating of prisoners by other prisoners is *Holt v. Sarver*.[92] In

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84. *Id.* at 562.
85. *Id.* at 566.
86. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).
87. 552 F.2d 193 (7th Cir. 1977).
88. *Id.* at 197 & n.8.
89. *Id.*
90. In *Walker* the plaintiff was on parole and therefore was not seeking injunctive or declaratory relief. *Id.* at 194. However, in cases where such relief is sought, the courts have applied a different test.

In Withers v. Levine, 615 F.2d 158 (4th Cir. 1980), the court held that prisoners must show that a pervasive risk of harm exists for an identifiable group of prisoners before declaratory or injunctive relief will be granted. *Id.* at 160-61. The Fourth Circuit further held that sexual assault was a problem for young prisoners and, therefore, granted both declaratory and injunctive relief. *Id.* at 161-62.

91. 663 F.2d at 782.
92. 442 F.2d 304 (8th Cir. 1971).

Holt, the plaintiff inmates sought declaratory judgment against prison farm administrators for a wide range of complaints, including the right to be free "from the abuses of fellow prisoners in all aspects of daily life," and "from the brutality of being guarded by fellow inmates."[93] The Eighth Circuit ruled that the eighth amendment affords prisoners some degree of protection from attacks and sexual assaults,[94] but the court did not formulate a standard for determining under what circumstances a prison official's conduct constituted an eighth amendment violation.[95] Therefore, *Wade* represents a significant step by the Eighth Circuit in defining a standard for determining whether a prisoner's right to be free from cruel and unusual punishment has been violated.

The court of appeals first ruled that the evidence was sufficient to sustain a verdict against William Smith, the correction officer who caused Wade to be confined with two other inmates in the administrative segregation cell. The court indicated that Smith knew or should have known that Wade would likely be assaulted when Smith placed the third inmate in Wade's cell.[96] However, while the Eighth Circuit did not expressly hold that the qualified immunity standard of *Procunier v. Navarette*[97] was applied in *Wade*,[98] the court's ruling that Smith "knew or should have known" suggests that the *Procunier* test was utilized in holding that Smith was not entitled to immunity.[99]

The Eighth Circuit created some confusion in its analysis of the prison official's liability because the opinion did not clearly differentiate between the conduct required for qualified immunity and the requirements for imposing liability under the eighth amendment. It appears that the court overlapped these issues in its analysis by considering both official immunity and prison official liability under the heading of official immunity.[100] To avoid this confusion, the Eighth Circuit should have separately considered the issues of immunity and prison official liability and applied a clearly defined standard in resolving each issue.

However, the Eighth Circuit did expressly adopt the *Little* standard,[101] which requires the plaintiff to show that the prison of-

93. *Id.* at 305.
94. *Id.* at 307-08. *Accord* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 200-01 (8th Cir. 1974).
95. 442 F.2d at 307-08.
96. 663 F.2d at 780-81.
97. 434 U.S. 555 (1978).
98. 663 F.2d at 780. *See* notes 95-96 and accompanying text *supra*.
99. 663 F.2d at 780-81.
100. *Id.*
101. 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978).

ficials deliberately deprived him of his constitutional rights in cases alleging eighth amendment violations.[102] The Eighth Circuit held that Smith was liable because he "recklessly and with callous indifference placed Wade into a dangerous situation."[103] This holding follows directly from the test announced in *Little*.[104]

The appropriateness of awarding punitive damages was also a major issue in *Wade*.[105] The Eighth Circuit extensively analyzed Supreme Court decisions as well as those of the courts of appeals.[106] The Eighth Circuit concluded that the Supreme Court's decision in *Carey v. Piphus*[107] requires malicious intent on the part of a prison official before a prisoner may recover punitive damages under section 1983.[108] The court of appeals interpreted malicious conduct as including both actual and implied intent. The court reasoned that malicious intent may be implied from an official's reckless and callous disregard of known dangers.[109] Based on this analysis the court concluded that Wade was entitled to punitive damages.[110]

In a dissenting opinion, Judge Gibson argued that a finding of actual malice is required before punitive damages may be awarded in section 1983 cases.[111] He argued that *Carey* stands for the general proposition that if punitive damages are proper in section 1983 cases, then the plaintiff is required to show that the official acted maliciously before he may recover punitive damages.[112] That argument was based on Judge Gibson's interpretation of a footnote in *Carey* which suggests that punitive damages are only available upon a showing of malicious intent.[113] However, that interpretation appears to be a narrow one, because the Court in *Carey* did not specifically decide whether punitive damages may be awarded in section 1983 cases.[114]

The majority's analysis on this point is thorough and the court appears to have reached the best conclusion. The Eighth Circuit followed the general view that punitive damages are available in

102. 552 F.2d at 197.
103. 663 F.2d at 781.
104. *See* 552 F.2d at 197 & n.8.
105. 663 F.2d at 784-86.
106. *Id.*
107. 435 U.S. 247 (1978).
108. 663 F.2d at 785-86.
109. *Id.* at 786.
110. *Id.*
111. *Id.* at 786-89 (Gibson, J., dissenting).
112. *Id.* at 786.
113. *Id.* at 787.
114. *Id.* at 786-88. *See* Carey v. Piphus, 435 U.S. at 257 n.11.

section 1983 actions.[115] The court of appeals adopted the test applied in both the Third[116] and Seventh[117] Circuits that punitive damages are available in section 1983 litigation upon a showing of actual intent or recklessness.[118] The courts specifically ruled that a finding of malicious intent may be based upon a showing of an official's "reckless and callous disregard of known dangers."[119] That holding reflects a compromise between a rule that automatically imposes punitive damages upon a showing of a section 1983 violation and a rule that strictly requires a showing of actual malice. The balance promotes the deterrent function of punitive damages by allowing for an award for conduct which may not have been based on actual malice, yet was so reckless that punitive damages are desirable to discourage future reckless conduct.

CONCLUSION

In *Wade* the Eighth Circuit adopted two significant precedents for section 1983 litigation. The first of these precedents was the adoption of the deliberate indifference test for determining the liability of prison officials to inmates for violations of the eighth amendment's protection against cruel and unusual punishment.[120] However, the Eighth Circuit did not explain whether it expects the deliberate indifference test to be used in conjunction with qualified immunity or whether the test is to be a separate and distinct issue apart from qualified immunity.[121] Nevertheless, the deliberate indifference test serves as an important standard to be followed in section 1983 litigation involving the right of prisoners to be free from cruel and unusual punishment.

The second precedent established in *Wade* involves the award of punitive damages in section 1983 litigation. The Eighth Circuit held that punitive damages are available in 1983 actions and established a standard for awarding such damages. The court announced that the malicious intent prerequisite to an award of punitive damages is satisfied if the plaintiff can show that the official being sued acted with a reckless and callous disregard of known dangers.[122] Thus, *Wade* is a significant case that should be

115. *E.g.*, Scott v. Plante, 641 F.2d 117, 135 (3d Cir. 1981).
116. Cochetti v. Desmond, 572 F.2d 102, 105 (3d Cir. 1978).
117. Konczak v. Tyrrell, 603 F.2d 13, 17 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).
118. 663 F.2d at 785.
119. *Id.* at 786.
120. *Id.* at 781.
121. *See id.* at 780-82.
122. *Id.* at 786.

analyzed by civil rights practitioners.

WILLIAMS v. MISSOURI BOARD OF PROBATION AND PAROLE: PRISONERS' ACCESS TO THEIR PAROLE FILES

INTRODUCTION

The recent United States Supreme Court decision in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*[123] set an important standard for resolving the issue of whether prison inmates have a liberty interest in parole release. However, *Greenholtz* did not address the issue of whether prison inmates have a due process right to have access to their parole files or the extent of such a right. Both of these issues were addressed by the Eighth Circuit in *Williams v. Missouri Board of Probation and Parole*.[124]

FACTS AND HOLDING

Williams was a section 1983 class action suit brought on behalf of all inmates who were or would be eligible for parole. The case was initiated by two prisoners who were seeking money damages for being denied release on parole.[125] At issue in *Williams* was whether the Missouri parole statute created a protected liberty interest in parole release.[126] A second and equally important issue in *Williams* was whether prison inmates have a due process right to review the contents of their parole files.[127]

Williams was originally decided by the Eighth Circuit in 1978,[128] but that decision was vacated and remanded by the Supreme Court.[129] The Eighth Circuit subsequently remanded the case to the district court for reconsideration in light of *Greenholtz*.[130]

On remand, the district court ruled that the Missouri parole statute did not create a constitutionally protected interest in parole release.[131] On appeal to the Eighth Circuit for the second time, the court concluded that the Missouri penal institution in-

123. 442 U.S. 1, 7-9 (1979). For a thorough analysis of the *Greenholtz* decision, see Note, 48 U. CIN. L. REV. 1098 (1979).
124. 661 F.2d 697 (8th Cir. 1981).
125. *Id.* at 698 & n.1.
126. *Id.* at 698.
127. *Id.*
128. 585 F.2d 922 (8th Cir. 1978).
129. 442 U.S. 926 (1979).
130. 661 F.2d at 698.
131. *Id.*

mates had a constitutionally protected liberty interest, based on state law, in being released on parole.[132] In addition, the Eighth Circuit held that due process requires that prison inmates be informed of any adverse information contained in their parole files, and that inmates have an opportunity to address such information.[133]

BACKGROUND

The foundation for an analysis of recent cases involving the issue of whether a prison inmate has a constitutionally protected interest in parole release is the Supreme Court decision in *Greenholtz*. That case was a section 1983 class action brought by inmates of the Nebraska Penal Complex alleging that the discretionary procedure used by the Board of Parole in granting parole violated their procedural due process rights.[134] The guidelines established by the Court in *Greenholtz* provide that before a prisoner may claim a constitutionally protected liberty interest in parole release, he must show that language of the parole statute of the jurisdiction where he is incarcerated is mandatory.[135] More specifically, the Court ruled that Nebraska prisoners have a protected liberty interest under the due process clause of the fourteenth amendment because the Nebraska parole statute[136] provides for the mandatory release of a prisoner in the absence of a sufficient reason to deny parole.[137] Parole statutes in other states must be considered on a case-by-case basis, and any statutes which do not contain mandatory language similar to that of Nebraska will not support a prisoner's due process claim.[138]

In *Greenholtz*, the court extensively analyzed the due process interests of prisoners in parole release, but did not address the issue of whether inmates have a due process right of access to their parole files.[139] The lower federal courts have considered the extent to which prison inmates have constitutionally protected interests

132. *Id.*
133. *Id.* at 700.
134. 442 U.S. at 3-4.
135. *See* 442 U.S. at 12-13.
136. NEB. REV. STAT. § 83-1,114 (Reissue 1976) provides: "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release *unless* it is of the opinion that his release should be deferred. . . ." *Id.* (emphasis added).
137. 442 U.S. at 3, 12-15. *See* NEB. REV. STAT. § 83-1,114 (Reissue 1976).
138. 442 U.S. at 12. The Supreme Court also expressly ruled that there is no inherent right to release on parole even if the incarcerating state has elected to provide a parole system. *Id.*
139. *Id.* at 11-12.

in both parole release and in gaining access to their parole files.[140] The lower courts have generally followed the Supreme Court's ruling in *Greenholtz* that the extent of a prison inmate's due process rights pertaining to release on parole are determined by the language of the jurisdiction's parole statute.[141] However, the courts disagree as to whether inmates have a due process right of access to their parole files. For example, the Fifth Circuit has ruled that the denial of access to the contents of a parole file is not a deprivation of due process,[142] while the Fourth Circuit has recognized a limited right of access to the contents of a parole file. In *Paine v. Baker*,[143] the Fourth Circuit held that prisoners do not have an absolute right of access to their parole files,[144] but added that prisoners have a right, based on due process, to have erroneous information removed from their files.[145] That limited right of access strikes a balance between the due process rights of prisoners to have their eligibility for release on parole determined on the basis of accurate information and the legitimate interests of the state in protecting the anonymity of persons who contribute information to the file.[146] It has also been ruled that the state has a legitimate interest in minimizing its administrative burden and, therefore, the state has a legitimate interest in allowing only limited access to parole files.[147]

ANALYSIS

The Eighth Circuit applied the Supreme Court's decision in *Greenholtz* in deciding that the plaintiffs in *Williams* had a constitutionally protected liberty interest in parole release.[148] In *Greenholtz*, the Court held that the mandatory language of the Nebraska parole statute created an expectancy of release entitled to "some measure of constitutional protection."[149] In *Williams*, the Eighth Circuit reasoned that the language of the Missouri law providing that *when* the statutory requirements are met, the inmate *shall* be released on parole "gives rise to the same protectible entitlement

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140. *E.g.*, Averhart v. Tutsie, 618 F.2d 479, 481 (7th Cir. 1980); Pugliese v. Nelson, 617 F.2d 916, 922-23 (2d Cir. 1980).
141. *Id.*
142. Craft v. Texas Bd. of Pardons and Paroles, 550 F.2d 1054, 1056 (5th Cir. 1977).
143. 595 F.2d 197 (4th Cir. 1979).
144. *Id.* at 200.
145. *Id.* at 200-01. *See also* Williams v. Ward, 556 F.2d 1143, 1160-61 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977).
146. 595 F.2d at 201.
147. *Id.*
148. 661 F.2d at 698.
149. 442 U.S. at 12.

as the Nebraska scheme providing that the prisoner *shall* be paroled *unless* certain findings are made."[150] The decision of the Eighth Circuit reflects the "case-by-case"[151] approach suggested by the Supreme Court in *Greenholtz*, and appears to reach the correct result in light of the mandatory language of the Missouri parole statute.[152]

The second and more difficult issue decided by the Eighth Circuit in *Williams* was whether prisoners have a due process right to examine the contents of their parole files. The court of appeals recognized that Missouri law gives the Board of Probation and Parole discretionary authority to allow an inmate or his attorney to inspect the inmate's parole file.[153] Nevertheless, the court held that the Board's general policy of nondisclosure of a file's contents presented a virtually insurmountable barrier for an inmate who desired to discover whether his parole file contained any adverse information.[154] The court added that any such information which remained "unverified or unrebutted" increased the risk of erroneous decision in the parole process.[155] For these reasons, the court of appeals held that "due process imposes the requirement that an inmate be advised of adverse information that may lead to an unfavorable decision and given an opportunity to address it."[156] The court remanded the case to the district court for a determination of what procedural safeguards are necessary to comply with due process requirements.[157]

In ruling that inmates have a due process right to be informed of any adverse information in their parole files, the court of appeals recognized a constitutionally protected right that is not widely recognized by the other circuits.[158] The closest any circuit has come to the *Williams* decision was the Fourth Circuit in *Paine v. Baker*.[159] However, *Paine* is distinguishable from *Williams* because *Paine* required a prisoner to allege that information contained in his file is false and is relied on to a constitutionally

150. 661 F.2d at 699 (emphasis in original). *Compare* Mo. REV. STAT. § 549.261 (1982 Supp.) *with* NEB. REV. STAT. § 83-1,114(1) (Reissue 1976).

151. 442 U.S. at 12.

152. *See* Mo. REV. STAT. § 549.261 (1982 Supp.).

153. 661 F.2d at 699.

154. *Id.* at 699-700.

155. *Id.* at 700.

156. *Id.*

157. *Id.*

158. *See, e.g.*, Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172, 175 (10th Cir. 1980); Williams v. Ward, 556 F.2d 1143, 1159-60 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); Craft v. Texas Bd. of Pardons and Paroles, 550 F.2d 1054, 1056 (5th Cir. 1977).

159. 595 F.2d 197 (4th Cir. 1979).

significant degree.[160] This procedure does not adequately protect prisoners because a prisoner who has not seen his file is in a poor position to challenge the accuracy of its contents.[161]

Williams provides the best protection of the inmate while simultaneously promoting the state's concerns regarding the contents of a prisoner's parole file. The scheme announced by the court of appeals requiring the prisoner to be informed of any adverse information contained in his parole file protects the prisoner by exposing inaccurate information and by giving the prisoner an opportunity to rebut adverse information.[162] Additionally, granting a prisoner the right to review adverse information contained in his parole file will improve that prisoner's perception of the parole process by giving him the impression that he is receiving the most equitable treatment possible.[163]

The process of informing the prisoner also protects the legitimate interests of the state in preserving the confidentiality of sources of information and maintaining security and discipline within detention facilities.[164] Finally, the state's interest is also protected because such a system avoids the administrative burden of disclosing the contents of every parole file held by the state.[165]

CONCLUSION

At the time of this writing, a petition for certiorari had been filed in the *Williams* case but had not yet been acted upon by the Supreme Court.[166] The Eighth Circuit's decision in *Williams*, coupled with the divergent views of the other lower federal courts, shows a need for Supreme Court resolution of the issue of whether prisoners have absolute, limited, or no constitutionally protected rights of access to their parole files. If the Court should decide to grant certiorari in *Williams*, it should reexamine Justice Marshall's dissent in *Greenholtz*, in which he argued that any statute establishing the mere possibility of parole release creates a constitutionally protected liberty interest.[167]

In addition, the Court should consider whether a prisoner has

160. *Id.* at 201.
161. Comment, *Prisoner Access to Parole Files: A Due Process Analysis*, 47 *Fordham L. Rev.* 260, 272 (1978) [hereinafter cited as *Prisoner Access to Parole Files*].
162. 661 F.2d at 700.
163. *Prisoner Access to Parole Files*, *supra* note 161, at 274.
164. 661 F.2d at 700.
165. *See Prisoner Access to Parole Files*, *supra* note 161, at 272.
166. 50 U.S.L.W. 3516 (U.S. Jan. 5, 1982).
167. 442 U.S. at 22 (Marshall, J., dissenting).

a right to be informed of adverse information in his parole file regardless of whether the confining jurisdiction has a parole statute that creates a constitutionally protected liberty interest. In any event, the Court would likely affirm its position in *Greenholtz* that due process rights of prison inmates regarding release on parole are dependent on the language of the parole statute of the confining jurisdiction.[168] The outcome of a grant of certiorari is less clear regarding the right of access to parole files.

TAYLOR v. PARRATT: NEGLIGENT DEPRIVATION OF PROPERTY AND SECTION 1983

INTRODUCTION

The United States Supreme Court recently reversed the Eighth Circuit's decision in *Taylor v. Parratt*.[169] The Supreme Court's reversal presents significant ramifications for section 1983 litigation involving negligent deprivations of property throughout the federal court system. For this reason, an analysis of *Taylor* is included in this survey.

FACTS AND HOLDING

Taylor was a section 1983 action brought by an inmate against prison officials seeking damages for the loss of a hobby kit valued at $23.57. The inmate, Bert Taylor, ordered a hobby kit through the mail and paid for the kit using funds from his inmate account.[170] Packages received by mail were normally delivered to each prisoner, or the prisoner was notified to pick up his package at the prison's central mail room. However, Taylor was not allowed to receive the hobby kit because he was confined in the adjustment center at the time it was delivered.[171]

Upon release from the adjustment center, Taylor contacted several officials in an attempt to locate his hobby kit. However, the officials were unable to find Taylor's package and he never received his hobby kit.[172] The principle issue presented in *Taylor* was whether the negligent loss of Taylor's package constituted a constitutionally proscribed deprivation of property.[173]

The district court held that the prison officials' negligent conduct constituted a violation of Taylor's fourteenth amendment due

168. *See id.* at 11-13.
169. 620 F.2d 307 (8th Cir. 1980), *rev'd*, 101 S. Ct. 1908 (1981).
170. Taylor v. Parratt, No. 76-L-57, slip op. at 1 (D. Neb. Oct. 25, 1978).
171. *Id.*
172. *Id.*
173. *Id.* at 2.

process rights.[174] Thus, the district court held negligent conduct of prison officials can form the basis for a section 1983 action.[175] The Eighth Circuit affirmed the decision of the district court without opinion.[176]

The Supreme Court granted certiorari and subsequently reversed the lower court's decision.[177] In an opinion by Justice Rehnquist, the Court held that Taylor had been deprived of property under color of state law.[178] However, the Court concluded that the negligent loss of the hobby kit did not constitute a constitutional deprivation necessary to bring suit under section 1983.[179] Justice Rehnquist reasoned that Nebraska's Tort Claims Act provided a post deprivation remedy which satisfied the due process requirements of the fourteenth amendment.[180]

BACKGROUND

Prior to *Taylor*, the Supreme Court had not decided whether a negligent deprivation of property by a state official violates the due process clause of the fourteenth amendment.[181] However, several of the courts of appeals had examined the negligence issue, but those courts reached conflicting results.

For example, the Fourth Circuit has ruled that negligent conduct by a state official can constitute the deprivation of a constitutional right protected by section 1983.[182] Other circuits follow the contrary view that negligence is not sufficient to support an award of damages in section 1983 litigation.[183] However, the weight of authority indicates that negligent conduct by a person acting under color of state law can be a constitutional deprivation actionable under section 1983.[184]

ANALYSIS

The district court relied on *Howell v. Cataldi*[185] and *Monroe v.*

174. *Id.* at 5.
175. *Id.*
176. 620 F.2d at 307.
177. 101 S. Ct. at 1917.
178. *Id.* at 1913.
179. *Id.* at 1917.
180. *Id. See* NEB. REV. STAT. §§ 81-8, 209 TO 81-8,254 (REISSUE (1976).
181. *See* 101 S. Ct. at 1911; Baker v. McCollan, 443 U.S. 137, 139 (1979); Procunier v. Navarette, 434 U.S. 555, 565 (1978).
182. Withers v. Levine, 615 F.2d 158, 162 (4th Cir. 1980).
183. *See* Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980).
184. 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 245 (2d ed. 1980). *E.g.*, Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980).
185. 464 F.2d 272 (3d Cir. 1972).

Pape[186] in deciding that negligence can be the basis for a section 1983 action.[187] These cases stand for the general proposition that section 1983 actions should be analyzed within the context of tort liability.[188] The court emphasized the language of *Monroe v. Pape* which suggests that intentional conduct is not required in section 1983 actions because the word "wilfully" does not appear in the statute.[189] Based on that reasoning, the court concluded that negligent conduct is actionable under section 1983.[190]

In *Taylor*, the Supreme Court spent little time analyzing the negligent deprivation issue.[191] The Court appeared to be more concerned with limiting the jurisdiction of the federal courts than in resolving the substantial conflict among the circuits in this area. The Court readily conceded that negligent conduct can constitute a deprivation,[192] but added that not all deprivations of property constitute a violation of the fourteenth amendment.[193] Justice Rehnquist reasoned that Taylor's due process rights were not violated because the Nebraska Tort Claims Act provided a remedy that satisfied the requirements of due process.[194] Justice Rehnquist further concluded that Taylor's claim could not be brought under section 1983 because he was not deprived of any constitutional rights.[195] Because the Court emphasized the fact that Taylor had a remedy under the Nebraska Tort Claims Act for the negligent loss of his property, future application of the *Taylor* case should necessarily be limited to cases where an adequate state remedy is available.[196]

CONCLUSION

In reversing the Eighth Circuit's decision in *Taylor*, the Supreme Court established a significant precedent that could substantially curtail the civil rights jurisdiction of the federal courts. However, the potential curtailment of section 1983 litigation is not necessarily cause for alarm. As one commentator has noted, the

186. 365 U.S. 167 (1961).
187. No. 76-L-57, slip op. at 2.
188. Monroe v. Pape, 365 U.S. at 187; Howell v. Cataldi, 464 F.2d at 279.
189. No. 76-L-57, slip op. at 2.
190. *Id.* at 3.
191. *See* 101 S. Ct. at 1912.
192. *Id.* at 1913.
193. *Id.*
194. *Id.* at 1917.
195. *Id.*
196. *See id.* at 1914-15.

Court's decision has a built in "safety valve,"[197] *i.e.*, the Court's indication that the state must provide an adequate postdeprivation remedy to a person who has been negligently deprived of property by a party acting under color of state law.[198] Thus, an individual who is wrongfully deprived of property by a person acting under color of state law is guaranteed a remedy under federal law if the state remedy is inadequate.

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197. Kirby, *Demoting Fourteenth Amendment Claims to State Torts*, 68 A.B.A.J. 166, 171 (1982).

198. *See* 101 S. Ct. at 1917.