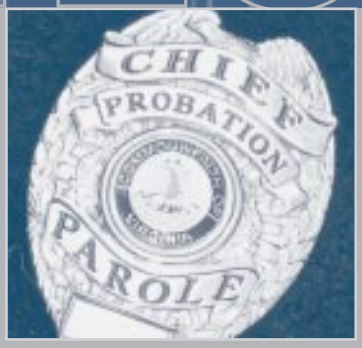
U.S. Department of Justice
National Institute of Corrections

Third Edition

CIVIL LIABILITIES

AND OTHER LEGAL ISSUES FOR PROBATION/PAROLE OFFICERS AND SUPERVISORS



U.S. Department of Justice
National Institute of Corrections
320 First Street N.W.
Washington, DC 20534

Morris L. Thigpen, Director

George M. Keiser, Chief Community Corrections Division

J. Richard Faulkner, Jr., Project Manager

National Institute of Corrections
World Wide Web Site
http://www.nicic.org

Civil Liabilities and Other Legal Issues for Probation/Parole Officers and Supervisors

Third Edition

Rolando V. del Carmen

and

Maldine Beth Barnhill

Gene Bonham, Jr.

Lance Hignite

Todd Jermstad

A PROJECT OF THE NATIONAL INSTITUTE OF CORRECTIONS

PROJECT STAFF FOR THE THIRD EDITION (2001)

Rolando V. del Carmen
Project Director
Professor of Criminal Justice
Sam Houston State University

Maldine Beth Barnhill
Ph.D. Candidate
Sam Houston State University

Gene Bonham, Jr.
Ph.D. Candidate
Sam Houston State University

Lance Hignite
Ph.D. Candidate
Sam Houston State University

Todd Jermstad
Legal Counsel
Community Supervision and Corrections Department
Bell County, Texas

PROJECT STAFF FOR THE SECOND EDITION (1985)

Eve Trook-White
Ph.D. Candidate
Sam Houston State University

BOARD OF CONSULTANTS FOR THE FIRST EDITION (1982)

Paul Chernoff
Justice
District Court of Newton
West Newton, Massachusetts

Richard Crane
Chief Legal Counsel
Department of Corrections
State of Louisiana

Frank R. Hellum
Research Center West
National Council on Crime and Delinquency

Arnold J. Hopkins
Director
Division of Parole and Probation
State of Maryland

Richard E. Longfellow
Deputy Commissioner
Probation Division
State of Georgia

Charles E. Walker, Jr.
General Counsel
Board of Pardons and Paroles
State of Texas

Editor: Melvin T. Axilbund

PREFACE TO THE THIRD EDITION

The first edition of this monograph was published in March 1982; the second edition came out in August 1985. Since then, many changes have taken place in probation and parole law; hence, the need for this third edition.

The changes from the second edition to the third edition are as follows:

- The second edition has 15 chapters; this third edition has 11 chapters.
- No chapter has been eliminated; instead some chapters have been combined and others have been transferred to the appendix.
- Chapter I of the second edition (Preliminary Considerations) is now part of the Introduction.
- Chapter II of the second edition (Courts and Basic Legal Concepts) is now Appendix A.
- Chapter X of the second edition (Modification of Conditions and Changes in Status) is now part of Chapter 8.
- Chapter XIV of the second edition (Liability for Private Programs and Community Service Work) is now part of Chapter 8.
- New topics are included in this third edition that were not in the second edition. Conversely, some topics in the second edition have been deleted because they have become dated.
- Cases have been updated, and a massive rewriting has been undertaken.
- Every chapter features an outline of topics at the beginning of the chapter.

The chapters in the third edition were mainly researched and rewritten by the following:

Maldine Beth Barnhill:	Chapter 10 (Liabilities of Supervisors)
Lance Hignite:	Chapter 5 (Presentence/Preparole Investigations and Reports) and Chapter 6 (Liability of Parole Board Members for Release or Nonrelease)
Todd Jermstad:	Chapter 7 (Conditions, Modifications, and Changes in Status), Chapter 8 (Supervision), and Chapter 9 (Revocation)

The rest of the chapters were revised by Rolando V. del Carmen, who also edited, supervised, and reviewed the revision.

I would like to thank the National Institute of Corrections for making this third edition possible. In particular, thanks to Rick Faulkner and George Keiser of the National Institute of Corrections. Without their initiative and support, this project would not have been possible. Rick Faulkner first suggested the revision, which was approved by George Keiser. Thanks are also extended to Dan Beto, Director of the Corrections Management Institute of Texas, for his help and support and for the many things he has done to make this publication known and available to the field personnel for whom it has been written.

I express gratitude to the Board of Consultants and legal researchers of the first edition, who did the groundbreaking job for the monograph. Thanks are also due to Eve Trook-White, the main assistant for the second edition. The third edition would not have been possible without the help of Gene Bonham, Jr., former Director of Community Corrections and parole officer in Kansas, who is currently a Ph.D. student in the College of Criminal Justice. He helped perform the legal research and took care of a lot of minutiae; without his assistance, the revision would have been even more tedious for me.

I would also like to thank Dean Richard Ward of the College of Criminal Justice, Sam Houston State University, for the support given to the project in a multitude of ways.

This monograph, from the first edition to the third, has truly been the product of collaboration between the author and myriad people. As usual, however, in a revision of this magnitude, there may be errors and shortcomings. Those are entirely mine.

Rolando V. del Carmen
College of Criminal Justice
Sam Houston State University
August 2000

ABOUT THE AUTHORS

Rolando V. del Carmen is Distinguished Professor of Criminal Justice, College of Criminal Justice, Sam Houston State University.

Maldine Beth Barnhill is a doctoral student, College of Criminal Justice, Sam Houston State University. She has a law degree from the University of Georgia.

Gene Bonham, Jr., is a doctoral student, College of Criminal Justice, Sam Houston State University. He served for 9 years as Director of Community Corrections for the 6th Judicial District in Kansas and was also a parole officer in the State of Kansas.

Lance Hignite is a doctoral student, College of Criminal Justice, Sam Houston State University.

Todd Jermstad is currently Legal Counsel, Community Supervision and Corrections Department, Bell County, Texas. He previously served as Assistant General Counsel of the Texas Department of Criminal Justice.

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INTRODUCTION

We live in an increasingly litigious society. One result is more lawsuits against government agencies and public officials. As the first edition noted, the largest target is the federal government, which was sued more than 30,000 times in 1980; the plaintiffs in those actions asked for damages in excess of $4.3 billion.[1] Add to this the comparable suits filed in state courts, and the full magnitude of the trend and the problems it presents becomes clear. As one writer stated, "If we wanted a new national motto, summing up the great national pastime, we could put it in two words: Sue 'em."[2]

When this monograph was first published in March 1982, only a few probation/parole officers had been involved personally in civil or criminal cases that put their professional conduct in issue. Although no reliable or official figures are available because no national or state survey has recently been conducted, it is safe to say, from decided cases, that the number of probation/parole liability lawsuits has increased in recent years.

Lawsuits of the type discussed here stem from allegations of nonperformance and improper performance of official duties and responsibilities. This publication examines mainly the concerns of probation/parole officers that appear to offer the most fertile grounds for litigation. It is written primarily for probation and parole personnel (including supervisors and administrative officials) but may also be of interest to lawyers and judges. While the monograph is directed at an audience that does not have extensive legal training, the footnotes have been conformed to the most widely recognized legal system of citation.

Court decisions continue to widen the net and add to the categories of officials who may be held legally responsible for acts performed while in office. What started as sporadic liability lawsuits in the early sixties directed primarily at prison personnel have now evolved into a nationwide pattern of greater liability for all public officials, particularly the police, probation, and parole officers.

Lawsuits are filed by the public and by employees against their supervisors and agencies. The United States is a litigious society and there are no signs of that abating in the immediate future. If anything, lawsuits will likely continue to escalate despite efforts at reform by state legislatures and the Congress of the United States, primarily through capping damage awards in state tort cases.

Probation and parole officers must be properly informed about legal liabilities. This monograph seeks to do that and to help them understand basic liability concepts in the hope that such information will lead to lawsuit avoidance. As public officers, they are vested with varying degrees of authority essential for effective task performance. With this authority comes an obligation to act responsibly and in accordance with law. More than ever, the general public demands accountability in all phases of public service. This is particularly true in the criminal justice system, where lives and personal liberties are often at stake. This accountability takes the form of possible civil or criminal liabilities for breach of duty and violation of rights. The courts have long abandoned their "hands off" policy in favor of a virtual "open door" era concerning citizen complaints. Accountability, court scrutiny, and greater job visibility are realities with which probation/parole officers must learn to live and cope.

There was a time when probation/parole officers were insulated from litigation. Those days are gone and are likely to be gone forever. During the past few years, many cases have been filed against officers and supervisors seeking to hold them accountable for what they may or may not have done. It is therefore necessary for probation and parole personnel to be familiar with basic concepts in legal liabilities if they are to protect themselves against possible lawsuits. Judicial officers (judges and prosecutors) are vested with absolute immunity, but probation/parole officers enjoy only qualified immunity. Moreover, while states generally enjoy immunity from lawsuits (unless waived), state officers and local government agencies and employees do not have this immunity. Probation/parole officers, therefore, whether they are state or local employees, are susceptible to liability lawsuits in whatever they do that is related to their job.

Variation abounds in probation/parole law among different jurisdictions. Advice given in the first edition was true then as it is now:

> This manual was written to provide general information. It is not designed to give authoritative legal advice on specific problems. Probation/parole officers are strongly urged to seek prompt advice and counsel from legal advisors if faced with specific legal questions.

As was the wish in the previous editions, it is hoped that this third edition will fill the void for information on the legal liabilities in general, and civil liabilities in particular, of probation/parole personnel on all levels. We hope the information is useful for those who need it.

Notes

1. *Houston Chronicle*, January 11, 1981, at 18.

2. *Id.*

CHAPTER 1

An Overview of State and Federal Legal Liabilities

INTRODUCTION

The array of legal liabilities to which probation/parole officers may be exposed are many and varied. They range from state to federal laws and from civil to criminal laws. For purposes of an overview, legal liabilities may be classified as shown in table 1–1.

Note that in addition, the officer may be subject to agency administrative disciplinary procedure that can result in transfer, suspension, demotion, dismissal, or other forms of sanction. Disciplinary procedures are defined by state law or agency policy.

The above legal liabilities apply to all public officers and not just to probation/parole officers. Police officers, jailers, prison officials, juvenile officers, and just about any officer in the criminal justice system may be held liable for any or all of the above provisions based on a single act. For example, assume that a parole officer unjustifiably uses excessive force on a parolee. Conceivably, he or she may be liable under all of the above provisions. He or she may be liable for conspiracy if he or she acted with another to deprive the parolee of his civil rights, as well as for the act itself, which constitutes the deprivation. The same parole officer may be prosecuted criminally and civilly under federal law and then be held criminally and civilly liable under state law for the same act. The double jeopardy defense cannot exempt him from multiple liabilities because double jeopardy applies only in criminal (not civil) cases, and only when two criminal prosecutions are made for the same offense by the same jurisdiction. Criminal prosecution under state and then under federal law for the same act is possible. If this is

Table 1–1. Classification of Legal Liabilities Under State and Federal Law

	I. Under State Law	II. Under Federal Law
A. Civil Liabilities	1. State tort law	1. Title 42 of the U.S. Code, Section 1983—Civil Action for Deprivation of Rights
	2. State civil rights laws	2. Title 42 of the U.S. Code, Section 1985—Conspiracy to Interfere With Civil Rights
		3. Title 42 of the U.S. Code, Section 1981—Equal Rights Under the Law
B. Criminal Liabilities	1. State penal code provisions aimed specifically at public officers	1. Title 18 of the U.S. Code, Section 242—Deprivation of Rights Under Color of Law
	2. Regular penal code provisions punishing criminal acts	2. Title 18 of the U.S. Code, Section 241—Conspiracy Against Rights
		3. Title 18 of the U.S. Code, Section 245—Federally Protected Activities

done, it indicates that the second prosecuting authority believes that justice was not obtained in the first prosecution.

All of the above types of liability are discussed briefly in this chapter. As indicated, liability can be classified according to federal or state law.

■ ■ ■

I. UNDER STATE LAW

There are two basic types of liability under state law: civil and criminal.

A. Civil Liability Under State Tort Law

1. State Tort Law

This liability is more fully discussed in Chapter 2 (State Tort Cases). For purposes of this overview section, the following information should suffice.

Tort is defined as "a wrong in which the action of one person causes injury to the person or property of another in violation of a legal duty imposed by law." Torts may involve a wrongdoing against a person, such as assault, battery, false arrest, false imprisonment, invasion of privacy, libel, slander, wrongful death, and malicious prosecution; or against property, such as trespass. A tort may be intentional (acts based on the intent of the actor to cause a certain event or harm) or caused by negligence. Probation/parole officers may therefore be held liable for a tortious act that causes damage to the person or property of another. Note that Section 1983 actions, federal cases, are sometimes referred to as "tort cases," but the reference is to federal rather than state torts.

2. State Civil Rights Laws

Many states have passed civil rights laws of their own, either replicating the compendium of federal laws that have been enacted or devising new categories of protected rights. For example, the Federal Civil Rights Act of 1964 prohibits discrimination on the basis of race, religion, color, national origin, sex, and pregnancy. These laws are enforceable by the federal government, but they may also be enforceable by the state if enacted as state statutes. The penalty or punishment imposed, therefore, is on the state level, and enforcement of the law may be done by the state.

B. Criminal Liability Under State Law

1. State Penal Code Provisions Aimed Specifically at Public Officers

State criminal liability can come under a provision of the state penal code specifically designed for public officers. For example, Section 39.03 of the Texas Penal Code contains a provision on "Official Oppression" that states that a public servant acting under color of his office or employment commits an offense if he:

a. Intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

b. Intentionally denies or impedes another in the exercise of enjoyment of any right, privilege, power, or immunity knowing his conduct is unlawful; or

c. Intentionally subjects another to sexual harassment.

A questionnaire sent to state attorneys general and probation/parole agency legal counsel asked if their states had statutes providing for criminal liability for probation, parole, and public officers in general. The results show that only a few states have statutes pertaining to liability for probation/parole officers specifically, 8 percent in both cases, but 84 percent of the states have statutes concerning the criminal liability of public officers in general.

2. Regular Penal Code Provisions Punishing Criminal Acts

In addition to specific provisions, probation/parole officers may also be liable just like any other person under the provisions of the state criminal laws. Under Texas criminal code, for example, they may be liable for murder, manslaughter, serious physical injury, etc., done to any probationer or parolee.

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II. UNDER FEDERAL LAW

A. Civil Liabilities

1. Title 42 of the U.S. Code, Section 1983—Civil Action for Deprivation of Rights

> 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 action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This section is discussed separately in Chapter 3 because the overwhelming number of current cases is filed under this section. Refer to that chapter for an exhaustive discussion of liability under federal law.

2. Title 42 of the U.S. Code, Section 1985—Conspiracy to Interfere With Civil Rights

Section 1985(3) provides a civil remedy against any two or more persons who:

a. Conspire to deprive a plaintiff of the equal protection of the law or equal privileges and immunities under the law, with

b. A purposeful intent to deny equal protection of the law,

c. When defendants act under color of state law, and

d. The acts in furtherance of the conspiracy injure the plaintiff in his person or property, or deprive him of having and exercising any right or privilege of a citizen of the United States.

This section, passed by the United States Congress in 1861, provides for civil damages to be awarded to any individual who can show that two or more persons conspired to deprive him of civil rights. Note that a probation/parole officer may therefore be held civilly liable not only for actually depriving a person of his civil rights (under Section 1983), but also for conspiring to deprive that person of his civil rights (under Section 1985). The two acts are separate and distinct and therefore may be punished separately. Under this section, it must be shown that the officers got together and actually agreed to commit the act, although no exact statement of a common goal need be proven. In most cases, the act is felonious in nature (as opposed to a misdemeanor) and is aimed at depriving the plaintiff of his civil rights. The plaintiff must also be able to prove that the officers purposely intended to deprive him of equal protection that is guaranteed him by law. This section, however, is seldom used against public officers because the act of conspiracy is often difficult to prove except through the testimony of coconspirators.

Moreover, it is limited to situations in which the objective of the conspiracy is invidious discrimination, which is difficult to prove in court. It is difficult for a plaintiff to establish in a trial that the probation/parole officer's action was discriminatory based on sex, race, or national origin.

3. Title 42 of the U.S. Code, Section 1981—Equal Rights Under the Law

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

b. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

c. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

This section was passed in 1870, a year earlier than Section 1983. Until recently, the plaintiff had to show that he was discriminated against because of his race, thus limiting the number of potential plaintiffs.

Section 1981 has been widely used in employment and housing discrimination cases (under its contracts and equal benefits provisions). However, currently the equal punishments provision is of greatest significance for probation and parole authorities.[1]

B. Criminal Liabilities

1. Title 18 of the U.S. Code, Section 242—Deprivation of Rights Under Color of Law

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person of any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties on account of such person being an alien, or by reason of his color, or race than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

This section provides for criminal action against any officer who actually deprives another of his civil rights. An essential element of this section is for the government to be able to show that the officer, acting "under color of any law," did actually commit an act that amounted to the deprivation of one's civil rights. Essential elements of Section 242 are the following: (a) the defendant must have been acting under color of law; (b) a deprivation of any right secured by federal laws and the United States Constitution; and (c) specific intent on the part of the defendant to deprive the victim of rights.

2. Title 18 of the U.S. Code, Section 241—Conspiracy Against Rights

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with the intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

As interpreted by the courts, this section requires the following: (1) the existence of a conspiracy whose purpose is to injure, oppress, threaten, or intimidate; (2) one or more of the intended victims must be a United States citizen; and (3) the conspiracy must be directed at the free exercise or enjoyment by such a citizen of any right or privilege under federal laws or the United States Constitution.

The main distinction between Section 242 and Section 241 is that Section 242 punishes the act itself, whereas Section 241 punishes the conspiracy to commit the act. Inasmuch as conspiracy, by definition, needs at least two participants, Section 241 cannot be committed by a person acting alone. Moreover, while Section 242 requires the officer to be acting "under the color of law," there is no such requirement under Section 241; hence, a private person can commit Section 241.

3. Title 18 of the U.S. Code, Section 245—Federally Protected Activities

This section is aimed at private individuals but is also applicable to public officers who forcibly interfere with such federally protected activities as:

- Voting or running for an elective office.
- Participating in government-administered programs.
- Applying for or enjoying the benefits of federal employment.
- Serving as juror in a federal court.
- Participating in any program receiving federal financial assistance.

Violations of Section 245 carry a fine or imprisonment of not more than 1 year, or both. Should bodily injury result from a violation, or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosive, or fire, the violator may be fined or imprisoned not more than 10 years, or both. Should death result from the acts committed in violation of this section, or if such acts include kidnapping, attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, the violator may be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. This is a more recent federal statute, passed in 1968, which seeks to punish private individuals who forcibly interfere with federally protected activities. Therefore, it applies to probation/parole officers who act in their private capacity. The first part of the law penalizes a variety of acts, as already noted. The second part refers to deprivations of such rights as attending a public school or college; participating in state or locally sponsored programs; serving on a state jury; participating in interstate travel; or using accommodations serving the public, such as eating places, gas stations, and motels. The

third part penalizes interference with persons who encourage or give an opportunity for others to participate in or enjoy the rights enumerated in the statute. It is distinguished from Sections 241 and 242 in that a person acting singly and in a private capacity can violate it. This law is seldom used at present.

■ ■ ■

III. MAY AN OFFICER BE HELD LIABLE UNDER ALL OF THE ABOVE LAWS? YES.

The whole array of laws outlined above may apply to a probation/parole officer based on a single act, if the required elements for liability are present. For example, an act of an officer that leads to the wrongful death of an offender may subject the officer to liability under state and federal laws. Under each, the officer may be held liable civilly, criminally, and administratively.

The defense of double jeopardy does not apply in these cases because double jeopardy applies only if there are successive prosecutions for the same offense by the same jurisdiction. Civil and criminal penalties may result from a single act because "successive prosecution" requires that both cases are criminal; hence, it does not apply if one case is criminal and the other civil. Criminal prosecutions may also take place in state court and federal court for the same act. There is no double jeopardy because of the "same jurisdiction" requirement. State and federal prosecutions take place in different jurisdictions; therefore, there is no double jeopardy. There is no double jeopardy either if an employee is dismissed from employment and then prosecuted later, or held civilly liable, for the same act. This is because dismissal by the agency is administrative in nature and is neither a civil nor a criminal proceeding.

An example of the applicability of these laws is what happened to the police officers (who are public officials like probation/parole officers) in the infamous Rodney King beating case. In that case, the officers were first suspended and then dismissed from employment by the agency (administrative liability). They were then tried for criminal acts (in Simi Valley) in state court, but all were acquitted. After acquittal, they were tried again for criminal acts (in Los Angeles) in federal court. Two of the four defendants were acquitted, but the other two were convicted and served time in a federal institution. The officers raised the double jeopardy defense on appeal, but that did not succeed because they were tried by two different jurisdictions. The officers were also held liable for civil damages, in addition to the administrative and criminal proceedings.

■ ■ ■

IV. DIFFERENT RESULTS IF HELD LIABLE

Civil liability results in payment of money by the defendant to the plaintiff for damages or injury caused. In civil liability cases, therefore, the plaintiff seeks money, although, in Section 1983 (federal) cases, the plaintiff may also seek changes in agency policy or practice in addition to monetary compensation. Sanctions imposed in criminal cases include time in jail or prison, probation, fine, restitution, or other sanctions authorized by law and imposed by the judge. Administrative sanctions include dismissal, demotion, transfer, reprimand, warning, or other sanctions that agency policy or state law authorize.

V. POSSIBLE DEFENDANTS IN CIVIL LIABILITY CASES

Using the "deep pockets" approach (meaning that plaintiffs usually include as defendants those who are in a better position to satisfy a monetary judgment against them because they have more money), plaintiffs generally include as defendants anybody who might possibly have anything to do with a case. This might include the probation/parole officer, the supervisors, and the governmental agency that is the employer of the alleged offending officer. The assumption is that probation/parole officers have a shallow pocket, while supervisors and agencies have deep pockets. Who is responsible for which amount is usually determined by state law.

A. Government Agency as Defendant

In lawsuits against the agency, immunity usually attaches if the defendant is a state agency. This is because states (and the federal government) enjoy sovereign immunity, a doctrine stemming from the common law concept that "the King can do no wrong," hence cannot be sued or held liable. Sovereign immunity, however, may be waived through law or judicial decision, and many jurisdictions have waived it. When sovereign immunity does exist in a state, the question arises as to whether the particular function involved was governmental (for which there is immunity) or proprietary (for which there is no immunity). This is a complex area of law and decisions vary from state to state.

The rule concerning local governments is different. Local governments are subject to liability under *Monell v. Department of Social Services*.[2] They have been deprived of the sovereign immunity defense, which was available to them until the *Monell* decision in 1978. Therefore, counties, judicial districts, municipalities, or other nonstate units of government may be sued and held liable for what their employees do.

B. Individual Officers as Defendants

1. State Officers

Although state agencies are generally exempt from liability for their governmental activities unless waived, immunity ordinarily is unavailable to individual state officers who are sued. Therefore, members of state probation/parole boards may be sued as individuals. The fact that a state provides counsel, or indemnifies the officer if held liable, does not mean that the state has consented to be sued. It simply means that, if held liable, the officer pays the damages and the state indemnifies or reimburses him. All officers, state or local, may therefore be sued in their individual capacity under Section 1983.

2. Officers of Nonstate Agencies

Officers of counties, judicial districts, municipalities, or other nonstate governmental units may be sued in their official or individual capacities. As in the case of state officers, however, plaintiffs will likely sue officers in their official capacities so they can include their supervisors and agencies as defendants.

■ ■ ■

VI. KINDS OF DAMAGES AWARDED IN CIVIL LIABILITY CASES

In general, three kinds of damages may be awarded in civil liability cases, particularly to those who file under state tort law:

A. Actual or Compensatory Damages

These damages reduce to monetary terms all actual injuries shown by the plaintiff. Consequential damages, such as medical bills and lost wages, are termed special damages and are included in the category of compensatory damages.

In *Byrd v. N.Y. City Transit Authority*,[3] a compensatory award was ultimately reduced from $950,000 to $250,000 for false arrest and assault when a plaintiff suffered "minor scarring" and there was insufficient evidence of loss of earnings.

B. Nominal Damages

These are an acknowledgment by the court that the plaintiff proved his cause of action, usually in the amount of $1. When the plaintiff was wronged but suffered no actual injury, nominal damages would be appropriate.

In one case, *Brooker v. N.Y.*,[4] for example, a plaintiff who was arrested by state police officers, was grabbed by the neck and pulled out of a tavern. In a claim alleging assault and battery, the court awarded $1 in nominal damages, finding that the plaintiff suffered "no injury" from the use of force and made "embarrassingly phony" moans of pain only when someone started to videotape the events. Similarly, in *Floyd v. Laws*,[5] a civil rights plaintiff was found to be entitled to judgment and award of nominal damages of $1 when a jury found her civil rights had been violated but awarded no actual or punitive damages.

Where nominal damages vindicate the plaintiff as wronged, the door to punitive damages is opened, with or without a compensatory damage award. Nominal damages also lay the basis for awarding 1983 attorney fees in that they identify the prevailing party.

C. Punitive or Exemplary Damages

These damages are designed to punish or make an example of the wrongdoer, as well as to deter future transgressions. Punitive damages awarded can at times be quite high. In one case, the U.S. Supreme Court held that a $10 million punitive damage award did not violate due process requirements of the 14th amendment. In making its decision, the Supreme Court noted that the absolute or relative size of a punitive award was not the test of excessiveness but, rather, whether an award reflects bias, passion, or prejudice by the jury.[6] Punitive damages are awarded only against willful transgressors. However, the Supreme Court has ruled that no punitive damages may be awarded against local governments.[7]

SUMMARY

Probation/parole officers may be exposed to legal liabilities under federal and state law. Legal liabilities may also be classified into civil and criminal. This chapter discusses the various laws and damages to which an officer may be exposed in connection with his work. These liabilities are not mutually exclusive; in fact, one serious act may expose the officer to a number of civil and criminal liabilities under federal and state law. In addition, the officer may be subject to administrative disciplinary proceedings that can result in transfer, suspension, demotion, dismissal, or other forms of sanction.

The constitutional protection against double jeopardy does not apply to the above cases because the cases are not all criminal in nature, the criminal prosecutions discussed here do not refer to the same act, and the prosecutions are by different jurisdictions.

Double jeopardy applies only where criminal prosecutions of the same offense are made by the same jurisdiction.

In addition to the probation/parole officer, a plaintiff, using the "deep pockets" approach, may include as defendants anybody who had anything to do with the case. This could include supervisors as well as the government agency, either state or federal, which is the employer of the probation/parole officer. However, a state or federal agency normally will enjoy sovereign immunity unless waived through law or judicial decision. If sovereign immunity does exist in a state, it then becomes important to determine whether the particular function involved was governmental (for which there is immunity) or proprietary (for which there is no immunity).

Local governments, such as counties, judicial districts, municipalities, or other nonstate units of government, may be sued and held liable for the actions of their employees under *Monell v. Department of Social Services*.

In civil liability cases, there are essentially three kinds of damages that may be awarded. These include actual or compensatory damages, in which damages are reduced to a monetary amount for actual injuries shown by the plaintiff. A second type of damage award is nominal damages. Here the court acknowledges that the plaintiff has proved his/her cause of action, but no actual injury was sustained. In this case, a nominal damage award of $1 would be appropriate. A third type of damages awarded in civil cases is punitive or exemplary damages. These damages are awarded to punish or make an example of the wrongdoer as well as to deter transgressions by others in the future.

Notes

1. See unpublished manuscript of Charles E. Walker, Jr., General Counsel Board of Pardons and Paroles, Austin, Texas, "Legal Liabilities of Probation and Parole Authorities."

2. Monell v. Department of Social Services, 436 U.S. 658 (1978).

3. Byrd v. N.Y. City Transit Authority, 568 N.Y.S.2d 628 (A.D. 1991).

4. Brooker v. New York, 614 N.Y.S.2d 640 (A.D. 1994).

5. Floyd v. Laws, 929 F.2d 1390 (9th Cir. 1991).

6. TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993).

7. City of Newport v. Fact Concerts, Inc., 435 U.S. 247, 101 S. Ct. 2748, 79 L. Ed. 616 (U.S.S.C. 1981).

CHAPTER 2

Civil Liability Under State Law: State Tort Cases

INTRODUCTION

This chapter discusses two major kinds of state tort cases: intentional tort and negligence tort. In legal terminology, the act itself is called a tortious act, while the person who commits the act is known as a tortfeasor. There is so much variation in state tort law from one state to another; hence, this discussion is restricted to general principles. State law must be consulted for specifics.

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I. DEFINITION OF STATE TORT

Tort is defined in *Black's Law Dictionary* as:[1]

> A legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual.

The same act can be a crime against the state and a tort against an individual; thus, both a criminal prosecution and a civil tort action may arise from the same act. For example, a person who drives while intoxicated and causes an accident resulting in injury to another driver and damage to his or her car may be guilty of the criminal offense of driving while intoxicated, and civilly liable for the injury inflicted on the other person and the damage to the car. Tortious acts may also be the basis for suits charging violation of civil rights under Section 1983 (federal cases), as discussed in Chapter 3.

Tort actions are usually tried in state court before a jury that makes determination of liability and the amount of damages to be paid under instructions from the judge as to the applicable law. The jury determination is subject to modification, either by the trial judge or on appeal. A successful tort action generally results in payment of monetary damages to the wronged party.

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II. KINDS OF STATE TORT

Acts that constitute tort vary from one state to another and are usually determined by case law or legislative enactment. As indicated above, there are generally two kinds of tort: intentional tort and negligence tort. Probation/parole officers are exposed to both but, of late, more and more cases have been filed under negligence tort. The allegation in negligence tort cases is that the officer failed or neglected to do what he or she ought to have done, resulting in injury to the plaintiff, usually a member of the public.

A. Intentional Tort

Black's Law Dictionary defines intentional tort as "a tort in which the actor is expressly or impliedly judged to have possessed intent or purpose to injure."[2] To win an intentional tort case, the plaintiff must prove the following:

- An act by the defendant;
- The act must be deliberate and purposeful or the defendant knew with substantial certainty that consequences could result from the act;
- The result must have been caused by the act; and
- Damages resulted from the act.

Example: A probation officer beats up a juvenile probationer for no reason whatsoever, as a result of which the juvenile suffers injury. The officer may be held liable under intentional tort because the act was committed by

the defendant (the officer), the act was deliberate and purposeful, the injury was caused by the act, and damages (the injury) resulted from the act.

Intentional tort may be subdivided into two categories: physical tort and nonphysical tort.

1. Physical Tort

An illustrative—not exhaustive—list of acts that constitute physical tort is presented below.

a. *Battery*. Intentional harmful or offensive touching.

b. *Assault*. Intentionally placing a person in reasonable apprehension of immediate touching.

c. *Intentional infliction of emotional distress*. Acts of an officer that caused emotional distress.

d. *False arrest*. Arresting a person illegally in the absence of a warrant.

e. *False imprisonment*. Illegally detaining a person after arrest.

f. *Wrongful death*. Death caused by the wrongful act of another.

Some torts, such as assault and battery, involve injury to the person; others, such as trespass, represent a wrong to a person's property. These torts are intentional, which means that they are based on the intent of the actor to do the act which caused a certain event or harm. Other intentional torts include false arrest or false imprisonment, conversion, invasion of privacy, infliction of mental distress, libel, slander, misrepresentation, wrongful death, and malicious prosecution. Elements of some of these physical torts include the following:

- **Battery** is the intentional infliction by an individual of a harmful or offensive touching. The defendant in a case of battery is liable not only for contacts that do actual physical harm, but also for relatively trivial ones that are merely offensive or insulting, such as pushing, spitting in the face, forcibly removing a person's hat, or any touching of someone in anger. The consent of the plaintiff to the contact is a defense.[3]
- **Assault**, on the other hand, is an intentional act on the part of an individual that might not involve any contact, but that places a person in reasonable apprehension of immediate touching. Assault is thus a mental invasion, rather than the physical invasion involved in battery (although in many cases both assault and battery are involved). Examples of assault include shaking a fist in someone's face, raising a weapon, or chasing someone in a hostile manner. Threatening words alone are usually not sufficient, although they may contribute to an assault. Note that the trend among the states is to combine assault and battery as a single, combined offense.[4]
- **False arrest and false imprisonment** are two other tortious actions for which probation/parole officers may be liable. False arrest takes place when a person is illegally arrested in the absence of a warrant. This occurs, usually, when the arresting officer lacks probable cause to believe that a crime was committed and that the person arrested committed the act. False imprisonment takes place when, after arrest, a person is illegally detained. The detention does not have to be in a prison or jail. It can take place in such facilities as a halfway house, juvenile home, mental facility, hospital, or even a private home. Physical force need not be used under false imprisonment. Present, immediate threats are sufficient; future ones are not. A probation/parole officer need not actually use force to detain a probation/parolee illegally. Although false imprisonment usually follows false arrest, false imprisonment may take place even after a valid arrest. An example is if a probation officer makes a valid arrest but refuses to release the probationer after having been ordered to do so by the judge.[5]

- **Wrongful death lawsuit** is brought by such persons as surviving relatives or the executor of the deceased's estate. This tort provides damages to those hurt by the death when it was wrongfully caused by the actions of another. No recovery is possible if the deceased could not have won a suit in his or her own right had that party survived.

2. Nonphysical Tort

An illustrative list of acts that constitute nonphysical tort is presented below.

a. *Defamation*. An invasion of a person's interest in his or her reputation.

b. *Invasion of privacy*. An umbrella concept covering unreasonable interference with an individual's right to be left alone.

c. *Misrepresentation of facts*. False representation of a past or present fact, on which individuals may justifiably and actually rely in making decisions.

d. *Malicious prosecution*. The initiation of criminal proceedings without reasonable cause or for improper reasons, such as revenge.

e. *Wrongful death*. When death results from the wrongful act of another person.

Harm to an individual's nonphysical interests, such as his or her reputation, privacy, and emotional well-being, is also tortious.

- **Defamation** refers to invasion of a person's interest in his or her reputation. In order for defamation to take place, material about an individual must be communicated, either orally (slander) or in written form (libel), to at least one third person who understood it.[6] The material must tend to lower the reputation of the person to whom it refers, in the estimation of at least a substantial minority of a community. Proof of the statement's truth is an absolute defense regardless of how damaging it may be.
- **Invasion of privacy** is an umbrella concept embracing several distinct means of interfering with an individual's solitude or personality. Each, in its own way, is an unreasonable interference with a person's right to be left alone. The areas of concern include (1) intrusion of the plaintiff's private affairs or seclusion, (2) publication of facts placing the plaintiff in a false light, and (3) public disclosure of private facts about the plaintiff. The act of invasion may be mere words, such as the unauthorized communication of some incident of a person's private life, or it may be an overt act, such as wiretapping, "peeping," or taking unauthorized photographs.[7]
- **Infliction of emotional distress** refers to acts (either intentional or negligent) that cause emotional distress to the plaintiff. Words alone or gestures or conduct may be sufficient. Bullying tactics by probation/parole officers or insults shouted in public might be examples, especially if they can be deemed "extreme" and "outrageous." In some states, the emotional distress must be severe enough to have resulted in demonstrable physical injuries. In other states, however, the outrageous nature of the defendant's conduct is a sufficient basis for liability.[8]
- **Misrepresentation of facts** requires a false representation of a past or present fact, on which individuals may justifiably and do actually rely in making decisions. By the nature of their work, probation/parole officers are susceptible to this. A related tort is disparagement or injurious falsehoods. These falsehoods are statements harmful to a person, but that do not necessarily hurt his or her reputation. False statements such as "A is no longer in business," or the filing of a false change of address card with the post office, are examples.[9]
- **Malicious prosecution** involves the initiation of criminal proceedings, as in a report to the police or other official that results in a warrant for the plaintiff's arrest. The accusation must be without probable cause and for an improper reason, such

as revenge. In order for the defendant to be liable for malicious prosecution, the plaintiff against whom proceedings were initiated must be found innocent.[10]

B. Negligence Tort

Negligence tort is filed with increasing frequency by plaintiffs who are injured by crimes that probationers/parolees commit while on probation/parole supervision. It is based on the assumption by the public, and made official policy in some departments, that one of the purposes of probation/parole is public protection. Example: X, a member of the public, is raped by a parolee. X brings a lawsuit against the parole officer and the department alleging negligence in their duty to protect the public. Whether the lawsuit succeeds or not is an entirely different story; the likelihood is it will not. The point, however, is that a lawsuit for negligent supervision may be brought against the officer, the supervisor, and the department for crimes committed by probationers/parolees. Not all types of negligence in supervision lead to liability. An important question for probation/parole officers is: When are they negligent in their jobs as to be exposed to negligence lawsuits? The answer is: It depends on the legal definition of negligence and available defenses in their jurisdiction.

1. Definition of Negligence

One court offers this widely accepted definition of negligence:[11]

> Negligence, in the absence of statute, is defined as the doing of that thing which a reasonably prudent person would not have done, or the failure to do that thing which a reasonably prudent person would have done in like or similar circumstances; it is the failure to exercise that degree of care and prudence that reasonably prudent persons would have exercised . . . in like or similar circumstances.

One phrase is mentioned three times in the above definition: a reasonably prudent person. The definition of negligence relies a lot on what a reasonably prudent person would or would not have done under similar circumstances. For purposes of day-to-day decisionmaking, probation/parole officers are best advised to do what a reasonably prudent person would have done under the circumstances. Note, however, that the above definition may be superseded by a definition given by state statute or state case law. A definition that is found in a state statute or state case law prevails over the above definition.

2. Elements of Negligence Tort

In general, the following must be present if the defendant is to be held liable under negligence tort law:[12]

- A legal duty owed to the plaintiff;
- A breach of that duty by omission or commission;
- The plaintiff must have suffered an injury as a result of that breach; and
- The defendant's act must have been the proximate cause of the injury.

3. Types of Negligence

Negligence may be slight, gross, or willful. Slight negligence is defined as "an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use"—in other words, "a failure to exercise great care." Gross negligence is described as "a failure to exercise even that care which a careless person would use," while willful negligence means that "the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, or so great as to make it highly probable that harm would follow."[13]

In general, no liability ensues if the negligence is slight; liability ensues only if the

negligence is gross or willful. The problem, however, is that it is sometimes hard to determine which specific negligence is slight, gross, or willful. Despite definitions, these terms are subjective with the trier or fact in specific cases. What may appear slight to one judge or jury may be gross to other individuals. The good news, then, is that there is no liability for slight negligence (with some exceptions, as in strict liability cases); the bad news is that there is no definite guideline to determine what is slight or gross.

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III. DEFENSES IN STATE TORT CASES

Many defenses are available in state tort cases, including consent, self-defense, defense of others, and defense of property. Just about each type of tort case has its own particular defense. For example, the defense for the tort of assault and battery differs from the defense against the tort of defamation; the defense for intentional tort differs from the defense for negligence tort.

Nonetheless, types of defenses are discussed here because they apply only to government officials or entities, not to private persons. These are the official immunity defense (applies to government officials), the governmental immunity defense (applies to governmental agencies), and the public duty doctrine defense (applies to public officials in injury cases as a result of alleged supervision negligence).

A. The Official Immunity Defense

Official immunity from liability applies to public officials. The historical justification for official immunity is that since a government can only act through its officials and since sovereign immunity is to protect the operations of government, then those who carry out governmental operations must also be immune.[14] Another argument advanced is that it would be unfair and intimidating to allow a private individual to hold a government officer or employee liable for performing his or her duty. For example, if a prosecutor could be subjected to a possible tort lawsuit every time a prosecution failed, he or she might well decide to prosecute with less vigor and only when absolutely certain the case will result in a conviction. The fear of tort liability could have a chilling effect on job performance.

The meaning of and requirements for the official immunity defense vary from state to state. One state court lists the requirements that must be present in many states for the defense to succeed, holding that government employees are entitled to official immunity from lawsuits arising from the performance of their "discretionary duties, in good faith, as long as they are acting within the scope of their authority."[15] This definition requires that for the official immunity defense to succeed, the following must be proved by the probation/parole officer: (1) the officer must have been performing a discretionary, not mandatory, act; (2) the officer must have acted in good faith; and (3) the officer must have acted within the scope of his or her authority. What do these terms mean?

- **Discretionary** means that the act involves personal deliberation, decision, and judgment. Actions that require obedience to orders or performance of duty to which the officer has no choice are not discretionary; they are, instead, ministerial.[16] Example: To revoke or not to revoke a probationer for a minor offense is usually left to the discretion of the officer, unless revocation is required by agency policy—which it seldom is. On the other hand, respecting the constitutional rights of a probationer, at least those not lost as a result of being placed on probation, is ministerial in that the officer had no option to disregard those rights.

- **Good faith** means that the officer "acted in the honest belief that the action taken or the decision was appropriate under the circumstances."[17] Example: A probation officer denies permission for a probationer to travel, based on the reasonable belief that there is a strong possibility the probationer will not return.
- **Acting within the scope of authority** means that the officer is discharging the duties generally assigned.[18] Example: An officer making a home contact is acting within the scope of authority. In contrast, an officer who revokes a probationer without justification is clearly acting outside the scope of authority.

1. Categories of Official Immunity

Official immunity may be divided into three categories: absolute, qualified, and quasi-judicial. Each is briefly discussed below.

a. *Absolute immunity*. The need to encourage fearless decisionmaking has led to recognition of an absolute immunity for some officials. This privilege protects the official from liability for official acts even if they were done with malice, and allows the courts to dismiss actions for damages immediately without going into the merits of the plaintiff's claim.[19] Federal and state legislators, judges, and prosecutors have this type of immunity. (Indeed, it is often referred to as "judicial immunity.") Although they could be sued in actions alleging their decisions were based on malicious grounds, such cases will be dismissed by the courts. These officials are thus protected from liability. Courts at both the federal and state levels have consistently upheld absolute immunity for legislators and judges, based on the rationale that these officials must be free from the fear of liability to exercise their discretion appropriately.[20] This does not mean that absolutely immune officials are not accountable for their decisions. Legislative and judicial ethics bodies may inquire into and punish misconduct; somewhat more formally, legislators and judges can be impeached in appropriate cases; and all legislators and many judges are subject to citizen censure at the polls. They are simply protected from personal financial liability. It must be noted that judges do not enjoy absolute immunity in everything they do. They have absolute immunity only when performing judicial or adjudicatory responsibilities, such as issuing setting conditions of probation or revoking a probationer. They do not have absolute immunity when performing nonjudicial functions, such as when serving as a member of a juvenile probation board or when hiring or firing probation officers.

b. *Quasi-judicial immunity*. Absolute immunity is generally applied to officials in the judicial and legislative branches of government, while qualified immunity applies to those in the executive branch. Some officials, however, have both judicial and executive functions. Such officials include court personnel, parole board members, and some probation officers. These officials are given some protection, referred to as "quasi-judicial immunity." Under this type of immunity, judicial-type functions that involve discretionary decisionmaking or court functions are immune from liability, while some other functions (such as ministerial duties of the job) are not.[21] The emphasis is on the function performed rather than on the position the officer holds. In other words, there are nonjudicial officials who enjoy the same immunity as judges when performing certain responsibilities that are analogous to those performed by judges.

c. *Qualified immunity*. The courts have been less willing to find absolute immunity for other public employees who are not involved in the legislative or judicial process. These officials are usually from the executive department of government.

The doctrine of qualified immunity has two different formulations. According to one,

the immunity defense is held to apply to an official's discretionary acts, meaning those that require personal deliberation and judgment. The immunity defense is not available, however, for ministerial acts, meaning those that amount only to the performance of a duty in which the officer is left with no significant choice of his or her own.[22] For example, a parole hearing officer's recommendation to revoke or not to revoke parole is a discretionary act, but the duty to give the parolee a hearing before revocation is ministerial because a hearing is required by the Constitution, as decided by the United States Supreme Court.

A major difficulty with the discretionary-ministerial distinction is that there is no adequate way of separating discretionary from ministerial duties. The distinction seems to vary from judge to judge and from jurisdiction to jurisdiction and is thus difficult to predict. It is clear, however, that officials in policymaking positions (such as probation/parole board members) at the planning level of government are more likely to be making discretionary decisions and are thus better able to claim the immunity defense for their actions. Field officers and others at government's operational level usually perform ministerial acts and, therefore, are advised to consider their functions as ministerial and not immune, unless otherwise previously decided by a court in closely similar circumstances.

A second and better known way of interpreting qualified immunity, used in some states, is by relating it to the "good faith" defense. Under this concept, a public officer (other than one who enjoys absolute immunity) is exempt from liability only if he or she can demonstrate that the actions were reasonable and were performed in good faith within the scope of employment.[23]

2. What Type of Immunity Do Probation/Parole Officers Have?

Immunity for probation/parole officers is often dependent on the agencies for which they work and the nature of the functions performed, but in general they merely have qualified immunity. Probation officers who are employees of the court and work under court supervision do not enjoy the same absolute immunity of judges, but they may be vested with judicial immunity for some acts. For example, in a recent federal case, the Fifth Circuit Court of Appeals held that a probation officer was entitled to judicial immunity when preparing and submitting a presentence report in a criminal case and was not subject to liability for monetary damages.[24] Another case, decided by the Ninth Circuit Court of Appeals in 1970, held that in preparing and submitting a presentence report on the defendant, the probation officer was performing a "quasi-judicial" function and was therefore immune from liability under Section 1983.[25]

Many of the actions of such court-supervised probation officers, however, are considered executive, and hence are likely to come under qualified immunity. Probation officers are liable unless the act is discretionary or done in good faith. Parole officers are usually employees of the executive department of the state and, as such, they enjoy only qualified immunity. They do not enjoy any type of judicial immunity that some courts say probation officers have when performing certain court-ordered functions.

Most federal courts of appeals have ruled that higher officials of the executive branch who must make judgelike decisions are performing a judicial function that deserves absolute immunity. This particularly refers to parole boards when performing such functions as considering applications for parole, recommending that a parole date be rescinded, or conducting a parole revocation hearing.[26] One federal appellate court, however, has stated that probation and parole board members and officers enjoy absolute immunity when engaged in adjudicatory duties but only qualified, good faith immunity for administrative acts. The same court categorized the failure to provide procedural

due process in a revocation hearing as ministerial in nature, for which liability attached.[27]

B. The Governmental Immunity Defense

This type of immunity protects the government (instead of individuals) from liability. It derives from the early English concept of "sovereign immunity," which proclaims that "the King could do no wrong," and, therefore, he could not be subjected to suits in his own courts.[28] Sovereign immunity was adopted in the United States at an early date through court cases and memorialized in the 11th amendment to the Constitution.[29]

Initially, the doctrine was held by the court to bar suits against the federal and state governments, based on the premise that the government had authority to protect itself from liability suits. The right to sue for damages was created by the government, and the government, as the creator, could exempt itself from the enforcement of that right. Various justifications for exempting the government from liability were advanced, involving considerations of finance and administrative feasibility.[30]

Neither the federal government nor any state fully retains its sovereign immunity. Legislatures in every jurisdiction have been under pressure to compensate victims of governmental wrongs, and all have adopted some form of legislation waiving immunity in at least some areas of governmental activity. As noted by one scholar:[31]

> The urgent fiscal necessities that made the governmental immunity acceptable at the outset are no longer present. The United States and a growing number of states have found it financially feasible for them to accept liability for and consent to suit upon claims of negligence and omission, for which they traditionally bore no liability at all; the availability of public liability insurance as well as self-insurance makes the assumption of this wholly new liability quite tolerable.

No state, however, has gone so far as to totally relinquish immunity for all injuries caused through the misadministration of the governmental process.

State immunity, subject to waiver by legislation or judicial decree, is an operational doctrine for states and their agencies. A distinction must be made, however, between agency liability and individual liability. State immunity only extends to state agencies. It does not necessarily extend to individual state officers who can be sued and held personally liable for civil rights violations or tortious acts. Therefore, in states where sovereign immunity has not been waived, state officials may still be sued and held liable because they do not partake of governmental immunity. For example, a state cannot be sued (unless sovereign immunity is waived), but the chairman and members of the State Parole Board can be sued and held liable. Whether the state will provide legal representation and indemnification, if held liable, varies from state to state.

Prior to the 1978, municipal governments, counties, and villages could not be sued because they were considered extensions of state power and hence enjoyed sovereign immunity. All that changed in 1978 when the United States Supreme Court held in *Monell v. Department of Social Services*[32] that local units of government may be held liable, in a Section 1983 action, if the allegedly unconstitutional action was taken by the officer as a part of an official policy or custom.

As is evident from the above discussion, the immunity defense is complex, confusing, and far from settled, particularly in the case of probation/parole officers. Variations are found from state to state and from one jurisdiction to another. The above discussion is designed merely to provide a general

framework and guideline. (Table 2–1 presents what courts in most jurisdictions have said. It is not meant to be a definitive statement on the issue of immunity. Readers should consult their legal advisors for the law and court decisions in their states.)

C. The Public Duty Doctrine Defense in Injury Cases Resulting From Negligent Supervision

The general rule is that there is no liability on the part of probation/parole officers for failing to protect a member of the public who suffers injury inflicted by a probationer/parolee. This protection from liability stems from the "public duty doctrine," which holds that government functions are owed to the general public but not to specific individuals.[33] Therefore, probation/parole officers who fail to prevent an injury to a member of the public are not liable for the injury inflicted. One of the goals of probation/parole is public protection. Injured members of the public file lawsuits against probation/parole officers and departments because they link the injury caused by probationers or parolees to negligent supervision or failure to revoke probation or parole. The public assumes that, had the offender been properly supervised and had the probation/parole been revoked upon violation of conditions, the injury could have been prevented.

Logical as this thinking may be, it generally has no basis in law. The reality is that, were it not for the protection against civil liability given by the public duty doctrine, nobody would ever want to be a police, probation, or parole officer. These are high-risk occupations that profess public protection as a part of their mission, yet they hardly have any control over what the public or their supervisees do vis-à-vis the public; therefore, they are protected against civil liability.

Table 2–1. General Guide to Types of Official Immunity in State Tort Lawsuits

	Absolute*	Quasi-judicial†	Qualified§
Judges	Yes		
Legislators	Yes		
Prosecutors	Yes		
Parole Board Members		Yes, if performing a judgelike function	Yes, if performing other functions
Supervisors			Yes
Probation Officers		Yes, if preparing a presentence report under order of judge	Yes, if performing other functions
Parole Officers			Yes
Police Officers			Yes
Prison Guards			Yes
State Agencies	Yes, unless waived by law or court decision		
Local Agencies	No immunity	No immunity	No immunity

* Absolute immunity means that a civil liability suit, if brought, is dismissed by the court without going into the merits of the plaintiff's claim. No liability.

† Quasi-judicial immunity means that officers are immune if they are performing judicial-type functions, such as when preparing a presentence report under orders of the judge, and liable if they are performing other functions.

§ Qualified immunity means that the officer's act is immune from liability if it is discretionary, but not if it is ministerial. Also, an officer may not be liable even if the act is ministerial if it was done in good faith.

The Exception: Liability May Be Imposed If a Special Relationship Exists

There is one major but multifaceted and largely undefined exception to the public duty doctrine. This is the special relationship exception. The term means that if a duty is owed to a particular person rather than to the general public, then a probation/parole officer or agency that breaches that duty can be held liable for damages. *Special relationship* has many meanings depending on state law, court decisions, or agency regulations.[34]

In cases involving the police and law enforcement officers, courts might find liability to injured individuals in the following instances based on special relationship:

- When the police deprive an individual of liberty by taking him or her into custody.[35]
- When the police assume an obligation that goes beyond police duty to protect the general public.[36]
- When protection is mandated by law.[37]
- When protection is ordered by the court.[38]
- In some domestic abuse cases.[39]

What the above situations above have in common is that the duty of the police has shifted from that of protecting the public in general to protecting a particular person or persons; hence a special relationship is deemed to have been established.

There are instances when the special relationship exception might apply to probation/parole officers. This is particularly likely when they are vested with law enforcement authority, as they are in some jurisdictions. Realistically, however, liability based on special relationship in probation/parole might arise in the following cases:

- When a probation/parole officer has credible knowledge that a crime is about to be committed by a probationer/parolee and the officer could have prevented it, but negligently failed to do so. Example: A parole officer has credible information that a parolee is planning to commit a crime and could have prevented it, but failed to do so; and
- When the probation/parole officer fails to follow a specific order of the court. Example: A judge orders a probation officer not to allow a probationer to have access to his estranged wife and the officer could have done that but failed to do so.

The problem with the special relationship exception is that it is difficult to determine under what specific circumstances a special relationship exists. There are no definite guidelines. Special relationship cases in policing appear to indicate that courts or juries first impose liability in particularly bad cases to compensate an injured member of the public, then fall back on the special relationship exception to justify the award. The thinking seems to be that the victim has suffered because of what the probationer/parolee has done and should be compensated either by the state or by those in charge of supervision.

The public duty doctrine and the special relationship exception are discussed more fully in Chapter 8, Supervision.

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SUMMARY

Probation and parole officers may be held liable under state tort law. There are two kinds of state tort: intentional tort and negligence tort. Intentional tort has two subcategories: physical tort and nonphysical tort. Negligence tort has assumed greater importance for probation/parole officers because of the increasing number of cases filed by the public. This happens when a member of the public is injured by a probationer/parolee and that person feels the injury could have been prevented had the officer properly supervised the probationer/parolee. Intentional tort is a tort of commission,

whereas negligence tort is generally a tort of omission, meaning the officer failed to do something that ought to have been done.

Three defenses to state tort are discussed in this chapter: the official immunity defense (applies to government officials); the governmental immunity defense (applies to government agencies); and the public duty doctrine defense (applies to public officials in injury cases as a result or alleged supervision negligence). Official immunity may be divided into three categories: absolute, qualified, and quasi-judicial. Judges and prosecutors enjoy absolute immunity while performing judicial responsibilities; probation/parole officers have qualified immunity. Governmental immunity means that the government cannot be sued because of sovereign immunity, unless such immunity is waived by legislation or case law. Local agencies, however, do not enjoy sovereign immunity; hence, they can be sued and held liable. The public duty doctrine holds that government functions are owed to the general public but not to specific individuals. Therefore, probation/parole officers who fail to prevent an injury to a member of the public are not liable, unless it falls under the special relationship exception. Special relationship, however, is an ill-defined concept and tends to be applied on a case-by-case basis.

Notes

1. *Black's Law Dictionary*, sixth edition (1991), at 1036.

2. *Id*. at 560.

3. W. Prosser, *Handbook of the Law of Torts*, at 10 (4th ed. 1971).

4. *Id*. at 41.

5. *Id*. at 47.

6. *Bay Area Review Course*, Torts (Los Angeles, Ca., Bay Area Review Course, Inc., 1972), at 76.

7. *Id*. at 87.

8. *Id*. at 89.

9. *Id*. at 97-98.

10. *Id*. at 101.

11. *See* Biddle v. Mazzocco, 248 P.2d 364 (1955).

12. *Supra* note 3, at 143.

13. *Supra* note 3, at 183-85.

14. Committee on the Office of Attorney General, National Association of Attorneys General, *Official Liability: Immunity Under Section 1983*, at 7 (July 1979).

15. City of Lancaster v. Chambers, 883 S.W.2d (Texas 1994).

16. City of Pharr v. Ruiz, 944 S.W.2d 709 (Tx. Cr. App. Corpus Christi, 1997).

17. *Id*.

18. *Supra* note 14.

19. Texas Advisory Commission on Intergovernmental Relations, *Personal Tort Liability of Texas Public Employees and Officials: A Legal Guide*, at 12 (1979).

20. *Supra* note 13, at 7.

21. *Supra* note 13, at 47.

22. *Supra* note 13, at 8.

23. *Supra* note 13, at 69.

24. Spaulding v. Nielsen, 599 F.2d 728 (5th Cir. 1979).

25. Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1970).

26. Keeton v. Procunier, 468 F.2d 810 (9th Cir. 1972), *cert. denied*, 411 U.S. 987 (1973); Pope v. Chew, 521 F.2d 400 (4th Cir. 1975); Douglas v. Muncy, 570 F.2d 499 (4th Cir. 1978). For a more detailed discussion of cases on the issue of

immunity in the performance of quasi-judicial functions, see *supra* note 18, at 47 et seq.

27. Thompson v. Burke, 556 F.2d 231 (3d Cir. 1977).

28. *Supra* note 13, at 1.

29. *Id*. at 2.

30. *Id*. at 5.

31. D. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, at 60 (1972).

32. Monell v. Department of Social Services, 436 U.S. 658 (1978).

33. For a classic formulation of the public duty doctrine, see Ryan v. State, 656 P.2d 616 (1982).

34. For cases on the special relationship exception to the public duty doctrine, see I. Silver, *Police Civil Liability* (Matthew Bender), 1991, Sec. 9.07 ff.

35. *See* Sanders v. City of Belle Glade, 510 So. 2d (Fla. App. 1987).

36. *See* Schuster v. City of New York, 154 N.E.2d 534 (N.Y. 1958).

37. *See* Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984).

38. *See* Sorichetti v. City of New York, 482 N.E.2d 70 (1985).

39. This happens in cases when a state passes legislation authorizing courts to issue protective orders to spouses in domestic abuse situations and the police fail to enforce the order.

CHAPTER 3

Civil Liability Under Federal Law: Section 1983 Cases

INTRODUCTION

Section 1983 of Title 42, United States Code, is perhaps the most frequently used provision in the array of legal liability statutes against public officials, including probation and parole officers. It is therefore important that this law be properly understood by probation and parole officers. This chapter discusses Section 1983 cases, sometimes also called civil rights cases. These cases are usually filed in federal courts and the plaintiff, as in state tort cases, seeks damages and/or changes in agency policy or practice.

■ ■ ■

I. SECTION 1983 CASES

A. The Law

Title 42, United States Code, Section 1983—Civil action for deprivation of rights, reads as follows:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

B. History of the Law

Section 1983 dates from the post-Civil War Reconstruction Era when Congress saw a need for civil means to redress civil rights violations. It was not feasible at that time to enact a federal criminal statute. In 1871, the federal Congress passed Section 1983, then popularly known as the Ku Klux Klan Act.[1] It was designed to enforce the provisions of the 14th amendment against discrimination and to minimize racial abuses by state officials. Its immediate aim was to provide protection to those wronged through the misuse of power possessed by virtue of state law and made possible only because the wrongdoer was clothed with the authority of state law. As originally interpreted, however, the law did not apply to civil rights violations where the officer's conduct was such that it could not have been authorized by the agency; hence, it was seldom used. That picture changed in 1961 when *Monroe v. Pape* was decided.

In *Monroe v. Pape*,[2] the United States Supreme Court ruled that Section 1983 applied to all violations of constitutional rights even when the public officer was acting outside the scope of employment. This greatly expanded the scope of protected rights and gave impetus to a virtual avalanche of cases filed in federal courts based on a variety of alleged constitutional rights violations, whether the officer was acting within or outside the scope of duty.

C. Why Section 1983 Lawsuits Are Popular

Civil rights suits are often used by plaintiffs for a variety of reasons. First, they almost always seek damage from the defendant, meaning that if the plaintiff wins, somebody pays. This can be very intimidating to a probation/parole officer who may not have the personal resources or the insurance to cover

liabilities. Second, civil rights suits can be filed as a class action suit where several plaintiffs alleging similar violations are grouped together and their cases are heard collectively. This presents the appearance of strength and unity and affords plaintiffs mutual moral support. Third, if a civil rights suit succeeds, its effect is generic rather than specific. For example, if a civil rights suit succeeds in declaring unconstitutional the practice of giving parolees only one hearing before revocation instead of a preliminary and final hearing as indicated in *Morrissey v. Brewer*,[3] the ruling benefits all parolees instead of just the plaintiff. Fourth, civil rights cases are usually filed directly in federal courts where procedures for obtaining materials from the defendant (called "discovery") are often more liberal than in state courts. This facilitates access to important state documents and records needed for trial. A fifth and perhaps most important reason is that since 1976, under federal law, a prevailing plaintiff may recover attorney's fees. Consequently, lawyers have become more inclined to file Section 1983 cases if they see any semblance of merit in the suit.

D. Roadblocks to Criminal Cases Against a Public Officer

Plaintiffs use Section 1983 suits extensively despite the availability of criminal sanctions against the public officer. One reason is that the two are not mutually exclusive. A case filed under Section 1983 is a civil case in which the plaintiff seeks vindication of rights. The vindication that an injured party feels if a criminal case is brought because of injury is less direct. Moreover, there are definite barriers to the use of criminal sanctions against erring probation/parole officers. Among these are the unwillingness of some district attorneys to file cases against public officers with whom they work and whose help they may sometimes need. An exception might be where the injury was serious or if the case has generated massive adverse publicity. Another roadblock is that serious criminal cases in most states must be referred to a grand jury for indictment. Grand juries may not be inclined to charge public officers with criminal offenses unless it is shown clearly that the act was gross and blatant abuse of discretion. In many criminal cases involving alleged violation of rights, the evidence may come down to the word of the complainant against the word of a public officer. The grand jury may be more inclined to believe the probation/parole officer's testimony. Finally, the degree of certainty needed to succeed in civil cases is mere preponderance of evidence (roughly, more than 50 percent certainty), much lower than the guilt beyond a reasonable (95 percent or more certainty of guilt) standard needed to convict criminal defendants.

■ ■ ■

II. TWO REQUIREMENTS FOR A SECTION 1983 LAWSUIT TO SUCCEED

There are two requirements for a 1983 lawsuit to succeed in court:

- The defendant acted under "color of law"; and
- The defendant violated a constitutional right or a right given by federal (but not by state) law.

A. The Defendant Acted Under Color of Law

This means the misuse of power possessed by virtue of law and made possible only because the public official is clothed with the authority of law.[4] (Note: Some writers prefer to use the term "color of state law." While this is the more accurate term, it can be misleading because Section 1983 also applies to federal officers and officers on the county, municipality, or lower government level. To avoid confusion, this writer feels it

is better to use the term "acting under color of law," such term referring to law on all levels—federal, state, county, municipal, or smaller governmental units.)

While it is easy to identify acts that are wholly within the term "color of law" (as when a probation officer conducts a presentence investigation upon court order), there are gray areas that defy easy categorization (as when a probation officer who moonlights as a private security guard illegally arrests a person known by that individual to be a probationer). As a general rule, anything a probation/parole officer does in the performance of regular duties and during the usual hours is considered under color of state law. Conversely, what he or she does as a private citizen during his or her off-hours falls outside the color of state law. In general, an officer acts under color of law if the officer takes advantage of his or her authority to do what he or she did. Example: A probation officer, during off-duty hours, sees a parolee in a local strip joint. One word leads to another and the officer arrests and beats up the probationer. The officer is acting under color of law.

The term "color of law" does not mean that the act was in fact authorized by law. It is sufficient if the act appeared to be lawful even if it was not in fact authorized.[5] Hence, if the probation/parole officer exceeded lawful authority, he or she is still considered to have acted under color of law. An example is a probation officer who searches a probationer's residence without legal authorization. Such officer is considered to have acted under color of law and therefore may be sued under Section 1983.

Can federal officers be sued under Section 1983? The United States Supreme Court in *Bivens v. Six Unknown Agents*,[6] decided in 1971, in effect said "yes." The court stated that a cause of action, derived from the Constitution, exists in favor of victims of federal officials' misconduct. In addition, a federal officer can be sued directly under Section 1983 if he or she assists state officers who act under color of law.[7]

In 1997, the United States Supreme Court held that prison guards working for privately run state prisons may be held liable in Section 1983 cases.[8] This means that private individuals who are under contract with or performing public functions for probation/parole agencies will likely be held suable under Section 1983 because they are considered "acting under color of law."

B. The Violation Must Be of a Constitutional Right or of a Right Given by Federal (but Not State) Law

Under this requisite, the right violated must be one that is guaranteed by the United States Constitution or is given the plaintiff by federal law. Rights given only by state law are not protected under Section 1983. For example, the right to a lawyer during a parole release hearing is not given by the Constitution or by federal law, so a violation thereof does not give rise to a 1983 suit. If this right is given an inmate, however, by state law, its violation may be punishable under state law or administrative regulation, but not under Section 1983.

The worrisome aspects of this requirement are not acts of probation/parole officers that are blatantly violative of a constitutional right (as when a probation officer searches a probationer's house without authorization). The problem lies in the difficulty in ascertaining whether or not a specific constitutional right exists. This is particularly troublesome in probation/parole where the courts have only recently started to define the specific rights to which probationers and parolees are constitutionally entitled. The United States Supreme Court has decided only a handful of cases thus far, although federal district courts and courts of appeals have decided many. Some of these decisions may be inconsistent with each other. It is important, therefore, for the probation/parole officer to be familiar with the

current law as decided by the courts in his or her jurisdiction. This is the law that must be followed regardless of decisions to the contrary in other states.

A probation/parole officer is liable if the above two elements are present. Absence of one means that there is no liability under Section 1983. The officer may, however, be liable under some other law, as for tort, or under the penal code, but not Section 1983. For example, a drunken probation officer who beats up somebody in a downtown bar may be liable under the regular penal code provisions for assault and battery, but not under Section 1983. Regrettably, the absence of any of the above elements does not prevent the filing of a 1983 suit. Suits may be filed by anybody at any time. Whether the suit will succeed or not is a different matter.

The United State Supreme Court has ruled that defendants in Section 1983 lawsuits may raise the qualified (good faith) immunity defense in both motion to dismiss and motion for summary judgment, and may be able to appeal denials both times in the same case prior to trial.[9]

■ ■ ■

III. OTHER LEGAL CONSIDERATIONS

Although Section 1983 cases require only two requirements to succeed (as discussed above), there are other considerations that help explain when Section 1983 cases succeed or fail. These are:

A. The Violation Must Reach Constitutional Level

Not all violations of rights lead to liability under Section 1983. The violation must be of constitutional proportion. What this means is not exactly clear, except that unusually serious violations are actionable, whereas less serious ones are not. This is reflected in the requirement, previously noted, of "gross negligence" or "deliberate indifference," etc. In the words of the Eighth Circuit Court of Appeals:[10]

> Courts cannot prohibit a given condition or type of treatment unless it reaches a level of constitutional abuse. Courts encounter numerous cases in which the acts or conditions under attack are clearly undesirable . . . but the courts are powerless to act because the practices are not so abusive as to violate a constitutional right.

Mere words, threats, a push, or a shove do not necessarily constitute a civil rights violation.[11] Neither does Section 1983 apply to such cases as the officer giving false testimony, simple negligence, or name calling.[12] On the other hand, the denial of the right to a parole revocation hearing as mandated in *Morrissey v. Brewer*[13] now constitutes a clear violation of a constitutional right. Before 1972, there would have been no violation because the right at that time had not as yet been declared as required by the Constitution.

B. The Defendant Must Be a Natural Person or a Local Government, but Not a State

Until recently, only natural persons could be held liable in 1983 suits. State and local governments were exempt because of the doctrine of sovereign immunity. In 1978, however, the United States Supreme Court, in *Monell v. Department of Social Services*,[14] held that the local units of government may be held liable if the allegedly unconstitutional action was taken by the officer as a part of an official policy or custom. What "policy or custom" means has not been made clear and is subject to varying interpretations. Apparently, if the employee on his or her own and without sanction or participation by the local government deprived another

of his or her rights, no liability attaches to the local government even if the officer is adjudged liable.

Monell does not affect state immunity because it applies to local governments only. This is not of much consolation to state officers, however; civil rights cases can be filed against the state officer himself, and he or she will be personally liable if the suit succeeds. While *Monell* involved social services personnel, there is no reason to believe it does not apply to local probation/parole operations. Lower courts have already applied it to many local agencies.

While local governments can be sued, states generally cannot be sued because they are insulated from liability by the doctrine of "sovereign immunity," which means that a sovereign is immune from lawsuit because it can do no wrong. The one big exception to this rule, however, is if sovereign immunity has been waived by the state (and many states have waived sovereign immunity in varying degrees, thus allowing themselves to be sued) through legislation or court decisions.

■ ■ ■

IV. DEFENSES IN SECTION 1983 LAWSUITS

There are a number of defenses to Section 1983 cases, usually depending upon the facts of the case. Two of those defenses (the others being more technical) are discussed here. One is the good faith defense and the other the probable cause defense.

A. The Good Faith Defense as Defined in *Harlow v. Fitzgerald*

The "good faith" defense in Section 1983 cases holds that an officer is not civilly liable unless he or she violated a clearly established statutory or constitutional right of which a reasonable person would have known. This definition was given in the 1983 case of *Harlow v. Fitzgerald*,[15] wherein the Court said:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. . . . The judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

The above excerpt indicates that the good faith defense has two requirements: (a) an officer violated a clearly established statutory or constitutional right, and (b) of which a reasonable person would have known. Both must be established by the plaintiff; otherwise no liability is imposed.

Although the *Harlow* case, above, did not involve probation or parole officers (it involved two White House aides under former President Nixon), the Court, in *Anderson v. Creighton*,[16] later said that the *Harlow* standard applies to other public officers, such as the police, who are performing their responsibilities. In the *Anderson* case, a federal agent and other law enforcement officers made a warrantless search of a home, believing that a bank robber was hiding there. The family that occupied the home then sued for violation of the fourth amendment right against unreasonable search and seizure, alleging that the agents' act was unreasonable. On appeal, the Court said that the lower court should have considered not only the general rule about home

entries, but also the facts known to the agents at the time of entry. According to the Court, the proper inquiry was whether a reasonable law enforcement officer could have concluded that the circumstances surrounding that case added up to probable cause and exigent circumstances, which would then justify a warrantless search. If such a conclusion is possible, then the good faith defense applies. This should apply to probation and parole officers as well. In short, if a reasonable probation or parole officer could have concluded that the circumstances surrounding the act make the action taken legal and valid, then the good faith defense should apply.

When is a right considered to be "clearly established?" The Federal Court of Appeals for the Fifth Circuit sets this standard: "A plaintiff must show that, when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his or her acts were unlawful." The court then added that: "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity."[17]

The "clearly established" requirement of a Section 1983 good faith defense may be illustrated by the recent case of *Wilson et al. v. Layne*, otherwise known as the "media ride-along case," decided by the Court in 1999.[18] Although involving a police officer, the case should apply to probation and parole officers as well because the principle is the same. In this case, federal and local law enforcement agents invited a newspaper reporter and a photographer to accompany them while executing a warrant to arrest a suspect who was the son of the plaintiffs. The son was not in the house, but the reporters photographed the incident, although the photographs were never even published by their newspaper. The parents sued. The issue on appeal was whether plaintiffs' constitutional rights were violated when law enforcement agents invited the photographers to ride along with them during the arrest. The Court said yes, but did not impose monetary damages on the officers because the officers acted in good faith. The Court said that the right violated at the time of the incident was not yet "clearly established," since at that time it was not clear whether ride-alongs were violative of constitutional rights. The law enforcement officers, therefore, did not violate a "clearly established constitutional right of which a reasonable person would have known." From now on, however, law enforcement officers who invite the media to "ride along" to take pictures during an arrest may be held liable because they will violate a "clearly established constitutional right of which a reasonable person would have known."

The good faith defense has two important implications for probation and parole officers and agencies. First, officers must know the basic constitutional and federal rights of offenders. Although officers may be familiar with these rights from college courses and corrections training, their knowledge needs constant updating in light of new court decisions in criminal procedure and constitutional law. The second implication of the Harlow test is that it places an obligation on police agencies to constantly inform their officers of new cases that establish constitutional rights. Moreover, agencies must update their manuals or guidelines to reflect decided cases not only from the United States Supreme Court but also from federal courts in their jurisdiction.

Some Good Faith Concerns

There are issues other than the meaning of good faith that need to be addressed in this section. One is the question of procedure during the trial. The question is this: In a Section 1983 case, should the plaintiff prove bad faith on the part of the defendant to be entitled to damages, or is it enough for the plaintiff to state that he or she was deprived of a constitutional right and leave it to the defendant to prove good faith, if that be his or her defense? This is important because it is often difficult for a plaintiff to prove

the bad faith state of mind. Obviously, the defendant will always claim good faith in an effort to justify his or her act. In *Gomez v. Toledo*,[19] decided in 1980, the United States Supreme Court resolved this issue, which had long troubled lower appellate courts and had resulted in inconsistent decisions. The Court stated that in Section 1983 actions the plaintiff is not required to allege, much less prove, that the defendant acted in bad faith in order to state a claim for relief. The burden is on the defendant to plead good faith as an affirmative defense. The court construed the provisions of Section 1983 as requiring only two allegations:

- The plaintiff must allege that some person has deprived him or her of a federal right.
- The person who has deprived him of that right acted under color of law.

The decision is significant in that the defendant in a civil rights suit now has the burden of proving good faith in the performance of his or her responsibilities. The officer must rely on the strength of his or her own good faith defense instead of hoping that the plaintiff's case is weak and that it fails to prove bad faith.

A second important issue involving good faith was resolved by the United States Supreme Court in *Owen v. City of Independence*,[20] also decided in 1980. In Owen, the Court said that a municipality sued under Section 1983 cannot invoke the good faith defense, which is available to its officers and employees. Stating that individual blameworthiness is no longer the acid test of liability, the Court said that "the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." The decision concluded thus:[21]

> The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole.

The decision should cause some concern to probation and parole officers employed by local agencies because of its budgetary and supervisory implications. It would appear from the decision that once damage is established in court, liability on the part of the agency ensues under the "equitable loss-spreading" rationale, even if the act was done in good faith by municipal officials. The concomitant budgetary strain from this decision is obviously difficult to estimate. Should the liability have no exceptions, then the decision may have the salutary effect of motivating local governments to scrutinize their own rules and practices as an act of fiscal wisdom. The Court in fact hoped that the threat that damages may be levied against the city might encourage those in policymaking positions to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. In addition, the Court anticipated that the threat of liability ought to increase the attentiveness with which officials at higher levels of government supervise the conduct of their subordinates. Unless subsequent decisions blunt its sharp effects, the *Owen* case, although assuring a degree of victim compensation at a time when it is fashionable to do so, may create problems among local governmental agencies that will doubtless have interesting ramifications for local probation/parole officers.

B. The Probable Cause Defense, but Only in Fourth Amendment Cases

The second defense in Section 1983 discussed in this chapter is the probable cause defense. It states that the officer is not liable in cases where probable cause is present. It is a limited type of defense because it applies

only in fourth amendment cases where probable cause is required for the probation or parole officer to be able to act legally. It cannot be used in cases alleging violations of other constitutional rights, such as the 1st, 5th, 6th, or 14th amendments.

One court has said that for purposes of a legal defense in Section 1983 cases, probable cause simply means "a reasonable good faith belief in the legality of the action taken."[22] That standard is lower than for the fourth amendment concept of probable cause, which is defined as "more than bare suspicion; it exists when the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

V. SECTION 1983 AND STATE TORT CASES COMPARED

State tort cases (discussed in chapter 2) and Section 1983 cases (discussed in this chapter) can be confusing unless their basic features are identified. Table 3–1 presents a comparison of these two types of lawsuits that are usually brought against probation/parole officers.

■ ■ ■

SUMMARY

Civil liability cases in federal court are generally known as Section 1983 cases. Based on Title 42 of the United States Code, Section 1983 cases need two requirements

Table 3–1. Types of Lawsuits Brought Against Probation/Parole Officers

Federal (Section 1983) Cases	State Tort Cases
Based on federal law	Based on state law
Plaintiff seeks money for damages and/or policy change	Plaintiff seeks money for damages
Law was passed in 1871	Usually based on decided cases
Usually tried in federal court	Usually tried in state court
Only public officials can be sued	Public officials and private persons can be sued
Basis for liability is violation of a constitutional right or of a right secured by federal law	Basis for liability is injury to person or property of another in violation of a duty imposed by state law
"Good faith" defense means the officer did not violate a clearly established constitutional or federal right of which a reasonable person should have known	"Good faith" defense usually means the officer acted in the honest belief that the action taken was appropriate under the circumstances

if they are to succeed. The first is that the defendant acted under color of law; the second is that the violation must be of a constitutional right or of a right given by federal (but not by state) law. There are a number of defenses in Section 1983 cases, two of which are discussed in this chapter. The first is the good faith defense, meaning that the officer is not liable unless he or she violated a clearly established statutory or constitutional right of which a reasonable person would have known. This good faith definition in Section 1983 cases is different from the good faith definition in state tort cases. The second defense is probable cause, meaning that the officer is not liable if probable cause was present when the action was taken. This defense, however, is limited only to fourth amendment cases and does not apply to violations of any other constitutional right.

Notes

1. M. Weisz and R. Crane, *Defenses to Civil Rights Actions Against Correctional Employers* (Correctional Law Project, American Correctional Association, 1977).

2. 365 U.S. 167 (1961).

3. 408 U.S. 471 (1972).

4. Williams v. United States, 342 U.S. 97 (1951).

5. Americans for Effective Law Enforcement, *Defense Manual: Civil Rights Suits Against Police Officers—Part I*, at 13 (1979).

6. 403 U.S. (1971).

7. *See supra* note 5, at 9.

8. Richardson v. McKnight, 117 S. Ct. 2100 (1997).

9. Behrens v. Pelletier, 116 S. Ct. 834 (1996).

10. Witsie v. California Department of Corrections, 406 F.2d 515 (8th Cir. 1968).

11. *See supra* note 1, at 9, 10.

12. *See supra* note 5, at 30.

13. 408 U.S. 471 (1972).

14. 436 U.S. 658 (1978).

15. 457 U.S. 800 (1982).

16. 483 U.S. 635 (1987).

17. Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992).

18. No. 98-93 (1999).

19. 446 U.S. (1980).

20. 445 U.S. 622 (1980).

21. *Id.* at 4399.

22. Rodriguez v. Jones, 473 F.2d 599 (5th Cir. 1973).

CHAPTER 4

Legal Representation, Attorneys' Fees, and Indemnification

INTRODUCTION

A probation/parole officer facing a liability lawsuit under state or federal law has three immediate concerns: legal representation, attorneys' fees, and indemnification (that is, who pays for the damages imposed) in case of liability. These concerns are discussed below in the light of legal research and findings from an extensive survey distributed to the offices of attorneys general nationwide for the first edition of this monograph. The survey was conducted in the early eighties, but, as best we know, no other survey or study has been conducted since then specifically on these issues in relation to probation/parole officers. The survey results are dated, but no other information is currently available on these topics; hence, the results are used here with available updates.

■ ■ ■

I. LEGAL REPRESENTATION

States use various guidelines in deciding what kinds of acts of public officers they will defend. In general, the states are more willing to provide legal assistance to state employees sued in civil cases than they are in criminal cases. All of the states in the survey cover civil actions, at least some of the time, for both probation and parole officers. A substantial percentage, however, indicate that they will not defend in all civil suits.

A. In Civil Liability Cases

Most states set few limitations on the types of acts they will defend in civil suits, requiring only that the officer's act or omission occur within the scope of employment, as they define it. Some states require, additionally, that the officer act in good faith. The term "good faith" is ill defined in state tort law, and the definition varies from state to state. In some states, good faith means "not grossly negligent"; in others, it means that the officer has not violated a state rule or law; in others, it denotes that the officer acted in the honest belief that what he or she did was proper and appropriate under the circumstances. In contrast, the definition of good faith in Section 1983 (federal) cases is clear—it means that the officer is not liable unless he or she violated a clearly established statutory or constitutional right of which a reasonable person would have known.

In many states, if an officer's behavior is within state guidelines, the attorney general may serve as the officer's legal counsel in the lawsuit. Many states have no other provisions for the defense of state employees. In some states, however, if the particular act comes under an applicable insurance policy, the insurer's counsel may undertake the defense. Reliance on such insurance can be risky, however, if policy limits are unrealistically low. In these cases, insurance carriers sometimes simply pay the limit of their liability in court in lieu of defending a suit, realizing that it can be less expensive for them to settle the lawsuit. The officer could be left unrepresented and exposed personally for the balance of the claim. Moreover, the officer and agency will bear the blemish of having been held liable in a civil liability case even if the case could perhaps have been won if it went to trial.

Some states permit outside lawyers to be hired at state expense to defend a state employee. These states usually allow reimbursement by the state or agency for lawyers' fees and court costs if the employee wins the suit after the state's attorney general's office has refused to defend the officer. On the other hand, if the state does undertake the defense of the officer and the individual is found to have acted in bad faith, and thus held liable, such officer may have to reimburse the state for costs (in at least three states). Thus, there are uncertainties involved in obtaining legal representation for state officials.

The attorney general's office has considerable discretion in undertaking the defense of an officer sued in a civil suit. In those cases in which the attorney general's office refuses to defend the officer, private legal assistance might have to be obtained. As of the time of the survey for the first edition, only two states, California and Vermont, had procedures for appealing the state's refusal to defend the officer. Only California required a judicial determination as to whether the employee was entitled to legal assistance from the state.

If known, the fact that the state refuses to defend the officer could serve to prejudice the judge or jury. However, the majority of states, with the exception of Maryland, Oklahoma, and Oregon, made no provision for barring evidence of state refusal to defend in the trial. This could be potentially damaging evidence against the state employee because of the implication, warranted or unwarranted, that the state found the case to be outside the scope of the officer's duty. State survey results concerning defense of probation/parole officers in civil cases are presented in tables 4–1 and 4–2.

B. In Criminal Liability Cases

The picture is different if the probation or parole officer is alleged to be involved in a criminal action. Almost half of the states did not undertake a defense of an officer. In many states, the state becomes the prosecutor against an officer if the charges involve criminal liability. A conflict of interest

Table 4–1. Defense of Probation Officers in Civil Cases*

"If a *probation officer* in your state is sued in a *civil* case, will the governmental agency undertake the defense of that officer?" (Number of states responding: 49.)

	Number	Percent
Yes	20	40.8
Sometimes	29	59.2
No	0	0.0

*All the tables in this chapter are taken from R.V. del Carmen and Carol C. Veneziano, "Legal Liabilities, Representation, and Indemnification of Probation and Parole Officers," 17 U.S.F. L. Rev., at 240-243 (1983).

Table 4–2. Defense of Parole Officers in Civil Cases

"If a *parole officer* in your state is sued in a *civil* case, will the governmental agency undertake the defense of that officer?" (Number of states responding: 50.)

	Number	Percent
Yes	22	44.0
Sometimes	28	56.0
No	0	0.0

would thus prevent the state from representing the probation or parole officer. The responses from several of the states in the survey indicated that state legal representation would be at the discretion of the attorney general's office. Others stated that the situation had never arisen and that the policies were unclear. Very few states indicated unequivocally that the state would undertake the defense of an officer if the case were a criminal matter. State survey results concerning defense of probation/parole officers in criminal cases are presented in tables 4–3 and 4–4.

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II. ATTORNEYS' FEES

The discussion on attorneys' fees must be addressed under fees in state tort cases and fees in Section 1983 cases because the rules are different.

A. In State Tort Cases

The general rule in state tort cases is that each party pays attorneys' fees regardless of who wins or loses. Example: A probationer brings a state tort case against a probation officer. Whether the probationer wins or loses the case, he or she pays his or her own lawyer. By the same token, whether the probation officer wins or loses, he or she pays his or her own lawyer. In a few states, however, this rule differs, and the defendant may be made to pay plaintiff's attorneys' fees if he or she loses the case. This is the exception, however, rather than the general rule.

B. In Section 1983 (Federal) Cases

The rule in federal cases is different and deserves a more extended discussion. In 1976, Congress passed legislation providing attorney's fees for cases of this nature at the federal level. The act, known as the Civil Rights Attorney's Fees Awards Act of 1976

Table 4–3. Defense of Probation Officers in Criminal Cases

"If a *probation officer* in your state is sued in a *criminal* case, will the governmental agency undertake the defense of that officer?" (Number of states responding: 47.)

	Number	Percent
Yes	4	8.5
Sometimes	21	44.7
No	22	46.8

Table 4–4. Defense of Parole Officers in Criminal Cases

"If a *parole officer* in your state is sued in a *criminal* case, will the governmental agency undertake the defense of that officer?" (Number of states responding: 49.)

	Number	Percent
Yes	4	8.2
Sometimes	22	44.9
No	23	46.9

(Section 1988), allows the court to award attorney's fees to the prevailing party in some types of federal civil rights suits. The act provides:[1]

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of 42 U.S. Code . . . or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Prior to the passage of this act, an award of attorneys' fees was relatively rare. The passage of this act made it more likely that a prevailing party in a federal civil rights suit can also collect attorney's fees, as well as damages or injunctive relief, from the defendant.[2]

The act allows an award of fees to the "prevailing party" in a federal action. The term "prevailing party" has been broadly defined. For example, an award of fees has been found appropriate even where the parties reached a voluntary settlement.[3] And in *Maher v. Gagne,*[4] the U.S. Supreme Court said that attorney's fees may be awarded when a party prevails in a consent decree, with no judicial determination that federal rights have been violated. This means that even if the case is settled out of court, the defendant may be made to pay attorney's fees. Even if the plaintiff does not succeed on all the issues of the case, he or she can still be the "prevailing party" for the purposes of Section 1988.[5] A defendant who does not actually "lose" a case can thus be required to pay the plaintiff's attorneys' fees. Moreover, the governmental agency or unit that employed the individual sued can be ordered to pay the attorney's fees, even though it is not a named defendant.[6]

Under this act, prevailing probation/parole officers may also be awarded attorneys' fees but not on the same basis as prevailing plaintiffs. A plaintiff is usually awarded fees because he or she is found to have won the suit.[7] A defendant such as a public employee, however, must not only "win"; he or she must show that the plaintiff's suit was frivolous, unreasonable, or unfounded.[8] The law, therefore, tends to favor the person bringing a lawsuit against the probation/parole officer. Although this may be harsh to government officers, it is not surprising because the law was designed to deter unconstitutional actions by government agencies and officers.

The Attorneys' Fees Act appears to have been expanded in a 1980 case. Originally, Section 1983 and Section 1988 were applied to violations of constitutional rights only. However, the Supreme Court decided in the case of *Maine v. Thiboutot*[9] that individuals could sue for violations of any citizen's rights created under any federal statutes (in this case, denial of federal welfare payments by the state agency). Furthermore, the Court ruled that successful plaintiffs could recover legal fees from the losing parties. This decision may serve to provide individuals with further means of bringing suit under federal law beyond civil rights in such areas as the administration of federal programs. Probation and parole agencies that participate in federal programs potentially can be subject to lawsuits under Section 1983 if they violate federal laws applicable to these programs and may have to pay attorney's fees for the other party if they lose the lawsuit. If the individual bringing the suit prevails, attorney's fees may be awarded.

Federal courts have adopted somewhat differing standards for determining the appropriateness of a fee award. According to a United States Supreme Court case, the following factors are likely to be considered:[10]

- The time and labor required by the attorney.
- The novelty and difficulty of the legal questions presented.
- The skill required to perform the legal services.

- The preclusion of other employment by the attorney due to acceptance of the case.
- The customary fee in the community.
- Whether the fee is case fixed or contingent on winning the case.
- Time limitations imposed by the client or circumstances.
- The amount involved and the results obtained.
- The experience, reputation, and ability of the attorney.
- The undesirability of the case.
- The nature and length of the professional relationship with the client.
- Awards in similar cases.

Although no research is currently available, it may be surmised that awarding attorney's fees to the prevailing party may have encouraged the filing of cases under Section 1983 instead of under state tort. Attorneys are more likely to accept cases where they can collect fees if they prevail. Case law shows that attorneys' fees awards in some cases may grossly exceed damages awarded to plaintiffs. For example, in one case, the Federal Court of Appeals for the Eleventh Circuit awarded $162,209.50 in attorneys' fees and court costs in a police case, although the damage award was only $500 in compensatory and $10,000 in punitive damages.[11] In another law enforcement case, the Federal Court of Appeals for the Ninth Circuit upheld an award of $66,535 in attorneys' fees to a plaintiff who was awarded only $1 in damages.[12] In yet another case, the Federal Court of Appeals for the Fifth Circuit approved the award of $5,000 in attorneys' fees for a $1 award in nominal damages.[13] The $5,000 attorneys' fees award, however, was reversed by the United States Supreme Court on appeal, the Court saying that although plaintiff was a "prevailing party," in such cases, the "only reasonable fee is usually no fee at all."[14]

III. INDEMNIFICATION IN CASE OF LIABILITY

If an employee is held liable for his or her actions, who pays for damages assessed by the court? A majority of the states provide for indemnification or reimbursement for civil damages assessed against employees. However, the amount that states are willing to pay varies considerably. In addition, the conditions under which the state will pay differ and are sometimes unclear. Some states set no limit on the amount of money they will pay in a suit against a state employee. The majority of states set some type of limit.[15] If the court awards the plaintiff an amount larger than the maximum allowed by the state, the employee will likely have to pay the difference. The states, therefore, range from not allowing indemnification to setting no limit.

Although most states provide some form of indemnification for officers who are sued, this does not mean that the state will automatically indemnify. The majority of states will help pay the judgment only if the act on which the finding of liability is based was "within the scope of employment," whatever that phrase may mean in a particular jurisdiction. State survey results concerning probation/parole officer indemnification are presented in tables 4–5 and 4–6.

For procedural purposes, an important question is: Whose determination of good faith is binding for purposes of indemnification eligibility? In general, the determination is made by either the state attorney general, the court trying the case, or the state agency. In some states, the court decision indicates whether or not the employee acted in bad faith. If, however, the state makes a pretrial investigation to determine if the employee is eligible for state legal representation, the result of that investigation could potentially

Table 4–5. Probation Officer Indemnification

"If a *probation officer* in your state is held *civilly* liable, will the governmental agency of which he is an employee pay or indemnify?" (Number of states responding: 48.)

	Number	Percent
Yes	9	18.8
Sometimes	33	68.7
No	6	12.5

Table 4–6. Parole Officer Indemnification

"If a *parole officer* in your state is held *civilly* liable, will the governmental agency of which he is an employee pay or indemnify?" (Number of states responding: 49.)

	Number	Percent
Yes	10	20.4
Sometimes	32	65.3
No	7	14.3

bind the state to indemnity, even if a subsequent court decision on the case finds that the employee acted in bad faith. In some states, the steps for determining good faith are unclear; some indicated that the situation had not yet arisen with respect to probation/parole officers. In other states, only the matter of scope of employment must be determined, not the usually broader issue of the presence or absence of good faith.

There are jurisdictions that, by law, exempt officers from liability in state tort cases. Other jurisdictions specifically provide that plaintiffs sue the government employer, not the officer, in tort cases. For example, federal law states that in tort cases the government, not the officer, is to be sued. By contrast, in Section 1983 cases, the officer is to be sued, not the federal government.[16]

In summary, a probation/parole officer who is sued faces a number of uncertainties. He or she may ask for and be provided with legal assistance, depending on the state. If the state has provision for indemnification, the officer may have to undergo more than one determination of good faith, in which "good faith" might not be a well-defined or consistently applied term. Despite these determinations, a court ruling against an employee may negate that claim to good faith and consequently the claim to indemnification. Even if the officer is indemnified, not all expenses may be covered, particularly in states that place a limit on the amount of indemnification. Finally, state assistance may vary depending on whether the lawsuit is brought in state or federal court.

IV. LEGAL REPRESENTATION AND INDEMNIFICATION: THE LAW IN TWO STATES—TEXAS AND KANSAS

The law on legal representation and indemnification varies from one state to another, in states that have such laws. The laws of two states are summarized below to illustrate how state laws do differ.

A. In Texas

In Texas, probation (juvenile and adult) and parole officers are state officers for purposes of representation and indemnification, although they are considered local employees for other purposes. Texas law provides that the state attorney general's office is obliged to defend employees who are sued and the state indemnifies employees who are held liable.[17] The state is required to pay damages imposed on employees but only for official acts or omissions, as determined by the state attorney general's office. The law also requires the state to provide counsel in lawsuits where an employee is sued in connection with official conduct. It further provides that notification must be given to the attorney general's office within 10 days after the probation/parole officer is served with notice of the lawsuit.

Indemnification under Texas law is limited. The state liability payment is capped at $100,000 to a single plaintiff and at $300,000 to multiple plaintiffs if the liability resulted from a single occurrence. Payment of damages is limited to cases of personal injury, death, or deprivation of a right or privilege. The state will also pay damages up to $10,000 for damage to property arising from a single occurrence. In the absence of provision to the contrary, it may be presumed that this covers damages resulting from litigation in state and federal courts. It must be noted that nothing prevents the state from paying monetary damages beyond the above amounts specified by law (unless proscribed in the court decision), but the state's obligation is limited to what state law provides.

B. In Kansas

The situation in Kansas is complicated somewhat by the structure of probation and parole in that state. Parole officers are considered to be state officers employed by the Kansas Department of Corrections. Thus, under state law, parole officers are eligible to be defended under the Kansas Tort Claims Act.[18] Legal defense would generally be provided by the Kansas Department of Corrections. Court services officers, who supervise both adult and juvenile probationers, are also considered state officers even though they are structurally under the Kansas judicial branch. While clearly eligible for legal defense under state law, it is unclear whether defense would be provided by the Kansas attorney general's office or the specific county/district in which the court services officer works, especially in state tort cases. The Kansas attorney general's office will provide representation for any state employee sued in federal court. In both instances, the statute requires that the employee must request legal defense within 15 days of service of process or subpoena upon the employee in the action. Refusal to provide defense may occur under any one of the following conditions: (1) the act or omission was not within the scope of the employee's employment; (2) the employee acted or failed to act because of actual fraud or actual malice; (3) the defense of the action by the governmental entity would create a conflict of interest between the governmental entity and the employee; or (4) the request was not made in accordance with statute as described above.

Legal defense for community corrections officers is a bit more complicated. In Kansas, community corrections programs are established either by single counties or interlocal agreements between multiple counties. While funding for such programs is provided by grants from the Kansas Department of Corrections and/or the Kansas Juvenile Justice Authority, officers are generally considered to be employees of the county or counties who established the programs. Thus, legal representation would generally be provided by the county entities involved or through liability insurance carried by the county or program for such purposes. Each set of circumstances will be different, so it is important that the community corrections officer ascertain the particular arrangement that applies in his or her district.

Indemnification for state officers is permissible in Kansas for injury or damages proximately caused by an act or omission of the employee acting within the scope of his or her employment. The employee will not be indemnified, however, for any punitive or exemplary damages, or for any costs, judgments, or settlements that are paid through an applicable contract or policy of insurance.[19] It is also critical that the employee cooperate in good faith in the defense of the claim or risk loss of indemnification. Kansas statute provides a cap of $500,000 for any number of claims arising out of a single occurrence or accident.

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V. PROFESSIONAL LIABILITY INSURANCE

Since public employees in many states might not be able to obtain legal representation or indemnification if they are sued, professional liability insurance for probation/parole officers becomes attractive. It is a necessity in high-profile professions like medicine and law. Although no recent figures are available, in the survey for the first edition of this publication, a minority of states (30 percent) had purchased this insurance for probation and parole officers. The purchase of insurance is likely to depend on the standards for the immunity doctrine in the particular state or jurisdiction. It may also depend on statutes legally authorizing the government unit or agency to purchase insurance, as authorization must exist to take such action.[20] Then there is always the issue of who pays the premium. Some states prohibit the payment of a professional insurance premium with public funds.[21]

Insurance for public employees is sometimes rejected for fear it might encourage the filing of lawsuits by citizens against public officers. It is also assumed that the amount of damages awarded would increase if the judge or jury become aware that the costs would be borne by an insurance company rather than by an individual or governmental unit.[22] In many jurisdictions, however, insurance ownership or governmental indemnification cannot be mentioned at a trial or hearing. In addition, it can be argued that if insurance coverage is available, the public would be better served, in that the public officer would better fulfill his duties if he were not concerned with personal liability for acts performed in good faith and in the scope of his or her duties if the worry about civil liability diminished.

Insurance appears to be desirable in jurisdictions where state legal representation or indemnification is uncertain or nonexistent. Insurance policies, however, cover only acts performed within the scope of employment and may require a demonstration of good faith. In jurisdictions that do not provide for insurance purchase, agencies might work for the modification of statutes and policies so that insurance for agency employees can be obtained with public funds. State survey results concerning probation/parole officer liability insurance are presented in tables 4–7 and 4–8.

SUMMARY

Legal representation and indemnification are two real concerns of probation/parole officers in liability cases. The survey for the first edition of this monograph shows that modes of representation and indemnification vary greatly among states, ranging from guaranteed representation or indemnification to no formal policy whatsoever. Most states that provide representation do so in civil cases only, while others include criminal cases as well. The Civil Rights Attorney's Fees Awards Act of 1976 allows courts to award fees to the prevailing plaintiff in a civil rights lawsuit. There is hardly any policy as to who pays these fees. Some states pay; others do not. Professional liability insurance provides protection to probation/parole officers but has inherent problems, such as who pays the premium, will it encourage the filing of more lawsuits, and whether or not an insurance company is available to underwrite the policy.

Notes

1. 42 U.S.C. Sec. 1988 (1976).

2. Americans for Effective Law Enforcement, *Defense Manual: The Civil Rights Attorney's Fees Awards Act of 1976*, at 3 (1979).

3. Americans for Effective Law Enforcement, *Defense Manual: Civil Rights Suits Against Police Officers—Part II*, at 61 (1979); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977).

4. Maher v. Gagne, 48 LW 4893 (1980).

5. Guajardo v. Estelle, 432 F. Supp. 1373 (S.D. Tex. 1977), *modified* 580 F.2d 748 (5th Cir. 1978).

6. Hutto v. Finney, 437 U.S. 678 (1978).

7. *Id.*

8. Christianberg Garment Co. v. EEOC, 434 U.S. 412 (1978).

Table 4–7. Liability Insurance for Probation Officers

"Is there any form of liability insurance supplied by the governmental agencies that employ probation officers in your state?" (Number of states responding: 48.)

	Number	Percent
Yes	14	29.2
Sometimes	7	14.6
No	27	56.3

Table 4–8. Liability Insurance for Parole Officers

"Is there any form of liability insurance supplied by the governmental agencies that employ parole officers in your state?" (Number of states responding: 50.)

	Number	Percent
Yes	15	30.0
Sometimes	5	10.0
No	30	60.0

9. Maine v. Thiboutot, 448 U.S. 1 (1980).

10. Hutto v. Finney, 437 U.S. 678 (1978).

11. Duckworth v. Whisenant, 97 F.3d 1393 (11th Cir. 1996).

12. Wilcox v. Reno, 42 F.3d 550 (9th Cir. 1994).

13. Farrar v. Hobby, 941 F.2d 1311 (5th Cir. 1991).

14. Farrar v. Hobby, 61 LW 4033 (1992).

15. Committee on the Office of Attorney General, *Sovereign Immunity: The Tort Liability of Government and Its Officials* (September 1979).

16. *See generally* provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. Section 1671.

17. *See* Chapter 104, Texas Civil Practices and Remedies Code.

18. *See* Kan. Stat. Ann. 75-6108.

19. *See* Kan. Stat. Ann. 75-6109.

20. Texas Advisory Commission on Intergovernmental Relations, Intergovernmental Brief, *Tort Liability Insurance for Public Employees and Officials: An Introductory Guide*, at 8 (August 1978).

21. For example, Article 11, Section 57 of the General Appropriations Act for FY 1996–1997 prohibited the use of funds under the Act for purchasing insurance to cover claims under the Texas Tort Claim Act. See unpublished opinion letter of Todd Jermstad, Assistant General Counsel for the Texas Department of Criminal Justice, dated January 18, 1996.

22. W. Prosser, *Handbook of the Law of Torts*, Fourth Edition (1971).

CHAPTER 5

Presentence/Preparole Investigations and Reports

INTRODUCTION

Presentence and preparole investigations are important for the offender. Often such investigations determine how much time an offender spends in prison (presentence) or whether an offender continues to stay in prison (preparole). Offenders do not lose all constitutional rights because of conviction; some rights are lost while others are retained. Complicating an analysis of legal issues is that the procedure, substance, and use of presentence reports are governed by state law in some states, but the procedure, substance, and use of preparole reports is often set by agency policy.

This chapter discusses the legal issues involved in presentence and preparole reports based on consideration of constitutional rights, state laws, and agency policies.

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I. PROBATION PRESENTENCE REPORT ISSUES

An examination of state court decisions shows that the states generally follow federal court decisions in determining state use of presentence reports. This is no surprise, since most of the federal cases are decided on due process grounds, a constitutional issue, thus forcing the states to follow federal decisions.

There are states that have afforded defendants greater protections than those required by the federal courts. But recent federal activity makes federal courts the leader on various presentence report legal issues. An examination of the pertinent federal case law should serve to identify the trends and patterns most jurisdictions follow and use.

A. Contents

The purpose of the presentence report is to help the judge impose the most appropriate sentence by providing him or her with information about the defendant's life and characteristics, and, if customarily or specially requested, the informed recommendation of the probation officer. The report helps implement the modern concept that rehabilitation is promoted by individualized sentences. Because the stage of deciding guilt or innocence has passed, it has been held to be reasonable to allow the judge to exercise wide discretion as to the sources and types of information to be used in sentence selection.[1] At the federal level, the Federal Rules of Criminal Procedure require presentence reports to include information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment.[2]

Studies examining the actual use of these reports indicate some variation in perceived value and use, but in general studies show a high correlation between the report recommendations and the sentence imposed.[3] Given its importance, defense counsels feel that due process, meaning fundamental fairness, requires their access to the report. Lawyers maintain that there is a distinct liberty interest involved at the presentencing stage that does not always exist after sentence has been passed. In general, however, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he or she may consider or the source from which it may come.[4]

1. General

State courts and state statutes either require or allow a variety of data in the presentence report. The officer must be aware of the

local rules on this subject because they differ. Jurisdictions vary, for example, on the use of criminal justice system contacts that were dismissed or did not result in conviction. In general, however, it is safe to assume that if the information is relevant to the particular case, inclusion in the presentence report will be permitted. Rules of evidence, so important in criminal trials, are not applied strictly in presentence reports. Thus, in many jurisdictions, hearsay evidence and evidence illegally obtained by the police may be included in the report. Judges may prescribe, however, the kind of information they want excluded—usually based on their concept of fundamental fairness. Some states specify, by law, what information may be included in the presentence report; other states leave that decision to judges.

2. Victim Information

Several jurisdictions now allow the inclusion of information relating to the victim in a presentence report. Such information is commonly termed the "victim impact statement," but the exact terminology varies by state statute or judicial rule. Generally, this information includes an itemization of any economic loss suffered by the victim, an identification of any physical injury, including the seriousness and permanence of injury, a description of any change in the victim's personal welfare or familial relationships as a result of the offense, an identification of any request for psychological services initiated by the victim as a result of the offense, and any other information related to the impact of the offense upon the victim that the court requires. The contents of these statements vary by jurisdiction, but are allowed in whole, or in part, in Colorado,[5] Delaware,[6] District of Columbia,[7] Idaho,[8] Indiana,[9] Louisiana,[10] Maryland,[11] Minnesota,[12] Mississippi,[13] Missouri,[14] Montana,[15] Nebraska,[16] New Jersey,[17] New York,[18] North Carolina,[19] North Dakota,[20] Oregon,[21] Puerto Rico,[22] Vermont,[23] Virginia,[24] and Wisconsin.[25]

3. Hearsay

"Hearsay" is information that is offered as a truthful assertion that does not come from the personal knowledge of the person stating the information, but from knowledge that person received from another. Generally, it is not admissible in trials under the rules of evidence because the truth of the facts asserted cannot be tested by cross-examination of the witness. Decided cases make it clear, however, that hearsay is not in and of itself constitutionally objectionable in a presentence report.[26] The purpose of the report is to aid the judge in determining an appropriate sentence; hence, it is important that the judge "not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to the restrictive rules of evidence properly applicable at trial."[27] In addition, presentence reports are not restricted in their content to established fact.[28] As the report is usually not compiled by persons trained in the law, it is up to the judge to exercise both proper and wide discretion as to the sources and types of information used to assist the court. This does not give the court unlimited discretion, however. The defendant must have an opportunity to rebut information that is claimed to be false.

4. Confrontation and Cross-Examination

Some jurisdictions allow the defendant to cross-examine the presentence report author or experts relied upon in compiling the report. The more damaging the information, the more likely it is that the court will permit cross-examination. Jurisdictions vary in restricting of the defendants' right to confront sources of adverse information. Rulings in the Federal Court of Appeals for the Fourth and Seventh Circuits have held that defendants have no right to cross-examine *ex parte* (on behalf of only one party) communications between probation officers and the court because the officer is acting as "the court's neutral agent."[29] Similarly the Federal Court of Appeals for the Ninth Circuit has held that cross-examination of probation

officers is not allowed at pretrial conferences when the officer merely "explains the basis for his or her recommendation without straying into the area of advocacy or argument."[30]

5. Criminal Record

A presentence report is not considered manifestly unjust simply because it contains a history of a defendant's prior arrests and/or charges.[31] Information relating to prior criminal activity is likely to be considered critical and, therefore, subject to mandatory disclosure. More recently, jurisdictions are allowing the use of juvenile records in the presentence report. A few states, including Kentucky,[32] Massachusetts,[33] Montana,[34] and Utah,[35] allow such records.

6. Suppressed Evidence

The Supreme Court under Chief Justice William H. Rehnquist has shown some disfavor with the exclusionary rule. This court-developed doctrine prohibits the use in a criminal trial, as direct evidence of the defendant's guilt, of information obtained in violation of the defendant's fourth, fifth, or sixth amendment rights. The Court has consistently resisted efforts to extend the remedy of exclusion or suppression of such evidence to proceedings other than the trial itself. For example, the Court has allowed suppressed material to be considered by a grand jury.[36]

The current United States Supreme Court majority argues that the rule suppressing illegally obtained evidence is justified by the need to deter police misconduct. In cases where it has held that the extension of the exclusion remedy is not warranted, the Court has said that additional deterrence of official misconduct cannot be obtained without undue harm to the public interest. When examined in the context of a probation revocation hearing, the argument may be sound in that the new proceeding may be so remote from the misconduct that gave rise to the trial suppression that no additional deterrence can be attained through exclusion from different proceedings.

It can also be argued, however, that sentencing is so closely related to the trial that use of evidence illegally obtained is improper. While there is a general tendency in the courts to permit all uses of suppressed information once guilt has been determined, the United States Supreme Court has not ruled specifically on the propriety of its inclusion in presentence reports. Note, however, that in a 1998 case, *Pennsylvania Board of Probation and Parole v. Scott*, the Court held that the application of the exclusionary rule is not required by the Constitution in parole revocation proceedings and, therefore, its application is governed by state rules.[37] Probation officers should ascertain the current rule in their jurisdiction. Those rules are binding on them.

B. Disclosure

1. In General

On the federal level, the Federal Rules of Criminal Procedure[38] require a federal judge to disclose to a defendant or defendant's counsel all presentence information relied upon in sentencing, excluding:

- Any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;
- Sources of information obtained upon a promise of confidentiality; or
- Any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

The rule does not give the defendant access to a codefendant's presentence report.[39]

The general rule is that the court shall disclose such information in the report as was taken into consideration by the court. However, some states provide by law that the information may be given to counsel rather than to the defendant personally. Counsel may be given access with instructions not to disclose its content to the defendant.[40] Partial access

that excludes information for reasons other than those listed above is insufficient access.[41]

A variation of the application of the rule is found in the Federal Court of Appeals for the First Circuit, where the judge may either identify for the record and disavow any information not relied upon or disclose those portions of the report that were relied upon.[42]

While the trend is toward disclosure, the United States Supreme Court has not considered the failure or refusal to disclose the contents of the presentence report as violative of constitutional rights. However, in a Florida case involving imposition of the death penalty, the Court did consider it a denial of due process where the sentence was passed on the basis of information that the defendant had no opportunity to deny or explain. The case does not indicate that similar requirements would hold in a noncapital situation, and at least one Florida court has refused to apply it in a noncapital case.[43]

A few cases have specifically held that there is no constitutional right of access to a presentence report.[44] But most jurisdictions require disclosure under a statute or rule of court. The jurisdictions so holding include Alabama,[45] Alaska,[46] Arizona,[47] Colorado,[48] Connecticut,[49] Delaware,[50] District of Columbia,[51] Florida,[52] Hawaii,[53] Idaho,[54] Illinois,[55] Indiana,[56] Kansas,[57] Louisiana,[58] Maine,[59] Maryland,[60] Massachusetts,[61] Michigan,[62] Minnesota,[63] Montana,[64] Nevada,[65] New Hampshire,[66] New York,[67] North Carolina,[68] Ohio,[69] Oregon,[70] Pennsylvania,[71] Puerto Rico,[72] South Dakota,[73] Tennessee,[74] Utah,[75] Virgin Islands,[76] Virginia,[77] Washington,[78] and Wisconsin.[79]

Caution is suggested here as these jurisdictions utilize various restrictions on access, such as limiting the disclosure of the sentencing recommendation, diagnostic opinions, victim statements, information obtained under the promise of confidentiality, and/or any information that, if disclosed, may harm a third party.

State statutes or rules have been held to leave the matter of disclosure to the discretion of the court in Georgia, Iowa, Maryland, Nebraska, Oklahoma, Texas, and Vermont.[80]

2. Disclosure to Third Parties

Although Rule 32(c) of the Federal Rules of Criminal Procedure sets the federal standard for release of presentence reports to defendants, their attorneys, and the prosecuting attorneys, it remains silent as to the disclosure to various "third parties." No statute or rule requires that presentence reports remain confidential after the sentencing hearing has occurred.[81] Third parties are defined as persons or entities other than the courts, the Parole Commission, the Bureau of Prisons, and probation officers. The general trend both at the state and federal levels has been that presentence reports are confidential and not subject to third party disclosure. More recently, however, the Federal Courts of Appeal for the Second, Fifth, Seventh and Ninth Circuits and a few state statutes have addressed the possibility of disclosure to persons outside the realm of the court.

The states of Arizona, Hawaii, Kansas, Louisiana, Montana, and New Jersey have addressed some aspect of third party disclosure in statutes or rules of the court. Arizona allows the crime victim to inspect the presentence report once it is available to the defendant.[82] Louisiana also allows disclosure to the victim or designated family member.[83] Montana allows the prosecutor to disclose the contents of the presentence report to the victim.[84] Hawaii allows disclosure to researchers.[85] Kansas statutes state that the presentence report shall become part of the court record and shall be accessible to the public, except the official version, the defendant's version, the victim's statements, any psychological reports, and any drug and alcohol reports are exempt form public disclosure.[86] New Jersey allows disclosure of the defendant's financial records to its Victims of Crime Compensation Board.[87]

The Federal Court of Appeals for the Second Circuit addressed the issue of third party disclosure in *United States v. Charmer Industries and Peerless Industries*.[88] *Charmer* involved disclosure of a presentence report prepared by the United States Probation Service to the Arizona State Attorney General. The report contained information about defendant Peerless Importers, a major wholesale liquor distributor who had entered a plea of nolo contendere in an antitrust case in New York. The report was requested, and sent without prior judicial approval, to the Arizona Attorney General who was preparing, with the Arizona Department of Liquor Licenses and Control, a liquor license revocation proceeding against a subsidiary of Charmer and Peerless Industries. The report included financial data collected from Peerless, a description of the government's contentions against the company, and hearsay information from unidentified law enforcement officers. The Arizona Attorney General inquired as to whether the presentence report could become part of the public record in Arizona.

The Federal Court of Appeals for the Second Circuit issued an injunctive order requiring the Arizona Attorney General to return to the court the presentence report and all copies and extracts made of it, and prohibited the publication or use of any portion of the report that was not already publicly available. The court reasoned that allowing public availability of presentence reports would "likely inhibit the flow of information to the sentencing judge."[89] The court stated that in order for a presentence report to be disclosed to a third party, the party must make "a particularized showing of a compelling need."[90] Similarly, the third party must demonstrate that disclosure of the report is required "to meet the ends of justice."[91]

The Federal Court of Appeals for the Ninth Circuit relied upon the "compelling need to meet the ends of justice" standard when it allowed third party disclosure of a presentence report to the estate of a deceased man and a California town's newspaper.[92] The case stemmed from the murder of a former county district attorney by a man he had successfully prosecuted for arson some 30 years prior to the murder. Soon after the killing, the murderer committed suicide to avoid capture by the police. Although the court stated that it does not suggest that presentence reports should be released to third parties routinely, it held that the unique nature of the case allowed the third party disclosure compelling needs standard to be met. Disclosure of the presentence report to the estate of the man murdered was based upon the estate's argument that it required disclosure so that it could determine whether it had a cause of action for negligence based on the failure of the probation office to warn the deceased of the threat posed to him by the murderer and that this information could not be obtained from any other source.[93] The court found the newspaper's assertion that disclosure would serve the public interest by informing the public about the sentencing process was valid and thus met the disclosure standard. The interest in disclosure asserted by the newspaper was found by the court to be rooted in the common law right to inspect judicial records and documents.[94]

The common law right of the media to inspect judicial records that was relied upon by the Ninth Circuit was the basis of an Illinois newspaper's request for a presentence report disclosure in the Federal Court of Appeals for the Seventh Circuit case, *United States v. Corbitt*.[95] The case stemmed from the conviction of a former Illinois police chief of three counts of extortion and racketeering. During the sentencing phase of the trial, the presiding judge imposed a lesser sentence than was recommended in the presentence report, due, in part, to numerous letters written by public officials seeking leniency for the former chief. Citizens of the town and the Board of Trustees, apparently disconcerted by the downward departure, expressed a strong interest in learning which

public officials had written letters. The Board of Trustees sent a letter to the judge asking for public access to the letters written by the town officials. Similarly, a newspaper covering the case moved to secure release of the presentence report and the letters relied upon by the judge in the downward departure from the guidelines at sentencing. The newspaper argued that the entire criminal proceeding was affected with a public interest and that the public had an especially strong interest in learning what factors had persuaded the judge to impose what was seen as a very lenient sentence. The Seventh Circuit allowed the release of the letters because the defendant did not challenge the disclosure of the letters on appeal, but denied disclosure of the presentence report. The court held that such would not promote effective functioning of the probation office and that disclosure would constitute a positive hindrance to the probation office's performance of its obligation to provide the sentencing court with a comprehensive analysis of the defendant's character.[96] The court stated that the public's interest in the Ninth Circuit case described previously is of a "different order" than that of the public interest in this case.[97] Furthermore, the court held that news organizations seeking access to a presentence report must make a substantial, and specific, showing of need for disclosure before a court may allow public inspection of the report.[98]

In 1995, the Federal Court of Appeals for the Fifth Circuit decided a third-party disclosure case in *United States v. Huckaby*.[99] Huckaby, a state district court judge in Louisiana, pleaded guilty to one misdemeanor count of failing to file an income tax for the year 1987. During the presentence investigation, the probation office concluded that Huckaby had not filed any federal income tax returns for nearly 12 years. The Internal Revenue Service estimated the total taxes owed by him for the years 1981 to 1992 at approximately $146,311. The prosecution of this case was highly publicized in the judge's hometown of Shreveport, Louisiana. According to the trial court, Huckaby, his friends, and some Shreveport officials and community leaders contended that the reason he (Huckaby) was being singled out for prosecution was that he was black and that he had raised to a position of power within the community. The trial judge, apparently dismayed at the contentions, took the unusual step of filing the presentence report into the public record. The judge then sentenced Huckaby to a 12-month term of imprisonment, a fine of $5,000, and a 1-year term of supervised release. The Federal Court of Appeals for the Fifth Circuit upheld the disclosure, but required that the portion of the presentence report titled "Offender Characteristics," the objections of the defendant, and the probation officer's responses to the objection be removed from the record. The court held that the compelling necessity of relieving racial tension, coupled with the need for the revelation of facts found in the presentence report that would persuade the public of the defendant's culpability, justified disclosure.

In summary, it is most likely that all or part of every presentence report will be disclosed to the defendant or his counsel as a result of state statute, court rule, or the exercise of judicial discretion. It is not clear, however, what, if any, portions of the presentence report will be made available to interested third parties. The probation officer should exercise care in selecting material for inclusion in a report and making sure any information included is accurate. Concerning disclosure, in case of doubt, the better practice is to give the presentence report to the judge and leave the issue of disclosure to him or her.

The officer should exercise care to avoid tort, and possibly criminal, liability and to prevent damage to the interests of justice he or she is sworn to advance. Probation or parole officers should know that intentionally including inaccurate information in a report with knowledge of its falsity or with reckless disregard for its truth or falsity

could make them liable to the defendant. In addition to defamation-based torts, other intentional torts are possible. Additionally, negligence charges have been brought when a defendant could allege that unprofessional care was exercised in report preparation.

C. Officers Are Generally Immune From Civil Liability When Preparing Presentence Investigation Reports

Several state and federal courts of appeal have specifically addressed liability issues against probation officers who have been accused of including false and inaccurate presentence reports. The courts, including the Federal Courts of Appeal for the Ninth and District of Columbia Circuits, have all rejected liability claims citing the historic quasi-judicial immunity enjoyed by probation officers in the preparation of presentence reports.[100] Similarly, federal district courts in New York[101] and Pennsylvania,[102] and the Ohio State Court of Appeals[103] have granted officers absolute immunity. As evident in these decisions, most courts have held that probation officers have the same immunity (absolute) as judges when preparing presentence investigation reports. The only exception is if the falsehoods or inaccuracies are included due to malice or ill will on the part of the probation officer.

The Federal Court of Appeals for the Fifth Circuit, in *Maynard v. Havenstrite*, 727 F.2d 439 (5th Cir. 1984), found liability where an inaccurate presentence report was not shown to the plaintiff prior to sentencing. The defendants, a Chief U.S. Probation Officer and a federal probation officer, were granted absolute immunity from monetary damages. However, the appellate court held that, where administrative remedies were exhausted, the officers were not necessarily immune from an action for declaratory and injunctive relief.

But the harm to the public interest can be more substantial. It has long been the rule that a sentence cannot be based on false information.[104] When a defendant is sentenced on the basis of a report that is materially false or unreliable, that person's right to due process is violated.[105] The remedy usually invoked in such cases is the vacation of the sentence imposed and remand for presentencing. Civil liability, however, is usually not imposed, except if the officer acted with malice or ill will.

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II. PREPAROLE INVESTIGATION AND REPORT ISSUES

The major issue that arises out of preparole investigation concerns the extent to which prisoners are given access to files containing information about them. When this issue has been litigated, courts have had to resolve three questions:

- Does any applicable statute or administrative rule provide access?
- Does the prisoner have a right to due process in connection with the parole release proceedings?
- If there is such a due process right, is file access encompassed within it?

The tradition under which courts operate requires them to settle cases on nonconstitutional bases whenever possible. Recent litigation has granted file access to federal prisoners, although suits concerning the contours of the statutory right are still possible.

A. Federal Prisoner File Access

The Parole Commission and Reorganization Act of 1976[106] provides that a federal prisoner shall be given reasonable access to any report or other document the Parole Commission will use in making its release decision. Not all file material need be released; the material that may be withheld

is the same kind of information a federal court need not disclose to a defendant in connection with sentencing:

- Diagnostic opinions that, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;
- Any document that reveals sources of information obtained upon a promise of confidentiality; or
- Any other information that, if disclosed, might result in harm, physical or otherwise, to any person.

B. State Prisoner File Access

Where there is a state statute, or parole board or other rule, that grants file access to a state prisoner, the scope of potential litigation is restricted to issues of rule compliance and the applicability of any exceptions that limit the granting of access. In the absence of such a provision, however, file access can be secured through litigation only by establishing that the prisoner has a 14th amendment right to due process in parole release decisionmaking, and that the right includes file access. The Supreme Court has addressed the first branch of that inquiry.

1. The *Greenholtz* Case—Due Process Applies?

The 14th amendment bars states from depriving a person of "liberty" without due process of law. What does "liberty" mean in the parole release context? When the Supreme Court took up that question in 1979, the federal courts of appeal were sharply divided. The Federal Courts of Appeals for the Third, Fifth, Sixth, Ninth, and Tenth Circuits[107] had held that "liberty" was not involved and that due process rights were therefore inapplicable. But the Second, Fourth, Seventh, and District of Columbia Circuits[108] had reached the opposite conclusion. This controversy was settled in *Greenholtz*.

In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,[109] the Supreme Court held that unless a state law creates a reasonable expectation that the prisoner will be paroled, the prisoner's constitutional "liberty" is not affected by the releasing process and no federal due process right applies. The Court said:[110]

> That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained . . . to that extent the general interest asserted here is no more than the inmate's hope that he will not be transferred to another prison, hope which is not protected by due process . . . .

Because the Nebraska law provided that the parole board "shall" release a parole-eligible prisoner "unless" certain antirelease factors were found to exist,[111] the Court held the statute created the necessary reasonable expectation and that due process applied. By grounding its conclusion on the particular wording of the Nebraska law, the Court assured that decisions about other states would have to be made on a case-by-case basis.

2. *Sandin v. Conner*—The *Greenholtz* Standard Is Rejected

In the 1995 United States Supreme Court case, *Sandin v. Conner*, the court gave reasons for abandoning the "mandatory language" standard for prisoner due process cases.[112] *Sandin*, a prison case, held that the courts had "impermissibly shifted the focus of the liberty interest inquiry from one based on the nature of the deprivation to one based on language of a particular regulation."[113] This shift in focus led to prisoners searching state and federal statutes and regulations upon which liberty interests claims could be made. The Court then held that liberty interest principles established in earlier cases, such as *Wolff v. McDonnell*, 418 U.S. 539, should be relied upon in establishing due process rights, rather than the evolving "mandatory language" standard used in *Greenholtz*. Under *Wolff*, the proper standard is the nature of the deprivation and must

balance the needs of prison management concerns with the prisoner's liberty in determining the amount of liberty due.

Thus the standard of liberty interest leading to due process set in *Greenholtz* (holding that protected liberty interest may be created by the wording of state law, rules, or regulations) was rejected, indicating a return to the old *Wolff* standard. Since access to parole files involves prisoners, *Conner* would likely apply in prisoner access to file cases in instances where the wording of state law appears to create a liberty interest that is to be protected by due process.

3. Does Due Process Include Access to File?

Although the 5th and 14th amendments refer to "due process of law," the Constitution nowhere defines that term or gives it substance. A short definition of due process is "fundamental fairness." But what does that mean? In modern litigation, due process has been treated as a flexible concept that derives its meaning from the nature and weight of the competing rights and interests at stake in a particular proceeding. In the first parole case it fully considered, the Supreme Court applied such a balancing analysis to determine parolees' rights in revocation cases.[114]

Lower courts took this as a signal (erroneously, as we now know) that due process should apply—to other parole proceedings—and began the weighing process to give content to the concept in a variety of contexts. Although commentators concluded that due process embraced file access,[115] the courts were not so willing to do so. Thus, in *Williams v. Ward*,[116] the Federal Court of Appeals for the Second Circuit held (before *Greenholtz*) that while the interest of a state parole applicant in the parole release decision was subject to some due process protections, the disclosure of the parole file was not constitutionally required.

Likewise in *Franklin v. Shields* (also before *Greenholtz*), the Federal Court of Appeals for the Fourth Circuit stated "we discern no constitutional requirement that each (state) prisoner receive a personal hearing, have access to his files, or be entitled to call witnesses in his behalf to appear before the Board. These are all matters which are better left to the discretion of the parole authorities."[117]

But in *Walker v. Prisoner Review Board* (after *Greenholtz*),[118] where the State Board of Parole acted in violation of the state Rules Governing Parole, failure to allow inmate access to his file was ruled an infringement of due process.

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III. RIGHT TO NOTICE OF A PAROLE HEARING

If the prisoner under *Conner* can establish a liberty interest in parole, notice becomes a fundamental procedural right. Even without statutory provision for notice, courts could be expected to require it. The nature of the requirement would be functional: time to obtain evidence, inspect the file, and challenge adverse evidence—as permitted within the particular jurisdiction.

Again, if the prisoner can establish a liberty interest under *Conner*, notice would be meaningless without the right to present evidence at the hearing. However, such a right does not necessarily require personal appearance.[119] Functional input into the decision-making process would likely satisfy the court.

■ ■ ■

SUMMARY

This chapter examines probation presentence reports and preparole investigation reports. In general, the content of the probation presentence report is open ended,

guided by the general rules of good faith, reasonableness, and germaneness. The trend across jurisdictions is toward disclosure of the report's content, at least to legal counsel; however, most jurisdictions do not recognize a constitutionally based right to disclosure. Generally, state statute law or court rulings regulate disclosure.

The section on parole focuses on the effects of the *Greenholtz* and *Sandin* cases. The main holding in *Greenholtz* is that due process does not apply to parole release proceedings unless a state law creates an expectation that parole will be granted, thereby establishing a liberty interest. This mandatory language standard has come into question, however, with the more recently reestablished due process standard in *Sandin v. Conner*. Nevertheless, due process protections must generally come from state statute and/or administrative regulations and are not generated by the United States Constitution. Thus, access to the pre-parole reports and other files is dependent on statute or application of the balancing test weighing the needs of prison management versus the nature of inmate deprivation.

Notes

1. Williams v. New York, 337 U.S. 241 (1949).

2. U.S.C.S. Fed. R. Crim. P. Rule 32 (2000).

3. For three different views on the impact of presentence reports in the sentencing process, see J. Hogarth, *Sentencing Project: An Experiment in the Use of Short Form PreSentence Reports for Adult Misdemeanants* (1971); R. Carter and L. Wilkins, *Some Factors in Sentencing Policy*, 1967 J. Crim. L. C. & P. S. 503.

4. United States v. Tucker, 404 U.S. 443 (1972).

5. C.R.S. 16-11-102 (1999).

6. D.C. Ct. R. Ann. Rule 32 (2000).

7. D.C. SCR-Crim. Rule 32, 32.2 (2000).

8. Idaho Code Sec. 20-220 (1999).

9. Ind. Code Ann. Sec. 35-38-1-12, 13 (1999).

10. La. Code Crim. Proc. art. 875, 877 (2000).

11. Rule 4-341.

12. Minn. Stat. Sec. 609.115 (1999); D. Minn. LR 83.10.

13. Miss. Code Ann. Sec. 47-7-9; URCCC Rule 11.02 (2000).

14. R.S. Mo. Sec. 217.760, .762; Sec. 557.062.

15. Mont. Code Ann. Sec. 46-18-111, 112, 113.

16. R.R.S. Neb. Sec. 29-2261 (2000).

17. N.J. Stat. Sec. 2c:44-6 (2000).

18. N.Y. C.L.S. C.P.L. Sec. 390.20, .30, .40, .50 (1999).

19. N.C. Gen. Stat. Sec. 15A-1332, 1333.

20. N.D.R. Crim. P., Rule 32.

21. O.R.S. Sec. 137.077, .079 (1997).

22. 34 L.P.R.A. App. 2 R. 162.1 (1997).

23. 28 V.S.A. Sec. 204 (2000).

24. Va. Code Ann. Sec. 204 (2000).

25. Wis. Stat. Sec. 972.15 (1999).

26. State v. McKinney, 7 Or. App. 248, 489 P.2d (1971); State v. Woolery, 16 Or. App. 180, 517 P.2d 1212 (1974); People v. Books, 95 Mich. App. 500, 291 N.W.2d 662 (1980); State v. Mason, 107 Idaho 706, 692 P.2d 350 (1984); State v. Flynn, 675 S.W.2d 494 (Tenn. Crim. App. 1984); State v. Morris, 750 S.W.2d 746 (Tenn. Crim. App. 1987); O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491, *cert. denied*, 488 U.S. 871 (1988); State v. Eubank, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988); United States v. Fernandez-Vidana, 857 F.2d 673 (9th Cir. 1988); United States v. Kerr, 876 F.2d 1440, 1445 (9th Cir. 1989); United States v. Petty, 982 F.2d 673 (9th Cir. 1993); United

States v. Rocha, 1 F.3d 950 (10th Cir. 1993); United States v. Sustaita, 1 F.3d 950 (9th Cir. 1994); United States v. Anaya, 32 F.3d 308 (7th Cir. 1994).

27. Williams v. New York, 337 U.S. 241, 247 (1949).

28. Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978).

29. United States v. Johnson, United States v. Smith, 935 F.2d 47 (4th Cir. 1991); United States v. Jackson, 886 F.2d 838, 844 (7th Cir. 1989).

30. United States v. Govan, 152 F.3d 1088 (9th Cir. 1998).

31. The presentence report in Williams v. New York contained such data; *see also* United States v. Graves, 785 F.2d 870 (10th Cir. 1986).

32. Schooler v. Commonwealth, 628 S.W.2d 885 (Ky. Ct. App. 1981).

33. A.L.M. R. Crim. P. Rule 28 (1999).

34. Mont. Code Ann. Sec. 46-18-111, 112, 113 (1999).

35. State v. McClendon, 611 P.2d 728 (Utah 1980).

36. United States v. Calandra, 414 U.S. 338 (1974).

37. Pennsylvania Board of Probation and Parole v. Scott, 118 S. Ct. 2014 (1998).

38. U.S.C.S. Fed. R. Crim. Proc. Rule 32 (2000).

39. United States v. Martinello, 556 F.2d 1215 (5th Cir. 1977).

40. United States v. Long, 411 F. Supp. 1203 (E.D. Mich. 1976).

41. United States v. Hodges, 547 F.2d 951 (5th Cir. 1977).

42. United States v. Piccard, 464 F.2d 215 (1st Cir. 1972).

43. Levin v. State, 348 So. 2d 1189 (Fla. 4th D.C.A. 1977); McClendon v. State, 589 So. 2d 352 (Fla. App. 1991).

44. Colo. Rev. Stat. 16-11-102 (1999); Ga. Code Ann.

45. Ala. R. Crim. P. Rule 26.5 (1998).

46. Alaska R. Crim. P. Rule 32.1 (2000).

47. Ariz. R. Crim. P. Rule 26.6 (2000).

48. Colo. Rev. Stat. 16-11-102 (1999).

49. Conn. R. Ct. Rule 9 (2000).

50. Del. R. Ann. Rule 32 (1999).

51. D.C. Ct. R. Ann. R. 32 (2000).

52. Fla. R. Ct. Serv. Rule 88.1 (2000).

53. Michie's Haw. Rev. Stat. Ann. HRS Sec. 706-604 (1999).

54. Idaho Code Sec. 20-220 (1999); Idaho Ct. R. Ann. Rule 32 (1999).

55. Ill. Comp. Stat. Ann. Sec. 730 ILCS 5/5-3-4 (2000).

56. Ind. Code Ann. Sec. 35-38-1-12 (1999).

57. Kan. Stat. Ann. Sec. 21-4714, Sec. 21-4605 (1999).

58. La. Code Crim. Proc. art. 877 (2000).

59. Me. R. Ct. Rule 132 (1999).

60. Md. R. Ann. Rule 4-341 (1999).

61. Mass. R. Crim. Proc. Rule 28 (1999).

62. Mich. Stat. Ann. Sec. 28.1144 (1999).

63. Minn. Stat. LR 83.10 (1999).

64. Mont. Code Ann. Sec. 46-18-113 (1999).

65. Nev. Rev. Stat. Ann. Sec. 176.156 (2000).

66. N.H. Rev. Stat. Ann. Sec. 651:4 (1999).

67. N.Y. Consol. Law, Crim. Proc. Law Sec. 390.50 (1999).

68. N.C. Gen. Stat. Sec. 15A-1333 (1999).

69. Ohio Rev. Code Ann. Sec. 2951.03 (Anderson 1999).

70. Or. Rev. Stat. Sec. 137.077 (1997).

71. Pa. Stat. Sec. 9734 (1999).

72. P.R. Laws Ann. tit. 34, Rule 162.1 (1997).

73. S.D. Codified Laws Sec. 23A-27-7 (2000).

74. Tenn. Code Ann. Sec. 40-35-208 (1999).

75. Utah Code Ann. Sec. 76-3-404 (1999).

76. V.I. Ct. Rules Ann. Rule 32.0.1 (1999).

77. Va. Code Sec. 19.2-299 (1999).

78. Wash. R. Ct. Ann. Rule 9 (1999).

79. Wis. Stat. Sec. 972.15 (1999).

80. Ga: Benefield v. State, 140 Ga. App. 727, 232 S.E.2d 89 (1976); Iowa: State v. Randall, 258 N.W.2d 359 (Iowa 1977); Md: Haynes v. State, 19 Md. App. 428, 311 A.2d 822 (1973); Minn: County of Sherburne v. Schoen, 306 Minn. 171, 236 N.W.2d 592 (1975); Neb: State v. Richter, 191 Neb. 34, 214 N.W.2d 16 (1973); Okla: Lucker v. State, 552 P.2d 711 (Okla. Crim. App. 1976); S.D.: State v. Robinson, 87 S.D. 375, 209 N.W.2d 374 (1973); State v. Hanson, 88 S.D. 48, 215 N.W.2d 130 (1974); Texas: Tex. Code Crim. Proc. art. 42.12 (2000); Vermont: U.S. Dist. Ct. (Vt.) L. Cr. R. 57.1 (1999).

81. United States v. Huckaby, 43 F.3d 135 (1995).

82. Ariz. R. Ct. Ann. Rule 26.6 (2000).

83. La. C. Cr. P. art. 877 (2000).

84. Mont. Code Ann. Sec. 46-18-113 (1999).

85. HRS Sec. 706-601 (1999).

86. Kan. Stat. Ann. Sec. 21-4605 (1999).

87. N.J. Stat. Sec. 2C:44-6 (2000).

88. 711 F.2d 1164; 722 F.2d 1073 (1983).

89. 711 F.2d 1164, 1173.

90. *Id.* at 1175.

91. *Id.*

92. United States v. Schlette, 842 F.2d 1574 (1988).

93. *Id.* at 1584.

94. *Id.* at 1582.

95. 879 F.2d 224 (1989).

96. *Id.* at 229.

97. *Id.* at 240.

98. *Id.*

99. 43 F.3d 135 (1995).

100. *See* Demoran v. Witt, 777 F.2d 1402 (9th Cir. 1985); Turner v. Barry, 856 F.2d 1539 (D.C. Cir. 1988).

101. Sheldon v. McCarthy, 699 F. Supp. 412 (U.S.D.N.Y. 1988).

102. Bieros v. Nicola, 839 F. Supp. 322 (U.S.D. Pa. 1993).

103. Clark v. Eskridge, 602 N.E.2d 1288 (1991).

104. Townsend v. Burke, 334 U.S. 736 (1948).

105. United States v. Lasky, 592 F. 2d 560 (9th Cir. 1979); Moore v. United States, 571 F.2d 179 (3d Cir. 1978).

106. Pub. L. No. 94233, 90 Stat. 219, *codified* at 18 U.S.C. 4201-4218 (1976).

107. *See* Mosley v. Ashby, 459 F.2d 477 (3d Cir. 1972); Madden v. New Jersey State Parole Bd., 438 F.2d 1189 (3d Cir. 1971); Cruz v. Skelton, 543 F.2d 86 (5th Cir. 1976); Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied*, 429 U.S. 917 (1976); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.) (*en banc*), *vacated as moot*, 414 U.S. 809 (1973); Scott v. Kentucky Parole Bd., No. 741899 (6th Cir. Jan. 15, 1975), *remanded for consideration of mootness*, 429 U.S. 60 (1976), *reaffirmed sub nom*. Bell v. Kentucky Parole Bd., 556 F.2d 805 (6th Cir. 1977), *cert. denied*, 434 U.S. 960 (1978); Dorado v. Kerr, 454 F.2d 892 (9th Cir. 1972); Schawartzberg v. United States Bd. of Parole, 399 F.2d 297 (10th Cir. 1968).

108. See United States *ex rel*. Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d 925 (2nd Cir. 1974), *vacated as moot*, 419 U.S. 1015 (1975); Coralluzzo v. New York State Parole Bd., 566 F.2d 375 (2nd Cir. 1977), *cert. dismissed as improvidently granted*, 435 U.S. 912 (1978); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975); Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977) *(en banc), cert. denied*, 435 U.S. 1003 (1978); United States *ex rel*. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974).

109. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).

110. *Id*. at 11.

111. Neb. Rev. Stat. 831, 114 (1) (1971).

112. *See* Cripe, Clair A. (1997). *Legal Aspects of Corrections Management*. Gaithersburg, Maryland: Aspen Publishers.

113. 115 S. Ct. 2293 (1995).

114. Morrissey v. Brewer, 408 U.S. 471 (1972).

115. Note, *Prisoners Access to Parole Files: A Due Process Analysis*, 47 Fordham L.R. 260 (1978).

116. 556 F.2d 1143 (2nd Cir. 1977), *cert. dismissed*, 434 U.S. 944 (1978).

117. 469 F.2d 8 (4th Cir.), *aff'd in part and rev'd in part en banc*, 569 F.2d 784 at 800 (1977), *cert. denied*, 435 U.S. 13 (1978).

118. Walker v. Prisoner Review Board, 594 F. Supp. 556 (U.S.D. Ill., 1984). *See also*, Braxton v. Josey, 567 F. Supp. 1479 (D. Md. 1983), *contra*, and Stanley v. Dale, 298 S.E.2d 225 (W. Va. 1982) (prisoner entitled to see file unless security considerations dictate otherwise).

119. *See* Ybarra v. Dermitt, 104 Idaho 150, 657, P.2d 14 (1983) (no right to confront authors of letters contained in parolee's presentence report).

CHAPTER 6

Liability of Parole Board Members for Release or Nonrelease

INTRODUCTION

The issues of parole board liability for release or nonrelease, liability of parole board members to the general public for crimes committed by parolees, and liability for alleged violations of inmates' rights are addressed in this chapter. These topics are of significant interest to prospective parolees and the public and are also fertile areas of litigation.

The United States Supreme Court case *Greenholtz v. Nebraska Penal Inmates*,[1] decided in 1979, held that prison inmates are not entitled to due process rights under the Constitution in parole release decisions. The case stemmed from a class action against the Nebraska Parole Board alleging denial of procedural due process. Nebraska's discretionary parole procedures prescribed a two-stage parole hearing, including allowing inmates to present evidence, call witnesses, be represented by counsel, and be notified, in writing, of the reasons if parole was denied. Given these administrative procedures, the Court held that while the mere possibility of discretionary parole release does not carry with it due process rights under the Constitution, the state statute was worded in such a way that it created a liberty interest entitling inmates to due process. The Court in this case laid down three important constitutional principles on the granting or nongranting of parole:

- There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. Simply stated, parole is a privilege and not a right.
- A state may establish a parole system, but it has no duty to do so.
- There is a crucial distinction between being deprived of a liberty one has, as when one is already on parole and it is being revoked, and being denied a conditional liberty one desires, as when an inmate in prison seeks to be paroled.

I. THE PAROLE RELEASE HEARING: INMATE GENERALLY HAS NO DUE PROCESS RIGHTS

A. No Constitutional Right to Counsel

The general rule on representation is that there is no right to either retained or appointed counsel as a matter of constitutional law.[2] Any jurisdiction, state or federal, may allow representation by law or agency policy, but most do not. Several states are experimenting with retained counsel at the hearing, and most allow access to an attorney in preparation for a hearing.[3]

1. Federal

The right of the federal prisoner to retain counsel to accompany him or her to the parole release hearing has not been at issue since the enactment of the Parole Commission and Reorganization Act of 1976.[4] The act provides that a prisoner, prior to parole determination, may consult with a representative who qualifies under the rules and regulations of the Commission. Attorneys are not to be excluded as a class. Caution should be exercised, however, because the Sentencing Reform Act of 1984 abolished parole eligibility for federal offenders who commit offenses on or after November 1, 1987, and abolished the U.S. Parole Commission.[5] However, the Judicial Improvements and Parole Commission Phaseout Acts extended the Parole Commission's jurisdiction until November 1, 2002.[6] After this date, it is expected that new regulations will be published, but that the regulations will provide similar rights of consultation.

2. State

The question of whether a state inmate should be afforded the right to counsel remains basically a state question. The role of counsel in most states is restricted to advising the prisoner before the hearing, or making oral or written arguments to the parole board after the hearing.[7] In addition, courts that have considered the issue on constitutional grounds have decided there is no constitutional right to assistance of counsel at the release hearing.[8]

Federal Circuit Courts of Appeal have held that the Constitution does not require the appointment of counsel at a parole release hearing,[9] does not permit counsel to attend parole hearings,[10] and does not require the assistance of counsel at a parole application proceeding.[11]

B. Release Criteria

1. Federal

Federal statute sets out the criteria that the Parole Commission uses in determining whether to release the prospective parolee.[12] Publication of such criteria provides a guide to the Commission and some assurance that decisions will not be arbitrary.[13] Such criteria and the implementing Parole Commission guidelines are a step toward confining the discretion of the paroling authority without stripping it of its discretionary authority.[14]

Liability in this area focuses on the discretionary powers of the parole board. The parole board cannot be held liable under the Federal Tort Claims Act (FTCA) for a decision made in exercise of its discretionary function. However, FTCA liability may exist when required steps of the decisionmaking process are ignored.[15]

2. State

The question as to whether a state prisoner is entitled to know what criteria the paroling authority uses in making its determination is basically an issue of state law. When the issue was brought to the courts in the past, the prospective parolee was usually in a state that did not require publication of criteria. When the inmate brought the issue before a court, the allegations were based on a due process claim.

Inmates are usually not successful in claiming that due process mandates the criteria used by an authority in making its release decision be published. For example, the Federal Court of Appeals for the Fifth Circuit held the parole board's standards for deciding parole applications are of judicial concern only where arbitrary action results in the denial of a constitutionally protected liberty interest, and the expectation of release on parole is not such an interest.[16] The Federal Court of Appeals for the Second Circuit held "unless and until" the statement of specific facts and reasons for denial of parole given to prisoners prove inadequate to protect inmates in the parole decision-making process, the court would not compel the parole board to reveal its release criteria.[17]

Although Federal Courts of Appeals have determined that a federal constitutional right does not apply to the publishing of state parole release criteria, this does not prevent a court from finding otherwise under a state constitution. The basic principle is that a state is not restricted in extending rights to its citizens by the rights granted by the federal Constitution. Some states have been providing what the federal courts have declined to require.

Payton v. United States[18] suggests several bases for liability. In this case, probation officers were found to have a duty to furnish the parole board information concerning prisoners as well as, wherever not incompatible with public interest, their views and recommendations with respect to parole disposition. Parole boards may have a duty to acquire and read pertinent reports that would inform board members of inmates' violent propensities.

United States v. Irving[19] found parole board members absolutely immune from liability claims under Section 1983 of 42 U.S. Code. However, the court noted that the plaintiff's claims of systematic racial discrimination against black inmates with regard to parole releases were sufficient for declaratory relief. Impermissible discrimination on the part of the board is actionable, therefore, despite immunity principles. Liability for abuse of discretion may require a showing of bad faith or action outside the scope of board authority.[20] For example, board failure to consider, in the context of the Youth Corrections Act, the plaintiff's response to rehabilitation might reasonably constitute abuse of discretion.[21]

Where due process is required by the finding of a liberty interest in parole, one court ruled that due process required a statement of reasons for parole denial sufficient to enable a reviewing body to determine whether the parole had been denied for an impermissible reason.[22] A West Virginia court specified that a person denied parole was entitled to more than "mechanistic" written reasons.[23] But use of a checklist to inform an inmate of reasons for parole denial was deemed not improper in another case.[24]

C. Explanation for Denial of Parole

Since there is no general federal constitutional right to due process in parole release, there is no general constitutional right either to be given the reason for parole denial. This once was an area of considerable litigation; hence, it deserves discussion. As a practical matter, this is hardly an issue because surveys show that 47 jurisdictions routinely gave written explanations.[25] Prisoner complaints in some cases were based on a due process theory and on an administrative procedures act.

Administrative law is the body of law that governs the powers, procedures, and judicial reviewability of administrative agencies and their actions. An administrative procedures act is a codification by a legislature of a set of generic rules in these areas.

1. Federal

Section 555(e) of the federal Administrative Procedures Act (APA) requires that notice be given upon denial of an application before an administrative agency. In a 1974 case, the Seventh Circuit found the APA applicable to the United States Board of Parole and required the Board to give the appellant a statement of reasons for refusing his application for parole.[26] The traditional view had been that the APA was not applicable to the Board of Parole.

The relevance of the APA at the federal level has become of interest only since the creation of the Parole Commission. Sections 4206 and 4208(g) of Title 18, U.S. Code, provide that if parole is denied, a personal conference to explain the reasons for denial shall be held at the conclusion of the proceedings, if feasible. Furthermore, Section 4206(b) provides that if parole is denied, notice of that determination shall state with particularity the reasons for such denial within 21 days of the parole hearing.

Johnson v. Rhode Island Parole Board Members[27] held that parole board members were entitled to absolute immunity from liability for damages in a 42 U.S. Code Section 1983 action in thrice denying an inmate's parole application. The case stemmed from a Rhode Island inmate who brought a 42 U.S. Code Section 1983 action against the Rhode Island Parole Board seeking monetary damages for an alleged violation of his liberty interests and due process rights.

2. State

Where the interpretation of state statutes is in issue, federal rulings on related federal statutes have some influence but no direct precedential value. Moreover, unlike the federal Administrative Procedures Act, some state laws have a specific exception for parole

decisions. Not all states have such laws. It is best to check with local authorities for holdings pertinent to that jurisdiction.

Whether a statement of reasons for denial is required is not a totally independent issue but, rather, is dependent on one of three factors:

- State court interpretation of, or legislative inclusion or exclusion within, a state administrative procedure act;
- State court interpretation of the state's constitution concerning due process, or;
- The policy of an administrative agency.

In states without a state Administrative Procedures Act, the presumption is that there is no right to an explanation of a parole decision. However, as mentioned above, the majority of states provided oral or written explanations of the parole decision anyway.

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II. LIABILITY OF PAROLE BOARD MEMBERS FOR CRIMES COMMITTED BY RELEASED OFFENDERS

Parole board liability for the release of an offender on parole who subsequently commits an offense is an important legal issue that has drawn the attention of the courts and will continue to be litigated in the future. The question centers on possible liability of parole board members to victims or their families for crimes, particularly of a violent and predatory nature, committed by inmates released on parole.[28] The public reasons that since public protection is one purpose of parole, the parole board should be held liable if a parolee injures a member of the public because, if the parolee had not been released by the board, the injury would not have occurred.

Generally, however, parole board members are entitled to absolute immunity when engaged in actions within the proper scope of official duties. The courts have held that since parole board officials perform functions comparable to those of a judge, in deciding to grant, deny, or revoke parole, they are entitled to absolute immunity.

Case law in this area suggests most courts will honor immunity principles for parole board members but find some limited liability or an argument for potential limited liability. Judicial analyses focus on discretion. Where a parole board is seen by a court to omit a required step in its discretionary decisionmaking process or to abuse discretion, board members may jeopardize claims to immunity.

A. The General Rule Is No Liability

In *Santangelo v. State*,[29] an action for negligent release was brought in the New York Court of Claims against the state by a woman who was raped by a released inmate. The court conceded that there is a valid public interest in protecting society from the depredations of known dangerous individuals, but added that there also exists a recognized public interest in rehabilitating and reforming offenders. The court said that the Temporary Release Committee had the duty to exercise reasonable care to avoid the release of a prisoner where to do so would not be found just because subsequent events proved a release decision wrong. In the *Santangelo* case, the record reflected that the release decision did not entail a very thorough examination into the releasee's background or character. The inmate was never interviewed personally by the committee and appeared before the committee only to have the conditions of release explained to him. His parole officer was not consulted, even though it was the officer's recommendation that the inmate

serve additional time. Moreover, no psychiatric or psychological reports were considered.

Despite these indications of lack of due care, the court dismissed the plaintiff's claim because there was not sufficient evidence before it to determine if the committee's decision would have been any different had a more thorough examination been undertaken. (Before negligence liability is assessed, it is usually required that the negligence be proven to be the cause in fact of the injury. Here, it could not be said that "but for" the failure to take these diagnostic steps, the harm could have been prevented.) Thus, the plaintiff failed to establish that the committee knew or should have known of the dangers posed by its decision to release. No liability was assessed.

Similarly, in *Welch v. State*,[30] action was brought against the State of New York claiming damages caused by the state's negligence in paroling Freddie Lee Davis, who had a history of violent antisocial and deviant behavior and who had been incarcerated for viciously attacking and raping young women. It was further alleged that the state was negligent in supervising Davis as a parolee, thus causing the plaintiff permanent injuries when the parolee struck her with a piece of lumber and threw her in a river. The trial court dismissed the case and the plaintiff appealed. The state appellate court affirmed the dismissal, stating that the nature and extent of the state's duty of supervision, as well as the question of whether the released prisoner's actions were foreseeable, can be put at issue only if the claim sets forth adequate factual allegations supportive of the charge of negligence on the part of the state. In this case, the terms and conditions of the parolee's release were not set forth, nor were there any factual allegations as to the manner in which the state was negligent. The negligence of the state was not presumed from the fact of the assault. No liability was imposed.

Note that in these two cases, the courts did not say that the officers could never be held liable for what they did. On the contrary, the liability claim in *Santangelo* was the result of failure by the plaintiff to prove that without negligence the resulting decision by the agency would have been different, and, in the *Welch* case, it was the failure of the plaintiff to bring forth evidence sufficient to prove negligence on the part of the officers.

In *Thompson v. County of Alameda*,[31] decided by the California Supreme Court in 1980, a 5-year-old boy was sexually assaulted and killed by a delinquent within 24 hours after the delinquent's release by the county probation department. The parents filed action against Alameda County for reckless, wanton, and grossly negligent conduct in the following: (1) releasing the juvenile delinquent to the community; (2) failing to give notice of the delinquent's propensities to the delinquent's mother, the police, and the parents of the young children in the neighborhood, and notice of the fact and place of release to the police and such parents; (3) failing to exercise reasonable care through its agent, the delinquent's mother, after his release; and (4) failing to use reasonable care in the selection of its agent to undertake the delinquent's custody. Basing its decision primarily on the California law that provides immunity from liability for discretionary acts by government employees and immunity in determining parole or parole conditions, the trial court dismissed the case and the parents appealed. The appellate court found no liability because (1) the plaintiffs alleged no special or continuing relationship between themselves and the defendant county and (2) the decedent had not been a foreseeable or readily identifiable target of the juvenile offender's threats.

In summary, the court in *Thompson* ruled:[32]

> Whenever a potentially dangerous offender is released and thereafter commits a crime, the possibility of the commission of that crime is statistically foreseeable. Yet the Legislature has concluded that the benefits to society from rehabilitative release programs mandate their continuance. Within this context and for policy reasons the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim or group of victims . . . [citations omitted]. In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can he effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons.

In *Larson v. Darnell*,[33] a juvenile parolee raped and murdered a 12-year-old girl. The court found immunity for the board even if its decisions over whom to parole, when to parole, and where to place the parolee were performed negligently, willfully, and wantonly. Although the court noted that evidence of corrupt or malicious motives or abuse of power might have brought about a different result, the decision reflects a strong public policy interest in protecting discretionary decisions. *Larson* draws the boundaries of responsibility between board supervisory decisions and officers administering board supervisory decisions.

By contrast, in the following cases the potential liability recognized in the above cases was proved; hence, liability ensued.

In *Grimm v. Arizona Board of Pardons and Paroles*,[34] the parole board and its members were sued for negligent release of Mitchell Blazak, a diagnosed dangerous social psychopath who had served one-third of a sentence for armed robbery and assault with intent to kill. The parole board invoked the absolute immunity defense, but this was rejected by the Arizona Supreme Court. The court held that parole board members enjoy only qualified immunity in the exercise of their discretionary functions. Relying on state law, the court said that the Board had narrowed its duty in the case from one owed to the general public (for which there is no liability) to one owed to individuals (for which there may be liability) by assuming parole supervision over, or taking charge of, a person having dangerous tendencies. Liability was also based on the finding that the release decision was reckless or grossly or clearly negligent.

In jurisdictions like Arizona that reject the absolute immunity rule and therefore allow liability, the central issue becomes when are parole board members reckless or grossly or clearly negligent in granting a parole release?[35] There is no definitive answer; however, courts tend to use the standards of duty and foreseeability—meaning whether there was a legal duty of care imposed on the parole board members and whether, given the facts in the case, the danger could have been foreseen. One writer points out that a decision to release would be grossly negligent if the entire record of the prisoner indicated violent tendencies (as in *Grimm*), and there is no reasonable basis to believe that the prisoner has changed.[36]

Payton v. United States,[37] decided by the Federal Court of Appeals for the Fifth Circuit held, in 1981, that the United States Parole Commission could be sued for negligence because of the release of a federal prisoner who then kidnapped, raped, and murdered three women. The suit, brought under the Federal Tort Claims Act, charged that the Commission was negligent when it released a federal prisoner who had been repeatedly diagnosed as a dangerous, homicidal psychotic while in prison, and who had been sentenced to 20 years in prison for severely beating a woman. Despite these warning signals, the prisoner's sentence was

reduced to 10 years, and he was later granted parole in the custody of a priest. He later killed three women. The court said that the release of a prisoner in total disregard of his known propensities for repetitive brutal behavior was not an exercise of discretion, but, instead, was an act completely outside clear statutory limitations.

The court distinguished between the Commission's role as the promulgator of paroling guidelines and its responsibilities in applying the guidelines to individual cases. The court of appeals said that the government would have been immune if the damage suit had attacked the government guidelines themselves, because the dispute would then have concerned the selection of the appropriate release policy, which by law has been committed to agency discretion. In this case, however, the suit charged that the guidelines for parole were not properly applied to this particular parolee. This implies that the government enjoys immunity for drafting parole guidelines, but not for their negligent application. The court concluded by saying:[38]

> As government grows and the potential for harm by its negligence increases, the need to compensate individuals bearing the full burden of that negligence also increases. . . . Suits under the Federal Tort Claims Act provide a fair and efficient means to distribute the losses as well as the benefits of a parole system.

However, on subsequent rehearing by the Fifth Circuit, the decision to release without supervision was held to be discretionary and, therefore, not actionable under the FTCA. The court noted that had plaintiffs alleged that the Commission ignored a required step of the decisionmaking process, such a claim would be actionable. Alternatively, the court suggested that a claim would be actionable where the Board could be shown to have breached a duty sufficiently separable from the decisionmaking function to be nondiscretionary and, therefore, outside the judicial immunity exception to the FTCA. The court, speculating as to the course of arguments not made, also noted that the Board could have provided for continued supervision of the parolee and that failure to do so may have been an abuse of discretion.

The Federal Court of Appeals for the Sixth Circuit held in *Janan v. Trammell*,[39] that members of the Tennessee State Parole Board enjoyed absolute immunity from a 42 U.S. Code Section 1983 and 1985 suit alleging gross negligence in the release of an inmate on parole. The parolee, previously convicted of armed robbery and grand larceny, had been on his second term of parole for less than 2 months when he accompanied a prison escapee to Florida and committed murder. The family of the murder victim filed a Section 1983 action claiming that the parole board's action deprived the victim of his life without due process of law. The court held, however, that the family of the victim did not claim that the parole board, or the defendants, had any specific responsibility to the parolee, nor did they claim that the defendants should have known that the parolee's release or subsequent possible parole violations would endanger the victim. For these reasons, the court found the defendant's actions were causally remote from the murder.

The Federal Court of Appeals for the Eighth Circuit held that parole officials enjoyed immunity from 42 U.S. Code Section 1983 suits involving a parolee's crime. In *Nelson v. Balazic*,[40] a Missouri parolee kidnapped and raped three women after learning that he was going to be sent back to prison for violating his parole. The women were employees of a drug and alcohol treatment program that the parolee was referred to once paroled. The defendants were two members of the Missouri Board of Probation and Parole and the actual parole officer of the parolee. The court held the two parole board members to be absolutely immune from suit in performing the quasi-judicial function of deciding to grant, deny, or revoke parole. The parole

officer was found to have only qualified immunity because her duties were not "intimately associated with the judicial process." Although the probation officer was granted only qualified immunity, the court held that her conduct did not violate clearly established statutory or constitutional rights and she was thus immune from the suit.

To summarize, decided cases strongly indicate that, although suits by victims of crime challenging release decisions do not usually succeed, liability may in fact be found in cases of negligent release by board members, supervisors, or governmental agents, but such negligence must be gross or reckless. Mere negligence is not enough. Gross or reckless negligence, however, cannot be defined with precision and must be decided on a case-by-case basis. The preceding cases merely suggest general boundaries.

B. Legislative Remedy If There Is Liability Exposure

A case decided by the United States Supreme Court in 1980 invites special attention because it is an indication of what might and can be done legislatively to enable parole board members to avoid state tort liability based on negligent release. In *Martinez v. California*,[41] a 15-year-old girl was murdered by a parolee 5 months after he was released from prison despite his history as a sex offender. The parents of the deceased girl brought an action in a California court under state law and Section 1983 of 42 U.S. Code (such claims may also be filed in state courts at the option of the plaintiff), claiming that state officials, by their action in releasing the parolee, subjected the murder victim to a deprivation of her life without due process of law and were therefore liable in damages for the harm caused by the parolee. The trial court dismissed the complaint. The case eventually reached the United States Supreme Court. The Supreme Court held the following: (1) the California immunity statute is not unconstitutional when applied to defeat a tort claim arising under state law; and (2) the parole board members were not held liable under federal law because of the following:

- The 14th amendment protects a person from deprivation by the state of life without due process of law, and, although the decision to release the parolee from prison was state action, the parolee's action 5 months later cannot be considered as state action.
- Regardless of whether the parole board either had a duty to avoid harm to the parolee's victim or proximately caused her death, parole officials did not "deprive" the victim of life within the meaning of the 14th amendment.
- Under the particular circumstances where the parolee was in no sense an agent of the parole board and the board was not aware that a particular person, as distinguished from the public at large, faced any special danger, that person's death was too remote a consequence of parole board's action to hold the officers thereof responsible under Section 1983 of 42 U.S. Code.[42]

Note that *Martinez* involved, among other issues, the constitutionality of a state statute passed by California specifically granting absolute immunity to a public entity or a public employee from liability under state tort law for any injury resulting from parole release determinations. What the *Martinez* case decided was simply that a state immunity statute is constitutional when applied to defeat a tort claim against state officials arising under state law. The court said that whether one agrees or disagrees with California's decision to provide absolute immunity for these cases, one cannot deny that the law rationally furthers a policy that reasonable lawmakers may favor. The case did not resolve the issue of whether a parole board member, when deciding whether to release an inmate, is entitled to absolute immunity as a matter of constitutional law. That issue is still unresolved. Other states

might, however, pass a similar statute if they want to fully protect their officers from possible liability for official acts under state law.

Plaintiffs in *Martinez* contended that liability ensued under the 14th amendment of the Constitution. The United States Supreme Court replied, however, that the amendment protects persons only from deprivations by the state of life without due process of law. State involvement must be present for liability to ensue. Although the decision to release the parolee from prison in this case was originally considered an act of the state, what the parolee did 5 months after release could not be fairly characterized as state action. The death in this case was too remote a consequence of the parole officials' action to hold them responsible under the federal civil rights law. This implies that, in federal litigation, a negligent initial decision to release is weakened by the passage of time.

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III. LIABILITY OF PAROLE BOARD TO INMATES FOR VIOLATION OF RIGHTS

A. Substantive Rights

Two cases involving Section 1983 of 42 U.S. Code claims against parole boards alleged to have deprived plaintiffs of fundamental civil liberties. In *United States v. Irving*,[43] a Federal Court of Appeals for the Seventh Circuit decision, the plaintiff claimed systematic racial discrimination against black inmates with respect to parole releases. In *Jones v. Eagleville Hospital and Rehabilitation Center*,[44] a 1984 Pennsylvania District Court case, the plaintiff brought suit against the parole board after a parole revocation occasioned by the plaintiff's refusal to remove a skullcap with religious significance to the plaintiff while participating in a drug treatment program.

The *Irving* court found absolute immunity for parole board members. However, the court noted the plaintiff's claim for declaratory relief could still be addressed because evidence tended to demonstrate impermissible discrimination on the part of the parole board. The *Jones* court found the parole board was not "a person" within the meaning of Section 1983 of 42 U.S. Code. With regard to the hospital that terminated treatment on the plaintiff's refusal to remove his skullcap, the court found that the parolee could possibly make out a claim against it were he able to establish that the action taken was "state action."

B. Procedural Rights

Parole boards are also subjected to suit by offenders for alleged procedural due process violations. Here, case law demonstrates an easier compliance with notions of immunity. *Partee v. Lane*[45] held a summary of evidence relied on to deny parole was not required by due process. Parole decisions are based on broad discretion statutorily granted the parole authority. Furthermore, the *Partee* court held parole boards are absolutely immune from 42 U.S. Code Section 1983 suits for actions taken when processing parole applications.

Adams v. Keller[46] was a 42 U.S. Code Section 1983 action against the parole commissioner for misapplication of youth parole guidelines. The court examined the factual basis for the plaintiff's claim of abuse of discretion by the parole commission in setting the plaintiff's parole date. The court found no evidence of bad faith or action outside the scope of authority by the commissioner. However, the plaintiff's claim of right to a new parole hearing based on the parole commission's failure to consider the plaintiff's response to rehabilitation when setting a parole date was affirmed. The court found

that while Congress intended to apply concepts of punishment, retribution, and deterrence in passing the Youth Corrections Act, there was no indication that Congress intended to totally abandon any consideration of potential for rehabilitation.

In *Corby v. Warden*,[47] the plaintiff charged that the state parole hearing officer violated his constitutional rights by intercepting mail explaining mitigating circumstances for the alleged violation of parole. The court found the claim was based on the hearing officer's acts as a judicial officer and that the officer was, therefore, entitled to quasi-judicial immunity.

In three other 42 U.S. Code Section 1983 suits against parole boards,[48] courts easily found immunity for decisions relating to granting, denying, or revoking parole. *Walker v. Prisoner Review Board*[49] held that, although failure of the parole board to allow the inmate access to his file was a violation of due process rights provided under statutory law, the court nevertheless affirmed absolute immunity for these official actions. The court held the board's consideration of various newspaper articles would not be a violation of due process unless the inmate had not been given an opportunity to refute the information. Similarly, the court held the board is entitled to consider a wide array of information, and such information need not bear any relation to the crime with which the inmate plaintiff is charged. Finally, the court noted the Seventh Circuit's holding that all tasks of the Illinois Prisoner Review Board were adjudicatory in nature, meaning that no distinction between ministerial and adjudicatory functions was recognized. Therefore, Illinois parole officials enjoy absolute immunity for virtually all official actions.

Each of the above categories of parole board liability cases exhibits a similar pattern of analysis and similar results. Parole boards may find careful analysis of the statutes under which they operate to be a useful guide to procedural requirements.

SUMMARY

This chapter discusses issues related to the liability of parole boards for release or nonrelease. It addresses the following concerns: the rights, if any, to which inmates are entitled in parole release hearings, the civil liability of parole boards for crimes committed by inmates who are released and who commit crimes while on parole, and the liability of parole boards to inmates for violation of rights related to parole release.

Case law holds that inmates hardly have constitutional rights in parole release hearings. They do not have any constitutional right to counsel, although that may be given by state law or agency policy. They have no constitutional right to be informed of the release criteria, although that may also be given by state law or agency policy. There is no constitutional right to be given an explanation for parole denial, although most jurisdictions in fact routinely give inmates written explanations; hence, this is realistically not much of a legal issue.

Parole board liability for the release of an inmate on parole who subsequently commits an offense is an important issue that has repeatedly drawn the attention of the courts. The public reasons that since public protection is one purpose of parole, the board should be held liable if a parolee injures a member of the public because if the parolee were not released the injury would not have occurred. Generally, however, these claims have failed because courts hold that parole board members are entitled to absolute immunity when engaged in actions similar to those performed by a judge. Some courts have found liability, however, in cases where gross or reckless negligence on the part of the board is established.

In lawsuits involving alleged violations of inmates' constitutional rights related to parole, courts have held that parole board members are not liable, affording them

immunity in the performance of official responsibilities. Parole boards must be careful, however, to observe the procedural guidelines prescribed by state law or by agency policy because deviation from them might raise issues of due process violation.

Notes

1. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979).

2. Gagnon v. Scarpelli, 411 U.S. 778; 93 S. Ct. 1756 (1973).

3. It is doubtful whether any correctional system could prevent prisoners from securing prehearing legal assistance. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977). Pub. L. No. 94233, 90 Stat. 21q (*codified at* 18 U.S.C. Sec. 42014218 (1976)).

4. 18 U.S.C. Sec. 4208(d)(1) (1976).

5. United States Parole Commission. Available on the World Wide Web at *www.usdoj.gov/uspc/mission.htm*.

6. *Id.*

7. Comment, *Due Process: The Right to Counsel in Parole Release Hearings,* 54 Iowa L.R. 497, 499 (1968).

8. *Id.* at 499.

9. Ganz v. Bennsinger, 480 F.2d 88 (7th Cir. 1973).

10. Holup v. Gates, 544 F.2d 82 (2d Cir. 1976), *cert. denied,* 430 U.S. 941 (1977).

11. Buchanan v. Clark, 446 F.2d 1379 (5th Cir.), *cert. denied,* 404 U.S. 979 (1971).

12. 18 U.S.C.S. Sec. 4206, 9 (2000).

13. F. Merritt, Due Process in Parole Granting: A Current Assessment, 10 John Marshall J. 93, 111 (1976).

14. *Id.* at 113.

15. Payton v. United States, 679 F.2d 475 (5th Cir. 1982).

16. Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978).

17. Haymes v. Regan, 525 F.2d 540, 544 (2d Cir. 1975).

18. *Id.*

19. United States v. Irving, 684 F.2d 494 (7th Cir. 1982).

20. Adams v. Keller, 713 F.2d 1195 (6th Cir. 1983).

21. *Id.*

22. Horton v. Irving, 553 F. Supp. 213, (N.D. Ill. 1982). *See also,* U.S. *ex. rel.* Scott v. Illinois Parole & Pardon Board, 669 F.2d 1185 (7th Cir. 1982).

23. Stanley v. Dale, 298 S.E.2d. 225 (W. Va., 1982).

24. Partee v. Lane, 528 F. Supp. 1254 (U.S.D. Ill. 1982).

25. V. O'Leary and K. Hanrahan, *Parole Systems in the United States,* 44 (3d ed. 1976).

26. King v. United States, 492 F.2d 1337 (7th Cir. 1974). *See also*, Fronczals v. Warden, El Reno Reformatory, 553 F.2d 1219 (10th Cir. 1977).

27. Johnson v. State, 815 F.2d 5 (1987).

28. *See generally,* Johnson v. Wells, 566 F.2d 1016 (1978); Franklin v. Shields, 569 F.2d 784 (1972); Thompson v. Burke, 566 F.2d 231 (1977).

29. 426 N.Y.S.2d 931 (1980).

30. 424 N.Y.S.2d 774 (1980).

31. 614 P.2d 728 (1980).

32. *Id.* at 732.

33. Larson v. Darnell, 448 N.E.2d 249 (Ill. App. Ct. 1983).

34. Grimm v. Arizona, 115 Arizona 260, 564 P.2d 1227 (1977). Subsequently Ryan v. State, 656 P.2d 597 (Ariz. 1982) abolished the discretionary v. ministerial distinction in Arizona, hence severely curtailing the immunity defense.

35. Note, Torts—Parole Board Members Have Only Qualified Immunity for Decision to Release Prisoner, 46 Ford. L. Rev. 1301, 1313 (1979).

36. *Id.* at 1314.

37. Payton v. United States, 636 F.2d 132 (5th Cir.), *rehearing granted,* 649 F.2d 385 (5th Cir. 1981); 679 F.2d 475 (5th Cir. 1982).

38. *Id.*

39. Janan v. Trammell, 785 F.2d 557 (1986).

40. Nelson v. Balazic, 802 F.2d 1077 (1986).

41. Martinez v. California, 444 U.S. 277 (1980).

42. *Id.*

43. United States v. Irving, 684 F.2d 494 (7th Cir. 1982).

44. Jones v. Eagleville Hospital and Rehabilitation Center, 588 F. Supp. 53 (U.S.D. Pa. 1984).

45. Partee v. Lane, 528 F. Supp. 1254 (U.S.D. Ill. 1982).

46. Adams v. Keller, 713 F.2d 1195 (6th Cir. 1983).

47. Corby v. Warden, 561 F. Supp. 431 (U.S.D.N.Y. 1983).

48. Walker v. Missouri Department of Probation and Parole, 586 F. Supp. 411 (U.S.D. Mo. 1984); Ross v. United States, 574 F. Supp. 536 (U.S.D.N.Y. 1984); Walker v. Prisoner Review Board, 594 F. Supp. 556 (U.S.D. Ill. 1984).

49. *Id.*

CHAPTER 7

Conditions, Modifications, and Changes in Status

INTRODUCTION

The enforcement of the conditions of parole or probation is essential to the proper supervision of offenders. Conditions reflect the will of the court or parole board and the expectation that the court or parole board has established in order for a parolee or probationer to successfully complete the term of supervision. As officers of the court (probation officers) or officers of the executive branch (parole officers), probation and parole officers have the legal responsibility for ensuring that the offender abides with the conditions imposed by the court or parole board.

In addition, the conditions of parole or probation form an essential part of any supervision or treatment plan established for the offender. The determination of the risks and needs of an offender, the results of any assessments administered to the individual, and specific recommendations made by the officer to the court or parole board that is considering the release of the defendant often reappear as conditions of parole or probation. These conditions, in turn, must be incorporated in the supervision plan of the offender and any treatment plan developed for the individual.

Conditions of probation or parole can basically be categorized into three classifications: regular, special, and modified conditions. In addition to the conditions that an offender must follow, under certain circumstances, an offender may be obligated to report any changes in his status to his officer. This obligation to report a change in status may be required as a condition of probation or parole, as an administrative requirement of the probation or parole department, or as a statutory mandate. This chapter will examine the various types of conditions and change of status requirements that may be imposed on or required of an offender, the responsibility of an officer to ensure that conditions are enforced or a change in status is reported, and the potential liability issues that may arise in the inadequate or improper enforcement of conditions or reporting requirements.

A regular condition of probation or parole is generally one that is statutorily authorized or approved and is imposed on almost every offender granted probation or parole. In addition, a regular condition may be one that, even though not specifically statutorily mentioned or enumerated, is imposed by a particular court or parole board on almost every offender requesting a grant of probation or parole who appears before that sentencing or parole authority. Because of its universal application, this type of condition is referred to as a "regular" condition. The imposition of a regular condition of probation or parole is less likely to be successfully challenged on appeal than a special condition. A regular condition is almost invariably presumed to be reasonable.

A special condition is one that is not imposed as a matter of course on all probationers or parolees. It is usually designed to promote the rehabilitation of a specific offender by requiring him or her to avoid an environment deemed not to be conducive to his well-being or to participate in a particular program or service in order to address a specific problem or need of his or hers. In addition, a special condition may be imposed in order to reduce the potential of an offender committing a specific harm to the community or a victim. So long as a condition can reasonably be said to contribute both to rehabilitation aims and the protection of society, the condition is likely to be held permissible;[1] however, a condition that bears no relationship to the offense committed by the offender or to future criminal acts, does not protect the public, or impermissibly infringes on a probationer or parolee's basic constitutional rights is invalid.

Conditions are set only by the court or parole board; therefore, the field officer need not fear liability for their imposition. However, he or she should be concerned

with the enforcement of conditions, as matters of both rehabilitation and practicality. The best time to deal with such issues is before they are imposed. A presentence or preparole report should not include a condition that is either overly difficult to supervise or open to serious question as to its function or legality. For example, a condition requiring church attendance would fall into this category because of a potential conflict with the first amendment's guarantee of the free exercise of religion.

A condition that is phrased in such a way as to require compliance by the offender with "any other order" of the supervising officer can lead to serious problems for the officer. Such a condition may be an improper delegation of authority because it leaves the decision to impose or enforce a certain requirement on the offender to the probation or parole officer and not with the court or parole board. Thus, absent express statutory authority to the contrary, such a condition is generally void. Moreover, a court or parole board cannot bestow blanket authority on a probation or parole officer to require an offender to perform an act or refrain from doing so. Not only is such a "blank check" illegal, but it is also not conducive to rehabilitation to put the offender in a position that would cause severe peer or family conflict, such as ordering him to become an informant.

General rules can be stated that should give the field officer ample guidance. First, a formal condition set by the court or the board is generally acceptable (note the limitations discussed in this chapter). Second, a reasonable condition, such as meeting with the officer at a certain time and place, is acceptable as long as it is imposed in good faith. Third, in emergency situations, radical orders will be acceptable provided they are imposed in good faith, are temporary and necessary under a true emergency, and are not illegal. When faced with such a situation, the officer can best protect himself or herself by obtaining from the offender a written consent, or if that is refused, a written admission that the offender is aware of the order and wishes to challenge it. Fourth, substantial changes in set conditions should not be made except under emergency conditions. Fifth, any changes of an enduring nature must be made by the court or the board.[2] In all events, the officer is obligated to notify the offender of the change and, as with conditions in general, explain the condition to the offender.

Unequal or arbitrary enforcement of conditions can be the basis for a lawsuit under the due process and equal protection clauses of the United States Constitution and possibly under individual state constitutions. Unreasonable distinctions between individuals or classes of individuals will potentially expose the officer to personal liability. Moreover, the arbitrary or capricious enforcement of conditions or the requirement that a probationer or parolee perform an unreasonable act may also incur liability. The question of reasonableness will be decided on a case-by-case basis. Class distinctions and unequal or selective enforcement based on race, creed, gender, religion, or ethnicity are extremely difficult to justify and should always be avoided.

Several specific areas have been the targets of judicial examination, particularly conditions involving reproductive rights; rights of free speech and expression; "scarlet letters" (i.e., public shaming); and the requirement to undergo periodic polygraph examinations. After a brief statement of the current law on conditions in general, the remainder of the discussion about conditions in this chapter will consider the more difficult ones: (1) conditions that infringe upon fundamental constitutional rights, (2) conditions that infringe upon other rights, and (3) explanation of conditions to the offender.

I. CONDITIONS IN GENERAL

Probationers and parolees enjoy conditional freedom from confinement. All jurisdictions impose some explicit conditions, or standards of conduct, that the probationer or parolee is expected to observe in return for his or her release. Data about the number and variety of parole conditions are less abundant than probation condition data because the number of authorities imposing parole conditions is limited.[3]

Some of the more common conditions imposed on probationers and parolees are:

- Commit no offense against the state in which the offender was convicted, another state, or the United States of America.
- Refrain from congregating around or associating with disreputable persons or persons with criminal convictions.
- Abstain from the use or possession of alcohol or drugs.
- Maintain suitable employment.
- Report to one's probation or parole officer on a regular basis.
- Obtain permission to travel to another locality in the state or to another state.
- Observe limitations on the possession or ownership of firearms or other weapons.
- Pay restitution to the victim of the offender's crime.

Most of these above listed conditions are statutorily authorized by the legislatures of the States. This indicates the desire of legislators that the courts or parole board impose certain standard conditions on probationers and parolees. Nevertheless, the number of legislatively enumerated conditions of probation or parole varies widely from state to state. Some state laws have only a minimum number of prescribed conditions while other states' statutes list an extensive array of conditions.

In addition, legislators may authorize the courts or parole board to impose special conditions on certain offenders but not all. For example, sex offenders may be required to participate in sex offender therapy, register as sex offenders, and refrain from entering child safety zones. Substance abusers may be required to submit to urinalysis and participate in substance abuse treatment. Persons convicted for driving under the influence may be required to refrain from operating a motor vehicle and participate in counseling for alcohol abuse.

Moreover, courts or the parole board may impose a special condition on an offender that may not be statutorily mentioned but may address a specific risk or need of the individual offender. Thus, a person convicted of embezzlement may be required, as a condition or probation or parole, not to seek employment as a bookkeeper. A person convicted of domestic assault may be required, as a condition of probation or parole, not to contact his or her spouse or other injured family member. Generally, a special condition of probation or parole is invalid only if it has all three of the following characteristics: (1) has no relationship to the crime, (2) relates to conduct that is not in itself criminal, and (3) forbids or requires conduct that is not reasonably related to the future criminality of the offender or does not serve the statutory ends of probation or parole.[4]

Considering that more than 4.1 million adult men and women were on probation or parole at the end of 1998,[5] the frequency of litigation concerning the constitutionality and legality of conditions is surprisingly small. This is because a probationer/parolee realizes that he or she has agreed to the conditions and is also aware of the possible consequences of challenging them. The mere act of agreeing to the terms of probation/parole, however, does not mean that a legal challenge is foreclosed because of waiver. Courts have said that some constitutional rights may not be waived, particularly if the alternative to a refusal to waive is incarceration

or nonrelease. This might amount to undue influence or coercion.

As a general rule, the authority granting probation or parole has broad discretion to set terms and conditions within the statutory framework creating the disposition. Most authorizing statutes suggest minimum conditions. The supplemental discretion also conferred on the courts or parole board is not unlimited, however, and a challenged condition will not be upheld if it cannot be shown to bear some reasonable relationship to the rehabilitative purpose underlying the probation and parole systems or has some rational basis for deterring future criminal acts by the offender. As the core conditions almost always are so related, challenges to them are seldom successful. Nevertheless, even if a condition has a rational basis in law, the specific language found in the condition must inform the offender in clear, definite, and unambiguous terms of what he or she must or must not do or said condition will be invalid.[6]

As a general rule, courts will consider conditions valid as long as they are: (1) reasonably related to the rehabilitation of the offender or the protection of society, (2) clear, (3) reasonable, and (4) constitutional. How these requirements are interpreted, however, varies considerably from one court to another, even within one state.

What follows in this chapter deals with conditions that are less often imposed. The material presented will illustrate that the power to set conditions is limited and will discuss the approach taken by the courts to determine whether a condition is permissible. Even though these conditions are less often imposed, the imposition of certain conditions may show a trend indicating that they are being increasingly utilized by the courts. This is especially the case with regard to persons granted probation or parole for sex offenses and assaultive domestic offenses. In these situations, although still rare, certain conditions are gaining popularity in the country and are being used in more and more jurisdictions.

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II. CONDITIONS AND CONSTITUTIONAL RIGHTS*

In general, judges and parole boards exercise a lot of authority and discretion when imposing conditions of probation or parole. One limitation, however, is that the condition must be constitutional. Despite conviction, probationers and parolees have diminished constitutional rights, meaning they retain some but also have lost some constitutional rights. The manner in which courts have addressed the issue of what constitutional rights probationers and parolees retain or lose is discussed below.

A. Free Speech and Assembly

The United States Supreme Court has recognized that parolees (and by inference probationers) retain a conditional liberty interest whenever they are granted probation or parole.[7] Thus probationers and paroles have certain fundamental rights that are not abridged simply because the offenders are on probation or parole.[8] Although these fundamental rights may be restricted in certain circumstances, appellate courts have also limited the restrictions affecting speech and assembly rights that may be imposed on offenders as a condition of probation and parole. Two leading cases in the parole conditions content recognized the principle that certain constitutional rights cannot be abridged because of the status of the parolee.

*The issue of search and seizure is addressed in Chapter 8, Supervision.

In *Sobell v. Reed*,[9] a federal parolee asserted that his first amendment rights had been violated by an action of the parole board. Sobell was restricted by the board from going outside the limits of the Southern District of New York "without permission from the parole officer." On a number of occasions after his release, Sobell sought and obtained permission to travel to, and to speak at, various places. However, on other occasions, such requests were denied. Sobell charged that such denials invaded his first amendment rights.

The federal district court stated that while there are differences between prisoners and parolees, there are none that diminish the protections enjoyed by the latter under the first amendment.[10] After testing the restriction by the same principles, such as, "where the (parole) authorities strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement,"[11] the court held that the board violated Sobell's exercise of his rights of speech, expression, or assembly, except when it could show that withholding permission was necessary to safeguard against specifically described and highly likely dangers of misconduct by the parolee.[12]

The second case, *Hyland v. Procunier*,[13] involved a California parolee. As a condition of his parole, he was required to obtain permission from his parole officer before giving any public speeches. The parolee's requests to give speeches about prison conditions at a college campus were denied on two occasions on grounds that the speeches might lead to student demonstrations at the prison. The Court stated that "California (and) federal law has imposed the due process rule of reasonableness upon the State's discretion in granting or withholding privileges from prisoners, parolees, and probationers."[14] The Court found that California made no showing that the condition imposed on Hyland was in any way related to the valid ends of California's rehabilitative system. Thus, the Court permanently prohibited the state from:

1. Conditioning Hyland's parole on his seeking such advance permission; and
2. Prohibiting any California state parolee from addressing public assemblies held at the University of California at Santa Cruz, when such prohibition is because of the expected content of the speech.[15]

These two cases exemplify the basic notion that even though an individual may have been convicted of a crime, he still retains certain fundamental rights, especially the right of freedom of speech and freedom of assembly. These rights can be infringed only if the state shows a rational relationship between the restriction on the rights of the individual and a legitimate penalogical interest on the part of the state (or federal) authorities. For persons with a conditional liberty interest (e.g., parolees), the state usually must demonstrate a heightened or compelling interest, instead of a more general interest, for curtailing the parolee's liberty interest. Moreover, the restriction imposed on a fundamental constitutional right must be narrowly tailored to serve the compelling interest of the state in the least restrictive means possible. These court holdings logically extend to the probation area.

In *Porth v. Templar*,[16] the federal Tenth Circuit Court of Appeals stated that probation conditions must bear a relationship to the treatment of the offender and the protection of the public. "The case stands for the proposition that absent a showing of a reasonable relationship between a release condition and the purpose of release, the abridgement of a fundamental right will not be tolerated."[17] Thus, the implication in viewing this case with the other two cases is that release conditions abridging fundamental rights can be sustained only if they serve a legitimate and demonstrated rehabilitative objective or objectively serve to protect the public.[18]

Nevertheless, these cases do not suggest that the mere assertion by a probationer or parolee that some right is embraced within the first amendment will put that right beyond the reach of a properly tailored condition. For example, in *Porth v. Templar*, the probation condition prohibited a long-term tax protestor from circulating or distributing materials concerning the "illegality" of the Federal Reserve System and the income tax and from speaking or writing on those subjects. The court of appeals held these restrictions were too broad, but it approved a narrower condition prohibiting the probationer from encouraging others to violate the tax laws.[19] Another appeals court upheld a challenge to a condition of probation that a convicted gambler associate only with law-abiding citizens, a potential restriction on his associational rights.[20] Even political rights, which have traditionally been accorded preferred status, may be circumscribed under certain situations. Thus, the federal Fifth Circuit Court of Appeals once upheld the imposition of a condition of probation on a former congressman convicted of election law violations that prohibited him from engaging in political activity.[21]

Several recent court decisions have examined conditions restricting the first amendment rights of probationers. In *Commonwealth of Massachusetts v. Power*,[22] the defendant was convicted in a highly publicized case of armed robbery. Having granted probation to the defendant, the trial court then proceeded to order her, as a condition of probation, not to engage in any profit-generating activity connected to publishing anything about her crime or how she was a fugitive for so many years. The defendant appealed this condition, arguing that this restriction was an impermissible infringement on her first amendment right of free speech. The appellate court rejected this contention. The Court noted that the trial court did not order her not to discuss the incidents surrounding her offense. Instead, the trial court simply said that she could not profit monetarily from any discussion of her crime. The appellate court found that this condition was narrowly tailored to prevent her from receiving a financial reward for her crime without unduly infringing on her right to talk about the matter.

In another recent decision, *United States v. Crandon*,[23] the United States Third Circuit Court of Appeals upheld a condition of supervised release for a defendant who pleaded guilty to receiving child pornography that prohibited him from accessing the Internet or other similar computer networks without prior approval from his probation officer. The Court found that this condition was reasonably related to the criminal activity of the defendant, who had used the Internet to develop an illegal sexual relationship with a minor. Finally, the Courts have given approval to conditions of probation restricting antiabortion protestors convicted of trespassing on the private property of abortion clinics from being within a specific distance from the clinics. The Courts have held that this condition does not unduly infringe upon their right of assembly or free speech because the condition has a reasonable relationship to deterring future criminality, i.e., trespassing once again on private property.[24]

B. Association

Freedom of association is also protected by the first amendment. While a condition restricting association is permissible provided there is a correlation between the offense for which the probationer or parolee was convicted and a person or place the association with or presence at which may lead the probationer or parolee to commit the same or similar crime, this condition may still be invalidated by courts for vagueness or overbreadth. The condition must be clear to the probationer or parolee[25] and also to the officer responsible for enforcing the conditions.[26] An unclear or vague condition needs to be clarified further by the officer so that the probationer/parolee generally knows which conduct is prohibited. For example, does a

suspected gang member or person arrested for but not convicted of a crime come under the term "disreputable persons?" Does a condition forbidding a probationer/parolee from frequenting places where alcohol is served include restaurants or other places where alcoholic beverages may be sold? The purpose or intent of such conditions is usually a matter of judicial or agency determination and therefore varies from place to place.

C. Religion

The "free exercise" clause of the first amendment generally puts beyond the reach of government all questions of how an individual chooses to regulate his or her religious life. In the context of correctional institutions, penal officials are generally afforded certain latitude in restricting an inmate's free exercise of religion, provided that the restriction rationally furthers a legitimate interest of the penal institution.[27] However, in the conditions of probation or parole context, the Courts have examined much more closely the constitutionality of restrictions on a probationer's or parolee's free exercise of religion. Thus a probation or parole condition that purports to require that a convicted person attend Sunday school or church services has invariably been held to be improper.[28]

Recently the Courts have been examining the propriety of ordering an offender to participate in a religious-based treatment program as a condition of supervised release. In *Warner v. Orange County Department of Probation*,[29] the Orange County, New York, Probation Department recommended to the court that a defendant, convicted for the third time for driving while intoxicated, attend Alcoholics Anonymous meetings. The trial court followed the recommendation of the probation department and ordered the defendant to attend said AA meetings as a condition of probation. The defendant subsequently filed a federal lawsuit, arguing that the probation department violated his first amendment rights by recommending that he attend the AA meetings. The defendant contended that AA meetings had a pronounced religious component and that he, being an atheist, should not have been required to participate in a religious-based program.

The Second Court of Appeals agreed with the defendant's contention. The Court stated that a person who had no objection to a religious-based program could be required, as a condition of probation, to participate in a program such as Alcoholics Anonymous. However, if a person objected to participating in a religious-based program because of his religious beliefs, or lack thereof, then the probation department must afford him the opportunity to participate in a secular alcohol treatment program. This opinion seems to hinge on the fact that the probation department, in making its recommendation to the trial court, did not first ask the defendant whether he had any religious objections to participating in a religious-based program. If the department had and the defendant had acquiesced, then it does not appear that the defendant could later say the department's recommendation violated his first amendment rights.[30]

D. Privacy

The right of privacy has been the basis of arguments challenging conditions that restrict relationships with a family member,[31] prohibit childbearing,[32] and limit sexual intercourse.[33] A condition is not invalidated merely because it invades the fundamental right to privacy. However the state generally must demonstrate a compelling, as opposed to rational, interest for infringing on probationer/parolee's right to privacy. The degree of demonstrating this compelling state interest varies from state to state. For example, a condition that prohibits a probationer or parolee from residing with his or her spouse or other family members would doubtless be unconstitutional if imposed for driving while intoxicated, but might be justifiable if the crime were domestic abuse or an injury to a child.

E. Procreation

The litigation concerning abortion and contraception tells us that the Constitution protects—as an aspect of a judicially understood constitutional right of privacy—the procreative function from government regulation unless extremely well justified. However in the area of probation and parole law, research has revealed no appellate case that has approved the restriction of childbearing as a condition of supervised release for a female offender. Moreover, research has found very few instances in which an appellate court has affirmed an order of a trial court restricting procreative activity as a condition of supervised release for a male offender. Nevertheless, although court decisions across the country have been consistent in generally disallowing this particular condition, the reasons for doing so have varied from jurisdiction to jurisdiction.

In a California case that preceded the development of this right to its present status, a probation condition prohibiting a woman from becoming pregnant without being married was struck down.[34] It was central to the court's reasoning that the probationer had been convicted of robbery and that there was no relationship between robbery and pregnancy. In a subsequent California case, *People v. Pointer*,[35] a California appellate court once again barred the imposition of a condition precluding a female probationer from bearing children, even though the condition in that instance was directly related to the offense for which she was placed on probation.

In *Pointer*, the defendant had developed strange but deeply rooted beliefs regarding the proper nutrition for her children. The defendant believed in a very strict low-calorie vegetarian diet and rejected all forms of protein. She insisted that her children follow this dietary regiment. The children suffered severe malnutrition and physical defects as a result of this diet. The defendant was convicted of child abuse. Because of the defendant's insistence in following this diet and the potential that another of her children would suffer malnutrition, the trial court ordered her not to conceive during the term of her probation.

The defendant appealed this condition of the trial court. The defendant argued that this condition was an unconstitutional restriction of her fundamental rights to privacy and to procreate. The appellate court acknowledged that this condition was reasonable, in that it related to the offense for which the defendant was convicted, i.e., child endangerment. Nevertheless, the Court further noted that whenever a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds, the Court must also determine whether the condition is impermissibly overbroad in addition to determining its reasonableness. In this instance, the Court found that the purpose for imposing this particular condition, to wit, protecting the life and health of a future child, could be achieved by alternative restrictions less subversive to the defendant's fundamental right to procreate. Thus the appellate court invalidated this condition of probation.

Since this decision was rendered, several other appellate courts have invalidated conditions of probation restricting a defendant's right to procreate. In *Thomas v. State*,[36] a Florida appellate court struck a condition of probation ordering a probationer not to become pregnant during the term of her probation unless she was married on the grounds that it bore no relationship to the offense for which she was convicted and was not reasonably related to future criminality. In *People v. Ferrell*,[37] an Illinois appellate court struck down a condition prohibiting a probationer from engaging in any activity with the reasonable potential of causing pregnancy on the grounds that a state statute forbade a court from ordering a probationer to use a form of birth control as a condition of probation. Finally, in *United States v. Smith*,[38] United States Eighth Circuit Court of Appeals struck a condition that prohibited

a probationer from conceiving another child with someone other than his wife.

One case that affirmed a trial court's decision to order a probationer not to conceive a child as a condition of probation is *State v. Kline*.[39] In this case, the defendant, who had a history of abusing his children, was convicted of first-degree criminal mistreatment of a child. The trial court ordered that he not father any children before he completed a drug counseling and anger management treatment program. On appeal, the Oregon appellate court affirmed the imposition of this condition. It was clear that this condition was reasonably related to the offense for which he was convicted. Moreover, because the condition did not a permanently ban him from ever having children again but made conceiving another child contingent upon completing certain treatment programs, the Court found that this condition did not impermissibly infringe on his fundamental right to procreate.

The United States Supreme Court has yet to rule on the propriety of restricting one's right to procreate as a condition of probation or parole. Thus it has yet to be finally resolved whether this right can be infringed under certain circumstances. Nevertheless although various courts have invalidated this condition for various reasons, including the impracticality of enforcing such a condition, underlying each court's decision is the assumption that the right to procreate is a fundamental constitutional right and that the court will apply a strict scrutiny test for determining whether the state has demonstrated a compelling interest for validating this condition.

F. Travel

Another nonspecific but important right protected by the Constitution concerns travel. Banishment conditions, when challenged, are usually invalidated as against public policy and as not related to the offense.[40] Also, orders to deport a non-U.S. citizen as a condition of probation or parole have invariably been held to be invalid, principally on the grounds that said action by the court impermissibly infringes on the authority of the United States Immigration and Naturalization Service to make that determination.[41]

However, the limitation on travel within a city or region may survive where firmly linked to rehabilitative goals or if it bears a reasonable relationship to the offense for which the defendant was convicted or relates to the future criminality of the probationer or parolee. Moreover, a condition requiring a probationer or parolee to remain within a specified geographic region has generally been upheld as a valid exercise of the court's or parole board's authority. Finally, the use of the Interstate Compact to determine whether a state will provide courtesy supervision for a probationer or parolee convicted in another state does not constitute banishment.

However, requests to travel at the instigation of a parolee may well be denied without violating a constitutional right of the offender. In *Berrigan v. Sigler*,[42] war protestors challenged the federal parole board's denial of permission to make a trip to North Vietnam. This prohibition was upheld because it was consistent with the foreign policy interests of the United States and because it was necessary in order for the board to fulfill its duty to supervise those for whom it was responsible. Nevertheless if the action of the parole board to deny the offender a travel permit had solely been predicated on the content of the offender's speech, then the Court would have more closely scrutinized the action of the parole board.

G. Self-Incrimination

Conviction does not void or lessen a person's constitutional right not to testify against himself. Two courts of appeals, faced with probation conditions regarding self-disclosure on tax returns, clarified under what circumstances a probationer could be required to furnish incriminating information about

himself or herself. In one case, a probationer had been ordered to file tax returns without claiming his fifth amendment privilege.[43] In the other, a probationer was ordered to file amended tax returns.[44] The first of these conditions was held to be improper, while the second was approved. In the latter case, while the filing of amended returns was called for—and presumably complete returns were what the court had in mind—there was no attempt to interfere with the probationer's possible exercise of a constitutional right; he could comply with the condition, literally, and on the amended return claim his fifth amendment privilege. This would not violate the condition. Hence, probation could not be revoked for exercising an explicit right. In the former case, however, for the mere assertion of the right not to incriminate himself, the probationer would open himself up to revocation.

Another fifth amendment issue arises when the probationer or parolee is required by a condition (regular polygraph tests, for example) to disclose information that could be used against him in a new criminal proceeding. In such circumstances, the result of a fifth amendment challenge to the condition has turned on the following: (1) whether the government could reasonably have expected incriminating evidence to be forthcoming; (2) whether use immunity was promised; and (3) whether fifth amendment rights were voluntarily, knowingly, and intelligently waived.

In *Minnesota v. Murphy*,[45] the Supreme Court recognized that although a person on probation could not be compelled to waive his or her fifth amendment right against self-incrimination, the State, i.e., a probation officer, could ask an incriminating question to a probationer, and the probationer, if he or she voluntarily answered the question, would have waived any complaint that his or her fifth amendment right against self-incrimination was violated. In *Murphy*, the defendant had been granted probation for the offense of false imprisonment. Prior to the commission of this offense, the defendant had been suspected of raping and murdering a teenage girl. One of the conditions that the trial court imposed in his probation case was that the defendant attend sex offender counseling. While in counseling, the probationer admitted to his therapist that he had, indeed, murdered the girl. The therapist then contacted his probation officer regarding this admission, and the officer requested that the defendant report to her office. While visiting with his probation officer, the defendant admitted that the statement he had made in therapy was true. This statement was used to convict him of the murder of the teenage girl.

The defendant argued before the United States Supreme Court that he should have been Mirandized prior to being interviewed by his probation officer about the statement he made to his therapist. Moreover, the defendant argued that his incriminating statement should not have been introduced in his murder trial because the questioning by his probation officer was violative of his fifth amendment right against self-incrimination. The Supreme Court noted that the defendant was not under any form of custody at the time he was in his probation officer's office. This was so, even though if the probationer had failed to report to the office, his probation could have been revoked. Since he was not in custody, the Court therefore held that he need not have been administered a *Miranda* warning.

The Supreme Court next turned to the issue concerning whether the introduction of his incriminating statement at his murder trial violated his fifth amendment rights. The Court noted that, in most circumstances, a state agent is free to ask a question that may elicit an incriminating response. Moreover, the Court stated that ordinarily, the right against self-incrimination is not self-executing. In other words, a person must expressly invoke this right or it is waived. Thus the Court concluded that when the probationer

in *Murphy* openly admitted his guilt without asserting his fifth amendment right, he waived any complaint that any response to the question would violate his right against self-incrimination. Hence the Court held that this statement could be introduced in his trial for murder.

The issue that the Court never reached in *Murphy* concerned the legal implications if a probationer explicitly refused to answer a question propounded by his probation officer on the grounds that it might incriminate him. The Court touched upon this matter in a footnote in *Murphy* by stating:

> [A] state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's right to immunity as a result of his compelled testimony would not be at stake, "and nothing in the Federal Constitution would prevent a state from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as one of a number of factors to be considered by a finder of fact in determining whether other conditions of probation have been violated. . . ." *Id.* 1147 n. 7

The Court further stated:

> A defendant does not lose this [fifth amendment] protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than for which he has been convicted. *Id.* 1142

Nevertheless, the Court in *Minnesota v. Murphy* did not completely resolve this final issue, and the above-cited footnote has more often perplexed other appellate courts confronted with this issue than it has aided them.[46] Thus courts have struggled with the issue of whether, if a probationer (or parolee) invokes his or her fifth amendment right, a statement can still be compelled and introduced in a revocation proceeding but not another criminal prosecution. Must a probationer (or parolee) be granted immunity from prosecution in another case in order to be compelled to answer any incriminating question to his or her probation (or parole) officer? Can the refusal to answer an incriminating question that may link the probationer to another crime still be grounds to revoke his or her probation?

Despite these unresolved questions, *Minnesota v. Murphy* does establish several legal principles. One, a probationer or parolee is not entitled to a *Miranda* warning prior to being interviewed by his or her supervision officer concerning the conditions of his or her release. Moreover, a probationer or parolee cannot be compelled to incriminate himself or herself in another criminal action; nor can he or she be required to waive his or her fifth amendment right against self-incrimination. Finally, if a probationer or parolee voluntarily responds to a question from his or her supervision officer, that statement can be used for any purpose.

H. Some Specific Conditions and Their Legal Status

1. Shaming or Public Notification

One recent trend in the field of probation and parole law concerns the imposition of conditions of supervised release for the purpose of either shaming an offender or at least notifying the community of the nature of the offender's conviction. Conditions of these types are better known as "scarlet letter" conditions. Over the last decade, public notification laws have been enacted throughout

the country to inform the public of the residence of sex offenders. These laws vary from state to state, with some laws requiring information regarding the residence of a sex offender published in a local newspaper and others requiring residents living near a convicted sex offender to be individually notified of the residence of the offender. Although the legislative purpose of these laws is to protect the community by informing persons of potentially dangerous offenders living in their midst, these laws have a tendency to shame the offender because often the identify of these offenders, including their photograph, and a description to the crime they committed are made public through either a newspaper or a Web site on the Internet.

A more controversial condition of probation or parole is one that requires an offender to personally proclaim his or her guilt to the public. Appellate courts in the country are sharply divided regarding the validity of such a condition. Several jurisdictions have approved the imposition of scarlet letter conditions. In *Goldschmitt v. State*,[47] a trial court ordered a probationer, convicted of drunk driving, to place a bumper sticker on his car reading "Convicted D.U.I.—Restricted Licensee" as a condition of probation. The appellate court upheld the imposition of this condition, stating that it served a sufficient rehabilitative purpose and that it did not constitute cruel and unusual punishment. In *Ballenger v. State*,[48] a Georgia appellate court upheld the imposition of a condition requiring a probationer to wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT."

Nevertheless a number of jurisdictions have disallowed the imposition of scarlet letter conditions. In *People v. Heckler*,[49] the trial court imposed a condition on a probationer, convicted of shoplifting, that he wear a T-shirt bearing a bold, printed statement of his status as a felony theft probationer whenever he was outside his actual living quarters. The appellate court, relying on state constitutional grounds, found that this condition impinged upon his inalienable right to privacy. The Court further noted that this condition, which required him to wear this T-shirt whenever he was outside his home, would undermine certain other aims of his probation, such as procuring gainful employment and staying employed.

In another case, *People v. Meyer*,[50] a trial court ordered a defendant to erect at his home a 4- by 8-foot sign with 8-inch-high lettering that read "Warning! A Violent Felon Lives Here. Enter at Your Own Risk!" The Illinois Supreme Court found that the purpose of this sign was to inflict humiliation on the probationer. The court further noted that the statutory provisions for probation in the State of Illinois did not include humiliation as a punishment. Thus, the court disallowed this condition. Finally, in *People v. Letterlough*,[51] the New York Court of Appeals rejected the imposition of a condition that the defendant affix to the license plate of any vehicle he drove a fluorescent sign stating "Convicted DWI" on the grounds that this condition was not reasonably related to the defendant's rehabilitation and only the legislature had the authority to create a new form of punishment, to wit, humiliation.

These cases indicate a split in the jurisdictions of the country. Those courts that have disallowed the imposition of scarlet letter or shame conditions have usually done so on the grounds that the trial court exceeded its statutory authority in doing so, thus leaving open the question that a state legislature could amend its probationary statutes and authorize a trial court to impose a scarlet letter condition. Only a court in the State of California has disallowed the imposition of a scarlet letter condition on constitutional grounds, and in that instance, the court found the condition to be invalid on state constitutional grounds and not on federal constitutional grounds.

Those jurisdictions that have upheld this condition have done so on the grounds that this condition furthers the rehabilitation

aims of probation by deterring the offender from committing future crimes of the same nature as the one for which he or she was convicted. These courts have also held that shame or scarlet letter conditions do not violate the eighth amendment's proscription against cruel and unusual punishment. Nevertheless the United States Supreme Court has yet to rule on this matter, so the issue concerning whether a scarlet letter condition violates the eighth amendment to the United States Constitution has yet to be conclusively resolved.

2. Polygraphs

Another recent trend in the imposition of certain conditions of release is the requirement that a probationer or parolee submit to a polygraph examination. This condition has been increasingly utilized throughout the country, especially for sex offenders. Courts have generally considered the use of polygraphs for three purposes: (1) as an aid to treatment or counseling; (2) as a means to enforce other conditions of supervision imposed by the court or parole board; and (3) as an investigative tool to detect the commission of further crimes. Although courts in a number of jurisdictions have approved the use of polygraphs as a condition of release, courts have not necessarily approved their use for all of the above-stated purposes. Some courts have limited the use of polygraphs only as an aid to further the rehabilitative treatment of an offender, while other courts have condoned the use of polygraphs for much more expansive purposes.

One court case that has recently ruled on the use of polygraph examinations as a condition of probation and has approved its use for all of the above-stated purposes is *ex parte Renfro*.[52] In this case, the defendant was on probation for the offense of indecency with a child. Midway through the term of his probation, the trial court modified his conditions by requiring him to submit to a polygraph examination every 6 months. The defendant appealed the imposition of this condition, arguing that the only purpose that the court could impose this condition was to further his treatment as a sex offender and that he had already completed his court-ordered counseling.

The appellate court considered the various purposes for which a trial court could impose this condition. The Court noted that the polygraph condition helped to monitor compliance with certain other conditions imposed by the trial court, to wit, restricting the defendant's contact with young children. The Court also noted that because this condition was aimed at deterring and discovering criminal conduct most likely to occur during unsupervised contact with minors, the condition was reasonably related to future criminality. Thus the appellate court approved the imposition of this condition for reasons other than to further the treatment of the probationer and rejected his contention that this modified condition was invalid.

3. Work as a Condition—Paid or Unpaid Volunteer

It is a common practice to require probationers or parolees to hold employment and/or perform community service work. While such conditions are routinely upheld, they create potential liability issues. In the case of a paid employee who is injured or causes injury on the job, normal rules of respondeat superior, to wit, that the superior is responsible for what a subordinate does, may create liability.

However, in the case of a volunteer work assignment, who would be liable? Volunteers may not be covered by community agency liability or medical insurance. Workmen's compensation protection may not apply to volunteers. Ohio[53] requires offenders to pay a fee for liability insurance. Minnesota statutorily covers probationers under a state compensation plan for injured workers.[54] Texas, on the other hand, specifically excludes probationers performing community service from worker's compensation coverage.[55]

Where the court requires work as a condition, judges are usually protected from liability by an absolute immunity. Parole boards enjoy a qualified immunity. Probation and parole officers share those immunities insofar as they are exercising professional discretion.

While there is as yet no precedent for guidance, it is likely that a community service volunteer could do grievous harm to a party who could then find no defendant capable of redressing the injury. Would a probation or parole officer be liable for arranging a placement without also arranging for insurance protection? Would failure to insure or to make placements in an agency insuring volunteers be considered ministerial and, thereby, unprotected by traditional legal principles of immunity? To avoid potential liability, probation agencies might purchase insurance to cover volunteer work by offenders.

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III. VAGUENESS AND REASONABLENESS AS LIMITATIONS

A. Vagueness

Courts have settled on no standard for interpreting ambiguous conditions. Because such conditions may impinge upon constitutional rights, probationers and parolees (or their attorneys) may seek interpretation from probation and parole officers. Judicial review of conditions, usually in the context of revocation hearings, will generally incorporate officers' interpretations of conditions. Officers, therefore, would find it useful to make a written record of their interpretations or, in order to prevent the need for judicial review, to request the sentencing court or parole board imposing the vague condition for an interpretation.

The degree in which an appellate court reviewing the imposition of a particular condition of probation or parole would deem that condition too vague for enforcement purposes varies from jurisdiction to jurisdiction. Nevertheless if a parole or probation officer is unable to make an objective and reasonable interpretation of a condition, then that officer should petition the court or parole board imposing that condition to clarify its meaning and possibly to modify the condition in order to remove any vagueness or ambiguity about it. Nevertheless, no matter how clearly an officer understands the tenor of the condition, if the officer does not convey that understanding of the condition to the person the officer is supervising and ascertain that the offender understands what is expected of him or her, then it is doubtful that an appellate court would uphold any sanction imposed by the sentencing court or parole board for a violation of that condition. (see section IV, Explanation of Conditions, in this chapter).

B. Reasonableness

In addition to the requirements that a condition be related to rehabilitation of the offender and that it not unduly interfere with constitutional rights, the courts seem to insist that a challenged condition meet a general test of reasonableness before it can be enforced. "Reasonable" may vary from jurisdiction to jurisdiction. For example, some jurisdictions hold that if the condition does not directly relate to the offense for which the offender was convicted, the condition cannot be imposed.[56] Other jurisdictions allow more leeway for the imposition of conditions, especially if those conditions directly or indirectly contribute to the rehabilitation of the offender.[57]

The following conditions have fallen, apparently because there is such a test:

1. A probationer was ordered to abstain from alcohol for 5 years. Evidence that he was an alcoholic led the court to deny probation revocation when the condition was violated.[58]

2. A former serviceman convicted of accepting kickbacks was placed on probation on condition that he forfeit all personal assets and work without compensation for 3 years, or 6,200 hours. The condition was struck down as unduly harsh in its cumulative effect.[59]
3. A probationer was ordered to reimburse the government for the cost of court-appointed counsel and a translator. The condition was held unconstitutional because it was not made excusable if the probationer lacked the ability to pay.[60]
4. A probationer was ordered as a condition of probation to maintain a clean house and to keep her children clean. This condition was struck down because it did not relate to the defendant's behavior, which gave rise to her conviction for larceny and drug crimes.[61]

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IV. EXPLANATION OF CONDITIONS

Probationers and parolees must have knowledge of the conditions they are expected to follow. Case law suggests the wisdom of establishing the regular practice of providing the offender with a copy of the release conditions.[62] But courts will generally infer a condition prohibiting criminal acts.[63]

One case speaks to the issue of explanation of conditions, distinguishing that duty from that of merely informing. In *Panko v. McCauley*,[64] a condition was held to be unconstitutionally vague as applied to the petitioner. The condition forbade the petitioner from "frequenting" establishments selling alcoholic beverages. The condition was struck down, since there was no evidence that the petitioner understood that the term "frequent" meant "visit." This case implies that there may be a duty to explain conditions.

Even if there is a duty to explain conditions sufficiently to assist the offender in avoiding unintentional violations, the scope of the duty is apt to be limited by a reasonableness concept. It is not likely, for example, that the officer will be required to anticipate and warn against every possible type of violation. In a Ninth Circuit case in which revocation of probation was being appealed, the probationer defended his actions in part by asserting that he had no specific notice that training foreign military personnel would be charged as a violation of conditions (it was admitted that no law was violated, technically). The court of appeals was satisfied that the comments of the judge condemning the probationer's former life as a mercenary, together with the probation officer's warning to get rid of his guns and other comments, were sufficient to notify the probationer of what behavior was expected of him while on probation.[65]

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V. MODIFICATIONS OF CONDITIONS

Modifications of the conditions of probation or parole usually occur whenever there is a change in circumstances involving the person under supervision. The court or parole board may impose a modified condition of probation for rehabilitative purposes (e.g., to address a previously unidentified or new need of the probationer or parolee), or for punitive purposes (e.g., to apply a sanction for a violation of the initial conditions of probation or parole). Another reason the modifications may occur is to resolve any ambiguity in a previously imposed condition. Finally, certain conditions may have to be modified to conform to a newly enacted legislative enactment (e.g., a new sex offender registration requirement).

Modification may be requested by the person under supervision or by the field officer assigned the case by the supervisory court

or parole board. In lesser instances, the modification may be initiated by the supervisory court or the parole board on its own. Modification may be toward easing conditions, or toward adding, clarifying, or extending them. Typically, field officers seek additional restrictions or increased supervision to enhance the likelihood of the offender's progress.

Because parole and probation officers may regularly initiate revocation hearings, it is normally assumed such officers have the right to suggest the need for modification or change of conditions to the court or the parole board. In a few jurisdictions, parole and probation officers themselves have the power to modify conditions. In these jurisdictions, the officer may go ahead and modify the conditions, but only if it is clear that authority to modify conditions is given to the officer. In the past, the National Advisory Commission on Criminal Justice Standards and Goals has recommended that parole officers be authorized to carry out their requested modifications pending parole board approval.[66]

Most jurisdictions, by either legislation or court decisions, do not authorize officers to modify conditions on their own. Since this act is generally considered a judicial or board function, most jurisdictions in the country hold that, absent an express statutory authorization to the contrary, any modification by an officer would be an improper delegation of authority.[67] In reality, however, many judges do in fact delegate to the officer the power to modify or change conditions, or to specify the details of an imposed condition (such as the need for psychological treatment). It is also a common practice for judges to provide that the probationer may be subject "to such other conditions as the probation officer may deem to impose."

Modifying or changing probation conditions by the officer alone, without authorization, must be avoided if at all possible. It is proper for the officer to suggest that conditions be modified or changed, but unless otherwise clearly authorized, only the judge or board should make that change. If change or modification by the officer is unavoidable (either because that judge insists on such delegation despite invalidity or because of emergency conditions), the officer is best protected against liability by putting the modification or change in writing and making sure that the offender accepts the condition in writing. Once this is done, a copy should be sent to the judge or board to inform this authority of the change.

In sum, officers should not modify or change conditions unless clearly authorized by law or court decisions. As much as possible, modifications or changes must be done by the judge or court because they enjoy absolute immunity, whereas the officer does not.

There appear to be no clear due process standards for modification. Case law suggests notice is probably necessary; however, it is ambiguous as to the right to a hearing.[68] In those instances in which a hearing may be required, state statute usually imposes this mandate.[69] Moreover, whether there must be a showing that the offender violated one or more of the conditions imposed in order to modify the conditions of supervision or whether the sentencing court or parole board may do so upon a determination that such a modification would be in the best interests of the offender or society is largely controlled by state law.[70] Whether a liberty interest may be at stake is as yet untested except by analogy to the weak authority of the rescission cases.

As parole and probation officers raise their professional standards, the possibility of an implied duty to seek modification may arise. If, for example, a probationer or parolee is obviously in need of a different supervision than that originally deemed appropriate, a resulting victim—injured by the inadequately supervised offender—may allege that failure to seek modification is an act of negligence, implying liability. For this reason,

it is crucial for officers to be aware of the supervisory authority granted them by their particular jurisdiction.

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VI. EXTENSION

Conviction of an offense allows the state to intervene in the offender's life in specific ways authorized by statute. These limits are in general rigidly observed because of the severe nature of the infringements they impose on the rights of individuals. A corollary of this rule is that once service of sentence has begun, it is not subject to detrimental modification (absent special circumstances not relevant here).[71] It also follows that once a sentence has been served, jurisdiction is lost over the offender.

To what extent do grants of probation and parole provide authority to prolong a period of actual confinement beyond the duration originally set? One possibility, which the courts have not adopted, is to consider probation and parole time as the equivalent of confinement, thus freeing the offender at the end of the original period. While the states vary on the extent to which they give credit for street time against the period of actual confinement, there is agreement that entry into probation or parole status extends the time during which consideration may be given to imprisoning or reimprisoning the offender.

The question concerning what authority the court or parole board has to take action against an offender after the period of supervision has expired arises in several situations. In one, proceedings are begun to revoke probation or parole within the probation or parole term. In this case, even when the proceedings are not completed within the usual period, the new decision is given effect as long as the delay was not due to a lack of diligent prosecution on the state's part. Thus, a parolee who absconds from supervision,[72] or a probationer who seeks continuances that delay the hearing,[73] is not permitted to object that the proceedings and decision are untimely. Similarly, a New Jersey court held that the time for revoking New Jersey parole was extended during the period the offender was serving a New York sentence imposed while the offender was on parole, even though the New York court made the sentence concurrent with the original New Jersey sentence.[74]

An issue also arises when a new sentencing law comes into effect after an offender's conviction. Here, a different result is apt to occur. For example, California courts have held[75] that new penal laws extending the period of parole supervision may not be given retroactive effect, at least for those paroled under the more favorable terms of prior law. To do otherwise would run afoul of the ex post facto clause of the Constitution, the courts said.

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VII. TERMINATION

The federal parole law provides that parole does not end automatically at the conclusion of the term ordered, but continues until affirmatively granted after a termination hearing. The statute provided the hearing had to be held within 5 years when *Robbins v. Thomas*[76] arose. In that case, the hearing was 5½ years after parole was granted. On the day after the hearing, but before the parole commission made a decision on termination, Robbins was arrested on a new charge. The parole commission reopened its file to give consideration to this fact and decided to extend parole. Robbins argued that the commission was without power to consider anything occurring after 5 years or, in any event, after the termination hearing. The Ninth Circuit Court of Appeals disagreed, finding that until actual termination the commission could—indeed, was expected to—consider relevant evidence.

The court went on to rule that the procedures to be followed in such cases were equivalent to those provided for revocation hearings. While the decision not to terminate parole does not deprive a parolee of his conditional liberty, which would activate *Morrissey* rights, the statute appears to make termination automatic in the absence of an affirmative finding that the parolee is unlikely to respect the law. Thus, there is more than a "mere expectation" of the termination benefit, and some process is clearly due. Other courts could well choose a less-than-*Morrisey* standard, however.

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VIII. CHANGES IN STATUS OF THE OFFENDER

Generally there are three legal avenues under which a probationer or parolee may be required to provide notice of a change of status. An offender may be required to provide information regarding a change of status either (1) as a condition of release or (2) pursuant to a departmental policy of the supervising agency. Third, an offender may be required to provide notification of a change in status in accordance with a statutory mandate. These notification requirements may require a probationer or parolee to report status changes either to the court or parole board, the officer supervising the offender, or even to a third party.[77]

Ordinarily, conditions requiring a probationer or parolee to report changes of status have been upheld on appeal. This is especially true if the condition requires the offender to report changes in status that may have a bearing on the enforcement of the other conditions of supervision or may affect the likelihood of successfully rehabilitating the offender. In addition, Courts have generally approved an administrative policy established by the officer or agency supervising the offender that requires the offender to report to the officer or agency any changes in the offender's status. Courts have deemed that such an administrative policy does not constitute an improper usurpation of judicial or board authority but, instead, have held that such a policy is reasonably and necessarily related to the authority of the supervising agency to enforce the conditions imposed by the court or board.

Finally, a state statute may mandate that a probationer or parolee (or his or her supervision officer) provide notification of any change in his or her status. State legislatures increasingly have been enacting notification statutes requiring sex offenders to provide information on any change in their status. For example, the State of Texas has passed a statute providing that if a juvenile or adult probation officer or a parole officer supervising a person required under state law to register as a sex offender receives information to the effect that the person's status has changed in any manner that affects proper supervision of the person, including a change in the person's physical health, job status, incarceration, or terms of release, the supervising officer shall promptly notify an appropriate local law enforcement authority of that change.[78] Because of the inherent sensitivity of information bearing on the status of an offender, it is strongly recommended that probation and parole officers strictly follow the mandates established by a statute, court order, or administrative policy regarding the release of any information concerning a change in status and do not deviate from the statutory, judicial, or office procedures controlling the disclosure of such information.

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SUMMARY

This chapter has examined several issues concerning the setting of conditions of probation and parole. While there is rarely

any dispute concerning conditions, problems can arise when a special condition either infringes upon a fundamental constitutional right or is not clearly associated with a rehabilitative purpose. The so-called fundamental rights, such as "free speech" and "free exercise of religion" are given special treatment by the Courts.

In the view of the United States Supreme Court, any right so essential to our concept of liberty that to do away with it would fundamentally alter our political and social system is a fundamental right. Restrictions in these areas will always be considered "suspect"; that is, such conditions will be given a stricter review than other restrictions. Often validation of a condition is dependent upon supplying the reviewing court with sufficient information to link the government's interest in rehabilitation with the challenged condition.

A few jurisdictions authorize officers to modify or change conditions, but most jurisdictions do not. Unless clearly authorized by law or court decisions, an officer should not modify or change conditions because possible liability attaches should such conditions turn out to be unconstitutional or injurious to the offender or a third party.

No clear due process standards have been set for modification, but case law suggests that notice is probably necessary. Moreover, extensions of probation or parole are generally frowned upon because they constitute further deprivations of freedom. Also, when probation/parole actually terminates is governed by state law, not by a constitutional standard.

Reporting requirements necessitating that a probationer or parolee inform either his supervision officer or the court or parole board of a change of status have generally been deemed a valid exercise of the authority of the court/parole board or supervisory agency. Nevertheless, probation and parole officers need to be aware of any statutory mandates requiring probationers or parolees to provide information concerning any change in their status. Finally, supervision officers must exercise extreme caution in disclosing information regarding the change in status of a probationer or parolee.

Notes

1. *See* United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir. 1975). *See also*, Poth v. Templar, 453 F.2d 330 (10th Cir. 1971).

2. *See* State v. Maas, 41 Or. App. 133, 597 P.2d 838 (1979), where the Oregon Court ruled that a probation condition added by a probation officer could not serve as the basis for revocation because the officer had no authority to add conditions.

3. *See* Morrissey v. Brewer, 408 U.S. 471 (1973).

4. *See* Lacy v. State, 875 S.W.2d 3 (Tex. App. Tyler, 1994).

5. On December 31, 1998, approximately 3,417,600 adults were under federal, state, or local jurisdiction on probation and nearly 705,000 were on parole. See Probation and Parole Statistics, Bureau of Justice Statistics, U.S. Department of Justice, at *www.ojp.usdoj.gov/bjs/pandp.html*.

6. *See* Knight v. State, 593 So. 2d 1202 (Fla. App. 1992), in which a Florida appellate court ruled that a probation condition requiring the probationer "to show respect to officers connected with the criminal justice system" was too vague to inform the probationer of what conduct was acceptable or unacceptable.

7. *See* Morrissey v. Brewer, 408 U.S. 471 (1973).

8. The United States Supreme Court has recognized that even in a prison setting, inmates still retain certain fundamental rights. In Wolff v. McDonnell, 94 S. Ct. 2963 (1974), the Supreme Court stated that "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime."

9. Sobel v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971).

10. *Id*. at 1304.

11. *Id*. at 1303.

12. *Id*. at 1306.

13. Hyland v. Procunier, 311 F. Supp. 749 (N.D. Cal. 1970). *See also*, United States v. Lowe, 654 F.2d 562 (9th Cir. 1981); Barlip v. Commonwealth Board of Probation and Parole, 45 Pa. Commnw. 458, 405 A.2d 1338 (1979); State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766 (1982).

14. 311 F. Supp. 749 (N.D. Cal. 1970) at 750.

15. *Id*. at 750-751.

16. Porth v. Templar, 453 F.2d 330 (10th Cir. 1971).

17. Note, Fourth Amendment Limitations on Probation and Parole Supervision, 1976 Duke L. J. 71, 75 (1976).

18. Porth v. Templar, 453 F.2d at 76.

19. Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971). Accord, United States v. Patterson, 627 F.2d 760 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1378 (1981).

20. United States v. Furukawa, 596 F.2d 921 (9th Cir. 1979).

21. United States v. Tonry, 605 F.2d 144 (5th Cir. 1979).

22. Commonwealth of Massachusetts v. Power, 420 Mass. 410, 650 N.E.2d 87 (1995).

23. United States v. Crandon, 173 F.3d 122 (3d Cir. 1999). *See also*, State v. Riley, 121 Wash. 2d 22, 846 P.2d 1365 (1993), where the appellate court approved the imposition of a condition of probation forbidding the defendant, convicted of computer trespass, from associating with other computer hackers and communicating with computer bulletin boards.

24. *See* United States v. Bird, 124 F.3d 667 (5th Cir. 1997). *See also*, Crabb v. State, 754 S.W.2d 742 (Tex. App. Houston [1st Dist.], 1988).

25. *See* Rich v. State, 640 P.2d 159 (Alaska Ct. App. 1982); Whitehead v. State, 645 S.W.2d 482 (Tex. Crim. App. 1982); People v. Warren, 89 App. Div. 501, 452 N.Y.S.2d 50 (1982).

26. *See* Watson v. State, 17 Md. App. 263, 301 A.2d 26 (1973); Glenn v. State, 168 Tex. Crim. 112, 327 S.W.2d 763 (1959); Dulin v. State, 169 Ind. App. 211, 346 N.E.2d 746 (1976).

27. *See* O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987).

28. *See* Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946). *See also*, L.M. v. State, 587 So. 2d 1202, (Fla. App. 1992).

29. Warner v. Orange County Department of Probation, No. 1760 (2d Cir. 1996), decided September 9, 1996.

30. *See* Griffin v. Coughlin, WL 317180 (N.Y. June 11, 1996), in which the New York Court of Appeals made a ruling similar to that of the 2d Court of Appeals in Warner v. Orange County.

31. *See* West v. State, 160 Ga. App. 855, 287 S.E.2d 694 (1982). *See also* State v. Martin, 282 Or. 583, 580 P.2d 536 (1978); *In re* Peeler, 266 Cal. App. 2d 483, 72 Cal. Rptr. 254 (1968); and State v. Thomas, 428 So. 2d 950 (La. Ct. App. 1983).

32. *See* State v. Livingston, 53 Ohio App. 2d 195, 372 N.E.2d 1335 (1976); Skinner v. Oklahoma, 316 U.S. 535 (1942); People v. Dominguez, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967).

33. *See* Wiggins v. State, 386 So. 2d 46 (Fla. Dist. Ct. App. 1980); Michalow v. State, 362 S.2d 456 (Fla. Dist. Ct. App. 1978).

34. *See* People v. Dominguez, 256 Cal. App. 2d 627. 64 Cal. Rptr. 290 (1967). *See also*, L.M. v. State, 587 So. 2d 1202 (Fla. App. 1992).

35. People v. Pointer, 199 Cal. Rptr. 357 (Cal. App. 1st Dist. 1984).

36. Thomas v. State, 519 So. 2d 1113 (Fla. App. 1st Dist., 1988).

37. People v. Ferrell, 659 N.E.2d 992 (Ill. App. 4th Dist. 1995).

38. U.S. v. Smith, 972 F.2d 960 (8th Cir. 1992).

39. State v. Kline, 963 P.2d 697 (Or. App. 1998). *See also*, Krebs v. Schwartz, 568 N.W.2d 26, 212 Wis. 2d 127 (Wis. App. 1997), where the appellate court approved a condition requiring a defendant convicted of sexually assaulting his daughter to discuss and obtain permission from his probation officer prior to engaging in a sexual relationship.

40. People v. Baum, 251 Mich. 187, 231 N.W.95 (1930) (banishment from state for 5 years); People v. Smith, 252 Mich. 4, 232 N.W.397 (1930) (move to another neighborhood). *See also*, State *ex rel*. Halverson v. Young, 278 Minn 381, 154 N.W.2d 699 (1967); Flick v. State, 159 Ga. App. 678, 285 S.E.2d 58 (1981), State v. Gilliam, 274 S.C. 324, 262 S.E.2d 923 (1980); Carchedi v. Rhodes, 560 F. Supp. 1010 (S.D. Ohio 1982).

41. Hernandez v. State, 613 S.W.2d 287 (Tex. Cr. App. 1981). *See also*, Martinez v. State, 627 So. 2d 542 (Fla. App. 1993).

42. Berrigan v. Sigler, 358 F. Supp. 130 (D.D.C. 1973), *aff'd* 499 F.2d 514 (D.C. Cir. 1974). *See also*, Dukes v. State, 423 So. 2d 329 (Ala. Crim. App. 1982) (person convicted of theft from certain store ordered to stay out of that store during probation term); State v. Churchill, 62 N.C. App. 81, 302 S.E.2d 290 (1983) (cab driver guilty of trespassing at bus station ordered to stay away from bus station and adjoining restaurant unless traveling by bus with permission of probation officer). *But, see, In re* White, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979) (affirming, under the California Constitution, the "basic human right" of intrastate travel).

43. United States v. Conforte, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

44. United States v. McDonough, 603 F.2d 19 (7th Cir. 1979). *See also*, State *ex rel.* Halverson v. Young, 278 Minn. 381, 154 N.W.2d 699 (1967); Flick v. State, 159 Ga. App. 6778, 285 S.E.2d 58 (1981); State v. Gilliam, 274 S.C. 324, 262 S.E.2d 923 (1980); Carchedi v. Rhodes, 560 F. Supp. 1010 (S.D. Ohio 1982).

45. Minnesota v. Murphy, 104 S. Ct. 1136 (1984).

46. For examples of the problems courts have had in resolving this matter, *see* Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992); United States v. Ross, 9 F.3d 1182 (7th. Cir. 1993), *judgment vacated on other grounds*, 511 U.S. 1124 (1994); and Idaho v. Crowe, 952 P.2d 1245 (Idaho 1998).

47. Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986). *See also*, Lindsay v. State, 606 So. 2d 652 (Fla. App. 4th Dist. 1992).

48. Ballenger v. State, 436 S.E.2d 793 (Ga. App. 1993).

49. People v. Heckler, 16 Cal. Rptr. 2d 681, 13 C.A. 4th 1049 (1993).

50. People v. Meyer, 176 Ill. 2d 372, 680 N.E. 315 (1997).

51. People v. Letterlough, 655 N.E.2d 146 (N.Y. 1995).

52. *Ex parte* Renfro, 999 S.W.2d 557 (Tex. App. Houston [14th Dist.], 1999). Other jurisdictions that have upheld the validity of polygraph examinations as a condition of probation where the probationer is convicted of a sex crime are as follows: State v. Lumley, 267 Kan. 4, 977 P.2d 914 (1999); Cassamassima v. State, 657 So. 2d 906 (Fla. Dist. Ct. App. 1995); State v. Tenbusch, 131 Or. App. 634, 886 P.2d 1077, *cert. denied*, 116 S. Ct. 133 (1995); and People v. Miller, 208 Cal. App. 3d 1311, 256 Cal. Rptr. 587 (Cal. Ct. App. 1989).

53. Ohio Rev. Code Ann. Sec. 2951.02 (g).

54. Minn. State. Ann. Sec. 3.739 (West).

55. Vernon's Tex. Ann. Code Crim. Proc., art. 42.12, sec. 16(c).

56. *See* Turner v. State, 666 So. 2d 212 (Fla. App. 2d Dist. 1995), in which the appellate court held that the trial court could not order the defendant to submit to drug evaluation and treatment for an offense that was not alcohol or drug related.

57. *See* Vernon's Annotated Texas Code of Criminal Procedure, art. 42.12, sec. 11(a), which authorizes the trial court to impose any reasonable condition that is designed to protect or restore the community; protect or restore the victim; or punish, rehabilitate, or reform the defendant.

58. Sweeny v. United States, 353 F.2d 10 (7th Cir. 1967). *See also*, Turner v. State, 666 So. 2d 212 (Fla. App. 2d Dist. 1995).

59. Higdon v. United States, 627 F.2d 893 (9th Cir. 1980). *Compare*, United States v. Arthur, 602 F.2d 660 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979) (former bank president who misapplied bank funds properly required to accept employment without salary for 2 years).

60. United States v. Jiminez, 600 F.2d 1172 (5th Cir.), *cert. denied*, 444 U.S. 903 (1980). *See also*, State v. Asher, 40 Or. App. 455, 595 P.2d 839 (1979); State v. Langford, 12 Wash. App. 228, 529 P.2d 839 (1974).

61. State v. Graham, 636 A.2d 852, 33 Conn. App. 432 (1994).

62. Bennett v. State, 164 Ga. App. 239, 296 S.E.2d 787 (1982); Acosta v. State, 640 S.W.2d 381 (Tex. Crim. App. 1982); Meredith v. Raines, 131 Ariz 244, 640 P.2d 175 (1982) (oral notice of parole conditions permissible, but must be written notice for probation conditions).

63. *See* Joynes v. State, 437 N.E. 137 (1982); Shaw v. State, 164 Ga. App. 208, 296 S.E.2d 765 (1982) (past experiences on parole or probation source of knowledge of condition requiring obedience to law). *But, see also*, Neely v. State, 7 Ark. App. 238, 647 S.W.2d 473 (1983), *contra* (probationer not given list of conditions barring illegal act).

64. Panko v. McCauley, 473 F. Supp. 325 (C.D. Wisc. 1979). Information as well as explanation are statutorily required in some jurisdictions. *See, e.g.*, Mo. Ann. Stat. Sec. 549.237 (Vernon); N.Y. Exec. Law Sec. 257(4) (McKinney).

65. United States v. Dane, 570 F.2d 840 (9th Cir. 1977). *See also*, United States v. Dane, 587 F.2d 436 (9th Cir. 1978).

66. National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 12.7 (1973).

67. *See* In the interest of T.L.D., 586 So. 2d 1294 (Fla. App. 1991).

68. *See* United States v. Warden, 705 F.2d 189 (7th Cir. 1983), Forgues v. United States, 636 F.2d 1125 (6th Cir. 1980); Tyra v. State, 644 S.W.2d 865 (Tex. Crim. App. 1982); *In re* Appeal in Rinal County, Juvenile Action, 131 Ariz. 187, 639 P.2d 377 (Ct. App. 1981); State v. Simpson, 2 Ohio App. 3d 40, 440 N.E.2d 617 (1981); State v. Coltrane, 307 N.C. 511, 299 S.E.2d 199 (1983); Kelly v. State, 627 S.W.2d 826 (Tex. Crim. App. 1982).

69. *See* Russo v. State, 603 So. 2d 1353 (Fla. App. 1992).

70. *See* Malone v. State, 632 So. 2d 1140 (Fla. App. 1994).

71. *See* 541 F. Supp. 1253 (1st Cir. 1982); 560 F. Supp. 745 (2d Cir. 1983); 670 F.2d 507 (5th Cir. 1982); 699 F.2d 822 (6th Cir. 1983); 681 F.2d 1091 (7th Cir. 1982); 699 F.2d 387 (7th Cir. 1983); 555 F. Supp. 1344 (7th cir. 1983); 706 F.2d 1435 (7th Cir. 1983); 718 F.2d 921 (9th Cir. 1983); 534 F. Supp. 1015 (9th Cir. 1982); 678 F.2d 940 (11th Cir. 1982); 682 F.2d 1366 (11th Cir. 1982).

72. People *ex rel.* Flores v. Dalsheim, 66 A.2d 381, 413 N.Y.S.2d 188 (1979).

73. State v. Hultman, 92 Wash. 2d 736, 600 P.2d 1291 (1979).

74. Board of Trustees v. Smalls, 172 N.J. Super. 1, 410 A.2d 691 (1979).

75. *In re* Bray, 97 Cal. App. 3d 506, 158 Cal. Rptr. 745 (1979); Matter of Harper, 96 Cal. App. 3d 138, 157 Cal. Rptr. 759 (1979).

76. Robbins v. Thomas, 592 F.2d 546 (9th Cir. 1979).

77. For example, in People v. Gould, 662 N.Y.S.2d 520 (N.Y.A.D. 2 Dept. 1997), the appellate court approved the imposition of a condition on a probationer convicted of sodomy that he notify future employers of his conviction if he changes employment.

78. *See* Vernon's Annotated Texas Code of Criminal Procedure, chapter 62.05(a).

CHAPTER 8
Supervision

INTRODUCTION

Over the years, the potential liability for a field officer for improper supervision of offenders has risen. Besides the more common concerns of improper disclosure of information regarding the offender, the validity of searches and seizures, and fiduciary responsibilities arising from the collection of monetary payments from offenders, there has been an increasing concern for liability issues arising from the improper or negligent supervision of offenders. Under certain circumstances, not only may offenders file civil suits against an officer but also even victims of crimes may potentially assert a civil claim against an officer. This chapter examines these issues.

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I. SEARCH AND SEIZURE ISSUES IN SUPERVISION

Searches and seizures raise issues of important concerns for field officers who are supervising offenders. These concerns focus on the conditions of supervision requiring released offenders to waive fourth amendment protections regarding searches and seizures and on the legality of conducting warrantless searches of offenders in the absence of a condition authorizing an officer to do so. Such concerns appear fully justified by the complexity of the law in this area and by the frequency with which a search problem may be encountered. Officers need to be knowledgeable about applicable search and seizure law in their jurisdictions; parole and probation agencies must keep track of developments in this area and provide training on an ongoing basis.

A. *Griffin v. Wisconsin* Is the Leading Case

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Before 1987, various courts had grappled with the issue concerning whether warrantless searches and seizures could be performed on probationers and parolees and whether searches could be conducted on a standard of less than probable cause.

Courts that had allowed searches of probationers and parolees had done so based on a number of legal theories. A 1976 law review commentary observed that "in the past, courts have relied on express waivers by parolees or probationers, or have invoked the 'act of grace' and 'constructive custody' doctrines in order to strip released offenders of virtually all the fourth amendment guarantees afforded ordinary citizens."[1] Despite these various legal justifications that had been advanced by certain lower courts, it was not until 1987 that the United States Supreme Court examined this area involving fourth amendment rights.

In 1987, the Supreme Court came up with a decision that clarified this issue. In *Griffin v. Wisconsin*,[2] a defendant who had a prior felony conviction was convicted of resisting arrest, displaying disorderly conduct, and obstructing an officer, and the defendant was placed on probation. While the defendant was on probation, a probation officer received information from a detective that

the defendant had a gun in his apartment. A warrantless search did, in fact, reveal a handgun at the apartment. Consequently, the defendant was convicted of the offense of possession of a firearm by a convicted felon and sentenced to 2 years in prison.

Under Wisconsin law, probationers were placed in the custody of the State Department of Health and Social Services and made subject to conditions set by the court and to rules and regulations established by the department. One of the department's regulations permitted any probation officer to search a probationer's home without a warrant as long as his supervisor approved and as long as there were "reasonable grounds" to believe that contraband, including any item that the probationer could not possess under the probation conditions, would be found at the premises. Finally, the regulations set forth what factors an officer should consider in determining what constituted reasonable grounds. During the suppression hearing, the trial court ruled that a search warrant was not necessary to conduct the search, that the search itself was reasonable, and that the fruits of the search could be admitted as evidence in the trial.

The issues before the United States Supreme Court were whether a warrant was necessary in order for the officials to conduct a search of the probationer's apartment and whether the search itself was "reasonable" for purposes of the fourth amendment to the United States Constitution. The Court noted that a probationer's home, like anyone else's, was protected by the fourth amendment's requirement that searches must be "reasonable." However, the Court held that a search under these circumstances did not need to be made pursuant to a warrant. The Court found that the state's operation of a probation system presented "special needs" beyond normal law enforcement that could justify departures from the usual warrant requirement and that the supervision of probationers constituted a "special need" of the state that dispensed with the need to obtain a warrant in order to conduct a search of the probationer's home.

The Court further found that these special needs of the state justified a departure from the requirement that a search be based on probable cause. The Court stated that the special need to supervise a probationer permitted a degree of infringement upon the privacy of the probationer. Because of the nature of the probation system, it was proper for the state to replace the probable cause standard with a "reasonable grounds" standard as the test for justifying the search. Moreover, the Supreme Court stated that a determination of "reasonableness" was not based on a federal "reasonable grounds" standard. Instead, reasonableness was determined by a state court's finding that the search conformed to the regulations issued by the state. Since the Wisconsin state court found that the search was made pursuant to a valid regulation governing probationers, the Supreme Court held that the search of the defendant's residence was reasonable within the meaning of the fourth amendment.

While the *Griffin* decision resolved several questions regarding the legality of conducting warrantless searches of probationers and parolees, the Supreme Court left uncertain other matters that remain open for further consideration. First, although the Supreme Court recognized a reasonableness standard for conducting warrantless searches, the Court did not define what constitutes "reasonable." Instead, the Court held that reasonableness would be determined by the courts in individual states. Thus courts have since struggled with determining what level of suspicion gives rise to a reasonable standard for justifying a warrantless search of a probationer or parolee. Second, while the Court in *Griffin* found that Wisconsin's regulations in question permitting searches were "reasonable," the Court did not address whether a court-imposed condition, in lieu of an express regulation, permitting searches of probationers or parolees would be reasonable. Finally, the

Court did not address the issue concerning whether law enforcement officers could rely on a statute, regulation, or condition for conducting an independent search of a probationer or parolee, or whether only a supervision officer, either alone or accompanied by a law enforcement officer, could conduct the search. The following sections of this chapter will discuss how courts have addressed these unresolved matters.

B. Validity of Search as a Condition of Supervision

Although the United States Supreme Court in *Griffin* approved a search conducted pursuant to a state regulation and not imposed as a condition of supervision, numerous courts since the *Griffin* decision have approved a search conducted pursuant to a condition imposed by a court or board of parole. Nevertheless, a small minority of states still disapprove of warrantless search conditions imposed on probationers and parolees.[3] Moreover, several jurisdictions have limited the scope of a search conducted pursuant to a court order.

Most appellate courts that have approved of searches conducted in accordance with a condition imposed by a parole board or court have based their decisions on the legal theory that said condition is "consensual." These courts have stated that by accepting probation (or parole) in lieu of serving a prison sentence, the offender has agreed to a condition allowing a probation or parole officer to conduct a search of his person, residence, or automobile. One recent court decision that based its holding on this legal theory is *People v. Hale*.[4]

In *People v. Hale*, the defendant was convicted of criminally negligent homicide after having killed a woman in a boating accident while the defendant was intoxicated. The defendant entered a plea bargain agreement and was placed on probation. One of the conditions to which the defendant agreed was that:

> [Y]ou permit search of your vehicle and place of abode where such place of abode is legally under your control, and seizure of any narcotic implements and/or illegal drugs found, such search to be conducted by a Probation Officer or a Probation Officer and his agent.

Ten months into the probationary period, the defendant's probation officer received information that the defendant was dealing drugs at his home. The probation officer, accompanied by the defendant and by police officers, entered the defendant's house. In the ensuing search, the authorities discovered rifles, shotguns, illicit drugs, and a scale. The defendant was subsequently indicted on drug and weapons charges.

The defendant argued on appeal of his conviction that absent a search warrant, exigent circumstances, or a voluntary consent made at the time of the search, a probationer could be searched only if a court had issued a search order authorized under New York state law. The New York appellate court noted that, unlike *Griffin*, the search in this case was not conducted pursuant to a state regulation. Nevertheless, the Court in *Hale* stated that the court-imposed condition carried as great, if not greater, constitutional weight, as a regulation. In *Hale*, the defendant had agreed to the condition in order to avoid a prison sentence. Moreover, the Court stated that this agreement was no more coercive than any other agreement made to avoid a prison sentence. Since the defendant had consented to the condition, he could not now complain when drugs and weapons were seized by a probation officer in enforcing this condition of probation.

Even though a court may approve a search conducted pursuant to a court-imposed condition, some jurisdictions have nevertheless limited a search to certain items, e.g., illicit substances and drug paraphernalia or pornography and sexually oriented devices. For example, some courts have held that a

search condition must be tailored to the offense for which the offender was granted probation.[5] The *Hale* decision is a good example of a case in which the court limited a search condition to a specific item, i.e., drugs. In addition, the *Hale* decision shows that if, in the course of conducting a search for a specific item, another type of contraband is discovered, this other type of contraband may be seized and used in a subsequent criminal proceeding.

Moreover, some appellate courts have struck down certain search conditions as being overbroad or vague. Even in the Ninth Circuit, where a waiver condition is recognized as valid, the terms of the condition must be narrowly drawn. The court of appeals there disapproved as overly broad a condition that appeared to extend the benefits of a federal probation condition to all "law enforcement officers."[6] This holding was also based on the coerciveness of the circumstances that gave rise to a consent waiver. The condition that was approved provided: "A probationer must submit to a search of her person or property conducted in a reasonable manner at a reasonable time by a probation officer."[7] Such a condition, the court said, would meet the reasonableness requirement of the fourth amendment by properly balancing the relevant governmental and individual interests.

C. Warrantless Searches Conducted Without a Condition or Regulation

Courts across this country are almost unanimous in holding that a warrantless search of a probationer or parolee must be based on some express legal authorization. Thus the general rule is that warrantless searches cannot be conducted absent an express condition, regulation, or statute that gives the supervision officer the authority to conduct such searches. Nevertheless there are certain limited exceptions to this general rule.

Sometimes, the relevant condition is one that authorizes unannounced visits by a probation/parole officer to the residence of an offender. Such a condition may be useful because once lawfully on the premises, the officer may see (or detect through other senses) information that activates some exception to the warrant requirement of the fourth amendment. Such a situation arose in *United States v. Bradley*.[8] There, a Virginia parole officer received information sufficient to support a warrant that the parolee had a firearm in his possession. Some 6 hours later, acting under a visitation condition, she went to his residence and conducted a search, locating a weapon secreted in a closet. This evidence was used to convict the parolee in a federal criminal trial. The Fourth Circuit Court of Appeals reversed, holding that the warrant requirement was a rigid one.

> We therefore hold that unless an established exception to the warrant requirement is applicable, a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer.[9]

In a followup case, the Fourth Circuit applied this rule to a probation revocation proceeding.[10] This accords with the weight of authority that search and seizure law does not apply differently in parole and probation cases. Nevertheless if a probation or parole officer has a legitimate right to be at a certain place (e.g., authorized to conduct a home inspection pursuant to a condition of supervision) and sees a contraband item in plain or open sight, then the observance of the contraband item does not constitute a search, and the seizure of the item is an exception to the fourth amendment's warrant requirement.

D. Problems With Searches Resulting From Police/Supervision Officer Collaboration

One of the more significant developments in probation and parole supervision in the last decade has been the increasing collaborative efforts between supervision and law enforcement officers. While these collaborative arrangements have proven to be very beneficial to both the probation/parole and law enforcement disciplines, such arrangements also pose legal pitfalls. Moreover, because these joint efforts between police and supervision officers are a recent trend, many of the legal issues that pertain to these collaborative endeavors have yet to be examined by the courts.

Since law enforcement agencies and parole and probation departments serve different purposes in the criminal justice system and have contrasting missions, the most serious liability issues involving police/supervision officer collaboration arise when one agent or officer assumes or performs the role of the other. Although the purposes and missions between probation/parole supervision and law enforcement activity are not incompatible, they are not synonymous either. Thus, for example, there is nothing improper with a peace officer accompanying a probation/parole officer on a home inspection either to offer personal protection to the supervision officer or even to question a probationer/parolee on matters of mutual interest to the police and the supervision officer.

However, a police officer cannot direct that a supervision officer perform certain acts solely at the request of or for the benefit of the police officer without converting that probation/parole officer into a law enforcement agent. When this occurs, two liability concerns arise for the probation/parole officer. First, once a probation/parole officer assumes law enforcement responsibilities, then that officer must act in accordance with the same legal limitations that apply to law enforcement officers. Second, by performing law enforcement duties, the probation/parole officer may be deemed to have exceeded the course and scope of his or her duties as a supervision officer, and thus any negligent performance of the officer's duties that arose while the officer was acting as a law enforcement agent may result in personal liability for the supervision officer. Two of the issues involved in police/probation officer collaboration are discussed below.

1. Police Searches Conducted With Probation/Parole Officers

Generally, a law enforcement officer must comply fully with the fourth amendment before searching a parolee or probationer. Probation/parole officers, on the other hand, are not bound in full by the fourth amendment because they are generally authorized to search without a warrant or probable cause by the conditions of probation or parole. Nevertheless a probation/parole officer may enlist the aid of law enforcement personnel to expedite a search,[11] subject to the limitation that the primary purpose is probation/parole-related and not a subterfuge for a more general law enforcement goal. Under this situation, a police officer is allowed to assist in the search of a probationer/parolee if the purpose of the police officer accompanying the supervision officer is to provide protection to the supervision officer. Moreover, in the event that police seek to induce a probation officer to exercise his or her power to search, the probation officer may accommodate the request if he or she believes the search is necessary to the proper functioning of the probation system.[12]

The case that best exemplifies this general rule is *United States v. Ooley*.[13] In this case, the defendant was convicted in a California state court of second-degree burglary and placed on probation. As a condition of the defendant's probation, he agreed to waive his fourth amendment rights and to allow searches to be conducted on his person, place, and automobile. Less than 6 months

into the term of his probation, police officers arrested him in his automobile on suspicion of burglary. They also conducted a warrantless search of his home, where they found a loaded gun and some ammunition.

The defendant was indicted on the federal charge of a felon in possession of a weapon. He filed a motion to suppress the search of his home on the grounds that the search was not conducted in furtherance of enforcing the conditions of his probation but, instead, was conducted pursuant to an investigation of an alleged crime. The trial court denied the motion, and the defendant appealed his conviction to the Ninth Circuit United States Court of Appeals.

The Ninth Circuit observed that, with respect to a probationer, the Court had long recognized that the legality of a warrantless search depends upon a showing that the search was a true probation search and not an investigative search. The Court further stated that unlike an investigative search, a probation search should advance the goals of probation, the overriding aim of which "is to give the probationer a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls." The Court remanded the defendant's case to the trial court to conduct a hearing in order to determine whether the search in question was a probation search or an investigative search.

2. Searches Conducted by Police Officers Alone

Most courts hold that a police officer, acting alone, cannot conduct a warrantless search of a suspect simply because a warrantless search has been imposed on the offender as a condition of probation or parole. But a minority of jurisdictions allow police officers to conduct searches of probationers or parolees without the presence of a supervision officer, provided there is a condition of release requiring the defendant to "waive" his fourth amendment rights. In the recent case of *in re Tyrell*,[14] police officers searched a juvenile congregating with suspected gang members at a football game. The police discovered a bag of marijuana on the juvenile. Unknown to the police, the juvenile was on probation with a condition allowing the search of his person.

The California Supreme Court held that this condition was sufficient to authorize the search of the juvenile by police. Even though no probation officer was present when the search was conducted and even though the police were unaware that the juvenile was on probation and unaware of the search condition, the Court held that the search was reasonable. The Court stated that "as a general rule, probationers have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities 'reasonable' which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands."[15]

The current law is uncertain concerning whether a court or a probation/parole officer can delegate supervisory authority to a police officer and hence change the status of a law enforcement officer into that of a probation/parole officer. While certain court decisions have approved search conditions that extend the authority to law enforcement officers to conduct warrantless searches of probationers or parolees,[16] most courts have deemed that law enforcement officers, when conducting these searches, are "assisting" supervision officers and hence are not assuming the role of a supervision officer. In differentiating between the notion of assisting a supervision officer as opposed to assuming the supervision officer's role, courts have focused on whether the supervision officer authorized or initiated the search,[17] whether the search was conducted pursuant to a legitimate goal of probation or parole,[18] and whether the search was a pretext for conducting a criminal investigation of the probationer or parolee.[19] As a general rule, there is less liability for supervision

officers if the police officer is assisting the supervision officer than if the supervision officer is assisting the law enforcement officer.

E. State Standards of Reasonableness for Conducting a Search

Since the United States Supreme Court's decision in *Griffin v. Wisconsin*, the states that allow searches of probationers and parolees have adopted a reasonableness standard that is less than a probable cause standard.[20] A general definition of "reasonable" is that a warrantless search is legitimate whenever a probation/parole officer has reasonable cause to believe that the parolee or probationer is violating, or is about to violate, a condition.[21] Nevertheless the exact words of the judicial test vary from state to state, but the result is the same. For example, in *People v. Anderson*[22] a warrantless search was approved where the parole officer had "reasonable grounds" to believe there had been a violation. The language in *People v. Santos*[23] was "reasonable suspicion." In *State v. Williams*,[24] it was "sufficient information to arouse suspicion," and in *State v. Sievers*, it was "reasonable manner."[25]

When courts apply this approach, they often say that the totality of the circumstances must be considered, including the complaining party's status as a probationer or parolee.[26] This means that the amount of information required before action can be taken is less than in the case of a member of the general public. Nevertheless courts in almost every jurisdiction have held that a mere hunch that a probationer or parolee has violated the conditions of his release is insufficient to justify a search of that individual.[27] Even the California state courts, which have allowed investigative searches of probationers and parolees by law enforcement officers, have held that a search cannot be arbitrary, capricious, or harassing.[28]

The foregoing categorization is, however, artificial. It is more accurate to think of search and seizure law as a line along which various jurisdictions are arranged according to the relative amount of triggering information required by a reviewing court. To act properly within a jurisdiction, the probation or parole officer must consult local authorities.

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II. PROBATION/ PAROLE OFFICERS AND FIREARMS

A significant development in probation and parole supervision in the last decade has been the arming of probation/parole officers in some parts of the country. Although the federal system and a few other states had authorized probation/parole officers to carry weapons before the 1990s, the number of jurisdictions that have joined the ranks of arming their officers has grown markedly in the last 10 years. This, in turn, has increased the liability concerns of officers who now not only must be aware of all of the nuances of probation and parole laws but must also be aware of the legal consequences of the use of deadly force.

The arming of probation/parole officers results from several circumstances. First, with overcrowding problems in the nation's prisons during the last decade and the pressure to divert more and more offenders who had traditionally been sentenced to prison or had previously served longer periods of confinement, probation and parole caseloads now contain more "hardened" or serious offenders than before. Second, the mission of probation and parole departments in many jurisdictions has changed from rehabilitation to a more balanced approach with public protection. Finally, greater collaborative efforts between law enforcement agents and probation/parole officers have underscored the need for armed self-protection.

Whether or not a probation/parole officer is armed depends on several factors. First, in order for a state probation or parole officer to be armed, there must be state legal or statutory authority allowing that officer to carry a weapon. But even if state law authorizes the arming of officers, the local court, board of parole, or supervision department may elect not to arm its officers. Arming officers or allowing officers to carry firearms is discretionary with the supervisory authorities in most jurisdictions. Finally, even if a jurisdiction allows its officers to carry a weapon, state regulations or departmental policies may still preclude a particular officer from being armed for a number of reasons, such as psychological reasons, because of information found in a background check of the officer, or for failure of the officer to pass a weapons certification course. It is worth noting that very few jurisdictions in this country allow their juvenile probation officers to be armed.

Departments that have chosen to arm their officers have done so for one of two reasons: protecting their officers and general law enforcement. State laws differ on the justification for an officer being armed. For example, Texas allows its adult probation and parole officers to be armed for self-defense purposes only.[29] The law in Pennsylvania and New York, on the other hand, states that probation and parole officers are law enforcement officers during the period they are on duty and gives them broad powers to arrest probationers and parolees observed violating the conditions of their release.[30] Whether an officer is liable for an incident arising from the discharge of a weapon may depend on the extent of the authority given to the officer by state law to carry a weapon and on whether the officer exceeded that authority.

There is hardly any court decision examining liability issues arising from the discharge of a weapon by a probation/parole officer, but there are numerous court cases on the use of a weapon by a law enforcement officer. Because of the similarity in legal issues that arise in use of weapons lawsuits involving law enforcement officers and that would arise in cases involving probation/parole officers, one can draw analogous conclusions for probation/parole cases by examining law enforcement cases.

Although a party injured in an incident involving the discharge of a weapon by a probation/parole officer could file a lawsuit under the various states' tort claims acts, the most common cause of action for the improper use of a weapon is a claim for a deprivation of a constitutional right protected by federal law, Section 1983 of 42 U.S. Code. This provision was enacted by the United States Congress to provide persons a means of obtaining redress for the loss of a constitutional right caused by a person acting under color of law. Nevertheless, a mere assertion of negligent deprivation of a constitutional right is insufficient to prevail in a Section 1983 lawsuit.[31] There must be a showing that the deprivation indicated deliberate indifference or gross negligence on the part of the government official.[32]

Supervisors and political subdivisions of a state can be sued if the action of the supervisor or political subdivision was a contributing cause of the person's deprivation of a constitutionally protected right. This accounts for the reluctance by many departments and agencies to allow their officers to carry firearms. For example, the lack of sufficient training of probation/parole officers in the use of weapons may be grounds for a suit under Section 1983.[33] This failure to properly train extends to the failure to provide continuous training,[34] failure to ensure that the officers adequately understood the course material,[35] and even failure to provide instruction on first aid in case a person is injured as a result of the discharge of the officer's weapon.[36]

Probation and parole officers may be liable if they use excessive force in attempting to arrest or apprehend an offender. In *Tennessee v. Garner*,[37] the Supreme Court held that the use of excessive force (in this

case a shooting) to arrest a suspect of a crime constituted an unlawful seizure under the fourth amendment to the United States Constitution. The Court stated that a police officer could not use a deadly weapon to stop an unarmed nondangerous suspect from fleeing unless said deadly force was necessary to prevent the escape and the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others. In addition, the officer must give a warning, where feasible. The same rule applies to probation/parole officers.

In departments where officers are allowed to carry firearms, the following rules should be considered if civil liability is to be obviated or minimized:

- Proper training on the use of firearms is a must. Ideally, that training should be similar to that given to police or other law enforcement officers in the state.
- Ideally, officers should be properly certified as law enforcement officers. This includes participation in regular continuing education programs required of law enforcement officers.
- The department must set a clear policy on officers' use of deadly force. Such use should be limited to cases when there is probable cause to believe that deadly force is needed for self-defense or for the defense of other persons.

There is fear in some departments that the agency itself might be sued if officers are not allowed to carry firearms and are later injured in the course of their work. This is understandable, but as best we know no case has been filed in court so far on this issue. Even if filed, however, chances of success may be remote because the officer will have difficulty establishing that carrying a firearm would have prevented the injury. There will have to be deliberate indifference on the part of the department before liability can likely be imposed. When this takes place will be decided on a case-by-case basis, but not allowing an officer to carry a firearm in itself should not constitute deliberate indifference. It also helps if the agency has a policy aimed at minimizing the possibility of such incidents taking place. For example, the department can require that in risky situations, the officer should request the assistance or presence of police officers and not undertake the job alone, or that it be done only in the company of another probation or parole officer.

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III. DUTY TO THE OFFENDER NOT TO DISCLOSE INFORMATION

A major legal liability concern of field officers relates to confidentiality and privacy issues. Despite the widespread anxiety this issue generates among officers, there are actually only a few instances in which the breach of confidentiality has been the basis for a civil suit against an officer. This does not imply that confidentiality issues are not important for officers, or that officers cannot incur liability for the improper disclosure of information regarding an offender. Instead, it indicates that this has not been an issue over which offenders in the past have had a particular awareness and, therefore, there have been few claims alleging a breach of a confidential matter. Perhaps because of the heightened concern officers have regarding confidentiality, officers traditionally have taken a cautious approach when dealing with information concerning an offender.

What makes disclosure of information about a probationer/parolee less of a liability issue is that, in many states, the fact that a person is on probation or parole is a matter of public record and, therefore, there is no liability for disclosure. Moreover, such disclosure

might be justified by the fact that it is protective of society. The only possible exception to this is juvenile cases if disclosure of a juvenile being on probation or parole is prohibited by state or case law.

Although being on adult probation or parole is a matter of public record in most states, what may be disclosed beyond that is much less certain and depends upon state law or agency policy. This refers to information concerning how long a person is on probation, for what offense a person is on probation, what conditions have been imposed, and other issues. In most states, such information is not a matter of public record and therefore may not be disclosed.

One writer, however, gives this opinion on the issue of disclosure and liability under state tort law:

> It is doubtful that such acts as the disclosure of information to employers proscribing certain employment would be deemed tortious. Federal officers can reveal items of information from public records, such as records of prior arrests or convictions, free of liability from the tort of defamation. Regardless of the source of the information, if it is accurate, no liability could arise for defamation, since truth is a complete defense. As to the tort of invasion of privacy, disclosure of items of public record creates no liability. Also, release of information to a large number of persons is an essential element of the tort of invasion of privacy; that element would be lacking in the release of information to an individual employer. Finally, the tort of interference with a contract or a prospective contract can be justified if the ultimate purpose of the disclosure outweighs the harm to the plaintiff. The impersonal disclosure of information to an employer to protect the public or a third party would appear to be within the rule of justification.[38]

In *Anderson v. Boyd*,[39] the plaintiff parolee brought suit against parole officers, claiming the defendants had knowingly repeated false statements regarding the plaintiff's criminal record to Idaho state officials and local police authorities. The court ruled that dissemination of information about a parolee to persons outside the parole board does not relate to the parole officers' duties in deciding to grant, deny, or revoke parole. Therefore, absolute immunity does not extend to such conduct; at most, parole officers would be entitled to executive, good faith immunity for their alleged conduct.

In addition to information gleaned from public records and correctional files about the offender, probation/parole officers frequently receive information directly from the offender and the officer's associates. If the offender has a right to prevent the dissemination of information from such sources, might he or she be able to recover damages from the officer in a proper suit in the event of disclosure? As a matter of general law, apparently the answer is no. Again, case law support for this conclusion is thin, but that in itself is somewhat indicative of the weakness of the argument that must be made to support liability. The question hinges on the nature of the relationship between the probation/parole officer and the offender.

One of the closest examinations of the relationship was made in a 1976 Washington criminal case.[40] In that case, a parolee contended that the trial court should not hear testimony from his parole officer concerning statements he made voluntarily during a telephone conversation. (Since there was no custodial interrogation, the parolee could not argue successfully that *Miranda* required suppression.) The defendant contended that the relationship between parole officer and parolee is a confidential one, that all communications between the two were thereby privileged, and that to hold otherwise would undermine the rehabilitation process envisioned by the parole system. The court disagreed:

> A parole officer's primary responsibility is to the court, secondly to the individual being supervised. To hold that each communication between the parolee and his parole officer is privileged would close the lips of the supervising personnel and allow the parolee to confess serious crimes with impunity.[41]

It must be noted that, in criminal prosecutions, courts require a very high degree of need for relevant testimony. They are reluctant, therefore, to expand the concept of privilege beyond its traditional bounds—lawyer-client, doctor-patient, clerical-penitent, husband-wife. While the civil law context is different, there is no reason to expect the officer-probationer/parolee relationship to be treated as confidential.

A. The Case of *Fare v. Michael C.* Says There Is No Privileged Communication Between Probation Officer and Offender

In *Fare v. Michael C.*,[42] the request by a juvenile on probation, who was suspected of murder, to see his probation officer—after having been given the *Miranda* warnings by the police—was not considered by the United States Supreme Court as tantamount to his asking for a lawyer. Evidence voluntarily given by the juvenile, even after he expressed a desire to see his probation officer instead of a lawyer, was held admissible in a subsequent criminal trial. The Court also addressed the issue of confidentiality of information between a probation officer and a juvenile probationer, saying:[43]

> A probation officer is not in the same posture with regard to either the accused or the system of justice as is [a lawyer]. Often he is not trained in the law, and so is not in a position to advise the accused as to his legal rights. Neither is he a trained advocate, skilled in the representation of the interests of his client before both police and courts. He does not assume the power to act on behalf of his client by virtue of this status as advisor, *nor are the communications of the accused to the probation officer shielded by the lawyer-client privilege. . . . In most cases, the probation officer is duty bound to report wrongdoing by the juvenile when it comes to his attention, even if by communication from the juvenile himself.* [Emphasis supplied.]

Although the above case involved a juvenile probationer, there are strong reasons to believe that the principles enunciated apply to adult cases as well. Constitutionally, therefore, probationers/parolees do not have a right against disclosure of information given to probation/parole officers; however, disclosure may be prohibited by state law or agency regulation. This is especially true if the nature of the disclosure involves the physical or mental health status of the individual.

Some supervisory agencies have administrative policies concerning public record access and disclosure. These rules may establish a policy forbidding an officer from releasing certain information regarding a probationer or parolee, even though no statute or other law prohibits an officer from doing so. An agency policy restricting the disclosure of certain information would supersede the general principles discussed here. Hence, the reader should determine whether there is an applicable agency policy that would prohibit an officer from releasing information maintained by the agency. In addition, certain states have now established laws or administrative policies restricting the disclosure of information pertaining to the victim of a crime. A probation or parole officer should thoroughly familiarize himself or herself about laws or policies in his or her jurisdiction that preclude the release of information pertaining to a victim.

B. Invasion of Privacy

An area of liability concern that is similar to the disclosure of confidential information involves the potential tortious invasion of

privacy. Many, if not most, states recognize a cause of action for a breach of privacy. Generally, the elements for a breach of privacy are (1) the publication of matters concerning an individual's private life, the publication of which would be highly offensive to a reasonable person of ordinary sensibilities; and (2) the matter that is publicized is not of legitimate public concern.[44] While disclosure of information that is a public record or factual information regarding an individual's criminal conviction is not actionable as an invasion of privacy, the disclosure of certain highly personal information about an offender may be.

Thus, the improper disclosure of information obtained while questioning the offender being supervised may give rise to a suit for the invasion of privacy. For example, even though a probationer or parolee may be supervised for a sex offense, it still may be an invasion of the individual's privacy if a probation or parole officer were to disclose highly sensitive information about the offender's sex life. If this information about the individual's sex life were not criminal in and of itself, but such that an ordinary person would find highly embarrassing if it were disclosed about that individual, then such disclosure may constitute an invasion of privacy. Moreover, if the agency responsible for supervising the offender has a policy against disclosing such information, it may be presumed that such information is highly sensitive and therefore be presumed that the publication of such would constitute a breach of privacy.

Finally, the improper questioning of a probationer or parolee during supervision may give rise to a suit for unreasonable intrusion upon the privacy of the individual. While officers have a great deal of discretion and are given considerable leeway in questioning an offender who is under supervision, the questioning must have a reasonable bearing on rehabilitation of the offender or enforcement of the conditions of release. For example, if an officer were to extensively question a probationer or parolee convicted of theft about the offender's sexual life or practices, said questioning could be deemed improper, especially if there were no indication that the offender's sexual behavior was interfering with efforts to rehabilitate the individual or had contributed to commission of the offense for which he or she was placed on probation or granted parole. Thus even though a probationer or parolee has been convicted of a crime, the individual still has an interest in preventing unreasonable intrusion into his or her private life.

C. Libel and Slander

Another area of concern touching upon privacy issues involves libel and slander. Libel is a written or printed defamation that tends to injure the reputation of a living person and thus expose him or her to public hatred, contempt, ridicule, or financial injury, or impeach his or her honesty, integrity, virtue, or reputation. Slander is a defamatory statement orally communicated or published to a third person without legal excuse. Even though probationers and parolees have been convicted of a criminal offense and even if their reputation is not held in high esteem in the community, libel and slander laws still protect them.

Thus if an officer were to make a false factual statement about an probationer or parolee, such as a false accusation that an offender convicted of embezzlement is a drug dealer or a person convicted of driving while intoxicated is a child molester, the offender could bring an action against the officer for libel or slander. Moreover, since making false accusations regarding a probationer or parolee is clearly not within the course and scope of an officer's job responsibilities, it if doubtful whether an officer could assert the defense of official immunity in response to a suit for libel or slander. Hence any statement that an officer makes about an offender must be factually based and verifiable and the publication of which must be consistent with department policies and state law.

D. No Tortious Interference With a Contract If Disclosure Is Justified

Officers frequently face situations in which they see the need to inform a person employing a probationer or parolee about the individual's criminal record (see section IV, Liability for Failure to Disclose Offender Background Information to Third Parties, in this chapter). A potential liability concern for disclosing information to an employer regarding an offender under supervision is the tortious interference with a contractual relationship between the employer and his or her employee. The elements for establishing such causes of action are (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) proximate cause of damages by reason of the interference; and (4) the actual occurrence of loss or damages.[45]

Ordinarily there is no tortious interference with a contract if there is a legal justification for informing the employer about the employee. In probation and parole supervision, legal justification would likely exist if the disclosure of information concerning the offender would protect the interests of the employer or further the safety of the public. Thus if a probation or parole officer notifies a hospital that its employee, working in a dispensary, was convicted of a drug offense or notifies a bank that one of its tellers had been convicted of embezzlement, this would be justified on the grounds that said disclosure protected the interests of the employer and the public. Liability might issue, however, if disclosure is prohibited by state law or agency policy, as is the case in juvenile probation or parole supervision.

Nevertheless, an officer should inform an employer only about one of his or her employees who is being supervised in strict accordance with guidelines established by or under the direction of the court, board of parole, or supervisory agency. Moreover, an officer should under no circumstances recommend to the employer that the employee be terminated. The officer should provide only factual information to the employer for the purpose of making the employer aware that he or she may need to take certain precautions regarding the employee. The precautions that are taken should be left to the discretion of the employer.

E. Federal Rules of Confidentiality

Every state has laws regarding the disclosure of confidential information. These laws generally protect information concerning an individual's physical or mental health status. In addition, states may also have laws protecting other information deemed sensitive in nature. These state laws may or may not pertain to probationers or parolees in various jurisdictions. Since this manual discusses only probation and parole matters that have general applicability to the nation as a whole, it is advisable for a probation or parole officer to seek legal advice concerning whether local laws may provide additional protections for the disclosure of information pertaining to offenders.

Federal law, under certain circumstances, creates a right of confidentiality throughout the country regarding information about alcohol or substance abuse treatment. This law has stringent requirements for allowing the disclosure of alcohol and substance abuse information and has severe penalties for the improper disclosure of this type of information. This law also applies to offenders in the criminal justice system. Thus it is important for probation and parole officers to understand federal confidentiality rules.

Volume 42 United States Code Section 290dd-2 provides that if a treatment provider falls within the ambit of federal regulations, then the confidentiality of the identity of any patient seeking drug and alcohol treatment must be protected.[46] In addition, this law provides that any person

who receives information regarding the identity of a patient being treated for drug or alcohol abuse in a federally regulated facility cannot pass it on without proper authorization. "Patients" include probationers or parolees being treated for substance abuse problems by a treatment provider subject to federal regulations. Thus a probation or parole officer may be precluded from acknowledging that an offender is being treated for alcohol or substance abuse or from indicating the location of an offender who is residing in a substance abuse treatment facility, even to a court or law enforcement agency.

This federal law allows only the disclosure of information identifying a person as being treated for a substance abuse problem under certain narrow exceptions. One is if the person being treated signs an informed consent allowing the disclosure of treatment information to certain parties. The other is if the offender is being investigated for the commission of another crime and the disclosure is required pursuant to a court order. However, in order to procure a court order authorizing the release of this type of information, there must first be a court hearing. A subpoena signed by a judge compelling the disclosure of this information is not sufficient.

At the court hearing, the court must find that "good cause" exists for disclosing this information. In order to find "good cause," the court must consider the seriousness of the alleged offense and balance the necessity and public interest in disclosing the information with the right of the patient to keep this information confidential. If a court deems the information disclosable, then an order will be issued compelling the individual having information regarding the identity of the person being treated for a substance abuse problem to reveal the information to proper authorities.

Not all substance abuse treatment providers come under this federal confidentiality law; only those treatment providers subject to federal regulations do. Generally, treatment providers that receive federal funding either directly or indirectly, such as through Medicare payments, are subject to federal regulations. However, because of the seriousness of a breach of this federal law, a probation or parole officer who refers an offender to substance abuse treatment should inquire of that treatment provider concerning whether it is subject to federal regulations.

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IV. LIABILITY FOR FAILURE TO DISCLOSE OFFENDER BACKGROUND INFORMATION TO THIRD PARTIES

A. The "Public Duty Doctrine" Generally Precludes Liability

The term "third parties" refers to the general public that may be harmed by what an offender does. For example, may a probation/parole officer be held liable for what a person under supervision does? The answer is no, but with some exceptions.

One purpose of probation or parole is public protection; in fact, some agency manuals explicitly say so. The public, therefore, has reason to think that if an injury is caused by a probationer or parolee, the probation or parole officer and department failed in its job to protect the public. The "public duty doctrine" protects officers from liability whenever a crime is committed against the public by an offender. This doctrine holds that government functions, such as protecting the public, are owed to the public in general, but not to specific individuals in particular. Example: A parole officer may have an obligation to protect the community in general, but not a member of the community in particular. Therefore, if a

person is harmed by a parolee, the parole officer is not liable.

While this doctrine generally insulates officers from liability, there are exceptions to it, the most significant being "special relationship," discussed below. Probation/parole officers may be liable in a narrow set of circumstances when a third person is harmed by an offender about whom there was no disclosure of background information. The leading cases from the probation and parole settings are discussed separately.

B. There Might Be Liability If a "Special Relationship" Exists

Every person walking the streets faces some risk of harm at the hands of a parolee or probationer. But it is not—and could not—be the rule that in every case of actual injury, the supervising government agency or probation or parole officer will be liable to the party injured. The cases in this section point to the factor that is most likely to lead to actual liability. The key is the concept of "special relationship." Unfortunately, this concept is the type into which courts tend to pour meaning on a case-by-case basis.

Based on a study of relevant cases, the Federal Probation Service's legal advisor has concluded that the central requirement necessary to give rise to a "special relationship" is a reasonably foreseeable risk of harm to a particular person or narrow class. This element is explained by one source as follows.

1. Reasonably Foreseeable Risk

The duty to warn arises when, based on the probationer's (parolee's) criminal background and past conduct, the officer can "reasonably foresee" a prospect of harm to a specific third party. "Reasonably foresee" means that the circumstances of the relationship between the probationer (parolee) and the third party, e.g., employer and employee, suggest that the probationer (parolee) may engage in a criminal or antisocial manner similar, or related to, his past conduct. Examples include (1) a rapist in an apartment complex or television repair job; (2) an embezzler in a bank or financial company; (3) a drug user in a pharmacy or hospital; BUT NOT (4) a family assaultist in an apartment complex (this would be related to a prospect of harm to members of his family, assuming he has not demonstrated a general violent disposition); or (5) a financial scheme criminal who starts a "home security" business (the risk would be to burglarize homes or sell plans, which is not similar or related to his criminal conviction; also, the clients would be general, not specific possible victims).[47]

For purposes of minimizing possible liability based on foreseeability, a policy probation and parole departments might want to consider is that used by the federal government in determining whether to notify an employer. Its *Guide to Judiciary Policies and Procedures* (1983)[48] provides the following:

> **Decision Regarding Disclosure**
>
> (1) If the probation officer determines that no reasonably foreseeable risk exists, then no warning should be given.
>
> (2) If the probation officer determines that a reasonably foreseeable risk exists, he or she shall decide, based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his rehabilitation, whether to: (a) give no warning, but increase the probationer's supervision sufficiently to minimize the risk; (b) give no warning, but preclude the probationer from the employment; or (c) give a confidential warning to party on notice of the risk posed. When appropriate, the probationer may be permitted to make the disclosure with the understanding that the probation officer will verify the disclosure.

This policy protects against possible liability because it gives the officer discretion to determine foreseeability and what remedial measures are to be taken if foreseeability exists.

Nevertheless, disclosure is a problem in juvenile cases where state law or department policy may prohibit disclosure of records. In these cases, an officer who wants to disclose a juvenile record to a prospective employer (to protect against a possible lawsuit by the employer for nondisclosure) should obtain a waiver in writing, if such is allowed by law or agency policy, to disclose such record to the employer.

Another instance when liability might ensue in probation/parole supervision is if there is foreseeability and an identifiable victim. Example: A parolee tells a parole officer during an interview that she is losing control of herself and will likely kill her husband, whom she blames for all her problems. If that threat is credible (foreseeability), then the officer is obliged to do something to prevent it from happening. In fact, this contingency should be covered by agency policy. Some agencies provide that in instances where there is foreseeability and an identifiable victim, the police must be informed immediately, or the offender must be placed under temporary custody or surveillance. Courts will likely conclude that the presence of foreseeability and an identifiable victim creates a "special relationship" between the officer and the public that can lead to liability if no action is taken.

2. Reliance

Another element that the above liability cases have in common, aside from foreseeability, in some cases, is *reliance*, i.e., that the probation/parole officer undertook specific actions that contributed to the harm suffered by the victim. For example, in *Johnson v. State*,[49] California officials prevailed upon the plaintiff to accept the parolee as a foster child; in *Georgen v. State*,[50] the officers persuaded the plaintiff to hire the parolee; and in *Rieser v. District of Columbia*,[51] District of Columbia officials found the parolee the job and permitted him to remain in a position to prey on women even as evidence mounted that he was a rapist. In all these cases, the injured parties had reasons to believe that the offenders were competent to do the work and not prone to commit violent acts.

This principle of reliance was central to the *Myers* case,[52] discussed below, where the California Court of Appeals decided that the officers were not liable for failing to warn an employer that the probationer was a convicted embezzler. This was because the probation department did not place the probationer with the employer or direct him in his employment activates, nor did the department have any other special relationship with the employer; hence, there was no reliance.

While the above cases deal with failure to disclose, the act of disclosure may lead to a probationer/parolee not getting the job; hence, the probationer/parolee may sue. Chances of liability in these cases are slight because the disclosure may be justified under the concept of "protection of society." A legally sound policy for the department to adopt, however, is one that makes disclosure or nondisclosure optional in those cases where a probationer/parolee obtains a job on his own and without the help of the officer or department. This protects the officer either way in that if he or she discloses the record, the policy protects him or her; conversely, if he or she does not disclose, there is no liability because such disclosure is optional.

There are departments that require disclosure by the officer to the employer of the employee's record, even if the employee obtained employment on his or her own. This policy carries added risks for the officer because failure to disclose would then amount to negligence of duty or a violation of policy. The better policy is to make disclosure or nondisclosure optional, as recommended above.

As stated above, however, courts have not set any definitive standard as to when special relationship exists, instead determining liability almost on a case-by-case basis. This

writer theorizes that courts, particularly in jury trials, will compensate injured plaintiffs in cases where the facts look bad for the defendants and then justify the damage award based on special relationship. The rationale seems to be that the plaintiff has suffered enough because of wrongful behavior by the probation and parole officer and, therefore, compensation must be given for an innocent victim's injury. Given this, it is difficult to say specifically when special relationship exists.

C. Cases Involving Parole Officers

In *Johnson v. State*,[53] a case decided by the California Supreme Court, a parolee was placed with a foster parent, the plaintiff. Shortly thereafter, the parolee assaulted the plaintiff, who then brought suit alleging that the parole officer had negligently failed to warn her of the youth's homicidal tendencies and background of violence and cruelty. The state argued that this was a discretionary act by the parole officer and the officer was entitled to immunity. The court found that the consideration involved in deciding whether to disclose background information was at the lowest to no immunity. The state also argued that it owed no duty of care to the plaintiff.

The court rejected this and held the state liable, stating:[54]

> As the party placing the youth with Mrs. Johnson, the state's relationship to the plaintiff was such that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character. . . . Accordingly, the state owed a duty to inform Mrs. Johnson of any matter that its agents knew or should have known that might endanger the Johnson family. At a minimum, these facts certainly would have included homicidal tendencies and a background of violence and cruelty, as well as the youth's criminal record.

The court concluded that if a state parole officer failed to consciously consider the risk to the plaintiff in accepting a 16-year-old parolee in her home and consequently failed to warn the plaintiff of a foreseeable, latent danger in accepting him, and that failure led to the plaintiff's injury, the state would be liable for such injuries.

In the similar case of *Georgen v. State*,[55] a state court found liability against the New York Division of Parole for failure to disclose the violent background of a parolee who was recommended for employment to the plaintiff, whom he later assaulted. The court concluded that the plaintiff's reliance on the recommendation and her complete ignorance of the danger posed by the parolee were sufficient grounds to find a duty to disclose. Another case, *Rieser v. District of Columbia*,[56] is perhaps the best known case involving a parole officer where liability was imposed. The facts of the case and the decision are complex but are briefly summarized here.

In *Rieser*, the plaintiff's daughter, Rebecca Rieser, was raped and murdered by a parolee, Thomas W. Whalen. He had been assisted by the District of Columbia Department of Corrections in finding employment at the apartment complex where the victim lived. The parolee was a suspect in two rape-murder cases at the time of parole and, during his employment in the apartment complex, became a suspect in a third murder of a young girl. Parole was not revoked, but the parole board did advise the parole officer to supervise the parolee closely. No warning was given to the employer by the parole officer of the potential risk posed by the parolee's presence.

The employer was later warned by the police of the parolee's record and his status as a suspect in the three murders, but the employer did not do anything. Shortly thereafter, the parolee entered the victim's room and raped and strangled her. The United States District Court for the District of Columbia entered

judgment on the jury's verdict awarding damages in the amount of $201,633 against the District of Columbia. The decision was appealed. The United States Court of Appeals for the District of Columbia affirmed the award, stating that the parole officer had a duty to reveal the parolee's prior history of violent sex-related crimes against women to the management of the apartment complex, as the employer of the parolee, in order to prevent a specific and unreasonable risk of harm to the women tenants.

The court stated that an actionable duty is generally owed to reasonably foreseeable plaintiffs subjected to an unreasonable risk of harm by the actor's (in this case the parole officer's) negligent conduct:

> Abron's position as a parole officer vested in him a general duty to reveal to a potential employer Whalen's full prior history of violent sex-related crimes against women, and to ensure that adequate controls were placed on his work. Placement of Whalen at McLean Gardens put him in close proximity to the women tenants, with the opportunity to observe their habits, and gave him potential access to the keys to their apartments and dormitory rooms. . . . The jury could conclude that a breach of Abron's general duty would present a specific and unreasonable risk of harm to the women tenants of McLean Gardens therefore giving rise to a special duty toward them.[57]

D. Cases Involving Probation Officers

In *Meyers v. Los Angeles County Probation Department*,[58] the California Court of Appeals decided that the county probation department and its employees were not liable for failing to warn an employer that a probationer was a convicted embezzler, thus enabling the probationer to embezzle funds from the employer. In this case, the probation department did not place the probationer with the employer or direct him in his employment activities and had no other special relationship with the employer. It was irrelevant that the probationer was to devote some of his earnings to court-ordered restitution.

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V. OTHER SUPERVISION ERRORS

Failure to warn where there is some duty to do so is not the only circumstance that could give rise to liability to third parties. Deficiencies in the whole range of a field officer's responsibilities are replete with possibilities. An example is *Semler v. Psychiatric Institute*,[59] decided by the Fourth Circuit Court of Appeals in 1976, which resulted in liability.

Semler needs full discussion in view of its convoluted facts. The case was a negligence action under Virginia law. It was brought by Helen Semler to recover damages for the death of her daughter, who was killed by John Gilreath, a Virginia probationer. Gilreath had been prosecuted for abducting a young girl in 1971. Pending his trial, Gilreath entered the Psychiatric Institute of Washington, D.C., for treatment. The doctor said that he thought Gilreath could benefit from continued treatment and that he did not consider him to be a danger to himself or others as long as he was in a supervised, structured environment such as was furnished at the Psychiatric Institute. In August 1972, Gilreath pleaded guilty. His 20-year sentence was suspended, conditioned on Gilreath's continued treatment and confinement at the Institute.

A few months later, on the doctor's recommendation and the probation officer's request, the state judge allowed Gilreath

to visit his family for Thanksgiving and Christmas. Subsequently, again on the recommendation of the doctor, the judge allowed additional passes, and early in 1973 he authorized the probation officer to grant weekend passes at his discretion. In May 1973, the doctor recommended that Gilreath become a day care patient so that he could go to the hospital each morning and leave each evening. The probation officer transmitted this recommendation to the judge, who approved it.

In July 1973, the probation officer gave Gilreath a 3-day pass to investigate the possibility of moving to Ohio. The probation officer later gave Gilreath a 14-day pass so he could return to Ohio to prepare for a transfer of probation to that state. The officer approved each of these trips after discussing them with the doctor. Neither pass was submitted to the state judge for approval. On August 29, 1973, the doctor, assuming Gilreath would be accepted for probation in Ohio, wrote the probation officer that Gilreath had been discharged from the Institute.

The Ohio probation authorities, however, rejected Gilreath's application for transfer. Gilreath telephoned this news to his probation officer, who instructed him to return to Virginia. On September 19, 1973, Gilreath visited his doctor, who told him he should have additional therapy. The doctor did not restore Gilreath to day care status, enrolling him instead in a therapy group that met 2 nights a week. As an outpatient, Gilreath first lived at home and later alone, working as a bricklayer's helper. Gilreath told the probation officer about this arrangement, but the officer did not report it to the judge. In late September, the officer was promoted and a new probation officer was assigned to Gilreath on October 1. Gilreath killed the plaintiff's daughter on October 29, 1973.

In allowing the plaintiff's claim, the appeals court stressed that the requirement of confinement until released by the criminal court was to protect the public, particularly young girls, from a foreseeable risk of attack. The special relationship created by the probation order imposed a duty on the government and the probation officer to protect the public from the reasonably foreseeable risk of harm at Gilreath's hands that the state judge had already recognized. The plaintiff was awarded $25,000 in damages, with the probation officer liable for one-half.

The facts in the *Semler* case are rather unique and, because of that, its applicability to other probation cases is doubtful. An old adage states that "hard facts make bad law." Nonetheless, it appears crucial in *Semler* that the probation officer in effect changed the status of the probationer from that of a day care patient to an outpatient without authorization from the judge. The probation officer gave Gilreath more liberty than the judicial order allowed. The result in the case would most probably have been different had the actions of the probation officer and the doctor been in accord with a judicial order, even if the young girl died. The judge himself could not possibly be liable because of the absolute immunity defense. Carrying out the orders of the court is a valid defense in liability cases, unless those orders are patently illegal or unconstitutional.

Special note should be taken of the way in which *Semler* differs from the cases in the preceding section. Unlike *Johnson*, *Georgen*, and *Rieser*, the plaintiff in *Semler* did not allege that a risk of harm to her daughter was foreseeable. The deceased was simply a member of the general public. While the *Semler* court used the term "special relationship," it was used in an entirely different way than in the other cases. The potential consequences of the *Semler* precedent are significantly more worrisome as a result.

It should also be noted that the kind of conduct that might have defeated liability in *Semler* was quite different from the

companion cases. The state court in *Semler* knew all of the facts concerning Gilreath's background. What was not communicated was his present treatment status, information the court might have used to keep the probationer in check. In *Meyers* and the other cases, it was the party injured who did not receive information.

Finally, in *Semler* there was a unique breach of orders factor. When the physician and probation officer ceased to involve the judge in making decisions about Gilreath, they arrogated to themselves power that was not theirs to exercise. They could not do this without also accepting the consequences of their actions.

■ ■ ■

VI. DO OFFENDERS HAVE AN ENFORCEABLE RIGHT TO TREATMENT PROGRAMS?

Courts have generally viewed the granting of probation or parole as a privilege and not a right. For example, in *Flores v. State*,[60] the Texas Court of Criminal Appeals stated that "there is no fundamental right to receive probation; it is within the discretion of the trial court to determine whether an individual defendant is entitled to probation." Nevertheless, once granted probation or parole, an offender may be entitled to participate in certain programs or services that are available to similar probationers and parolees and the denial of which may result in a revocation proceeding.

There are very few reported cases that have examined this issue. However, in *People v. Beckler*,[61] an appellate court focused on the plight of a defendant who was rejected by the treatment program to which the trial court had assigned him. The appellate court ruled that the defendant had a statutorily created interest in remaining under supervision. Consequent due process required notice, a hearing, right to confront and cross-examine adverse witnesses, and disclosure of evidence against the defendant used by the agency in refusing him further treatment. In *Beckler*, the appellate court held that procedures should be utilized to ensure that the agency ruling had not arbitrarily disregarded the defendant's interest in supervision. However, *Beckler* merely suggests supervision may not be denied without due process where statutes so provide. While the case presently stands alone, its inherent logic constitutes a forceful argument for compliance by officers working under provisions of similar statutes. Nevertheless, *Beckler* stands for a right to due process, not a right to supervision.

■ ■ ■

VII. REPORTING VIOLATIONS

The enforcement of the conditions imposed on a released offender is another issue of concern for field officers. Generally, an officer has a duty to report violations to the court or parole board. He or she has the duty to maintain close contact with and supervision of the probationer/parolee in the interests of rehabilitation and protection of the public.[62] Nevertheless, research has found very few cases in which liability arose from an officer's failure to report a violation and a subsequent crime or tort committed by a client. (See section X, Recent Judicial Decisions Concerning Liability of Probation and Parole Officers for Supervision, in this chapter). However, see the discussion of *Semler v. Psychiatric Institute* in this chapter for a case in which liability attached when a change in treatment status was not communicated.

For a discussion of violations as an aspect of revocation, see Chapter 9, Revocation.

■ ■ ■

VIII. RESTITUTION COLLECTION

A probation officer generally cannot assess the amount of restitution. If an amount is not specified in the order of probation, none may be collected.[63] The court must provide the probationer with a specific amount to be paid as restitution. It is improper to delegate that authority to the probation supervisor.[64] The basic premise here is that the imposition of restitution, as with any other part of a sentence, is by statutory authority granted to the court and, therefore, the court must determine the amount.[65] The imposition of probation conditions is the duty of the court and cannot be delegated. Again, the only exception is if otherwise specifically provided for by law.[66]

Once restitution has been ordered, it becomes the responsibility of the probation/parole officer or the department, depending upon organizational structure, to handle and disburse funds received from the offender in a proper manner. The order of the court (or parole board) will include the party to whom restitution is due, as well as the amount. While in some cases the order may state something less than a specific name, such as a company, it is the duty of the officer to pay out the funds to the proper party.

No personal responsibility accrues unless the officer is given the duty of disbursing the funds. In most cases, a separate office is maintained to handle payments by the offender and disbursements, in which case the department, not the individual officer, is responsible. However if the officer is responsible, he may be held liable for improper disbursement. No funds may be disbursed to anyone other than the party named in the order of the court (or parole board). Thus, an officer was held liable for having paid restitution money to a relative of a court-ordered recipient.[67] In this situation, restitution was to be paid through the probation office, but the supervising officer ordered the office to pay funds to the recipient's sister with whom the recipient was living. The officer was found by the court to be exercising action outside the duties of his office.

If restitution is being paid directly by the offender, the officer may be responsible for assuring payment, but only insofar as his supervision duties allow him or her to know the facts. Therefore, if the officer is not aware of the failure of the offender to make payments after exercising proper diligence, he or she will not be liable. If he or she is aware, there is a duty to report the matter to the court (or parole board) as a violation of conditions, at which point there will be no liability on the part of the officer.[68]

While the imposition of a fine or restitution by the court as a condition of release is obviously constitutional, the U.S. Supreme Court has held in *Bearden v. Georgia*[69] that a judge cannot properly revoke a defendant's probation for failure to pay a fine and make restitution—in the absence of evidence and finding that the probationer was somehow responsible for the failure, or that alternative forms of punishment were inadequate to meet the state's interest in punishment and deterrence. Simply stated, if a probationer/parolee cannot pay a fine or restitution because he is indigent, his probation/parole cannot be revoked unless alternative forms of punishment are inadequate. On the other hand, if the probationer/parolee has the financial capacity to pay, but refuses to pay, revocation is valid.

IX. SHOULD THE PROBATION OFFICER GIVE THE PROBATIONER *MIRANDA* WARNINGS WHEN ASKING QUESTIONS CONCERNING A CRIMINAL OFFENSE?

The case of *Minnesota v. Murphy*, decided by the U.S. Supreme Court in 1984 and discussed more extensively in Chapter 9, Revocation, answers most of the concerns on this issue. The effect of the *Murphy* decision may be summarized as shown in table 8–1.

The crucial question then is: When is a probationer in the custody of a probation officer? This was not answered satisfactorily in *Murphy*. All the Court said was: "It is clear that respondent was not 'in custody' for purposes of receiving *Miranda* protection since there was no formal arrest or restraint on freedom of movement of the degree associated with formal arrest." It is, therefore, clear that a probationer who is under arrest is in custody, but what about other instances? From a study of court cases, the rule appears to be: If after the interrogation, the officer intends to let the probationer leave, then the probationer is not in custody. Conversely, if the officer during the interrogation had no intentions of allowing the probationer to leave after the interrogation (either because of prior information of the probationer's activities or because of answers during the interrogation that convince the officer that the probationer should be placed under custody), then the probationer is under custody and, therefore, the rules as summarized above apply.

What about cases where initially an officer does not intend to place the probationer in custody, but as the interview develops the officer feels that the probationer, because of an incriminating response, should now be placed in custody? In these cases, the probationer is considered to be in custody at that point in time when the officer decided that the probationer should not be allowed to leave. At that stage, the *Miranda* warnings must be given if answers obtained are to be used during a subsequent criminal trial. Obviously, that determination is subjective.

There is a distinction therefore between supervisory interrogation (where the *Miranda* warnings need not be given) and

Table 8–1. The Effect of Murphy on the Use of *Miranda* Warnings

Should the *Miranda* warnings be given by the probation officer if the evidence obtained is to be admissible?

	If Used in Revocation	If Used in Trial
Not in custody	No	No, unless probationer asserts rights
In custody	Depends on state law or court decisions	Yes

custodial interrogation (where the *Miranda* warnings must be given if the evidence is to be used in a criminal trial, or in a revocation proceeding, if state law so provides). The *Murphy* case involved a probationer, but there are reasons to believe that the principles should apply to parole cases as well.

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X. RECENT JUDICIAL DECISIONS CONCERNING LIABILITY OF PROBATION AND PAROLE OFFICERS FOR SUPERVISION

Over the last decade, several court decisions have examined personal liability claims involving probation/parole officers. These court decisions have generally focused on two areas: negligent supervision of offenders and assertions of defense of immunity to suits against individual officers. Moreover, with regard to negligent supervision cases, the germane issues that the courts have been asked to determine is whether the officer owed a duty to an identifiable victim or victims and whether the actions of the officer created a reasonably foreseeable harm. With regard to claims of immunity, the germane issue has been whether the officer acted in good faith.

A. Negligent Supervision

Suits involving claims of negligent supervision are not novel to the 1990s. In 1986, the Alaska Supreme Court, in *Division of Corrections v. Neakok*,[70] was asked to decide whether the Alaska Department of Health and Social Services, Division of Corrections, and Alaska Parole Board were negligent in placing a parolee in a small village that did not have police protection or the presence of a parole officer. In this case, the parolee shot and killed his teenage stepdaughter and her boyfriend and raped, strangled, and beat to death another woman. The parolee had a history of alcohol abuse and violence and was highly intoxicated at the time he committed these offenses.

The families of the victims filed a lawsuit against the Alaska state agency, contending that the agency was negligent in (1) failing to impose special conditions of release; (2) failing to supervise the parolee adequately while on parole; (3) allowing the parolee to return to a small, isolated community without police officers or alcohol counseling; and (4) failing to warn his victims of his dangerous propensities. The court noted that the Alaska state agency was aware of the defendant's alcoholism and violent behavior. Moreover, the court rejected the state's argument that in order for the state to have a duty of care, there must be a specifically identifiable victim. Instead, the court stated that victims in this case all belonged to a small, isolated community and that the residents of this village constituted a "group of victims" that were not unidentifiable members of the general public.

Although negligent supervision cases are not new, the last decade has seen an increase in suits filed against individual probation and parole officers. *Taggart v. State* and *Sandau v. State*[71] examined the issue of the "negligent supervision" of a parolee and the responsibility that a parole officer has toward a third party injured by a parolee. In both these cases, the parole board for the State of Washington and several parole officers were sued by victims of crimes committed by two persons who were being supervised on parole. In the *Taggart* case, the parolee had a history of violent sexual behavior and substance abuse. He had been incarcerated numerous times in both juvenile and adult facilities. Despite his criminal history and behavioral problems, a parole agent recommended that he be released from prison and once again placed on parole. The parole board accepted the recommendation of the parole agent and approved parole for the

individual with special conditions that he complete a substance abuse program and submit to urinalysis testing. While on parole, the individual failed to follow the conditions imposed by the parole board and subsequently assaulted another victim, causing her severe injuries.

In the *Sandau* case, the parolee also had a history of committing violent crimes and also a history of substance abuse. While on parole, the individual violated the conditions of release and his parole officer decided to suspend his parole. Nevertheless, despite violating the conditions of his parole, no parole warrant was issued for his arrest. Instead, the parolee left the State of Washington and moved to Montana. Although the parole agency was aware of the absconder status of the parolee, there was a delay in issuing an arrest warrant. While in Montana, the parolee raped a 9-year-old girl.

The victims in these two cases filed suit against both the parole board in the State of Washington and individual parole officers. The plaintiffs alleged that certain parole officers were negligent in recommending to the parole board that the parolees be placed on parole, that the parole board was negligent in granting parole, and that certain other parole officers were negligent in supervising the parolees while they were on parole.

With regard to the parole board's action granting parole, the court stated that such decisions are quasi-judicial and, therefore, the parole board is entitled to absolute immunity from liability. The court also extended absolute immunity to the recommendations of parole officers made to the parole board concerning the suitability of an individual for parole, finding that these recommendations were quasi-judicial in nature. On the issue of the supervision of parolees, the court disagreed that officers were entitled to absolute immunity for all of their actions. Nevertheless, the court did give them qualified immunity, saying that parole officers are immune from liability for allegedly negligent parole supervision if their action is in furtherance of a statutory duty and in substantial compliance with the directives of superiors and relevant regulatory guidelines. In addition, the court said that parole officers did not have to show that their actions were reasonable once it had been shown that the officers performed a statutory duty in compliance with the directives of superiors and relevant guidelines. Moreover, the court stated that individual liability would attach only if a parole officer's conduct was not in substantial compliance with the directives of superiors and regulatory procedures.

The court proceeded to determine whether the alleged actions by the parole officers in *Taggart* and *Sandau* created a fact issue concerning whether their conduct was not in substantial compliance with the rules and regulations of the parole agency. The court noted that the policy and procedures established by the parole agency in the State of Washington required parole officers to take certain steps in supervising parolees (i.e., perform regular drug testing, conduct field contacts, and apply certain sanctions upon learning of violations of the conditions of parole). Moreover, the court observed that in both *Taggart* and *Sandau*, parole officers had failed to perform certain responsibilities as required by agency policies and directives. Hence, the court held that there existed a fact issue concerning whether the parole officers had been negligent in supervising their parolees and remanded both cases to the lower court for resolution of the fact issues.

Many courts in this country, especially in the state of Washington, have continued to recognize a cause of action for negligent supervision under certain fact situations. In *Hertog v. City of Seattle*,[72] the defendant, a convicted sex offender, was placed on probation. While on probation, the defendant raped a 6-year-old girl. The guardian of the girl brought suit against certain individual

officers and the city of Seattle, claiming negligent supervision. In particular, the guardian alleged that the probation officer failed to monitor the probationer's compliance with the conditions of probation.

The facts in this case showed that the probation officer knew that the probationer was likely to cause bodily harm to others, that his previous criminal history showed an escalation to more serious sex offenses, and that his offenses were linked to alcohol and drug abuse. Moreover, testimony was introduced in the trial that an experienced officer would have provided intensive supervision to this type of offender. Consequently, the appellate court held that a material fact existed concerning whether the probation officer had a duty to take reasonable steps to prevent the probationer from committing a reasonably foreseeable injury.

B. Immunity Defenses

The courts over the last decade have also examined the defense of immunity to claims alleged against probation/parole officers. In *Kipp v. Saetre*,[73] a judge attempted to "revoke" an offender's probation without affording the individual a hearing. In addition, a probation revocation warrant was issued on the defendant. In a postsentencing hearing, it was determined that the "revocation proceeding" was invalid.

The offender filed a lawsuit against the judge, probation officer, and prosecuting attorney, claiming that he had been falsely arrested and imprisoned. On appeal, the Minnesota appellate court held that the probation officer was entitled to immunity. The court noted that it was the judge who made the decision to issue the warrant for the offender's arrest and directed the probation officer to do so accordingly. The probation officer was simply complying with the order of the judge. Thus, the appellate court held that a probation officer, when acting in association with a judge, could assert absolute immunity as a defense.

In another court decision, a Texas appellate court examined the claim of official immunity asserted by a probation officer in a suit brought by a probationer. In *Rhodes v. Torres*,[74] the plaintiff had been placed on probation for the misdemeanor offense of cruelty to animals. As a condition of her probation, the trial court had ordered her to perform 50 hours of community service for a local branch of the Society for the Prevention of Cruelty to Animals (SPCA). Having confirmed several times with the local branch that the plaintiff had failed to complete her community service, the probation officer supervising her filed a motion to revoke her probation. After the motion had been filed, the local SPCA notified the probation officer that there was a mistake with the society's records and the plaintiff had, in fact, performed the requisite number of hours of community service.

The plaintiff filed a lawsuit against the probation officer; the probation officer claimed official immunity. The trial court agreed with the probation officer's claim and dismissed the lawsuit. The plaintiff appealed this decision to an intermediary appellate court. The appellate court stated that government employees, including probation officers, are entitled to official immunity from suits arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority. In this case, in examining whether the officer acted in good faith, the court adopted an objective, as opposed to subjective, test for determining good faith. The court stated that a probation officer acts in good faith in causing the arrest of a probationer if a reasonably prudent officer, under the same or similar circumstances, could have believed that causing the arrest of the probationer was lawful in light of clearly established law and the information possessed by the officer at the time he filed the motion to revoke.

In the *Rhodes* case, the appellate court noted that the probation officer had every reason

to believe that the plaintiff had not completed her community service hours as mandated by the trial court. The court observed that the officer not only verified and reverified the information on which he relied in filing the motion but that he also consulted with his supervisor and the judge who had indicated their concurrence with his decision to request that a motion to revoke be filed. Thus, the court held that the evidence raised in the trial court conclusively established all of the elements of the defense of official immunity.

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SUMMARY

This chapter deals with liability exposure in supervising offenders. The United States Supreme Court has declared that warrantless searches of probationers and parolees may be conducted under certain circumstances. Nevertheless, the Supreme Court has left several important issues regarding the fourth amendment rights of probationers and parolees for the lower courts to address. It also deals with the complex issue of possible liability for disclosure or nondisclosure of information. In general, officers are protected from liability in supervision but there might be liability if a "special relationship" exists, whatever that means. However, officers may be negligent if they could have reasonably foreseen that their actions in supervising an offender could result in harm to an identifiable victim. In the area of violations, the law is clear: The officer has a responsibility to inform the court or board of parole whenever the offender has breached the conditions of release. However, once the officer has brought the matter to the attention of the proper authority, then he or she has discharged his or her responsibility. In addition, monetary collections should be carefully handled by the field officer. Finally, as a general rule, an officer must give the *Miranda* warnings if the probationer is in custody and if the evidence obtained is to be used in a criminal trial.

Notes

1. *Note, Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. Rev. 800, 800 (1976).

2. Griffin v. Wisconsin, 107 S. Ct. 3164 (1987).

3. *See* Tamez v. State, 534 S.W.2d 686 (Tex. Cr. App. 1976), decided prior to the United States Supreme Court holding in Griffin v. Wisconsin, 107 S. Ct. 3164 (1987).

4. People v. Hale, 692 N.Y.S.2d 649, 93 N.Y.2d 454, 714 N.E.2d 861 (1999). *See also*, People v. Woods, 981 P.2d 1019, 88 Cal. Rptr. 2d 88 (1999).

5. State v. Moses, 618 A.2d 478 (Vt. 1992).

6. United States v. Consuelo-Gonzales, 521 F.2d 259, 262 (9th Cir. 1975).

7. *Id*. at 263.

8. United States v. Bradley, 571 F.2d 787 (4th Cir. 1978).

9. *Id*. at 789.

10. United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

11. Ryan v. State, 580 F.2d. 988 (9th Cir.), *cert. denied*, 440 U.S. 977 (1978); United States v. Dally, 606 F.2d 861 (9th Cir. 1979).

12. Ryan v. State, 580 F.2d 988 (9th Cir.), *cert. denied*, 440 U.S. 977 (1978).

13. United States v. Ooley, 116 F.3d 370 (9th Cir. 1997).

14. *In re* Tyrell, 876 P.2d 445 (Cal. 1998).

15. The California Supreme Court extended the holding in Tyrell to parolees in People v. Reyes, 968 P.2d 445 (1998).

16. *See* People v. Mason, 488 P.2d 630 (Cal. 1971); State v. Montgomery, 566 P.2d 1329 (Ariz. 1977); State v. Josephson, 867 P.2d 993 (Idaho 1993); Allen v. State, 369 S.E.2d 909 (Ga. 1988); and Himmage v. State, 469 P.2d 763 (Nev. 1972).

17. *See* United States v. Jarral, 754 F.2d 1457 (9th Cir. 1985). *See also*, United States v. Richardson, 849 F.2d 439 (9th Cir. 1988).

18. *See* United States v. Watts, 67 F.3d 795 (9th Cir. 1995).

19. *See* United States v. McDonald, 21 F.3d 1117 (9th Cir. 1994).

20. *See* Toney v. State, 572 So. 2d 1308 (Ala. Cr. App. 1990).

21. Hill, *Rights of the Convicted Felon on Parole*, 13 U. Rich. L. Rev. 370, 371 (1979). *See also*, State v. Perbix, 331 N.W.2d 14 (ND 1983).

22. People v. Anderson, 189 Colo. 34, 536 P.2d 302 (1975).

23. People v. Santos, 82 Misc. 2d 184, 368 N.Y.S.2d 130, (N.Y. County Sup. Ct. 1975).

24. State v. Williams, 486 S.W.2d 468 (Mo. 1972). *See also*, People v. Anderson, 189 Colo. 34, 536 P.2d 302 (1975); State v. Pinson, 104 Idaho 227, 657 P.2d 1095 (1983).

25. State v. Sievers, 511 N.W.2d 205, 2 Neb. App. 463 (1994).

26. Souders v. Kroboth, 547 F. Supp. 187 (U.S.D. Pa. 1982); Hunter v. State, 139 Ga. App. 676, 229 S.E.2d 505 (1976); State v. Davies, 9 Or. App. 412, 496 P.2d 923 (1972).

27. *See* State v. Epperson, 576 So. 2d 96 (La. App. 1991).

28. *See* People v. Reyes, 968 P.2d 445 (Cal. 1998).

29. *See* Vernon's Annotated Texas Penal Code, Section 46.15.

30. *See* 61 Pennsylvania Statutes, sec. 309.1, and New York State Criminal Procedural Law, art. 2.10, sec. 23.

31. *See* Daniels v. Williams, 106 S. Ct. 662 (1986).

32. *See* Estelle v. Gamble, 429 U.S. 97 (1976). *See also*, County of Sacramento v. Lewis, 523 U.S. 833 (1998) and Schaefer v. Goch and Marathon County, No. 97 C 394 (7th Cir. 1998).

33. *See* City of Canton v. Harris, 109 S. Ct. 1197 (1989). *See also*, Paiva v. City of Reno, 939 F. Supp. 1474 (D. Nev. 1996).

34. Popow v. Margate, 476 F. Supp. 1237 (D. N.J. 1979).

35. Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992).

36. City of Canton v. Harris, 109 S. Ct. 1197 (1989).

37. Tennessee v. Garner, 105 S. Ct. 1694 (1985).

38. J. Kutcher, The Legal Responsibility of Probation Officers in Supervision, 41 Fed. Prob. 35, 37-38 (1977).

39. Anderson v. Boyd, 714 F.2d 906 (9th Cir. 1983).

40. State v. Roberts, 14 Wash. App. 727, 544 P.2d 754 (1976).

41. *Id.* at 730, 544 P.2d at 757.

42. Fare v. Michael C., 442 U.S. 207 (1979).

43. *Id.* at 719-720.

44. *See* Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976).

45. *See* Victoria Bank and Trust v. Brady, 811 S.W.2d 931 (Tex. 1991).

46. The federal regulations implementing 42 U.S.C. 290dd-2 are found in 42 CFR Part 35.

47. Unpublished remarks of Judd D. Ketcher to the American Probation and Parole Association (October 29, 1980).

48. *Guide to Judiciary Polices and Procedures: Probation Manual,* Chapter 4, 1983.

49. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

50. Georgen v. State, 196 N.Y.S.2d 455, 18 Misc. 2d 1085 (Ct. Cl. 1959).

51. Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977).

52. Meyers v. Los Angeles County Probation Department, 78 Cal. App. 3d 309, 144 Cal. Rptr. 186 (1978).

53. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

54. *Id.* at 785, 447 P.2d at 355, 73 Cal. Rptr. at 243.

55. Georgen v. State, 196 N.Y.S.2d 455, 18 Misc. 2d 1085 (Ct. Cl. 1959).

56. Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977).

57. *Id.* at 479.

58. Meyers v. Los Angeles County Probation Department, 78 Cal. App. 3d 309, 144 Cal. Rptr. 186 (1978).

59. Semler v. Psychiatric Institute, 538 F.2d 121 (4th Cir. 1976).

60. Flores v. State, 904 S.W.2d 129 (Tex. Cr. App. 1995), *cert. denied*, 516 U.S. 050 (1996).

61. People v. Beckler, 459 N.E.2d 672 (Ill. App. Ct. 1984).

62. United States v. Glasgow, 389 F. Supp. 217 (D.D.C. 1975); Jones v. State, 360 So. 2d 1158 (Fla. Dist. Ct. App. 1978); State v. McCain, 150 N.J. Super. 497, 376 A.2d 185 (Super. Ct. App. Div. 1977); State v. Marshall, 247 N.W.2d 484 (S.D. 1976).

63. State v. Thieme, 89 Wisc. 2d 287, 278 N.W.2d 274 (1979).

64. Cothron v. State, 377 So. 2d 255 (Fla. Dist. Ct. App. 1979).

65. People v. Julye, 64 A.D.2d 614, 406 N.Y.S.2d 529 (1978).

66. United States v. Crocker, 435 F.2d 601 (1971).

67. Pouliot v. Hodgdon, 119 N.H. 437, 402 A.2d 199 (1979).

68. McCrady v. Mahon, 119 N.H. 247, 400 A.2d 1173 (1979).

69. Bearden v. Georgia, 461 U.S. 660 (1983).

70. Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska Sup. Ct. 1986).

71. *See* Taggart v. State and Sandau v. State, 822 P.2d 243 (Wash. Sup. 1992).

72. Hertog v. City of Seattle, 943 P.2d 1153 (Wash. App. 1997).

73. Kipp v. Saetre, 454 N.W.2d 639 (Minn. App. 1990).

74. Rhodes v. Torres, 901 S.W.2d 794 (Tex. App. Houston [14th Dist.], 1995).

CHAPTER 9
Revocation

INTRODUCTION

The release of an offender on probation or parole implies that, in the best judgment of the releasing authority, the releasee will thereafter respect and abide by the law and observe the conditions of release. Unfortunately, this expectation does not always materialize. In 1998, 17 percent of all probationers and 42 percent of all parolees were reincarcerated because of a technical violation of the conditions of release or because of the commission of a new offense.[1] Consequently, situations arise that warrant consideration of revocation of probation or parole. All field officers must be aware of the basic legal principles that govern revocation, as well as their agencies' detailed procedures.

The controlling judicial decisions on revocation are *Morrissey v. Brewer*,[2] a 1972 Supreme Court case, and *Gagnon v. Scarpelli*,[3] a case the Supreme Court decided the year following the *Morrissey v. Brewer* decision. In *Morrissey*, the Supreme Court held for the first time that parolees faced with parole revocation were entitled to certain due process rights. In *Gagnon v. Scarpelli*, the Supreme Court extended its legal holding in *Morrissey* to probation revocation hearings, thus placing revocation of parolees and probationers on the same level.

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I. PAROLE REVOCATION: *MORRISSEY V. BREWER* IS THE LEADING CASE

A. The Factual Setting

Morrissey was convicted of passing a bad check in Iowa in 1967. Upon a plea of guilty, he was sentenced to 7 years in prison. He was paroled in June 1968. Seven months later, at the direction of his parole officer, he was arrested in his hometown as a parole violator and held in a local jail. A week later, after review of the officer's written report, the Iowa Board of Parole revoked Morrissey's parole, and he was returned to prison. Morrissey received no hearing prior to his revocation.

Morrissey allegedly had violated the conditions of his parole by buying a car under an assumed name and operating it without permission of his parole officer. He was also accused of giving a false address to the police and an insurance company after a minor traffic accident. Additionally, Morrissey was alleged to have obtained credit under an assumed name and failed to report his residence to his parole officer. According to the parole officer's report, Morrissey admitted some of these technical violations of his parole conditions.

After his parole was revoked, Morrissey exhausted his state remedies and filed a habeas corpus petition in federal district court. He charged it was a denial of due process to revoke his parole without a hearing. The federal district court and the Eighth Circuit Court of Appeals both denied the petition, but the United States Supreme Court granted his application for writ of certiorari. The Supreme Court reversed the decisions of the two lower courts.

B. The Reasoning of the Court

The Court began by observing that parole has become an integral part of the correctional system and that it serves a number of useful purposes. The Court said it is implicit in the system that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of parole. It identified the components of the revocation process as, first, a wholly retrospective factual inquiry concerning whether parole terms were violated. Second, the Court further noted that if it were found that a violation has occurred then is it necessary to decide the proper disposition of the matter, i.e.,

whether to revoke the parole of the individual and send him back to prison or to continue his parole with or without additional conditions of parole.

The Court observed that revocation is not part of a criminal prosecution and "thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation."[4] It acknowledged that revocation is the deprivation of conditional liberty, not the absolute liberty of the ordinary citizen. The Court then examined the nature of this limited liberty in order to determine whether it is within the ambit of the due process guarantees found in the 14th amendment. The Court said yes, saying:[5]

> We see, therefore, that the liberty of the parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the fourteenth amendment. Its termination calls for some orderly process, however informal.

Finally, the Court assessed the governmental interest and found that it, too, would be served by an informal hearing process designed to develop the facts concerning the alleged violation and the equities involved in the sanction of revocation.

C. The Holding of the Court

After concluding that some process was due, the Court proceeded to determine what procedures are required. The Court held that two hearings should be conducted.

1. Preliminary Hearing

A preliminary hearing is necessary, the Court said, because there will often be a substantial delay between the arrest of a parolee and the date of the revocation hearing; there may also be a substantial distance between the place of arrest and the final hearing.[6]

> [S]ome minimal inquiry should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. . . . Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

The Court specified that the hearing officer at this inquiry should be someone who is not involved in the case (not necessarily a judicial officer) and that the parolee should be given notice of the hearing and of its purpose. On the request of the parolee, persons who have given adverse information on which the parole violation is based are to be made available for questioning in the parolee's presence. However, confrontation and cross-examination can be denied if the hearing officer decides that the informant would be placed at risk if identified. Based upon the information presented (which he must summarize for the record), the hearing officer should determine if there is reason to warrant the parolee's continued detention. The hearing officer must state the reasons for his decision and the evidence relied on. The Court stated that the process could be informal.

2. Revocation Hearing

At the request of the parolee, the Court said, there must be a second hearing to lead to a final determination of any contested relevant facts and consideration of whether the facts warrant revocation, saying:[7]

> The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as the State suggests occurs in some cases, would not appear to be unreasonable.

The Court went on to specify procedures to be observed in the revocation hearing. They include:

> (a) Written notice of the claimed violation of parole;
>
> (b) Disclosure to the parolee of evidence against him;
>
> (c) An opportunity to be heard in person and to present witnesses and documentary evidence;
>
> (d) The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
>
> (e) A "neutral and detached" hearing body, such as a traditional parole board, members of which need not be judicial officers or lawyers; and
>
> (f) A written statement by the fact finders as to the evidence relied on and reasons for revoking parole.[8]

The Court did not decide the question as to whether the parolee could have the assistance of retained counsel, or appointed counsel if he were indigent. When this issue was addressed in *Gagnon v. Scarpelli*,[9] the Court held that decisions would have to be made on a case-by-case basis, with consideration given to the presence or absence of contested facts, any possible mitigating circumstances to be considered in opposition to revocation, and the apparent ability of the probationer or parolee to present his case effectively. *Gagnon v. Scarpelli* also held that the above rights given to parolees must also be given to probationers in probation revocation proceedings (see section III, Probation Revocation: *Gagnon v. Scarpelli* Is the Leading Case).

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II. COURT DECISIONS AFTER *MORRISSEY*

Although *Morrissey* was unusually detailed, the facts of the case did not present the infinite variety of situations encountered in day-to-day administration of the probation and parole systems. In the nearly three decades since *Morrissey* was decided, there has been considerable litigation seeking to hone its rules and define the parameters of those rules. This section presents court decisions addressing a number of significant issues. Legislatures and administrative agencies have also sought to codify the *Morrissey* rules for individual systems, but these legislative refinements are not considered here. What follows addresses only court decisions.

A. Preliminary Hearing Issues

1. Location

The only time a problem appears to arise here is when violations have occurred in different geographical jurisdictions. An Eighth Circuit Court of Appeals decision[10] appears to state the general rule. The "arrest" referred to by the Supreme Court in *Morrissey* refers to the probation or parole violation arrest. Hence, the requirement that the preliminary hearing be held "near" the

place of arrest was not violated when a Nebraska probationer received a Nebraska hearing to consider alleged probation violations that occurred in Oklahoma.

2. Promptness

The jurisdictions vary considerably on this point. At one end, New York typifies a point of view that the determination of what constitutes a "reasonably prompt inquiry" must be made on a case-by-case basis.[11] California case law suggests the outside limit of promptness is 4 months, after which charges will be struck.[12] This seems reasonable, perhaps generous, because the period does not begin when cause to consider revocation is discovered; it only starts when the probationer or parolee is summoned or arrested. Another perspective is typified by Arizona law, where the limits of promptness are not less than 7 or more than 20 days after service of summons or warrant, unless the probationer requests otherwise.[13]

Some courts have held that it is possible to dispense with the preliminary hearing and retain the necessary due process. The Supreme Court held this to be the case in a 1976 decision[14] concerning a parolee who had been convicted of a new offense. The conviction conclusively establishes the necessary probable cause in such situations. Also, if the formal revocation hearing is held within a reasonable time after the alleged violation, a single revocation hearing may be sufficient. The view is typified by Michigan and appears to be the preferred method among states.[15] The constitutionality of this procedure was challenged in a Texas case, which went to the United States Supreme Court.[16] The Court, however, dismissed the appeal without authoritatively settling this issue.

3. Form of Notice

The general rule is typified by an Eighth Circuit ruling that requires written notice only with respect to the final hearing and not with respect to a preliminary hearing.[17] However, in situations in which an acceptable combined preliminary and revocation hearing is utilized, such as in probation revocation proceedings, the notice must allege the violation with greater specificity than would be required for only a preliminary hearing.[18]

4. Impartial Hearing Officer

The person conducting the hearing need not be a judicial officer or an attorney. He or she only must be impartial and detached, which appears to exclude only the parole officer who initiated the arrest. A different parole officer may conduct the hearing.[19]

B. Revocation Hearing Issues

1. Notice of Hearing

Morrissey requires that "written notice of the claimed violation of parole" be given. The states have shown considerable variation in determining the minimally acceptable form of notice. Most states have demanded reasonably complete notice to comply with standards of fairness. However, since *Morrissey* did not delineate any definite standards, states have been left to their own devices. For example, North Dakota found adequate a notice that did not mention the time and place of the hearing.[20] It is the majority rule that when notice is not given because the parolee makes himself unavailable, his failure to receive it does not violate his constitutional rights.[21] Although it is not always necessary that the parolee receive the notice, the mere affidavit of a hearing officer that he had directed that a violation report be sent to the individual was not enough.[22] Presumably, the failure to receive notice must be through the fault of the parolee.

2. Disclosure of Evidence

The *Morrissey* requirement of disclosure of the evidence against the parolee at the revocation hearing may be met by a number of methods. In some jurisdictions, mere verbal notice has sufficed, although written notice is generally preferable. Most jurisdictions allow the parolee access to pertinent official records and materials.[23] However, as long as

the parolee is advised in some manner of the evidence against him or her, the parole officer need not reveal his or her report or notes to the parolee. A federal district court in New York upheld denial of a parolee's access to his parole officer's chronological entries of conversations with the parolee.[24]

3. Confrontation and Cross-Examination

In *Morrissey*, the Supreme Court said that at a revocation hearing a parolee should have the right to confront and cross-examine adverse witnesses, unless the hearing officer excuses confrontation for good cause. The Court also said that the revocation hearing was not the same as a criminal trial and, as a result, the process should be flexible enough to permit consideration of material, such as letters and affidavits, that would not be allowable in a trial. These statements by the Court are somewhat contradictory because the reason that such materials are usually excluded (when offered to prove a material fact) is that their consideration would deprive a defendant of his or her right of confrontation and cross-examination. What have the courts said on this issue?

4. Hearsay Admissibility

Whether an officer may present hearsay testimony at a revocation proceeding has received varied treatment. Hearsay has been held admissible in Florida[25] and New York.[26] In most other states, hearsay has been construed to violate the due process requirements of *Morrissey*. All states have since enacted statutes compelling the appearance of witnesses for the defendant and permitting their confrontation and cross-examination unless good cause is shown for not allowing it.[27]

In practice, exclusion of hearsay evidence means that an officer's testimony that he has been informed of a violation of parole conditions, standing alone, will not be sufficient for revocation. In most cases, the person who witnessed the violation will be required to testify. In Colorado, revocation was not allowed based on a probation officer's testimony that the defendant had stolen 40 dollars from his employer because it was hearsay unsupported by evidence.[28] Due process was violated because there was no confrontation and cross-examination of the employer by the defendant. In Pennsylvania, testimony of a probation officer of what he was told by a hospital staff member was hearsay and not sufficient to revoke probation. Good cause was not shown for denying confrontation and cross-examination.[29]

There is some support for the proposition that an officer must be sufficiently familiar with the facts of the defendant's case to testify. Even though hearsay is permitted in revocation proceedings in Florida, probation revocation based solely on the testimony of an officer who took the case after the violations occurred was not allowed.[30] In a similar vein, the testimony of a probation officer was not allowed at a criminal trial for armed robbery because the officer was not an intimate acquaintance of the defendant, and he had not seen the probationer for 7 months.[31] This could be construed in the parole or probation revocation setting to mean that remoteness in time of contact with a parolee (or probationer) may have some bearing on the validity of an officer's testimony, especially testimony governing any general propensity of the part of the offender to engage in particular forms of behavior.

The rule forbidding revocation on the basis of hearsay evidence cannot be avoided simply because the officer presents the evidence in a written report rather than in verbal testimony at the hearing. An Oklahoma court stated, concerning a hearsay statement, that the fact that the probation officer had written the statement into his report did not make the statement admissible under the "business records" exception to the hearsay rule.[32] Louisiana applied this same reasoning in a case in which a probation officer stated in his report that the defendant's parents had information that the defendant was sniffing glue.[33] The requirement of confrontation

and cross-examination of witnesses cannot be avoided by means of an affidavit for the same reasons. In Pennsylvania, an affidavit by a police officer that the defendant possessed narcotics was not sufficient for revocation.[34] The majority of courts apparently require fairly strict compliance with the *Morrissey* requirements of confrontation and cross-examination of witnesses, so information contained in the officer's report will usually need to be corroborated by extrinsic evidence or testimony.

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III. PROBATION REVOCATION: *GAGNON V. SCARPELLI* IS THE LEADING CASE

In 1973, the Supreme Court considered whether its holding in *Morrissey v. Brewer* should apply to probation revocations. In *Gagnon v. Scarpelli*,[35] the defendant had been convicted in a Wisconsin state court for armed robbery but placed on probation for 7 years. The defendant was permitted to move to Cook County, Illinois, under the Interstate Compact. Nevertheless, while in Illinois, he was arrested for burglary of a house. The state of Wisconsin revoked his probation without giving him a hearing.

After having been imprisoned in Green Bay, Wisconsin, to serve his sentence for armed robbery, the defendant filed an application for writ of habeas corpus. The defendant raised two issues in his application: one, that he was denied a hearing on his revocation of probation, and two, that he was not afforded counsel. He contended that both these matters involved his due process rights. The United States Supreme Court granted his application for writ of certiorari and accepted the case for decision.

The Supreme Court, noting its earlier holding in *Morrissey*, observed that there was little if no difference between the revocation of parole and probation and that logic would dictate that the legal principles enunciated in *Morrissey* should be held applicable to probation revocations. Thus the Court held that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing under the conditions specified in *Morrissey v. Brewer*.

The Court next turned to the second matter raised by the defendant in his application, i.e., his not being afforded counsel at the revocation proceeding. This was an issue that had not been addressed by the Court in *Morrissey*. Although the Supreme Court had previously held that an indigent defendant has the right to court-appointed counsel whenever he/she was charged with an offense that carried the possibility of imprisonment or confinement in jail,[36] the Court in *Gagnon v. Scarpelli* refused to hold that a probationer or parolee had an absolute constitutional right to the appointment of counsel in a revocation proceeding. The Court noted that a revocation proceeding, unlike a criminal trial, was not a true adversarial proceeding. Moreover, the Court observed that certain inherent objectives in probation and parole, such as the speedy disposition of revocation matters and the overall goal of successfully reintegrating an offender back into society, would be thwarted if counsel were appointed to a probationer or parolee in all cases.

Nevertheless the Court recognized that in certain circumstances, fundamental fairness would require that counsel be appointed for an indigent offender in a revocation proceeding. The Court stated:

> Presumptively, it may be said that counsel should be provided in cases where probationer or parolee makes such a request, based on a timely and colorable claim (1) that he has not committed the alleged violation of the

> conditions upon which he is at liberty; or (2) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Thus the Court held that the decision to appoint counsel for an indigent probationer or parolee must be made on a case-by-case basis.

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IV. OTHER ISSUES IN PAROLE AND PROBATION REVOCATION PROCEEDINGS

For some issues, *Morrissey* and *Gagnon* offer little assistance. For instance, must revocation be limited to violation of explicit conditions? Would not *any* illegal act violate the spirit of probation or parole statutes? Is, in the case of an arrest, the evidence of an illegal act conclusive? Is conviction a required prerequisite to a finding that an illegal act occurred? Although *Morrissey* was extensive and detailed enough to provide guidance on many issues, answers in other areas were not suggested directly. How much proof, for example, is needed to support the decision to revoke? The response of the courts to a number of these supplemental questions is presented in this section.

Appellate courts have scrupulously attempted to apply the Supreme Court's holdings in *Morrissey* and *Gagnon*. As recently as 1999, the Fifth Circuit United States Court of Appeals in *Williams v. Johnson*[37] held that the due process guarantees enunciated by the Supreme Court in *Morrissey* are as equally applicable to revocation hearings as to preliminary hearings. Moreover, in *John v. United States Parole Commission*,[38] the Ninth Circuit United States Court of Appeals stated that, in circumstances in which the law leaves within the discretion of the parole board the decision as to whether or not to revoke an individual's parole, not only is the individual entitled to a revocation hearing but also the parole authority must abide by the six requirements of accurate fact-finding set out in *Morrissey* as necessary to satisfy the "minimum requirements of due process."

Appellate courts have had difficulty, however, in interpreting the holding of the Supreme Court in *Morrissey* when the Court stated:

> We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any state's parole system.

This statement has raised the question concerning whether the due process guarantees in *Morrissey* are absolute, or whether the flexibility mentioned permits exceptions to be made under justifiable circumstances. Thus appellate courts have struggled over the years to determine whether the six basic requirements established in *Morrissey* are ironclad due process guarantees or whether some deviations are permissible.

A. Necessity of Preliminary Hearing

Despite the Court's holding in *Morrissey* mandating a preliminary hearing, appellate courts under certain circumstances have dispensed with a preliminary hearing. The United States Supreme Court in *Moody v. Daggett* [39] held that if a parole violation warrant alleges that the parolee violated the conditions of his parole by being convicted of (as opposed to charged with) another criminal offense, then a preliminary hearing is not required. The Court reasoned that since the purpose of the preliminary hearing is to

establish probable cause to believe that the alleged violation occurred, a criminal conviction obtained in a court of law suffices to establish that probable cause exists to believe that the parolee committed the criminal offense. In *Ellis v. District of Columbia*,[40] the United States Court of Appeals for the District of Columbia held that the policy in the District of Columbia mandating that revocation hearings be conducted within 30 days of the arrest of a parolee satisfied the requirement that a preliminary hearing be conducted, and thus the preliminary and revocation hearing could be combined.

B. Standard of Proof

The standard of proof required to support revocation will have an effect upon an officer's decision to submit the case to the authority entrusted with making the revocation decision. Where an officer is conducting the revocation hearing, knowledge of the standard of proof required for revocation in the jurisdiction is essential. There is wide latitude among the states in determining the proper standard, and any formulation of a general rule would be of little help. For example, Georgia requires only "slight evidence" for revocation,[41] whereas Oklahoma requires that the decision be supported by a preponderance of evidence that could have been deemed more probably true than not.[42] Parole officers in each jurisdiction should consult legal counsel or departmental standards to determine the standard of proof required to revoke parole.

C. Nature of Proof Required

Illinois has held that once a defendant has admitted the grounds for violation of probation, the admission eliminates the necessity of proof by the state.[43] Louisiana, on the other hand, has held revocation improper where the only evidence relied upon was the probationer's uncounseled guilty plea.[44] Florida has held that some overt act is required to revoke parole. The mere statement of the parolee that he intended to violate his parole conditions was insufficient for revocation.[45] Often the testimony of the officer in charge of a probationer or parolee is crucial at a revocation proceeding. Whether the testimony of an officer—unsupported by other evidence—is sufficient to revoke parole varies in different states. A Texas court held that revocation cannot be based merely on the conclusionary statement of a probation officer that the probationer failed to report at least once a month as directed.[46] Oklahoma did not permit revocation based solely on an officer's testimony without supporting evidence that the defendant had moved to Missouri.[47] North Carolina reached the opposite result, holding that the uncontradicted testimony of a probation officer—that the defendant had been fired from his job and had not made payment toward his probation costs—was sufficient to support a revocation.[48] Similarly, in Georgia (where only "slight evidence" is needed), probation revocation was upheld based solely on the testimony of an arresting officer that in his opinion the probationer was driving while intoxicated.[49] (Even laymen usually are allowed to give an opinion on drunkenness.) It seems probable that similar reasoning would be applied to a parole officer in Georgia.

Courts probably will insist on detail in appropriate cases, rather than accept an officer's conclusions about an event. In an Oregon case,[50] a probation officer was required at a revocation hearing to testify to the precise relationship of the probationer with the 4-year-old daughter of the woman with whom the probationer was living. A probation condition prohibited the probationer from associating with young girls. The court was unwilling to equate living in the same household with the proscribed "association"; the court wanted to draw its own conclusion from the facts observed by or known to the officer.

As the above cases demonstrate, there is no clear rule on whether a parole (or probation) officer's testimony unsupported by other

evidence will be sufficient to revoke parole (or probation). But it must be noted that uncorroborated testimony concerning an observed event is admissible. Thus, if the parole or probation officer has personal knowledge of the event that forms the basis of the alleged violation (e.g., saw the offender consuming alcohol or present at a place or location prohibited by the court or parole board), or the offender made an admission against his penal interest to the officer (e.g., admitting that he had been taking drugs when ordered not to by the court or parole board), then this evidence is generally sufficient to justify a court or parole board revoking the offender's conditional release.

Probation/parole officers should also recognize that although testimony might be objectionable for one purpose, it might, nevertheless, be received for another legal purpose. For example, the Supreme Court has held that even though evidence obtained in violation of *Miranda* may not be introduced in the case chiefly to prove that a defendant actually committed the criminal offense alleged, such evidence may still be introduced for impeachment purposes if the defendant takes the stand and denies that he committed the act alleged by the State.[51] Thus, probation and parole officers need to be aware that even if certain evidence is ordinarily excludible in a revocation hearing, it may still be admissible as rebuttal evidence, for impeachment purposes, or to show the state of mind of the offender.

In addition, if a probation or parole officer does not have personal knowledge of the incident that forms the basis of the revocation proceeding, then ordinarily any testimony on the part of the officer would not be probative, meaning it could not support a finding that the probationer or parolee actually committed the violation alleged. Thus, on the issue of whether a probationer or parolee had a particular history of arrests, or had written certain bad checks, the officer might not be a qualified witness. A certified copy of a police record or the testimony of a bank officer might be deemed necessary to prove such matters.

Moreover, what type of evidence is probative is also dependent on what violation of the conditions of release is alleged. For example, proof that a parolee or probationer was arrested for a new offense would not be sufficient to prove an allegation that the offender committed a new offense. However, proof of an arrest might be sufficient if the allegation were that a condition of the offender's release was to report all new arrests to his probation or parolee officer and he had failed to do so. Thus in determining whether to seek revocation of an offender's conditional release, a probation or parole officer must not only consider the probative value of any evidence he may have concerning a particular violation of the conditions of release, but also evaluate the probative value of this evidence in light of other conditions imposed by the court or parole board.

A West Virginia case illustrates the points made regarding the admissibility of evidence for limited purposes.[52] In that case, the defendant had been charged as an accessory to murder. He took the stand in his own defense and, in the course of seeking to establish his good character, acknowledged that he had been previously convicted in Ohio, but claimed that he had observed the conditions of his parole. The defendant had in fact violated a nonassociation parole condition. Ordinarily observance of parole conditions was clearly collateral to the murder prosecution; thus, the rules of evidence normally would bar the testimony because impeachment is not permitted on a collateral matter. Nevertheless the court held, in this particular case, that the testimony could be received for the limited purpose of suggesting that the defendant did not always tell the truth; hence, his version of the facts in the murder case might not be credible.

D. Limitation on Testimony

The cases do not tell the precise limits on the relevance of the testimony or other evidence that may be offered to support revocation. One New York case,[53] however, shows that there are limits. In that case, after the revocation hearing but before any decision was announced, an officer discovered that the parolee had written more bad checks than were considered at the hearing; he brought this information to the attention of the hearing officer. In a summary opinion, which did not explain the court's reasoning, this was held to be improper, and a new hearing before a different examiner was ordered. A number of *Morrissey* rights arguably were interfered with. There was no written notice about these additional "charges," and the parolee had no opportunity to refute or explain them. Moreover, the additional information might have been viewed as tending to bias the hearing examiner.

E. Right to Speedy Hearing

Generally, most courts have held that a probationer or parolee does not have a sixth amendment right to a speedy hearing on the allegations of violations of the conditions of release. Instead appellate courts have held that the sixth amendment right to a speedy trial as guaranteed in the United States Constitution is applicable only to criminal trials and not to revocation proceedings. Nevertheless, despite holdings that a probationer or parolee facing a revocation hearing does not have a sixth amendment right to a speedy hearing, courts have entertained the notion that an unacceptable delay procuring the arrest (as opposed to conducting the hearing) may implicate certain due process rights.

In *Bennett v. Bogan*,[54] the defendant had been sentenced in federal court to 8 years in prison and 5 years on special parole for a controlled substances offense. However, the defendant was also sentenced to a state prison by a New Jersey court. The defendant was placed in a New Jersey state prison but was subsequently granted probation and released. While on probation, the defendant was arrested for drug trafficking. The United States Parole Commission issued a parole violator warrant. However, at the hearing to revoke his parole, the parole commission decided to withdraw the warrant and to have the defendant extradited to New Jersey in order to be tried on the state drug trafficking charges.

Several years after the decision to remand the defendant to the custody of New Jersey officials, the United States Parole Commission issued a second parole violator warrant, alleging the same conduct alleged in the first warrant and also alleging that the defendant had failed to report to his parole officer while awaiting trial on the New Jersey charges. However, the parole commission did not move to execute the warrant, i.e., cause the parolee's arrest, until 5½ years after issuing the warrant. The parolee was eventually arrested on the warrant, and the parole commission finally proceeded to revoke his parole. The defendant/parolee contended on appeal that his sixth amendment and due process rights were violated by the delay of the parole commission in executing the second violation warrant 5½ years after it had been issued.

Although the United States Sixth Circuit Court of Appeals rejected his assertion of a sixth amendment right to a speedy revocation hearing, the court was open to considering a possible due process infringement. The Court noted that previous courts, in examining this issue, had held that a parolee, in complaining of the delay in arresting and then conducting a revocation hearing, must demonstrate some harm and prejudice in holding the hearing so long after the issuance of the warrant. Moreover, the Court acknowledged that the parole commission, after issuing a parole violator warrant, had some obligation to have the defendant arrested on the warrant. Nevertheless, the Court also said that certain mitigating circumstances could preclude a

parolee from asserting that his due process rights were violated by failing to arrest him in a timely manner. In this case, since the parolee had failed to report to his parole officer, the Court held that the parolee's actions absolved the parole commission from speedily executing the parole violator warrant.

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V. OTHER SUPREME COURT DECISIONS AFFECTING REVOCATION PROCEEDINGS

Four other Supreme Court rulings have addressed issues related to probation revocation. The first is *Pennsylvania Board of Probation and Parole*,[55] decided in 1998 (illegally obtained evidence may be admitted in revocation proceedings); in 1983, the Court decided *Bearden v. Georgia*[56] (whether an indigent's probation can be revoked for failure to pay a fine and make restitution); in 1984, the Court handed down a ruling in *Minnesota v. Murphy*[57] (involving the admissibility of evidence obtained from the probationer without the *Miranda* warnings); and in 1985, the Court decided *Black v. Romano*[58] (whether due process requires courts to consider alternatives to probation prior to revocation). These significant cases invite further details.

A. Illegally Obtained Evidence May Be Admitted: The Case of *Pennsylvania Board of Probation and Parole v. Scott*

The most recent United States Supreme Court decision dealing with revocation proceedings addressed the issue concerning whether evidence obtained in violation of a constitutional provision could nevertheless be introduced in a revocation proceeding. In *Pennsylvania Board of Probation and Parole v. Scott*,[59] the defendant pleaded nolo contendere to the charge of third-degree murder and had been sentenced to prison for 10 to 20 years. Ten years later, the defendant was released on parole. One of the conditions of the defendant's parole was that he refrain from "owning or possessing any firearms or other weapon." In addition, the defendant signed a consent to allow agents of the Pennsylvania Board of Probation and Parole to conduct searches of his person, property, and residence.

Five months into the defendant's period of parole, he was arrested for several alleged violations of the conditions of his release. In addition, parole agents conducted a search of the parolee's residence, which was also the home of his mother. The agents found five firearms, a compound bow, and three arrows as a result of the search of his residence. Although the parolee objected to the introduction of the seized weapons at his revocation hearing, the evidence was nevertheless admitted at the hearing and his parole was revoked.

The defendant appealed the admission of this evidence to the Pennsylvania Supreme Court. The defendant argued that the evidence was seized in violation of his United States constitutional rights under the 4th and 14th amendments. The Pennsylvania Court agreed and held that the exclusionary rule applied to this case. The State appealed this ruling to the United States Supreme Court.

The United States Supreme Court noted that it had applied the exclusionary rule only where its deterrence benefits outweighed its "substantial social costs." Thus using this analytical premise, the Court examined the deterrence benefits versus the social costs in applying the exclusionary rule to a revocation proceeding. A majority of the Court stated:

> [T]he application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings. The rule would provide only minimal deterrence benefits in this context,

> because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches.

Therefore, the Court held that the exclusionary rule did not ban the introduction at a parole revocation hearing of evidence seized in violation of a parolee's fourth amendment rights. In short, the Court held that the Constitution does not require the states to exclude illegally obtained evidence in revocation hearings. This means that a state can, at its discretion, admit or exclude illegally obtained evidence in revocation proceedings.

Although the Supreme Court deemed the deterrent effect of the admissibility of illegally obtained evidence minimal in a revocation proceeding, there are certain situations under which this assumption could be questioned. For example, state prosecutors may decline to try a parolee in a criminal action if they believe that certain critical evidence may not be admissible but, instead, forgo prosecuting the parolee for the new offense and seek to have the evidence used in a revocation proceeding. Moreover, the Court in *Scott* did not address the question concerning a violation of a parolee's fifth amendment rights, i.e., whether a confession obtained by force or coercion could still be admissible in a revocation proceeding. Finally, despite this holding, certain states may create their own state exclusionary rules and restrict the admissibility of illegally obtained evidence in a parole or probation revocation proceeding.

B. Equal Protection and Revocation: The Case of *Bearden v. Georgia*

In *Bearden*,[60] the petitioner pleaded guilty in a Georgia trial court to burglary and theft by receiving stolen property. The court did not enter a judgment of guilt; instead, in accordance with Georgia law, the court sentenced the petitioner to probation on condition that he pay a $500 fine and $250 in restitution, with $100 payable that day, $100 the next day, and the $550 balance within 4 months. The probationer borrowed money and paid the first $200, but a month later he was laid off from work, and despite repeated effort, was unable to find other work. Shortly before the $550 balance became due, he notified the probation office that his payment was going to be late. Thereafter, the State filed a petition to revoke probation because the probationer had not paid the balance. The trial court, after a hearing, revoked probation, entered a conviction, and sentenced the probationer to prison. The record of the hearing disclosed that the probationer had been unable to find employment and had no assets or income.

On appeal, the United States Supreme Court held that a sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence. Said the Court:

> Over a quarter-century ago, Justice Black declared, "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has. . . . There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection clause, one must determine whether and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation.

The *Bearden* decision is consistent with *Williams v. Illinois*,[61] where the Court said that a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine. In many jurisdictions, however, indigence

(or inability to pay) is an affirmative defense to a revocation petition for failure to pay monetary obligations—hence avoiding a constitutional challenge similar to *Bearden*. The burden of proving indigence is usually with the probationer (or parolee). In jurisdictions that do not provide for indigence as a bar to revocation, the *Bearden* case becomes important as a defense to incarceration. It is evident from *Bearden*, however, that a distinction must be made between failures to pay because of indigence, thus foreclosing revocation, and refusal to pay, where revocation or a possible contempt proceeding is a valid option for the Court to take.

C. Interrogations and *Miranda*: Cases Prior to *Minnesota v. Murphy*

When the evidence a defendant seeks to exclude from a criminal trial is his own statement, the outcome is governed by *Miranda v. Arizona*.[62] That case holds that any statement made during custodial interrogation conducted in violation of *Miranda* rules is inadmissible. *Miranda* requires that the following warnings be given:

- The suspect has a right to remain silent.
- Any statement made may be used against the suspect in court.
- The suspect has a right to the presence of an attorney before and during any questioning.
- If the suspect cannot afford to hire an attorney, one will be provided by the state.
- Interrogation will be terminated any time the suspect desires.

The *Miranda* decision affects only the admissibility of evidence at trial. It does not directly apply to probation or parole revocation, but circumstances frequently arise where the investigation indicates the occurrence of a new offense. When this occurs, the officer must be careful not to cross the line between supervision—his or her proper role—and serving as agent for law enforcement authorities to ferret out information of a crime. If the line is crossed, and perhaps even if it is approached closely, *Miranda* warnings should be given.

In cases of doubt, the probation/parole officer might well ask him or herself whether the circumstances amount to custodial interrogation. An affirmative answer will indicate that the officer is involved in an investigation of some act or circumstance that might be construed as being of an independent nature—that is, separate from the supervision function. Moreover, if the officer formulates the intent to refuse to allow a probationer or parolee to leave until he or she completes any investigative inquiries, then this may constitute custodial interrogation.

The courts consider whether the suspect was "deprived of freedom of action in any significant way" in determining if questioning is custodial in nature. The defendant need not have been in actual custody. The suspect need only have held a reasonable belief that he or she was deprived of freedom in any significant way.

It could be argued that a parolee is always in custody; however, the Supreme Court ruled against this view. In an Oregon case, a parolee was asked by his parole officer to meet to discuss a burglary. They met at a police station as a convenient place and the suspect confessed. The Court held this was not a custodial interrogation, as he was in fact free to leave.[63]

If the parolee is in custody on a new charge, the officer is required to give the *Miranda* warnings.[64] What actually constitutes custodial interrogation is determined on a case-by-case basis, and jurisdictions vary considerably as to what is construed as custodial. A Kansas case held that when a parole officer went with the police to the parolee's home, took the parolee to the parole office, and questioned him there, the interrogation was

custodial.[65] The court suggested that any questioning by the parole officer related to a new offense requires *Miranda* warnings. However, the Oregon case referred to above holds otherwise.

Courts have held the following not to be custodial interrogations, obviating the need for *Miranda* warnings:

1. Where questioning by a parole officer occurred during a ride to the parole office and at the office, but the investigation had not yet become accusatorial. Once the parole officer has probable cause to make an arrest, *Miranda* must be given effect.[66]
2. Where a parolee was confined at a state hospital and confessed to a crime on his own initiative. The court mentioned as significant the facts that the parolee was not handcuffed and was free to leave the interviewing area, and third parties were present in the interviewing area.[67]
3. In a New York case, although the probationer was not free to leave the interviewing room, *Miranda* was not applied, as the coerciveness involved did not exceed that inherent in the probation or parole relationship. (Often the client has agreed to answer questions as part of the release agreement.)[68]

D. Interrogations and *Miranda*: The Effect of *Minnesota v. Murphy**

In 1984, the United States Supreme Court decided *Minnesota v. Murphy*[69] (also discussed in Chapter 8, Supervision), which gives some answers as to whether or not evidence obtained by a probation officer may be admissible in evidence in the absence of the *Miranda* warnings. In that case, Murphy pleaded guilty to a sex-related charge and was given a suspended sentence and placed on probation. The terms of probation required him to participate in a treatment program for sexual offenders, to report to his probation officer periodically, and to be truthful with the officer "in all matters." During the course of a meeting with his probation officer, who had previously received information from a treatment counselor that the probationer had admitted to a 1974 rape and murder, Murphy, upon questioning, admitted that he had committed the rape and murder.

After being indicted for first-degree murder, Murphy sought to suppress the confession made to the probation officer on the ground that it was obtained in violation of the 5th and 14th amendments. The case went to the United States Supreme Court. The Court held that the 5th and 14th amendments did not prohibit the introduction into evidence of the probationer's admissions to the probation officer in the subsequent murder prosecution. In general, the obligation to appear before his probation officer and answer questions truthfully did not in itself convert an otherwise voluntary statement into a compelled one. A witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the fifth amendment privilege rather than answer if he desires not to incriminate himself. If he chooses to answer rather than assert the privilege, his choice is considered to be voluntary since he was free to claim the privilege.

A number of questions arise from *Murphy*. For example, if the probationer had objected to answering the questions asked by the probation officer, but had been forced to do so, would the evidence have been admissible? The answer appears to be in the negative. When is a probationer considered to be in custody such that the *Miranda* warnings must be given if the evidence is to be used

*For a further discussion of *Minnesota v. Murphy*, see Chapter 7, Conditions, Modifications, and Changes in Status, section II.G, Self-Incrimination.

in a criminal trial? The Court does not answer that in *Murphy*, other than saying that "it is clear that respondent was not 'in custody' for purposes of receiving *Miranda* protection since there was no formal arrest or restraint on freedom of movement of the degree associated with formal arrest." Does the holding in *Murphy* extend to parole cases? This was not decided by the Court, but there are reasons to believe that it should.

The effect of the *Murphy* decision may be summarized as shown in table 9–1.

E. Due Process and Probation Revocation: The Case of *Black v. Romano*

In *Black v. Romano*,[70] the Supreme Court addressed the issue concerning whether the United States Constitution requires a judge to consider alternatives to incarceration before revoking probation. In that case, a certain Nicholas Romano pleaded guilty in a Missouri state court to several controlled substance offenses, was placed on probation, and given suspended prison sentences. Two months later, he was arrested for and subsequently charged with leaving the scene of an automobile accident, a felony under Missouri law. After a hearing, the judge who had sentenced the defendant revoked his probation and ordered the execution of the previously imposed sentences. Romano filed a habeas corpus petition in Federal District Court alleging that the state judge had violated due process requirements by revoking probation without considering alternatives to incarceration. The District Court agreed and ordered Romano released from custody. The Court of Appeals affirmed that decision. On appeal, the Supreme Court held that the due process clause of the 14th amendment does not generally require a sentencing court to indicate that it has considered alternatives to incarceration before revoking probation. The procedures for revocation of probation, first laid out in *Morrissey v. Brewer* and then applied to probation cases in *Gagnon v. Scarpelli*, do not include an express statement by the fact finder that alternatives to incarceration were considered and rejected. The Court reiterated that the procedures specified in *Morrissey* adequately protect the probationer against revocation of probation in a constitutionally unfair manner.

Addressing specific facts in the case, the Court went on to say that the procedures required by the due process clause were afforded in this case, even though the state judge did not explain on the record his consideration and rejection of alternatives to incarceration. The revocation of probation did not violate due process simply because the offense of leaving the scene of an accident was unrelated to the offense for which the defendant was previously convicted or because, after the revocation proceeding, the charges arising from the automobile accident were reduced to the misdemeanor of

Table 9–1. The Effect of *Murphy* on the Use of *Miranda* Warnings

Should the probation officer give the probationer *Miranda* warnings when asking questions concerning a criminal offense?*

	If Used in Revocation Proceeding	If Used in Criminal Trial
Offender not in custody	No	No, unless probationer asserts rights
Offender in custody	Depends upon state law or court decision	Yes

*This chart is also found in Chapter 8, Supervision.

reckless and careless driving. The *Romano* case, therefore, reiterates that *Morrissey* is still the yardstick by which revocation due process challenges are measured. However, the Court has shown an unwillingness to expand the meaning of due process beyond that laid out in *Morrissey*.

■ ■ ■

VI. CASES ON LIABILITY FOR REVOCATION

In *Hall v. Schaeffer*,[71] a federal district court ruled on a civil rights action brought by a former probationer against a probation officer. The court found that the defendant, in filing a petition seeking the arrest of the plaintiff, was performing a discretionary function pursuant to her official law enforcement duties as a probation officer. She was, therefore, entitled to quasi-judicial immunity.

In another case, the United States Fifth Circuit Court of Appeals[72] examined a civil rights suit against a probation officer who mistakenly caused the arrest of a plaintiff probationer due to the erroneous assumption that a person with the same name as the plaintiff was, in fact, the plaintiff. The court found the officer could be subjected to suit only where his conduct clearly violated an established statutory or constitutional right of which a reasonable person would have known. The rationale offered for this standard was a clear need to vindicate constitutional guarantees without dampening the ardor of public officials and the discharge of their duties. Specifically, the court ruled that the officer was not performing an adjudicatory function and was not entitled to judicially derived immunity.

However, in the same year,[73] the United States Ninth Circuit Court of Appeals heard a suit brought by a plaintiff claiming repeated arrests and consequent nonbail parole holds pending investigation of baseless charges of parole violations. This court found the decision to arrest directly related to the decision to revoke parole and, therefore, was protected by absolute immunity.

Jones v. Eagleville Hospital and Rehabilitation Center[74] suggests other bases for liability. In this case, a suit was brought after a parole revocation for refusal to remove a skullcap with religious significance to the plaintiff. Although the court found no liability, that decision appears to be the result of a provision in Section 1983 of 42 U.S. Code that limits a proper defendant to a "person." The defendant in this case was the parole board and not a "person." Thus, the question of liability under the facts in this case has yet to be unequivocally resolved by a court.

■ ■ ■

VII. EXTRADITION

In this mobile society, a parolee or probationer is often wanted by the authorities of one state while he or she is physically present in another state. The process for retrieving a person from another state is known as extradition. The outline of the process is found in the Constitution, which states:

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

Questions have arisen over the years concerning this process. These include the circumstances under which extradition may be refused, the behavior that makes one a fugitive from justice, and the authority of federal courts to require extradition. The only issue addressed here, probably the only one in which probation/parole officers are involved, is the

adequacy of the papers and documentation on which the extradition demand is based.

Exactly what documentary evidence must be assembled to support a governor's request to extradite a suspected violator varies considerably from state to state. Colorado does not require a certificate of judgment, conviction, and the sentence imposed; a certified record of the defendant's plea, suspended sentence, and probation is sufficient.[75] The same logic might be applied to parole, but it seems likely that at least a judgment of conviction would be required. In another Colorado case, it was held that a judgment of conviction and a statement from the governor that the person violated the terms of his probation were sufficient.[76] New Hampshire allowed the court to infer a probable probation violation, even though it was omitted from the extradition papers, because the conditions of probation included that the defendant not leave the state without permission.[77] Thus, probation/parole officers should consult with departmental legal counsel whenever a question involving the necessary documentation required for successful extradition arises.

At various times since 1934,[78] multistate agreements or compacts have been proposed that contain detailed procedures for moving offenders from one state to another. These include the "Agreement on Detainers" and the "Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act." When these or other compacts apply, they may simplify the process. Readers should determine from local authorities whether a particular compact is relevant, whether the rendering and demanding state are parties to the compact, and what procedures must be followed.

A simplified version of extradition is provided by the Interstate Compact, which provides for the courtesy supervision of parolees and probationers when residing out of state. The Interstate Compact applies only to states that are parties to the agreement.[79] It establishes the eligibility criteria for one state having to provide courtesy supervision of a probationer or parolee convicted in another state. Although a receiving state is not precluded under the Interstate Compact from accepting courtesy supervision of any probationer or parolee, if the probationer or parolee does not meet the eligibility criteria established in the compact, then the state can refuse to accept courtesy supervision and the offender must remain in the state of conviction.

If a receiving state becomes dissatisfied with a probationer or parolee for whom it is providing courtesy supervision, then that state can request that the sending state resume custody of the offender. Moreover, since an interstate compact carries the weight of federal law, an officer who violates the compact may incur federal liability.[80] Nevertheless, where the probationer or parolee is found in a third state and is not supervised there under the Interstate Compact, then formal extradition is required. Finally, probationers or parolees often validly waive extradition procedures and permit informal retaking.

■ ■ ■

SUMMARY

This chapter examines legal issues related to revocation, focusing primarily on the due process guarantees that the Supreme Court has established for revocation proceedings. The procedural due process rights set forth in *Morrissey* and clarified a year later in *Gagnon* remain the law of the land. *Morrissey* mandates a two-stage process consisting of a preliminary hearing and a final hearing. The preliminary hearing can be dispensed with under certain circumstances. *Gagnon* states that the due process guarantees established in *Morrissey* for parole revocation proceedings are equally applicable to probation revocation proceedings. However, *Gagnon* adds that the right to appointed counsel in revocation proceedings must be made on a case-by-case basis.

Morrissey raised a host of legal issues that were left unaddressed in that case. Among these are preliminary hearing issues (including location, promptness, form of notice, and impartial hearing officer); revocation hearing issues (including notice of hearing, disclosure of evidence, and confrontation and cross-examination); and hearsay admissibility. Other issues related to revocation proceedings that are discussed in this chapter are standard of proof, nature of proof required, limitations on testimony, and the exclusionary rule as applied to probation/parole cases. Despite the continuing viability of *Morrissey* and *Gagnon* as precedents, the Supreme Court has refused to extend greater due process guarantees in revocation proceedings than enunciated in these two cases.

The application of the *Miranda* decision is addressed in accordance with the 1984 Supreme Court decision of *Minnesota v. Murphy*. Whether the *Miranda* warnings must be given depends on the nature of the questioning. If it is a custodial interrogation, *Miranda* does apply if the evidence is to be used in a subsequent criminal trial. Moreover, its admissibility for use in a subsequent probation or parole revocation proceeding is determined by state law or judicial decisions. Some states require that the *Miranda* warnings must be given for the evidence to be admissible; others do not.

In *Black v. Romano*, the Court refused to expand the due process guarantees in *Morrissey*, saying that the due process clause does not generally require a sentencing court to indicate that it has considered alternatives to incarceration before revoking probation. In *Bearden v. Georgia*, the Supreme Court stated that probation cannot be revoked for failure to pay a fine or fees solely on the ground that the probationer was indigent and did not have the financial ability to pay the fine or fee. Finally, in *Pennsylvania Board of Probation and Parole v. Scott*, the Supreme Court held that the exclusionary rule does not apply in revocation proceedings.

The rules on extradition vary considerably from state to state; hence, probation/parole officers are advised to consult their legal counsel whenever questions concerning extradition documentation arise. This chapter also examines the Interstate Compact for Probationers and Parolees and discusses the provision of courtesy supervision for probationers and parolees convicted in one state but residing in another.

Notes

1. *See www.ojp.usdoj.gov/bjs/pub/press/ppus98.pr.*

2. Morrissey v. Brewer, 408 U.S. 471 (1972).

3. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

4. Morrissey v. Brewer, 408 U.S. at 480.

5. *Id.* at 482.

6. *Id.* at 485.

7. *Id.* at 488.

8. *Id.* at 488-489.

9. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

10. Kartman v. Parratt, 535 F.2d 450 (8th Cir. 1976). *Read closely, Gagnon* requires counsel at the preliminary hearing as well as the final hearing in most instances. *See, e.g.,* Van Ermen v. Percy, 489 F. Supp. 791 (E.D. Wis. 1980); Cresci v. Schmidt, 419 F. Supp. 1279 (E.D. Wis. 1976); Kemp v. Spradlin, 250 Ga. 829, 301 S.E.2d 874 (1983).

11. McLucas v. Oswald, 40 A.D.2d 311, 339 N.Y.S.2d 760 (1973).

12. *In re* La Croix, 32 Cal. App. 3d 319, 108 Cal. Rptr. 93 (1973).

13. State v. Settle, 20 Ariz. App. 283, 512 P.2d 46 (1973).

14. Moody v. Daggett, 429 U.S. 78 (1976).

15. People v. Hardenbrook, 68 Mich. App. 640, 243 N.W.2d 705 (1976).

16. Vincent v. State, 586 S.W.2d 880 (Tex. Crim. App. 1979), *appeal dismissed*, 449 U.S. 119 (1980).

17. United States v. Pattman, 535 F.2d 1062 (8th Cir. 1976).

18. *See* United States v. Havier, ____ F.3d ____ (9th Cir. 1997) No. 97-10500, decided September 9, 1998, in which Ninth Circuit Court of Appeals, in interpreting federal rules of criminal procedure that incorporated the Supreme Court's holding in *Morrissey*, held that when a revocation petition alleges the commission of a new crime and the offense being charged is not evident from the condition of probation being violated, then a defendant is entitled to receive notice of the specific statute he is charged with violating.

19. *In re* Ricks, 31 Cal. App. 3d 1006, 107 Cal. Rptr. 786 (1973); People *ex rel*. Warren v. Mancusi, 40 A.2d 279, 339 N.Y.S.2d 882 (1973); Parker v. Coldwell, 320 Ohio App. 2d 193, 289 N.E.2d 382 (1972); *Ex parte* Ates, 487 S.W.2d 353 (Tex. Crim. App. 1972).

20. State v. Hass, 264 N.W.2d 464 (N.D. 1978).

21. State v. Nangesser, 269 N.W.2d 449 (Iowa 1978).

22. Abel v. Wyrick, 574 S.W.2d 411 (Mo. 1978).

23. V. O'Leary and K. Hanrahan, *Parole Systems in the United States*, 57 (3d ed. 1976).

24. Augello v. Warden, Met. Corr. Ctr., 470 F. Supp. 1230 (E.D.N.Y. 1979).

25. Reeves v. State, 366 So. 2d 1229 (Fla. Dist. Ct. App. 1979).

26. Kaufman v. Henderson, 64 A.D.2d 849, 407 N.Y.S.2d 340 (1978). *See, e.g.*, U.S. v. McCallum, 677 F.2d 1024 (4th Cir. 1982); State *ex rel*. Thompson v. Riveland, 109 Wis. 2d 580, 326 N.W.2d 768 (1982); State v. Virgil, 97 N.M. 749, 643 P.2d 618 (Cr. App. 1982); Jones v. State, 423 So. 2d 513 (Fla. Dist. Ct. App. 1982).

27. For example, State v. Fraley, 258 S.E.2d 129 (W. Va. 1979).

28. People v. Thomas, 42 Colo. App. 441, 599 P.2d 957 (1979).

29. Commonwealth v. Maye, 411 A.2d 783 (Pa. Super. Ct. 1979).

30. Reeves v. State, 366 So. 2d 1229 (Fla. Dist. Ct. App. 1979).

31. State v. Fowler, 37 Or. App. 299, 587 P.2d 104 (1978).

32. Meyer v. State, 596 P.2d 1270 (Okla. Crim. App. 1979).

33. State v. Sussman, 374 So. 2d 1256 (La. 1979).

34. Jones v. Commonwealth, 47 Pa. Commw. Ct. 438, 408 A.2d 156 (1979).

35. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

36. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972).

37. Williams v. Johnson, ____ 3d ____ (5th Cir. 1999) No. 97-11116, decided March 29, 1999.

38. John v. United States Parole Commission ____ F.3d ____ (9th Cir. 1997) No. 96-16418, decided September 10, 1997.

39. Moody v. Daggett, 429 U.S. 78 (1976). *See also*, Roberts v. Champion, ____ F.3d ____, (10th Cir. 1997) No. 97-5096.

40. Ellis et al. v. District of Columbia et al., ____ F.3d ____ (C.A.D.C., 1996) nos. 95-7090 and 95-7109, decided May 28, 1996.

41. Dickerson v. State, 136 Ga. App. 885, 222 S.E.2d 649 (1975).

42. Cooper v. State, 599 P.2d 419 (Okla. Crim. App. 1979).

43. People v. Felton, 69 Ill. App. 3d 684, 387 N.E.2d 1094 (1079).

44. State v. Varnado, 384 So. 2d 440 (La. 1980). *See also*, State v. McGlothin, 427 So. 2d 280 (Fla. Dist. Ct. App. 1983).

45. Kish v. Florida Parole and Prob. Comm., 369 So. 2d 87 (Dist. Ct. App. 1979). *But see, e.g.,* Strickland v. State, 649 S.W.2d 817 (Tex. Crim. App. 1983).

46. Herrington v. State, 534 S.W.2d 311 (Tex. Crim. App. 1976).

47. Meyer v. State, 596 P.2d 1270 (Okla. Crim. App. 1979).

48. State v. Dement, 42 N.C. App. 254, 255 S.E.2d 793 (1979).

49. Gilbert v. State, 150 Ga. App. 339, 258 S.E.2d 27 (1979).

50. State v. Winters, 40 Or. App. 9, 605 P.2d 293 (1980).

51. Harris v. New York, 401 U.S. 222 (1971).

52. State v. Grimmer, 251 S.E.2d 780 (W. Va. 1979), *overruled on other grounds*; State v. Petry, 273 S.E.2d 346 (W. Va. 1980).

53. People *ex rel*. Thiel v. Dillon, 70 A.D.2d 778, 417 N.Y.S.2d 534 (1979).

54. Bennett v. Bogan, ___ F.3d ___ (6th Cir. 1995) No. 94-1931, decided October 5, 1995.

55. Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998).

56. Bearden v. Georgia, 461 U.S. 660 (1983).

57. Minnesota v. Murphy, 104 S. Ct. 1136 (1984).

58. Black v. Romano, 471 U.S. 606 (1985).

59. Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998).

60. Bearden v. Georgia, 461 U.S. 660 (1983).

61. Williams v. Illinois, 399 U.S. 235 (1970).

62. Miranda v. Arizona, 384 U.S. 436 (1966).

63. Oregon v. Matheason, 429 U.S. 492 (1977).

64. State v. Davis, 67 N.J. 222, 337 A.2d 33 (1975).

65. State v. Lekas, 201 Kan. 579, 442 P.2d 11 (1968).

66. *In re* Richard T., 79 Cal. App. 3d 382, 144 Cal. Rptr. 856 (1978).

67. People v. Lipsky, 102 Misc. 2d 19, 423 N.Y.S. 599 (Monroe Co. Ct. 1979).

68. People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969).

69. Minnesota v. Murphy, 104 S. Ct. 1136 (1984).

70. Black v. Romano, 471 U.S. 606 (1985).

71. Hall v. Schaeffer, 556 F. Supp. 539 (U.S.D. Pa. 1983).

72. Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983).

73. Anderson v. Boyd, 714 F.2d 906 (9th Cir. 1983).

74. Jones v. Eagleville Hospital and Rehabilitation Center, 588 F. Supp. 53 (U.S.D. Pa. 1984).

75. Miller v. Cronin, 197 Colo. 391, 593 P.2d 706 (1979).

76. Morgan v. Miller, 197 Colo. 341, 593 P.2d 357 (1979).

77. Martel v. Knight, 119 N.H. 190, 400 A.2d 478 (1979).

78. In that year, Congress enacted 4 U.S.C. Section 112, which provides that the consent of Congress is hereby given to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.

79. Presently the territory of Guam is the only place in the United States that is not a party to the Interstate Compact on Parolees and Probationers.

80. *See* Cuyler v. Adams, 101 S. Ct. 703 (1981), in which the United States Supreme Court stated that an inmate held pursuant to an interstate agreement on detainers could make a claim for relief under 42 U.S.C. Section 1983 for an alleged violation by state officials of the terms of the detainer agreement.

CHAPTER 10

Liabilities of Supervisors[1]

INTRODUCTION

In simplest terms, a supervisor is a person who has somebody working for or with him or her in a subordinate capacity. At the apex of the supervisory hierarchy are the administrators who have ultimate responsibility for the operation and management of an agency. The term "supervisor" is used in this discussion generally to include probation/parole administrators, chiefs, heads, or directors.

Although lawsuits against officers are directed mainly at field personnel, including probation or parole officers, plaintiffs are inclined to include supervisory officials and the agency as parties-defendants, based on the theory that the officer acts for the agency and, therefore, what the officer does reflects agency policy and practice. As a matter of legal strategy, it benefits plaintiffs to include supervisors and agencies in a liability lawsuit. Lower level officers may not have the financial resources to satisfy a judgment, nor are they in a position to prevent similar future violations by other officers or the agency. Moreover, chances of financial recovery are enhanced if supervisory personnel, by virtue of their position, are included in the lawsuit. The higher the position of the employee, the closer the plaintiff gets to the deep pocket of the county or state agency. Inclusion of the supervisor and agency may also create disagreement in the legal strategy of the defense, based on a conflict of interest, hence strengthening the plaintiff's claim against one or some of the defendants.

In *Brandon v. Holt*,[2] a 1985 decision, the United States Supreme Court ruled that a money judgment against a public officer "in his or her official capacity" imposes liability upon the public entity that employs him or her, regardless of whether or not the agency was named as a defendant in the suit. In this case, the plaintiff alleged that although the director of the police department had no actual notice of the police officer's violent behavior, because of administrative policies, the director should have known. The Court said that although the director could be shielded with qualified immunity, the city could be held liable. Speaking in dissent, Justice Rehnquist opined that the Court's opinion supports the preposition that in suing a public official under Section 1983 of 42 U.S. Code, a money judgment against the public official "in his or her official capacity" is collectible against the public that employs the official. In *Retenauer v. Flaherty*,[3] a 1994 decision, Pennsylvania Judge James R. Kelley quotes from the *Brandon* case to clarify the issue:

> [T]he issue before the court was whether the judgment was payable by the City of Memphis or whether the Police Director was individually liable. The court held that the City of Memphis was responsible for the judgment, but cautioned:
>
> > In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his or her official capacity" imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit.
> >
> > In *Retenauer*, the city of Pittsburgh was not named as a party, notified of involvement, nor given the opportunity to participate in settlement negotiations with the plaintiff. Therefore, it was exonerated from all liability in the case.

I. CATEGORIES OF SUPERVISORY LAWSUITS

Lawsuits may be categorized in various ways, each with varying implications. First, they may be brought under state or federal laws, or under both. Most cases are in fact brought under tort law (state courts) and Section 1983 of 42 U.S. Code (Federal courts). Both are civil cases and enjoy advantages in terms of a lower quantum of proof needed to win (compared with criminal cases) and probable financial benefit in the form of damages awarded. Section 1983 cases have the added advantage of the plaintiff being able to recover attorney's fees from the defendant, by judicial order, if he or she prevails in any of the allegations, or even if the case results in a consent decree.

Second, liability lawsuits may be classified as coming from two possible sources (i.e., from clients, such as probationers, parolees, or the general public, and from subordinates or employees). In either case, the usual allegation is that the supervisor is liable for injury caused by action or inaction. While most cases filed thus far stem from clients' liability claims, an increasing number of cases have arisen from subordinates for acts done or injuries suffered in the course of employment that could have been obviated had the supervisor performed his or her job properly.

Third, supervisory liability cases may be classified into direct liability and vicarious liability. Direct liability means that a supervisor is held liable for what he or she does, whereas vicarious liability holds a supervisor liable for what his or her subordinates do. This is based on the theory that the officer acts for the agency and, therefore, what he or she does is reflective of agency policy and practice.[4]

Fourth, liability lawsuits may be filed against the supervisor as a private individual or in his or her capacity as a public officer.

Liability as a private individual arises when the supervisor acts on his or her own and outside the scope of duty. In these cases, the agency will not undertake his or her defense or pay for damages if held liable. The initial determination whether that officer acted within the scope of duty is made by the agency. Unless provided otherwise by statute or agency regulation, such determination is not appealable to any court or higher administrative agency. Most lawsuits, however, are brought against a supervisor in his or her official capacity, regardless of the nature of the act. Plaintiffs prefer to hold both the officer and the agency liable so as to broaden the financial base for recovery.

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II. LIABILITIES OF SUPERVISORS FOR WHAT THEIR SUBORDINATES DO (VICARIOUS LIABILITY)

Vicarious or indirect liability stemming from negligence of a supervisor is one of the most frequently litigated areas of liability and, therefore, merits extended discussion. Most decided cases in the area of supervisor liability are police or prison cases, but their principles should be applied to probation and parole supervisors as well. It must be noted that most decided cases require "deliberate indifference" (a higher level of blame) for a supervisor to be liable. Simple negligence will not establish liability.

A. Negligent Failure to Train

This has generated a spate of lawsuits in the law enforcement and corrections areas of criminal justice. As early as 1955, a state court entertained tort actions for monetary damages resulting from improper or negligent

training.[5] The usual allegation in these cases is that the employee has not been instructed or trained by the supervisor or agency to a point at which he or she possesses sufficient skills, knowledge, or activities required of him in the job. The rule is that administrative agencies and supervisors have a duty to train employees and that failure to discharge this obligation subjects the supervisor and the agency to liability if it can be proven that such violation was the result of failure to train or improper training.[6]

Although no cases decided thus far involve probation and parole, some cases have mandated jail and prison administrators to train their staffs or improve their training programs. In *Owens v. Haas*,[7] the plaintiff argued that lack of training for personnel in the local jail resulted in the violation of his or her constitutional rights stemming from the use of force against him. The Second Circuit held that while a county may not be liable for mere failure to train employees, it could be liable if its failure was so severe as to reach the level of gross negligence or deliberate indifference. The court added that a municipality is fairly considered to have actual or imputed knowledge of the foreseeable consequences that could arise from nonexistent or grossly inadequate training.

In *McClelland v. Facteau*,[8] the Tenth Circuit held that a police chief might be held liable for civil rights violations for failure to train or supervise employees who commit an unconstitutional act. The plaintiff was booked by the New Mexico State Police at a local jail facility, and while there beaten by the officers as well as denied use of the telephone and access to an attorney. In holding the officers liable, the court said that in order for liability to attach, there must be a breach of an affirmative duty owed to the plaintiff, and the action must be the proximate cause of the injury. In this case, it was well known that instances of constitutional violations were occurring in the department because they had been thoroughly aired by the press. Additionally, the jail itself was under lawsuit in two instances of wrongful death. Similarly, in *Rock v. McCoy*,[9] a 1985 decision, when Mr. Rock approached a police officer to inquire whether the officer wanted to speak with him, a brawl quickly turned into a severe beating by law enforcement. Although the city had no policy or custom of beating citizens or suspects, the city was held liable because adequate training would have eliminated the grossly negligent officers' actions.

The question arises: Will a single act by a subordinate suffice to establish liability under failure to train? Most cases hold that a pattern must be proven and established. The *Owens* case indicates a single brutal incident may be sufficient to constitute a link between failure to train and violation. *Owens* considered solely the degree of violation to determine liability instead of waiting for a pattern to develop based on a series of violations. The United States Supreme Court has answered this question in the negative. In 1985, the Court ruled that an isolated act of police misconduct could not ordinarily make a city subject to a damage suit for violating an individual's civil rights.[10] This decision was reiterated in 1997 when the Court, in *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, held that a single hiring decision made by a county official was not enough to hold the county liable.[11] In another case, *Oklahoma City v. Tuttle*, the Court overturned a $1.5 million damage award against Oklahoma City, won by the widow of a man whom an Oklahoma City officer had shot to death in the process of investigating a reported robbery. The plaintiff in this case argued that the city's inadequate training of its police force constituted an official "policy" for which the city should be held liable. The Court of Appeals for the Tenth Circuit accepted the plaintiff's theory and ruled that the officer's action was so plainly and grossly negligent as to provide the necessary link between the policy and the injury. The United States Supreme Court reversed that decision. Writing for four of the seven justices in the majority,

Justice Rehnquist said that the notion of inadequate training as a policy was too nebulous and remote from the charge of unconstitutional deprivation of life as to form a basis for municipal liability. He added that a single incident could give rise to municipal liability only if the incident was actually caused by an existing, unconstitutional municipal policy, which can be attributed to a policymaker. But where the policy relied upon is not itself unconstitutional, considerably more proof than a single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the policy and the constitutional deprivation.

In *City of Canton v. Harris*,[12] decided in 1989, the Court held "deliberate indifference" was the standard to be used on the issue of municipal liability for inadequate training. In 1998,[13] the United States Court of Appeals for the Sixth Circuit held that to be held liable for supervisor liability, the administrator must display deliberate indifference in his or her inaction toward the situation.

Lawsuits against supervisors and agencies for failure to train come from two sources (i.e., a client whose rights have been violated by an officer who has not been properly trained, and a subordinate who suffers injury in the course of duty because he or she was not trained adequately). The obvious defense in these cases is proper training, but training may in fact be deficient due to circumstances beyond a supervisor's control, such as lack of funds and a dearth of expertise.

Will the supervisor be liable if no resources have been allocated to provide the desired level of training? Budgetary constraints generally have not been considered a valid defense[14] by the courts and, therefore, place the supervisor in a difficult position. With proper documentation, however, the supervisor should be able to establish good faith if he or she repeatedly calls the attention of those who hold the purse strings to the need for training. Even if financial resources are available, unstructured training alone may not be sufficient. The nature, scope, and quality of the training program must be properly documented and its relevance to job performance identified. There is a need to document training sessions with detailed outlines to substantiate course content. Attendance sheets are necessary for defense purposes in lawsuits brought by one's own subordinates.

B. Negligent Hiring

Negligent hiring stresses the importance of proper background investigation before employing anyone to perform a job. Liability ensues when an employee is unfit for appointment, when this unfitness was known to the employer or when the employer should have known about it through the background investigation, and when the act is foreseeable.[15] In one case,[16] the department hired a police officer despite a record of preemployment assault conviction, a negative recommendation from a previous employer, and a falsified police application. The officer later assaulted a number of individuals in separate incidents. He and the supervisor were sued and held liable. In another case,[17] the court held a city liable for the actions of a police officer who was hired despite a felony record and who appeared to have been involved in many street brawls. Liability was based on the complete failure of the agency to conduct a background check before hiring the applicant.

In a 1997 case, *Board of County Commissioners of Bryan County, Oklahoma v. Brown*,[18] the United States Supreme Court held that a county cannot be held liable under Section 1983 for a single hiring decision made by a county official. In *Brown*, the plaintiff and her husband approached a police checkpoint and then turned around to avoid it. Two deputies pursued the vehicle for more than 4 miles at speeds in excess of 100 miles an hour. When the vehicle stopped, one of the deputies pointed his gun at the truck and ordered the occupants to raise their hands. The other deputy went to the passenger side

of the truck and ordered Brown out of the vehicle. When Brown did not respond after the second request, the deputy pulled her from the truck by the arm and swung her to the ground. The fall caused severe injuries to Brown's knees, possibly requiring knee replacement. Brown sued the deputy, the county sheriff, and the county for injuries under Section 1983, claiming that the sheriff failed to adequately review the deputy's background. The deputy did in fact have a history of misdemeanor offenses, including assault and battery, resisting arrest, driving while intoxicated, and public drunkenness prior to his hiring. The sheriff knew this and yet hired him. After some legal maneuvering, the sole issue presented to the Court was: Can a county be held liable in a Section 1983 case involving excessive use of force for a single hiring decision made by a county official?

The Court said no, saying that county liability for a sheriff's decision to hire does not "depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this officer* was highly likely to inflict *the particular injury suffered by the plaintiff*." This is a higher standard for liability for negligent hiring than the "deliberate indifference" standard set in negligent failure to train cases.

This is the only case decided by the United States Supreme Court thus far on negligent hiring. Although the case involves law enforcement, there are good reasons to assume it applies to probation and parole as well. Moreover, although the case involves county liability rather than liability of a supervisor for negligent hiring, there is no reason to believe it will not apply to supervisors if that issue ever comes up before the Court. In sum, in the absence of statute it may be assumed that the high standard set by the Court in Brown for county liability is the same standard that will be set for liabilities of supervisor negligent hiring.

It is important to note, however, that the *Brown* case is a Section 1983 (federal) case. State courts may set a lower standard for liability in state tort cases for negligent hiring.

C. Negligent Assignment

Negligent assignment means assigning an employee to a job without ascertaining whether or not he is adequately prepared for it, or keeping an employee on the job after he or she is known to be unfit. Examples would be a reckless driver assigned to drive a government motor vehicle or leaving an officer who has had a history of child molestation in a juvenile detention center. The rule is that a supervisor has an affirmative duty not to assign or leave a subordinate in a position for which he or she is unfit. In *Moon v. Winfield*,[19] liability was imposed on the police superintendent for failure to suspend or transfer an errant officer to a nonsensitive assignment after numerous disciplinary reports had been brought to the supervisor's attention. The court held that supervisory liability ensued because the supervisor had authority to assign or suspend the officer but failed to do so. Similarly, in a recent case[20] dealing with the probation of Jeffrey Dahmer, the victim's family sued the state of Wisconsin, Dahmer's probation officer, and others alleging gross negligence and mismanagement. Their main allegation was that the new probation officer, Donna Chester, was reckless in accepting 121 probation cases of offenders who were evaluated as high risk and not fully following procedure and making requisite home contacts. Chester, however, had followed agency procedure and submitted waivers to her supervisor for those home contacts; therefore, the court found no recklessness or negligence on her part. The court further held the state and Chester were immune from liability in their official capacity under the doctrine of sovereign immunity in Wisconsin.

Supervisors must pay careful attention to complaints and adverse reports against subordinates. These must be investigated, and

the investigation must be properly documented. This also implies that the supervisor must generally be aware of the weaknesses and competencies of subordinates and not assign them to perform tasks in which they are wanting in skill or competence.

D. Negligent Failure to Supervise

Failure to supervise means negligent abdication of the responsibility to oversee employee activity properly. Examples are tolerating a pattern of physical abuse of inmates, racial discrimination, and pervasive deprivation of inmate rights and privileges. One court has gone so far as to say that failure on the part of the supervisor to establish adequate policy gives rise to legal action.[21] Tolerating unlawful activities in an agency might constitute deliberate indifference to which liability attaches. The usual test is: Does the supervisor know of a pattern of behavior, but has he or she failed to act on it?[22] A related question is: What constitutes knowledge of a pattern of behavior? Some courts hold that actual knowledge is required, which may be difficult for a plaintiff to prove, while others have ruled that knowledge can be inferred if a history of violation is established and the official had direct and close supervisory control over the subordinates who committed the violations.

In *Thomas v. Johnson*,[23] the police chief allegedly failed to supervise an officer against whom numerous complaints had been filed, resulting in an assault, battery, negligence, and violation of the plaintiff's civil rights. In both cases, the courts noted possible liability for negligent failure to supervise. In *London v. Ryan*,[24] one Lt. Weaver was the senior officer at the scene of a crime that resulted in two young officers firing their weapons and injuring an innocent person. Although he arrived in his patrol car at the same time as the two responding officers, Lt. Weaver failed to exit his vehicle and take command. The Louisiana court said that Lt. Weaver's failure to provide proper supervision in a situation involving firearms created a grave risk of serious bodily injury to innocent parties at the scene of the crime. In failing to provide supervision, Weaver breached a duty he owed the plaintiff and other parties present; hence, he was obliged to repair it.

The current law on liability for negligent failure to supervise is best summarized in an article as follows:[25]

> To be liable for a pattern of constitutional violations, the supervisor must have known of the pattern and failed to correct or end it. . . . Courts hold that a supervisor must be "causally linked" to the pattern by showing that he had knowledge of it and that his or her failure to act amounted to approval and hence tacit encouragement that the pattern continue.

A writer gives this succinct advice: "The importance of this principle is that supervisors cannot shut their eyes and avoid responsibility for the acts of their associates if they are in a position to take remedial action and do nothing."[26]

E. Negligent Failure to Direct

Failure to direct means not sufficiently telling the employee of the specific requirements and proper limits of the job to be performed. Examples are failure on the part of the supervisor to inform an employee in a prison mailroom of the proper limits of mail censorship or to advise prison guards as to the extent of preserved, rights of access to court and counsel. In one case,[27] the court refused to dismiss an action for illegal entry, stating that it could be the duty of a police chief to issue written directives specifying the conditions under which field officers can make warrantless entries into residential places. The court held that the supervisor's failure to establish policies and guidelines concerning the procurement of search warrants and the execution of various departmental operations made him vicariously liable for the accidental shooting death of a young girl by a police officer. In another

case,[28] the failure to direct involved the chief's negligence in establishing procedures for the jail concerning diabetic diagnosis and treatment. The case involved incarceration for public drunkenness. The arrestee experienced a diabetic reaction that resulted in a diabetic coma, stroke, and brain damage. The jailer did not recognize this condition and, therefore, failed to provide for the proper medical care, resulting in death. Liability was assessed.

The best defense against negligent failure to direct is a written manual of policies and procedures for departmental operations. The manual must be accurate and legally updated, and it must form the basis for agency operations in theory and practice. It must cover all the necessary and important aspects of the job an employee is to undertake. It is also necessary that employees be required to read and to be familiar with the manual as part of their orientation to the agency. A signed statement by the employee to the effect that he or she has read and understood the manual will go a long way toward exculpating a supervisor from liability based on failure to direct.

F. Negligent Entrustment

Negligent entrustment refers to the failure of a supervisor to supervise or control properly an employee's custody, use, or supervision of equipment or facilities entrusted to him on the job. Examples are improper use of vehicles and firearms that result in death or serious injury. In *Roberts v. Williams*,[29] a farm superintendent gave an untrained trustee guard a shotgun and the task of guarding a work crew. The shotgun discharged accidentally, seriously wounding an inmate. The court held the warden liable based on negligence in permitting an untrained person to use a dangerous weapon. In *McAndrews v. Mularchuck*,[30] a periodically employed reserve patrolman was entrusted with a fireman without adequate training. He fired a warning shot that killed a boisterous youth who was not armed. The city was held liable in a wrongful death suit. Courts have also held that supervisors have a duty to supervise errant off-duty officers where an officer had property, gun, or nightstick belonging to a government agency.

G. Negligent Failure to Discipline

Negligent failure to discipline means the failure to take action against an employee in the form of suspension, transfer, or terminations, when such employee has demonstrated unsuitability for the job to a dangerous degree. The test is: Was the employee unfit to be retained and did the supervisor know or should he have known of the unfitness?[31]

The rule is that a supervisor has an affirmative duty to take all necessary and proper steps to discipline and/or terminate a subordinate who is obviously unfit for service. This can be determined either from acts of prior gross misconduct or from a series of prior acts of lesser misconduct indicating a pattern of unfitness. Such knowledge may be actual or presumed. In *Brancon v. Chapman*,[32] the court held a police director liable in damages to a couple who had been assaulted by a police officer. The judge said that the officer's reputation for using excessive force and for having mental problems was well known among the police officers in his precinct; hence, the director ought to have known of the officer's dangerous propensities and to have fired him before he assaulted the plaintiffs. This unjustified inaction was held to be the cause of the injuries to the couple for which they could be compensable. In *McCrink v. City of New York*,[33] a police commissioner who personally interviewed an errant officer, and yet retained him after a third offense of intoxication while on duty, was deemed to have actual knowledge. Presumed knowledge arises where the supervisor should have known or, by exercising reasonable diligence, could have known the unfitness of the officer. No supervisory liability arises where the prior acts of misconduct were minor or unforeseeable, based on the prior conduct of the officer.

The defense against negligent retention is for the supervisor to prove that proper action was taken against the employee and that the supervisor did all he or she could to prevent the damage or injury. This suggests that a supervisor must know what is going on in the department and must be careful to investigate complaints and document those investigations.

In summary, supervisory liability under state law arises under a variety of circumstances, all based on negligence. While most courts impose supervisory liability only when the negligence amounts to deliberate indifference, other courts go with a lower standard. Regardless of the standard used, the determination of negligence is made by the trier of fact, be it a judge or jury, and so the distinction may not be all that significant. The seven possible sources of liability discussed above are not mutually exclusive and do in fact overlap. For example, negligent failure to direct or assign may also mean failure to supervise, and vice versa. The plaintiff's complaint may, therefore, cover more than one area of potential liability even if allegations are anchored on a single act.

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III. LIABILITIES OF SUPERVISORS FOR WHAT THEY DO TO THEIR SUBORDINATES (DIRECT LIABILITY)

In contrast to vicarious liability (liability of supervisors for what their subordinates do, where cases are filed by probationers or parolees), direct liability is filed by employees against supervisors allegedly because employees' rights have been violated by the supervisor.

Direct liability of supervisors under state law for acts affecting subordinates arises from varied sources and in a number of ways. Responsibilities attach in the hiring, termination, demotion, suspension, or reassignment phases of a supervisor's work. There are usually two issues involved in supervisor-subordinate cases. The first has to do with the causes for which an employee may be terminated, demoted, suspended, or reassigned. The second looks at the procedure that must be followed, if any, before an employee may be terminated, demoted, suspended, or reassigned. Both cause and procedure for supervisory action are primarily governed by laws on:

- Rights of employees given by the Constitution;
- Rights of the employee given by federal laws;
- Rights of the employee given by state laws;
- Rights of the employee given by agency policy;
- Rights of the employee given by collective bargaining agreements.

These sources of rights are not mutually exclusive and, in fact, interface in many cases. For example, prevailing state laws may supplement an employee contract; moreover, basic constitutional rights overlay individual contracts or agency regulations. Unconstitutional provisions in contracts or agency guidelines may be challenged in court. The waiver of a basic constitutional right as a condition for employment has found increasing disapproval in public employment litigation.[34]

A. Rights of Employees Given by the Constitution

Constitutional rights usually invoked by employees are:

- **First Amendment Freedom of Religion, Speech, the Press, Assembly, and Petition**

the Government. Example: An employee is terminated or disciplined for exercising constitutional rights, such as suing his or her superior or department, criticizing the department, exercising freedom of religion, or choosing an unconventional lifestyle. As a general rule, an employee may be disciplined if the supervisor is able to prove that what the employee did impairs his or her efficiency in the department,[35] or demonstrably affects job performance.[36] For example, criticisms, which ordinarily fall under the exercise of free speech, must have an adverse effect, or affect the efficiency of the department, before adverse action against the employee can be taken. In *Pickering v. Board of Education*,[37] the United States Supreme Court said that the right to speak cannot be curtailed absent proof of false statements knowingly and recklessly made, or a statement that disrupts the harmony of the department.

- **Fourth Amendment Right Against Unreasonable Searches and Seizures.** Example: An employee's desk is searched without permission. The general rule is that supervisors may validly conduct a search without a warrant or probable cause if the officer has no reasonable expectation of privacy.[38]
- **Fifth Amendment Right Against Self-Incrimination.** Example: An employee is dismissed for refusing to answer questions in connection with an investigation. The general rule is that an employee has no right against self-incrimination in an administrative investigation. Consent searches are valid; hence, he or she must answer carefully crafted questions but will retain such rights in a criminal investigation. Whatever is obtained in the administrative investigation cannot be used against the employee in a subsequent criminal proceeding.
- **14th Amendment Right to Equal Protection, Due Process, Property Interests, and Liberty Interests.** Example: An employee is dismissed from the job without a hearing. The general rule is that an employee acquires property rights to his or her job upon passing the probationary status, the length of which is governed by state law. When the termination takes away an employee's liberty (such as (a) when it seriously damages an employee's standing and association in the community, or (b) when the action imposes a stigma or other disability), that limits an employee's chances for other employment. The employee is entitled to rights under the 14th amendment.

The general rule concerning homosexual activities appears to be that sufficient nexus must exist between homosexuality and job performance to justify dismissal.[39] In one case, the court held that a homosexual junior high school teacher could not be dismissed or transferred simply because he was a homosexual. Some showing must be made of his or her homosexual behavior with students or teachers, or that his or her homosexuality, in general, was notorious.[40] In another case,[41] the court held that civil servants could not be discharged for homosexuality unless their homosexuality was rationally related to job performance.

In other sexual activity cases, the general rule is that an employee's private sexual conduct is within the zone of privacy and is, therefore, shielded from government intrusion. Most disciplinary actions by supervisors have not been sustained because these are areas of an employee's life over which the government has no legitimate interest. An exception is where the sexual activities of an employee are open and notorious, or if such activities take place in a small town where impact on the department may be easily demonstrable. In these cases, the supervisor might very well have an interest in investigating such activities and terminating the employee.[42]

Mere membership in a political party cannot be prohibited or used as a basis for disciplinary action, but participation in partisan politics can be prohibited because of possible conflict of interest and potential abuse of

the prerogatives of one's office.[43] In *Giglio v. Court of Pennsylvania*,[44] the court found such a prohibition to have important state interests. The employee retains the options of resigning his or her employment or requesting an exemption from the Pennsylvania court. Similarly in Georgia,[45] holding a political office and being a state employee were held to be a conflict of interest for which the state had a compelling interest in imposing restrictions about holding both at the same time.

The general rule stated above can be superseded, however, by federal or state law, agency policy, civil service rules, or collective bargaining agreements. Because of this, specific employee rights vary from one jurisdiction to another.

B. Rights of Employees Given by Federal Law[46]

Several statutes govern direct liability of supervisors to subordinates under federal law. Most notable are the following:

1. **The Equal Pay Act of 1963.** The Equal Pay Act protects women and men against pay discrimination based on sex, if they are performing substantially equal work in the same establishment. The law does not apply to pay differences based on factors other than sex, such as seniority, merit, or a system that rewards worker productivity.[47]
2. **The Age Discrimination in Employment Act.** The Age Discrimination in Employment Act protects workers aged 40 to 70 from age discrimination in hiring, discharge, pay, promotions, fringe benefits, and other aspects of employment. It applies to all federal, state, and local governments. The law does not apply if an age requirement or limit is a bona fide job qualification, is a part of a bona fide seniority system, or is based on reasonable factors other than age.[48] A June 2000 case held that the discrimination claim must be weighted along with all other factors that precipitated the firing.[49] Once the defendant has established a prima facie case of discrimination, direct evidence of the plaintiff's bias is not necessary for the case to go to the jury. In other words, indirect evidence will suffice to take the defendant's claims to jury deliberation.
3. **The Rehabilitation Act of 1973.** The Rehabilitation Act of 1973, the precursor to the ADA, applies to Federal agencies receiving federal funding. Under its auspices, discrimination based on disability is prohibited, including rehabilitation, public building access, and employment.[50]
4. **The Americans With Disabilities Act of 1990.** In an attempt to further the beneficial effects of the Rehabilitation Act of 1973, the Legislature passed the Americans With Disabilities Act of 1990. Under this act, discrimination based on disability was further prohibited as long as the individual had the requisite skills for the job in question. Admittance could not be denied to governmental programs, services, or activities, and public accommodations.[51]
5. **The Civil Rights Act of 1991.** This act deals mainly with technical court rules dealing with discrimination cases and opened the issue of damages awarded to include emotional suffering and punitive damages.[52]
6. **The Family and Medical Leave Act of 1993.** This act, applying to employers with 50 or more employees, provides leave, which is unpaid, for 12 weeks to any employee who qualifies, such as for childbirth/adoption/foster care or parental/spousal/child medical care.[53]
7. **The Pregnancy Discrimination Act.** In 1978, the Legislature amended Title VII and added the Pregnancy Discrimination Act. Under the Pregnancy Discrimination Act, employers are required to treat both hiring and leave decisions dealing with pregnancy, childbirth, and all related

matters as though it were a temporary disability. The only exception is the allowance of refusal to hire because the woman cannot complete the probationary employment period because of a pregnancy-related issue. Paid maternity leave is not required; however, if the agency has a temporary disability pay policy, it must be followed in this situation. Promotion, forced leave, and firing are also dealt with, as none may be done based solely on status as pregnant or dealing with pregnancy-related issues.[54]

8. **The Veterans Era Readjustment Act.** This act deals with the allocation of governmental contracts. The Veterans Era Readjustment Act states that federal agencies should seek to hire disabled and nondisabled veterans for contracts of and over the amount of $10,000.[55]

9. **The Civil Rights Act of 1964.** One of the most significant civil rights legislation passed by the Congress of the United States in the last four decades, the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, religion, color, or national origin. Under this law, employment discrimination is prohibited in such areas as recruitment, testing, hiring or firing, transfer, promotion, layoff, and training.[56] It is also the basis for rules and regulations prohibiting sexual harassment of employees.

   Sexual harassment is defined as unwelcome verbal, nonverbal, or physical conduct of a sexual nature or based on sex. It is a form of discrimination based on sex; hence, it is prohibited by the Civil Rights Act of 1964.

   Activities that may constitute sexual harassment include the following:[57]

   a. Touching.

   b. "Off color" jokes.

   c. Unwanted, unwelcome, and unsolicited propositions.

   d. Use of language.

   e. Holding up to ridicule.

   f. Leaving sexually explicit books, magazines, etc., in places where female employees can find them.

   g. Notes, either signed or anonymous, placed on bulletin boards, in lockers, in desks, etc.

   h. The required wearing of particular types of clothing.

   i. Transfer, demotion, dismissal, etc., after refusing or resisting sexual advances.

   j. Requesting and/or ordering employees of one sex to perform tasks traditionally viewed as "women's work," such as making coffee, going out to get lunch, or doing personal shopping for male supervisors.

   k. Demeaning comments or actions.

   l. Unwanted, unwarranted, and unsolicited "off duty" telephone calls, contacts, etc.

The above is an illustrative, not exhaustive, list of harassing activities. Not all sexually oriented acts constitute sexual harassment. There are levels of sexual harassment that vary in severity and consequence. For example, telling an "off color" joke is not as serious as sexual assault. The general rule is that less serious types of sexual harassment do not automatically lead to liability, whereas more serious acts do.

Sexual harassment can take place in two ways, vertical or horizontal: (1) harassment of subordinates by supervisors, and (2) harassment of employees by coemployees who are not their superiors. The general rule is that harassment of subordinates by supervisors (vertical) leads to agency liability, while harassment of employees by coemployees (horizontal) leads to supervisory liability only if the supervisor knew or should have known about it and could have stopped it but did not.

Must there be reprisal or revenge by the supervisor before harassment becomes unlawful? What if the supervisor propositions a subordinate but does not take any adverse action whatsoever when rebuffed? The answer is that sexual harassment, whether physical or verbal, may be unlawful even if there is no immediate employment reprisal. Under a 1980 Equal Employment Opportunity Commission regulation, sexual harassment is present if the unwelcome sexual advance has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[58] There is, therefore, no need for adverse action from the supervisor for sexual harassment to take place.

In *Cuesta v. Texas Dept. of Criminal Justice*,[59] a 1991 decision, the court held that harassment that affects the psychological well-being of the employee is enough, although the defendant could not prove that a term or condition of her work was affected. Further, the court held that the department had a lot of inappropriate behavior pervading the work environment; therefore, the board had knowledge of the harassment on a constructive level. Sexual harassment is an active area of law that is currently in the process of refinement by the courts. In 1998 alone, the United States Supreme Court decided three cases on sexual harassment that have implications in probation and parole. These cases deal with the issues of same sex harassment,[60] reasonableness of employer's conduct,[61] and lack of adverse consequences for rejecting advances.[62]

C. Rights of Employees Given by State Laws

Many federal laws have also been enacted into state laws and can, therefore, be enforced by the states, usually by creating a state Human Rights Commission. When this happens, the law can then be enforced both by the federal government and the states. The federal government may choose to leave enforcement to the state—based on a financial incentive. In addition to re-enacting federal laws, states may also pass laws of their own giving rights and remedies to employees. An example is whistleblower statutes that proscribe dismissal of the employee who exposes malfeasance in an agency. Some states have civil service laws giving employees rights that must be respected by supervisors. State rules vary as to whether public employees are covered by civil service rules.

D. Rights of Employees Given by Agency Policies

Agency policies sometimes give rights to employees beyond those given by the United States Constitution and laws. Those policies are binding on the agency. These rights may be enforced in state courts. Agencies must therefore be careful when drafting agency policies affecting their own employers. These policies do not rise to the level of constitutional rights; hence, they cannot be the subject of a lawsuit under Section 1983, which is a source of legal action under state tort law.

E. Rights of Employees Given by Collective Bargaining Agreement

Collective bargaining agreements cover various aspects of employment. These provisions are specific about working conditions and usually give more rights to employees than are given by the Constitution and laws. These rights bind the agency and must be respected. Penalties for violations are usually provided for in the collective bargaining agreement itself. Some probation/parole employers are unionized and working conditions are governed by collective bargaining agreements; other employers are not.

IV. AGENCY REPRESENTATION AND LIABILITY FOR ACTS OF SUPERVISORS

As a general rule, a supervisor is personally liable if he or she acts outside the scope of employment. State officials sued in their individual capacity are liable for civil rights violations,[63] although neither the state nor state officials may be sued in state court under Section 1983, when they were acting in their official capacity.[64] An employee's act is within the scope of employment if the following are present: the act is of the kind he or she is employed to perform; it occurs within the authorized time and space limits; and it is performed, at least in part, with the intent of serving the employer.[65] In short, there is no governmental liability unless the act performed is at least incidental to employment and a part of the employee's duties. As to who is the employer, the Court held in 1997 that whether a sheriff is an agent of the county or state is determined by the state's constitution, laws, and other regulations.[66]

In an earlier case, *Monroe v. Pape*,[67] the United States Supreme Court decided that the plaintiff could not recover from the municipality in Section 1983 cases, saying that "the response of the Congress to make municipalities liable for certain actions . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular context to include them." All that changed in 1978, when in *Monell v. Department of Social Services*,[68] the court reversed itself, holding that municipalities and other local government units are "persons" that can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief. Although the court found the municipality could be liable for damages, it declined to find liability for respondeat superior, or simply because of employment. Further, quoting from *Popow v. City of Margate*, a 1979 decision, "[T]o establish municipal liability, a plaintiff must prove either (a) an official policy or custom which results in constitutional violations, or (b) conduct by officials in authority evincing implicit authorization or approval or acquiescence in the unconstitutional conduct."[69]

In *Quern v. Jordan*,[70] the Court reiterated that the 11th amendment immunity barred suits against states for damages, thus reaffirming the doctrine of sovereign immunity. As a result, only natural persons, municipalities, cities, and other local units of government can be sued for damages without consent. State immunity is alive and well, unless waived by legislation, which many states have done in varying degrees, or in court decisions. In an action for overtime pay, the Court held probation officers could not sue their state due to sovereign immunity.[71] The federal legislature does not have the authority to override a states sovereign immunity with a federal law. Even in states where sovereign immunity still applies in totality, nothing bars the state from indemnifying its own supervisors for liability incurred while acting in the course of duty. The Court found that municipalities cannot claim a good faith defense under Section 1983.[72]

If a supervisor acts outside the scope of employment and is sued in his or her individual capacity, chances are that the agency will refuse to provide legal defense, nor will the agency indemnify if the officer is held liable. The matter of legal representation should be a justifiable cause of concern among supervisors because of its undefined status. While some states provide representation as a matter of right, surveys have shown that legal representation in many states is

largely unstructured.[73] In some states and agencies, an informal and unwritten understanding allows the state attorney general to defend the supervisor if, in his or her judgment, the case is meritorious. In municipal agencies, the practice is even more uncertain, with no designated legal counsel to undertake the defense and no official legal representation policy.

To compound the uncertainty, most jurisdictions will represent only if the employee acted within the scope of duty. That may sound reasonable and consistent with public policy, except that the term "scope of duty" is subjective and eludes precise definition. An agreed and viable working definition goes a long way toward protecting the rights of officers and alleviating anxiety. Additionally, it is necessary that there be an understanding that a trial court's finding that the officer acted outside the scope of duty, and, hence, is liable, not be made binding on the state or local agency for purposes of indemnification or representation on appeal. An independent judgment must be given to the agency, based on circumstances as determined by that agency. Ideally, only gross and glaring cases of abuse should be denied representation or indemnification. Without this understanding, agency legal assurances of indemnification may only be a mirage because, as current case law stands, acts done by a supervisor in good faith and within the scope of employment are likely to be exempt from liability anyway, so there is nothing to indemnify.

Supervisory lawsuits can lead to a possible conflict of interest in a number of ways. If the supervisor is sued in both an official and individual capacity, the agency might assert that the supervisor acted outside his or her scope of duty and hence should be personally liable. In the absence of mandated representation, the supervisor will most likely have to provide his or her own defense. This creates a financial burden and places the supervisor at a disadvantage because of the inevitable implication that in the judgment of the agency the act was unauthorized. A second source of conflict of interest comes from the supervisor's relationship with his or her subordinate. A supervisor, when sued for what his or her subordinate has done, may want to dissociate himself from the act, claiming either that the subordinate acted on his or her own or in defiance of agency policy, particularly when the violation is gross or blatant. In these instances, the supervisor's defense will be inconsistent with that of the subordinate. Determination will have to be made by the agency as to the party it will defend and whom to indemnify if held liable. Chances are that the agency will decide for the supervisor, but that is a decision to be made by policymakers on a case-by-case basis.

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SUMMARY

Supervisory liability is a fertile source of civil litigation against probation and parole personnel and departments. The developing case law in this field strongly suggests the need for supervisors to know the legal limits of their job and to be more aware of what goes on among, and the competencies of, subordinates in their department. An area that deserves immediate attention, because of increasing court litigation, is negligent failure to train. Indications are that training is a neglected area in corrections. This is deplorable because corrections in general is a field that, because of low pay and unattractive job status, needs training even more than the other subsystems in criminal justice if the quality of personnel is to be upgraded. Problems arise for supervisors because of financial constraints occasioned by the reluctance of political decisionmakers to commit financial resources to training, despite perceived need. Such neglect carries serious legal implications for the supervisor and decisionmakers, hence must be given proper and immediate attention.

In addition to civil liability for what their subordinates do, supervisors are liable for what they do to their subordinates. Supervisors must be familiar with the rights of their subordinates that are given by the Constitution, federal and state laws, agency policy, and collective bargaining agreements. These rights vary a lot from state to state and have become a rich source of litigation. Sexual harassment should be an area of concern for supervisors. Agencies must have policies on sexual harassment, and complaints should be promptly investigated. Sexual harassment of subordinates by supervisors, once proven, almost always leads to liability and other consequences.

The days of unfettered discretion among supervisors in probation and parole are gone. Judicial scrutiny can be irritating and sometimes frustrating for a probation or parole supervisor, yet it can also lead to more effective and equitable administration, something the public desires and deserves. Judicial intervention and supervisory liability may be a mixed blessing, but they are realities with which probation and parole supervisors must learn to live and cope.

Notes

1. This chapter is a modified and updated version of an article that was first published in *Federal Probation*, September 1984, pp. 52-56.

2. Brandon v. Holt, 469 U.S. 464 (1985).

3. Retenauer v. Flaherty, 642 A.2d 587 (1994).

4. Del Carmen, Rolando. 1984. "Legal Liabilities and Responsibilities of Corrections Agency Supervisors." *Federal Probation*, September 1984.

5. Meistinsky v. City of New York, 140 N.Y.S.2d 212 (1955).

6. Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), *cert. denied*.

7. 601 F.2d 1242 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 483.

8. 610 F.2d 693 (10th Cir. 1979).

9. 763 F.2d 394 (10th Cir. 1985).

10. Oklahoma City v. Tuttle, 37 Cr. L. 3077 (1985).

11. Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997).

12. 489 U.S. 378 (1989).

13. Macigewski v. Backus and Kandrevas, Nos. 97-1516; 97-1591; 1998 U.S. App. LEXIS 15395.

14. Alberti v. Sheriff of Harris County, 460 F. Supp. 649 (S.D. Tex. 1975).

15. *See AELE Special Report, The AELE Workshop on Police and Liability and the Defense of Misconduct Complaints* (Americans for Effective Law Enforcement, 1982), p. 12-1.

16. Moon v. Winfield, 383 F. Supp. 31 (N.D. Ill. 1974).

17. Peters v. Bellinger, 159 N.E.2d 528 (Ill. App. 1959).

18. 520 U.S. 397 (1997).

19. 383 F. Supp. 31 (N.D. Ill. 1974).

20. Weinberger v. State of Wisconsin 105 F.3d 1182 (1997).

21. Ford v. Brier, 383 F. Supp. 505 (1974).

22. Moon v. Winfield, 383 F. Supp. 31 (N.D. Ill. 1974).

23. 295 F. Supp. 1025 (D.D.C. 1968).

24. 349 So. 2d 1334 (La. App. 1977).

25. Hardy & Weeks, *Personal Liability of Public Officials Under Federal Law* 7 (1980).

26. J. Palmer, *Civil Liability of Correctional Workers* 24 (1980).

27. Ford v. Brier, 383 F. Supp. 505 (E.D. Wis. 1974).

28. Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974).

29. 302 F. Supp. 1972 (N.D. Mass. 1969).

30. 162 A.2d 820 (N.J. 1960).

31. *See AELE Special Report, supra* note 11, at 122.

32. L.R. No. 10509 (W.D. Tennessee 1981).

33. 71 N.E.2d 419 (Ct. App. N.Y. 1974).

34. Garrity v. New Jersey, 365 U.S. 493 (1967).

35. *See* Pickering v. Board of Education, 391 U.S. 563 (1968).

36. *See* New York v. Onofre, 48 U.S.L.W. 2520 (N.Y. App. Div. January 24, 1980).

37. 391 U.S. 563 (1968).

38. O'Connor v. Ortega, 480 U.S. 709 (1987).

39. Safransky v. State Personnel Board, 215 N.W.2d 379 (1974).

40. Acanfora v. Board of Education, 359 F. Supp. 843 (D. Md., 1973).

41. Norton v. Macy, 417 F.2d 1161 (D.C. Cir., 1969).

42. Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979).

43. There are federal and state laws restricting the political activities of certain public officers. *See, in general, BRANCATO, supra* note 31, at 78.

44. 675 F. Supp. 266 (1987).

45. MacKenzie v. Snow, 675 F. Supp. 1333 (1987).

46. This section relies on an article by P. Rubin, *Civil Rights and Criminal Justice: Employment Discrimination Overview* (Research in Action, U.S. Department of Justice, National Institute of Justice, June 1995, NCJ 154278).

47. 29 U.S. Code, Sec. 206 (1976).

48. 42 U.S. Code, Sec. 2000e (1976).

49. Reeves v. Sanderson Plumbing Products, No. 99-536 (2000).

50. Sections 501.503, and 504, 29 U.S. Code, Sec. 791, 793, 794.

51. 42 U.S. Code, Sec. 12101.

52. 42 U.S. Code, Sec. 1981 *et seq*. (1976).

53. 29 U.S. Code, Sec. 2601 *et seq*. (1976).

54. 42 U.S. Code, Sec. 2000k (1976).

55. 38 U.S. Code, Sec. 2012.

56. 42 U.S. Code, Sec. 2000e-2000e-17 (1976).

57. *See Americans for Effective Law Enforcement, Legal Defense Manual*, 1982, p. 49.

58. *See* G. Brancato and E.P. Polebaum, *The Rights of Police Officers* (New York: Avon Books), 1980, pp. 5859. *See also*, Jansen v. Packaging Corp. of America, 895 F. Supp. 1053 (1995).

59. 805 F. Supp. 451 (1991).

60. Onscale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

61. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

62. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

63. Hafer v. Melo, 502 U.S. 21 (1991).

64. Will v. Michigan Department of State Police, 491 U.S. 58 (1989).

65. *See AELE Special Report, supra* note 11, at 14-1.

66. McMillan v. Monroe County, Alabama 520 U.S. 781 (1997).

67. 365 U.S. 167 (1961).

68. 436 U.S. 658 (1978).

69. 476 F. Supp. 1237, at 1245 (1979).

70. 440 U.S. 332 (1979).

71. Alden v. Maine 527 U.S. 706 (1999).

72. Owen v. City of Independence, 445 U.S. 622 (1980).

73. *See, in general*, R. del Carmen, "Legal Responsibilities of Probation and Parole Officers; Trends, General Advice, and Questions," *Federal Probation* 45 (3) (Sept. 1981).

CHAPTER 11

Questions, Specific Concerns, and General Advice

INTRODUCTION

This final chapter features questions, specific concerns, and general advice that should be of help to readers. Taken from the first edition of the book, the questions that start the chapter are a composite of the concerns expressed by the Board of Consultants for the first edition. The questions are featured in this final chapter to heighten awareness of the legal issues that need further study and exploration in specific jurisdictions.

Five concerns are also addressed in this chapter: legal representation, indemnification, professional liability insurance, immunity statute, and source of authoritative information. Not much has changed in these concerns since the first edition was published; therefore, these concerns are reiterated.

Finally, general advice is given to probation/parole officers on how legal liability might be lessened or avoided. The generic advice given here represents the composite result of an extensive national survey of offices of attorneys general that was conducted in the early eighties for the first edition of this book. There is every reason to think that their advice would be the same today; hence, that part of the survey is replicated in this third edition. It is not meant, however, to preempt the advice of a legal counsel who is more familiar with the law in specific jurisdictions.

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I. QUESTIONS

For better legal protection and deeper awareness, listed below are important questions probation/parole officers should ask and for which they should obtain answers from their employers and legal advisors. These questions highlight several vital issues addressed in this monograph and help apply these legal concerns to individual states or jurisdictions. It would be in the interest of probation/parole officers to arrange a seminar or workshop with their employers, legal advisors, or other knowledgeable persons who can give authoritative answers to the following:

1. If I am sued in a criminal, tort, or civil liability action in state or federal court, will my agency or employer provide a lawyer to represent me?
2. If a parolee, probationer, or anyone else is contemplating suit against the agency, agency personnel, or me, and I am contacted by their lawyer, what should I do?
3. What specifically should I do if and when I am served with legal papers and/or court documents indicating that a lawsuit has been filed against me?
4. If there is a conflict between me and a codefendant, or me and my agency, will the government appoint a different attorney for me?
5. Are there any special defenses available to me as a state probation/parole officer in a tort suit in which I am the defendant?
6. Are there any specific criminal laws in my jurisdiction of which I must be aware that apply specifically to probation and/or parole officers or public officials/employees?
7. Are there any decided cases in my state where a probation/parole officer has been held liable under state tort law either to the client or to a third party? If yes, how will those cases affect me?
8. What type of immunity, if any, do I enjoy as a probation/parole officer under my state's law?
9. Does our state have laws that would indemnify me if I am found liable in a state tort or a federal civil rights action? If so, how do these laws apply to me? Is the coverage mandatory or optional?

10. What do I have to do to enhance my chances of indemnification if I am sued? What procedures must I follow?
11. What is the best way, consistent with the laws of my state, to protect my personal assets from seizure and execution for satisfaction of a judgment against me?
12. Is there any kind of liability insurance available to me individually or as a member of a group through the government or privately?
13. Does our state have a state civil rights law that might affect me in my work? If so, what and how?
14. Does our state have a law covering the issue of disclosure of information about the offender to others (e.g., privacy laws, laws on confidentiality of criminal offender record information, and laws on the confidentiality of mental health, education, and vocational information)? If so, how does it apply to me and what are the penalties and procedures for violations?
15. Does our state have a state law that gives the offender, his or her lawyer, his or her designate, or others access to information in my file or in my reports? If so, what are the specific requirements and what are the penalties and procedures for noncompliance?
16. Does our state have an Administrative Procedures Act that applies to me? If so, how?
17. As a parole officer, what should I do if, at a revocation hearing, I feel that the hearing officer is denying the parolee his or her rights to due process under *Morrissey*?
18. Is there a compilation of regulations, policies, and directives that govern my conduct as an employee and relate specifically as to my work with offenders?
19. Who is my legal advisor? Is there any public official to whom I can turn who is obligated to advise me in legal matters and upon whose advice I am entitled to rely?
20. Am I a peace officer? What are my law enforcement powers vis-à-vis arrest, search, seizure, and ability to assist and be assisted by law enforcement officers? Am I empowered to carry a weapon?
21. Does my court or agency have any guidelines on arrest and search or frisk of offenders and their homes and property?
22. Are there specific laws in our state that relate to my responsibilities and duties as a public employee and as a probation/parole officer in particular? What are they?
23. Are there specific laws in our jurisdiction that set out the rights and duties of my offenders?
24. Do we have a written policy on assessment of restitution that will give the probationer access to a judicial determination if he disagrees with the amount claimed by the victim or assessed preliminarily by me?
25. According to state law or court decisions in this state, can a judge or parole board delegate the imposition of conditions or the setting of the restitution amount to me? If these cannot be delegated, but judges or boards do it anyway, what is my best defense under state law against liability?
26. Do we have a written policy on my imposing or modifying conditions of probation or parole that will give the offender immediate access to the judge or board if he contests my action?
27. What should I do about transporting offenders (prisoners) in my private vehicle? What responsibility will my employer assume in the event of an auto accident?

28. Should I warn third persons if I believe the offender presents a possible danger to them? If so, under what circumstances? If it is a close call, whom should I contact for advice?
29. Do you want me to advise offenders on procedures and on how to put their "best foot forward" when appearing before the court or board?
30. Do you want every violation reported to the court or parole board?
31. What do the terms "good faith" and "negligence" mean in our state?
32. How can I be sure that I am informed on an up-to-date basis regarding administrative rules, regulations, and decided cases affecting me?

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II. SPECIFIC CONCERNS FOR PROBATION/PAROLE OFFICERS

A. Legal Representation

Legal representation should rank as a major concern of probation/parole officers. In some states, an unwritten understanding exists that allows the state attorney general to undertake the defense of a public officer if, in the attorney general's judgment, the case is meritorious. This informal but pervasive practice creates uncertainty and allows denial of representation based on political or personal considerations. States use various guidelines in deciding the kinds of acts they will defend. While all of the states surveyed for the first edition of this monograph stated that they provide legal representation at least some of the time, a substantial number indicated that they will not defend in all civil suits. The same survey showed that half of the states will not undertake the defense of an officer accused of a crime. Creation of a state statute making such defense by the state obligatory should be explored, if no such statute exists. Legal representation can be undertaken by the office of the attorney general, the city or county legal officers, or through a system similar to medical insurance where an employee has the option to choose his or her own lawyer.

Legal representation on the local government level is much less reassuring than representation for state officers. This is significant because while parole agencies in a great majority of states are administered and funded by the states, probation offices are predominantly controlled on the local level, either by local judicial districts, judges, or political agencies. Each agency determines the type of legal representation it gives to local public officers. Arrangements vary from allowing local officials to get their own lawyer at county's expense to having the county or district attorney represent the officer. Whatever the arrangement, it is important that the policy on representation and indemnification be clarified and formalized. An informal policy ("Don't worry, we will take care of you if a lawsuit is filed") should be avoided because it can be implemented selectively and is far from reassuring.

B. Indemnification

Closely related to representation is the issue of indemnification, if and when the officer is held liable. A majority of the states provide indemnification for the civil liabilities of their public employees, albeit in varying amounts. The conditions under which the state will pay also vary and are sometimes unclear. Moreover, although most states provide for some form of indemnification, states often do not automatically indemnify. In most states and local agencies, employees can expect the state to help pay the judgment only if the act on which the finding of liability is based was within the scope of employment and done in good faith. The definitions of the terms "within the scope of employment"

and "good faith" vary from state to state, and a decision not to represent an employee is usually final and not appealable.

Probation/parole officers are advised to look into their specific state statutes covering legal representation and indemnification. If no such statute exists, the possibility of adopting one ought to be examined to ensure maximum protection for the officers. Part of the lack of protection comes from a definitional problem. While it is difficult, if not impossible, to spell out very specific guidelines that further refine the phrases "acting within the scope of duty" and "good faith," working definitions of these terms go a long way toward alleviating anxiety and minimizing arbitrariness. Such definitions are not found in a number of current statutes.

For purposes of maximum protection, it is important that there be an understanding that a trial court's finding that the officer acted outside his scope of duty and in the absence of good faith not be made binding on the state or local agency, particularly for purposes of indemnification. An independent determination must be allowed the representing or indemnifying state authority (usually the attorney general's office for state officers and the district attorney or county attorney for local officers), based on circumstances as perceived by that agency. Only cases that are gross and obviously outside the scope of employment should be denied legal representation and indemnification. Without this understanding, a state's legal representation and indemnification law can be ineffective because, as current case law stands, acts that are performed by probation/parole officers in good faith and within the scope of their employment are exempt from liability anyway. So, because of the prerequisite of the "good faith" and "acting within the scope of employment" provisions of most state laws, an officer who acts in good faith has no liability (and therefore needs no indemnification), whereas one who is adjudged liable (and therefore needs indemnification) cannot be indemnified under most state laws because he acted in bad faith and/or outside the scope of employment.

C. Professional Liability Insurance

Professional liability insurance should be given serious consideration along with the issues of legal representation and indemnification. According to the project survey for the first edition, only a minority of states (30 percent) have insurance protection for probation/parole officers. Insurance is particularly desirable in states where legal representation or indemnification is either absent or uncertain. This is because insurance companies may provide both legal counsel and damage compensation. In states where insurance is not provided, the enactment of a law or the issuance of an administrative policy should be explored and, wherever feasible, recommended. Otherwise, personal purchase of insurance should be considered.

The problems associated with professional liability insurance, however, are varied. In the first place, although law enforcement officers can easily obtain insurance, only a few insurance companies carry liability insurance for corrections personnel. By contrast, liability insurance for police officers is readily obtainable either individually or collectively through police associations. The second problem is premium payment. Ideally, it should be paid by the agency, but some states and local government units do not allow public money to be used for employee liability insurance. Third, policymakers, whether on the state or local level, may not be disposed to obtain liability insurance for their employees because of high premiums, preferring instead to be self-insured, meaning that they will pay out of their own funds if liability ensues. The employee paying the premium is always an option, but that can be prohibitive for the employee.

D. Immunity Statute

Another possible source of protection that should be explored by probation/parole officers requires action by state legislatures. The United States Supreme Court, in *Martinez v. California*,[1] held that California's immunity statute was constitutional when applied to defeat a tort claim arising under state law. That section of the California law (section 845.8(a) of the California Government Code) provides as follows:

> Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the conditions of his parole or release or from determining whether to revoke his parole or release.

A similar statute may be enacted by other states at the initiative of probation parole officers. It may be necessary, however, to keep an avenue open for meritorious claims. This can be done by creating a state administrative body or a court of claims where reasonably deserving cases may be adjudicated.

Note, however, that a state-enacted exception from civil liability does not apply to Section 1983 cases, which are based on federal law. But although the applicability of a state immunity statute is limited to state tort litigations, such a law does extend a measure of protection to public officers. Although the California statute specifically limits its coverage to parole cases, there appears to be no legal impediment to extending that coverage to include probation officers, particularly on such matters as the setting of conditions, supervision, and probation revocation.

E. Source of Authoritative Information

Probation/parole officers in each state need a source to which they can refer for authoritative information on the topics addressed here. It is suggested that, at the very least, each state develop a manual, perhaps along the topics discussed in this monograph. Some states have already done this, focusing on certain specific areas of concern. The state manual need not be lengthy, but it must contain information specific to that state. The topics discussed in this monograph, as well as the questions listed above, should be helpful starting points. Agency manual writers should remember, however, that this monograph gives generic information that may not apply to each state or jurisdiction. Moreover, the information in this publication may quickly be superseded by new decisions and statutory developments. Each state should update the information in its manual periodically, perhaps through the probation/parole or corrections association's newsletter or occasional memoranda from the probation/parole agency or the office of the attorney general.

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III. GENERAL ADVICE

The survey questionnaire sent by the project staff in the early eighties to all offices of attorneys general in the United States included the following question:

> What three most important bits of legal advice would you give probation and parole officers to help them avoid or lessen possible legal liability in connection with their work?

There is no more recent survey than that conducted for the first edition, which was done in the early 1980s, but the answers are not likely to have changed over the years. The results of that survey are therefore reproduced here. Ranked in the order of response frequency, the top five answers were as follows:

- Document your activities. Keep good records. (40 percent)

- Know and follow departmental rules and regulations and your state statutes. (35 percent)
- Arrange for legal counsel and seek legal advice whenever questions arise. (27 percent)
- Act within the scope of your duties, and in good faith. (20 percent)
- Get approval from your supervisor if you have questions about what you are doing. (18 percent)

Other bits of advice (in descending order) were:

- Keep up with developments in your field (e.g., relevant legal developments, statutes, new departmental regulations). Ignorance of the law or regulations excuses no one.
- Use common sense.
- Review important decisions with supervisors.
- Undertake thorough investigations before making recommendations.
- Report the violations of offenders.
- Notify your supervisor immediately if you suspect that legal action is being seriously contemplated.
- Have clear and comprehensive policies in your department.
- Perform duties on time.
- Take out insurance.
- Stick to the facts in all dealings with clients.
- Do not get personally involved with offenders.
- Be familiar with revocation procedures.
- Keep out of politics.
- Advise officers on ethical practices.
- Do not act as a police officer.
- Avoid transporting offenders when possible.
- Ensure safeguards for client property.

It behooves probation/parole officers to note these words of advice from legal professionals in the field. On the other hand, a word of caution is in order. Knowledge of legal responsibilities and awareness of possible liabilities could lead an officer to the path of overcaution amounting to inaction. This should be avoided because reluctance or failure to perform one's duties can often be more damaging than acting incorrectly. In case of doubt, the general principle is to be guided by the principle of fundamental fairness in decision-making, whether that decision is made by a probation/parole officer or a supervisor. Fundamental fairness is the essence of due process and should go a long way toward minimizing liability if a lawsuit arises.

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A FINAL WORD

Lawsuits are a burden. They cause anxiety, drain time, cost money, and take a heavy toll on parties involved. A countersuit by the probation/parole officer in retaliation is a possibility, but that merely compounds the problem, generates anxiety, and leads to more expenses. Avoidance of lawsuits through proper job performance and fundamental fairness is the wiser option as probation/parole officers continue to discharge their duties and responsibilities in a time of legal challenge and constant change.

Note

1. 444 U.S. 275 (1980).

APPENDIX A

The Court System and Basic Legal Concepts

A quick examination of any telephone directory will reveal an almost bewildering array of courts. No matter where the reader is within the United States, he or she is within the territorial or geographic jurisdiction of at least one state court and one federal district court. Given their work with the courts and exposure to legal liabilities, it is important that probation/parole officers gain a good working knowledge of the various levels of courts and basic legal concepts. This appendix seeks to do that. Space and function limitations do not permit us to explain the specific power of each of the many types of courts to pass upon the actions of probation/parole officers. However, an outline of state and federal court systems can be presented.

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I. THE COURT SYSTEM IN THE UNITED STATES

The United States has a dual court system: federal and state. This is, however, a misnomer because in reality the United States has 52 different systems comprising the court systems of the 50 states, the federal government, and the District of Columbia. Nonetheless, for the purpose of an overview, dividing courts into federal and state suffices.

A. The Federal Court System

There are three layers to the federal system of courts of general jurisdiction. At the top of the hierarchy is the Supreme Court of the United States. Except for a few situations in which cases can be heard originally by the Supreme Court, it is exclusively an appellate or reviewing court. The Supreme Court is composed of nine Justices, who hear and decide all cases as one body (en banc).

At the base of the federal system are 94 district courts, which, in 1999, had 646 judges. Each state has at least one federal district court; no federal court district crosses state lines. Most districts have more than one active federal district judge.

As an adjunct of the district courts, Congress created the United States magistrate system to afford workload relief to the district judges. Magistrates have limited powers, and many are connected with the preliminary stages of criminal cases, such as issuing search and arrest warrants, holding bail hearings, and conducting preliminary hearings. Of special relevance here is the fact that, in some federal districts, magistrates are called upon to make a preliminary assessment of the merit of Section 1983 cases.

The United States Courts of Appeals occupy the middle rank of the federal court system. Each of the 13 courts of appeals serves a designated multistate territory, except for the Court of Appeals for the District or Columbia. The size of the bench in each appellate "circuit" varies. Altogether, as of 1999, the courts of appeals were authorized to have 179 active circuit judges. Most court of appeals cases are decided by "panels" of at least three judges. (Panels may include district judges and circuit judges who are not on the court's active roster.) When court of appeals panels reach different conclusions on points of law, and in other circumstances, courts of appeals might meet en banc.

B. State Court Systems

If examined in any degree of detail, the court systems of the 50 states and the District of Columbia appear to be highly idiosyncratic. Fortunately, the state systems are enough like each other and the federal court system to make quick summary possible.

A supreme court is at the pinnacle of each state's system. Texas and Oklahoma have specialized supreme courts; in each, there is one court of last resort for civil cases and a different one for criminal cases. In Maryland and New York, the highest court is called the court of appeals.

The states call their general jurisdiction trial courts by many different names; sometimes more than one name is used in a state. Circuit court, district court, and superior court are the most popular choices. Most states have an even lower level of original jurisdiction courts, to which have been applied a greater variety of names. Courts at this level have limited and/or specialized jurisdiction. In many cases, they are courts not of record. Typically, the procedures in such courts are less formal than those observed in the courts of general jurisdiction.

A majority of states have a layer of appellate courts below the Supreme Court.

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II. THE APPEAL PROCESS

With rare exceptions, cases enter the federal and state judicial systems at the trial court level. At that level, a jury—or the judge in cases being heard without a jury—determines the facts of the case based on the evidence presented. By applying the facts to the settled, applicable law, the judge or jury determines the outcome of the suit.

It is axiomatic that every case has a winner and a loser. A party seeks review, and possible reversal, of an unfavorable judgment by appealing it up the judicial hierarchy. In states without an intermediate appellate court, all appeals are heard by the supreme court. Courts of appeal do not hear further evidence; generally, they do not reevaluate the evidence presented in the trial court. Their function is to determine errors of law and give a remedy for prejudicial but not harmless errors.

A large majority of the cases filed in any court system are finally decided at the lowest level. Appeal is more a potential than an actual part of the usual case. Of those cases appealed, most are found to have been rightly decided at the level below, or otherwise not subject to reversal.

The dual court systems—federal and state—merge at the Supreme Court of the United States. Because the supremacy clause of the Constitution makes the Constitution the "supreme Law of the Land," and because the Supreme Court decides the meaning of the Constitution, that body can review state supreme court decisions insofar as they pass on claims or defenses founded on the Constitution or laws enacted under its authority. Conversely, the Supreme Court will not disturb a state decision that it finds was based on adequate state law grounds.

Two other consequences flowing from the supremacy clause must be mentioned. First, state courts may not decide a case contrary to the Constitution; the clause specifically requires state court judges to observe the Constitution, and they take an oath to do so. Second, unless precluded by a federal law from doing so, claims arising under federal law may be heard in state as well as federal courts; state courts have concurrent jurisdiction over most federal causes of action, including Section 1983 cases. This has proved to be of limited practical significance, however, because most plaintiffs have preferred to have federal courts hear their federal claims. (In certain, limited circumstances, federal courts have been authorized by Congress to hear cases originally brought in state court.)

The reader should also be aware of the concept of precedent. While the immediate function of every judicial decision is to settle the rights of the parties before the court, a secondary function is to forecast how subsequent, similar cases will be decided so that other persons can conform their conduct to the demands of the law. This predictive aspect is the precedential value of a case. As a result of the hierarchical structure of court systems, the precedential value of a case—

and often its persuasiveness—varies directly with the level of the court that decided it. The Supreme Court of the United States hands down the decisions of greatest future significance; trial courts render decisions that have comparatively slight utility as precedent.

From these facts and principles, it is possible to distill guidelines concerning the relevance of the court decisions cited in this book, or found elsewhere, to the individual reader.

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III. THE EFFECT OF JUDICIAL DECISIONS

The jurisdiction of every American court is limited in some way. One type of limitation is territorial or geographic. In a strict sense, therefore, each judicial decision is authoritative and has precedential value only within the geographic limits of the area in which the deciding court is authorized to function. Hence:

- United States Supreme Court decisions on questions of federal law and the Constitution are binding on all American courts because the whole country is under its jurisdiction.
- Federal court of appeals decisions on such issues are the last word within the circuit if there is no Supreme Court action. The First Circuit Court of Appeals, for example, settles federal issues for Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico, the areas to which its jurisdiction is limited.
- When a district court encompasses an entire state, as is the case in Maine, its assessment of federal law (again barring appellate action) produces a uniform rule within the state. In a state like Wisconsin, however, where there are multiple districts, there can be divergent rules.

The same process operates in the state court systems. There is one regard, however, in which state supreme court decisions are recognized as extending beyond state borders. Since the Constitution declares the sovereignty of the states within the areas reserved for state control, the court of last resort of each state is the final arbiter of issues of purely local law. The meaning that the Supreme Court of California gives to a state statute, for example, will be respected even by the United States Supreme Court as authoritative.

The existence of dual court systems, state and federal, and the limited jurisdictional reach of the vast majority of courts make it practically inevitable that the courts will render conflicting decisions on a single point of law. A core function of the appellate process is to provide a forum for resolving these conflicts. Indeed, the existence of a conflict in the law is a strong argument for securing appellate review of an unfavorable decision.

But an unresolved conflict is just that—unresolved—and each competing decision remains effective within the jurisdiction of the court that decided it. As this monograph illustrates, there are few Supreme Court cases on probation and parole issues, and other courts are in conflict on some points. The individual reader should take particular note of the rule in effect for the area in which he works, if one is given.

The reader should be most interested in the local rule for two reasons. First, under the concept of *stare decisis*, courts decide new cases in accordance with prior cases—with precedent. The locally effective rule can be expected to define the conduct standards to which the probation/parole officer will be held if he becomes a defendant. Second, if there is a change in the law, as sometimes occurs, proof that the defendant was acting within the law will go far toward establishing a good faith defense, if that is applicable.

The reader cannot, however, safely ignore decisions from other jurisdictions. Again, there are two reasons. First, there may be no settled law on an issue in his or her area. When that issue is presented to a local court initially—a case of first impression— the local federal or state court will probably decide it on the basis of the dominant or "better" rule being applied elsewhere.

The second reason requires recognition that the law is not stagnant but evolving. Over a period of time, trends develop in the law. When a particular court senses that its prior decisions on a point are no longer in the mainstream, it may give consideration to revising its holdings. The decisions reported here may enable the reader to spot a trend and anticipate what local courts may be doing in the future.

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IV. BASIC LEGAL CONCEPTS

Knowledge of some legal concepts and terminology is necessary for an understanding of the legal responsibilities and liabilities of probation/parole officers. A basic collection of these concepts is contained in Appendix B (Glossary of Legal Terms). Some concepts need to be discussed more extensively here in contrastive style so they may be better explained.

A. Civil versus Criminal Cases

All litigation falls into one of two broad categories, civil or criminal. A probation/parole officer could face either a civil or a criminal suit as a result of his or her work.

If the government charges that the officer is a wrongdoer because he or she violated some criminal law, the probation/parole officer will become accused—the defendant—in a criminal case. It will then be the government's responsibility to prove "beyond a reasonable doubt" that: (1) a crime has been committed; and (2) the defendant committed it. If the government does not carry its burden of persuasion in the trial court, the case will normally end when the trier of fact returns a verdict of "not guilty." The government's right of appeal in criminal cases is quite restricted.

The person, if any, whose injury gives rise to the criminal charge is known as the complainant. Complainants are not formal parties in criminal cases and usually have no role other than as witnesses.

On the other hand, no civil case can be instituted other than by the person or entity (or a proper representative) claiming to have been injured in some way by the action or inaction of another person. The party going forward is the plaintiff, and the party complained against is the defendant. In most civil suits, the plaintiff seeks to recover money from the defendant as damages for the harm done. In another large group of civil cases, the plaintiff seeks an injunction, which is an order from the court requiring the defendant in the future to behave in a specified way.

The civil case plaintiff must prove that (1) the defendant owed some legal or contractual duty or obligation; and (2) some breach of duty by the defendant resulted in harm—to the plaintiff. The nature and magnitude of the duty, the breach, and the harm will be considered in determining the type and size or scope of the remedy to be given the plaintiff. In order for the plaintiff to prevail, he or she need only prove the case by a "preponderance of the evidence." This is a much lighter burden of persuasion than in criminal cases; the evidence need only show that it is more likely than not that the defendant breached some duty, causing harm. Civil plaintiffs and defendants have equal rights of appeal.

B. Criminal Conviction versus Civil Liability

Conviction in a criminal case is a much more serious matter than being found civilly liable. In addition to the opprobrium that the criminal defendant may suffer as a result of conviction, these differences should be noted.

Type of penalty. Monetary penalties are possible in either type of case: damages in a civil action, a fine in a criminal case. Additionally, probation, incarceration, and alternative community service may be imposed on the defendant upon conviction.

Collateral effects. Criminal conviction carries with it civil disabilities, meaning that the convicted person may be barred by state or federal statute from exercising certain rights during and even after service of the sentence. Such divested rights usually include the right to vote, to be a member of a jury, to be a guardian, to hold public office, and to obtain certain types of employment. If the offense of which the defendant is convicted is a felony, in some jurisdictions that conviction constitutes grounds for divorce. Civil liability carries no such disabilities; hence, its effect is not far reaching.

Evidentiary effects. Conviction in a criminal case may be introduced as evidence in a subsequent civil case arising out of the same incident, but a judgment of civil liability cannot be used as evidence in a subsequent criminal case.

For example, X, a probation officer, pleads guilty to a criminal charge of unlawful search and seizure of a probationer's apartment. That guilty plea may be used as evidence later in a state tort liability case that the probationer may bring against X. This is because the amount of evidence needed to convict in criminal cases is "beyond reasonable doubt," which is much higher in degree of certainty than the mere "preponderance of evidence" needed in civil cases.

On the other hand, if X is found civilly liable, the finding cannot be introduced in evidence in a subsequent criminal case against X arising out of the same act.

C. Federal versus State Jurisdiction

Suppose a probationer or parolee wants to file a civil case against a probation/parole officer. How is the lawyer to know whether the case should be filed in a state or a federal court? The answer is that it normally depends on the law being invoked. If the case alleges a violation of federal law, it is filed in a federal court; if the alleged violation is of a right or interest created by state law, it is filed in a state court. The chapters on legal liabilities talk about the two types of civil cases for damages usually brought against probation/parole officers:

- Tort cases, which are usually filed in state courts based on state tort law.
- Section 1983 (civil rights) cases, which are usually filed in federal courts because the basis is an alleged violation of Section 1983 of 42 U.S. Code.

In criminal cases, the same basic rule applies. If an act is a violation of federal law, the federal government must prosecute. Conversely, if the act is a violation of state law, the state will prosecute in a state court.

However, if the act violates both federal and state criminal laws (such as when a probation/parole officer illegally arrests a probationer or parolee), both governments may prosecute. There is no double jeopardy because of the "dual sovereignty" doctrine, which says that states and the federal government are both sovereign entities and, therefore, may prosecute the same act separately. This does not usually happen in fact because federal or state prosecutors as a matter of policy generally disfavor subsequent prosecutions if they are satisfied with the

results in the first case. Successive prosecutions, however, are constitutional and have been resorted to in a number of cases.

D. Jurisdiction versus Venue

The meaning of these terms can be confusing. Jurisdiction refers to the power of a court to hear a case. A court's jurisdiction is defined by the totality of the law that creates the court and limits its powers; the parties to litigation cannot invest the court with jurisdiction it does not possess. Defects in the subject matter jurisdiction of a court cannot be waived by the parties and can be raised at any stage of litigation, including on appeal. The court can raise the question of its jurisdiction *sua sponte* (meaning on its own motion). In order to render a valid judgment against a person, a court must also have jurisdiction over that person. Defects in obtaining personal jurisdiction, however, can be waived by the defendant's voluntary act, or by operation of law as when the defendant fails to assert his rights in a timely or proper manner.

The concept of venue is *place* oriented. It flows from the policy of the law to have cases tried in the locale where they arose, where a party resides, or where another consideration makes it reasonable. Legislation establishes mandatory venue for some types of cases and preferred venue for others. But, within a court system, venue may be proper in any court with subject matter jurisdiction and jurisdiction over the defendant. Venue defects are almost always waived by the defendant's failure to object promptly.

An example of the interplay of these concepts may help make them clear. Texas law requires that felonies be prosecuted in the state district courts and in no other type of court. Another law provides, in general, that felonies be prosecuted in the county where the offense occurred. The first of these provisions is jurisdictional, while the second deals with venue.

E. Statutory Law versus Administrative Law

Statutory law is law passed by the state or federal legislature, such as a state tort law or Section 1983), while administrative law refers to rules and regulations promulgated by governmental agencies such as probation and parole offices. Once properly promulgated, these rules and regulations have the force and effect of statutory law and are binding on that agency, its officers, and third parties dealing with them unless and until declared illegal or unconstitutional by the courts. The same is true, although to a lesser extent, with agency policies, guidelines, and administration directives. Failure to follow agency regulations or guidelines may lead to administrative action and, in some cases, civil liability. Conversely, compliance with agency regulation usually establishes good faith or reasonableness of an officer's action, hence negating liability.

F. State Tort Law versus Section 1983

A tort is civilly wrongful conduct that causes injury to the person or property of another, in violation of a duty imposed by law. The great bulk of tort law is made in the courts rather than in the legislature. In the states, the usual legislative role is to provide the judicial framework for tort litigation. Substantive tort law was inherited with the bulk of the English common law, and courts have been refining and modernizing it since. In Texas, for example, no statute defines the elements of a civil assault, although laws do identify the courts authorized to hear assault cases and limit the time within which the cases must be filed. Some specific torts, however, are legislatively created, such as the wrongful death action.

The federal pattern, in general, differs from the state pattern. Tortious conduct normally must be defined by Congress in order to be actionable in federal courts. (When federal district courts hear tort cases—automobile negligence cases are the most common—

they apply state tort law in determining the rights of the parties.) Section 1983 is, in essence, one statutorily created federal tort. In Section 1983 of 42 U.S. Code, Congress authorized suits for damages (and other relief) by any person deprived of rights given by the Constitution or federal law. The action lies against any person (and sub-state units of government)—usually a government employee who acts under color of law, i.e., who has apparent official authority for his conduct. The frequency with which Section 1983 has been used has made it a major concern for probation/parole officers.

Because of the dual sovereignty doctrine, the same act, such as the groundless arrest of a parolee, might be a state tort—such as false arrest/imprisonment—and a Section 1983 violation. Two suits might result. Both of these potential sources of civil liability are treated separately in previous chapters.

G. Absolute versus Qualified Immunity

Both absolute and qualified immunity are defenses in civil litigation. They differ in the degree of protection they afford and by whom they may be asserted. The proper assertion of absolute immunity normally will derail a case at the beginning, while qualified immunity may not.

Legislators, judges, and prosecutors may assert the absolute immunity defense concerning their official duties in those positions. While "absolute" technically may be a misnomer, it is close enough to be apt. The officer seeking to claim absolute immunity must establish his or her official position and that the action complained of was legislative, judicial, or prosecutorial, as the case may be.

"Qualified immunity" is the term applied to the protection that other public officials have. It has different meanings in state tort and Section 1983 cases. In state tort cases, it means that an official's act may be immune from liability if the act is discretionary, but not if it was ministerial. In addition, the act must have been within the scope of authority and performed in good faith. In Section 1983 cases, qualified immunity means that the officer is immune only if he or she acted in good faith. Good faith, in turn, means that the officer did not violate a clearly established statutory or constitutional right of which a reasonable person would have known.

It is the policy of the law that each person should be held accountable for the consequences of his or her acts. Immunity defenses conflict with this philosophical bent and, therefore, are not favored by the courts. This is evident in the hesitancy with which they have extended absolute immunity to parole boards that, in their releasing decisions at least, exercise a most judgelike function. Individual probation/parole officers generally can establish only qualified immunity.

H. Basic Constitutional Rights

Most of the cases (but particularly Section 1983 cases) filed against probation/parole officers are based, directly or indirectly, on an alleged violation of a constitutional right. It is therefore helpful to be reminded of the basic rights under the Bill of Rights and the 14th amendment.

First Amendment

1. Freedom of religion.
2. Freedom of speech.
3. Freedom of the press.
4. Freedom of assembly.
5. Freedom to petition the government for redress of grievances.

Fourth Amendment

1. Prohibition against unreasonable searches and seizures.

Fifth Amendment

1. Right to a grand jury indictment for capital or otherwise infamous crime.
2. Right against double jeopardy.
3. Right against self-incrimination.
4. Prohibition against the taking of life, liberty, or property without due process of law.
5. Right against the taking of private property for public use without just compensation.

Sixth Amendment

1. Right to a speedy and public trial.
2. Right to an impartial jury.
3. Right to be informed of the nature and cause of the accusation against him.
4. Right to be confronted with the witnesses against him.
5. Right to have compulsory process for obtaining witnesses in his favor.
6. Right to have the assistance of counsel.

Eighth Amendment

1. Prohibition against excessive bail.
2. Prohibition against cruel and unusual punishment.

14th Amendment

1. Right to privileges and immunities of citizens.
2. Right to due process.
3. Right to equal protection of the laws.

The right to privacy is a basic constitutional right, but is not one of the rights explicitly mentioned in the Constitution. The Court, however, has said that the right to privacy is implied from provisions of the 1st, 4th, 5th, 6th, 9th, and 14th amendments.

APPENDIX B

Glossary of Legal Terms

Abuse of discretion. No clear standard exists but, generally (1) no reasonable person would take the view adopted by the decisionmaker, or (2) the decision was made for some arbitrary reason wholly unrelated to the statutory standard, or (3) the decision was made in contradiction of applicable policy or statutes.

Absolute immunity. The exemption enjoyed by certain government officials from liability in a lawsuit by virtue of the position they occupy. This means that if a civil suit is brought, it will be dismissed by the court without going into the merits of the plaintiff's claim. Legislators, judges, and prosecutors enjoy absolute immunity for the decisions they make in the performance of their jobs.

Administrative law. Rules and regulations promulgated by governmental agencies instead of by legislative bodies. Once promulgated, these rules and regulations have the force and effect of law and are binding on that agency, its officers, and those who deal with them, unless declared illegal or unconstitutional by the courts. Examples are rules and regulations issued by probation and parole agencies.

Civil cases. Cases brought to recover some civil right or to obtain redress for some wrong. Tort actions are examples of civil cases. All noncriminal cases are civil cases.

Civil Rights Attorney's Fees Awards Act of 1976. A federal law (sometimes known as Section 1988) that allows the court to award attorney's fees to the prevailing party in some types of federal suits, particularly Section 1983 cases.

Civil rights cases. Another name given to Section 1983 cases. Refer to Section 1983, below, for a more extended definition.

Color of law. Actions taken under "color of law" have the appearance but not the reality of being legally justified. The term suggests the misuse of power possessed by virtue of state law and that the misuse is possible only because the alleged wrongdoer is clothed with the apparent authority of the state. The term includes conduct actually authorized. Generally, anything a probation/parole officer does in the performance of assigned duties, whether or not actually authorized, is done under color of law.

Damages. Monetary compensation to the person who suffers loss or harm from an injury; a sum recoverable as amends for a wrong to a person, his property, or his rights. Damages (nominal, compensatory, or punitive) may be awarded to the plaintiff in state tort or Section 1983 cases.

Defendant. The party against whom an action is brought; the party denying, opposing, resisting, or contesting the action brought by the plaintiff or the state. Probation/parole officers may become defendants in several kinds of cases arising out of improper task performance.

De novo. The hearing of a case anew, afresh, a second time.

Discretionary acts. Acts that require personal choice and judgment, such as deciding on policies and practices. In general, the consequences of discretionary acts cannot result in liability, unlike mandatory or ministerial acts.

Double jeopardy. A defense of constitutional origin in a criminal prosecution claiming that the defendant is being placed on trial for a second time for the same offense for which he has previously been tried. The double jeopardy defense, however, does not apply where one case is a criminal prosecution and the other prosecution is made successively under state and federal jurisdiction, or vice versa.

Dual court system. The court system in the United States where there is one court system for federal cases and separate systems for state cases.

Due process. A courser of legal proceedings according to those rules and principles established in our system of justice for the enforcement and protection of private rights. In the most simple of terms, fundamental fairness.

Exclusionary rule. A rule that prohibits the use in criminal proceedings of evidence of any nature that was obtained in violation of the fourth amendment. The rule has been extended to include any evidence subsequently discovered solely as the result of the illegally obtained evidence.

Good faith defense. This term has different meanings in civil liability cases. In state tort cases, good faith means that the officer acted with honest intentions in the belief that the action taken was appropriate. In Section 1983 cases, however, good faith means that the officer did not violate a clearly established constitutional or statutory right of which a reasonable person would have known.

Governmental immunity. Exemption of government agencies or entities from liability for their governmental, but not their proprietary, functions.

"Hands off" doctrine. The doctrine adopted by the courts since the mid-1960s to entertain cases filed by prisoners and others in the criminal justice process seeking redress of grievances or monetary liability against government officials. The "hands on" doctrine has led to the "open door" era in corrections and the whole field of criminal justice litigation.

Immunity. A general term referring to exemption from tort liability or other forms of lawsuits. Immunity can be governmental or official; absolute, qualified, or quasi-judicial.

Indemnification. To make good the loss of another; in the case of a public employee who is sued, indemnification refers to payments to the officer from the government to fully or partially pay the damages assessed against him.

Jurisdiction. The authority of a court to hear and decide a case.

Legal liabilities. Refers to the various civil and criminal proceedings to which a probation/parole officer may be exposed if he breaches any of his legal responsibilities through malfeasance (the commission of some lawful act), or nonfeasance (the nonperformance of an act that should be performed).

Legal responsibilities. Duties and obligations imposed on probation/parole officers by the United States Constitution, the state constitution, federal laws, state laws, court decisions, administrative rules, and agency guidelines that, if breached, give rise to legal liabilities.

Ministerial act. An act that consists of the performance of a duty, in which the officer has no choice but to carry out the act (e.g., the duty to provide a probationer/parolee a revocation hearing before revoking probation/parole). Nonperformance of a ministerial act, unless in good faith, can lead to liability.

Negligence. The doing of that which a reasonably prudent person would not have done, or the failure to do that which a reasonably prudent person would have done in like or similar circumstances; failure to exercise that degree of care and prudence that reasonably prudent persons would have exercised in similar circumstances. Negligence can lead to liability under state tort law or Section 1983.

Official immunity. Exemption of certain classes of officials from tort liability or lawsuits because of the functions they perform.

Plaintiff. The person who initiates a civil lawsuit. In a state tort or a Section 1983 action, this is the person who alleges that he has been injured in some way or has rights violated by the actions of the probation/parole officer.

Preponderance of evidence. That evidence which, in the judgment of the jurors or judge, is entitled to the greatest weight, appears to be more credible, has greater force, and overcomes the opposing evidence. The side with the preponderance of evidence wins a civil case. Preponderance denotes more than quantity.

Probable cause. That amount of evidence, supported by circumstances, that is sufficiently strong to warrant a cautious person to believe that an accused is guilty of the offense with which he or she is charged.

Qualified immunity. Exemption from liability under some circumstances. In state tort law, this means that an official's act may be immune from liability if discretionary but not if ministerial. In addition, the act must have been within the scope of authority and performed in good faith. In Section 1993 cases, qualified immunity means that the officer is immune only if he or she acted in good faith.

Quasi-judicial immunity. Officials who have some functions of a judicial character and some executive duties may be immune from liability for the former duties, but not for the latter. Example: Parole board members have quasi-judicial immunity when making decisions to release or not to release an inmate, but only qualified immunity when performing supervisory responsibilities.

Respondeat superior. Refers to the responsibility of an employer for the acts or negligence of his employees or agents. Generally not applicable when the government is the employer.

Section 1983 case. A suit based on a federal law enacted in 1871 seeking various remedies (among them monetary damages) from a government officer on the grounds that the plaintiff's federal or constitutional rights have been violated. Also referred to as "civil rights cases," they are usually tried in federal courts.

Special condition. A condition of probation or parole that is not imposed as a matter of course on all probationers or parolees but is designed to meet a special rehabilitative need.

***Stare Decisis*.** A doctrine of law that states that when a court decides an issue of law, that decision will be followed by that court and by the courts under it in subsequent cases presenting similar circumstances.

Statutory law. Laws passed by legislatures instead of by other bodies or agencies.

Tort. A wrong in which the action of one person causes injury to the person or property of another in violation of legal duty imposed by law.

Tortfeasor. A person who commits a tort; a wrongdoer.

United States Courts of Appeals. The courts to which cases from the federal district courts are appealed. There are 12 courts of appeals, each serving a designated "circuit" of several states (except for the District of Columbia Circuit). From the courts of appeals, cases are appealed to the United States Supreme Court.

United States District Courts. The lowest courts in the hierarchy of general jurisdiction federal courts. This is where federal cases, including Section 1983 cases, are tried. There is a minimum of one district court per state.

United States Supreme Court. The highest court in the United States, to which appeals from federal or state courts may be taken. Composed of one Chief Justice and eight associate justices who are appointed for life, its decisions are binding on both state and federal courts throughout the country.

Venue. The place where the case is to be heard.