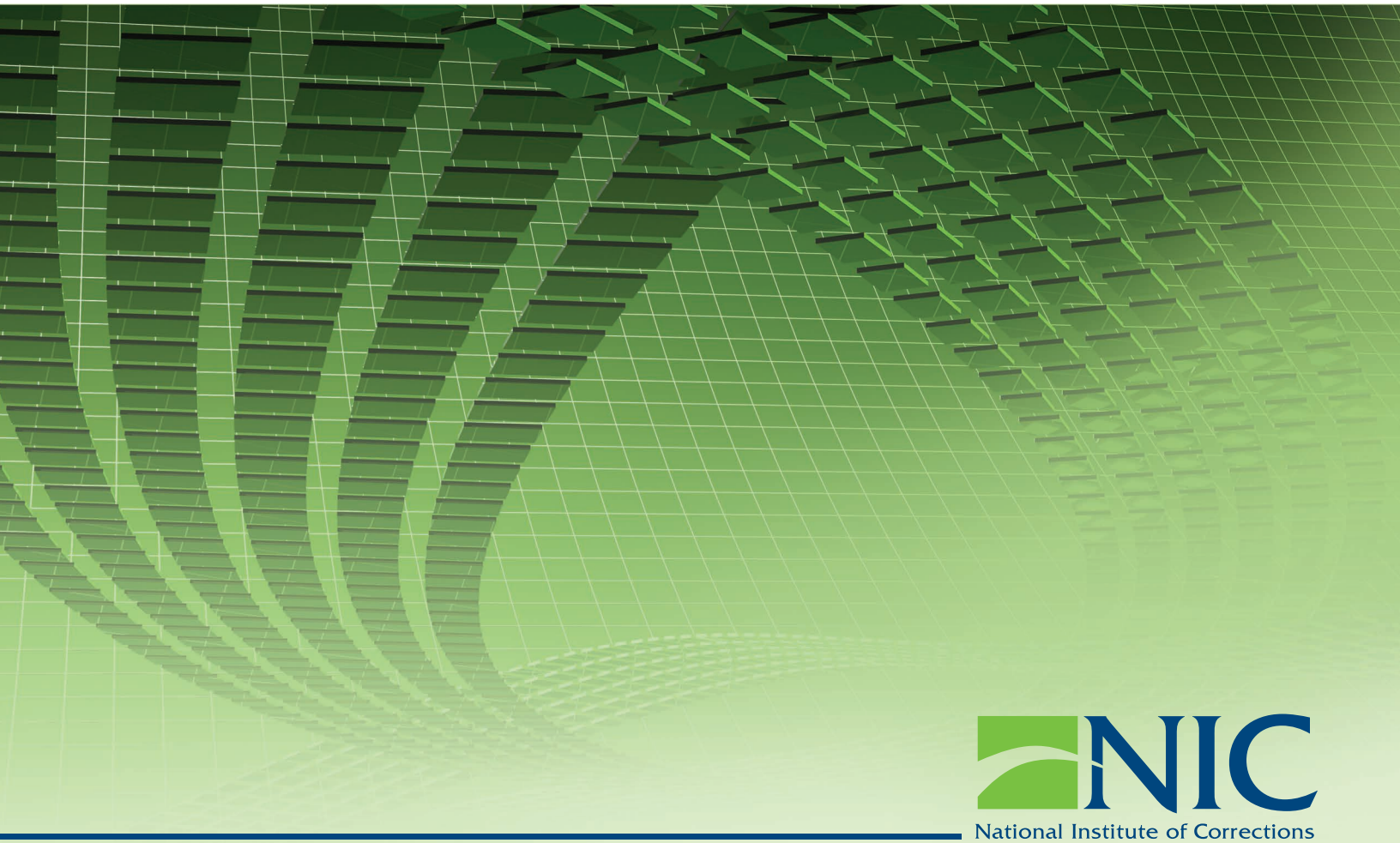
U.S. Department of Justice
National Institute of Corrections

CIVIL LIABILITIES

and Other Legal Issues for Probation/Parole Officers and Supervisors

4th Edition



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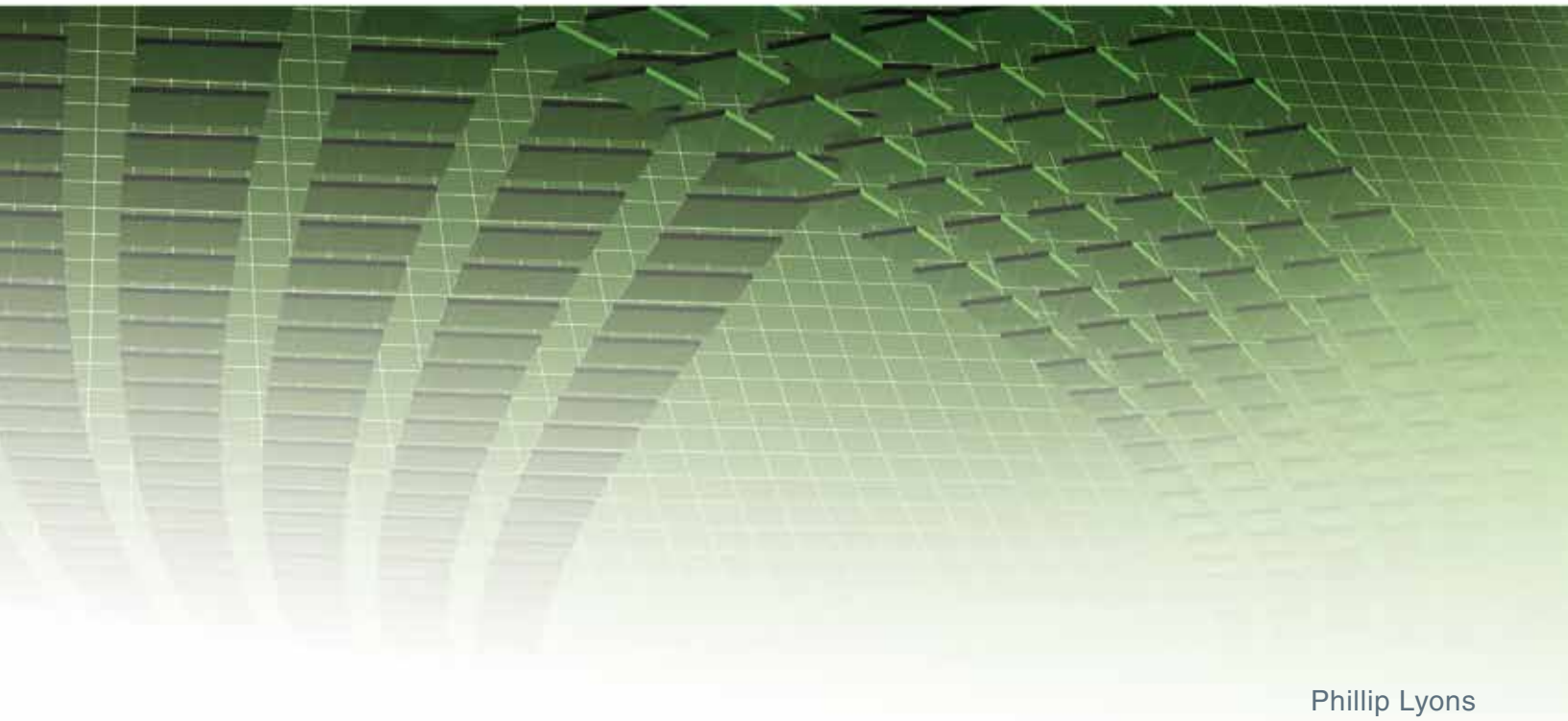

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Contents

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 include state and federal laws of both civil and criminal varieties. An overview of these liabilities is depicted in Table 1–1.

Note that in addition to these statutory sources of liability, the officer may be subject to administrative disciplinary procedures within the agency 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 or her 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 and occurs with some frequency. If this occurs, it often indicates that the second prosecuting authority believes that justice was not served 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.

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

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

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

A tort is defined as "A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another."[1] 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 arson, conversion, or 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 § 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 various 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 they have also been enacted as state statutes. The penalty or punishment imposed through such state statutes, therefore, is at the state level.

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, § 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; b. intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or c. intentionally subjects another to sexual harassment.[2]

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 aimed only at public officials, probation/parole officers may also be liable like any other person under the provisions of the state criminal laws. The state criminal codes, for example, impose criminal liability on anyone who commits murder, manslaughter, assault, and so forth as against any other person.

II. UNDER FEDERAL LAW

A. Civil Liabilities

1. Title 42 of the U.S. Code, § 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 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.[3]

This section is discussed separately in Chapter 3 because of the overwhelming number of civil liability cases 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, § 1985—Conspiracy to Interfere With Civil Rights

Section 1985(3) provides a civil remedy against any two or more persons who "conspire … for the purpose of depriving … any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws…."[4]

Passed by Congress in 1861, this law provides for civil damages to be awarded to any individual who can show that two or more persons conspired to deprive her of her civil rights. Note that a probation/parole officer may therefore be held civilly liable not only for actually depriving a person of her civil rights (under § 1983), but also for *conspiring* to deprive that person of his civil rights (under § 1985). The two acts are separate and distinct and therefore may be punished separately. Under this section, it must be shown that the officers had a meeting of the minds 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 its severity (as opposed to a misdemeanor) and is aimed at depriving the plaintiff of her civil rights. The plaintiff must also be able to prove that the defendants purposely intended to deprive her of equal protection of the 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, § 1981—Equal Rights Under the Law

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.

***

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.

***

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.[5]

This section was passed in 1870, a year earlier than § 1983. Originally, 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, the like punishments provision should be of greater significance for probation and parole authorities because criminal justice system officials have been held liable for violating its mandate.[6]

B. Criminal Liabilities

1. Title 18 of the U.S. Code, § 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.[7]

This section provides for criminal action against any officer who actually deprives another of his civil rights. An essential element of this section requires the government 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 § 242 are the following: (a) the defendant must have been acting under color of law; (b) a deprivation of any right secured by the United States Constitution or federal laws; and (c) specific intent on the part of the defendant to deprive the victim of rights.

2. Title 18 of the U.S. Code, § 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.[8]

The courts have interpreted this section as requiring 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 § 242 and § 241 is that § 242 punishes the act of depriving one of rights, whereas § 241 punishes the conspiracy to so deprive one of rights. Inasmuch as conspiracy, by definition, requires at least two participants, § 241 cannot be committed by a person acting alone. Moreover, although § 242 requires the officer to be acting the "color of any law," there is no such requirement under § 241; hence, a private person can commit a § 241 violation.

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

This section applies to all individuals and, therefore, applies 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.[9]

Violations of § 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.[10] This statute, passed in 1968, seeks to punish all persons 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 noted above. The act goes on to authorize punishment for 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. Finally, the act penalizes interference of 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 entire 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. Moreover, the officer can be punished by his agency through administrative sanctions.

The defense of double jeopardy does not apply in these cases because that defense is available only if there are successive prosecutions for the same offense by the same jurisdiction.[11] Civil and criminal penalties imposed by the same government may result from a single act because "successive prosecution" means 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 for the defense. State and federal prosecutions take place in different jurisdictions; therefore, there is no double jeopardy. There is also no double jeopardy protection if an employee is dismissed from employment or otherwise disciplined by her agency and then either prosecuted, or held civilly liable, for the same act. This is so because agency discipline, like a civil action, is not a criminal proceeding.

The series of events involving the defendant police officers in the infamous Rodney King case provides an example of how double jeopardy protection applies and, importantly, how it does not. 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 state court, but were acquitted. After acquittal, they were tried again for criminal acts in federal court. Two of the four defendants were acquitted in federal court, but the other two were convicted and served time in a federal institution. The officers raised the double jeopardy defense on appeal, but did not prevail because they were tried by two different jurisdictions. The officers were also held liable for civil damages.

IV. DIFFERENT RESULTS IF HELD LIABLE

Civil liability results in payment of money by the defendant to the plaintiff for damages caused. In civil liability cases, therefore, the plaintiff seeks money. In § 1983 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 are authorized by agency policy or state law.

V. POSSIBLE DEFENDANTS IN CIVIL LIABILITY CASES

Using the "deep pockets" approach (plaintiffs usually include as defendants those who are best positioned to satisfy a monetary judgment against them), 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 shallow pockets, whereas supervisors and agencies have deep pockets. Resolving the question of who is responsible for what amounts is usually determined by state law (See Chapter 4 on Indemnification).

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. Congress, for example, has waived most of the federal government's sovereign immunity. Where 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 the United States Supreme Court's decision in *Monell* v. *Department of Social Services.*[12] In the 1978 Monell decision, the Court stripped local agencies of the sovereign immunity defense.

Therefore, counties, judicial districts, municipalities, or other political subdivisions 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 sovereign immunity is 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 § 1983.

2. Officers of Local Agencies

Officers of counties, judicial districts, municipalities, or other political subdivisions 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.

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.,* 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.[13] Courts, have held that a nominal damage award must be entered where a constitutional violation has been found, even if no actual damages resulted.[14]

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. These fees are not automatic in cases involving nominal damages, however; the Supreme Court has held that courts must take into account the amount of the award and other relief granted in deciding whether to award attorney’s fees and in what amounts.[15]

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 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.[16] Punitive damages are awarded only against willful transgressors. However, the Supreme Court has ruled that no punitive damages may be awarded against local governments.[17]

SUMMARY

Probation/parole officers may be exposed to legal liabilities under federal and state law. Legal liabilities may be classified as civil, criminal and administrative. This chapter discusses the various laws and consequences to which an officer may be exposed in connection with her 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 both 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 necessarily preclude liability under all of these sources of law simultaneously because the cases (a) may not all be criminal, (b) may not relate to the same criminal act, or (c) may not be prosecuted by the same jurisdiction. Double jeopardy protection applies only where criminal prosecutions for the same offense are undertaken 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 employing 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 official immunity).

Local governments, such as counties, judicial districts, municipalities, or other political subdivisions may be sued and held liable for the actions of their employees under the U.S. Supreme Court’s decision in 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 the form of 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 her cause of action, but no actual injury was sustained. In this case, a nominal amount of, say, $1 might be awarded. 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. Black's Law Dictionary, ninth edition (2009).

2. Tex. Pen. Code, § 39.03 (2003).

3. 42 U.S.Code, § 1983 (2006).

4. 42 U.S. Code, § 1985 (2006).

5. 42 U.S. Code, § 1981 (2006).

6. E.g., *Giron* v. *City of Alexander,* 693 F.Supp.2d 904 (E.D. Ark. 2010).

7. 18 U.S. Code § 242 (2006).

8. 18 U.S. Code § 241 (2006).

9. 18 U.S. Code § 245 (2006).

10. Id.

11. 21 Am. Jur. 2d Criminal Law § 275 (Westlaw, July 2010).

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

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

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

15. *Farrar* v. *Hobby,* 506 U.S. 103 (1992).

16. *TXO Production Corp.* v. *Alliance Resources Corp.,* 509 U.S. 443 (1993).

17. *City of Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247 (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.

I. DEFINITION OF STATE TORT

A tort is defined in Black's Law Dictionary as:

> A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another.[1]

The same act can simultaneously 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 both for the injury resulting to the other person and the damage to the car. Tortious acts may also be the basis for suits charging violation of civil rights under §1983, as discussed in Chapter 3.

Tort actions are usually tried in state court before a jury that makes determination of liability and fixes 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.

II. KINDS OF STATE TORT

The specific acts which give rise to tort liability vary from one state to another and are determined by case law or legislation. There are three types of torts, namely, intentional torts, negligence torts, and strict liability torts. Because the latter category of torts involves damages associated with the manufacture, sale, and distribution of dangerous products, probation and parole officers are unlikely to face such claims. Instead, they are likely to encounter claims of the other two varieties, intentional torts and negligence torts. Probation and 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 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 committed by someone acting with general or specific intent."[2] To prevail in 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.
- Damages resulted from the act.

Example: A probation officer beats a juvenile probationer causing injury. The officer may be held liable under the intentional tort of battery because the act was committed by the defendant, the act was deliberate and purposeful, the injury was caused by the act, and damages or harm resulted from the act.

Intentional torts may be subdivided into two categories, namely physical torts and nonphysical torts.

1. Physical Tort

An illustrative list of physical torts is presented below.

a. Battery. Intentional harmful or offensive touching.

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

c. Infliction of emotional distress. Acts of an officer that caused emotional distress.

d. False arrest and false imprisonment. Arresting or detaining a person illegally.

e. 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. As intentional torts, they are based on the intent of the actor to engage in the act which results in 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.[3] 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.[4] The consent of the plaintiff to the contact is a defense.
- 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.[5]
- Infliction of emotional distress refers to extreme and outrageous acts, whether intentional or reckless, that cause emotional distress to the plaintiff.[6] The wrongdoer may also be liable for physical harm resulting from the emotional distress.[7] Words alone or gestures or conduct may be sufficient. Bullying tactics by probation/parole officers or insults shouted in public might be examples if they can be deemed "extreme" and "outrageous."
- False arrest and false imprisonment are two other tortious actions for which probation/parole officers may be liable. The essential elements of both involve the unlawful interference with the physical liberty interests of another.[8] False arrest takes place, for example, 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. A probation or parole officer need not actually use force to detain a

probationer or 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.

- A 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 harmed 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.[9]

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.

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

- The tort of defamation refers to invasion of a person's interest in his or her reputation. It involves (1) a publication that is (2) false, (3) defamatory, and (4) unprivileged, and (5) tends to injure or that causes special damage.[10] 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.[11] 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 under this tort regardless of how damaging it may be.[12]

- Invasion of privacy is an umbrella concept embracing several distinct means of interfering with an individual's solitude or personality.[13] Each, in its own way, is an unreasonable interference with a person's right to be left alone that results in harm.[14] The most likely 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.

- Misrepresentation of facts requires a false representation of a fact on which individuals may justifiably and do actually rely in making decisions.[15] It is technically distinct from the general class of intentional and negligent wrongs and applies to interferences with commercial interests.[16] 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.

- 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 not guilty.[17]

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 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:

> Negligence is defined as "the lack of ordinary care" or, more specifically, "the failure of a person to do something that a reasonably careful person would do, or the act of a person in doing something that a reasonably careful person would not do, measured by all the circumstances then existing [citation omitted]."[18]

Some view negligence more simply as "the absence of reasonableness" [citations omitted].[19] The definition of negligence relies heavily on what a reasonably careful or reasonably prudent person would or would not have done under similar circumstances. For purposes of day-to-day decision making, probation/parole officers are best advised to do what a reasonably careful person would have done under the circumstances. Note, however, that the above definitions, although typical, are exclusive to particular jurisdictions. Negligence in a specific jurisdiction may vary as laid out in state statute or state case law.[20]

2. Elements of Negligence Tort

In general, the following must be present if the defendant is to be held liable under negligence tort law:[21]

- 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.
- The defendant's act must have been the proximate cause of the injury.

3. Types of Negligence

Many jurisdictions draw distinctions among different levels of negligence, depending on the state of mind of the wrongdoer. As noted in the definition of negligence above, simple negligence involves a failure to exercise the care that a reasonably careful person would exercise in like circumstances. Gross negligence requires a higher level of culpability on the part of the wrongdoer; "Gross negligence involves a failure to act under circumstances that indicates a passive and indifferent attitude toward the welfare of others. Negative in nature, it implies an absence of care."[22] Ordinary and gross negligence can both be distinguished from willful, wanton, or reckless conduct in that "Willful misconduct, on the other hand, requires an intentional act or an intentional failure to act, either with knowledge that serious injury is a probable result, or with a positive and active disregard for the consequences."[23]

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. Nearly every type of tort case has its own particular defense. For example, the defenses for the torts of assault and battery differ from the defense against the tort of defamation; the defenses for intentional torts differ generally from the defenses for the negligence tort. These defenses vary somewhat from jurisdiction to jurisdiction and private persons who are alleged to have engaged in tortious conduct are encouraged to consult the laws of their own jurisdiction to find out applicable defenses and their elements.

The types of defenses discussed here are those that are applicable to government officials or entities, not to private persons. These include 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. Immunity for Officials

Government officials enjoy immunity from being sued and held liable when they are being sued in their individual capacities. The United States Supreme Court has articulated the justification for this immunity thusly:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties-suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[24]

1. Categories of Immunity Available to Officials

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

a. Absolute immunity is premised on the idea that the public interest is best served if government officials are free to discharge their official duties without the distraction of being haled into court time and time again. This privilege "defeats a suit at the outset" by protecting the official from even being subjected to trial.[25] The privilege applies to prosecutors, legislators, and judges who are performing judicial duties within their own jurisdictions.[26] The Supreme Court summarized the elements of this kind of immunity in the classic case on this point as follows, "absolute immunity from state-law tort actions should be available only when the conduct…is within the scope of their official duties *and* the conduct is discretionary in nature."[27] The discretionary criterion is included because, "[w]hen an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct.[28] Unlike qualified immunity, discussed below, good faith is not required in order for an official to avail herself of the absolute immunity privilege.[29]

   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 probation. 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 who are undertaking their official policymaking functions, whereas

qualified immunity (see below) 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 in some jurisdictions as "quasi-judicial immunity." "Absolute quasi-judicial immunity is extended to nonjudicial officers if they perform official duties that are functionally comparable to those of judges, that is, duties that involve the exercise of discretion in resolving disputes."[30] Under this type of immunity, judicial-type functions that involve discretionary decision making or court functions are immune from liability, whereas some other functions (such as ministerial duties of the job) are not. The emphasis is on the function performed rather than on the position the officer holds.[31]

c. Qualified immunity.[32] As noted above, absolute immunity attaches to prosecutors, legislators, and judges for their policy-making (i.e., discretionary) official acts (i.e., within the scope of their employment). Absolute and quasi-judicial immunity were creatures of the common law that were not available to every public official. As the Supreme Court observed in 1967, "The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith."[33] This good faith requirement has become the qualifier in qualified immunity.

   One state court, for example, 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."[34] Applied to probation and parole officers, this means that, in order to prevail on an official immunity claim, the officer will have to prove that: (1) she was performing a discretionary, not a mandatory, act; (2) she acted within the scope of her authority; and, perhaps, (3) she acted in good faith (if the state immunity defense requires it). 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.[35] Probation and parole officers should consider which of their actions are discretionary (e.g., motions to revoke probation?) for which official immunity might apply, and which actions are ministerial (e.g., supervising those probationers or parolees to whom the officer is assigned).
   - The "scope of authority" criterion has been defined as follows: "[A] public official or employee is acting within the scope of his or her authority if he or she is discharging the duties generally assigned to him or her even if they are performed wrongly or negligently."[36] Example: A probation officer making a home contact is acting within the scope of his authority. By contrast, a probation officer who decides to remove an infant from a probationer's home in order to protect the infant is clearly acting outside the scope of his authority.
   - "An officer acts in good faith and is entitled to official immunity from liability if a reasonably prudent officer, under the same or similar circumstances, could have believed that his acts were justified."[37] Good faith has been described somewhat more recently in the context of police pursuits as applying where: a reasonably prudent officer might have believed that the pursuit should have been continued. The officer need not prove that it would have been unreasonable to stop the pursuit or that all reasonably prudent officers would have continued the pursuit. Immunity should be recognized if officers of reasonable competence could disagree on this issue."[38]

   It is worth noting that the protection afforded by the privilege is quite substantial. As the U.S. Supreme Court acknowledged in the case of *Malley* v. *Briggs,* "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[39]

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 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, the Fifth Circuit Court of Appeals held that a federal 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.[40] Other cases, both before[41] and since[42] have reached the same conclusion relative to state probation officers.

Many of the actions of such court-supervised probation officers, however, are considered executive, and hence are likely to come under qualified immunity. Distinguishing those functions for which absolute immunity attaches from those entitled only to qualified immunity, the Tenth Circuit Court of Appeals held "[t]he more distant a function is from the judicial process, the less likely absolute immunity will attach."[43] Probation officers without absolute immunity protection, who enjoy qualified immunity instead, may be held liable unless the act is discretionary, within the scope of their employment, and undertaken 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.[44] 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.[45]

B. Governmental Immunity

The doctrine of sovereign immunity from suit was originally based on the monarchical, semireligious tenet that "the King can do no wrong." In modern times, it is more often explained as a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities. The public service might be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. [footnotes omitted][46]

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:

> 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.[47]

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, operates to protect the states and their agencies. A distinction must be made, however, between agency liability and individual liability. Sovereign or governmental immunity only extends to state agencies. It does not 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 enjoy 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 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[48] that local units of government may be held liable, in a § 1983 action if the allegedly unconstitutional action was part of a 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 and parole officers. Variations exist from state to state and between the state and federal governments. The foregoing discussion is intended merely to provide a general guide and a description of the legal framework. Similarly, Table 2–1 summarizes what courts in most jurisdictions have held. It is not intended to serve as a definitive statement on the issue of immunity. Interested readers should consult their legal advisors for the law and court decisions in their states.

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
Prison Guards			Yes
Police Officers			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.

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

As a general matter, there is no liability on the part of probation and parole officers for failing to protect a member of the public. 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.[49] 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 and parole is public protection. Injured members of the public file lawsuits against probation and parole officers and departments because they relate the injury caused by probationers or parolees to inadequate supervision or failure to revoke probation or parole. The public assumes that, had the offender been properly supervised and had the probation or 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 promote 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.

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

There is one major, multifaceted, and largely undefined exception to the public duty doctrine, namely, the special relationship exception. The exception essentially holds that liability may attach despite the public duty doctrine if a special relationship exists between the government and the individual who suffers harm.[50] The application of the exception in the context of probation and parole means that if a duty is owed to a particular person rather than to the general public, then a probation or 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.

The cases involving exceptions to the public duty doctrine have generally involved law enforcement officers and have established liability on the basis of special relationships in the following circumstances: (a) such a duty arises from a statute, (b) the government creates the danger (as opposed merely to failing to prevent it), (c) the government voluntarily undertakes special protection of the individual victim, (d) the government or its officers made a statement or promise to persuade the victim to rely on the government for protection, or (e) the government officers exacerbated an existing risk of harm to the victim.[51]

- When the police deprive an individual of liberty by taking him or her into custody.[52]
- When the police assume an obligation that goes beyond police duty to protect the general public.[53]
- When protection is mandated by law.[54]
- When protection is ordered by the court.[55]

What the above situations have in common is that, in each circumstance, 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 or parole officers. This is particularly likely when they are vested with law enforcement authority, as they are in some jurisdictions.

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

SUMMARY

Probation and parole officers may be held liable under state tort law. There are two kinds of state torts that should be of particular relevance to probation and parole officers, namely, intentional torts and negligence torts. 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 or parolee and the plaintiff believes the injury could have been prevented had the officer properly supervised the probationer or 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.

Two types of immunity and one defense are discussed in this chapter: the immunities available to officials; the immunity available to the government; and the public duty doctrine defense. The immunity available to officials may be divided into three categories: absolute, quasi-judicial, and qualified. Judges and prosecutors enjoy absolute immunity while performing their judicial responsibilities, whereas probation and parole officers have qualified immunity. Governmental immunity means that the government cannot be sued because of its status as sovereign, unless such sovereign 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 and 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, ninth edition (2009).

2. Black's Law Dictionary, ninth edition (2009).

3. Restatement Second, Torts § 13.

4. Restatement Second, Torts § 19.

5. Restatement Second, Torts § 21(1).

6. Restatement Second, Torts § 46; Restatement Third, Torts: Liability for Physical and Emotional Harm § 45.

7. *West Virginia Fire and Casualty Co.* v. *Stanley,* 602 S.E.2d 483 (2004).

8. *City of St. Petersburg* v. *Austrino,* 898 So. 2d 955 (Fla. Dist. Ct. App. 2d Dist. 2005); *Smith* v. *Knight,* 907 So. 2d 831 (La. Ct. App. 2d Cir. 2005); *Peterson Novelties, Inc.* v. *City of Berkley,* 259 Mich. App. 1, 672 N.W.2d 351 (2003); *Jacobs* v. *Bonser,* 46 S.W.3d 41 (Mo. Ct. App. E.D. 2001); *Williams* v. *City of Jacksonville Police Dept.,* 165 N.C. App. 587, 599 S.E.2d 422 (2004).

9. 22A Am.Jur.2d Death § 19 (Westlaw, July 2010).

10. *Taus* v. *Loftus,* 151 P.3d 1185 (Cal. 2007).

11. 50 Am.Jur.2d Libel and Slander § 1 (Westlaw, July 2010).

12. 50 Am.Jur.2d Libel and Slander § 472 (Westlaw, July 2010).

13. 62A Am.Jur.2d Privacy § 29 (Westlaw, July 2010).

14. Restatement Second, Torts § 652A(1).

15. 37 Am.Jur.2d Fraud and Deceit § 56.

16. *P.G.* v. *State, Dept. of Health and Human Services, Div. of Family and Youth Services,* 4 P.3d 326 (Alaska 2000).

17. 1 Am.Jur.2d Abuse of Process § 3 (Westlaw, July 2010).

18. *Deal* v. *Bowman,* 188 P.3d 941 (Kan. 2008).

19. *Metcalf* v. *County of San Joaquin,* 43 Cal.Rptr.3d 522, 533 (Cal. App. 3 Dist.,2006).

20. 57A Am.Jur.2d Negligence § 9 (Westlaw, July 2010).

21. 57A Am.Jur.2d Negligence § 5 (Westlaw, July 2010).

22. 57A Am.Jur.2d Negligence § 231 (Westlaw, July 2010).

23. 57A Am.Jur.2d Negligence § 231 (Westlaw, July 2010).

24. *Barr* v. *Matteo,* 360 U.S. 564, 571 (1959).

25. 63C Am.Jur.2d Public Officers and Employees § 307 (Westlaw, July 2010).

26. 63C Am.Jur.2d Public Officers and Employees § 307 (Westlaw, July 2010).

27. *Westfall* v. *Erwin,* 484 U.S. 292, 297-298 (1988).

28. *Westfall* v. *Erwin,* 484 U.S. 292, 296-297 (1988).

29. *Minch* v. *D.C.,* 952 A.2d 929 (D.C. 2008); *Smith* v. *Stafford,* 189 P.3d 1065 (Alaska 2008).

30. 63C Am. Jur. 2d Public Officers and Employees § 309 (Westlaw, July 2010).

31. 63C Am. Jur. 2d Public Officers and Employees § 307 (Westlaw, July 2010).

32. Because this form of immunity has evolved over time and across multiple jurisdictions, it is now always known by the name "qualified immunity." For example, "Texas law of official immunity is substantially the same as federal qualified immunity law." (*Wren* v. *Towe,* 130 F.3d 1154, 1160 (5th Cir. 1997); see also, e.g., *Haggerty* v. *Texas Southern University* 391 F.3d 653 (5th Circuit 2004); *Murray* v. *Earle,* 405 F.3d 275 (5th Circuit 2005).

33. *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967).

34. *City of Lancaster* v. *Chambers,* 883 S.W.2d 650 (Texas 1994); see also, e.g., *Murphy* v. *Bajjani,* 647 S.E.2d 54 (Ga. 2007); *Ross* v. *Consumers Power Co.,* 363 N.W.2d 641 (Mich. 1984).

35. *City of Pharr* v. *Ruiz,* 944 S.W.2d 709 (Tex. Cr. App. Corpus Christi, 1997); see also, e.g., *Barnard* v. *Turner County,* 2010 Westlaw 3749087, __ S.E.2d __ (Ga.App. 2010). "A discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed."

36. *Ballantyne* v. *Champion Builders, Inc.,* 144 S.W.3d 417 (Tex. 2004).

37. *Moore* v. *Novark,* 1995 Westlaw 571854 (Tex. Ct. App.-Houston 1995).

38. *City of Pharr* v. *Ruiz,* 944 S.W.2d 709, 715 (Tex. Ct. App.-Corpus Christi 1997); see also, *Loftin* v. *Morales,* 187 S.W.3d 533 (Tex. Ct. App.-Tyler 2005).

39. *Malley* v. *Briggs,* 475 U.S. 335, 341 (1986).

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

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

42. *Parris* v. *Quattlebaun,* 2009 Westlaw 734146 (M.D. Ala. 2009).

43. *Snell* v. *Tunnell,* 920 F.2d 673, 687 (10th Cir.1990).

44. *Keeton* v. *Procunier,* 468 F.2d 810 (9th Cir. 1972).

45. *Thompson* v. *Burke,* 556 F.2d 231 (3d Cir. 1977); see also, *Moriarty* v. *Rendel,* 2009 Westlaw 1458201 (M.D. PA 2009).

46. 72 Am. Jur. 2d States, Territories, and Dependencies § 97 (Westlaw, July 2010).

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

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

49. 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 88 (Westlaw, July 2010).

50. 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 84 (Westlaw, July 2010).

51. 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 175 (Westlaw, July 2010).

52. CJS Municipal Corporations § 492, Duties (2010).

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

54. Restatement Third, Torts: Liability for Physical and Emotional Harm § 38 (2005).

55. Police Misconduct: Law and Litigation § 2:37, Failure to provide police protection--Domestic violence (2010).

CHAPTER 3

CIVIL LIABILITY UNDER FEDERAL LAW: § 1983 CASES

INTRODUCTION

Title 42 of the United States Code, § 1983 is perhaps the most frequently used provision in the array of legal liability statutes against public officials, the category of actors that includes probation and parole officers.[1] It is therefore important that this law be properly understood by probation and parole officers. This chapter discusses § 1983 cases, sometimes also known as 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. § 1983 CASES

A. The Law

Title 42, United States Code, § 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 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.[2]

B. History of the Law

The Civil Rights Act of 1871[3] was enacted in the post-Civil War Reconstruction Era when Congress saw a need for civil remedy to address civil rights violations by state officials intrusive of liberty protected by the 14th Amendment to the Constitution.[4] It was not feasible at that time to enact a federal criminal statute to address such violations. 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*[5] was decided.

In *Monroe* v. *Pape,* the United States Supreme Court ruled that § 1983 applied to all violations of constitutional rights even where the public officer was acting outside the scope of employment. This greatly expanded the scope of protection of 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 § 1983 Lawsuits Are Popular

Civil rights suits are a popular vehicle for plaintiffs for myriad 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 or 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 lawsuit wherein several plaintiffs alleging similar violations are certified as a class and their case is heard collectively. This puts the plaintiffs in a position of strength and affords them 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,*[6] the ruling benefits all similarly situated parolees, not 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 § 1983 cases if they see any merit in the suit.

D. Roadblocks to Criminal Cases Against a Public Officer

Plaintiffs use § 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 § 1983 is a civil case in which the plaintiff seeks vindication of rights. The benefit to an aggrieved party if a criminal case is brought because of injury is less direct than the benefit to that party where damages are paid. Moreover, there are definite barriers to the use of criminal sanctions against erring probation or parole officers. Among these are the unwillingness of some district attorneys to file cases against public officers with whom they work regularly and whose help they may sometimes need. 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 egregious. 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 side with the probation or parole officer than the probationer or parolee. 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 doubt standard[7] needed to convict criminal defendants.

II. TWO REQUIREMENTS FOR A § 1983 LAWSUIT TO SUCCEED

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

- The defendant acted under "color of law."
- 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 requirement means the official must have misused power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[8] Although it is easy to identify acts that are wholly within the term "color of law" (as where a probation officer conducts a presentence investigation pursuant to court order), there are gray areas that defy easy categorization (as where a probation officer makes a citizen's arrest, but identifies himself as an agent of the criminal justice system). As a general rule, much of what a probation or parole officer routinely does in the performance of her or his duties and during the usual hours is likely to be considered under color of state law. Conversely, what he or she does as a private citizen during his or her off-hours is likely to fall 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 sexually assaults a probationer during a home visit. The officer is acting under color of law.

As suggested by the preceding example, 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.[9] Hence, even if the probation or parole officer exceeded his or her lawful authority, he or she may still be considered to have acted under color of law. Indeed, sometimes it is either the plaintiff's or the defendant's subjective beliefs about whether the actions were under color of state law that control.[10]

Can federal officers be sued under § 1983? The answer, for the most part, is no. The plain language and case law surrounding § 1983 make it clear that it applies to persons acting under color of *state* law. Federal officials can be held liable under parallel authority pursuant to the United States Supreme Court decision in *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*.[11] There the Court held that a cause of action, derived from the Constitution, exists in favor of victims of federal officials' misconduct. *Bivens* provides essentially the same protection against constitutional violations by federal officials that § 1983 provides as against state and local officers; the only real difference is that the former is a common law right, whereas the latter is statutory.[12] Moreover, a federal officer can be sued directly under § 1983 if he or she assists state officers who act under color of law.[13]

Can private contractors be sued under § 1983? Yes. Private contractors cannot be held to be acting under color of state law simply because they are contracting with state or local governments.[14] However, such contractors may be held to be acting under color of state law if either the conduct at issue is under control of the government[15] or the function provided by the contractor is typically within the exclusive purview of the government.[16]

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

Under this requirement, the right violated must be one that is guaranteed by the United States Constitution or is given the plaintiff by federal law. Rights provided exclusively under state law are not protected under § 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 cannot be adjudicated in a § 1983 suit. Instead, such right would have to be vindicated through state law remedies or administrative regulations.

The worrisome aspects of this requirement relate not to the acts of probation or parole officers that are blatantly violative of a known constitutional right (as when a probation officer conducts an illegal search). The problem lies in ascertaining whether a specific constitutional right exists in the first place. This is particularly troublesome in probation and 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 probation and parole officers to be familiar with the current law as decided by the courts in their own jurisdictions as this is the law that must be followed regardless of decisions to the contrary in other states.

A probation or parole officer is liable if the above two elements are present. Absence of one means that there is no liability under § 1983. The officer may, however, be liable under some other legal authority (e.g., tort or under the penal code). For example, a probation officer whose negligent driving results in injury to a probationer whom she is transporting may be liable under tort law for negligent driving, but not under §1983. Of course, 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 is a different matter.

The United State Supreme Court has ruled that defendants in § 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.[17]

III. OTHER LEGAL CONSIDERATIONS

Although § 1983 cases require only two elements to succeed (as discussed above), some elaboration is required in order to understand better the circumstances under which § 1983 cases succeed or fail.

A. The Violation Must Reach Constitutional Level

Not all violations of rights lead to liability under § 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 one scholar:

> 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.[18]

Relatively few wrongs involving probation or parole officers have been held by the courts to rise to the level of a constitutional violation remediable through § 1983. Cases where courts have found § 1983 either to be available or likely to be available (e.g., by allowing a § 1983 action to go forward on the ground that a constitutional right is involved) include:

- Conspiring with another to wrongfully confine a parolee as a parole violator.[19]
- Arbitrary denial of a furlough or work release.[20]
- Denial of the right to a parole revocation hearing.[21]
- Compelling a probationer to attend faith-based treatment programs for substance abuse (i.e., Alcoholics Anonymous).[22]
- Improper disclosure of a probationer's health status as HIV-positive.[23]
- Improper *failure* to disclose a parolee's HIV status may also be a constitutional violation.[24]

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

When the Civil Rights Act of 1871 was originally enacted, 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,*[25] 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. Even a single act may qualify as an official policy if it is undertaken by the appropriate policymaking body or official.[26] The *Monell* Court explained that, in order to qualify as a custom, the practice must be "so permanent and well settled as to constitute a custom or usage with the force of law."[27] One court defined the requirement as follows:

> To establish a policy or custom, it is generally necessary to show a persistent and wide-spread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the

> governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.[28]

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. Although *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.

Whereas 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. States cannot be sued in federal court because of the Eleventh Amendment.[29] Federal courts have held that states are similarly immune from being subjected to suits in their own jurisdictions.[30] 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 § 1983 LAWSUITS

There are a number of defenses to § 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 § 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,* 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. (citations and notes omitted).[31]

Thus, the good faith defense articulated in *Harlow* will be available to defend against liability unless two requirements are met: (a) an officer violated a clearly established statutory or constitutional right, and (b) the right is one 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 Supreme Court, in *Anderson* v. *Creighton,*[32] held that the *Harlow* standard applies to other public officers, such as the police, who are performing their responsibilities. In *Anderson,* officers conducted a warrantless search of a home, believing that a bank robber was hiding there. The family that occupied the home sued for violation of the Fourth Amendment right against unreasonable search and seizure. On appeal, the Supreme Court held 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 added that: "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity."[33] It is worth noting that, although this case continues to control the Fifth Circuit,[34] it has not been embraced elsewhere.

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 should be updated constantly 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 criminal justice agencies to 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.

1. Good Faith Defense Not Available to Agencies

Although the good faith defense articulated in *Harlow* is available to government actors sued in their individual capacities, the defense does not extend to the government agencies themselves. In *Owen* v. *City of Independence,*[35] the U.S. Supreme Court held that a municipality sued under § 1983 cannot invoke the good faith defense. 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."[36] The decision concluded thus:

> 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.[37]

The decision should concern probation and parole agencies because it suggests that, where agencies have violated constitutional rights of probationers or parolees, those agencies may not be let off the proverbial hook as readily as the government actors themselves. One way of looking at this holding is that individual officers may be excused for violating constitutional rights if they did not (and could not have) known better, but agencies will be held liable. The *Owen* 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.

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

The second defense in § 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.

In evaluating the availability of the defense to police officers who violated the Fourth Amendment in the mistaken belief that they had probable cause to search and arrest, The Ninth Circuit Court of Appeals held "that the officers are entitled to qualified immunity on this claim because a reasonable officer could have believed that probable cause existed."[38]

The Second Circuit Court of Appeals decision in the aforementioned *Bivens* case held the probable cause defense operates as follows:

> Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.[39]

This 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.[40]

V. § 1983 AND STATE TORT CASES COMPARED

State tort cases (discussed in chapter 2) and § 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.

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

Federal (§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

SUMMARY

Civil liability cases in federal court are generally known as Section 1983 cases. Based on Title 42 of the United States Code, § 1983, these cases need two requirements 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. Erika A. Swanson, Who Framed Roger Devereaux? *Devereaux* v. *Perex,* a Deliberate Indifference Standard, and a Right not to be Framed in the Context of Child Sex Abuse Investigations, 77 Chicago-Kent L.Rev. 901 (2002).

2. 42 U.S.Code, § 1983 (2006).

3. Act of Apr. 20, 1871, ch. 22; 17 Stat 13, (Also known as the Ku Klux Klan Act).

4. 15 Am. Jur. 2d Civil Rights § 63 (Westlaw, July 2010).

5. *Monroe* v. *Pape,* 365 U.S. 167 (1961).

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

7. Courts are famously reluctant to quantify "proof beyond a reasonable doubt" in terms of percentages, but one commonly accepted definition is "the kind of doubt which people in the more serious and important affairs of their own lives might be willing to act upon" (29 Am. Jur. 2d Evidence § 186 (Westlaw, July 2010)).

8. *West* v. *Atkins,* 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic,* 313 U.S. 299, 326 (1941).

9. *Davis* v. *Murphy,* 559 F.2d 1098, 1101 (7th Cir. 1977) (holding officers acted under color of state law in provoking a fight because they were carrying guns and badges).

10. Steve Libby, When Off-Duty State Officials Act Under Color of State Law For the Purposes of Section 1983, 22 Memphis S.U.L.Rev. 725 (1992).

11. *Bivens* v. S*ix Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 410 (1971).

12. *Wilson* v. *Layne,* 526 US 603, 609 (1999).

13. *Cabrera* v. *Martin,* 973 F.2d 735 (9th Cir. 1992); Hurt v. Philadelphia Housing Authority, 806 F. Supp. 515 (E.D. Pa. 1992).

14. 15 Am. Jur. 2d Civil Rights § 77 (Westlaw, July 2010).

15. *Chan* v. *City of New York,* 1 F.3d 96 (2d Cir 1993).

16. *Ancata* v. *Prison Health Services,* Inc. 769 F.2d 700 (11th Cir. 1995).

17. *Behrens* v. *Pelletier,* 516 U.S. 299 (1996) 63C Am. Jur. 2d Public Officers and Employees § 398 (Westlaw, July 2010).

18. Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 72 Va.L.Rev. 841, 843 (1971).

19. *Ackerman* v. *Putnam,* 295 F.Supp 1023 (DC Pa) 1969).

20. *Brooks* v. *Dunn,* 376 F.Supp. 976 (DC Va 1974); *Gahagan* v. *Pennsylvania Board of Probation and Parole,* 444 F.Supp. 1326 (DC Pa 1978).

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

22. *In re Garcia,* 24 P.3d 1091 (Wash. Ct. App. 2001); *Warner* v. *Orange County Department of Probation,* 115 F.3d 1068 (2d Cir. 1997).

23. *Herring* v. *Keenan,* 218 F.3d 1171 (10th Cir. 2000).

24. See *Greer* v. *Schoop,* 141 F.3d 824 (8th Cir. 1998) (assumed without deciding the failure to warn the parolee's girlfriend of his HIV status was a constitutional violation; case decided on the ground that such right was not clearly established at the time).

25. 436 U.S. 658 (1978).

26. 81 A.L.R. 549, at § 3 (Westlaw, October 2010).

27. *Monell* v. *Department of Social Services,* 436 U.S. 658, 691 (1978); see also *T.Z.* v. C*ity of New York,* 635 F.Supp.2d. 152 (E.D. NY 2009).

28. *Depew* v. *City of St. Mary's, Georgia,* 787 F.2d. 1496 (11th Cir. 1986).

29. 15 Am. Jur. 2d Civil Rights § 99 (Westlaw, July 2010).

30. *Doe* v. *Leach,* 988 P.2d 1252 (1999); *Nichols* v. *Danley,* 266 F.Supp.2d 1310 (D.NM 2003); *Will* v. *Michigan Dep't of State Police,* 491 U.S. 58 (1989).

31. *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982).

32. *Anderson* v. *Creighton,* 483 U.S. 635 (1987).

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

34. *Bazan* v. *Hidalgo County,* 246 F.3d 481 (5th Cir. 2001); *Scallion* v. *Red River Parish,* 2007 WL 496624 (W.D.La. 2007).

35. 445 U.S. 622 (1980).

36. *Owen* v. *City of Independence, Mo,* 445 U.S. 622, 657.

37. *Owen* v. *City of Independence, Mo,* 445 U.S. 622, 657.

38. *Crowe* v. *County of San Diego,* 593 F.3d. 841, 869 (9th Cir. 2010). See also 61 A.L.R. Fed. 7, at § 2[a] (Westlaw, October 2010).

39. *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narc.,* 1972, 456 F.2d 1339, 348 (2d. Cir. 1972).

40. *Brinegar* v. *U.S.,* 338 U.S. 160, 175-176 quoting *Carroll* v. *United States,* 267 U.S. 132, 162 (1925).

CHAPTER 4

LEGAL REPRESENTATION, ATTORNEYS' FEES, AND INDEMNIFICATION

INTRODUCTION

A probation/parole officer who faces a liability lawsuit filed under state or federal law has three primary concerns:

- Legal representation (i.e. who will represent me?).
- Attorneys' fees (i.e. who will pay for my attorney?).
- Indemnification (i.e. who will pay for the monetary damages that may be imposed if I am found liable?).

These three topics are discussed below in the light of historical and recent statutes and case law, and of findings from an extensive survey which was distributed to the offices of attorneys general nationwide in the early 1980s for the first edition of this monograph. To our knowledge, no other survey or study has been conducted specifically on these issues with regard to probation/parole officers. The survey results are more than a quarter century old; hence, the discussion of these topics cites updated statutes, case law, and other reliable documentary sources in order to provide the most current available information.

I. LEGAL REPRESENTATION

States differ in their statutes and guidelines that determine what types of acts of probation or parole officers a particular state will defend. In general, states are more willing to provide legal assistance to state employees who are sued in civil cases, rather than those who are named as defendants in criminal cases. All states in the survey covered civil actions, at least some of the time, for both probation and parole officers. However, a substantial percentage of states indicated that they would not provide legal representation for a state employee defendant in all types of civil suits. Many states have limited the types of civil actions for which a state will provide legal representation for defendants who are sued in their capacity as state employees.

A. In Civil Liability Cases

Most states set few limitations on the types of acts that they will defend in civil suits. Generally, the parole or probation officer's act or omission must occur within the scope and course of their employment. "Scope and course of employment" is defined by each state. In addition to the "scope of employment requirement", some states additionally require that the officer must act in "good faith." The term in "good faith" is not well-defined in state tort law, and its definition varies from state to state. In some states good faith means "not grossly negligent." In other states, it means that the officer has not violated a state law or rule. Furthermore, some states hold that an officer is "not grossly negligent" if an officer acts with the honest belief that his or her action was proper and appropriate under the circumstances. By contrast, the definition of "good faith" in § 1983 case law for suits filed in federal courts is clear— it means that the officer will not be held liable unless he or she violated a clearly established statutory or constitutional right of which a reasonable person would have known.

The meaning of "gross negligence" also differs between states and judicial jurisdictions, but in general "…most courts consider that 'gross negligence falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind."[1] The lack of a clear definition of the term as compared to "negligence" presents a difficult hurdle for plaintiffs and for defendants to overcome.

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. Other 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; but reliance on such a policy may be risky if the policy limits of liability payment are unrealistically low. In these instances, insurance companies will sometimes pay the monetary limit of the liability policy as part of a settlement, in or outside of court, in lieu of preparing a suit for defense at trial. Settlements between the plaintiff(s) and the defendant(s) can be less expensive are often made in order to avoid the expensive processes of a lawsuit and trial.

Once a case is settled, it is possible that probation or parole officers inherit the risks of personal exposure and responsibility for the balance of a claim against them. This means that the officer will have to pay personally any remaining balance of monetary awards that were not paid under the settlement. In either case, the reputations of the officer and the agency will be damaged by having been held liable in a civil liability case, even if the case could have been won at trial. Public and political support for probation and parole officers, agencies, and the issues that are important to the operations of these entities can wane in the aftermath of severe cases in which liability was incurred by an individual's or agency's act or omission.

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, according to the survey results, at least three states require that 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, the officer may have to reimburse the state for associated fees and costs. Thus, there are uncertainties involved in obtaining legal representation for state officials, and officers should be familiar with the laws and guidelines set forth by the state and local jurisdiction in which they are employed.

The attorney general's office has considerable discretion in whether to undertake the defense of an officer who is named as a defendant in a civil suit. Most states' statutes (see e.g., New Jersey[2] and North Carolina[3]) provide that the attorney general is obligated to provide legal assistance to state employees unless the employee's act or omission was (a) outside the scope and course of employment; or (b) involved actual fraud, actual malice, corruption, or willful misconduct; or (c) the defense of the employee would create a conflict of interest within the state; or (d) the defense of the act would not be in the best interests of state.

In civil liability cases in which the attorney general's office refuses to defend a probation or parole officer, the officer will need to obtain private legal counsel. As of the time of the survey for the first edition of this book, only two states, California and Vermont, had procedures for appealing the state's refusal to defend the officer; and only California required a judicial determination as to whether the state employee was statutorily entitled to legal assistance by the state.

As stated earlier, it is imperative that probation and parole officers familiarize themselves with their state's statutes and case law concerning the topics presented in this book. It has been more than 25 years since the survey upon which this book is based was administered and it is more than likely that a state's statutes, case law, and guidelines have changed since that time. For example, New Jersey now has guidelines on the appeal ability of the state's refusal to defend an employee in a civil liability suit. The Supreme Court of New Jersey recently held that judicial review of a refusal by the attorney general to defend a state employee under the State Tort Claims Act is appropriate, but that the attorney general's decision should not be reversed by a court unless it finds that the refusal is "…arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole."[4]

The fact that a state refuses to defend the officer could serve to prejudice a judge or jury, if this information is admissible as evidence in a legal proceeding. However, according to the survey, with

the exception of Maryland, Oklahoma, and Oregon; the majority of states made no provision for barring at trial the evidence of the state's refusal to defend a its employee. Such evidence could be damaging to the state employee's defense because of the implication, whether warranted or unwarranted, that the state's refusal to defend was due to the act or omission being outside the scope and/or course of the officer's authority or duty, or some other adverse statutory exception for denial of representation.

B. In Criminal Liability Cases

Criminal liability cases present a different matter if the probation or parole officer is allegedly involved in a criminal act or omission. In the survey, almost half of the states did not undertake a defense of an officer in cases of criminal liability. In many states, the state prosecutes the officer if the charges involve criminal liability; thus the state would be unable to provide a defense due to a conflict of interest between itself and the state employee.

Survey responses from several of the states indicated that state legal representation is at the discretion of the attorney general's office, barring conflict of interest. Other states responded that the situation (i.e. a parole or probation officer sued in a criminal case) had never arisen and that their policies on this matter were unclear. Hence, very few states in the survey unequivocally indicated that the state would undertake the defense of an officer if the case were a matter involving criminal liability.

II. ATTORNEYS' FEES

The discussion of the rules and guidelines for assessing and awarding attorneys' fees in civil liability cases is addressed under two distinct headings (a) fees in state tort cases and (b) fees in § 1983 cases. The rules and guidelines for state cases differ from state to state, and are generally different from those for federal cases. The rules and guidelines related to attorneys' fees for § 1983 cases filed in federal courts are extensive. There are several state and federal sources of information upon which the discussions below are based: statutes, case law, and codes of procedure and evidence. For instance, each state has its own procedural and evidentiary rules which may or may not be modeled on the federal rules of evidence or procedure.

A. In State Tort Cases

The general rule in state tort cases is that each party pays attorneys' fees regardless of which party prevails at trial. For example, a probationer may file a state tort lawsuit against a probation officer. The probation officer is responsible for paying her own attorney's fees whether she wins or loses the case. The probationer would also have to pay his or her own attorney's fees. However, in a few states this general rule may not apply. In the event that the defendant probation or parole officer loses the case, the court may order the defendant probation or parole officer to pay plaintiff's attorneys' fees.

It is important to note that the rules of assessing and awarding attorney's fees may not apply in cases that are settled outside of the court without a trial or are not pursuant to a consent decree. During the mediation or arbitration processes of determining a settlement, the parties to the lawsuit are free to fashion the terms of the settlement and to determine the amount of fees, if any, and who should pay them.[5]

B. In § 1983 (Federal) Cases

The rules and guidelines in § 1983 cases filed in federal district courts differ from those that apply to state tort cases. In 1976, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988). This legislation permits a court to award attorney's fees to the prevailing party in some types of federal civil rights suits. The Attorney's Fees Act provides in part:

> 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….[6]

Prior to the passage of this act, an award of attorneys' fees was relatively rare due to the "American Rule", or "loser pays" rule, which required each party to pay their own attorney's fees and expenses.[7] The passage of the Attorney's Fees Act made it more likely that a prevailing party in a federal civil rights suit can collect attorney's fees, thus making such suits more attractive to lawyers.[8]

Section 1988(b) authorizes an award of attorney's fees to the "prevailing party" in a federal action. There are two points to consider here.[9] First, a prevailing *pro se* plaintiff is never entitled to attorney's fees because a *pro se* litigant is not represented by an attorney. This applies to attorneys who choose to represent themselves as a party to a lawsuit.[10] Second, prevailing defendants should not be permitted to recover attorney's fees.[11]

Generally, in a §1983 case, party prevails when the court has awarded some actual relief on the merits of a claim in which the legal relationship of the parties has been altered.[12] It is not enough that the lawsuit was a catalyst that caused a losing party to alter its conduct toward the plaintiff,[13] there must be a "material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees"[14] as a result of a court's judgment on the merits of a case or a court-ordered consent decree.

For example, in *Maher* v. *Gagne*[15] an award of fees was been found appropriate even where the parties avoided a trial and reached a voluntary settlement under a consent decree agreement. Furthermore, 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.[16] 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 § 1988.[17] 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.[18]

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.[19] 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.[20] 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 application of the Attorneys' Fees Act was expanded in a 1980 case. Originally, §§ 1983 and 1988 were only applied to violations of constitutional rights. However, in *Maine* v. *Thiboutot,*[21] the U.S. Supreme Court determined that individuals could sue for violations of any citizens' rights created under any federal statute. Furthermore, the Court ruled that prevailing plaintiffs could recover legal fees from the losing party. This decision has served to provide individuals with further means of bringing suit under federal law beyond civil rights in areas such as the administration of federal programs. Probation and parole agencies that participate in federal programs (e.g., programs that provide grants to the agencies) can potentially be subjected to lawsuits under § 1983, if they violate federal laws applicable to these programs. The probation and parole agencies may also have to pay attorney's fees for the other party if the agencies lose the lawsuit. In these cases, attorney's fees are awarded when the individual bringing the suit prevails over the agency.

Lower federal courts had adopted ambiguous standards for determining the appropriateness of a fee award. The U.S. Supreme Court clarified the standards in *Hensley* v. *Eckerhart* by holding that any of the following factors can be considered in calculating the "lodestar" or reasonable amount of attorney's fees that can be awarded by a court:[22]

- 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 can be surmised that awards of attorney's fees to the prevailing party may have encouraged plaintiffs to file cases under § 1983, instead of under state tort statutes. Attorneys are more likely to accept cases for which they can collect fees. In addition, case law shows that the attorneys' fees awards in some cases may grossly exceed damages awarded to plaintiffs. In one case, the Federal Court of Appeals for the Eleventh Circuit awarded $162,209.50 in attorneys' fees and court costs in a case involving a police officer even though the damage award was only $500 in compensatory and $10,000 in punitive damages.[23] 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.[24] 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 of nominal damages.[25] The $5,000 attorneys' fees award, however, was reversed by the United States Supreme Court on appeal which held that although plaintiff was a "prevailing party," in cases such as this one, the "only reasonable fee is usually no fee at all."[26]

III. INDEMNIFICATION IN CASE OF LIABILITY

Who will pay for the damages and costs assessed and ordered by the court when employees are found liable for their actions? A majority of the states provide for indemnification or reimbursement for civil damages assessed against agency employees as a result of a lawsuit.[27] However, there is considerable variation in the amount that states and their agencies are willing to pay.[28] Some states set no limit on the amount of money they will pay in a suit against a state employee, yet the majority of states set some monetary limit.[29] In addition, conditions under which the state will pay also vary and are sometimes ambiguous. 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. States, therefore, range from paying nothing to possibly paying an unlimited amount of the award on behalf of a probation or parole officer. Generally, the state will pay a partial or entire award if the probation or parole officer acted within the scope and course of his or her authority.[30]

Although most states provide some form of indemnification for officers who are sued, this does not mean that the state will automatically indemnify a probation or parole officer in every case. 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." The definition of this phrase may differ across jurisdictions.

For procedural purposes, an important question is: Who determines if good faith is binding for purpose of eligibility for indemnification? The determination is made by the state attorney general, the court, or the state agency. In some states, the court decision states whether 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 bind the state to indemnity, even if a subsequent court decision on the case finds that the employee had not acted in good faith. In some states, the steps for determining good faith are unclear. In the survey, some states indicated that, with respect to probation/parole officers, such a case had not been decided. In other states, only the matter of "scope of employment" must be determined without consideration of the broader issue of the presence or absence of good faith.

The survey also indicated that there are jurisdictions which, by law, exempt officers from liability in state tort cases. Other jurisdictions specifically provide that plaintiffs must sue the government employer, not the officer, in tort cases. For example, the Federal Tort Law Claims Act waives immunity for the federal government, but not for its employees, and in effect, states that in tort cases the government, not the officer, is to be sued.[31] The Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfall Act, grants federal employees, with few exceptions, absolute immunity from civil liability for wrongful or negligent acts committed while acting under the scope of employment.[32] By contrast, in § 1983 cases, the officer is to be sued, not the federal government.[33]

In summary, a probation/parole officer who is sued in his or her official and/or individual capacity faces an array of uncertainties. An officer's request for legal assistance and representation by the agency or the state may be provided, but is dependent upon his or her state's statutes, and agency rules and guidelines. If the state has provisions for indemnification, the officer be subjected to more than one determination of good faith, in which "good faith" may or may not be a well-defined or consistently applied term. Despite these inconsistencies, a court may rule against an employee by negating a claim of good faith, which negates the employee's claim of indemnification in turn. Even if the officer is indemnified, not all fees and expenses may be covered, particularly in states that place a limit on the amount of fees and awards for indemnification. Finally, whether the lawsuit is brought in state or federal court is a decisive factor in whether indemnification will apply to the officer's case.

IV. LEGAL REPRESENTATION, ATTORNEYS' FEES, AND INDEMNIFICATION IN TWO STATES: TEXAS AND KANSAS

The law on legal representation, attorney's fees, and indemnification varies from one state to another. The laws of two states are summarized below to illustrate the differences that can occur between states.

A. In Texas

In Texas, probation and parole officers are state officers for purposes of representation and indemnification, although they are considered local employees for other purposes. Probation officers, known as Community Supervision Officers, are employed by Community Supervision and Corrections Departments.[34] These are local judicial agencies,[35] and the officers are generally paid by the county

in which the court has jurisdiction, but funding for adult community supervision is also provided by the Texas Criminal Justice Assistance Division.[36] The Texas Department of Criminal Justice (TDCJ) is the state agency under which the Parole Division operates, thus, state parole officers are employees of the state. There are two types of parole officers in Texas: (1) Institutional Parole Officers (IPOs), and (2) officers who work in Field Operations. IPOs work with inmates in the Correctional Institution Division of TDCJ, but are overseen by the Texas Board of Pardons and Paroles which is quasi-independent state agency.[37] The TDCJ Parole Division has oversight of field operations officers in state regional offices who supervise parolees and individuals on mandatory supervision.[38]

Chapter 104 of the Texas Civil Practices and Remedies Code contains the statutes that regulate the state's liability for the conduct of its public servants. Texas law provides that the state attorney general's office is obliged to defend employees in certain instances, and the state indemnifies employees who are held liable.[39] The state is required to pay damages, court costs, and attorney's fees adjudicated against employees.[40] However, these laws apply only to an officer's conduct if the claims and damages are based on official acts or omissions in the course and scope of employment as determined by the state attorney general's office.[41] The state will not indemnify if the damages are the result of a "wilful or wrongful act or gross negligence."[42] When a civil lawsuit is filed against an employee, the law further requires that the attorney general must be served and given an opportunity to defend the suit, or notification must be given to the attorney general's office within 10 days of the date that the officer is served with notice that he or she is being sued.[43] Funds for defense of state employees are appropriated to the attorney general from the General Revenue Fund and are used for the attorney general to investigate, depose parties to the suit, conduct and respond to discovery processes, prepare for trial, prepare exhibits and other evidence for trial, and for actual participation at trial.[44]

Indemnification under Texas law is limited to specific amounts recoverable damages. State liability for indemnification is capped at $100,000 to a single indemnified person and at $300,000 to multiple indemnified persons if the liability resulted for a single occurrence made the basis of a lawsuit.[45] 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.[46] In the absence of statutory provisions 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. The individual officer will have to pay the difference out of his or her own pocket, if there is no other insurance contract or plan of statutorily authorized self-insurance.[47]

B. In Kansas

A discussion of the structure of probation and parole in Kansas is somewhat complicated. Parole officers are considered to be state officers employed by the Kansas Department of Corrections' Community and Field Services Division.[48] Thus, under state law, parole officers are eligible to be defended under the Kansas Tort Claims Act.[49] Legal defense would generally be provided by the Kansas Department of Corrections. Another complication in the structural issues in the Kansas probation and parole systems is the role of Court Services within judicial branch of the state government at the district court level. Court services officers have wide discretion and broad objectives from the preparation of presentence investigation reports to supervision of felony and misdemeanant adult and juvenile probationers.[50] It is possible that court services officers could be shielded by absolute immunity because they are carrying out functions at the behest of the judiciary as judicial agents, yet Kansas case law gives little guidance in this matter.[51]

Although statutorily eligible for legal representation, the Kansas statute does not clearly delineate the conditions, especially in state tort cases, under which a defense for probation, parole, or court services officers would be provided by either the Kansas attorney general's office, the specific county/district in which the court services officer works, counsel from the private bar, or counsel for an insurer.[52] If there is an insurance contract, claims against the state or an employee acting within the scope of employment can be compromised or settled by the attorney general, subject to the approval of the state finance council as delegated by the legislature, or by the legislature itself, if it is in session.[53] The chasm between the probation and parole officers in the executive branch and the court services officers in the judicial branch presents a challenge in determining which of the Kansas statutes apply to whom and under what circumstances they may be applicable.

By and large, the Kansas attorney general's office will provide representation for any state employee sued in a state tort claims case or in a federal court in a case involving civil rights claims.[54] In either instance, the statute requires that the employee must request legal defense within 15 days of receipt of service of process or a subpoena by filing the request with the attorney general's office.[55] Refusal to provide a defense may occur under any one of the following conditions: (1) the act or omission was not within the scope of 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 Kansas Statute Annotated § 75-6108(e).[56]

Legal defense for community corrections officers is a bit more complicated. In Kansas, the Community Corrections Section is under the auspices of the Department of Corrections' Division of Community and Field Services.[57] Unlike their parole officer counterparts, the community corrections structure and services are established either by single counties or interlocal agreements between multiple counties, thus making probation officers employees of a county or consortium of counties.[58] 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.[59] Thus, legal representation would generally be provided by the county entities involved or through liability insurance carried by the county as permitted by Kansas law.

The Kansas Tort Claims Act sets cap of $500,000 for any claims related to a single occurrence or accident.[60] The Kansas statute does not permit liability for punitive or exemplary damages, or for interest accrued prior to an order of final judgment as long as the employee was acting within the scope of employment.[61] Payment of damages assessed by compromise, settlement, or final judgment of a court, and costs to defend an action, is rendered by the attorney general from a the state treasury's tort claim fund, whether in a state tort claims action or civil rights action under United States laws.[62] Kansas statutorily permits government entities and interlocal cooperative entities to purchase insurance from a company or an association for state tort claims or any civil right actions.[63] The insurance contract is allowed to exceed the $500,000.00 statutory cap on damages.[64]

Each set of circumstances is different and indemnification arrangements vary from one Kansas jurisdiction to another, so it is important that the probation officer ascertain the particular arrangement that applies to his or her local jurisdiction or interlocal cooperative agreement. Incidentally, Kansas law prohibits the introduction of evidence at a trial in a civil rights case that an employee may be indemnified by the government and a mistrial shall be declared if this evidence is admitted.[65]

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 provided that the employee acted in good faith and without actual fraud or malice.[66] 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.[67] It is a statutory imperative

that the employees cooperate in good faith in the defense of the claims against them, because not doing so can preclude indemnification.

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 and parole officers becomes attractive. It is a necessity in high-profile professions like medicine and law where practitioners pay their premiums out-of-pocket. 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 a particular state or jurisdiction. It may also depend on statutes legally authorizing the government unit or agency to purchase insurance, as authorization to purchase insurance policies must exist prior to taking such action. Ultimately, there is always the issue of who pays the premium. Some states may prohibit the payment of a professional insurance premium with public funds.

Insurance for public employees is sometimes rejected for fear it might encourage the filing of lawsuits by citizens against public servants. It may also be assumed that the amount of damages awarded could increase if a judge or the jury becomes aware that the costs would be borne by an insurance company rather than by an individual employee or governmental agency or other entity. In many jurisdictions, however, insurance ownership or governmental indemnification cannot be mentioned at a trial or during a hearing. It could be argued that if insurance coverage is available, the public would be better served, in that public employees would be more inclined to fulfill their duties if their concerns about personal liability were diminished for acts performed in good faith in the scope of their authority and employment.

Within the scope of the survey results, liability 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 permit or provide liability insurance, agencies can attempt to influence legislative initiatives for the modification of statutes and policies so that insurance for agency employees can be obtained with public funds.

VI. PRIVATIZATION OF PROBATION SERVICES

In an era of budget deficits and shrinking revenue sources, state and local governments have increasingly turned to private contractors for the provision of probation services.[68] For example, Georgia statutes allow the state to contract most of its probation services to a single private contractor.[69] Other states, such as Missouri, Alabama, Arkansas, Florida, Utah, and Tennessee, also have state statutes that permit privatization of probation supervision services.[70] In the early 2000s, 10 states used private probation agencies to provide supervisions assistance and 10 others contracted with private agencies which had the primary responsibility for supervision of misdemeanants and low-risk offenders who were serving probation under court order.[71] Generally, states require that private probation companies carry general liability insurance. However, Missouri does not statutorily require the private companies to carry liability insurance[72] which leaves those companies which operate without adequate insurance susceptible to litigation and leaves open questions about legal representation, attorney's fees, and indemnification for the entity's probation officers, agents, and other employees. Moreover, a state's tort claims statutes may not be a proper vehicle for addressing or redressing claims in a suit against a private probation officer.

Because § 1983 applies to persons acting "under color" of state law, if a state has contracted with a private probation company for the provision of services, § 1983 applies to those private parties which act jointly under contract with the government to perform functions that were traditionally and exclusively in the government's sphere.[73] For the purposes of § 1983, private probation officers are state actors and are required to uphold the constitutional requirements for handling probationers.[74] Case law is still developing with regard to privatization of probation services and officers are well-advised to stay abreast of statutory and case law developments within their jurisdictions.[75] Probation officers employed by private entities which have contracted with a state or local jurisdiction to provide services will need to consult with their employers for answers to the questions of legal representation, attorney's fees, and indemnification.

SUMMARY

Legal representation, attorney's fees, and indemnification are real concerns of probation and parole officers in cases involving civil liability. 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, whereas 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 a paucity of policy as to who pays these fees and there is no standardization between and, sometimes, within; states as to who is entitled to be represented and/or indemnified by the state. The problem is compounded where counties, parishes, and municipalities are considered. Professional liability insurance provides protection to probation and parole officers, but inherent problems remain, such as: (1) who pays the premium, (2) will it increase the number of lawsuits filed, and (3) is an insurance company is available and/or willing to underwrite the policy? Each state and local jurisdiction must take responsibility for educating and training their probation and parole officers so that they will be prepared to act promptly and properly if they are named as a party in a lawsuit that may expose them to civil liability.

NOTES

1. Black's Law Dictionary (9th ed.), citing Prosser and Keeton on the Law of Torts § 34, at 211-12 (W. Page Keeton ed., 5th ed.).

2. See N. J. Stat. § 59:10A-2 (2010).

3. See N. C. Gen. Stat. § 143-300.4 (2010).

4. *Prado* v. *State,* 186 N.J. 413 (2006).

5. *See e.g., Toms* v. *Taft,* 338 F3d 519 (6th Cir. 2003) in which a plaintiff did not qualify as a prevailing party in a private out-of-court settlement).

6. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (1976).

7. Darrell L. Ross, *Civil Liability in Criminal Justice,* Fifth Edition, (2009).

8. *Id.*

9. *Id.*

10. *Kay* v. *Erhler,* 499 U.S. 432 (1991).

11. *Hughes* v. *Rowe,* 449 U.S. 5 (1980).

12. *Farrar* v. *Hobby,* 506 U.S. 103 (1980).

13. *Buckhannon Board & Care Home* v. *West Virginia Department of Health & Human Resources,* 532 U.S. 598 (2001).

14 *Id.* at 604.

15. *Maher* v. *Gagne,* 448 U.S. 122 (1980).

16. *Id.*

17. *Hensley* v. *Eckerhart,* 461 U.S. 424 (1983). *See also Guajardo* v. *Estelle,* 432 F. Supp. 1373 (S.D. Tex. 1977), *modified* 580 F.2d 748 (5th Cir. 1978).

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

19. *Id.*

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

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

22. *Hensley* v. *Eckerhart,* 461 U.S. 424 (1983).

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

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

25. *Estate of Farrar* v. *Cain,* 941 F.2d 1311 (5th Cir. 1991).

26. *Farrar* v. *Hobby,* 506 U.S. 103 (1992).

27. Ross, at 81.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See generally* Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680 and 28 U.S.C. § 1346(b).

32. *See generally* Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), also referred to as the Westfall Act, 28 U.S.C. 2679.

33. *Id.*

34. *See* Community Supervision and Corrections Departments (CSCD) at http://www.tdcj.state.tx.us/definitions/definitions-home.htm#community_supervision *and* Community Supervision Officer (CSO).

35. Corrections Statistics for the State of Texas, available at http://nicic.gov/features/statestats/?State=TX, and http://www.tdcj.state.tx.us/definitions/definitions-home.htm#Parole%20Division.

36. *See* Criminal Justice Assistance Division at http://www.tdcj.state.tx.us/cjad/cjad-what.htm.

37. *See* Organizational Chart available at http://www.tdcj.state.tx.us/cjad/cjad-what.htm.

38. *See* Parole Officer http://www.tdcj.state.tx.us/definitions/definitions-home.htm#Parole%20Division.

39. Texas Civ. Prac. & Rem. §§ 104.001 and 104.004 (2010).

40. Texas Civ. Prac. & Rem. §§ 104.001 (2010).

41. Texas Civ. Prac. & Rem. § 104.002 (2010).

42. Texas Civ. Prac. & Rem. § 104.002(a)(1) (2010).

43. Texas Civ. Prac. & Rem. § 104.005 (2010).

44. Texas Civ. Prac. & Rem. § 104.007 (2010).

45. Texas Civ. Prac. & Rem. § 104.003(a)(1) (2010).

46. Texas Civ. Prac. & Rem. § 104.003(a)(2) (2010).

47. Texas Civ. Prac. & Rem. § 104.003(b)(1)&(2) (2010).

48. Corrections Statistics for the State of Kansas, available at http://nicic.gov/features/statestats/?State=KN.

49. *See generally* Kansas Tort Claim Act, Kan. Stat. Ann. §§ 75-6101 – 75-6115 (2009).

50. *See e.g.,* Thomas County District Court web page retrieved November 30, 2010 and available at http://www.thomascounty.us/CourtServices.htm.

51. A recent unpublished opinion from another jurisdiction may be instructive in this matter; *See Christianson* v. *Nelson,* 2010 WL 562883 (D.S.D. 2010) ("Defendant relies upon *Hansen* v. *Kjellsen,* 638 N.W.2d 548 (S.D.2002), as support for her position that she is entitled to absolute immunity. In that case the South Dakota Supreme Court held that a court services officer was entitled to absolute judicial immunity when conducting a presentence investigation and preparing the report. The South Dakota Supreme Court reasoned that a sentencing court required complete and accurate information about an offender being sentenced, and that subjecting a court services officers *(sic)* to harassing and vexatious litigation would not promote the free flow of information to the sentencing court. Defendant was not preparing a presentence report in this case but rather, was exercising her discretion in carrying out the sentencing court's order regarding the terms of a juvenile's probation. Defendant's function was neither adjudicatory nor prosecutorial in nature so as to warrant absolute immunity. *See Ray* v. *Pickett,* 734 F.2d 370 (8th Cir.1984)(probation officer not entitled to absolute immunity in writing a report to secure a parole violator's warrant). The Defendant has not met her burden of showing that public policy justifies the application of absolute immunity in this case."; A Kansas Statute defines court services officers as "law enforcement officers" in its Code of Criminal Procedure, thus muddying the waters even further when compared to the apparent clear cut role of court services officers in South Dakota; *See McCormick* v. *Board of County Com'rs of Shawnee,* 227 Kan. 627 (2001) K.S.A. 22-2202(13) defines a law enforcement officer as "…any person who by virtue of office or public employment is vested by law with a duty to maintain public order or to make arrests for violation of the laws of the state of Kansas ... and includes court services officers, parole officers and directors, security personnel and keepers of correctional institutions ... while acting within the scope of their authority" *(initial quotations and ellipses added).*

52. Kan. Stat. Ann. § 75-6108(a)& (b) (2009).

53. Kan. Stat. Ann. § 75-6106 (a) (2009).

54. Kan. Stat. Ann. § 75.6116.

55. Kan. Stat. Ann. § 75-6108(e) (2009).

56. Kan Stat. Ann. § 75-6108(c) (2009).

57. Kansas Department of Corrections: 2010 Annual Report at 48 (May 2010); available at http://www.doc.ks.gov/ publications/2010%20KDOC%20Annual%20Report%20(Released%20May%202010).pdf.

58. *Id.* at 48.

59. *Id.* at 52-55.

60. Kan. Stat. Ann. § 75-1605(a) (2009).

61. Kan. Stat. Ann. § 75-6015(c) (2009).

62. Kan. Stat. Ann. § 75-6117 (2009).

63. Kan. Stat. Ann. § 75-6111 (a) (2009).

64. *Id.*

65. Kan. Stat. Ann. § 75-6116(d).

66. Kan. Stat. Ann § 75-6109 (2009).

67. *Id.*

68. Christine S. Schloss and Leanne F. Alarid, *Standards in the Privatization of Probation Services: A Statutory Analysis,* Criminal Justice Review 32(3) (2007). DOI: 10.1177/0734016807304949.

69. Private Probation Association of Georgia, retrieved November 30, 2010 from http://www.ppa-gonline.com/about.htm. *See also,* H.K.O. Sparrow, *Private Probation in Georgia: A new direction,* Atlanta, GA: Administrative Office of the Courts (2001).

70. Schloss and Alarid, at 234.

71. *Id.* at 233 with citing M. O. Reynolds, *Privatizing probation and parole,* (NCPA Policy Report No. 233, Dallas, TX: National Center for Policy Analysis, and Sparrow *supra* note 41.

72. Schloss and Alarid, *Id.* at 240.

73. *See Lee* v. *Katz,* 276 F3d. 500 (Ninth Circ. 2002); *See also Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Assoc.,* 531 U.S. 288 (2001).

74. Richard Frankel, *The Failure of Analogy in Conceptualizing Private Entity Liability Under Section 1983,* 78 UMKC L. Rev. 967 (2010).

75. Barbara Kritchevsky, *Civil Rights Liabilities of Private Entities,* 26 Cardozo L. Rev. 35 (2004).

CHAPTER 5

PRESENTENCE AND PREPAROLE INVESTIGATIONS AND REPORTS

INTRODUCTION

Presentence and preparole investigations and reports are important for several key functions in the criminal justice system. First, the presentence investigations and reports (PSIRs) assist judges in determining the type and length of sentence that an offender will serve. Probationers are usually supervised by the courts through probation offices under the judicial branch of government. PSIRs are used to determine the terms and conditions of probation or parole. PSIRs may also be used by judges to assess the monetary amounts for fines and victim restitution. Preparole investigations and reports (PPIRs) assist parole boards and commissions in deciding whether an offender should remain incarcerated, or be placed on supervised release. Parolees are generally supervised by a state board or commission under the executive branch of government. PPIRs are used by decision makers to fashion the terms and conditions of an inmate's parole release (e.g., community supervision, day reporting center, halfway house, electronic monitoring).

Another essential criminal justice function is that PSIRs contain information about criminal history and risk assessments that are used by state correctional facilities and the federal Bureau of Prisons for classification purposes to determine an inmate's security level, to decide where an inmate should be housed, and to assess program assignments. Information in the PSIR can assist agencies in assigning an offender to a minimum, medium, maximum, or super-maximum facility.

A third function of the PSIR and the PPIR is their use in decision-making about victims. Victims have certain rights conditioned by the information contained in an offender's report (e.g., the right to a court-ordered temporary or permanent restraining order against a perpetrator or the right to be present at a parole hearing). Furthermore, these reports can help victims' services personnel assess the crime victims' entitlement to and needs for services.

Offenders do not lose all of their constitutional rights because of conviction, probation, confinement, or parole; but they do have diminished rights. In other words, some basic constitutional rights are retained, whereas other rights are curtailed depending on the severity of the crime, the type of sentence received, and conditions of release. Presentencing and preparole processes may affect the scope of an offender's rights, therefore it is imperative for probation and parole officers to understand the limits of an offender's or inmate's rights. In most states, the procedure, substance, and use of PSIRs are governed by state law and procedural rules. The operation of PPIRs is often set by state or federal agency policy. These divergent frameworks present complicated legal issues in any analysis of the laws and rules that govern presentence and preparole investigations and reports.

Focusing on constitutional rights; state and federal statutes and rules; and agency policies, this chapter discusses some of the central legal issues involved with the PSIR and PPIR. Federal and state probation and parole officers should consult their agencies' manuals, publications, memoranda, and other official documents for more specific information about the laws, rules, and guidelines that govern their actions with regard to any topic that is discussed in this chapter.

I. PROBATION PRESENTENCE INVESTIGATION REPORT (PSIR) ISSUES

An examination of state court decisions shows that the states generally follow federal court decisions in determining state use of PSIRs. Most federal cases are decided on due process grounds, a constitutional issue, thus forcing the states to follow federal decisions. There are states which afford defendants greater protections than those required by the federal courts, but state courts basically rely on federal court decisions related to various PSIR legal issues. Although local rules and procedures in a federal or state jurisdiction may vary, an examination of existing federal case law should serve to identify the trends and patterns that most federal and state jurisdictions follow.

A. Contents of a PSIR

At the federal level, the Federal Rules of Criminal Procedure require PSIRs to include information about the defendant's history and characteristics; including any prior criminal record, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or determining correctional programming and treatment.[1] The purpose of the PSIR is to help the sentencing judge impose the most appropriate sentence by providing extensive information about the defendant and, if customarily or specially requested, an informed recommendation by the probation officer. The report supports two contemporary concepts in the field of corrections. The first concept is that rehabilitation is promoted by individualized sentences, and the second is that sentencing disparity for the same or similar offenses should be reduced.[2] Because the stage of deciding guilt or innocence occurs prior to sentencing, the United States Supreme Court has long held it reasonable to allow a judge to exercise wide discretion as to what sources and types of information he or she will rely on to determine an appropriate and lawful sentence.[3] However, a relatively recent U.S. Supreme Court ruling in *Blakely* v. *Washington*[4] holds that a judge must distinguish between sentencing factors and elements[5] of an offense when passing sentence because departures from sentencing statutes or guidelines are questions of fact for a jury.

Empirical studies that have examined the utility of PSIRs indicate mixed results for the perceived value and use of the reports.[6] Scholars have given more attention to use of PSIRs by parole officers, but the significance of the reports to defense attorneys has been understudied.[7] Given the importance of the PSIR, the dictates of due process and fundamental fairness require providing defense counsel access to the report. Attorneys may maintain that there is a distinct liberty interest involved at the presentencing stage that does not always exist after sentence has been passed. However, a judge may conduct an inquiry that is broad in scope and largely unlimited as to the types and sources of information that he or she may consider in passing sentence.[8]

1. Federal Rules

Most states incorporate the requirements and exclusions used in the preparation of federal PSIRs. These required and excluded elements will be explained in this section. Rule 32 of the Federal Rule of Criminal Procedure (Rule 32) sets forth the requirements for sentencing and judgment in federal cases. Among the provisions of Rule 32 are the required contents of a PSIR. After the U.S. Supreme Court ruled in *United States* v. *Booker*[9] that United States Sentencing Guidelines[10] were advisory and not mandatory, the language of Rule 32 was altered to reflect the "Advisory Sentencing Guidelines."[11] Under Rule 32 the federal PSIR must include the following:

- Identity of all applicable guidelines and policy statements of the United States Sentencing Commission.
- Calculation of the defendant's offense level and criminal history category.
- Statement of the resulting sentencing range and kind of sentencing available.
- Identification of any factor relevant to either the appropriate kind of sentence, or the appropriate sentence within the applicable sentencing range.
- Identification of any basis for departing from the applicable sentencing range.[12]

Rule 32(d)(2) lists the additional information that has traditionally been included in federal and state PSIRs. For federal PSIRs, these items must include:

- A defendant's history and characteristics, including prior criminal history, circumstances affecting the defendant's behavior that may assist the judge in imposing sentence or in correctional treatment programs.

- Information that assesses financial, social, psychological, and medical impact on any victim.
- When appropriate, the nature and extent of nonprison programs and resources available to the defendant.
- Information sufficient to determine appropriate court-ordered restitution, if the law provides for restitution to the victim or victims.
- Results and recommendations of any study ordered by the court under 18 U.S.C. § 3552(b).[13]
- Information relevant to the factors under 18 U.S.C. § 3553(a),[14] and any other information that the court requires.
- Specification of whether the government seeks forfeiture under Rule 32.2 and any other provision of law.

It is also important to be aware of exclusions under Rule 32(d)(3). Federal PSIRs under the rule must not include

- Any diagnoses that might seriously disrupt a rehabilitation program.
- Any sources of information obtained in exchange for a promise of confidentiality.
- Any other information that, if disclosed, might result in physical or other harm to the defendant or others.

B. General Overview of the PSIR

Although most states base their PSIR on the content and exclusions set out in Federal Rule 32, state statutes and state courts may require or permit a variety of information to be contained in or excluded from the PSIR. The probation officer must be aware of the state and local rules with regard to the PSIR because jurisdictions vary. For example, case dismissals, or cases in which a defendant was not convicted, may or may not be appropriate for inclusion in a PSIR. A determination for inclusion of these types of criminal justice system contacts depends on the statutes and rules of a jurisdiction or on the type of offense with which a defendant is charged. If the information is relevant to the offense for which the presentence investigation is being conducted, then inclusion in the PSIR is likely permissible. Rules of evidence and the standard of proof of beyond a reasonable doubt, so important in criminal trials, do not strictly apply to PSIRs. In fact, the preponderance standard is the basic standard for information included in a PSIR to satisfy due process requirements for sentencing.[15] At the very least, information in the PSIR "…should have a 'sufficient indicia of reliability to support its probable accuracy.'"[16] In *U.S.* v. *Ramirez,* the federal Fifth Circuit Court of Appeals held that the sentencing court may consider any relevant evidence contained in the PSIR, provided that the information relied on has "sufficient indicia of reliability," even if the evidence would be inadmissible at a trial.[17]

The presentence interview is not an interrogation—it is a routine interview that is governed by statutes, rules, and case law.[18] The Second Circuit Federal Court of Appeals found that there was no violation of the Fifth Amendment where a defendant voluntarily wrote and then gave a letter to the U.S. Probation Officer during an interview.[19] There is no obligation to provide the *Miranda* warning to a defendant prior to an interview for the purposes of preparing a PSIR because the defendant's Fifth Amendment right against self-incrimination is not triggered, unless the interview can be shown to be coercive.[20]

A defendant may object to the information contained in the PSIR. The probation officer should initially attempt to resolve any disputes concerning the contents of the report, either with the defendant or the defense attorney. If the officer is unable to resolve the issues, the defendant may file a motion to object to the contents or a motion to correct any inaccuracies in the PSIR. If a motion is filed, generally the sentencing court will conduct a hearing and grant or deny the motion. If the court rules that

the content must be amended or excluded, the probation officer who prepared the PSIR will amend or remove the objectionable content and present the amended report to the sentencing court, the government's attorney, the defendant, and the defense attorney.

In *Townsend* v. *Burke,* 334 U.S. 736 (1948), the U.S. Supreme Court found that the sentencing court relied on information that was "extensively and materially false." This case illustrates that there is a constitutional limit on the information that can be considered at sentencing. Rule 32(i)(3)(B) expressly directs judges to resolve factual disputes to assure that the disputed information is not considered when assessing a sentence. *Townsend* and the Rule are especially relevant to the accuracy of information contained in a PSIR. It is the responsibility of the probation officer to assess objectively the veracity of the information contained in the report. In many jurisdictions, hearsay evidence and/or any evidence illegally obtained by the police may be included in the PSIR,[21] but judges usually stipulate the kind of information that they want excluded from the report. Some states statutorily specify the information that may be included in or excluded from the PSIR, whereas other states leave these decisions solely to the judge.

1. Victim Information

After the passage of the Crime Victims' Rights Act of 2004,[22] all 50 states, the District of Columbia, and U.S. territories have consented to some form of victim impact statement at sentencing.[23] Most states permit inclusion of a written statement in a PSIR. Federal PSIRs must include the written statement. According to the National Center for Victims of Crime, victim impact statements may include: (a) an itemization of any economic loss suffered by the victim; (b) an identification of any physical injury or emotional damage to the victim, including the seriousness and permanence of injury or damage; (c) a description of any change in the victim's personal welfare or familial relationships as a result of the offense; (d) an identification of any request for medical or psychological services initiated by the victim as a result of the offense; (e) a need for court-ordered restitution; and (f) any other information required by the court and related to the effect of the offense on the victim.[24] In some states the victim impact statement may also include a victim's description of his or her views about the offense and/or the offender, and the victim's belief in an appropriate sentence.[25]

2. Hearsay

"Hearsay" is defined in Black's Law Dictionary (9th ed., 2009) as:

> testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence…. In federal law, a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Hearsay is not normally 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 are clear, however, that hearsay is not in and of itself constitutionally objectionable in a PSIR.[26] Hearsay may be permitted in a PSIR because the Federal Rules of Evidence concerning hearsay do not apply to the investigation or preparation of the report.

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, PSIRs 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 broad and proper discretion as to the sources and types of information used to assist the court. This does not give the court unlimited

discretion. The defendant is afforded an opportunity to rebut hearsay information that is claimed to be false or inaccurate by objecting to the contents of a PSIR either verbally or by filing a motion to object to the information in the report or a motion to correct inaccuracies.

3. Confrontation and Cross-Examination

Some jurisdictions allow the defendant to cross-examine the PSIR author or any experts that the probation officer relied on for information contained in the report. The more damaging the information may be to the defendant, the more likely it is that the court will permit cross-examination of the officer who prepared the report or of the experts who provided the information. Jurisdictions vary in restricting a defendant's Sixth Amendment right to confront and cross-examine adversary witnesses who are sources of inculpatory or other unfavorable 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* 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]

4. Criminal Record

A PSIR 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 usually considered critical to the sentencing court and, therefore, is subject to mandatory disclosure by law enforcement agencies for use in the PSIR. In *U.S.* v. *Chaikin,*[32] a federal circuit court held that a sentencing court may consider the evidence about a defendant's criminal history and background beyond offenses for which he or she has been convicted. This also includes evidence of charges or counts that have been dismissed by the government. For the purposes of sentencing, 18 U.S.C. § 3661 (2010) states: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Can juvenile offenses be used in a PSIR? Can these offenses be used to enhance a sentence? Some state jurisdictions allow juvenile records to be included in PSIRs. It is not clear at the federal level whether juvenile offenses can be used to enhance a sentence for a current offense, and there is some conflict in the federal circuit courts which leaves the question unanswered.[33] The laws and rules of each state and federal jurisdiction, and the rules and guidelines of specific agencies, must be consulted prior to making decisions about including or excluding juvenile records.

5. Suppressed Evidence

The U.S. Supreme Court under former Chief Justice William H. Rehnquist showed some disfavor toward the exclusionary rule. This court-developed doctrine is derived from the Fourth Amendment. The exclusionary rule prohibits information obtained in violation of the defendant's Fourth, Fifth, or Sixth Amendment rights to be used in a criminal trial as direct evidence of the defendant's guilt. The Rehnquist Court and the more recent Roberts Court have resisted efforts to extend the exclusion or suppression of illegally obtained evidence to proceedings other than the trial itself. It is argued that the rule suppressing illegally obtained evidence is justified by the need to deter police misconduct. In cases where lower courts have held that the extension of the suppression remedy is not warranted, the Supreme Court has said that additional deterrence of official misconduct cannot be obtained without undue harm to the public interest.

The Federal Courts of Appeals have permitted the use of suppressed information once guilt has been determined because the exclusionary rule does not routinely prohibit a sentencing court from

considering illegally obtained evidence even though such evidence is inadmissible at trial.[34] In several federal circuit court cases, illegally obtained evidence of weapons and drugs that were excluded at trial was permitted to be considered by sentencing judges.[35] However, some federal circuit courts have placed an exception on the use of excluded evidence—if the evidence is being used specifically to attempt to establish a more severe sentence, then it must be excluded.[36]

Probation officers should ascertain the current laws and rules in their jurisdictions with regard to including excluded or suppressed evidence relevant to the current offense. They should also assess the rules and guidelines for including excluded evidence from prior offenses, if this type of information is available to them.

C. Disclosure

1. Disclosure to the Public in General

Rule 32 of the Federal Rules of Criminal Procedure does not permit a U.S. probation officer to submit a PSIR to the court or to disclose the contents to any other person or entity until the defendant has entered a plea of guilty or *nolo contendere,* or guilt has been adjudicated.[37] The Rule 32 exclusions for the PSIR are also prevented from disclosure. These sections of the Rule do not apply if the officer has obtained the defendant's written consent to disclose.[38] The Rule does require the officer to disclose the PSIR to the defendant or the defendant's counsel and to the government attorney no later than 35 days prior to sentencing.[39] A defendant may, however, waive this required minimum disclosure period.[40]

Although Rule 32(e) of the Federal Rules of Criminal Procedure sets the federal standard for release of PSIRs to defendants, their attorneys, and the government's prosecutors, it remains silent as to disclosure to various "third parties." No statute or rule requires that PSIRs remain confidential after the sentencing hearing has occurred.[41] The general guideline is that a court may disclose information in the PSIR, with the exception of the Rule's exclusions, if the information was considered by the court in determining a sentence.

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 PSIRs are confidential and not subject to third party disclosure. More recently several Federal Courts of Appeals and a few states' statutes, have addressed the possibility of disclosure to persons outside the realm of the sentencing court.

A variation of the application of the Rule is found in a First Circuit Federal Court of Appeals case.[42] The court determined that a judge may both identify for the record and disavow any information not relied upon, or may disclose those portions of the report that were relied upon for sentencing.

In 1995, the Federal Court of Appeals for the Fifth Circuit decided a third-party disclosure case in *United States* v. *Huckaby.*[43] Huckaby, a state district court judge in Louisiana, pleaded guilty to one misdemeanor count of failing to file an income tax return 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 were 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 Huckaby was being singled out for prosecution because he was black and had risen to a position of power within the community. The trial judge, apparently dismayed at these contentions, took the unusual step of filing the PSIR 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. On appeal Fifth Circuit upheld the disclosure of

the report, but required that the portion of the PSIR titled "Offender Characteristics," the objections of the defendant, and the probation officer's responses to the objection be removed from the record. The circuit court held that the compelling necessity of relieving racial tension, coupled with the need for the revelation of facts found in the PSIR that would persuade the public of the defendant's culpability, justified the disclosure of the PSIR in the public record.

The United States Supreme Court has not considered the failure or refusal to disclose the contents of the PSIR as violative of constitutional rights. Most jurisdictions require disclosure of the report to the government's attorney, the defendant, and defense counsel under a state statute or court rule. Caution is suggested here as these jurisdictions have various restrictions to 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. Discretion in these matters is most often left to the sentencing court.

2. Disclosure to the Defendant and Defense Counsel

During a U.S. probation officer's interview with the defendant for the purposes of obtaining information to be included in a PSIR, defense counsel is entitled to attend.[44] The Sixth Amendment provision of right to counsel does not attach to presentence investigation interviews, but the defendant's attorney must be afforded notice and a reasonable opportunity to be present during the interview.[45] The Fifth Amendment provision against self-incrimination does not apply to PSIR interviews.[46] Therefore, a probation officer does not face civil liability when defense counsel has been notified and given an opportunity to be present, but declines to attend an interview.[47]

Some state laws may provide that the PSIR, and in some instances the supporting documentary information, be disclosed to the defendant's attorney, rather than to the defendant directly. The defendant does not have a right to information developed for use in the PSIR.[48] However, the sentencing court must provide a written summary, or summarize for a review in chambers, any information excluded under the disclosure exceptions in Rule 32 if the court will rely on those facts to determine the sentence.[49] Counsel may be given access to the PSIR and supporting documents with instructions not to disclose the contents to the defendant.[50] Partial access that excludes information for reasons other than those listed above is insufficient disclosure.[51]

The defendant does not have a right under Rule 32 to have access to a codefendant's PSIR.[52] There is a distinction in disclosure. If a coconspirator witness' PSIR contains exculpatory material, that part of the report must be disclosed to defendant's counsel.[53] On the other hand, if the PSIR information is to be used only to impeach a coconspirator's testimony, disclosure to defense counsel is not required, unless there is a reasonable likelihood of affecting the outcome of a bench or jury trial.[54]

3. Disclosure to Victims

Crime victims have a number of rights under the federal Crime Victims' Rights Act (CVRA). The discussion in this section is based on the federal CVRA.[55] Many states have their own crime victims' right acts which are similar to the provisions of the Federal CVRA. Probation and parole officers must have working knowledge of their state's statutes and rules that pertain to crime victims' rights.

Among the victims' rights enumerated in the federal CVRA, are the right to be "…reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[56] The CVRA's definition of crime victim "means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."[57] The CVRA does not specifically exclude misdemeanors or infractions, therefore it applies to any federal offense.[58] The act also states that the victim has "the right to be treated with fairness and with respect for the victim's dignity and privacy.[59] The statute directs any United States Department of Justice personnel, including its officers and employees and other United States departments and agencies "…

engaged in the detection, investigation, or prosecution of crime…," to "make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a) of the act."[60] Victims can also assert their rights under the CVRA independently.[61] The CVRA directs the district courts to "…ensure that the crime victim is afforded the rights" given to them under the act.[62] Subsequent amendments to the CVRA can affect many stages of a federal criminal proceeding; therefore, it is incumbent upon a probation officer to consult the current version of his or her jurisdiction's CVRA whenever a question of victims' rights is in issue.[63]

Section (d)(6) of the federal CVRA states:

> Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.

The upshot is that no cause of action for damages is created by the CVRA. United States Probation and Parole Officers cannot be sued for damages in a civil action for violation of a victim's rights. This does not mean that a court could not grant injunctive or declaratory relief in victim's suit against an officer. Potential claims against probation and parole officers can be brought under 42 U.S.C. § 10607 which requires government officials to provide certain types of services to crime victims.[64] For example, if a probation officer fails to notify the victim that he or she has a right to prepare a victim impact statement for inclusion in the PSIR or if an officer does not treat the victim fairly and with respect for the victim's dignity and privacy, this statute permits a cause of action under its requirements.

Under the enforcement provision of the Federal CVRA pursuant to § 3771(d)(3), victims can assert a violation of their rights under the CVRA by filing a motion for relief or writ of mandamus in the district court where the defendant is being prosecuted. A writ of mandamus is "a writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, [usually] to correct a prior action or failure to act."[65] If the district court fails to permit the relief sought by the victim, he or she can petition a Federal Court of Appeals which has jurisdiction over the district court. This type of remedy does not include damages against the probation or parole officer for civil liability, because an award of damages is not permitted by the CVRA.

The Supreme Court has rendered few decisions with regard to the CVRA, and none involving the CVRA and disclosure of PSIRs (or for Preparole Reports). However, some U.S. Courts of Appeals and Federal District Courts have ruled on this matter. These cases, either published or unpublished, are discussed below. Case law is constantly in flux, so probation and parole officers must be aware of current case decisions that are precedential and binding (published) or instructive (unpublished) in their jurisdictions.

The Ninth Circuit Federal Court of Appeals affirmed a district court's decision to deny a victim's writ of mandamus and found that neither the CVRA nor its legislative history supported a general right for a victim to have access to a PSIR.[66] The Circuit Court agreed with the district court that the victim failed to demonstrate that his reasons for requesting the PSIR outweighed its confidentiality under the "ends of justice" test that is traditionally applied to such requests.

In an earlier case, the Ninth Circuit relied on the "compelling need to meet the ends of justice" standard when it permitted third party disclosure of a PSIR to the estate of a deceased victim and to the newspaper in California town.[67] *United States* v. *Schlette* stemmed from the murder of a former county district attorney by a man he had successfully prosecuted for arson some 30 years before the murder occurred. Soon after the killing, the murderer committed suicide to avoid capture by the police. Although the court stated that it does not suggest that PSIRs should be released to third parties routinely, it held that the unique nature of the case met the third party disclosure compelling needs standard. Disclosure of the PSIR to the estate of the murdered man was based upon the estate's arguments that this information could not be acquired from any other source, and the estate needed

disclosure in order to 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.[68] The court validated the newspaper's assertion that disclosure would serve the public interest by informing the public about the sentencing process, 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.[69]

In an unpublished opinion in the Fourth Circuit case of *In re Brock,*[70] a district court denied a victim's motion requesting partial disclosure of several defendants' PSIRs. The Circuit Court affirmed the district court's finding that the victim had been given sufficient documentation related to the defendants' sentencing to prepare and file a victim's impact statement. The victim had in fact filed the statement, and the district court's denial was not violative of the CVRA. The victim did not need the PSIR in order to describe the impact of the crime.

An unpublished order of a federal district court in Texas noted that the CVRA does not require disclosure of PSIRs to a victim, or other third party, unless a "compelling, particularized need for disclosure" has been demonstrated.[71] The CVRA does not require the disclosure of a PSIR, despite its language that the government must use its "best efforts" to notify crime victims. Similarly, in an unpublished order in a Connecticut federal district court, disclosure of a PSIR was denied to a multiple victims who were members of a group of investment funds who requested additional information about financial disclosures contained in the PSIR. The court found that the victims' rights to "full and timely restitution" under the CVRA may be satisfied by petitioning the government, but not by obtaining the PSIR from the actual defendant.[72] The orders of the Texas and Connecticut courts were recently cited in *U.S.* v. *Coxton,* a published order of a North Carolina federal district court.[73] The family members of the victim of a fatal shooting were denied access to the defendant's PSIR based on the prior holdings of the U.S. Supreme Court, and on published and unpublished opinions and orders of other federal district and appellate courts. The district court found that victim's family had already been afforded sufficient information regarding sentencing without the PSIR.

In *In re Siler*[74] the Sixth Circuit Federal Court of Appeals distinguished between prior cases and the *Siler* case which involved a petition for mandamus for disclosure of PSIRs eighteen months after police officers were convicted of conspiracy to violate Siler's civil rights. Siler sought the PSIRs in pursuit of discovery in a civil case against the officers. The federal circuit court ruled that there was no authority under the CVRA for the district court to release the PSIRs. The *Siler* decision stated that PSIRs are not public records within the judicial system, but are instead confidential and handled accordingly. Rule 32 does not authorize release of PSIRs to parties other than those specified in the rule. Furthermore, information found in PSIRs is often available from other public sources. Siler failed to show "special need" for release of the confidential nonpublic PSIR

It is apparent from the case law that disclosure of the PSIR to victims, their family members, or their estates must clear high legal hurdles in order to be granted access to complete or partial disclosure of PSIRs. Probation officers have a legal duty to protect the confidentiality of the contents of PSIRs from breach. The report cannot be released to victims or related parties, unless the probation officer is ordered by a court to disclose all or part of the report.

4. Disclosure to Other Government Agencies

After sentencing, the federal PSIRs are transmitted to the Federal Bureau of Prisons and to the United States Parole Commission (USPC). Despite the abolition of federal parole, the USPC is still a viable federal agency. The USPC currently has jurisdiction and responsibility for federal offenders who committed offenses prior to November 1, 1987 and who are eligible for parole; certain District of Columbia Code offenders, and Uniform Code of Military Justice offenders. Presentence reports created by U.S. Probation Officers are still used by the USPC in making release decisions.[75]

The Federal Court of Appeals for the Second Circuit addressed the issue of third party disclosure to other government agencies in *United States* v. *Charmer Industries and Peerless Industries.*[76] *Charmer* involved disclosure of a PSIR 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 that 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 a liquor license revocation proceeding against a subsidiary of Charmer and Peerless Industries, in conjunction with the Arizona Department of Liquor Licenses and Control. The PSIR 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 PSIR could become part of the public record in Arizona.

The Second Circuit court issued an injunctive order requiring the Arizona Attorney General to return the PSIR to the district court along with all copies and extracts made of the report. The court further prohibited the publication or use of any portion of the report that had not already been made publicly available. The court reasoned that allowing public disclosure of PSIRs would "likely inhibit the flow of information to the sentencing judge."[77] The court stated that in order for a PSIR to be disclosed to a third party, the party must make "a particularized showing of a compelling need."[78] A third party government agency must demonstrate that disclosure of the report is required "to meet the ends of justice."[79]

5. Disclosure to the Media

Although the case of *United States* v. *Schlette* discussed above is pertinent to the topic of disclosure to the media, other cases have been decided by Federal circuit courts as well.

The U.S. Supreme Court's construction and application of common law, the First Amendment, and of the Freedom of Information Act (FOIA)[80] have implications for release of PSIRs to the media.

The common law right of the media to inspect judicial records was the basis of the Seventh Circuit court's ruling on an Illinois newspaper's request for a PSIR disclosure in *United States* v. *Corbitt.*[81] 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 PSIR, 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 sentencing judge asking for access to the letters written by the town officials.

A newspaper covering the criminal trial moved to secure the release of the PSIR 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 perceived as a lenient sentence. The Seventh Circuit allowed the release of the letters because the defendant did not challenge the disclosure of the letters on appeal. However, the court denied disclosure of the PSIR and held that the release of the report would not promote effective functioning of the probation office. The court added that disclosure would constitute a hindrance to the probation office's performance of its obligation to provide the sentencing court with a comprehensive analysis of the defendant's character.[82] The court stated that the public's interest in the Ninth Circuit's *Schlette* case is of a "different order" than that of the public interest in this case.[83] Furthermore, the Seventh Circuit court held that news organizations seeking access to a PSIR must make a substantial, and specific, showing of need for disclosure before a court may allow public inspection of the report.[84]

6. Disclosure to Other Third Parties

Rule 32 does not address disclosure of the PSIR to third parties and courts resist disclosure to anyone except government's attorney, the defendant, and the defendant's attorney. *United States* v. *Schlette,*[85] a Ninth Circuit case referred to, above, was an unusual case in which the PSIR was disclosed to the newspaper and to murdered victim's estate. The court found that disclosure served the public interest due to the information about the sentencing process. The estate also showed a compelling need for the PSIR for use in a civil suit against a parole officer who allegedly had a duty, but failed to warn the victim about the defendant.

States differ in the statutes and rules for disclosure to third parties other than those discussed above in sections 1 through 5. Probation officers and parole officers are advised to seek current information about their state's laws and agency's stance on disclosure of PSIRs.

In summary, it is most probable that all or part of every PSIR will be disclosed to the defendant or his counsel as a result of statute, court rule, or the exercise of judicial discretion. It is not clear, however, what, if any, portions of the PSIR will be made available to interested third parties other than victims, other government agencies, and the media. Probation officers should exercise care in selecting lawful material for inclusion in a report and ensure that the information is accurate. When in doubt, it is preferable to leave the issue of disclosure to the court.

The officer should proactively avoid exposure to possible civil and criminal liability, and to prevent harm to the interests of justice that he or she is sworn to advance. Probation or parole officers should know that intentionally and knowingly including false or inaccurate information in a PSIR, or acting with maliciousness or reckless disregard for its truth, could be the basis for state tort litigation or litigation under § 1983. In addition to defamation-based torts, other intentional torts are possible, and negligence claims can be brought when a defendant claims that inadequate care was exercised in preparation of the report.

D. Probation Officers Generally Immune from Civil Liability for Preparing Presentence Investigation Reports

When preparing PSIRs, several state and federal courts of appeal have specifically addressed liability issues against probation officers who have been accused of including false and inaccurate information in PSIRs. 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 PSIRs.[86] Similarly, federal district courts in New York[87] and Pennsylvania,[88] and the Ohio State Court of Appeals[89] have granted officers absolute immunity. As evident in these decisions, most courts have held that probation officers have the same absolute immunity as judges when preparing presentence investigation reports because probation officers act as agents of the court. Absolute immunity will not be granted when false or inaccurate information is included in a PSIR due to malicious or intentional falsification by the probation officer who prepared the report.

A federal Second Circuit Court of Appeals case, *Peay* v. *Ajello,*[90] relied on prior case law within the circuit,[91] as well as that of three other circuits, including Louisiana (5th Circuit),[92] California (9th Circuit),[93] and Alabama (11th Circuit)[94] and held that Connecticut state probation officers are entitled to absolute immunity from suits for damages when a claim relies on the preparation and submitting of PSIRs. Peay, a *pro se* litigant and Connecticut state prisoner, appealed a final judgment of a federal district court for dismissal of his complaint in a § 1983 action for damages against Assistant Probation Officer Colon who had prepared a Peay's presentence report after conviction on two counts of burglary. Peay claimed that Colon deprived Peay of his constitutional rights by willfully including false

information in the PSIR. The Second Circuit court affirmed the lower court's dismissal and explained why Connecticut state probation officers are entitled to absolute immunity.

The circuit court stated that it had previously ruled that federal probation officers and New York state probation officers were entitled to absolute immunity for similar damages claims. The court reasoned that defendants have procedural mechanisms to challenge alleged falsification of information in PSIRs, an opportunity to be heard in the sentencing court, and to present evidence at the court's discretion relevant to inaccurate or false information in a report. Peay had even challenged his sentence on direct appeal on the basis of false information contained in the report. The Second Circuit's opinion states, "…as under federal and New York law, 'the presentence report prepared by the probation officers is subject to adversary scrutiny and at least two layers of judicial review'" (p. 69 citing *Dorman* v. *Higgins,* 821 F.2d 133 (2d Cir.1987)). Provisions of Connecticut law consider that the role of PSIRs is to assist a judicial function. The law provides protection of a defendant's right to be sentenced based on accurate information contained in the report. Peay's allegation that Colon deliberately included false information in the PSIR is irrelevant given that Connecticut probation officers enjoy absolute immunity for preparation of PSIRs.

In a similar vein, the Fifth Circuit Federal Court of Appeals found liability in *Maynard* v. *Havenstrite,* 727 F.2d 439 (5th Cir. 1984) where an inaccurate PSIR was not disclosed to 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.

Although absolute immunity from claims for damages is granted to probation officers in preparing PSIRs, the harm to the public interest can be substantial. It has long been the rule that a sentence cannot be based on false information.[95] Where a defendant is sentenced on the basis of a report that is materially false, inaccurate, or unreliable; his or her right to due process is violated.[96] The remedy usually invoked in such cases is vacating the imposed sentence and remanding the case back to the lower court for resentencing. Civil liability is usually not imposed unless the officer acted with malicious intent or deliberate ill will.

II. PREPAROLE INVESTIGATION AND REPORT (PPIR) ISSUES

Although defendants and inmates have no constitutional right to review presentence reports personally, there are statutory and administrative laws and rules that permit access to PSIRs and to other documents used by parole boards and commissions in making release decisions. At the federal level, probation and parole officers will find that their respective agencies have prepared publications and manuals that guide them in determining when and to whom access to certain information contained in PSIRs and PPIRs should be granted.[97] States are free to create their specific parole systems.[98] As of 2009, at least 16 states have abolished parole and have adopted sentencing guidelines.[99]

The Parole Commission and Reorganization Act,[100] which took effect in May 1976, renamed the federal Board of Parole the United States Parole Commission (USPC). The United States Parole Commission Extension Act of 2008 authorized the USPC as an independent agency within the U.S. Department of Justice (U.S. DOJ) until November 2011.[101] Federal parole was abolished by Congress in the Comprehensive Crime Control Act of 1984.[102] As discussed earlier, the USPC still retains jurisdiction and responsibility for federal offenders who committed offenses prior to November 1, 1987 who are eligible for parole; certain District of Columbia Code offenders; Uniform Code of Military

Justice offenders; certain offenders in transfer-treaty cases; and state probationers and parolees who are placed in the Federal Witness Protection Program.[103]

Presentence reports are forwarded from the U.S. Probation Office to the Bureau of Prisons and then to the U.S. Parole Commission where the report is used to determine whether an inmate should be released on parole. The major issue that arises out of preparole investigation reports (PPIRs) concerns the extent to which inmates are given access to files containing information that will be used to determine whether to detain or release them. Where this issue has been litigated, courts have had to resolve three questions:

- Does any applicable statute or administrative rule provide access to PSIRs and/or PPIRs?
- Does the prisoner have a right to due process in parole release proceedings?
- If there is such a due process right, does it encompass access to PSIRs and/or PPIRs?

The tradition under which courts operate requires them to settle cases on a constitutional basis whenever possible. However, in cases involving qualified immunity, the prior controlling U.S. Supreme Court two-part inquiry in *Saucier* v. *Katz*[104] was recently overturned in *Pearson* v. *Callahan.*[105] Although qualified immunity is rarely at issue for probation or parole officers in granting or denying access to PSIRs or PPIRs, the ruling in the recent case holds that the lower courts should use discretion in determining whether to decide the constitutionality of an alleged violation of civil rights in § 1983 cases prior to ruling on qualified immunity for government officials—that is, whether the right was clearly established at the time of the alleged misconduct. If the facts underlying constitutional claims are of little value to the outcome of a case, the issue of "clearly established law" may be decided prior to any consideration of constitutionality. The *Pearson* ruling serves to conserve judicial resources by permitting the lower courts to bypass the question of constitutionality if there is a violation of clearly established law in a § 1983 case involving civil liability of a state government official or employee.

Recent litigation has granted file access to federal prisoners, although suits concerning the contours of the statutory right are still possible. Litigation involving state prisoners is fact-bound and jurisdictionally specific. Therefore, probation and state parole officers must be knowledgeable about the statutes, administrative rules, and case law in their respective jurisdictions.

A. Federal Prisoner File Access

The United States Parole Commission's Rules and Procedures Manual sets forth the guidelines for access to files by federal prisoners.[106] The Parole Commission and Reorganization Act of 1976[107] provided that a federal prisoner must be given reasonable access to any report or other document the USPC will use in making its release decision. Not all file material need be released. The material that may be withheld is identical to the information that a federal court need not disclose to a defendant in connection with sentencing under Rule 32 (i.e. 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).

The U.S. Supreme Court's decision in *United States DOJ* v. *Julian*[108] is clear—inmates have a right to review their presentence reports which are used in determining parole release. In *Julian,* a federal inmate in Arizona sued the United States Department of Justice under the Freedom of Information Act after his request for a copy of his PSIR was denied. In a similar case, a California federal prisoner sued the United States Parole Commission pursuant to the FOIA for access to his PSIR. The two cases were consolidated and decided by the Supreme Court on the same day under *Julian.* The

Court held that the criminal defendants who have been adjudicated guilty can access their presentence reports under the FOIA and the PSIRs must be disclosed, except for matters related to the Rule 32 exclusions (i.e. confidential sources, diagnostic opinions, and potentially harmful information). The Parole Commission must disclose an inmate's presentence reports, except for Rule 32 exclusions, to the inmate or the inmate's designated representative prior to a parole hearing.

In instances of federal parole, the *Julian* case is the standard for giving federal inmates access to their presentence reports prior to a parole hearing. Federal parole officers should consult the U.S. Parole Commission's Rules and Procedures Manual for further guidance.

B. State Prisoner File Access

Where there is a state statute, administrative rule, or a parole board or commission that grants file access to a state prisoner, the scope of a potential cause of action filed by an inmate is restricted to issues of compliance with the statute or rule, and the applicability of any exceptions that limit a state prisoner's access to PSIRs and/or PPIRs. In the absence of these provisions, an inmate can only secure file access through litigation by establishing that he or she has a Fourteenth Amendment right to due process in parole release decision making, and that the right includes access to his or her file. The Supreme Court has addressed that inquiry in the cases of *Greenholtz and Conner.*

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

The Fourteenth Amendment bars states from depriving a person of liberty without due process of law. What is the meaning of "liberty" 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[109] 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[110] had reached the opposite conclusion. This controversy was settled in *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex.*[111]

In *Greenholtz,* inmates argued that they were entitled to constitutional or state statute-created due process rights in parole release determinations. The Supreme Court held that unless a state law creates a reasonable expectation that a prisoner will be paroled, the prisoner's constitutional "liberty" is not affected by the parole release process and no federal due process right applies. The Court opined:

> 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 . . . .[112]

Because Nebraska state law provided that the parole board "shall" release a parole-eligible prisoner "unless" certain anti-release factors were found to exist,[113] the Court held that the statute created the necessary reasonable expectation and that due process applied under a state-created liberty interest. By grounding its conclusion in the specific wording of the Nebraska statute, and finding that the statute complied with due process requirements, the Court assured that similar decisions about other states would necessarily be made on a case-by-case basis by taking into account a state's particular wording in its statute.

Greenholtz holds that no constitutionally protected liberty interest in receiving parole exists for state prisoners unless a state statute contains mandatory language that requires a parole board or commission to grant parole in certain instances. If state statutes and rules provide that the parole board or commission "may" grant release to an inmate, a protected liberty interest has not been

established. Conversely, if the statute states that an inmate "shall" be released by parole authorities when certain conditions are satisfied, the mandatory language creates a liberty interest protected by under the Due Process Clauses of the Fifth and Fourteenth Amendments that cannot be denied without due process of law. Where an inmate has a liberty interest in parole, an inmate's due process rights are fulfilled, at a minimum, by notice and an informal hearing at which the inmate has an opportunity to be heard and make statements or present evidence on his or her behalf.

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

In the 1995 United States Supreme Court case, *Sandin* v. *Conner,* the Court abandoned the Greenholtz "mandatory language" standard in prisoner due process cases. *Conner,* a prison litigation 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."[114] According to the Court, this shift in focus had led prisoners to search state and federal statutes and regulations for bases of liberty interests claims. The Court then held that liberty interest principles established in earlier cases, such as *Wolff* v. *McDonnell,*[115] 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. *Conner* holds that courts must balance the needs of legitimate prison management concerns against the scope of a prisoner's liberty interest.

The standard defining the liberty interests leading to due process protection was set in the *Greenholtz* decision—a protected liberty interest may be created by the wording of state law, rules, or regulations. Nevertheless, this standard was rejected in *Conner* which indicated a return to the prior balancing standard set forth in *Wolff*. Because access to parole files involves prisoners, *Conner* would likely apply in cases in which prisoners sought access to files in instances where the wording of state law appeared to create a liberty interest that was to be protected by due process. The question remains: does due process include access to PSIRs and/or PPIRs?

3. Does Due Process Include Access to Files?

Although the Fifth and Fourteenth Amendments refer to "due process of law," neither the term nor its substance is defined in the U.S. Constitution. The basic definition of due process is "fundamental fairness." But what does that mean? There are two types of due process rights: procedural and substantive. Black's Law Dictionary (9th ed., 2009) defines procedural due process as "[t]he minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments, [especially] if the deprivation of a significant life, liberty, or property interest may occur." Black's defines substantive due process as "[t]he doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective." Procedural due process was partially defined by the United States Supreme Court as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.... The notice must be of such nature as reasonably to convey the required information.[116]

In contemporary jurisprudence, 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 other words, it is a balancing test. In the first parole case fully considered by the U.S. Supreme Court, *Morrissey* v. *Brewer* (1972),[117] the Court applied a balancing analysis to determine parolees' rights in revocation cases. In *Morrissey,* the Court expanded the procedural safeguards for due process in revocation hearings. Lower courts took the Court's analysis as a signal that due process should apply to other parole proceedings and began weighing due process to give content to

the concept in a variety of contexts. Although commentators concluded that due process embraced file access,[118] the courts were not as willing to agree with this point of view. Thus, in *Williams* v. *Ward* (1977),[119] the Federal Court of Appeals for the Second Circuit held in the year 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,*[120] also prior to *Greenholtz,* the Federal Fourth Circuit Court of Appeals 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."[121] In *Walker* v. *Prisoner Review Board* (1984),[122] a federal district court reached a somewhat different conclusion by finding that where the State Board of Parole acted in violation of the state's Rules Governing Parole, failure to allow an inmate access to his file was ruled an infringement of due process.

After the Supreme Court's decision in *Sandin* v. *Conner,* either through legislation and procedural or administrative rules, states began authorizing prisoners' access to information that would be used to determine their release in parole proceedings. Inmates can bring a cause of action to pursue their right to due process when that right has been breached and they have a legitimate liberty interest.

In the federal system, due process includes access to files. The USPC Rules and Procedures Manual (2010) that governs federal parole outlined the information that can be taken into consideration in the release determination procedure:

§ 2.19 INFORMATION CONSIDERED.

(a) In making a parole/preparole determination the Commission shall consider, if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Pre-sentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney;

(5) Reports of physical, mental, or psychiatric examination of the offender; and

(6) A statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim.

(b)

(1) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.[123]

At least 60 days prior to a release hearing, a federal inmate who is eligible for parole must be given notice of his or her right to request disclosure of reports and documents that the USPC will consider in making its release determination.[124] The documents requested are required to be disclosed to the inmate 30 days prior to the hearing.[125] Documents that are exempt from disclosure under 18 U.S.C. 4208(c) must be summarized in a manner that does not reveal information that is not subject to

disclosure so that the inmate is aware of the basic content of the exempted material.[126] Under federal parole procedures, inmates have a right to access their files, including the PSIR for each conviction that was used to compute their sentence, as well as any updated PSIR from a U.S. Probation Officer.[127] If an inmate's disclosure request is denied, he or she may appeal to the Chairman of the USPC.[128]

For information on a particular state's processes for access to files or documents to be used in a parole hearing, one must consult that state's statutes, rules, and agency regulations. For example, in states which have mandatory language in statutes or rules that create a liberty interest in parole, due process applies and files will most likely be available to inmates through a process similar to the above-described federal process. For those states in which non-mandatory language is used, there may or may not be a provision for disclosure of files to inmates for parole hearings. Each state's statutes, rules, and regulations must be examined in the contexts of substantive and procedural due process to determine if due process includes inmates' access to files for parole hearings.

C. Victim Access

Under the CVRA, Crime victims have a right to be reasonably heard at any release or parole proceeding. They also have "the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.[129] This does not mean that victims have a right to view the content of PSIR or of a PPIR (see discussion, *supra,* on PSIR disclosure to victims). Victims and other interested parties may attend release hearings in the federal parole system[130] and in many state parole systems. Probation and parole officers should consult the rules and procedures in their specific jurisdictions to determine if, when, and how a victim or victim's family members can participate in release or revocation processes.

D. Other Third Party Access

The USPC Rules and Procedures Manual (USPC Manual) states that third parties may obtain copies of disclosable records,[131] but only with required proof of authorization from the inmate or parolee who is the subject of the records. Some disclosable records are also available to third parties through the FOIA or the Privacy Act of 1974 (Privacy Act). To request disclosable copies of records created by an entity other than the USPC, a third party must generally make requests under the FOIA or the Privacy Act to the originating agency. Documents or portions of documents that are exempt from disclosure under the FOIA may be withheld by the USPC or the originating agency. There are other limitations and exceptions to confidentiality of USPC records discussed in the USPC Manual, but they are beyond the scope of this chapter which focuses on the disclosure of complete or redacted PSIRs and PPIRs.[132]

III. RIGHT TO NOTICE OF A PAROLE HEARING

Where due process applies to a protected liberty interest in parole, inmates have a right to notice of a hearing because it is the first essential element of minimal procedural process that is due. Under *Sandin* v. *Conner,* notice becomes a fundamental procedural right if the prisoner can establish a liberty interest in parole. Even without statutory provision for notice to a prisoner of a parole hearing, courts could be expected to require it where a statute or rule creates a liberty interest. The nature of the notice requirement would be functional in that it permits the inmate time to obtain evidence, inspect the file, and challenge adverse evidence, if permitted in a particular jurisdiction. Where a prisoner can establish a liberty interest under *Conner,* notice would be meaningless without the right to be present and to present evidence at the parole hearing. However, such a right does not necessarily require personal appearance of any witnesses who may have provided information considered by

the board or commission in making the release decision.[133] Notice and the opportunity to be heard is functional input into the decision-making process that would likely satisfy a court's requirement of an inmate's due process rights to notice and meaningful participation in a parole hearing.

The federal rules are clear—a federal inmate has fundamental due process rights related to a parole hearing. For state inmates, the clarity of what process is due is sometimes uncertain given the diverse natures of parole systems from state to state. However, in those states where a liberty interest in parole is created by state statute or rule, notice of a parole hearing is the first of an inmate's minimal essential due process rights.

SUMMARY

This chapter examined key reasons that presentence investigation reports and preparole investigation reports are important. PSIRs and PPIRs are regulated by federal law and rules, and by the laws and rules of each state. Case law is also an essential component of the ways in which these reports are prepared and used in the criminal justice system. The emergence of victims' rights legislation has altered some aspects of disclosure and many of the issues surrounding victims' access to PSIR and PPIR information have been determined by the courts. The return to the rehabilitation model in corrections has also been a factor in changing the course of presentence and preparole investigating and reporting.

Any discussion of the complexity of the preparation and use of PSIRs and PPIRs is confounded by the differences between the federal and state systems. It is relatively uncomplicated to sort out the legal issues, especially those of civil liability, in the federal system where probation and parole officers are generally afforded absolute immunity in the absence of wrongdoing. However, fully explaining state issues is more problematic due to the sheer volume and diversity of statutes, rules, regulations, case law, and guidelines that pertain to each state, the District of Columbia, and U.S. territories.

Resources for guidance have been provided in the chapter text and endnotes for federal probation and parole officers. Conversely, state probation and parole officers, and their counterparts in the District of Columbia and U.S. territories, must look to their respective agencies for assistance adequately to understand and use the PSIRs and PPIRs accurately, fairly, and lawfully in order to avoid civil, criminal, or administrative liability.

NOTES

1. The Federal Rules of Criminal Procedure are cited in the following endnotes as Fed. R. Crim. P. (2010). In the text, Rule 32 of the Federal Rules of Criminal Procedure is referred to as the "Rule" or "Rule 32."

2. For a discussion of the history of the PSIR and the contemporary re-emergence of the rehabilitation model, see Jeanne B. Stinchcomb & Daryl Hippensteel, *Presentence Investigation Reports: A Relevant Justice Model Tool or a Medical Model Relic?,* 12 Crim. Just. Pol'y. Rev. 164 (2001).

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

4. 543 U.S. 296 (2004).

5. *See Apprendi* v. *New Jersey,* 530 U.S 466 (2000) for the U.S. Supreme Court's finding and explanation of the distinction between sentencing factors and elements of a crime.

6. *Compare e.g.,* R. Carter and L.T. Wilkins, *Some Factors in Sentencing Policy*, 58 J. Crim. L. Criminology, and Police Science 503 (1976); Rodney Kingsnorth, Debra Cummings, John Lopez, & Jennifer Wentworth, *Criminal Sentencing and the Court Probation Office: The Myth of Individualized*

Justice Revisited, 20 Jus. Sys. J. 255 (1999); Christina Rush & Jeremy Robertson, *PSIRs: The Utility of Information in the Sentencing Decision,* 11 Law & Hum. Behav. 147 (1987).

7. Leanne Fiftal Alarid & Carlos D. Montemayor, *Attorney Perspectives and Decisions on the Presentence Investigation Report: A Research Note,* 21 Crim. Just, Pol'y Rev. 119 (2010) (some portions of the PSIR have more import for prosecutors than for defense counsel).

8. *United States* v. *Tucker,* 404 U.S. 443; *see also* Williams, *supra* note 3.

9. 543 U.S. 200 (2005). The Supreme Court held that federal judges must continue to refer to the United States Sentencing Guidelines, but judges are not bound to follow them—the guidelines are advisory, not mandatory.

10. The United States Sentencing Guidelines [hereinafter U.S.S.G.] (see U.S. Sentencing Commission, Federal Sentencing Guidelines Manual (2010) *available at* http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm) were created under the Sentencing Reform Act of 1984 (18 U.S.C. §§ 3351-3673, 28 U.S.C. §§ 991-998) which abolished the federal parole system and established a determinate-based sentencing scheme.

11. Fed. R. Crim. P. 32(d)(1) (2010).

12. *Id.* 32(d)(1)(A)-(E) (2010).

13. 18 U.S.C. § 3552(b) (2010) permits the court, before or after the PSIR is prepared and submitted, to order the Bureau of Prisons to conduct an additional presentence study and report of a felony or misdemeanor defendant, if the court finds that there are "no adequate professional resources available in the local community to perform the study." This section of the code states, "The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553 (a)." *See infra* note 14.

14. 18 U.S.C. § 3553(a) (2010) provides for, among other things, the consideration of

> (a)(2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

15. *McMillan* v. *Pennsylvania,* 477 U.S. 79 (1986).

16. Office of Probation and Pretrial Services, Administrative Office of the United States Courts, *The Presentence Investigation Report* (Publication 107) (Rev. March 2006) citing commentary to U.S.S.G. § 6A1.3.

17. 367 F.3d 274, 277 (5th Cir. 2004).

18. *See e.g., U.S.* v. *Tyler,* 281 F.3d 84 (3d Cir. 2002); U.S. v. Cortes, 922 F.2d 123 (2d. Cir. 1990) (Presentence interview is routine and not court-ordered).

19. *See* Tyler, *supra* note 18.

20. *Id.*; *See also U.S.* v. *Washington,* 11 F.3d 1510.

21. *See e.g., U.S.* v *Nichols,* 438 F.3d 437, 442 (4th Cir. 2006) (defendant's statements obtained in violation of *Miranda* may be considered, if the statements were otherwise voluntary).

22. 18 U.S.C. § 3771 (2010) [hereinafter CVRA].

23. The National Center for Victims of Crime, *Victim Impact Statements* (1999), *available at* http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32515 (last accessed December 2010).

24. The National Center for Victims of Crime, Get Help: Victim Impact Statements (2008), *available at* http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=45721 (last accessed December 2010). *See also supra* note 23.

25. *See supra* note 24.

26. *Gregg* v. *United States,* 394 U.S. 489, 492 (1969) (PSIR may include hearsay evidence and information that is not related to the current offense); *Hili* v. *Sciarrotta,* 140 F. 3d 210, 216 (2d Cir 1998) (sentencing court is permitted to consider hearsay information in the PSIR); *U.S.* v. *Beasley* 442, F.3d 386, 593 (6th Cir. 2006) (hearsay testimony of probation officer who prepare report permitted to clarify information in PSIR); *U.S.* v. *Berry,* 258 F.3d 971, 975-977 (9th Cir. 2001) (corroborative hearsay from codefendants may be considered by sentencing court to establish minimum indicia of reliability).

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 information; *see also United States* v. *Graves,* 785 F.2d 870 (10th Cir. 1986).

32. 960 F.2d 171, 174 (D.C. Cir. 1992); see also *United States* v. *Furman,* 112 F.3d 435, 439 (10th Cir. 1997) (references to unresolved counts against the defendant that government agreed to dismiss may be considered by a sentencing court if it does not violate a sentencing agreement).

33. *See* Article: IV. Sentencing, 38 Geo. L.J. Ann. Rev. Crim. Proc. 681 (2009) text accompanying note 2200.

34. *See e.g., United States* v. *Torres,* 926 F.2d 321 (3d cir. 1991); *United States* v. *McCrory,* 930 F.2d 63 (D.C. Cir. 1991; *United States* v. *Haynes,* 216 F.3d 789 (9th Cir. 2000); *see also infra* notes 34 & 35.

35. *United States* v. *Brimah,* 214 F.3d 854 (7th Cir. 2000); *United States* v. *Tauil-Hernandez,* 88 F.3d 576 (8th Cir. 1996); *United States* v. *Lynch,* 934 F.2d 1226 (11th Cir. 1991).

36. *United States* v. *Acosta,* 303 F.3d 78 at 86 (1st Cir. 2002); *See also United States* v. *Van Dam,* 493 F.3d 1194 (10th Cir. 2007); *United States* v. *Montoya-Ortiz,* 7 F.3d 1171 (5th Cir. 1993); *United States* v. *Jenkins,* 4 F.3d 1338 (6th Cir. 1993).

37. Fed. R. Crim. P. 32 (d)(1) (2010).

38. *Id.*

39. *Id.* at 32(d)(2).

40. *Id.*

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

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

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

44. Fed. R.Crim. P. 32(c)(2) (2010).

45. *United States* v. *Hodges,* 259 F.3d 655 (7th Cir. 2001).

46. *United States* v. *Tyler,* 281 F.3d 84 (3d Cir. 2002); *United States* v. *Washington,* 11 F.3d 1510 (10th Cir. 1993).

47. *United States* v. *Archambault,* 344 F.3d 732 (8th Cir. 2003); *United States* v. *Benlian,* 63 F.3d 824 (9th Cir. 1995); *United States* v. *Washington,* 11 F.3d 1510 (10th Cir. 1993).

48. *See e.g., United States* v. *Gianetta,* 909 F.2d 571 (1st Cir. 1990) and *United States* v. *Moore,* 225 F.3d 637 (6th Cir. 2000).

49. *See e.g., United States* v. *Nappi,* 243 F.3d 758, (3d Cir. 2001); *United States* v. *Scalzo,* 716 F.2d 463 (7th Cir. 1983); *United States* v. *Alvarado,* 909 F.2d 1443 (10th Cir. 1990).

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

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

52. *See e.g., United States* v. *Martinello,* 556 F.2d 1215 (5th Cir. 1977); *United States* v. *Molina,* 356 F.3d 269 (2d Cir. 2004); *United States* v. *Simmonds,* 235 F.3d 826 (3d Cir. 2000).

53. *United States* v. *Figurski,* 545 F.2d 389 (1976).

54. *Id.*

55. For practical guidance on the CVRA, *see generally,* Russell P. Butler, *What Practitioners and Judges Need to Know Regarding Crime Victims' Rights in Federal Sentencing Proceedings,* 19 Fed. Sent'g Rep. 21 (October 2006).

56. CVRA § 3771(a)(4) (2010).

57. CVRA § 3771(e) (2010). It appears that the CVRA does not exclude juvenile offenders and delinquency proceedings, but such proceedings are rarely open to the public. In addition, organizations are not excluded from the CVRA. *See* Wood, *infra* note 63 pp. 5 & 10 for a brief discussion of these issues.

58. *See* Wood, *infra* note 63 p. 8.

59. *Id.* at § 3771(a)(8) (2010).

60. *Id.* at § 3771(c)(1) (2010).

61. *Id.* at § 3771(d)(1) (2010).

62. *Id.* at § 3771(b)(1) (2010), referring to subsection (a) of the act.

63. Jefri Wood, *The Crime Victims' Rights Act and the Federal Courts,* Federal Judicial Center (June 2, 2008). ((According to Wood (p. 1) updates of legislative changes and case law are available on the Center's intranet website at cwn.fjc.dcn.))

64. *See* case cited *infra* note 92 pp. 10.

65. Black's Law Dictionary, 9th ed. (2009).

66. In re Kenna, 453 F.3d 1136 (9th Cir. 2006).

67. *United States* v. *Schlette,* 842 F.2d 1574 (9th Cir. 1988).

68. *Id.* at 1584.

69. *Id.* at 1582.

70. 262 Fed.Appx. 510 (4th Cir. 2008) *per curiam.*

71. *United States* v. *Citgo Petroleum Corp,* 2007 WL 2274393 (S.D. Tex. 2007).

72. *United States* v. *Sacane,* 2007 WL 951666 (D. Conn. 2007).

73. 598 F.Supp.2d 737 (W.D.N.Car.. 2009).

74. 571 F.3d 604 (2009).

75. *See generally* United States Department of Justice, United States Parole Commission's website at http://www.justice.gov/uspc/.

76. 711 F.2d 1164.

77. 711 F.2d 1164, 1173.

78. 90. *Id.* at 1175.

79. *Id.*

80. 5 U.S.C. § 552 (2010) [hereinafter FOIA].

81. 879 F.2d 224 (1989).

82. *Id.* at 229.

83. *Id.* at 240.

84. *Id.*

85. *See supra* note 73.

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

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

88. *Bieros* v. *Nicola,* 839 F. Supp. 322 (S.D. Pa. 1993).

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

90. *Peay* v. *Ajello,* 470 F.3d 65 (2d Cir. 2006).

91. *Hili* v. *Sciarrotta,* 140 F.3d 210 (2d Cir. 1990) (absolute immunity from claims for damages for federal probation officers for preparation and furnishing of PSIR to court); *Dorman* v. *Higgins,* 821 F.2d 133 (1987) (comparing New York probation officers to federal probation officers in granting absolute immunity for same).

92. *Freeze* v. *Griffith,* 849 F.2d 172 (5th Cir.1988) (granting absolute immunity from damages claims granted to Louisiana probation officers for preparation and submission of PSIRs).

93. *Demoran* v. *Witt,* 781 F.2d 155 (9th Cir. 1986) (California probation officers absolutely immune from damages claims for same as supra note 106).

94. *Hughes* v. *Chesser,* 731 F.2d 1489 (11th Cir. 1984) (absolute immunity for Alabama probation officers from damages claims for same as supra notes 92 & 93).

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

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

97. *See generally* the current versions of Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Publication 107, *The Presentence Investigation Report,* March 2006 revision *available at* http://www.fd.org/pdf_lib/publication%20107.pdf [note that newer revision may be available elsewhere]; and the United States Parole Commission's Rules and Procedures Manual *available at* http://www.justice.gov/uspc/rules_procedures/uspc-manual111507.pdf; last updated June 30, 2010 (from the USPC website at http://www.justice.gov/uspc/rules_procedures/rulesmanual.htm).

98. *Greenholtz* v. *Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1 (1979).

99. Article: IV. Sentencing, 38 Geo. L.J. Ann. Rev. Crim. Proc. 681 at 817 (2009).

100. 18 U.S.C. 4201-4218 (1976).

101. Pub. L. No. 110-312, 122 Stat 3013 (2008).

102. (Pub. L. No. 98-473 § 218(a)(5), 98 Stat. 1837, 2027 (1984) [repealing 18 U.S.C.A. §§ 4201-4218]) *See supra* note 107 for explanation.

103. *See generally* United States Department of Justice, United States Parole Commission's [hereinafter USPC] website at http://www.justice.gov/uspc/.

104. 533 U.S. 194 (2001).

105. 555 U.S. 223 (2009).

106. *See generally supra* USPC's Rules and Procedures Manual, note 99.

107. 18 U.S.C. 4201-4218 (1976) *repealed by* the Comprehensive Crime Control Act of 1984 Pub.L. 98-473, Title II, § 218(a)(5), Oct. 12, 1984, 98 Stat. 2027; however, the Parole Commission and Reorganization Act of 1976 is still applicable to offenses committed prior to Nov. 1, 1987.

108. 486 U.S.1 (1988).

109. 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).

110. See United States *ex rel. Johnson* v. *Chairman, New York State Bd. of Parole,* 500 F.2d 925 (2d Cir. 1974), *vacated as moot,* 419 U.S. 1015 (1975); *Coralluzzo* v. *New York State Parole Bd.,* 566 F.2d 375 (2d 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).

111. 442 U.S. 1 (1979).

112. *Id.* at 11.

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

114. 515 U.S. 472 (1995) at 472.

115. 418 U.S. 539 (1974).

116. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 657 (1950).

117. 408 U.S. 471 (1972).

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

119. 556 F.2d 1143 (2nd. Cir. 1977), *cert. dismissed,* 434 U.S. 844 (1978).

120. 569 F.2d 784 at 800 (4th Cir. 1977), *cert. denied* 435 U.S. 944 (1978).

121. *Id.* at 800.

122. 594 F.Supp. 556 (S.D. Ill. 1984) *superseded by statute,* 20 Ill. Admin.Code § 1610.30(b) (1986 Supp.), *as recognized in Blackwell* v. *Klincar* 1990 WL 92767 (N.D. Ill 1990). *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).

123. *See supra* USPC Rules and Procedures Manual (2010) at note 97, pp. 30-31.

124. *Id.* at pp. 147-148.

125. *Id.* at p. 151.

126. *Id.* at p. 148.

127. *Id.* at p. 149.

128. *Id.* at p. 155.

129. CVRA § 3771(2).

130. *See supra* USPC Rules and Procedures Manual (2010) at note 97, p. 23.

131. *See generally Id.* at 154 -162.

132. *Id.*

133. *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

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 regarding 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 even victims of crimes may potentially assert a civil claim against an officer. This chapter examines these issues.

I. SEARCH AND SEIZURE

For the last several decades the United States Supreme Court has periodically examined the propriety of conducting searches and seizures of persons who are being supervised either on probation or parole. In each of these decisions the Court has resolved some issues regarding these types of searches and seizures, left open some issues to be addressed in subsequent decisions, and have generated new issues that continue to be unresolved. This, in turn, has required state courts to issue opinions to fill in the gaps that United States Supreme Court decisions have left unanswered. Finally this topic remains complex and continues to be an evolving area of the law. As such parole and probation agencies must be aware of new developments in this area of law and must provide training to their officers on an on-going 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.

For years 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. However it was not until 1987 that the United States Supreme Court examined this area involving fourth amendment rights.

In *Griffin* v. *Wisconsin,*[1] a defendant, who had a prior felony conviction, was convicted of resisting arrest, disorderly conduct, and obstructing an officer and 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 two 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 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 in order 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.

Although 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 remained open for further consideration. First, although the Supreme Court recognized a reasonableness standard for conducting warrantless searches, the Court did not define what constituted 'reasonable.' Instead, the Court held that reasonableness must be determined by the courts in individual states. Thus courts have since struggled with determining what level of suspicion gave rise to a reasonable standard for justifying a warrantless search of a probationer or parolee.

Second, although 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 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.

B. *United States* v. *Knights* Answers Many of the Questions Left Unaddressed by *Griffin* v. *Wisconsin*

Several of the issues left open in *Griffin* v. *Wisconsin* were finally addressed late in 2001 in *United States* v. *Knights.*[2] In this case, the defendant had been placed on probation by a California state court for the offense of drug possession. As a condition of the defendant's probation, he was required to "submit his person, property, place of residence, vehicle, [and] personal effects to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Three days after having been placed on probation, a transformer belonging to the Pacific Power and Electric Company and a telecommunication vault belonging to Pacific Bell were vandalized, causing approximately $1.5 million in damages. The defendant was suspected of committing the acts of vandalism.

The police began conducting a surveillance of the defendant's apartment. A police officer, aware that a search condition had been imposed on the defendant, also conducted a search of the defendant's residence without first obtaining a warrant. The police officer found explosive devices on the premises and the defendant was indicted in federal court for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition.

The defendant moved to suppress the evidence seized as a result of the search of his apartment. The district judge, finding that reasonable suspicion existed for conducting the search, nevertheless granted the defendant's motion on the grounds that the search was conducted for "investigatory" purposes rather than for "probation" purposes. The United States Ninth Circuit Court of Appeals upheld the ruling of the district judge. Thus the Supreme Court was confronted with two issues, to-wit: whether a search conducted pursuant to a probation condition and supported by reasonable suspicion satisfied the Fourth Amendment to the United States Constitution and whether the Fourth Amendment limited searches conducted pursuant to a probation condition to those with a probationary purpose only.

In analyzing these issues, the Supreme Court first noted that the touchstone of the Fourth Amendment was reasonableness, and the reasonableness of a search was determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests." The Court recognized that this particular condition significantly diminished the defendant's reasonable expectation of privacy. Nevertheless the Court also noted that this condition furthered two primary goals of probation – rehabilitation and protecting society from future criminal violations.

In balancing the interests of the individual and that of the government, the Supreme Court observed that the status of a person on probation already deprived the individual of certain freedoms enjoyed by law-abiding citizens. Moreover, the Court stated that the State's interest in apprehending violators of the criminal law and thereby protecting potential victims of criminal enterprises could justifiably focus on probationers in a way that it did not on ordinary citizens. Thus the Court stated that the factors favoring the legitimate interests of the State greatly outweighed the diminished privacy interests of the probationer.

Therefore, the Court concluded that when balancing these various considerations the Fourth Amendment required no more than reasonable suspicion to conduct a search of the probationer's house. Moreover, the Court further held that the same balancing factors that allowed searches of a probationer on a basis of less than probable cause also dispensed with the need to obtain a warrant in order to conduct the search. Finally, the Court stated that as long as a search condition had been imposed on a probationer, it did not matter whether the search in question was conducted for probation purposes or solely for law enforcement purposes.

This opinion resolved several matters that had been left unaddressed in the Supreme Court's holding of *Griffin*. *Knights* affirmed that a search could be based on a condition imposed by the court as well as pursuant to an agency regulation. In addition, *Knights* held that peace officers, along with probation officers, were authorized to search the premises (and presumably the person) of a probationer. Finally, the Court dispensed with the notion enunciated by certain state courts and federal appellate courts that the search conducted pursuant to a condition of supervision had to be for "probationary" purposes only and not for independent "investigatory" or law enforcement purposes.

Nevertheless the *Knights* decision still had not finally resolved all of the questions surrounding the propriety of conducting searches of probationers and parolees. For example, although the Supreme Court had clearly stated that the standard for conducting a search of a probationer need not be based on probable cause and that state courts must define what constituted "reasonable suspicion," the Court had yet to determine how the standard of "reasonableness" had to be applied. Thus

although the Court in *Knights* assumed that there had been reasonable suspicion for conducting the search of the defendant's apartment, the Court was not clear whether the standard had been established by independent facts brought to the attention of the police officer, whether "reasonableness" was inferred simply by the fact that the judge had imposed a search condition, or whether the Court premised its decision on the fact that the search was "reasonable" because both parties did not question the reasonableness of the search and thus did not contest this matter on appeal.

C. *Samson* v. *California* Creates Two Separate Standards for Searches of Probationers and Parolees

Although *Griffin* and *Knights* dealt with search conditions imposed on probationers, it had been an underlying assumption by most, if not all appellate courts, that these decisions would apply equally to parolees. Nevertheless a decision rendered by the Supreme Court in *Samson* v. *California*[3] proved this assumption to be incorrect. In this case a police officer with the San Bruno Police Department stopped an individual on parole whom the officer believed had an outstanding parole warrant. After determining that the individual did not have a warrant for his apprehension, the officer nevertheless conducted a search of the individual's person. The officer found a plastic baggie on the parolee that contained methamphetamine. The parolee was subsequently convicted of possession of methamphetamine and sentenced to seven years in prison. The parolee eventually perfected an appeal to the United States Supreme Court. The parolee argued that since there was no basis of suspicion in conducting the search, the search was unreasonable and therefore the evidence seized pursuant to the search should have been suppressed.

The Court, in resolving this matter, noted that the State of California had a statute which required every prisoner eligible for release on state parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer . . . with or without a search warrant and with or without cause." The Court further noted that a California penal statute provided that "it is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment" and that California case law had prohibited "arbitrary, capricious or harassing" searches of probationers and parolees.

In deciding this matter the Supreme Court made a very important distinction between probationers and parolees. The Court observed that on a continuum of state-imposed punishments, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Hence the Court reasoned that on the continuum of possible punishments, parole was the stronger "medicine" and thus parolees enjoyed even less of the average citizen's absolute liberty than did probationers. As such the Court concluded that parolees had severely diminished expectations of privacy by virtue of their status alone and they could be subject to searches without the need of individualized suspicion.

By holding in *Samson* that a search could be conducted on a parolee without the need of individualized suspicion, the Court may have also answered the question left unresolved in *Knights,* to-wit: whether a search of a probationer conducted pursuant to a search condition must be based on individualized suspicion. Under *Samson* one can arguably conclude that the Court has created two different standards for conducting searches of probationers and parolees. Even if the wording of the search condition might be identical in both situations and even be based on identical statutory language, nevertheless it appears that the Court has implied that searches of probationers must be based on reasonable suspicion and hence individualized suspicion while searches of parolees do not need to be so.[4] Moreover if one follows the Court's reasoning in *Samson* it would appear that this individualized suspicion must be based on the totality of the independent facts brought to the attention of an officer and not simply inferred by the fact that the judge has imposed a search condition

whereas the imposition of a search condition in and of itself will be sufficient to conduct a search of a parolee.

Nevertheless, this case may be something of an anomaly because the Court observed that most jurisdictions in the country require a search conducted pursuant to a condition of release to be based on some level of suspicion whereas the California statute does not. Consequently State law and especially a State court's interpretation of its own State's constitution guaranteeing the right against improper searches and seizures of its residents may still control this matter.[5] As such it is necessary to examine certain court decisions that rely on state law in deciding this issue.

D. State Holdings Concerning the Scope of Conducting Searches of Probationers and Parolees

Since the United States Supreme Court holding in *Griffin* approving a search conducted pursuant to a state regulation, numerous courts have approved a search conducted pursuant to either a regulation or 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.[6] Moreover several jurisdictions have limited the scope of a search conducted pursuant to a court order. Finally some appellate courts have held that a probationer or parole waives any contention regarding the propriety of the search if the person voluntarily consents to the search.

Some courts have held that a search condition must be tailored to the offense for which the offender was granted probation.[7] In *People* v. *Hale,*[8] the defendant was convicted of criminally negligent homicide after having killed a woman in a boating accident when the defendant was intoxicated. The defendant entered into a plea bargain agreement and was placed on probation. One of the conditions to which the defendant agreed was that:

> "you 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. Although the defendant argued on appeal that absent a search warrant, exigent circumstances, or a voluntary consent, his home could not be searched by a Probation Officer, the appellate court nevertheless stated that the court-imposed condition carried as great, if not greater constitutional weight as a regulation. As such the appellate court upheld the conviction.

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 such as illicit substances and drug paraphernalia or pornography or sexually oriented devices. The *Hale* decision is a good example of a case in which the court limited a search condition to a specific item, namely, 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, the other type of contraband may be seized and used in a subsequent criminal proceeding.

Moreover, some appellate courts have examined the propriety of imposing certain search conditions on the grounds of being overbroad or vague. In *Phillips* v. *State,*[9] the defendant was convicted of multiple counts of property offenses. The defendant was granted probation and the court ordered him, as a condition to probation, to comply with certain special instructions dealing with substance abuse. The defendant argued on appeal that the condition was overbroad. The appellate court on appeal noted that the record included substantial evidence of the defendant's history of substance abuse.

The court further observed that conditions of probation that authorized warrantless searches for drugs and alcohol had been allowed where there was a case-specific basis for the condition. As such the appellate court approved the sentencing court's imposition of such a condition where substance abuse in the defendant's background suggested that searches for drugs and alcohol could further the defendant's rehabilitation.[10]

Consent to the conducting of a search is a well-recognized exception to the constitutional requirement of the need to obtain a warrant and to have a [reasonable basis] for conducting the search.[11] Courts have extended this exception to the context of dispensing with the need to conduct a search of probationers based on reasonable suspicion.[12] Nevertheless a search conducted based on the consent of a probationer may still be invalid if the extent of the search is limited by the scope of the consent given and the search exceeded that scope.[13] Moreover, consent that is voluntary may nonetheless result in suppression if the consent derives from exploitation of the official illegality or police conduct that significantly affects the decision to consent. Thus in *State* v. *Tyler,*[14] an Oregon appellate court held that the state could not simply show voluntary consent. It had to also show that the consent was derived neither from police conduct that significantly affected the defendant nor from the exploitation of unlawfully obtained knowledge.

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[15] have adopted a reasonableness standard that is less than a probable cause standard.[16] 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 of release.[17] 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*[18] 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*[19] was "reasonable suspicion." In *State* v. *Williams,*[20] it was "sufficient information to arouse suspicion" and in *State* v. *Sievers,*[21] it was "reasonable manner." 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.[22] 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 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 or peace officer the authority to conduct such searches.[23] This general rule remains true after the Supreme Court's holding in *Samson* v. *California*. Without some legal authorization to conduct a search of a probationer or parolee, the search will be *per se* unreasonable.

Moreover courts in almost every jurisdiction have held that a mere hunch that a probationer has violated the conditions of his release is insufficient to justify a search of that individual.[24] 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.[25] Moreover appellate courts have generally held that reasonable suspicion cannot be based on anonymous tips that are either not verified or corroborated by independent evidence.[26] Finally, because probation searches must be based on reasonable suspicion that a probationer is in violation of a condition of probation, almost all courts that have examined the issue has disallowed random searches.[27] The only exceptions to this rule are that random drug testing and suspicionless searches of computers for sexually oriented graphics or pictures have been upheld on appeal.[28]

F. Issues Still Pertinent to Conducting Searches of Probationers

A condition to visit the home of the probationer/parolee cannot be converted into a search condition.[29] Nevertheless 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. It is well established that law enforcement officers may seize incriminating evidence found in "plain view." For the plain view exception to the warrant requirement to attach, two prerequisites must be met: 1) the officer must lawfully make the initial intrusion or otherwise be in a proper position to view the item or lawfully be on the premises; and 2) the fact that the officer has discovered evidence must be immediately apparent.[30]

Although almost all court decisions recognizing the plain view doctrine have applied to law enforcement agents, there is no constitutional reason why this doctrine cannot also apply to probation or parole officers.[31] Provided that the officer is legitimately at the residence of the probationer or parolee and sees contraband or other incriminating evidence in plain view, such as drugs on a sofa or child pornography on a coffee table, then this evidence can be seized without the need of a warrant or other legal justification. (Whether it is wise to attempt to seize this contraband or instead report its finding to law enforcement for the issuance of a warrant must be controlled by an individual probation or parole authorities' policies and procedures).

One recent court decision that discussed the difference between a home visit and a search is *State* v. *Moody.*[32] In this case the defendant was placed on probation for two years in Montana for a driving while intoxicated offense and an offense of assaulting a peace officer. The defendant appealed the imposition of a condition requiring her to "make the home open and available for the Probation and Parole Officer to visit as required by policy." The defendant argued on appeal that this condition violated the reasonable cause standard to searches of probationers' residences.

The Supreme Court of Montana recognized that home visits were a commonly imposed condition of probation. Moreover the court determined that a probationer did not have a reasonable expectation of privacy when a probation officer conducted a home visit. Because a reasonable expectation of privacy did not exist, the Court therefore concluded that a home visit could not constitute a search as understood under the Fourth Amendment.[33]

The court further observed that because a home visit was not a search, a probation officer could not open drawers, cabinets, closets, or the like; nor could the officer rummage through the probationer's belongings. Furthermore the court noted that while a home visit had the potential to turn into a search pursuant to an officer's plain view observations, it had to remain within the parameters of a home visit unless or until there was reasonable cause to engage in a search. As such the court held that home visits, as a routine and reasonable element of supervising a convicted person serving a term of supervised release, were not searches and were thus not subject to the reasonable cause standard.

1. Police Searches Conducted with Probation/Parole Officers

How much simpler it would be if the holdings in *United States* v. *Knights* and *Samson* v. *California* completely resolved the problems of police officers conducting searches of probationers with or without the presence of probation officers. For example *Knights* clearly stated that police officers could conduct searches of probationers without the presence of a probation officer and for investigatory purposes only. Moreover as previously discussed the *Samson* decision, while reaffirming that a law enforcement agent could enforce a search condition, this decision also indicated a higher threshold for overcoming a Fourth Amendment objection to conducting a search of a probationer as opposed to a parolee. Nevertheless an analysis of police searches of probationers with or without the assistance of a probation officer cannot be performed solely under federal constitutional principles. State laws and state constitutional considerations must also be taken into account.

Thus some states may limit the conducting of a search of a probationer to supervision officers. This limitation may be based on state court decisions or by a specific state statute.[34] Nevertheless other states have recognized that a probation officer may enlist the aid of law enforcement personnel to expedite a search,[35] subject to the limitation that the primary purpose is probation-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, other states have held that if the 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.[36]

One recent court decision that discussed the proper boundaries in probation/police officer collaboration is *State* v. *Jones.*[37] In this case during the period that the defendant was being supervised on parole a police detective informed the defendant's parole officer that he had information that the defendant was sexually involved with a fourteen year old girl. The police officer told the parole officer that he had knowledge that the probationer had given the girl nude photographs of himself and love notes.

Accompanied by police officers the parole officer went to the defendant's residence. The defendant came out of the room in the house in which he was living and closed and locked the door behind him. A locksmith was called to open the door. After the police officers entered the room and surveyed it, the parole officer entered the room by herself and conducted the search without police involvement. During her search the parole officer discovered, among other items, nude photos, allegedly of the fourteen year old victim, female clothing, and love letters. As a result of the introduction of this evidence in a subsequent trial the defendant was convicted of second-degree sexual assault of a child and sexual exploitation of a child and punished as a repeat offender.[38]

The defendant argued on appeal that the evidence seized in the search should have been suppressed because the search of his room was not a probation search, but was instead a police search and therefore required a warrant. The appellate court, reviewing this matter, concluded that the search of the defendant's room was a probationary search and not a police search. The court noted that cooperation between a probation officer and law enforcement did not transform a probation search into a police search. Moreover the court stated that a probation search was also not transformed into a police search because the information leading to the search was provided by law enforcement. In addition the court observed that a probationary search was not transformed into a police search due to the existence of a concurrent investigation. Finally the court stated that the facts demonstrated that the officers were present at the defendant's residence for protective purposes and that this was a recognized example of cooperation between law enforcement and probation agents. As such the appellate court concluded that the police participation in this case did not exceed their role of providing protection for the officer conducting the search.

2. Searches Conducted by Police Officers Alone or by Directing a Probation/Parole Officer to Conduct a Search

Until the decision of *United States* v. *Knights,* most courts had held that a police officer, acting alone, could not conduct a warrantless search of a suspect simply because a warrantless search has been imposed on the offender as a condition of probation. Nevertheless a minority of jurisdictions had allowed police officers to conduct searches of probationers without the presence of a supervision officer provided that there was a condition of release requiring the defendant to "waive" his fourth amendment rights. Hence in *In re Tyrell,*[39] police officers searched a juvenile congregating with suspected gang members at a football game. The police discovered a bag of marijuana on the juvenile. Unbeknownst 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, much less aware 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."[40] Whether the minority holding in *In re Tyrell* becomes a majority holding for most jurisdictions in the future is hard to predict. What is reasonably certain is that in light of the recent holding in *Knights,* many state jurisdictions will reexamine past holdings that provided greater restrictions to the search of probationers than has been provided by the United States Supreme Court in its interpretation of the Fourth Amendment right against unreasonable searches and seizures of probationers.

Prior to the holdings in *Knights* and *Samson,* there was some uncertainty concerning whether a court or a probation/parole officer could 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 had approved search conditions that extended the authority to law enforcement officers to conduct warrantless searches of probationers or parolees,[41] most courts had deemed that law enforcement officers, when conducting these searches, were "assisting" supervision officers and hence were 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 had focused on whether the supervision officer authorized or initiated the search,[42] whether the search was conducted pursuant to a legitimate goal of probation or parole,[43] and whether the search was a pretext for conducting a criminal investigation of the probationer or parolee.[44] Moreover, most courts have held that if a peace officer requests that a probation officer conduct a search of a probationer, that officer must have a basis and reason in accordance with the officer's duties supervising the offender in order to conduct a search.[45] While the holdings in *Knights* and *Samson* have now blurred these distinctions, 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.

Finally, certain appellate courts have held that when a probation officer acts on information furnished by a law enforcement agent, that officer has a duty to conduct an independent analysis of the information in order to determine whether reasonable suspicion exists to conduct a search of a probationer. In *Culver* v. *Delaware,*[46] probation officers searched a probationer's home after police "tipped off" probation officers that they suspected that he was involved in drug activity. The police contacted the probation department after receiving a call from an anonymous person whose "tip" made it clear that the caller had no personal information about the probationer consistent with illicit drug activity. While conducting a search of the probationer home, the probation officers did not find any drugs but did find a revolver and a detoxification kit.

The defendant argued on appeal that the anonymous caller's tip was entirely speculative, lacked any corroboration, and therefore the relayed tip to the probation officer by the police could not form the basis of reasonable suspicion to conduct a search of the probationer's home. The Delaware Supreme Court stated that probation officers could not rely on police officers vouching for anonymous callers with no proven track record for supplying credible, reliable information. Instead, the court stated that police officers must provide probation officers sufficient facts so that the probation officers can independently and objectively assess the reasonableness of the inferences to be drawn from the caller's tip. Finally the court stated that to hold otherwise would make probation officers essentially surrogates for the police, conveniently used when the police had no lawful authority to act on their own. Because there was no independent basis for having reasonable suspicion that the probationer might be in violation of the conditions of his probation, the court reversed the conviction of the defendant.

II. PROBATION/PAROLE OFFICERS AND FIREARMS

A significant development in probation and parole supervision over the last two decades has been the arming of probation/parole officers in some parts of the country. Although the federal system and a few other states have authorized probation/parole officers to carry weapons prior to the 1990s, the number of jurisdictions that have joined the ranks of arming their officers has grown markedly since that time. The arming of officers has now included even the arming of juvenile probation officers.[47] 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 case loads 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 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 due to 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.

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.[48] The law in Pennsylvania and New York, on the other hand, states that probation and parole officers are law enforcement officers during the period that they are on duty and gives them broad powers to arrest probationers and parolees observed violating the conditions of their release.[49] 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 are hardly any court decisions 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, including state wrongful death statutes, 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 the federal law codified at, 42 U. S. C. § 1983. This provision was enacted by the United States Congress in order 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 § 1983

lawsuit.[50] There must be a showing that the deprivation indicated deliberate indifference or gross negligence on the part of the government official.[51]

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 § 1983.[52] This failure to train properly extends to the failure to provide continuous training,[53] failure to ensure that the officers adequately understood the course material,[54] 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.[55]

Probation and parole officers may be liable if they use excessive force in attempting to arrest or apprehend an offender. In *Tennessee* v. *Garner,*[56] 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 were 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 a subsequent decision, the United States Supreme Court examined what constitutional standard governed a person's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of the individual's person. In *Graham* v. *Connor*[57] the plaintiff filed a § 1983 lawsuit seeking to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop. The plaintiff, a diabetic, had felt the onset of an insulin reaction and had asked a friend to take him to a nearby convenience store to purchase some orange juice. When the plaintiff arrived at the store, he saw a long line of customers at the checkout counter and concerned about the delay decided to go to a friend's house instead. A police officer observed plaintiff going in and out of the store and became suspicious. He stopped the car to investigate the matter and the plaintiff told him he needed to get to a friend's house because he was having an insulin reaction. As a result of his encounter with the police, the plaintiff sustained a broken foot, cuts on his wrists, a bruised forehead and an injured shoulder.

The Supreme Court, in examining what standard determined an excessive use of force, observed that in a claim arising in the context of an arrest or investigatory stop, the standard should be most properly characterized as one invoking the protections of the Fourth Amendment. As such the Court stated that all claims that law enforcement officers had used excessive force–deadly or not–in the course of an arrest, investigatory stop, or other "seizure" had to be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Moreover the Court stated that as in other Fourth Amendment contexts, the "reasonableness" inquiry in an excessive force case was an objective one: the question was whether the officers' actions were "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Finally the Court stated that because the test of reasonableness under the Fourth Amendment was not capable of precise definition or mechanical application, its proper application required careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight.

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 to carry a weapon. This includes participating in regular continuing education programs to those similarly required of law enforcement officers.
- The department must set a clear policy on the use by officers of deadly force. Such use should be limited to cases when there is probable cause to believe that there is an imminent threat of death or serious bodily injury and 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 there has been no case 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 a showing of deliberate indifference on the part of the department before liability can likely be imposed. Although this showing will have to be decided on a case-by-case basis, merely 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 placing an officer in a situation of undue risk. For example, the department can require that in risky situations, the officer should ask 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.

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 in which offenders in the past have had a particular awareness and therefore there have been few claims alleging a breach of 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 statutory 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 such information as: 1) what is the person's status on probation, 2) has the person been referred to certain treatment programs, such as substance abuse treatment or sex offender counseling, 3) whether the person is successfully complying with the conditions of release, and so forth. In many if not most states, these are not matters 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, the 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.[58]

In *Anderson* v. *Boyd,*[59] 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 offender'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 this relationship was made in a 1976 Washington criminal case.[60] 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. (Because 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.[61]

It must be noted that, in criminal prosecutions, courts have a significant 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. Although 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 Probation Officer-Probationer Privileged Communication

In *Fare* v. *Michael C.,*[62] 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:

> 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 added)[63]

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 maintain 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 him or herself with 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 an invasion of privacy.[64] Generally, the elements for an invasion of privacy are: 1) the disclosure of private facts must be a public disclosure; 2) the facts disclosed to the public must be private, secluded or secret; and 3) the matter made public must be offensive and objectionable to a reasonable person of ordinary sensibilities under the circumstances.[65] Although 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 being 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 the unreasonable intrusion upon the privacy of the individual. Although 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 the rehabilitation of the offender or the enforcement of the conditions of release. For example, if an officer were to question extensively 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 the efforts to rehabilitate the individual or had contributed to the 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 the 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 which 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.[66] Slander is a defamatory statement orally communicated or published to a third person without legal excuse.[67] To establish a prima facie case of defamation a plaintiff must demonstrate that: 1) the defendant published a defamatory statement; 2) the defamatory statement identified the plaintiff to a third person; 3) the defamatory statement was published to a third person; and 4) the plaintiff's reputation suffered injury as a result of the statement.[68]

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, because making false accusations regarding a probationer or parolee is clearly not within the course and scope of an officer's job responsibilities, it is 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 Liability for Failure to Disclose Client Background Information to Third Parties, below) 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 a cause of action are: 1) the existence of a contractual or business relationship or expectancy; 2) an intentional act of interference by a party outside that relationship or expectancy; 3) proof that the interference caused the harm sustained; and 4) damages.[69] 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 only inform an employer 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 only provide 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. Because this manual only discusses 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.

1. Federal Rules of Confidentiality Regarding Substance Abuse Treatment

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.

42 United States Code § 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.[70] 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 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 only allows 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. Another 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 who 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 whether it is subject to federal regulations.

2. Health Insurance Portability and Accountability Act (HIPAA)

In 1996 the United States Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). This act provides that information regarding a person's health care treatment is confidential and cannot be released except as otherwise provided in this act or through a waiver voluntarily executed by the patient. Nevertheless the regulations promulgated for the enforcement of this act, known as the Privacy Rule, did not go into effect until April 14, 2003. The Privacy Rule prohibits covered entities from using or disclosing protected health information except as the rule permits.[71] Moreover, a state law that is "contrary" to the Privacy Rule is preempted.[72] In addition HIPAA provides civil and criminal penalties for its violation.[73]

The Privacy Rule only applies to a "covered entity" which is a health care plan, health care clearinghouse, and a health care provider. Although this may appear to limit the application of HIPAA, covered entities are broadly construed and under certain circumstances can include treatment services provided through a probation or parole department. The Privacy Rule encompasses "individually identifiable health information." "Individually identifiable health information" is "information that is a subset of health information, including demographic information collected from an individual," and:

(1) Is created or received by a health care provider, *health plan*, *employer*, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

  (i) That identifies the individual; or

  (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.[74]

Generally, a covered entity using, disclosing, or requesting protected health information "must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."[75] The Privacy Rule permits a covered entity to "use or disclose protected health information for its own treatment, payment, or health care operations."[76] Also, an individual may authorize or agree to certain uses or disclosures of protected health information.[77] In addition under HIPAA a covered entity can disclose protected health information for the following purposes:

a) To provide, coordinate, and manage the individual's health care and any related services.

b) To obtain payment for the services provided.

c) To facilitate the function of the entity's health care operations.

d) When required to do so by any federal, state, or local law.

e) When there is a risk to public health.

f) If the entity believes that a patient is the victim of abuse, neglect or domestic violence.

g) To cooperate with a health care oversight agency in conducting such functions as audits; civil, administrative, or criminal investigations, inspections, licensure, etc.

h) In the course of any judicial or administrative proceeding in response to an order of a court or administrative tribunal.[78]

i) To a law enforcement official for law enforcement purposes.

j) For research when research protocols have been approved to address the privacy of the patient's protected health information.

k) When necessary to prevent or lessen a serious and imminent threat to the patient's health or safety or to the health and safety of the public.

l) To comply with worker's compensation laws.[79]

At first glance it may appear that a criminal justice agency such as a probation or parole office would not constitute a covered entity. Thus, if the probation or parole agency were outsourcing the provision of such rehabilitative services as counseling for emotional problems, substance abuse or mental health treatment or only making referrals to outside entities for these services then it would appear that the department would not fall under HIPAA's definition of a "covered entity." However if the probation or parole were providing in-house counseling or treatment services, including services provided in a residential setting that is administered by a parole agency or a probation department, then these services might well fall within the definition of "individually identifiable health information" and the parole agency or probation department would be a covered entity for purposes of complying with the requirements established under HIPAA. If such were the case then not only would the parole agency or probation department be required to follow the Privacy Rule's regulations but the entity would also have to develop policies and procedures to comply with HIPAA's requirements.

IV. CASES ON LIABILITY FOR REVOCATIONS

In *Hall* v. *Schaeffer*[80] 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[81] 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 or 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,[82] 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*[83] suggests other bases for liability. Here suit was brought after a parole revocation for refusal to remove a skull cap with religious significance to the plaintiff. Although the court found no liability, that decision appears to be the result of a provision in 42 U. S. C. § 1983 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 have yet to be unequivocally resolved by a court.

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,*[84] 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 two nights a week. As an out-patient, 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 the other liability cases discussed in this chapter and more akin to the case of *Faile* v. *South Carolina Department of Juvenile Justice,* the plaintiff in *Semler* did not allege that a risk of harm to her daughter was foreseeable. The decedent was simply a member of the general public. Although the *Semler* court used the term "special relationship," it used it in an entirely different way from those 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. 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,*[85] 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, the denial of which may result in adverse consequences.

There are very few reported cases that have examined this issue. However, in *People* v. *Beckler*[86] an appellate court focused on the plight of a defendant who was rejected by the treatment program to which the trial court assigned him. The appellate court ruled that the defendant had a statutorily created interest in remaining under supervision. Consequent due process required notice, 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. Although 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.[87] 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 Recent Judicial Decisions Concerning Liability of Probation and Parole Officers, below, 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.*

VIII. RESTITUTION COLLECTIONS

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.[88] 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.[89] 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.[90] 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.[91]

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. Although 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.[92] 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.[93]

Although 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*[94] 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.

*For a discussion of violations as an aspect of revocation, see Chapter 9.

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 PROBATION OFFICERS GIVE OFFENDERS *MIRANDA* WARNINGS WHEN ASKING QUESTIONS?

The case of *Minnesota* v. *Murphy,* decided by the U. S. Supreme Court in 1984 and discussed more extensively in Chapter IX on Revocation, answers most of the concerns on this issue. The effect of the *Murphy* decision may be summarized as follows:

MUST MIRANDA WARNINGS BE GIVEN BY THE PROBATION OFFICER IF THE EVIDENCE OBTAINED IS TO BE ADMISSIBLE?

	Revocation	Trial
Not in custody	No	No (unless probationer asserts rights)
In custody	Depends upon state law	Yes

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 because 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 in custody and therefore the rules as summarized above apply.

What about cases where initially an officer did 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 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.

X. INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION

Since 1937 various states have entered into a contract to control and regulate the supervision of probationers and parolees convicted in one state but living in another state. This contract also has established the criteria for a probationer or parolee to be deemed eligible to have his/her supervision transferred to another state. This compact had been known as the Interstate Compact for the Supervision of Parolees and Probationers. In 2002 a new compact, known as the Interstate Compact for Adult Offender Supervision became applicable to all member states and territories. As of today, all fifty states in the union, along with the District of Columbia, Puerto Rico and the U. S. Virgin Islands are members of the compact.

Overseeing the operations of the compact is the Interstate Commission for Adult Offender Supervision. Each member state and territory of the compact can designate one individual to serve on the commission. The purpose of the Commission is to promulgate uniform rules and procedures for the acceptance, supervision and sometimes the return of a parolee or probationer from one state or territory to another. The Commission also monitors compliance with the rules governing interstate movement of offenders and initiates interventions to address and correct noncompliance. Finally, the Commission coordinates training and education regarding regulations of interstate movement of offenders for officials involved in such activity.[95]

The compact operates on a state to state level and not at a local level. Thus a local jurisdiction wishing to transfer the supervision of an offender must initiate the proceedings through its respective state compact administrator handling interstate transfer matters and cannot directly contact a local office in another state or territory to begin the transfer process. The receiving jurisdiction has the opportunity to review the requested transfer and even investigate the background of the probationer or parolee. If the probationer or parolee does not meet the eligibility criteria under the compact for transfer, the receiving state can reject the requested transfer. If a receiving jurisdiction rejects transfer, then the probationer or parolee must remain in the sending state or territory and be supervised there.

It is important to note that the compact incorporates the legal holdings enunciated by the United States Supreme Court in *Morrissey* v. *Brewer*[96] and *Gagnon* v. *Scarpelli.*[97] In addition, it is critical for the courts, parole authorities, and probation and parole departments to understand that a violation of the rules of the compact may entail serious legal liabilities. Under the express terms of the compact, judicial enforcement is authorized by a majority vote of the Commission members to enforce the provisions of the compact. Moreover the Commission can seek both injunctive relief and monetary damages against a state or territory in violation of the compact and the prevailing party can even be entitled to an award of costs, including reasonable attorney's fee.[98] As such it is extremely important that persons involved in the supervision of probationers or parolees understand the rules of the compact.[99]

SUMMARY

This chapter deals with liability exposure in supervising offenders. In the area of searches, 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 created two different standards for the search of probationers and parolees. This chapter also deals with the complex issue of possible liability for disclosure or nondisclosure of information. In addition, this chapter discusses the various theories under which an officer could be deemed liable for the acts of a person under his/her supervision. In general, officers are protected from liability in supervision but there might be liability if a "special relationship" exists or the officer "takes charge" of an offender. 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. Nevertheless, 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. Furthermore, 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. Finally, this chapter stresses that an officer should familiarize him or herself with the rules and regulations of the Interstate Compact for Adult Offender Supervision.

NOTES

1. *Griffin* v. *Wisconsin,* 483 U.S. 868 (1987).

2. *United States* v. *Knights,* 534 U. S. 112 (2001).

3. *Samson* v. *California,* 547 U. S. 843 (2006).

4. Although in certain cases a parolee has tried to narrow the scope of the holding in *Samson* v. *California* by arguing that the search of the residence of a parolee still needs to be based on some basis of reasonable suspicion, this argument has been generally rejected by appellate courts. See *United States* v. *Lopez,* 474 F. 3d 1208 (9th Cir. – 2007).

5. In *People* v. *Wilson,* 228 Ill. 2d 35, (Ill. – 2008), the Illinois Supreme Court followed the holding of *Samson* v. *California* and held that the suspicionless search of the residence of a parolee was proper.

6. 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,* 483 U.S. 868 (1987).

7. *State* v. *Moses,* 618 A. 2d 478 (Vt. 1992).

8. *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) and *State* v. *Moses,* 618 A. 2d 478 (Vt. 1992).

9. *Phillips* v. *State,* 211 P. 3d 1148 (Alaska App. – 2009).

10. In *Lambert* v. *State,* 172 P. 3d 838 (Alaska App. – 2007), an Alaska appellate court disallowed the imposition of a condition requiring a defendant convicted of assault "to submit, at the request of his probation officer, to a search of his "person, personal property, residence or any vehicle in which [he] may be found for the presence of contraband" as overbroad. Even though the defendant had a history of substance abuse, the court noted that the term "contraband" included more than a search for drugs or alcohol; the term "contraband" also included "stolen property, weapons, burglary tools, counterfeit money, photographs, videotapes, etc.," the search for which none of these items had any relationship for the offense for which he was convicted; to-wit: assault. If the search condition had been limited to items related to the abuse of alcohol or an illegal substance, then, in all likelihood, the appellate court would have affirmed the imposition of a search condition.

11. *Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973).

12. *Brooks* v. *State,* 677 S. E. 2d 68 (Ga. 2009); see also, *People* v. *Thornburg,* 895 N.E. 2d 13 (Ill. App. 2d Dist. – 2008).

13. *Florida* v. *Jimeno,* 500 U. S. 248 (1991).

14. *State* v. *Tyler,* 178 P. 3d 282 (Or. App. – 2008).

15. Even though the Supreme Court's holding in *Samson* v. *California* dispensed with the need to articulate an individualized suspicion in conducting searches of parolees, this section will still reference state holdings, discussing the level of reasonableness for conducting searches of parolees. This is for two reasons. One, even if a state court no longer recognizes the need for individualized suspicion where conducting a search of a parolee, these case cited are still useful for articulating the level of reasonableness in conducting a search of a probationer. Second, even though the United States Supreme Court has now held that the Fourth Amendment to the United States Constitution does to require individualized suspicion when conducting searches of parolees, some states may still find under either state statute, case law or their state constitution that searches of parolees must be based on individualized suspicion in order to meet the state standard of reasonableness.

16. See *Toney* v. *State,* 572 So. 2d 1308 (Ala. Cr. App. - 1990).

17. See *Sierra* v. *State,* 958 A. 2d 825 (Del. – 2008); see also, Hill, Rights of the Convicted Felon on Parole, 13 U. Rich. L. Rev. 370, 371 (1979) and *State* v. *Perbix,* 331 N. W. 2d 14 (ND 1983).

18. *People* v. *Anderson,* 189 Colo. 34, 536 P. 2d 302 (1975).

19. *People* v. *Santos,* 82 Misc. 2d 184, 368 N.Y.S. 2d 130, (N.Y. County Sup. Ct. 1975).

20. *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).

21. *State* v. *Sievers,* 511 N. W. 2d 205, 2 Neb. App. 463 (1994).

22. See *State* v. *Campa,* 2009 MT 251 (Mont. – 2009), in which the Montana Supreme Court stated that determining the existence of reasonable cause to conduct a probationary search involves a factual inquiry based on the totality of the circumstances.

23. See *Jones* v. *State,* 653 S. E. 2d 456 (Ga. – 2007), in which the Georgia Supreme Court stated that a defendant's status as a probationer, standing alone, could not serve as a substitute for a search warrant and allow a probation officer and police officers to conduct a warrantless search of the defendant's residence where the state failed to show the existence of any law, legally authorized regulation, or sentencing order imposing any limitation on the defendant's Fourth Amendment right against warrantless searches of his residence at the time of the search.

24. See *People* v. *Borger,* 848 N.Y.S. 2d 841 (N. Y. Co. – 2007); see also, *State* v. *Epperson,* 576 So. 2d 96 (La. App. - 1991).

25. See *People* v. *Reyes,* 968 P. 2d 445 (Cal. 1998).

26. See *Gordon* v. *State,* 1 So. 3d 1117 (Fla. App.--1 Dist. 2009), in which a Florida appellate court held that an unverified, anonymous phone tip alleging a probation violation by a probationer, namely the presence of illegal drugs inside the probationer's residence, was not sufficient to provide reasonable suspicion supporting a search of the residence; see however, *Spencer* v. *State,* 667 S. E. 2d 223 (Ga. 2008), in which the Georgia Supreme Court upheld a search conducted by narcotics agents pursuant to a special condition of probation because the anonymous tip was supported by other evidence.

27. See *State* v. *Bennett,* 200 P. 3d 455 (Kansas 2009), in which the Kansas Supreme Court stated that a condition of probation requiring that a probationer submit to random, suspicionless searches violated the probationer's constitutional rights under the Fourth Amendment to the United States Constitution and the Kansas Constitution's Bill of Rights.

28. *People* v. *Thornburg,* 895 N. E. 2d 13, (Ill. App.--2 Dist. 2008).

29. *United States* v. *Bradley,* 571 F. 2d 787 (4th Cir. 1978).

30. *Horton* v. *California,* 496 U. S. 128 (1990).

31. In *United States* v. *Reyes,* 283 F. 3d 446 (2nd Cir. 2002), the Second Circuit Court of Appeals upheld a plain view discovery of contraband in the context of a home visit of a probationer pursuant to a probation condition permitting home visits at any time.

32. *State* v. *Moody,* 148 P. 3d 662 (Mont. 2006).

33. The Court in *State* v. *Moody* noted that other courts addressing this issue of whether a home visit constituted a search had concluded that, although such visits could evolve into a search, the initial visit was not a search, citing *United States* v. *Workman,* 585 F. 2d 1205 (4th Cir. – 1978) and *Latta* v. *Fitzharris,* 521 F. 2d 246 (9th Cir. – 1975).

34. In *McArthur* v. *State,* 1 S. W. 3d 323 (Tex. App. – Fort Worth, 1999), the Fort Worth Court of Appeals approved the imposition of a search condition on a sex offender granted community supervision that required him "to permit your supervision officer to search your residence, vehicle and possessions for the presence of sexually explicit material;" see also, 11 Del. C. § 4321 which provides:

> Probation and parole officers shall exercise the same powers as constables under the laws of this State and may conduct searches of individuals under probation and parole supervision in accordance with Department procedures while in the performance of the lawful duties of their employment and shall execute lawful orders, warrants and other process as directed to the officers by any court, judge or Board of Parole in this State.

35. *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).

36. *Ryan* v. *State,* 580 F. 2d 988 (9th Cir.), *cert. denied,* 440 U. S. 977 (1978).

37. *State* v. *Jones,* 762 N. W. 2d 106 (Wis. App. 2008).

38. One of the contentious issues in the appeal was whether the defendant was on parole or probation. The defendant argued that he was not on parole but rather extended supervision and therefore his status was more closely analogous to a probationer rather than to a parolee. Nevertheless both parties agreed to analyze this search as if it were a probation search and therefore the standard formulated for the search of parolees in *Samson* v. *California,* 547 U. S. 843 (2006) was not considered.

39. In re Tyrell, 876 P. 2d 445 (Cal. 1998).

40. The California Supreme Court extended the holding in Tyrell to parolees in *People* v. *Reyes,* 968 P. 2d 445 (1998).

41. 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).

42. See *U. S.* v. *Jarral,* 754 F. 2d 1457 (9th Cir. 1985); see also, *U. S.* v. *Richardson,* 849 F. 2d 439 (9th Cir. 1988).

43. See *U. S.* v. *Watts,* 67 F. 3d 795 (9th Cir. 1995).

44. See *U. S.* v. *McDonald,* 21 F. 3d 1117 (9th Cir. 1994).

45. In *State* v. *Bolden,* 13 So.3d 1168 (La. App. 2009), a Louisiana appellate court stated that a parole or probation officer may not use his authority as a subterfuge to help another police agency that desires to conduct a search, but lacks probable cause; the parole or probation officer must believe that the search is necessary in the performance of his duties and reasonable in light of the total circumstances.

46. *Culver* v. *Delaware,* 956 A. 2d 5 (Del. – 2008).

47. In 2009 the Texas Legislature enacted S. B. 1237, which gave county juvenile probation departments the discretion to allow juvenile probation officers to be armed while performing official duties. See Texas Human Resource Code, § 141.066. It is worth noting that very few jurisdictions in this country still allow their juvenile probation officers to be armed.

48. See Vernon's Annotated Texas Penal Code, § 46.15.

49. See 61 Pennsylvania Statutes, § 309.1 and New York State Criminal Procedural Law, Article 2.10, § 23.

50. See *Daniels* v. *Williams,* 474 U.S. 327 (1986).

51. 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).

52. See *City of Canton* v. *Harris,* 489 U.S. 378 (1989); see also, *Paiva* v. *City of Reno,* 939 F. Supp. 1474 (D. Nev. 1996).

53. *Popow* v. *Margate,* 476 F. Supp. 1237 (D. N.J. 1979).

54. *Russo* v. *City of Cincinnati,* 953 F. 2d 1036 (6th Cir. 1992).

55. *City of Canton* v. *Harris,* 489 U.S. 378 (1989).

56. *Tennessee* v. *Garner,* 471 U.S. 1 (1985).

57. *Graham* v. *Connor,* 490 U. S. 386 (1989).

58. J. Kutcher, The Legal Responsibility of Probation Officers in Supervision, 41 Fed. Prob. 35, 37-38 (1977).

59. *Anderson* v. *Boyd,* 714 F. 2d 906 (9th Cir. 1983).

60. *State* v. *Roberts,* 14 Wash. App. 727, 544 P. 2d 754 (1976).

61. *Id.* at 730, 544 P. 2d at 757.

62. *Fare* v. *Michael C.,* 442 U. S. 707 (1979).

63. *Id.* at 719-720.

64. See *Vargas* v. *Shepherd,* 903 N. E. 2d 1026 (Ind. App. 2009) and *Brungardt* v. *Summitt,* 7 So. 3rd 879 (La. App 2009). Note: A claim of breach of privacy has also been asserted through a claim under the fourth amendment to the United States Constitution; see *Hudson* v. *Palmer,* 468 U.S. 517 (1984).

65. See *Gettner* v. *Fitzgerald,* 677 S. E. 2d 149 (Ga. App 2009); see also, *Moreno* v. *Hanford Sentinel, Inc.,* 91 Cal. Rptr. 3rd 858 (Cal. App. 5 Dist, 2009).

66. See *Abromats* v. *Wood,* 213 P. 3rd 966 (Wyo. 2009); see also, *Joseph* v. *Scranton Time L. P.,* 959 A. 2d 322 (Pa. Super. – 2008).

67. See *Mayweather* v. *Isle of Capri Casino, Inc.,* 996 So. 2d 136 (Miss. App. 2008); see also, *Parrish* v. *Allison,* 656 S. E. 2d 382 (S. C. App. 2007).

68. See *Morgan* v. *Bubar,* 975 A. 2d 59 (Conn. App. 2009); see also, *Alston* v. *PW – Philadelphia Weekly,* 980 A. 2d 215 (Pa. Cmwlth, App. 2009); finally, see *Clark County School Dist.* v. *Virtual Educ. Software, Inc.,* 213 P. 3d 496 (Nev. 2009), in which the Nevada Supreme Court held that an action for defamation required the plaintiff to prove four elements: a false and defamatory statement; 2) an unprivileged publication to a third person; 3) fault, amounting to at least negligence; and 4) actual or presumed damages.

69. See *Hatfield* v. *Health Management Associates of West Virginia,* 672 S. E. 2d 395 (W. Vir. – 2008) and *Smith* v. *Morris, Manning and Martin, LLP,* 666 S. E. 2d 683 (Ga. App. – 2008); see also, *Victoria Bank and Trust* v. *Brady,* 811 S. W. 2d 931 (Tex. 1991).

70. The federal regulations implementing 42 U. S. C. § 290dd-2 are found in 42 CFR Part 35.

71. 45 C. F. R. § 164.502(a).

72. 45 C.F.R. § 160.203 (2003). Note: A state statute is contrary if it would be impossible to comply with both the state statute and with HIPAA, or if state law would be an obstacle to "accomplishing the full purposes and objectives of the Administrative Simplification portions of HIPAA." OCR Summary, *supra* note 8, at 16; 45 C.F.R. § 160.202 (2003). Moreover, the Privacy Rule does not exempt state statutes that are "more stringent." 45 C.F.R. §§ 160.202-.203 (2003). Generally, a state statute is more stringent than the Privacy Rule if it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." *Id*. § 160.202(6).

73. *See* 42 U.S.C. §§ 1320d-5, 1320d-6 (2000).

74. 45 C.F.R. § 160.103 (2003) defines "protected health information."

75. *Id.* § 164.502(b)(1).

76. *Id.*

77. *Id.* § 164.506(b)(1).

78. Under this circumstance, the covered entity may disclose the protected health information in response to a subpoena to the extent authorized by state law if the entity is satisfied that the patient has been notified of the request or that an effort was made to secure a protective order.

79. To understand better the privacy protections under HIPAA, information is available at the United States Department of Health and Human Services website at the following address: http://www.hhs.gov/ocr/privacy/hipaa/understanding/.

80. *Hall* v. *Schaeffer,* 556 F. Supp. 539 (U.S.D. Pa. 1983).

81. *Galvan* v. *Garmon,* 710 F. 2d 214 (5th Cir. 1983).

82. *Anderson* v. *Boyd,* 714 F. 2d 906 (9th Cir. 1983).

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

84. *Semler* v. *Psychiatric Institute,* 538 F. 2d 121 (4th Cir. 1976).

85. *Flores* v. *State,* 904 S. W. 2d 129 (Tex. Cr. App. - 1995), *cert. denied,* 516 U.S.1050 (1996)

86. *People* v. *Beckler,* 459 N.E. 2d 672 (Ill. App. Ct. 1984).

87. *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).

88. *State* v. *Thieme,* 89 Wisc. 2d 287, 278 N. W. 2d 274 (1979).

89. *Cothron* v. *State,* 377 So. 2d 255 (Fla. Dist. Ct. App. 1979).

90. *People* v. *Julye,* 64 A.D. 2d 614, 406 N.Y.S. 2d 529 (1978).

91. *United States* v. *Crocker,* 435 F. 2d 601 (1971).

92. *Pouliot* v. *Hodgdon,* 119 N. H. 437, 402 A. 2d 199 (1979).

93. *McCrady* v. *Mahon,* 119 N. H. 247, 400 A. 2d 1173 (1979).

94. *Bearden* v. *Georgia,* 461 U. S. 660 (1983).

95. http://www.interstatecompact.org/About/History/tabid/58/Default.aspx.

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

97. *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973).

98.http://www.interstatecompact.org/About/History/InterstateCompactFAQs/tabid/57/Default.aspx.

99. A probation or parole officer can access the rules of the compact at the website of the Interstate Commission on Adult Offender Supervision at: http://www.interstatecompact.org/Portals/0/library/legal/ICAOS_Rules.pdf.

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 complete the term of supervision successfully. 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 defined or compelled, 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 challenged successfully on appeal than a special condition.[1] 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 or her well-being or to participate in a particular program or service in order to address a speciety, the condition is likely to be held permissible; 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.[2]

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, both as matters of rehabilitation and practicality. The best time to deal with such issues is before they are imposed. A pre-sentence or pre-parole 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 specific problem or need of his or her. 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 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 so 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.[3] 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 the 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 target of judicial examination recently. In particular, conditions involving reproductive rights; rights of free speech and expression; "scarlet letters", that is, public shaming; the requirement to undergo periodic polygraph examinations and access to computers and the use of the Internet have been subject to judicial scrutiny. 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.[4]

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 vary 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 not enter 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 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, to not seek employment as a bookkeeper. A person convicted of domestic assault may be required, as a condition of probation or parole, from not contacting his or her spouse or other injured family member. Generally, a special condition of probation or parole is only invalid 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.[5]

Considering that more than 5 million adult men and women were on probation or parole at the end of 2006,[6] 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 non-release. This might amount to undue influence or coercion.

Generally speaking, 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.[7]

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 the courts take 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 in regards 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.

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 lost some constitutional rights. Thus determining whether a particular condition is constitutional involves a balancing of the interests of the State and the rights of the offender. In the area of probation law this balance test usually involved three factors: 1) the purpose sought to be served by probation, 2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers and 3) the legitimate needs of law enforcement.[8] Because parolees have already been incarcerated, courts, in reviewing the imposition of conditions of parole, may give much greater deference to the interests of the State than they would in reviewing a condition imposed on a probationer.[9]

In the federal system, generally federal appellate courts will not strike down conditions of release, even if they implicated fundamental rights, if such conditions are reasonably related to the ends of rehabilitation and protection of the public from recidivism.[10] Nevertheless, federal appellate courts do require that the federal district judge imposing the condition specify on the record the reason for doing so.[11] Moreover, whenever fundamental rights are involved, the condition imposed must not deprive the offender of greater liberty than is reasonably necessary to achieve the goals of deterrence, protection of the public, and/or the rehabilitation of the defendant.[12] How 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.[13] Thus probationers and parolees have certain fundamental rights that are not abridged simply because the offenders are on probation or parole.[14] 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 taken up in Chapter 6, Supervision.

In *Sobell* v. *Reed,*[15] a federal parolee asserted that his First Amendment rights had been violated by an action of the Board of Parole. 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.[16] 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 . . . ,"[17] 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.[18]

The second case, *Hyland* v. *Procunier,*[19] 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."[20] 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.
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.[21]

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 only be infringed if the state shows a rational relationship between the restriction on the rights of the individual and a legitimate penological interest on the part of the state (or federal) authorities. For persons with a conditional liberty interest; such as parolees, the state usually must demonstrate a heightened or compelling interest, instead of a more general interest, for curtailing the parolee's liberty. 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,*[22] 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."[23] 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.[24]

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.[25] 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.[26] 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 from engaging in political activity.[27]

Several recent court decisions have examined conditions restricting the First Amendment rights of probationers. In *Commonwealth of Massachusetts* v. *Power,*[28] 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, to not 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.

With the advent of new forms of electronic communication, courts are having to closely examine the propriety and even constitutionality of conditions that limit or even preclude access to certain forms of communication. For example, in *State* v. *Zimmer,*[29] an appellate court in the state of Washington held that the trial court could not impose a condition that the defendant, who was convicted of the offense of possession of methamphetamine, not possess a cell phone or a handheld electronic data device. The court reasoned that the ban on possessing a cell phone or a data storage device was not a "crime related prohibition."* Finally, courts have approval conditions of probation restricting anti-abortion 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, that is, trespassing once again on private property.[30]

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[31] and also to the officer responsible for enforcing the conditions.[32] 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 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. In the absence of clear boundaries, those conditions may be overly vague and broad as to be fundamentally unfair.

Some courts have upheld a condition restricting association if it is not vague under certain circumstances even though it might be construed differently in another situation. For example, in *United*

*For a discussion of conditions restricting access to the Internet, see § II.H.6 of this Chapter.

States v. *Schave,*[33] the defendant, a white supremacist, was convicted of unlawful possession of an unregistered destructive device. As a condition of release after serving a term in prison, the defendant was ordered not to associate "with organizations that, or their members who, espouse violence or the supremacy of the white race." The defendant argued that this condition was impermissibly vague and unconstitutional because the wording of the condition could include not just a prohibition against participating with white supremacist organizations but also could preclude the defendant from associating with any group, even a legitimate group such as the United States military that espoused violence.

The appellate court affirmed that a condition of supervised release is unconstitutionally vague if it would not afford a person of reasonable intelligence sufficient notice as to the conduct prohibited. The court noted that the contested condition in *Schave* could be construed so the defendant would be in violation of it if he associated with an individual who, unbeknownst to him, belonged to a white supremacist organization or if the defendant associated with an organization that, even though it advocated violence, was not a white supremacist organization. Despite these ambiguities stemming from the wording of this particular condition, the appellate court held that this condition could be reasonably construed as limiting the defendant's associational rights to groups that both espoused violence and were white supremacist organizations. As such the appellate court upheld this condition.

Another recent court decision examining the propriety of imposing a condition limiting the association of the defendant with gang members is *United States* v. *Soltero.*[34] In this case the defendant was convicted of the offense of being a felon in possession of a firearm. He was sentenced to 72 months in prison followed by three years of supervised release. Among the condition of release imposed by the trial court were the following:

- "not be present in any area known as a criminal street gang gathering of the Delhi, as directed by the Probation Officer."
- "not wear, display, use or possess any insignia, emblem, button, badge, cap, hat, scarf, bandana, jewelry, paraphernalia, or any article of clothing which may connote affiliation with, or membership in the Delhi gang."

The defendant appealed the imposition of these two conditions of release. Clearly these conditions adversely impacted his First Amendment rights of free expression and association. Moreover the appellate court noted that restrictions infringing upon fundamental rights must be reviewed carefully. Nevertheless the appellate court upheld that imposition of these conditions, noting that since they specifically referenced the "Delhi gang" and the defendant had admitted that he was a member of this gang, that the district court was entitled to presume that the defendant was familiar with the Delhi gang's members, its places of gathering and its paraphernalia and therefore these conditions were not impermissibly vague.

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.[35] However, in the context of probation or parole matters, 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.[36]

One area of recent litigation and of particular concern for probation and parole officers regards 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,*[37] 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.[38]

In a more recent opinion, another federal court of appeals held that a parole officer could be sued for requiring a parolee, despite his religious objects, to attend a substance abuse treatment program that had participating in AA/NA as one of its components. In *Inouye* v. *Kemna*[39] the offender, a Buddhist who had a methamphetamine addiction, had been sentenced to prison in Hawai'i and subsequently paroled. As one of his conditions of parole, the parole authority authorized his parole officer to order him into a drug treatment program. Through his attorney, the parolee had informed the Hawai'i Parole Authority of his opposition to being placed in a religious-based narcotics treatment program as a condition of his parole.

Initially, the parole officer did not require the parolee to attend a drug treatment program. However the parolee was subsequently arrested for trespassing and tested positive for drug use. The parole officer then ordered him to attend the Salvation Army's Addiction Treatment Services, which entailed requiring him to participate in AA/NA meetings. The parolee eventually refused to participate in the program and was terminated from it. This in turn led to the parole officer issuing a warrant for his arrest and formed the basis of the reason for the revocation of his parole.

The parolee filed a civil suit under 42 U. S. C. § 1983, contending that his placement in the AA/NA program and his termination from parole for refusing to participate in the program violated his First Amendment rights. There was no dispute by either party in this lawsuit that the AA/NA program was not a religious based program since the basis of AA/NA was rooted in a regard for a "higher power" and therefore it was uncontested that requiring a parolee to attend religion-based treatment programs violated the First Amendment. The court further noted that there was no evidence in this case that the parolee had ever been told that he had a choice of programs. Nevertheless the parole officer still argued that he was entitled to qualified immunity and that he could not be sued for his actions.

Although the Federal District Judge ruled in the parole officer's favor, when this case was appealed, the Ninth Circuit Court of Appeals noted that qualified immunity from civil suit is available to government officials performing discretionary duties only "insofar as their conduct does not violated clearly established statutory or constitutional rights of which a reasonable person would have known."[40] The Ninth Circuit examined various court decisions in other federal courts of appeals and by state appellate courts regarding this matter. The court determined that there was almost total unanimity by the

courts that had examined this issue that requiring a offender to attend AA/NA meetings regardless of the person's religious objections violated the First Amendment to the Constitution. As such the Ninth Circuit Court of Appeals held that official immunity was not available to the parole officer in this case.

These decisions pose a vexing dilemma for probation and parole officers. It is evident that if a supervision officer on his or her own requires a probationer or parolee, despite the religions concerns expressed by that individual, to attend a religion-based treatment program, that supervision officer can be found liable for violating the constitutional rights of the offender. However assuming that a trial judge or parole board expressly requires, as a condition of release, that a probationer or parolee to attend a religious-based treatment program, what is the liability for the officer in enforcing that condition? The trial judge or parole board can probably escape liability by claiming judicial or quasi-judicial immunity.[41]

However, can the supervision officer enforcing that condition claim derivative judicial immunity? While it is possible that a claim of derivative judicial immunity could be recognized in a civil action alleging a deprivation of a constitutional right by the enforcement of an invalid or improper condition of supervision, it cannot with any certain be stated that this would be the case.[42] Instead it is recommended that if a court or parole board imposes a condition of supervision requiring a probationer or parolee to participate in a religious-based treatment program, that the officer inform the offender that the particular program in which he or she has been order to participate has a religious component to it. Then if the offender voices no objection to participating in the program, the officer can impose a sanction for failure to attend and the offender cannot at that point argue that the officer cannot impose a sanction for past violations because he or she now has a religious objection to attending the program. However, if the offender is informed of the religious nature of the program and voices an objection to participating, then the officer should offer the offender an alternative secular program. Finally if the offender voices an objection to attending a religious-based treatment program, the officer should inform the court or parole board and request that the conditions be amended to require the probationer or parolee to participate in a secular-based treatment program."

D. Privacy

The right of privacy has been the basis of arguments challenging conditions that restrict relationships with a family member,[43] prohibit child-bearing,[44] and limit sexual intercourse.[45] A condition is not invalidated merely because it invades the fundamental right to privacy. However the state generally must demonstrate a compelling, as opposed the 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.

Interestingly, several court decisions have approved conditions requiring a defendant to inform a person of his criminal status if he intends to engage in intimate relations with that other person. In *State ex rel Kaminski* v. *Schwarz,*[46] the appellate court affirmed the decision of the trial court revoking the defendant's probation for refusing to comply with a condition requiring him to inform his probation officer before beginning an intimate relationship with another person so that the probation officer could ensure that the other person knew that the defendant was a convicted sex offender. Moreover in *State* v. *Autrey*[47] a defendant convicted of rape of a child was ordered, as a condition of community custody to 1) not have sexual contact with anyone without his or her explicit consent and 2) not have sexual contact with anyone without prior approval of his therapist and his community corrections officer. The appellate court, in upholding the imposition of these two conditions, determined that they were valid crime-related prohibitions because even choosing an adult sexual partner was reasonably

related to his crime due to the fact that "potential romantic partners may be responsible for the safety of live-in or visiting minors.

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 child-bearing 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.[48] 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,*[49] 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, that is, 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*[50] 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*[51] an Illinois appellate court invalidated a condition prohibiting a probationer from engaging in any activity with the reasonable potential of causing pregnancy on the grounds that a state statute forbad a court from ordering a probationer to use a form of birth control as a condition of probation. In *United States* v. *Smith,*[52] United States Eighth Circuit Court of Appeals struck a condition that prohibited a probationer from conceiving another child other than to his wife. Finally, in *Trammell* v. *State,*[53] the appellate court held that the trial court could not impose a condition that the defendant not become pregnant.

Only a couple of appellate courts, however, have affirmed a trial court's decision to order a probationer not to conceive a child as a condition of probation and in each of these cases the defendant had been male. In *State* v. *Kline,*[54] 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.

One other appellate court has upheld a condition restricting the right of a father to procreate. In *State* v. *Oakley,*[55] the defendant was convicted of criminal nonsupport and placed on probation for five years. The trial court noted that the defendant had had nine children, none of which he had supported, that his refusal to pay child support was long running and intentional and that he had had a history of criminal incidents. Therefore as a condition of probation the trial judge ordered "while on probation, the defendant cannot have any more children unless he demonstrates that he had the ability to support them and that he is supporting the children he already had."

The defendant appealed the imposition of this condition. Nevertheless the Wisconsin Supreme Court concluded that in light of the defendant's ongoing victimization of his nine children and the extraordinary troubling record manifesting his disregard for the law, this anomalous condition imposed on a convicted felon facing the far more restrictive and punitive sanction of prison was not overly broad and was reasonably related to the defendant's rehabilitation. Moreover the court stated that because the defendant could satisfy this condition by not intentionally refusing to support his current nine children and any future children as required by law, this condition was narrowly tailored to serve the State's compelling interests of having parents support their children and on rehabilitating the defendant through probation rather than prison. Nevertheless in its re-hearing of this matter the court stressed that this holding was based on extraordinary circumstances and was reasonably related to the offense for which the defendant was convicted.

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, underlining 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. Territorial Restrictions and Travel

Another non-specific, but important, right protected by the Constitution concerns travel or to reside in a place of one's own choosing. Banishment conditions, when challenged, are usually invalidated as against public policy and as not related to the offense.[56] Nevertheless banishment generally entails being ordered to leave the country or an entire state.[57] Geographical restrictions as a condition of release that are less than banishment are not per se unconstitutional. Instead each case must be analyzed on its own facts, circumstances and total atmosphere to determine whether the geographical restriction is narrowly drawn.[58]

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 Custom Enforcement (formerly the United States Immigration and Naturalization Service) to make that determination.[59] One example of a court

decision disallowing a deportation condition is *State of Utah* v. *Arviso.*[60] In this case, a Utah appellate court held that the trial judge's order that a defendant not return to the United States after he had been deported contravened the Supremacy Clause of the United States Constitution since it was exclusively within the authority of the United States Congress as delegated to the [then] Immigration and Naturalization Service to determine whether a person could or could not enter into the United States.

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,*[61] 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 the offender's speech, then the court would have more closely scrutinized the action of the parole board.

The limitation on travel within a city or region may survive where firmly linked to rehabilitative goals, 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.[62] Thus in *United States* v. *Sicher*[63] an appellate court upheld the order of a federal district court that as a condition of supervised release, the offender could not enter Lehigh and Northampton counties, in Pennsylvania, without permission from her probation officer. The appellate court found that there was ample evidence that if the defendant were to return to the location and associates that shaped her youth, she would be extremely likely to return to a life of crime. Since this territorial limitation was clearly intended to promote her rehabilitation by keeping her away from the influences that would most likely cause her to engage in further criminal activity, the court held that the imposition of this condition was proper.

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. For example, in *State* v. *Moody,*[64] the Montana Supreme Court upheld a condition that the probationer not leave her assigned district without permission from her probation and parole officer. In addition, a probationer or parolee does not have a right to travel or relocate to another state. Depending on whether the probationer or parolee is eligible under the rules of the Interstate Commission for Adult Offender Supervision, in which all fifty states and almost all of the territories and possessions of the United States are members, a person convicted of a criminal offenses in one state may or may not be entitled to transfer to a different state. Also, the use of the Interstate Compact in order to determine whether a state will provide courtesy supervision for a probationer or parolee convicted in another state does not constitute banishment.[65]

Geographical restrictions imposed as a condition of supervision may be deemed unreasonable in light of its breadth and purpose. In *State* v. *Franklin,*[66] a defendant, who lived in St. Paul, Minnesota, was ordered as a condition of supervision to not enter the city of Minneapolis, St. Paul's neighboring city. The purpose of this condition was to keep the defendant from visiting a certain apartment complex located in Minneapolis, the site where the defendant had been involved in several domestic incidents. The defendant appealed, arguing that it was unduly restrictive. The Minnesota Supreme Court noted that while geographical exclusions were not presumptively invalid, the court must consider the exclusion in relation to the purpose sought to be achieved.

In this case, the court noted that the effect of this condition was to preclude the defendant from engaging in certain activities in Minneapolis, such as attending church services, that the defendant had been accustomed to doing. In addition, the court noted that this condition was much broader than it needed to be to achieve the purpose of preventing the defendant from visiting the apartment complex. Given the condition's potential infringement on the defendant's fundamental rights and the

paucity of justification for that infringement, the court concluded that an insufficient nexus existed between the exclusion from Minneapolis and the defendant's rehabilitation or the preservation of public safety.

G. Self-Incrimination

Conviction does not void or lessen a person's constitutional right not to testify against him or herself. Thus, a condition of supervision that required a probationer or parolee to waive his or her Fifth Amendment right against self-incrimination would be invalid.[67] Under some circumstances appellate courts have upheld a condition that required a probationer or parolee to report certain information to the government. Whether such self-reporting constitutes an infringement of the individual's constitutional right against self-incrimination depends on three factors: 1) whether the information is compelled, 2) whether the information is incriminating and 3) whether the individual invokes the right against self-incrimination.

Two courts of appeals, examining probation conditions regarding self-disclosure on tax returns, clarified under what circumstances a probationer could be required to furnish incriminating information about him or herself. In *United States* v. *Conforte,* a probationer was ordered to file tax returns without claiming her Fifth Amendment privilege.[68] The district court had reasoned that since the defendant had now been convicted of tax evasion and the only incriminating evidence found in a tax return would relate to tax matters, filing a completed and accurate tax form would not entail the defendant furnishing incriminating evidence to the government. The appellate court, in rejecting the reasoning of the district court and striking down this condition, observed that a tax return potentially contained evidence that would incriminate a defendant not just for tax matters but also for other criminal offenses, such as illegal gambling, prostitution, and so forth.

In *United States* v. *McDonough,* a probationer was ordered to file amended tax returns.[69] However, the court did not specify that the defendant furnish complete and accurate information on the return, nor that he waive his Fifth Amendment right against self-incrimination. In this case, the appellate court upheld the imposition of the condition. The appellate court noted that this condition did not compel the defendant to report incriminating evidence to the government, nor to waive his right against self-incrimination. Instead the probationer could still invoke his Fifth Amendment right and refuse to answer certain questions on the tax return that he might consider incriminatory. As such the mere filing of a tax return could not be considered compelled testimony.

In *Minnesota* v. *Murphy,*[70] 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, that is, a probation officer, could ask an incriminating question to a probationer and the probationer, if he or she voluntarily answered the question, would waive 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 at the time the defendant was in his probation officer's office, he was not under any form of custody. 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 compliant 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 . . . ."[71]

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."[72]

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 when confronted with this issue than it has aided them.[73] Thus courts have struggled with the issue 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 him 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.

Since the decision in *Murphy,* several courts have examined the unresolved question concerning whether a refusal to answer an incriminating question that would link the probationer to another

crime could be grounds to revoke his or her probation or parole. This dilemma in which the defendant is compelled to answer a question which, if he or she complies with the demand, may lead to a prosecution for a new criminal offense and the refusal to do so may lead to a revocation of the person's probation or parole is referred to as a "classic penalty situation" or "penalty case." Two recent court decisions that have examined whether the imposition of a certain condition may create an unacceptable penalty situation are *Chapman* v. *State*[74] and *United States* v. *Antelope.*[75]

In *Chapman* v. *State,* the defendant had been granted probation for a term of ten years after having been charged with two offenses of indecency with a child. As a condition of the defendant's probation, he was required to attend a Sex Offender Treatment Program (SOTP), to "participate in and comply with all treatments, guidelines, and direction given by the sex offender therapist," and also to attend a group therapy program for offenders administered by Child Protective Services (CPS).

During therapy the defendant told his group therapist and therapy group that he had sexually molested two other young girls prior to the two offenses for which he was placed on community supervision. The therapist relayed this admission to the defendant's supervision officer and at his next regular report when asked about this admission by his officer he confirmed that he had made this admission. The probationer even gave the girls' names and contact information to his supervision officer. The officer conveyed all this information to the police and they were able to contact the victims and get verification that the defendant had sexually abused these other girls.

Based on the subsequent investigation the defendant was charged with two other acts of indecency with a child. The defendant sought through a motion to have his statements suppressed at the second trial on the grounds that he had not been given his *Miranda* warnings prior to making his admissions in group therapy. The trial court denied his motion and the defendant thus entered a plea of guilty to the two new charges. This time the trial court sentenced him to twenty years in prison.

The defendant appealed his conviction, arguing that under the terms of the conditions of community supervision imposed by the trial court he was forced to choose between waiving his right against self-incrimination and admitting to other criminal offenses or suffering revocation because he had refused to cooperate with the sex offender treatment program. The Texas Court of Criminal Appeals, in reviewing this matter stated that the critical question was whether the defendant affirmatively invoked his right against self-incrimination, and if not, whether the facts in this case fell within "the classic penalty situation" exception, that is, where a person is threatened with punishment for relying upon his Fifth Amendment privilege, which would relieve him of the responsibility to affirmatively assert his Fifth Amendment privilege.

The Texas Court of Criminal Appeals noted that all parties agreed that the defendant had not affirmatively invoked his right against self-incrimination when he made the criminal admissions. The Court then proceeded to conduct a thorough analysis regarding whether undue forced had been applied to the probationer to make incriminating statements against his will. The Court initially determined that state authorities did not expressly or implicitly convey that the defendant's probation would be revoked if he chose to invoke his Fifth Amendment privilege. Moreover the Court stated that there was no evidence that the therapist had indicated that he would automatically drop the defendant from the treatment program (and thus, jeopardize his conditional liberty) if he refused to answer a direct question about uncharged criminal conduct.

However, more importantly, the Court observed that the therapist never asked the defendant directly about his sexual history. Instead, the Court noted that the defendant testified that he approached the therapist with this information. Moreover, the Court stated that the record showed that the defendant testified that he was motivated to reveal this incriminating information in the hopes that the young victims could be identified and helped to overcome the trauma they had suffered by his acts. Since there was ample evidence in the record to support the trial court's implicit finding that the defendant

was compelled to speak by his own conscience, and not by any explicit or implicit external threat of punishment, the Texas Court of Criminal Appeals held that since the defendant did not affirmatively invoke his Fifth Amendment right against self-incrimination, the trial court did not err in denying his motion to suppress his voluntary statements to his therapist, his probation officer, and the police.

Nevertheless another appellate decision in the federal court system found that the enforcement of a treatment condition could result in a defendant being compelled to incriminate himself. In *United States* v. *Antelope,* the defendant pleaded guilty to possession of child pornography and was sentenced to five years probation. One of the conditions that the district court imposed on the defendant was a requirement that he participate in a Sexual Abuse Behavior Evaluation and Recovery (SABER) program.

One of the requirements for successfully completing the SABER program was for the probationer to detail his sexual history. The probationer refused to comply with this requirement, contending that to do so without any assurance of immunity created the risk that he would reveal past crimes and his admissions could then be used to prosecute him. The district court did not agree with his contention and on two occasions revoked his probation for failure to give a detailed sexual history as part of his treatment. Finally the Ninth Circuit Court of Appeals examined his contention that the government violated his Fifth Amendment right when it conditioned his probation and supervised release on the submission of a sexual autobiography.

The appellate court stated that to establish a Fifth Amendment claim, the defendant must prove two things: 1) that the testimony desired by the government carried the risk of incrimination and 2) that the penalty he suffered amounted to compulsion.[76] Moreover the Court observed that the Fifth Amendment privilege was only properly invoked in the face of "a real and appreciable danger of self-incrimination." It could only be invoked when the threat of future criminal prosecution was reasonably particular and apparent and if the threat were remote, unlikely, or speculative, the privilege did not apply.[77] In this case the Court concluded that the probationer's risk of incrimination was "real and appreciable" and that his successful participation in the SABER program would trigger a real danger of self-incrimination.

The appellate court next examined the second prong of the self-incrimination inquiry, to-wit: whether the government had sought to "impose substantial penalties because he elected to exercise his Fifth Amendment right not to give incriminating testimony against himself." The Court, noting that the defendant's probation had already been revoked twice for refusing to detail his sexual history as part of his treatment, held that his privilege against self-incrimination was violated because he was sentenced to a longer prison term for refusing to comply with SABER's disclosure requirements.[78]

Several appellate courts have addressed the another outstanding issue left undecided in *Minnesota* v. *Murphy,* to-wit: 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? It appears that most courts that have examined this issue have concluded that, unless the question posed to the probationer concerning a violation of a condition of release would elicit an admission to a new criminal offense, the probationer cannot invoke his Fifth Amendment privilege and refuse to answer a question concerning whether he or she violated a condition of probation or parole.

Thus in *United States* v. *Locke,*[79] a defendant convicted of possession of child pornography was required as conditions of probation to "answer truthfully all inquiries by the probation officer and follow the instructions of the probationer officer" and to "participate in a sex offender treatment program which may include the application of physiological testing instruments to determine appropriate treatment." Prior to undergoing a polygraph examination, the defendant had admitted that he had used his

wife's computer to access the Internet to view erotic stories in violation of one of the conditions prohibiting him from "viewing, possessing, or obtaining pornography in any form."* This admission in turn lead to the probation officer obtaining the district court's approval to conduct a forensic search of the defendant's wife's computer, the analysis of which revealed downloaded erotic stories and images of adult pornography. Based on these facts the defendant's probation was revoked and he was sent to prison.

The defendant argued that the probation condition requiring his participation in a treatment program that included polygraph testing violated his Fifth Amendment right against self-incrimination. The Court concluded that the probationer's Fifth Amendment right had not been infringed, since the questions posed to him as part of the polygraph examination attempted to ascertain whether he had violated conditions of his probation and the probationer's answers could not serve as a basis for a future criminal prosecution. The Fifth Circuit Court of Appeals held that a probationer could only invoke his Fifth Amendment privilege if a truthful answer would incriminate the probationer by exposing him to prosecution for a different crime.

Other courts have reached the same conclusion as the Fifth Circuit Court of Appeals in *Locke*. In *State* v. *Uhlig,*[80] a Kansas appellate court held that a probationer may be required to answer questions concerning matters relevant to probation that pose no realistic threat of incrimination in a separate criminal proceeding. In *Perry* v. *State,*[81] a Florida appellate court held that the State could call a probationer in a revocation proceeding as a witness and the probationer could not refuse to answer a question just because the answer would disclose a probation violation that did not elicit information regarding conduct or circumstances that constituted a separate criminal offense. Finally, in *Packer* v. *State,*[82] an Indiana appellate court held that while the Fifth Amendment protects a probationer from answering questions that may incriminate her in a subsequent criminal prosecution, she may not invoke the Fifth Amendment in a revocation proceeding to avoid answering question regarding "basic identifying information and any disclosures which are necessary to effectively monitor her probation."

H. Some Specific Conditions and Their Legal Effect

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. In addition, since the early 1990s public notification laws have been enacted throughout the country in order 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 be 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 oft times the identify of these offenders, including their photograph, and a description to the crime they committed, are made public, either through a newspaper or a website 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,*[83] 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

*For a more in depth discussion of legal issues involving the administration of polygraph examinations as a condition of supervision, see § II.H.2. of this Chapter.

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,*[84] 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,*[85] 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,*[86] a trial court ordered a defendant to erect at his home a four foot by eight foot sign with eight 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,*[87] 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 whether a state legislature could amend its probationary statutes and authorize a trial court to impose a scarlet letter condition. However one 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

Over the last decade the imposition of certain conditions of release requiring a probationer or parolee to submit to a polygraph examination has become quite widespread in both federal and state courts. This condition is especially utilized 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. Even though courts in a number of jurisdictions have approved the use of polygraphs as a condition of release, courts have not necessarily approved the 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 state court case that has approved its use for all of the above stated purposes is *Ex parte Renfro.*[88] 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 six 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.

Even though numerous jurisdictions now allow the imposition of a polygraph examination as a condition of supervision, courts have been hesitant in allowing the use of its results in a revocation proceeding. In *Carswell* v. *State,*[89] the appellate court stated that although a defendant could be required to submit to a polygraph examination as a condition of probation, he could not be forced to agree to stipulate that the results be admissible in a subsequent court proceeding. Moreover in *Wright* v. *State,*[90] a Texas appellate court held that while admissions made to a polygrapher's pretest interview were admissible, evidence that these admissions were obtained in the course of polygraph examination were inadmissible. Thus, while certain admissions against penal interests such as oral confessions that the defendant had committed a new crime made during a pretest interview, during the polygraph examination itself, or during an interview after the examination may be admissible in a further court proceeding, it cannot be explained that these admissions were obtained pursuant to a polygraph examination.

A probationer or parolee who has been ordered to submit to a polygraph examination is not entitled to be administered a *Miranda* warning prior to being questioned. In *Arizona* v. *Levens,*[91] the defendant had been convicted of two counts of sexual conduct with a minor and placed on probation for ten years. As a condition of probation the Court required the defendant to "submit to any program of psychological or physiological assessment . . . including but not limited to . . . the polygraph, to assist in treatment, planning and case monitoring."

During the pre-test interview of the polygraph examination, the defendant admitted having firearms in his home. The polygrapher told the probationer's supervision officer about this statement and the officer subsequently conducted a search of the defendant's home and found four firearms and ammunition. The officer then proceeded to initiate a motion to revoke probation. The defendant filed a motion to suppress, arguing that the statements he made as part of the pre-test examination should not have been used to form the basis of the search of his home because he had not received his *Miranda* warnings prior to being questioned by the polygrapher.

The appellate court that considered this issue noted that requiring a probationer to provide certain information and to answer certain questions as part of a polygraph examination did not differ from a probationer reporting to his or her supervision officer and providing this same information or responding to questions elicited by his or her officer. Moreover the Court noted that there was no requirement to administer *Miranda* warnings prior to being questioned by the person's supervision officer about compliance with the conditions of probation. Finally the Court noted that the probationer did not argue that the interview took place while he was in police custody. Accordingly the Court held that the failure to administer the probationer's *Miranda* warnings was not determinative to the

admissibility of the statements he gave to the polygrapher and that formed the basis of the search of his home.

Courts have also held that the requirement that a probationer or parolee submit to a polygraph examination as a condition of release does not constitute a requirement that the individual waive his or her Fifth Amendment rights against self-incrimination. In *United States* v. *Lee*[92] the defendant pleaded guilty to knowingly transporting child pornography by a computer and possessing child pornography. The defendant was sentenced to 57 months incarceration followed by supervised release for three years. Among the conditions of release imposed by the district court was that the defendant "submit to random polygraph examination, examination to be administered by a certified examiner at the direction and discretion of the United States Probation Officer."

The defendant appealed the imposition of this condition, arguing that the condition violated his Fifth Amendment right due to the potential for self-incrimination. The appellate court observed that the Fifth Amendment is not infringed upon when a person on supervised release is asked during a polygraph examination about his compliance with a release condition, and the violation of that condition could not serve as the basis for a future criminal prosecution. Moreover, the appellate court noted that this condition did not require him to answer incriminating questions. Instead the Court stated that if a question were asked during a polygraph examination that called for an answer that would incriminate the defendant in a future criminal proceeding, the defendant still retained the right to invoke his Fifth Amendment privilege and remain silent. As such the Third Circuit Court of Appeals upheld that district court's imposition of this particular condition.[93]

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. Worker's compensation protection may not apply to volunteers. Ohio[94] requires offenders to pay a fee for liability insurance. Minnesota statutorily covers probationers under a state compensation plan for injured workers.[95] Texas, on the other hand, specifically excludes probationers performing community service from workers compensation coverage.[96]

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.

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. Nevertheless individual liability may be incurred for incidents arising in the supervision of community service or if the probation or parole officer exercises his or her discretion in the selection of a community service program or work site. Generally whether an officer would be liable or not would largely be determined by state law. Under most state laws officers in performing their discretionary acts would have either absolute or qualified immunity or the discretionary act would have to be performed with conscious indifference or have

*See Chapter 5 for a fuller treatment of specific tort liabilities.

constituted gross negligence.[97] It would be less likely for an officer to be found liable for an act of simple negligence.

4. Waiver of Extradition

Even though a jurisdiction may be permitted to allow a probationer or parolee to move to another state, the defendant may have to relinquish another constitutional right – that of contesting an extradition proceeding. In *Goode* v. *Nobles*[98] the defendant was placed on probation in the state of Colorado but granted permission to live in the state of Georgia. Nevertheless, as a condition of being allowed to move out of the state, the defendant was required to waive extradition if the state of Colorado ever wanted the defendant to return. The defendant agreed to the waiver, moved to Georgia and then violated the conditions of probation.

The state of Colorado issued a warrant for his arrest. The defendant argued in Georgia that his waiver of extradition was invalid because he did not voluntarily sign it. The Georgia Supreme Court approved the state of Colorado's action requiring the defendant to sign a waiver of extradition. Since the state of Colorado did not have to allow him to move to Georgia but did so as an act of grace, the Court concluded that the defendant could be required to waive extradition if he were ever summoned back to the state of Colorado.

In another court decision, a court in New York found that a requirement that a parolee waive extradition as a condition of release did not contravene the provisions of the Uniform Criminal Extradition Act (UCEA), which governed extradition proceedings between the various states. In *People* v. *Gordon,*[99] the offender, who had been an inmate in a New York State Correctional facility, was required to sign a Certificate of Release to Parole Supervision which included a condition that expressly waived his right to resist extradition. After the offender had been paroled, he was suspected of several homicides in New York. A year after the occurrence of these crimes, he was arrested by the Memphis, Tennessee police authorities and based on the waiver of extradition, returned to the State of New York.

Both the states of Tennessee and New York had adopted the UCEA. The parolee argued in a court in New York that the required waiver of extradition as a condition of parole violated the terms of the UCEA. The Court that reviewed this matter determined that the statutory procedures of the UCEA were not exclusive and waivers of extradition need not conform strictly to the procedures set forth in the UCEA.[100] The Court further noted that prior to his release the parolee signed the waiver of extradition after each and every aspect of it had been explained to him by his parole officer. The Court stated that when the inmate chose to sign the waiver, the benefit derived was that his status would become that of a parolee and not an inmate, for had he chosen not to sign the waiver, he would not have been released. Since the choice was his to make, the Court determined that the waiver was voluntarily and knowingly made and therefore valid.[101]

5. Sex Offender Registration Requirements

As mentioned earlier, one of the more notable developments in criminal justice during the last several decades has been the enactment of sex offender registration laws. These state and federal enactments, collectively known as Megan's Law, were named after a seven-year-old girl who was kidnapped from her home in New Jersey in 1994 and was brutally raped and murdered by a neighbor who was a twice convicted sex offender. When it was later discovered that neither the family of Megan nor the residents in the neighborhood were aware that a sex offender was living in their midst, there was an outcry that notification laws be enacted informing neighborhoods of the presence of sex offenders.[102] Under some states' Megan's Law, courts are authorized, or even mandated, to

require a probationer or parolee to register as a sex offender as a condition of supervision. Occasionally, the court or parole board may require a person, whose conviction does not fall within the list of sex offenses necessitating registration or whose offense is not a sex crime, nonetheless to register as a sex offender as a condition of probationer or parole. Appellate courts throughout the country are wrestling with the legality of requiring individuals to register for crimes that either are not sex offenses or do not come under the legislative list of sex offenses for which registration is required.* However with the enactment of the federal Sex Offender Registration and Notification Provisions of the Adam Walsh Child Protection and Safety Act of 2006 state registration requirements are now much more uniform.

In State of *Connecticut* v. *Misiorski,*[103] the defendant was placed on probation for the offense of sexual assault in the fourth degree and public indecency. A conviction of sexual assault in the fourth degree did not require registration as a sex offender under Connecticut law. Nevertheless the judge authorized the adult probation department to notify the defendant's neighbors and fellow bowling league participants of the defendant's conviction. The defendant contested the authority of the trial judge to permit notification under these circumstances. Although the Connecticut Supreme Court noted that Connecticut law did not require a fourth degree sex offender to register, the court read the state's Megan's Law expansively. The court held that the purpose of Megan's Law supported its view that the sex offender notification statute did not limit the authority of the office of adult probation to notify the community in cases such as this one.

While appellate courts can find greater justification in interpreting their applicable sex offender registration laws to include sex offenses that are not enumerated as registered offenses, it is more problematic when examining an order of a trial judge requiring a person convicted of a non-sex offense to still register as a sex offender. Whether an appellate court would uphold such a condition depends, in part, on whether there is statutory authority allowing a trial court or parole board to impose a registration requirement on an offender who was not convicted of a sex offender or whether the trial court or parole board is simply relying on its general authority to impose conditions of release when requiring a probationer or parolee not convicted of a sex offense to register as a sex offender.

For example, the courts in the state of Washington have held that a special condition of supervision cannot be imposed unless said condition is directly related to the criminal behavior at issue.[104] In *Speth* v. *State,* a Texas appellate court disallowed the imposition of certain sex offender conditions on a defendant who had been placed on probation for aggravated assault and subsequently acquitted of a sex charge in a different trial. The court reasoned that the imposition of sex offender conditions for a person who had been acquitted of the charges would constitute punishment for a crime for which the defendant had been exonerated.[105]

Other jurisdictions may allow a more liberal application of conditions that are not directly related to the criminal offense for which the defendant was placed on probation. For example, appellate courts in the state of Florida have held that general conditions may be imposed as long as they "are rationally related to the state's need to supervise the defendant, regardless of whether they are reasonably related to the defendant's offense or restrict conduct which is not itself criminal."[106] Nevertheless, whether certain courts in the country would extend the reasoning of Florida courts regarding general conditions to a very special condition, such as registering as a sex offender, is unsettled. Moreover, as noted later in this chapter, even if an appellate court so permitted, there would still be due process issues involving proper notice, an opportunity to present contravening evidence, proportionality between the culpable state of the offender and the severity of the imposed condition, and so forth.

*For a fuller discussion of determining an offender's status in order to require the individual to register as a sex offender, see § VII of this Chapter.

6. Restrictions on Access to Computers and the Internet

One of the most significant societal changes that has occurred in the last fifteen years is the widespread availability of the Internet and the increasing reliance on computers for purposes of communicating with others, accessing information, and even conducting business transactions. Moreover, the Internet has become an indispensible tool in the workplace for a great number of persons. In addition by creating new jobs in sales, repair, information systems maintenance, and software development computer technology has become a major source of employment in this country. Not surprisingly, conditions of release limiting access to the Internet, restricting the use of new types of online communication, such as e-mails and chat rooms, and curtailing the use of computers have become the subject of new litigation with courts at both the federal and state level having to grapple with the implications of orders abridging access to these emerging forms of computer technology. Furthermore, in considering this matter, Courts have had to decide whether to uphold a complete ban on access to the Internet and use of computers, allow the use of computers but uphold a ban on access to the Internet, or allow limited use and access to both computers and the Internet.

In order to better understanding this topic, this section will examine holdings by federal appellate courts followed by an examination of holdings by various state appellate courts. One of the first federal appellate courts to review the propriety of imposing a restriction on the use of computers and access to the Internet was the Second Circuit Court of Appeals. In *United States* v. *Peterson,*[107] the defendant entered a plea of guilty to the federal offense of bank larceny and was sentenced to five years on probation. The defendant had also had an unrelated New York state conviction for a sex offense. One of the conditions of probation imposed by the district court was banning his ability to possess or use personal computers or the Internet and only allowing him to use a commercial computer if approved by his probation officer. The defendant appealed the imposition of this condition.

The Second Circuit Court of Appeals stated that the district court could not impose a ban on computers or the Internet because the defendant had had a previous state conviction for a sex offense. The Court noted that there was no indication that the defendant's past crime of incest had had any connection to computers or to the Internet. Moreover the Court noted that computers and Internet access had become virtually indispensable in the modern world of communications and information gathering. By way of analogy, the Court emphasized that a person convicted of fraudulent transactions via a telephone could not have a condition imposed banning that individual from using the telephone and a person convicted of possession of pornography could not have a condition imposed banning him from access to all books, magazines, and newspapers. As such the Court concluded that this restriction was overbroad and therefore was not reasonably related to the defendant's offense or his history and characteristics.

Two years after rendering the decision in *United States* v. *Peterson,* the Ninth Circuit Court of Appeals examined this same issue. In *United States* v. *Rearden,*[108] the defendant was convicted of shipping child pornography in interstate commerce. He was sentenced to 51 months in prison followed by a term of supervised release. One of the conditions of release that the district court imposed on the defendant was that the defendant be prohibited from possessing or using a computer with access to any online service at any location without prior approval of the probation officer. The defendant appealed this condition, arguing that it was unreasonable, impermissibly vague, and overbroad.

The Ninth Circuit Court of Appeals recognized the importance of the Internet for information and communication, but nevertheless disagreed that the condition was plainly impermissible in the defendant's case. The Court reasoned that because the condition provided that the defendant could have access to the Internet with the approval of his probation officer, this condition left open the possibility of appropriate access. The Court further stated that because the defendant's offense involved e-mail

transmissions of quite graphic child pornography and one of the important goals of supervised release was to deter the defendant from reverting to similar conduct, it found that this condition did not plainly involve a greater deprivation of liberty than was reasonably necessary. Thus the Ninth Circuit Court of Appeals upheld the condition prohibiting access to the Internet because it did not constitute a complete ban.

In the same year that *United States* v. *Rearden* was decided, the Eighth Circuit Court of Appeals also examined this issue in two holding. In *United States* v. *Ristine,*[109] the defendant pleaded guilty to one count of receiving child pornography. He was sentenced to 27 months in prison followed by three years of supervised release. One of the conditions of release allowed the defendant's probation officer to permit him to possess a computer, but the defendant had to consent to periodic unannounced examinations and inspections of his computer as well as to the installation of hardware or software that monitored his computer use. Moreover this condition stated that even if the defendant were permitted to have a computer, he could still not have Internet service at his residence.

The Eighth Circuit Court of Appeals based its holding in *Ristine* on a decision it had rendered earlier in the year. In *United States* v. *Fields,*[110] the defendant had been convicted of selling child pornography. As with *Ristine,* a nearly identical condition of release had been imposed restricting his access to the Internet. In both *Ristine* and *Fields,* the Court noted that the defendants had used the Internet more than merely to download or access child pornography. In *Fields* the defendant had exchanged child pornography through the Internet and in *Ristine* the defendant had attempted to use the Internet to arrange sexual relations with underage girls. Moreover, perhaps the saving factor in upholding the condition in both *Ristine* and *Fields* was that the Court noted that the conditions in question did not wholly bar the defendants from using a computer.[111]

Finally, in the same year that *Rearden, Ristine* and *Fields* were decided another federal court of appeals decision explained its rationale for holding that a condition totally banning access to the Internet was unreasonable. In *United States* v. *Holm,*[112] the defendant, an information system technologist, was convicted of possession of child pornography. The defendant was sentenced to 59 months in prison followed by a period of supervised release. One of the conditions of release imposed by the district court was the following:

> "You shall not possess or use a computer that is equipped with a modem, that allows access to any part of the Internet, e-mail service, or other 'online' services. You shall not possess software expressly used for connecting to online service, including e-mail, or installation disks for online services or e-mail."

The defendant challenged this condition of supervised release. The Seventh Circuit Court of Appeals gave several reasons for holding that to the extent the condition was intended to be a total ban on Internet use, it swept more broadly and imposed a greater deprivation on the defendant's liberty than was necessary. First, the Court noted that such a ban rendered modern life exceptionally difficult. Second, since the defendant had been employed in the field of computers and was most likely to find gainful employment in the computer field upon his release from prison, the Court determined that the condition as currently written could affect his future productivity and jeopardize his rehabilitation. Finally, the Court noted that with the advent of new technology providing filters for computers, various forms of monitored Internet use could provide a middle ground between the need to ensure that the defendant never again use the Internet for illegal purposes and the need to allow him to function in the modern world.[113]

It appears that the federal appellate courts have taken the lead in examining the validity of conditions restricting access to new forms of computer technology and research has indicated that there are fewer state court decisions than federal appellate courts decisions that have addressed this issue. Moreover the federal courts have more closely scrutinized a district court's rationale for imposing

restrictions on the use of computers and access to the Internet, e-mails, and chat rooms and have tended to apply a more thorough analysis of the public policy implications or considered alternatives to the complete banning of the use of computers and the Internet than state appellate courts have done. Where federal and state court decisions seem to converge is in disallowing a complete ban on the use of computers.[114] Where certain federal courts and state courts differ is that several federal circuit courts of appeals have been more sympathetic to an offender's argument that a complete ban on access to the Internet would provide an undue hardship.

Thus in *Louisiana* v. *Cloward,*[115] an intermediate appellate court upheld the trial court's ban on a defendant, convicted of an offense of computer-aided solicitation for sexual purposes of a minor, from having any access to the Internet. Moreover, while one appellate court in the state of Washington disallowed a condition forbidding a defendant, convicted of second degree rape, from access to the Internet without the prior approval of his community corrections officer because the Court determined that the condition was not crime-related, a different appellate court in the state of Washington upheld a condition for a defendant, convicted of second degree child molestation, from having "access to the Internet unless approved by your sex offender therapist" because the defendant had been ordered to participate in a sex offender treatment program and the appellate court deemed this condition as necessary to monitor compliance with the order of the court.[116]

One reason that certain federal courts have generally disallowed bans on access to the Internet is that statutorily, while district courts have broad discretion in tailoring conditions of supervised release, the conditions imposed must not involve a greater deprivation of liberty than is reasonably necessary.[117] However federal courts have also considered the personal and economic costs to a defendant that a total ban on access to the Internet would entail. With people relying more and more on the Internet for news instead of reading newspapers or watching the nightly news on television, with e-mails becoming a more common form of communication than telephones, and with government, businesses and educational institutions encouraging transactions over the Internet, federal courts are open to the assertion that a ban on access to the Internet would be too impractical in today's modern society. In addition, with new and improved technology that allows supervision officers to search computers for improper use and to even to conduct "remote" monitoring of computer use, federal courts have recognized that requiring a defendant to install a filter device on his/her computer instead of a complete ban does not create an onerous burden on the part of a supervision officer to monitor conditions prohibiting access to improper materials, visual images, or communications on the Internet. It is likely that in the future more federal appellate courts will join their sister courts in the federal system in disapproving a total ban on access to the Internet and state courts will begin to follow the reasoning of federal courts in regards to allowing probationers and parolees access to online communications.[118]

III. VAGUENESS, REASONABLENESS, AND OVERBREADTH 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 to 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. However, 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.*

One recent court decision that has explained how appellate courts determine whether or not a particular condition will be struck for vagueness is *United States* v. *Guagliardo.*[119] In this case the defendant was convicted of possession of child pornography and sentenced to fifteen months in prison followed by three years of supervised release. One of the conditions that the district court imposed on the defendant was that he not possess "any pornography" including legal adult pornography. The defendant appealed the imposition of this condition, arguing that it was too vague in order to inform him what material this condition proscribed him from possessing.

The Ninth Circuit Court of Appeals noted that while a probationer does not have an unqualified First Amendment right to "sexually stimulating or sexually oriented materials" the probationer does have a separate due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison. The Court further stated that since the term "pornography" is entirely subjective, a probationer cannot reasonably understand what is encompassed by a blanket prohibition on "pornography." Moreover the Court observed that reasonable minds can differ greatly about what is encompassed by "pornography." As such given this inherent vagueness, the Court held that a defendant cannot determine how broadly his condition will extend and thus the Court remanded this case for the district court to impose a condition with greater specificity.

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.[120] Other jurisdictions allow more leeway for the imposition of conditions, especially if those conditions directly or indirectly contribute to the rehabilitation of the offender.[121]

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

1. A probationer was ordered to abstain from alcohol for five years. Evidence that he was an alcoholic led the court to deny probation revocation when the condition was violated.[122]
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 three years, or 6200 hours. The condition was struck down as unduly harsh in its cumulative effect.[123]
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.[124]

*See below, Explanation of Conditions.

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.[125]

C. Overbreadth

In order to be valid conditions of release, not only must the conditions be reasonably related to the offense or goals of supervision and unambiguous, but the conditions must also not be overbroad. In the federal system, as has been previously noted, overbroad conditions are those that impose a greater deprivation on a defendant's liberty than is necessary to achieve the goals of supervision.[126] In state courts, the general standard has been that a condition needs to be narrowly tailored to serve the state's compelling interest in rehabilitating the defendant and protecting the public or else it will be invalidated as being overbroad.[127]

A condition may be considered overbroad if, even though related to the offense, it is overly burdensome on the defendant.[128] Moreover a condition may be deemed overbroad if by its terms it is too categorical in regards to activities for which conduct is prohibited and does not give the supervision officer any leeway in allowing for reasonable accommodation in its enforcement.[129] Finally a condition may be deemed overbroad if the need for its enforcement or monitoring by a supervision officer is more intrusive than is reasonably necessary.[130]

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.[131] But courts will generally infer a condition prohibiting criminal acts.[132]

One case speaks to the issue of explanation of conditions, distinguishing that duty from that of merely informing. In *Panko* v. *McCauley,*[133] 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.[134]

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, that is, to address a previously unidentified or new need of the probationer or parolee, or for punitive purposes, that is, to apply a sanction for a

violation of the initial conditions of probation or parole. Another reason the modifications may occur is in order 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, such as 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 sentencing court or parole board. In lesser instances, the modification may be initiated by the sentencing 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 rehabilitation or public protection.

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 changes of conditions to the court or the parole board. In a few jurisdictions, parole and probation officers themselves have the power to modify conditions.

For example, Illinois provides statutory authority for a probation officer, in lieu of filing a violation of probation or conditional discharge, to serve on a minor or adult offender a notice of intermediate sanctions for a technical violation. This statutory authority further provides that if the minor or adult accepts the intermediate sanctions they shall be imposed immediately and if the minor or adult rejects the intermediate sanctions, then the officer must immediately file with the court a violation of probation or of conditional discharge.[135] In Texas if a judge places a defendant on probation, the judge may also authorize the supervision officer to modify the conditions of probation for the limited purpose of transferring the probationer to different programs within the community supervision continuum of programs and sanctions. If the probationer agrees to the modification in writing, the supervision officer must file a copy of the modified conditions with the district clerk and the conditions shall be enforced as modified. If the probationer does not agree to the modification in writing, then the supervision officer must refer the case to the judge of the court for modification.[136]

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.[137]

Most jurisdictions, either by 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.[138] 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."[139]

Modifying or changing probation conditions by the officer alone, without specific 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 an emergency situation), the officer is best protected against liability by putting the modification or change in writing and making sure that the condition is accepted by the offender 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 appears 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.[140] In those instances in which a hearing may be required, state statute usually imposes this mandate.[141] 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.[142]

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 from 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 and adhere to it.

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).[143] 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 so 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,[144] or a probationer who seeks continuances that delay the hearing,[145] 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.[146]

An issue also arises where 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[147] 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.

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 five years when *Robbins* v. *Thomas*[148] arose. In that case, the hearing was held five-and-one-half 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 five 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.

VIII. CHANGES IN STATUS OF THE OFFENDER

A. Duty to Provide a Change of Notice

Generally there are three legal avenues through 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[149] or 3) 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.[150]

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 supervision officer) provide notification of any change in his status. State legislatures have increasingly 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 his 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.[151] 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

establishes by a statute, court order, or administrative policy regarding the release of any information concerning a change in status and to not deviate from the statutory, judicial, or office procedures controlling the disclosure of such information.

Sometimes it will be the responsibility of a governmental entity to inform the court or parole authority of the status of an offender. For example, since October 1, 2007 it has been the responsibility of the Florida Department of Corrections to develop a system for identifying the offenders in the department's database and post in the Florida Department of Law Enforcement's Criminal Justice Intranet a list of all "violent felony offenders of special concern" who are under community supervision. This information is made available to the Courts in Florida at first appearance hearings and all subsequent hearings of offenders whose status has been determined to be a "violent felony offender of special concern."[152]

B. Determination of Status

Despite the numerous holdings that have generally upheld the decision to modify the conditions of release based on the status of an offender, due process does mandate that under certain circumstances, the sentencing or releasing authority must conduct a hearing initially in order to ascertain the status of an offender. This is particularly true when the court or parole authority wants to impose a condition on an offender that does not appear to relate to offense for which he or she was convicted. For example, in *Coleman* v. *Dretke,*[153] a defendant was convicted of burglary of a habitation and sentenced to prison in Texas. The defendant was later paroled. While on parole the defendant was indicted for aggravated sexual assault of a child and indecency with a child. Despite these new charges, the defendant was only convicted of misdemeanor assault. Nevertheless, his parole was revoked following the assault conviction and he was subsequently reincarcerated.

The defendant was later released on mandatory supervision on the condition that he reside in a halfway house until employed. A month later the parole board imposed two additional conditions on his release, to-wit: he register as a sex offender and attend sex offender therapy. The parolee was not given advance notice or a hearing to contest the imposition of these conditions. Although he registered as a sex offender, he failed to enroll or participate in therapy. As a result, his parole was revoked once again.

The parolee filed a writ in federal district court which was denied. The parolee then appealed the decision denying his writ to the Fifth Circuit Court of Appeals. In analyzing this issue, the Court of Appeals stated that a complaint dealing with a claim of a right to procedural due process involved a two-step inquiry. First, the court had to determine whether the parolee had a liberty interest in not having sex offender conditions placed on his parole. The court further stated that if this were to be the case then the second inquiry was whether the state provided constitutionally sufficient procedures before imposing them. Finally, the court noted that because the state of Texas did not dispute that it had provided no process in imposing the conditions and that the parolee had never been given the opportunity to contest his sex offender status, then if federal law clearly established that the parolee had a liberty interest in being free from sex offender conditions, the Court must grant him relief.

The parolee, citing the United States Supreme Court holding in *Vitek* v. *Jones,*[154] argued that the sex offender conditions placed on his parole presented such a dramatic departure from the basic conditions of parole that the Due Process Clause of the Fourteenth Amendment mandated procedural protections. The Court of Appeals, in examining this matter, noted that as in *Vitek,* the state imposed stigmatizing classification and treatment on the parolee without providing him any process. Moreover, the Court found that the state's sex offender therapy, involving intrusive and behavior-modifying techniques, was also analogous to the treatment provided in *Vitek*. As such the Fifth Circuit Court of Appeals determined that the Due Process Clause provided the defendant with a liberty interest in

freedom from the stigma and compelled treatment on which his parole was conditioned and therefore held that the state was required to provide procedural protections before imposing such conditions.

C. Third Party Notifications

Occasionally a court may order, as a condition of parole or probation, that a defendant inform a third party of his or her status as a criminal. When a court orders a probationer or parolee to inform an employer or potential employer of the person's criminal conviction, this is referred to as an occupational restriction. Under the federal system, an occupational restriction must be based on the offense of conviction.[155] Generally, such a condition is permissible only if the court determines that: (1) a reasonably direct relationship existed between the defendant's occupation and the conduct relevant to the offense of conviction and (2) the imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such a restriction, the defendant will continue to engage in unlawful conduct similar to that for which he or she was convicted.[156] Finally, not only should it be the determination of the court or parole board, rather than leaving to the discretion of the probation or parole officer, whether such notification is required; but also if the court or parole board does believe that such notification should be required for certain types of employment but not others, the court or parole board should specify guidelines to direct the probation or parole officer and not simply leave the issues of employer notification to the officer's discretion.[157]

SUMMARY

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

Work conditions may give rise to tort liabilities, particularly in the case of volunteer placements. This risk may be covered by agency insurance.

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.

Finally, reporting requirements necessitating a probationer or parolee to 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. Under some circumstances a probationer

or parolee may have a due process right to determine the person's status before a court or parole board can impose certain conditions of release. 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 (10 Cir. 1971).

2. In the federal system special conditions of supervised release are evaluated to determine if they are reasonably related to four different factors: 1) "the nature and circumstance of the offense and the history and characteristics of the defendant," 2) the need "to afford adequate deterrence to criminal conduct," 3) the need "to protect the public from further crimes of the defendant," and 4) the need "to provide the defendant with needed [training], medical care, or other correctional treatment in the most effective manner." See 18 U. S. C. § 3553 (a)(1)-(2) (1994); see also *United States* v. *Paul,* 274 F. 3d 115 (5th Cir. 2001), No. 00-41299, delivered November 19, 2001.

3. 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.

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

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

6. On December 31, 2006, approximately 4,237,000 adults were under Federal, State, or local jurisdiction on probation and nearly 798,200 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.

7. 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.

8. See *Carswell* v. *State,* 721 N. E. 2d 1255 (Ind. App. – 1999).

9. See *Samson* v. *California,* 126 S. Ct. 2193 (2006).

10. See *United States* v. *Schave,* 186 F. 3d 839 (7th Cir. 1999).

11. See *United States* v. *Warren,* 186 F. 3d 358 (3rd Cir. 1999).

12. See *United States* v. *Sales,* 476 F. 3d 732 (9th Cir. 2007); for the application of this general principle at the state level, see *People* v. *Forsythe,* 43 P. 3d 652 (Colo. App. 2001).

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

14. 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."

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

16. *Id.* at 1304.

17. *Id.* at 1303.

18. *Id.* at 1306.

19. See *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 Common. 458, 405 A. 2d. 1338 (1979); *State* v. *Camp,* 59 NC App. 38, 295 SE 2d 766 (1982).

20. 311 F. Supp. 749 (N. D. Cal. 1970) at 750.

21. *Id.* at 750-751.

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

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

24. See *Porth* v. *Templar,* 453 F. 2d at 76 (10th Cir. 1971).

25. See *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).

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

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

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

29. See *State* v. *Zimmer,* 2008 WL 3850490 (Wash. App. Div. 2 2008).

30. 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).

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

32. 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 NE 2d 746 (1976).

33. See *United States* v. *Schave,* 186 F. 3d 839 (7th Cir. 1999).

34. See *United States* v. *Soltero,* 510 F. 3d 858 (9th Cir. 2007).

35. See *O'Lone* v. *Estate of Shabazz,* 107 S. Ct. 2400 (1987). Nevertheless, as with probationers and parolees, the courts have uniformly held that a prisoner cannot be compelled to participate in a faith-based prison treatment program. See *Kerr* v. *Farrey,* 95 F. 3d 472 (7th Cir. 1996).

36. 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).

37. See *Warner* v. *Orange County Department of Probation,* 115 F. 3d 1068 (2nd Cir. 1997); affirmed 173 F. 3d 120 (2nd Cir. 1999).

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

39. See *Inouye* v. *Kemna,* 504 F. 3d 705 (9th Cir. 2007), No. 06-15474, filed September 7, 2007, amended October 3, 2007.

40. See *Harlow* v. *Fitzgerald,* 457 U. S. 800 (1982).

41. See *Mireles* v. *Waco,* 502 U. S. 9 (1991); see also *Montero* v. *Travis,* 171 F. 3d 757 (2nd Cir. 1999).

42. See *Babcock* v. *Tyler,* 7884 F. 2d 497 (9th Cir. 1989).

43. 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).

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

45. 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).

46. See *State ex rel. Kaminski* v. *Schwarz,* 630 N. W. 2d 164 (Wis. 2001).

47. See *State* v. *Autrey,* 150 P. 3d 580 (Wash. App. Div. 3 – 2006); 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.

48. 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).

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

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

51. See *People* v. *Ferrell,* 659 N. E. 2d 992 (Ill. App. 4th Dist. 1995).

52. See *United States* v. *Smith,* 972 F. 2d 960 (8th Cir. 1992).

53. See *Trammell* v. *State,* 751 N. E. 2d 283 (Ind. App. 2001).

54. See *State* v. *Kline,* 963 P. 2d 697 (Or. App. 1998).

55. See *State* v. *Oakley,* 629 N. W. 2d 760 (Wis. 2001), re-hearing affirmed at 635 N. W. 2d 760 (Wis. 2001).

56. See *People* v. *Baum,* 251 Mich. 187, 231 N.W. 95 (1930) (banishment from state for five 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 SC 324, 262 S. E. 2d 923 (1980); *Carchedi* v. *Rhodes,* 560 F. Supp. 1010 (S. D. Ohio 1982).

57. See *United States* v. *Abushaar,* 761 F. 2d 954 (3rd Cir. 1985); see also, *McCreary* v. *State,* 582 So. 2d 425 (Miss. 1991) and *State* v. *Young,* 154 N. W. 2d 699 (Minn. 1967). See also, *Terry* v. *Hamrick,* 663 S. E. 2d 256 (Ga. 2008), in which the appellate court upheld a condition that the defendant be banished from all counties in the state of Georgia except one. However, this condition was upheld because the defendant had been convicted of stalking and had been following the victim throughout the state.

58. See *State* v. *Stewart,* 713 N. W. 2d 165 (Wis. App. – 2006).

59. See *Hernandez* v. *State,* 613 S. W. 2d 287 (Tex. Cr. App. - 1981); see also, *Martinez* v. *State,* 627 So. 2d 542 (Fla. App. 1993).

60. See *State of Utah* v. *Arviso,* 993 P. 2d 894 (Utah App. – 1999).

61. See *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 NC 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).

62. See *People* v. *Coleman,* 812 N. Y. S. 2d 857 (Sup. 2006).

63. See *United States* v. *Sicher,* 239 F. 3d 289 (3rd Cir. 2000).

64. See *State* v. *Moody,* 148 P. 3d 662 (Mont. 2006).

65. For information on the rules allowing for the transfer and supervision of out of state probationers and parolees, the reader is directed to review the rules of the Interstate Commission for Adult Offender Supervision at www.interestatecompact.org.

66. See *State* v. *Franklin,* 604 N. W. 2d 79 (Minn. 2000).

67. See *Minnesota* v. *Murphy,* 465 U.S. 420 (1984); see also, *United States* v. *Davis,* 242 F. 3d 49 (1st Cir. 2000) and *State* v. *Gary,* 144 P. 3d 634 (Kan. 2006).

68. See *United States* v. *Conforte,* 624 F. 2d 869 (9th. Cir.), cert. denied, 449 U. S. 1012 (1980).

69. See *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,* 285 S. E. 58, Ga. App. – 1981); *State* v. *Gilliam,* 262 S. E. 2d 923, (So. Car. – 1980); *Carchedi* v. *Rhodes,* 560 F. Supp. 1010 (S. D. Ohio, 1982).

70. See *Minnesota* v. *Murphy,* 465 U.S. 420 (1984).

71. *Id.* at 437.

72. *Id.* at 427.

73. For examples of the problems courts have had in resolving this matter, see *Asherman* v. *Meachum,* 957 F. 2d 978 (2nd. Cir. 1992); *United States* v. *Ross,* 9 F. 3d 118 (7th. Cir. 1993), *judgment vacated on other grounds,* 511 U.S. 1124 (1994); and *Idaho* v. *Crowe,* 952 P. 2d 1245 (Idaho 1998).

74. See *Chapman* v. *State,* 115 S. W. 3d 1 (Tex. Cr. App. – 2003).

75. See *United States* v. *Antelope,* 65 Fed.Appx 112 (9th Cir. 2005).

76. See *Lefkowitz* v. *Cunningham,* 431 U. S. 801 (1977).

77. See *McCoy* v. *Comm'r,* 696 F. 2d 1234 (9th Cir. 1983).

78. See *United States* v. *Davis,* 242 F. 3d 49 (1st Cir. 2001), in which the First Circuit Court of Appeals upheld the imposition of a condition requiring a probationer to "cooperate with the Probation Officer in all investigations and interviews during his period of supervised release," reasoning that the general obligation to appear and answer questions truthfully did not amount to compulsion and that the probationer was still free to challenge any question posed to him that might incriminate him at the time it occurred.

79. See *United States* v. *Locke,* 482 F. 3d 764 (5th Cir. 2007).

80. See *State* v. *Uhlig,* 170 P. 3d 894 (Kan App. 2007).

81. See *Perry* v. *State,* 778 S0. 2d 1072 (Fla. App. 5th Dist. 2001.

82. See *Packer* v. *State,* 777 N. E. 2d 733 (Ind. App. – 2002).

83. See *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).

84. See *Ballenger* v. *State,* 436 S. E. 2d 793 (Ga. App. 1993).

85. See *People* v. *Heckler,* 16 Cal. Rptr. 2d 681, 13 C. A. 4th 1049 (1993).

86. See *People* v. *Meyer,* 176 Ill. 2d 372, 680 N. E. 315 (1997).

87. See *People* v. *Letterlough,* 655 N. E. 2d 146, (N.Y. 1995).

88. See 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).

89. See *Carswell* v. *State,* 721 N. E. 2d 1255 (Ind. App. – 1999).

90. See *Wright* v. *State,* 154 S. W. 3d 235 (Tex. App. – Texarkana, 2005).

91. See *Arizona* v. *Levens,* 152 P. 3d 1222 (Ariz. App. Div. 1 2007).

92. See *United States* v. *Lee,* 315 F. 3d 206 (3rd Cir. 2003).

93. See *United States* v. *Stoterau,* 524 F. 3d 988 (9th Cir. 2008), which held that a mandatory polygraph testing condition did not violate the defendant's Fifth Amendment constitutional right to be "compelled in any criminal case to be a witness against himself;" see also, *Arizona* v. *Levens,* 152 P. 3d 1222 (Ariz. App. Div. 1 2007) and *United States* v. *Locke,* 482 F. 3d 764 (5th Cir. 2007).

94. Ohio Rev. Code Ann. § 2951.02 (g).

95. Minn. State. Ann. § 3.739 (West).

96. Vernon's Tex. Ann. Code of Cr. Proc. Article 42.12, § 16 (c).

97. See *Tarrant County et al.* v. *Morales,* 207 S. W. 3d 870 (Tex. App. – Fort Worth, 2006); see also, Vernon's Tex. Ann. Code of Cr. Proc. Article 42.20.

98. See *Goode* v. *Nobles,* 518 S. E. 2d 122 (Ga. 1999).

99. See *People* v. *Gordon,* 762 N. Y. S. 631 (Sup. 1998).

100. In the area of extradition, federal law is controlling and state regulations on the subject are supplemental to, and facilitate, federal law. See *State* v. *Van Buskirk,* 527 N. W. 2d 922 (S. D. 1995).

101. Other court decisions that have upheld the validity of a waiver of extradition as a condition of release are Ex parte Johnson, 610 S. W. 2d 757 (Tex. Cr. App. – 1981), *Cook* v. *Kern,* 330 F. 2d 103 (5th Cir. 1964), and *Forester* v. *California Adult Authority,* 510 F. 2d 58 (8th Cir. 1975).

102. Since the enactment of the first Megan's Law, Congress has enacted several other sex offender registration acts, collectively known as the "Jacob Wetterling, Megan Kanka, and Pam Lychner Sex Offender Registration and Notification Programs. These various enactments are now found in the Sex Offender Registration and Notification Provisions of the Adam Walsh Child Protection and Safety Act of 2006 (P. L. 109-248).

103. See *State of Connecticut* v. *Misiorski,* 738 A. 2d 59 (Conn. – 1999).

104. See *State of Washington* v. *Schmeck,* 90 P. 2d 472 (Wash. App. – 1999).

105. See *Speth* v. *State,* 965 S. W. 2d 13 (Tex. App. – Houston [14th Dist.], 1998), reversed or another reason in *Speth* v. *State,* 6 S. W. 3d 530 (Tex. Cr. App. – 1999).

106. See *Greenwood* v. *State,* 754 So. 2d 158 (Fla. App. – 2000).

107. See *United States* v. *Peterson,* 248 F. 3d 79 (2nd Cir. 2001).

108. See *United States* v. *Rearden,* 349 F. 3d 608 (9th Cir. 2003).

109. See *United States* v. *Ristine,* 335 F. 3d 692 (8th Cir. 2003).

110. See 324 F. 3d 1025 (8th Cir. 2003).

111. Note however that in *United States* v. *Sofsky,* 287 F. 3d 122 (2nd Cir. 2002), the Second Circuit Court of Appeals found that a condition prohibiting the defendant from using a computer or the Internet without the approval of his probation officer was still too restrictive and the condition inflicted a greater deprivation on the defendant's liberty than was reasonably necessary.

112. See *United States* v. *Holm,* 326 F. 3d 872 (7th Cir. 2003).

113. To date almost all federal courts of appeals that have examined this issue has disallowed condition of release totally banning a defendant from use of a computer. See *United States* v. *Silvious,* 512 F. 3d 364 (7th Cir. 2008). Only one federal court of appeals has upheld such a condition. In *United States* v. *Paul,* 274 F. 3d 115 (5th Cir. 2001) the Fifth Circuit Court of Appeals held that even though the condition in question did not have a proviso permitting the defendant to use computers and the Internet with the approval of his probation officer, the Court could not say that the district court abused its discretion in determining that an absolute ban on computers and Internet use was reasonably necessary to protect the public and to prevent recidivism. Nevertheless in *Silvious* the Seventh Circuit Court, even though it disallowed a condition providing for a total ban on Internet use, stated that "we have not ruled out the possibility that such a condition might be justified in some cases."

114. See however *State* v. *Wardle,* 53 P. 3d 1227 (Idaho. App. – 2002) in which the appellate court upheld the trial court's order that the defendant, charged with sexual abuse of a child but convicted of the lesser included misdemeanor offense of battery, remove all his computers from his household. The court reasoned that since the facts showed that the defendant had the minor sit on his lap and view pornography on his computer, this justified the requirement that he possess no computers in his home.

115. See *Louisiana* v. *Cloward,* 960 So. 2d 356 (App. 2nd Cir. 2007).

116. See *State* v. *O'Cain,* 184 P. 3d 1262 (Wash. App. Div. 1 2008); see further, *State* v. *Castro,* 170 P. 3d 78 (Wash. App. Div. 3 2007).

117. See *United States* v. *Vinson,* 147 Fed.Appx 763 (10th Cir. 2005); see also 18 U. S. C. § 3563 (b).

118. See *United States* v. *Vinson,* 147 Fed.Appx 763 (10th Cir. 2005), in which the Tenth Circuit Court of Appeals, in examining a condition restricting access to the Internet, noted that most other circuit courts that had addressed this issue had 1) either rejected total Internet bans as conditions of supervised release or 2) had allowed Internet bans only where the ban could be lifted at the discretion of the probation officer.

119. See *United States* v. *Guagliardo,* 278 F. 3d 868 (9th Cir. 2002).

120. See *Turner* v. *State,* 666 So. 2d 212 (Fla. App. 2 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 which was not alcohol or drug related.

121. See Vernon's Annotated Texas Code of Criminal Procedure, Article 42.12, § 1 (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.

122. See *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).

123. See *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 two years).

124. See *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).

125. See *State* v. *Graham,* 636 A. 2d 852, 33 Conn. App. 432 (1994).

126. See *United States* v. *Holm,* 326 F. 3d 872 (7th Cir. 2003).

127. See *State* v. *Oakley,* 635 N. W. 2d 760 (Wis. 2001).

128. See *United States* v. *McKissic,* 428 F. 3d 719 (7th Cir. 2005).

129. See *United States* v. *Peterson,* 248 F. 3d 79 (2nd Cir. 2001), in which the Second Circuit Court of Appeals invalidated a condition that categorically prohibited a defendant from possessing any computer, including a computer at work as excessive and overbroad.

130. See *United States* v. *Lofshitz,* 369 F. 3d 173 (2nd Cir. 2004), in which the Second Circuit Court of Appeals remanded a case in which the district court had imposed a condition that required the defendant to "consent to unannounced examinations of any computer equipment owned or controlled by the defendant" and that required him to permit "the removal of such equipment for the purpose of conducting a more thorough investigation" in order for the district court to evaluate the privacy implications of the proposed computer monitoring techniques as well as their efficacy as compared with computer filtering, and then to impose a condition consistent with this condition.

131. See *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).

132. 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).

133. See *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. § 549.237 (Vernon); NY Exec. Law § 257 (4) (McKinney).

134. See *United States* v. *Dane,* 570 F. 2d 840 (9th Cir. 1977). See also, *United States* v. *Dane,* 587 F. 2d 436 (9th Cir. 1978).

135. See 705 ILCS 405, § 5-720 (7); see also, 730 ILCS 5, § 5-6-4 (i).

136. See Vernon's Annotated Texas Code of Criminal Procedure, Article 42.12, § 10 (d) and (e).

137. National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 12.7 (1973).

138. See In the interest of T. L. D, 586 So. 2d 1294 (Fla. App. 1991).

139. See *State of Connecticut* v. *Misiorski,* 738 A. 2d 595 (Conn. – 1999), in which the appellate court upheld a condition imposed by the trial judge that the defendant obey "any other conditions imposed by the office of adult probation."

140. 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 3rd 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).

141. See *Russo* v. *State,* 603 So 2d 1353 (Fla. App. 1992).

142. See *Malone* v. *State,* 632 So. 2d 1140 (Fla. App. 1994).

143. See 541 F. Supp. 1253 (1st Cir. 1982); 560 F. Supp. 745 (2nd 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).

144. See *People ex rel Flores* v. *Dalsheim,* 66 A. 2d 381, 413 N.Y.S. 2d 188 (1979).

145. See *State* v. *Hultman,* 92 Wash. 2d 736, 600 P. 2d 1291 (1979).

146. See *Board of Trustees* v. *Smalls,* 172 N. J. Super. 1, 410 A. 2d 691 (1979).

147. See *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).

148. See *Robbins* v. *Thomas,* 592 F. 2d 546 (9th Cir. 1979).

149. See *State ex rel. Kaminski* v. *Schwarz,* 630 N. W. 2d 164 (Wis. 2001), in which the Wisconsin Supreme Court approved an administrative rule of the Wisconsin Department of Corrections requiring an probationer under the department's supervision to notify his immediate neighbors of his sex offender status, reasoning that the rule furthered the goals of probation by protecting the public from criminal conduct and helping the probationer become a useful member of society.

150. 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.

151. See Vernon's Annotated Texas Code of Criminal Procedure, Chapter 62.05 (a).

152. See Title XLVII, Chapter 948, § 948.064, 2008 Florida Statutes.

153. See *Coleman* v. *Dretke,* 395 F. 3d 216 (5th Cir. 2004), rehearing denied 409 F. 3d 665 (5th Cir. 2005).

154. See *Vitek* v. *Jones,* 445 U. S. 480 (1980).

155. See 18 U. S. C. § 3563 (b) (5).

156. If a court orders a defendant, as a condition of release, to not seek work in specified fields of employment, then in order for that condition to be valid, not only must these two determinations be made but in addition the occupational restriction can only be in place for "the minimum time and to the minimum extent necessary to protect the public." See *United States* v. *Rearden,* 349 F. 3d 608 (9th Cr. 2003).

157. See *United States* v. *Peterson,* 248 F. 3d 79 (2nd Cir. 2001).

CHAPTER 8

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, all too often this expectation does not materialize. As of the end of 2007, more than 5.1 million adult offenders were being supervised in the community, either on probation or parole. This translates to about one in 45 adults in the United States. Moreover, of the parole population alone, a total of 1,180,469 offenders were at-risk of being re-incarcerated. Of these parolees, about 16% were returned to incarceration in 2007.[1] Clearly, 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 the revocation of their parole were entitled to certain due process considerations. In *Gagnon* v. *Scarpelli,* the Supreme Court extended its legal holding in *Morrissey* to the realm of probation revocation hearings.

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 seven 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. The Court 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,

that is, 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] The Court 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 fourteenth amendment. The Court held that it is.

The Court stated:

> 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.[5]

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.

> Some 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.[6]

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 s/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 the officer's 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.

In reference to the revocation hearing, the Court stated:

> 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.[7]

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) 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.

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 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 possibly 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 *Gagnon* v. *Scarpeilli,* below).

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. Immediately following the *Morrissey* decision and in the ensuing years thereafter, there has been considerable litigation seeking to hone its rules and define their parameters. 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 geographic 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 four 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 nor 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

A parolee who is arrested for an alleged violation of the conditions of parole must be given notice at the preliminary hearing of the charges filed against the individual.[17] Nevertheless the general rule as typified by an Eighth Circuit ruling only requires written notice with respect to the final hearing and not with respect to a preliminary hearing.[18] However, in those situations in which an acceptably combined preliminary and revocation hearing is utilized, such as in probation revocation proceedings, then the notice must allege the violation with greater specificity than would be required for only a preliminary hearing.[19]

4. Impartial Hearing Officer

The revocation of parole or probation should be made by a neutral and detached hearing body that is an independent decision maker not directly involved in the case.[20] Nevertheless the person conducting the hearing need not be a judicial officer or an attorney. Because the decision maker must be impartial and detached, it appears that the parole officer who initiated the arrest must be excluded from conducting this process. However, a different parole officer may conduct the hearing.[21]

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, because *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.[22] 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.[23]

Nevertheless, as a general rule, a probationer or parolee cannot be found to have violated his parole or probation for a violation that was not charged.[24] Moreover this violation must be based on a condition imposed by the court or parole authority. Probation or community control may not be revoked for a violation of a condition or requirement unilaterally imposed by the probation or parole officer but not

by the sentencing order.[25] Thus, any written order of revocation can only include those violations of probation (or parole) conditions that have been alleged, proved at a hearing, and relied upon by the trial judge (or parole board).[26]

Finally, most appellate courts have held that any notice alleging a violation of the conditions of release must be provided to the probationer or parolee prior to the revocation hearing in order for the person to prepare a legal response or defense to the allegations. In *In re Commitment of VanBronkhorst*[27] the respondent, who had a history of multiple sex offenses involving children and who had been diagnosed with pedophilia, had been adjudicated as a sexually violent person and was placed on supervised release. The State of Wisconsin subsequently filed a petition to revoke his supervised release. The State alleged that he had violated the conditions of his supervised release by having verbal contact with a seven year old male while outside the respondent's residence. During the hearing evidence was also introduced that the respondent had attempted to initiate a relationship with a neighbor who was a child. At the conclusion of the hearing the trial court revoked the supervised release of the respondent; however, the decision to revoke the supervised release was not based on the alleged violation in the notice but was based on testimony at the hearing of the other incident.

The respondent appealed the decision to revoke his supervised release, contending that he was denied due process when his supervised release was revoked based on a rule violation not charged. Even though this was an appeal involving a civil commitment of a sex offender, the appellate court stated that it saw no difference between the conditional liberty interest of a person on probation or parole and the interests of a person on supervised release as a sexually violent person. The appellate court further stated that in probation or parole revocation proceedings, notice to comply with due process requirements must be given sufficiently in advance of a scheduled court proceeding so that a defendant would have a reasonable opportunity to prepare for a defense. Thus, in this particular case, the Wisconsin appellate court held that a decision to revoke supervised release without giving proper notice was a violation of the person's due process.

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. Most jurisdictions require some form of written notice be provided to the probationer or parolee prior to the revocation hearing. Moreover most jurisdictions allow the parolee access to pertinent official records and materials.[28] 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.[29]

3. Application of *Crawford* v. *Washington* to Revocation Proceedings

One of the most significant decisions handed down by the United States Supreme Court in the last decade concerned a criminal defendant's right to confrontation of witnesses as secured by the Sixth Amendment to the United States Constitution. In *Crawford* v. *Washington,*[30] the defendant was tried in a state court for the offense of assault and attempted murder of a man who had allegedly tried to rape his wife. During the trial the State played for the jury a tape-recorded statement that the defendant's wife had made to the police describing the stabbing. The wife did not testify at the trial and thus the defendant did not get the opportunity to cross-examine her. The defendant objected to the introduction of the taped recording, arguing that this violated his federal constitutional right to be "confronted with the witnesses against him." The jury found the defendant guilty and the Washington Supreme Court upheld the conviction.

The United States Supreme Court eventually accepted this case on appeal to determine the issue that the defendant raised at his trial, to-wit: whether the State could introduce testimonial evidence

without affording him the right to confront and cross-examine the witness. The Supreme Court noted that the Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." After having reviewed the history of this right to confrontation and having examined the original intent of the framers of this constitutional amendment, the Court concluded that where testimonial evidence was at issue and the witness was unavailable for cross-examination, the Sixth Amendment demanded that such evidence could be introduced only if the defendant had had a prior opportunity to cross-examine the witness. Thus the rules of hearsay could only apply to evidence that was non-testimonial in nature. As such the Supreme Court reversed the judgment of the Washington Supreme Court.

One issue that the United States Supreme Court did not reach in its holding in *Crawford* v. *Washington* was what constituted testimonial evidence for purposes of invoking the Sixth Amendment right to confrontation. This matter was addressed in a subsequent Supreme Court decision. In *Davis* v. *Washington,*[31] another Washington state case, the defendant was tried for the felony offense of violation of a domestic no-contact order. The only witnesses to testify were two police officers who had responded to the 911 call. Even though the victim did not testify at trial the judge allowed the introduction of the recording of her exchange with the 911 operator. The defendant objected to the introduction of the tape recording but was overruled by the trial judge. The jury found the defendant guilty.

Once again this matter eventually made its way to the United States Supreme Court. The Court observed that while it had held in *Crawford* that the Sixth Amendment barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination," the Court had not needed to define "testimonial statements" in order to resolve this case. Nevertheless the Court further acknowledged that in deciding the case in *Davis,* the Court would have to explain what it meant by "testimonial statements." The Court held that statements were non-testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. Moreover the Court stated that statements were testimonial when the circumstances objectively indicated that there was no such ongoing emergency, and that the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution. In *Davis* the Court concluded that the 911 recording concerned events as they were actually happening, rather than describing past events. The Court further determined that the purpose of the 911 call was to enable police assistance to meet an ongoing emergency. As such the Supreme Court concluded that these 911 statements were non-testimonial and upheld the defendant's conviction.

a. Confrontation and Cross-Examination

Despite the holdings of the Supreme Court in *Crawford* v. *Washington* and *Davis* v. *Washington,* most appellate courts that have considered this matter have concluded that the Sixth Amendment right to confrontation does not apply in a revocation hearing. Most appellate courts have reasoned that because a revocation proceeding is administrative in nature and does not comprise a stage of a criminal prosecution, the holdings in *Crawford* and *Davis* are inapplicable. Thus in *United States* v. *Aspinall,*[32] the Second Court of Appeals stated that nothing in *Crawford,* which reviewed a criminal trial, purported to alter the standards set by *Morrissey*/*Scarpelli* or otherwise suggested that the Confrontation Clause principle enunciated in *Crawford* was applicable to probation revocation hearings. Other appellate courts, in both the federal system and at the state level, have almost unanimously made the same ruling.[33]

Nevertheless at least one federal district court has concluded that the holding in *Crawford* v. *Washington* is equally applicable in parole revocation hearings as in criminal proceedings. In *Ash* v. *Reilly,*[34] a parolee's parole was revoked solely on hearsay statements made by four or five witnesses to the police officer investigating the incident. The Court observed that the decision in *Morrissey* was

explicit that "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)" is a "minimum requirement of due process" to be afforded criminal defendants in parole revocation hearings. The district court's reasoning for concluding that *Crawford,* to the extent its language might contradict the language in *Morrissey,* superseded the *Morrissey* holding was that to use language differentiating the two types of criminal proceedings "as an invitation to disregard *Morrissey's* previous exposition of the 'minimum requirements of due process' would be incongruous."

Despite the continuing questions whether the holding in *Crawford* v. *Davis* applies or does not apply to a revocation hearing, appellate courts are fairly consistent that if a witness is amenable to being compelled to appear at a revocation proceeding and can offer relevant testimony for the probationer or parolee, the right to confrontation and cross-examination is violated if the court or parole authority fails to issue a subpoena requiring the witness to appear and give testimony for the defendant.[35]

Nevertheless, the exception to this right to compel witnesses is that a probationer or parolee is not entitled to the right to confrontation and cross-examination of adverse witnesses if the trial court or parole board finds good cause for not producing the witness. In *State* v. *Rose,*[36] an Idaho appellate court noted that when determining whether the admission of hearsay evidence violates a defendant's due process right to confront witnesses in probation revocation proceedings, the court must weigh the defendant's interest in confrontation against the state's good cause for denying it. Moreover, the Court observed that, in evaluating the defendant's interest, the court should weigh the defendant's right to confrontation under the specific circumstances presented in the case.

Thus the Court in *State* v. *Rose* stated that the weight to be given the right to confrontation in a particular probation revocation case depended on the importance of the hearsay evidence to the trial court's ultimate finding and the nature of the facts to be proven by hearsay evidence. In addition, the court stated that the more significant the particular evidence was to a finding, the more important it was that the defendant be given an opportunity to demonstrate that the proffered evidence did not reflect a verified fact, and similarly, the defendant's interest in testing hearsay evidence by exercising the right to confrontation increased in relation to the uncertainty of the evidence's reliability. Finally the court stated that, in evaluating good cause for denying the defendant's due process right to confrontation in probation revocation proceedings, the court must look to both the difficulty of procuring witnesses and the reliability of the evidence; hence, whether a particular reason was sufficient cause to outweigh the right to confrontation depended on the strength of the reason in relation to the significance of the defendant's right.

b. Hearsay Admissibility

Even if *Crawford* v. *Washington* does not apply, there is still a due process claim that any hearsay testimony must be reliable. Not following the holding of *Crawford* simply means that instead of analyzing the validity of hearsay testimony under the Sixth Amendment, one must analyze this matter under the due process clause to the Fourteenth Amendment. Moreover this approach is not only consistent with the holding of *Morrissey* but mandated by this holding as well. In addition the Court also emphasized in *Morrissey* 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, affidavits, and so forth that would not be allowable in a trial.

Most appellate courts that have examined this issue have stated that hearsay evidence in a revocation proceeding is admissible provided the evidence bears some "indicia of reliability." The United States Supreme Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." Nevertheless unless reliability can be inferred where the evidence falls within a firmly rooted hearsay exception,

then the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[37]

For those jurisdictions which have recognized that certain hearsay evidence may be introduced in a revocation proceeding, the Courts have used one of two tests for determining whether the particular hearsay statement can be properly admitted – one is a balancing test and the other is the substantial trustworthiness test. As mentioned above, in *State* v. *Rose,* under the balancing test, the trial court weighs the probationer's interest in confronting a witness against the interest of the State in not producing the witness. Under the substantial trustworthiness test, the due process confrontation requirement applicable in revocation matters will generally be satisfied where a trial court determines that proffered hearsay bears substantial sufficient indicia of reliability.[38]

Despite the widespread recognition that hearsay evidence can be considered in a revocation proceeding, depending on the jurisdiction, the weight of the hearsay evidence that the court or parole authority may give in finding a violation of a condition of release varies considerably. For example, despite other jurisdictions affirming the introduction of hearsay evidence in a revocation proceeding, the courts in Georgia still maintain that hearsay evidence has no probative value and is inadmissible in a probation revocation proceeding.[39] This holding is opposite of that of the Kansas Supreme Court, which has ruled that where hearsay evidence is reliable, it can be the sole basis for a probation revocation.[40] Finally, several appellate courts have taken a middle course and have held that, although a trial court can rely upon an out-of-court statement that bears substantial guarantees of trustworthiness, the decision to revoke probation cannot be based entirely upon hearsay evidence.[41]

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*[42] the defendant had been convicted in a Wisconsin state court for armed robbery but placed on probation for seven 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 of 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 any 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, namely, 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 was charge with an offense that

carried the possibility of imprisonment or confinement in jail,[43] 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 further 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.[44]

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.

IV. OTHER ISSUES IN PAROLE AND PROBATION REVOCATION PROCEEDINGS

For some issues *Morrissey* offers 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 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 2006 the Texas Court of Criminal Appeals reiterated that the United States Supreme Court had held in *Morrissey* v. *Brewer* that due process applies to parole revocations and that the Supreme Court had held in *Gagnon* v. *Scarpelli* that the procedures outlined in Morrissey also apply to probation proceedings.[45] Also, within the last decade, the Fifth Circuit United States Court of Appeals in *Williams* v. *Johnson,* held that the due process guarantees enunciated by the Supreme Court in *Morrissey* are equally applicable to revocation hearings as to preliminary hearings.[46]

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 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 iron-clad due process guarantees or whether some deviations are permissible.

A. Necessity of Preliminary Hearing

As explained in *Morrissey* the purpose of a preliminary hearing is two-fold. First, it establishes whether there is probable cause to arrest the individual on a violation warrant.[47] The second purpose of the preliminary hearing is to prevent unwarranted detention of the individual.[48] As such the period for conducting the preliminary hearing only begins when the person is actually taken into custody on the violation warrant.[49] This is true even if a person is being held in custody in one jurisdiction for a separate criminal matter and another jurisdiction places a detainer on the person based on a violation warrant.[50] The period for holding the preliminary hearing is not triggered until the violator completes the out-of-state sentence and the person is available for extradition.[51]

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*[52] 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, because 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. Nevertheless, if a parolee (or probationer) is charged with (as opposed to convicted) of a crime, then the person may be entitled to a preliminary hearing. Hence in *Ex parte Cordova,* the Texas Court of Criminal Appeals held that new pending charges did not deprive a parolee of his right to a preliminary hearing, within a reasonable time, to determine whether probable cause or reasonable grounds existed to show that he violated the conditions of his parole.[53]

In addition, a parolee can validly waive a preliminary hearing.[54] Moreover, if a parolee stipulates to the allegations against him in a revocation hearing, then the failure to hold a preliminary hearing in connection with proceedings to revoke supervised release does not violate a supervisee's due process rights.[55] In addition, a state appellate court, in following the holding of the Supreme Court in *Moody* v. *Daggett* has held that if a parolee has been convicted of a new crime based upon his plea of guilty, then that individual is not entitled to a preliminary hearing prior to a determination revoking the person's parole.[56] Finally, if the revocation hearing will be conducted at or near the time of the parolee's or probationer's apprehension on the revocation warrant, then some courts have held that the preliminary hearing can be dispensed with. Thus in *Ellis* v. *District of Columbia*[57] 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 thirty 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 and Burden of Proof in Revocation Proceedings

Once a probationer or parolee is granted a form of supervised release, that person is entitled to remain on conditional release unless and until that individual has substantially violated one or more of the conditions of release. Moreover, the probationer or parolee has a due process right that ensures that any decision to revoke the conditional release of that individual is based on a sufficient level of proof so that the court or board's factual determination that the person has indeed violation a condition of release is not arbitrary or capricious. In order to afford the probationer or parolee a fair revocation hearing courts are concerned with which party has the burden of establishing certain evidentiary facts, what standard of proof must be followed in order to support an adverse finding against the probationer or parolee, and whether, if a violation occurred, it was committed in a deliberate or willful manner.

1. Burden of Proof

Every appellate court that has addressed this matter has recognized that a probationer or parolee has a due process right in the prosecuting attorney carrying the burden to prove that the person violated a condition of released as alleged in a written notice to the defendant.[58] For example, in *Smith* v. *State*[59] an Indiana appellate court reversed the decision of the trial court to revoke the probation of the defendant, holding that by failing to consider any probative evidence presented by the State, the trial court in fact had shifted the burden to the defendant to prove that the crime he had been alleged to have committed in violations of the conditions of his probation was not committed. Nevertheless, although the courts have consistently affirmed that the State carries the burden of establishing a violation of a condition of release, some courts have also stated if the State presents a *prima facie* case indicating that the probationer violated a condition of probation, the burden may then shift to the probationer to show that the violation was not committed willfully. Thus, in *State* v. *Terry,*[60] a North Carolina appellate court stated that at a probation revocation hearing, once the State has presented competent evidence establishing the defendant's failure to comply with the terms of probation, the burden is then on the defendant to demonstrate, through competent evidence, an inability to comply with the terms.

2. 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, a knowledge of the standard of proof required for revocation in the jurisdiction is essential. Although research has turned up no revocation proceeding in which a finding of an alleged violation had to be proven beyond the reasonable doubt standard,[61] there is nevertheless a wide latitude among the states in determining the proper standard.

The standard that many states and the federal system require in order to prove that a probationer or parolee violated a condition of release is by a preponderance of the evidence.[62] This standard is satisfied in a revocation proceeding if the greater weight of credible evidence creates a reasonable belief that the defendant violated a condition of probation as alleged by the State.[63] Nevertheless, many states follow a variant of this standard. Thus an appellate court in Alabama has stated that the standard of proof in probation revocation hearings is to be the reasonable satisfaction, rather than beyond a reasonable doubt or by a preponderance of the evidence.[64] In New Mexico the proof to support probation revocation must be that which inclines a reasonable and impartial mind to believe that the defendant had violated the terms of probation.[65]

3. Willfulness of Violation

Even if there is sufficient evidence presented at a revocation hearing to substantiate a finding that the probationer or parolee violated a condition of release, the court or parole authority still cannot revoke the supervised release of the person if the violation was unintentional or unavoidable. As a general rule in revoking probation, a district court must find that any violation was intentional or inexcusable.[66] This is also true in parole revocation proceedings. In *Florida Parole Commission* v. *Ferguson,*[67] the appellate court held that the revocation of parole was not warranted where neither the hearing officer's record nor the parole commission's order of revocation indicated that the parolee's actions constituted a willful and substantial violation of his conditional release supervision. Finally, whereas some jurisdictions place the burden of indicating a willful violation on the State, others place this burden on the defendant. Thus in *State* v. *Skolaut,*[68] the Kansas Supreme Court held that where there is discretion to continue or revoke probation, the probationer is entitled to an opportunity to show not only that he did not violate the conditions of probation, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition.

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.[69] Louisiana, on the other hand, has held revocation improper where the only evidence relied upon was the probationer's uncounseled guilty plea.[70] 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.[71] 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 conclusory statement of a probation officer that the probationer failed to report at least once a month as directed.[72] Oklahoma did not permit revocation based solely on an officer's testimony, without supporting evidence, that the defendant had moved to Missouri.[73] 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.[74] 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.[75] (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,[76] a probation officer was required at a revocation hearing to testify to the precise relationship of the probationer with the four-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, for example, the officer 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, such as 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 may, 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 in chief 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.[77] 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.[78] 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 non-association parole condition. Ordinarily observance of parole conditions was clearly collateral to the murder prosecution; as such, 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,[79] 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.[80] This is true at both the state and federal level.[81] Instead appellate courts have held that the sixth amendment right to a speedy trial as guaranteed in the United States Constitution has only application to criminal trials and not to revocation proceedings.[82]

F. Due Diligence

Despite court holdings that a probationer or parolee facing a revocation hearing does not have a sixth amendment right to a speedy hearing, court have entertained the notion that an unacceptable delay procuring the arrest and even conducting the hearing may implicate certain due process rights. Moreover courts have found that this right of due diligence, which is sometimes characterized as a defense to the State's motion to revoke, arises not out of the sixth amendment to the United States Constitution but instead under the due process clause to the fourteenth amendment.[83] Due diligence

differs from the right to a speedy trial in that due diligence becomes an issue if the state moves for a revocation after the term of probation has expired while the right to a speedy trial only applies to a criminal proceeding if a defendant claims that the person's defense to new criminal allegations was unjustly prejudiced by the delay in the State trying the individual.

Generally, probation may be lawfully revoked beyond the probationary period if a revocation petition is filed prior to the end of the probationary period and the state acts on the petition within a reasonable time.[84] However, an unreasonable delay by the State in the issuance of and execution for the arrest of a probationer whose whereabouts are either known or ascertainable with reasonable diligence may result in the State's waiver of the violation and entitle the defendant to discharge. Moreover, once the probationer raises the matter of due diligence, the burden is on the State to show the exercise of due diligence in apprehending the person. Thus, where the record on appeal shows "an absence of evidence as to efforts actually made by the State to attempt service on a probationer or investigate his whereabouts," then appellate courts will hold that the State failed to make a timely and reasonable effort to serve the warrant on the defendant.[85]

Nevertheless, as with the right to a preliminary hearing, the time frame for the need to conduct a revocation hearing does not begin until a warrant for the arrest of the individual has been issued.[86] Thus, in *State* v. *Inscore,*[87] a defendant who was placed on probation in West Virginia was subsequently arrested for a different offense and sentenced to serve a term in prison in Virginia. Although the probation officer in West Virginia had prepared a petition to revoke, the state prosecutor filed a detainer on the defendant and took no further action on the individual until after he had completed his term of confinement in Virginia. The defendant, at his revocation hearing in West Virginia asserted that the delay in conducting the probation revocation hearing violated his state constitutional "right to a speedy trial."

The appellate court disagreed with his contention on appeal. Instead the appellate court held that where a defendant is incarcerated in another state and the prosecuting authorities in West Virginia wished to proceed with probation revocation proceedings, it was a sufficient exercise of due diligence for the prosecuting attorney to invoke the detainer process and to cause one or more bench warrants to issue for the defendant's arrest as a means of notifying the defendant of the pendency of the petition to revoke probation. The appellate court further held that where a defendant was incarcerated in another state and the prosecuting authorities in West Virginia wished to proceed with probation revocation proceedings, it was a sufficient exercise of due diligence for the prosecuting attorney to bring the defendant before the West Virginia court for a probation revocation hearing within a reasonable time following the conclusion of his sentence in the asylum state.

G. Disposition of Revocation Proceeding

A finding of a violation of the terms of release does not resolve a revocation proceeding. The hearing body must then decide whether to incarcerate the releasee or allow the individual to remain on supervision. Thus, a court or parole board's tasks at a revocation hearing are to determine whether the individual violated a release condition and if so, whether the probation or parole remains a viable means of rehabilitating the person and deterring future anti-social conduct, or whether revocation and thus confinement are in order.[88] The first component to the revocation hearing consists of an adversarial evidentiary hearing to determine whether the defendant has indeed violated a condition of probation; the second part of the hearing is based on policy considerations. Only if the evidence supports a violation does the second component of the revocation hearing come into play. In the second stage of the proceeding the court exercises its discretion and determines whether the beneficial, rehabilitative purposes of probation are still being serviced or whether the need to protect the public outweighs the probationer's (or parolee's) interest in liberty.[89]

These two components or stages to the revocation hearing actually entail a much more complex process for finally determining the outcome of a revocation proceeding. At a revocation hearing there are several potential issues to be resolved:

1. Whether the allegations of the revocation motion are true, which the State carries the burden of proving.[90]
2. Whether the defendant committed the violation willfully or without legal justification.[91]
3. If a violation is found, whether the community supervision should be continued, extended, modified, or revoked.[92]
4. If community supervision is revoked, whether the sentence should be reduced.[93]

Thus, even if a probationer admits a violation of the conditions of release, that individual must still be given an opportunity to offer mitigating evidence suggesting the violation does not warrant revocation.[94]

Although some appellate decisions have affirmed that a violation of a single condition of probation is sufficient to revoke probation,[95] the courts have also reiterated that the goal of a revocation hearing is to not to decide guilt or innocence, but to determine whether the defendant remains a good risk for probation.[96] As one federal appellate court stated: "the violation of probation conditions must be substantial; probation revocation is appropriate only if the probationer's behavior demonstrates that he cannot be counted on to avoid anti-social activity, and is not warranted by mere accumulation of technical violations."[97]

H. Written Findings

Ever since the Supreme Court's holdings in *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli,* appellate courts have consistently held that revocation disposition orders must be in writing. Thus the failure to make findings regarding the evidence upon which the trial judge relied and to provide the probationer with a statement of the judge's reason for revoking the person's probation is a denial of the probationer's right to due process.[98] Nevertheless, this requirement that the disposition order be in writing may be satisfied by the placement of the transcript of the evidentiary hearing in the record provided it contains a clear statement of the trial court's reasons for revoking probation.[99]

1. Right to Counsel

Surprisingly, one of the rights the Supreme Court in *Gagnon* v. *Scarpelli* held a probationer was not automatically entitled to under the United States Constitution in a revocation proceeding was the right to counsel. Instead, the Court in *Scarpelli* held that whether a probationer (and parolee) was entitled to counsel in a revocation proceeding must be decided on a case-by-case basis and largely depended on the complexity of the issues being decided at the revocation hearing. Certain appellate courts have followed this holding of the Supreme Court. Thus one appellate court has held that a probationer does not have an absolute right to counsel at a violation of probation hearing or on appeal following a probation adjudication hearing.[100] Nevertheless other appellate courts have held that either under its state constitution[101] or through a state statute,[102] the individual at a probation revocation hearing must be informed that s/he has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender.[103] However, other appellate courts have held that although a probationer may be entitled to counsel at a revocation hearing, a probationer is not entitled to counsel in any proceeding that falls short of a revocation hearing. Hence, one appellate court has held that a person is not entitled to counsel at a hearing to modify the conditions of his probation because a modification of probation does not result in the same loss of liberty as a probation revocation.[104] Finally, a probationer is not entitled to counsel if the nature of the proceeding is non-adversarial.[105]

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* v. *Scott,*[106] decided in 1998 (illegally obtained evidence may be admitted in revocation proceedings); in 1983, the Court decided *Bearden* v. *Georgia*[107] (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*[108] (involving the admissibility of evidence obtained from the probationer without the *Miranda* warnings); and in 1985, the Court decided *Black* v. *Romano*[109] (whether due process requires courts to consider alternatives to probation prior to revocation). These significant cases invite further elaboration.

A. Illegally Obtained Evidence May Be Admitted: *Pennsylvania Board of Probation and Parole* v. *Scott*

The most recent United States Supreme Court decision dealing with revocation proceedings addressed the issue of 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,*[110] the defendant had pleaded *nolo contendere* to the charge of third degree murder and had been sentenced to prison for ten to twenty 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 fourth and fourteenth 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 only applied the exclusionary rule 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:

> the 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 and instead 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, that is, 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: *Bearden* v. *Georgia*

In *Bearden,*[111] 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 four 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 that "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.

Nevertheless, 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.[112]

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). Nevertheless in order to revoke the supervised release of an individual for failure to make payments, it must be shown that the failure was willful on the part of the parolee or probationer.[113]

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 failure 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. Thus if a court finds that a probationer made sufficient efforts to satisfy probation conditions requiring payments, the court can order imprisonment only if it finds alternative punishments are not adequate to satisfy the state's interests in punishment and deterrence.[114] These alternatives to imprisonment that a court should consider include reduction of fine imposed, extension of time to pay, and performance of public service tasks in lieu thereof.[115]

Before a court considers alternatives to incarceration the probationer (or parolee) must show a good faith effort to comply with a payment condition. Thus in *Ransdale* v. *State,* the Wyoming Supreme Court held that a probationer's due process rights were not violated where a trial court revoked the person's probation for failure to pay restitution without first considering alternatives to imprisonment where it was shown at the hearing that the probationer admitted that he had made no effort to look for other employment when his family's business started to fold, and there was no evidence that the probationer made any effort to borrow money, seek a modification of the terms of the probation order, or notify the court of a change in circumstances.[116]

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.*[117] 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. Where 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.[118]

If the parolee is in custody on a new charge, the officer is required to give the *Miranda* warnings.[119] 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.[120] 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.[121]
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, was free to leave the interviewing area, and third parties were present in the interviewing area.[122]
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.)[123]

D. Interrogations and Miranda: The Effect of *Minnesota* v. *Murphy*

In 1984, the United States Supreme Court decided *Minnesota* v. *Murphy,*[124] which gives some answers 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 fifth and fourteenth amendments. The case went to the United States Supreme Court. The Court held that the fifth and fourteenth 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 as a result of *Murphy*. For example, had the probationer objected to answering the questions asked by the probation officer, but was 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 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.*

*For a further discussion of *Minnesota* v. *Murphy,* see the section on self-incrimination in Chapter 7, Conditions, Modifications, and Changes in Status.

The effect of the *Murphy* decision may be summarized as follows:

SHOULD THE MIRANDA WARNINGS BE GIVEN BY THE PROBATION OFFICER IF THE EVIDENCE OBTAINED IS TO BE ADMISSIBLE?

	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 of court decision	Yes

E. Due Process and Probation Revocation: *Black* v. *Romano*

In *Black* v. *Romano,*[125] the Supreme Court addressed the issue whether the United States Constitution requires a judge to consider alternatives to incarceration before revoking probation. In that case, 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 fourteenth 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 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. EXTRADITION (INTERSTATE RENDITION)

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.[126] 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.[127] 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.[128] Thus, probation/parole officers should consult with departmental legal counsel whenever a question involving the necessary documentation required for successful extradition arises. Finally if a probationer or parolee being supervised in a state gets permission to move to another state, then that individual's supervision will be governed by the rules of the Interstate Compact for Adult Offender Supervision.

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* v. *Scarpelli,* remain the law of the land. *Morrissey* mandates a two-stage process comprised 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* also states that the right to appointed counsel in revocation proceedings must be made on a case-by-case basis.

Morrissey gave rise to 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 which are discussed in this Chapter are: standard and burden of proof, nature of proof required, limitations on testimony, due diligence, disposition of revocation proceedings, and the exclusionary rule as applied to probation/parole cases. Despite the continuing viability of *Morrissey* and *Gagnon* 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. If a probationer or parolee was indigent, did not have the financial means to pay the fines, fees, or court costs, and had made a good faith effort to pay them, then an alternative means than imprisonment must be made available to the probationer or parolee to discharge any financial obligations. Finally, in *Scott* v. *Pennsylvania Board of Probation and Parole,* the Supreme Court held that the exclusionary rule does not apply in revocation proceedings.

While the United States Constitution mandates that an asylum state honor the request of any other state to extradite a person accused of a crime, 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. Nevertheless, probationers and parolees who have left a state in which they were being supervised without permission and are found in another state are subject to extradition. If a probationer or parolee has permission to leave a state, then that person will be subject to the rules of the Interstate Compact for Adult Offender Supervision.

NOTES

1. See www.ojp.usdoj.gov/bjs/pandp.htm.

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. *Loomis* v. *Killeen,* 21 P. 3d 929 (Idaho App. 2001).

18. *United States* v. *Pattman,* 535 F. 2d 1062 (8th Cir. 1976).

19. See *United States* v. *Havier,* 155 F. 3d 1090 (9th Cir. 1997), 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 where 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.

20. *Wortham* v. *State,* 188 P. 3d 201 (Okla. Crim, App. – 2008).

21. *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).

22. *State* v. *Hass,* 264 N. W. 2d 464 (N. D. 1978).

23. *State* v. *Nangesser,* 269 N. W. 2d 449 (Iowa 1978).

24. *Nelson* v. *State,* 802 So. 2d 470 (Fla. App 2 Dist. 2001).

25. *Perez* v. *State,* 805 So. 2d 76 (Fla. App. 4 Dist. 2002).

26. *McMahill* v. *State,* 826 So. 2d 526 (Fla. App. 5 Dist. 2002); In *Abel* v. *Wyrick,* 574 S. W. 2d 411 (Mo. 1978), the Missouri Supreme Court held that the mere affidavit of a hearing officer that he had directed that a violation report be sent to the individual was not enough to support a revocation or parole.

27. *In re* Commitment of VanBronkhorst, 633 N. W. 2d 236 (Wis. App. 2001).

28. V. O'Leary and K. Hanrahan, Parole Systems in the United States, 57 (3rd. ed. 1976).

29. *Augello* v. *Warden,* Met. Corr. Ctr., 470 F. Supp. 1230 (E.D.N.Y. 1979).

30. 541 U. S. 36 (2004).

31. 547 U.S. 813 (2006).

32. 389 F. 3d 332 (2nd Cir.- 2004).

33. *United States* v. *Martin,* 382 F. 3d 840 (8th Cir. 2004); *State* v. *Palmer,* 158 P. 3d 363 (Kan. App. 2007); *Reyes* v. *State,* 868 N. E. 2d 438 (Ind. 2007); and *People* v. *Stanphill,* 87 Cal. Rptr. 3D 643 (Cal. App. 3D Dist. 2009).

34. 354 F. Supp. 2nd 1 (D. D. C. - 2004).

35. *O'Hara* v. *Board of Parole and Post-Prison Supervision,* 203 P. 3rd 213 (Or. 2009); see also, *Williams* v. *Quarterman,* 2009 WL 73154 (5th Cir. 2009).

36. 2006 WL 1459803 (Idaho App. 2006).

37. *Ohio* v. *Roberts,* 448 U. S. 56 (1980).

38. *Hampton* v. *State,* 203 P. 3d 179 (Okla. Crim. App. 2009; see also, *Reyes* v. *State,* 868 N. E. 2d 438 (Ind. 2007), in which the Indiana Supreme Court found "the substantial trustworthiness test" the more effective means for determining the hearsay evidence that should be admitted at a revocation hearing than the balancing test.

39. *Brown* v. *State,* 668 S. E. 2d 490 (Ga. App. 2008).

40. *State* v. *Graham,* 30 P. 3d 310 (Kan. 2001).

41. *Hampton* v. *State,* 203 P. 3d 179 (Okla. Crim. App. 2009); see also, *Thompson* v. *State,* 994 So. 2d 468 (Fla. App. 3 Dist. 2008).

42. *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973).

43. See *Gideon* v. *Wainwright,* 372 U. S. 335 (1963) and *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).

44. *Gagnon* v. *Scarpelli,* 411 U.S. 778, 791(1973).

45. Ex parte Carmona, 2006 WL 1687682 (Tex. Cr. App. – 2006).

46. *Williams* v. *Johnson,* 171 3 rd. 300 (5th. Cir. 1999); see also, *State* v. *Sanchez,* 28 P. 3d 1143 and *State* v. *Hemmes,* 740 N. W. 2d 81 (N. D. 2007), in which the North Dakota Supreme Court enunciated that the minimum rights afforded to a probationer include: written notice of the claimed violations of his probation, disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body, and a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation. See also *John* v. *United States Parole Commission,* 122 F. 3d 1278 (9th Cir. 1997), in which 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 whether 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."

47. *McCants* v. *Travis,* 737 N. Y. S. 2d 416 (N. Y. A. D. 3 Dept. – 2002); see also, *State* v. *Giddings,* 29 P. 3d 475 (Mont. 2001).

48. *Jones* v. *Penn. Bd of Probation and Parole,* 952 A. 2d 710 (Pa. Comwlth App. 2008).

49. *Cotten* v. *Davis,* 215 Fed. Appx. 464 (6th Cir. 2007).

50. *State* v. *Hall,* 195 P. 3d 220 (Kan. 2008), in which the Kansas Supreme Court held that if an alleged probation violator is incarcerated as the result of a new felony conviction arising in another county, the state does not waive a probation violation if it lodges a detainer but does not execute a probation violation warrant while the alleged violator is imprisoned on a consecutive sentence, see also, *State* v. *Hernandez,* 730 N. W. 2d 96 (Neb. 2007). This legal principle is equally applicable to the federal system. In *Malave* v. *Kedrick,* 271 F. 3d 1139 (8th Cir. – 2001), the Eighth Circuit Court of Appeals held that a federal parole had no liberty interest in a prompt revocation hearing where he was never taken into custody on a parole violator warrant.

51. *Noble* v. *New York State Div. of Parole,* 826 N. Y. S. 2d 475 (N. Y. App. Div. 3 Dept. 2006).

52. *Moody* v. *Daggett,* 429 U. S. 78 (1976); see also, *Roberts* v. *Champion,* 18 Fed.Appx. 674, (10th Cir.- 1997).

53. *Ex parte* Cordova, 235 S. W. 3d 735 (Tex. Cr. App. 2007); see also, *Ex parte* Williams, 2007 WL 1264126 (Tex. Cr. App. 2007).

54. *McKenzie* v. *Pennsylvania Board of Probation and Parole,* 963 A. 2d 616 (Pa. Cmwlth. App. 2009); see also, *Prebella* v. *Pennsylvania Board of Probation and Parole,* 942 A. 2d 257 (Pa. Cmwlth. App – 2008). Note further, in *Suce* v. *Taylor,* 572 F. Supp. 2D 325 (S. D. N. Y. 2008) a federal district court held that a parolee can waive the right to be present at a final parole revocation hearing as long as the waiver is made knowingly and intelligently.

55. *United States* v. *Garner,* 309 Fed.Appx 911 (5th Cir. 2009).

56. *Peek* v. *Dennison,* 835 N. Y. S. 2d 783 (N. Y. App. Div. 4 Dept. 2007).

57. *Ellis, et al.* v. *District of Columbia, et al.,* 84 F. 3d 1413 (C. A. D. C. 1996).

58. *Hampton* v. *State,* 786 A. 2d 375 (R. I. 2001), in which the Rhode Island Supreme Court stated that the State's burden of proof during a probation revocation proceeding is to adduce reasonably satisfactory evidence of the defendant's violation of one of the terms of his probation.

59. *Smith* v. *State,* 904 N. E. 2d 282 (Ind. App. 2009).

60. *State* v. *Terry,* 562 S. E. 2d 537 (N. C. App. 2002).

61. In *State* v. *Tennant,* 540 S. E. 2d 807 (N. C. App. 2000), the appellate court acknowledged that general rule that an alleged violation by a probationer of a condition upon which a sentence is suspended need not be proven beyond a reasonable doubt.

62. *Pettigrew* v. *State,* 51 S. W. 3d 297 (Tex. App. Tyler, 2001) and *State* v. *Shannon,* 764 A. 2d 1281 (Conn. App. 2001); *United States* v. *Crain,* 11 Fed. Appx 645 (8th Cir. 2001) and *United States* v. *Thomas,* 239 F. 3d 163 (2nd Cir. 2001), in which the United States Court of Appeals for the 2nd Circuit stated that preponderance of the evidence standard applied in determining whether the defendant violated terms of his supervised release. See, however, *Government of the Virgin Islands* v. *Martinez,* 239 F. 3d 293 (3rd Cir. 2001), in which the United States Third Circuit Court of Appeals stated that in order to revoke probation a district court need to be only reasonably satisfied that the defendant had violated its terms and conditions.

63. *Armstrong* v. *State,* 82 S. W. 3d 444 (Tex. App. – Austin, 2002).

64. *Chenault* v. *State,* 777 So. 2d 314 (Ala. Crim. App. – 2000).

65. *State* v. *Sanchez,* 28 P. 3d 1143 (N. M. App. – 2001).

66. In re Welfare of J. K., 641 N. W. 2d 617 (Minn. App. – 2002).

67. *Florida Parole Commission* v. *Ferguson,* 987 So. 2d 186 (Fla. App. [1st Dist.], 2008).

68. *State* v. *Skolaut,* 182 P. 3d 1231 (Kan. 2008).

69. *People* v. *Felton,* 69 Ill. App. 3d 684, 387 N. E. 2d 1094 (1979).

70. *State* v. *Varnado,* 384 So. 2d 440 (La. 1980). See also, *State* v. *McGlothin,* 427 So. 2d 280 (Fla. Dist. Ct. App. 1983).

71. *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).

72. *Herrington* v. *State,* 534 S. W. 2d 311 (Tex. Crim. App. 1976).

73. *Meyer* v. *State,* 596 P. 2d 1270 (Okla. Crim. App. 1979).

74. *State* v. *Dement,* 42 N. C. App. 254, 255 S. E. 2d 793 (1979).

75. *Gilbert* v. *State,* 150 Ga. App. 339, 258 S. E. 2d 27 (1979).

76. *State* v. *Winters,* 40 Or. App. 9, 605 P. 2d 293 (1980).

77. *Harris* v. *New York,* 401 U. S. 222 (1971).

78. *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).

79. People *ex rel Thiel* v. *Dillon,* 70 A. D. 2d 778, 417 N.Y.S. 2d 534 (1979).

80. *State* v. *Triplett,* 195 P. 3d 819 (Mont. 2008); nevertheless please note that even in those circumstances in which an appellate court holds that the Sixth Amendment right to a speedy trial is inapplicable in a revocation proceeding, the appellate court may still analyze the issue by applying the criteria established by the United States Supreme Court in *Barker* v. *Wingo,* 407 U.S. 514 (1972), for determining whether there was a violation of a defendant's right to a speedy trial. See, for example, *Wilburn* v. *State,* 671 N. E. 2d 143 (Ind. App. 1996).

81. *United States* v. *Santana,* 526 F. 3d 1257 (9th Cir. 2008); see also *United States* v. *Taylor,* 931 F. 2d 842 (11th Cir. 1991).

82. Nevertheless, at least one appellate court has held that a probationer, in a revocation hearing, has a right to a speedy trial, apparently as a right under its state constitution. See *Reese* v. *State,* 866 P. 2d 82 (Wyo. 1993).

83. Sometimes this due process right of due diligence is codified in state statute. See *State* v. *Jackson,* 660 S. E. 2d 165 (N. C. App. 2008).

84. *Leech* v. *State,* 994 So. 2d 850 (Miss. App. 2008).

85. *State* v. *Myers,* 178 P. 3d 74 (Kan. App. 2008).

86. In *United States* v. *Romero,* 511 F. 3d 1281 (10th Cir. 2008), the Tenth Circuit Court of Appeals held that parolees being incarcerated for another criminal offense did not have a legal right to receive an immediate hearing on their supervised release revocation; instead, the court, citing *Moody* v. *Daggett,* 429 U.S. 78 (1976), held that there was no constitutional duty to provide prisoners an adversary parole hearing until they were taken into custody as parole violators.

87. *State* v. *Inscore,* 634 S. E. 2d 389 (W. Va. 2006).

88. *Commonwealth of Pennsylvania* v. *Kalichak,* 943 A. 2d 285 (Pa. Super. 2008); see also, *McKenzie* v. *Pennsylvania Board of Probation and Parole,* 963 A. 2d 616 (Pa. App. 2009), and *Vernon* v. *State,* 903 N.E.2d 533 (Ind. App. 2009) in which appellate courts continue to affirm that a parole or probation revocation process has two distinct components.

89. *State* v. *Chambers,* 767 A. 2d 1215 (Conn. App. 2001).

90. *Harris* v. *State,* 35 S. W. 3d 819 (Ark. App. 2000); see also, *People* v. *Renner,* 748 N. E. 2d 1272 (Ill. App. 5th Dist., 2001).

91. *Mathis* v. *Florida Parole Commission,* 944 So. 2d 1182 (Fla. App. 1st Dist. 2006) (Only a willful violation of a substantial condition of parole or probation will justify revocation of parole or probation).

92. *State* v. *Mynhier,* 765 N. E. 2d 917 (Ohio App. 1st Dist., 2001); see also, *Hendley* v. *State,* 783 S. W. 2d 750 (Tex. App. - Houston, 1990).

93. *State* v. *Leach,* 20 P. 3d 709 (Idaho App. 2001); see also, *Hampton* v. *State,* 786 A. 2d 375 (R. I. 2000).

94. *Cooper* v. *State,* 894 N.E.2d 993 (Ind. App. 2008).

95. *Pitman* v. *State,* 749 N. E. 2d 557 (Ind. App. 2001); see also, *Morgan* v. *State* 42 S. W. 3d 569 (Ark. App. 2001).

96. *State* v. *Brunet,* 806 A. 2d 1007 (Vt. 2002).

97. *United States* v. *Leigh,* 276 F. 3d 1011 (8th Cir. 2002) and *United States* v. *Tschebaum,* 306 F. 3d 540 (8th Cir. 2002); see also, *State* v. *Jones,* 787 A. 2d 43 (Conn. App. 2002), in which a Connecticut appellate court described the process of determining whether to revoke probation as one in which the trial court must consider the beneficial purposes of probation, namely rehabilitation of the offender and the protection of society by balancing the important interests in the probationer's liberty and rehabilitation against the need to protect the public.

98. *Commonwealth of Massachusetts* v. *MacDonald,* 757 N. E. 2d 744 (Mass. App. Ct. 2001); see also, *Peoples* v. *State,* 807 So. 2d 608 (Ala. Crim. App. 2001); *State* v. *Leiderman,* 86 S. W. 2d 584 (Tenn. Crim. App. 2002), in which a Tennessee appellate court stated that oral findings in the transcript of a probation revocation hearing were sufficient to satisfied the written statement requirement.

99. *Washington* v. *State,* 758 N. E. 2d 1014 (Ind. App. 2001).

100. *Weaver* v. *State,* 779 A. 2d 254 (Del. Supr. 2001); see also, *Evans* v. *State,* 794 So. 2d 1234 (Ala. Crim. App. – 2000); see further, *State ex rel. Boyle* v. *Sutherland,* 77 S. W. 3d 736 (Mo. App. E. D. 2002).

101. *Parker* v. *State,* 545 S. W. 2d 151 (Tex. Cr. App. 1977).

102. *Worthington* v. *Board of Probation and Parole,* 784 A. 2d 275 (Pa. Comwlth. 2001), in which a Pennsylvania appellate court stated that the right to counsel at a parole violation hearing is not based on either the state or federal constitutions but, rather, on statutory law, case law and regulatory law; see also, Tex. Code of Crim. Proc., Article 42.12, Section 21 (c).

103. *State* v. *Cator,* 781 A. 2d 285 (Conn. 2001).

104. *Gould* v. *Patterson,* 560 S. E. 2d 37 (Ga. App. 2002); see also, *Prevato* v. *State,* 77 S. W. 3d 317 (Tex. App. Houston, 2002).

105. *Dunson* v. *Commonwealth of Kentucky,* 57 S. W. 3d 847 (Ky. App. 2001), in which a Kentucky appellate court stated that a probationer's due process rights were not violated by not having counsel represent the probationer at a "Drug Court" proceeding.

106. *Pennsylvania Board of Probation and Parole* v. *Scott,* 524 U. S. 357 (1998).

107. *Bearden* v. *Georgia,* 461 U. S. 660 (1983).

108. *Minnesota* v. *Murphy,* 465 U.S. 420 (1984).

109. *Black* v. *Romano,* 471 U. S. 606 (1985).

110. *Pennsylvania Board of Probation and Parole* v. *Scott,* 524 U. S. 357 (1998).

111. *Bearden* v. *Georgia,* 461 U. S. 660 (1983).

112. The Bearden decision is consistent with *Williams* v. *Illinois,* 399 U. S. 235 (1970), 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.

113. In *Dangerfield* v. *State,* 656 S. E. 2d 352 (S. C. 2008), the South Carolina Supreme Court held that a magistrate's imposition of sentence for passing fraudulent checks after the defendant had failed to make restitution payments as a condition of suspended sentence, without conducting a hearing to determine the willfulness of the defendant's failure to pay, violated the defendant's right to due process; see also, *Brian* v. *McNeil,* 591 F. Supp. 1245 (M. D. Fla. 2009).

114. *State* v. *McCrimon,* 729 N. W. 2d 682 (Neb. App. 2007).

115. *State* v. *White,* 206 P.3d 553 (Kan. App. 2009).

116. *Ransdale* v. *State,* 149 P. 3d 459 (Wyo. 2006); see also, *State* v. *Monaghan* 2008 WL 2875715 (Ariz. App. Div. 1, 2008), in which an Arizona appellate court stated that a probationer's due process rights were not violated where his probation was revoked for failure to pay the probation fine and fee where it was shown that the probationer had made no effort to pay even the minimal amount towards the fines and fees order and had made no effort to obtain employment; see further, *State* v. *Jacobsen,* 746 N. W. 2d 405 (N. D. 2008).

117. *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

118. *Oregon* v. *Matheason,* 429 U. S. 492 (1977).

119. *State* v. *Davis,* 67 N. J. 222, 337 A. 2d 33 (1975).

120. *State* v. *Lekas,* 201 Kan. 579, 442 P. 2d 11 (1968).

121. *In re* Richard T., 79 Cal. App. 3d 382, 144 Cal. Rptr. 856 (1978).

122. *People* v. *Lipsky,* 102 Misc. 2d 19, 423 N.Y.S. 599 (Monroe Co. Ct. 1979).

123. *People* v. *Ronald W.,* 24 N. Y. 2d 732, 249 N. E. 2d 882, 302 N.Y.S. 2d 260 (1969).

124. *Minnesota* v. *Murphy,* 465 U.S. 420 (1984).

125. *Black* v. *Romano,* 471 U. S. 606 (1985).

126. *Miller* v. *Cronin,* 197 Colo. 391, 593 P. 2d 706 (1979).

127. *Morgan* v. *Miller,* 197 Colo. 341, 593 P. 2d 357 (1979).

128. *Martel* v. *Knight,* 119 N.H. 190, 400 A. 2d 478 (1979).

CHAPTER 9

EMERGING TRENDS CONCERNING LIABILITY OF PROBATION AND PAROLE OFFICERS FOR SUPERVISION

INTRODUCTION

Over the last several decades numerous court decisions have examined personal liability claims involving probation/parole officers. These court decisions have generally focused on two areas of: 1) whether a supervision office has "taken charge" of an offender and by the officer's deliberate indifference the offender has injured a third party and 2) assertions of defense of immunity to suits against individual officers. Moreover, in regards to claims of deliberate indifference, the complaining party has generally asserted one of three causes of actions: improper supervision, improper placement, and failure to warn. In regards to claims of immunity, the issue litigated is whether the officer acted in good faith. This chapter examines these issues.

I. "TAKING CHARGE" DOCTRINE

While many courts across the nation have examined liability issues involving probation and parole officer conduct, there is no consensus regarding whether liability can be found for the injury to a third person based on the conduct of an individual under the probation or parole officer's supervision. The issue central to recognizing a cause of action for improper supervision, placement, or failure to warn is whether the officer "took charge" of the offender and by the officer's deliberate indifference allowed the offender to harm another person. The problem in discussing this legal concept is that the various courts are not in agreement as to whether a probation or parole officer has "taken charge" of a defendant.

Almost every jurisdiction in the country recognizes as legal authority the Restatement of Torts (Second). This is a highly influential legal treatise issued by the American Law Institute. Section 315 of this Restatement states:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:
>
> (a) A special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) A special relationship exists between the actor and the other which gives to the other a right to protection."

In addition § 319 of the Restatement states:

> "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

Thus the general rule under tort law is that an individual has no duty to prevent a third person from causing physical injury to another. However the exception to this rule is that when a "special relationship" exists between the individual and the third party then a duty is imposed upon the individual to control the third person's conduct. Such a duty arises if the individual "takes charge" of the third person.[1]

Nevertheless certain appellate courts have interpreted the language in these two sections of the Restatement of Torts (Second) fairly restrictively and have held that unless the officer has custodial control of the defendant, that is, the defendant is being held in a restrictive facility, the officer has not taken charge of the defendant. Hence certain state appellate courts have held that a parole or probation officer does not take charge of a defendant simply because the officer is supervising the individual.[2] Nevertheless, other jurisdictions have recognized that under certain circumstances, a parole or probation officer supervising a defendant has taken charge of the person and can be liable

for injuries caused to third persons resulting in the negligent supervision of the defendant.[3] However even those jurisdictions that have held that a parole or probation officer can take charge of a parolee or probationer have said that the relationship between the officer and defendant must be definite, established, and continuous.[4]

II. IMPROPER SUPERVISION

Even for those jurisdictions that have held that a probation or parole officer supervising an offender has take charge of the individual, these courts have further held that a probation or parole officer can only be found liable for injuries caused by a person under supervision if the actions of the officer were somehow deliberately indifference. Deliberate indifference is premised on a duty owed to an individual, a breach of that duty and injuries proximately caused by that breach of duty.[5] Whether one person owes a duty to another largely depends on whether the person creating the risk to another could have reasonably foreseen that the person's acts or omissions would harm the other person.[6] Hence even if a probation or parole officer were to be deemed to have "taken charge" of an offender, the individual would still not be liability if it were determined that it could not have been reasonably foreseen that by the officer's actions, the offender harmed a third person.

Perhaps the most exemplary judicial decisions examining the issue of negligent supervision are *Taggart* v. *State* and *Sandau* v. *State.*[7] In both of 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 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 this parolee too 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 nine year old girl.

The victims in these two cases filed suit against both the Board of Parole in the State of Washington and individual parole officers. The plaintiffs alleged that certain parole officers acted improperly in recommending to the parole board that the parolees be placed on parole, that the parole board acted improperly in granting parole, and that certain other parole officers improperly supervised the parolees while they were on parole.

In regards 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 improper 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 question of fact 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; namely, perform regular drug testing, conduct field visits, 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 deliberately indifferent in supervising their parolees and remanded both cases to the lower court for resolution of the fact issues.

Other jurisdictions have also held that it could have been reasonably foreseen that the actions of a probation or parole officer would result in an offender injuring a third party. In *Starkenburg* v. *State*[8] a defendant had been granted parole after having served a prison term for murder. His parole officer allowed him to leave the State of Montana and go to the State of Washington for a vacation and to look for work. The parole officer did not inform the officials in Washington that the parolee would be visiting their state. Moreover the parolee decided to remain in Washington and his parole officer took no steps to secure his return to Montana. In addition, the parole officer had received reports concerning the abusive behavior by parolee to his new girlfriend but took no actions to address the parolee's conduct. Finally following another incident involving the parolee and his now ex-girlfriend, the parolee ambushed her and several of her friends, killing one of the friends and wounding two others.

The family of the victim filed a lawsuit claiming negligent supervision. The State of Montana argued that the parolee's criminal acts were unforeseeable as a matter of law. The appellate court disagreed with this contention. The court concluded that the facts in the case supported a finding that the parole officer could reasonably have foreseen criminal acts of violence by the parolee against his ex-girlfriend and her friends and justified submitting a causation issue to the jury.

In a more recent case the State of Alaska was asking to re-examine its previous holding in *Division of Corrections* v. *Neakok,*[9] that recognized a cause of action for inadequate supervision. In *State, Department of Corrections* v. *Cowles,*[10] a parolee murdered his former girlfriend and then shot himself. The family of the victim filed a lawsuit, alleging that the parole officer impermissibly failed to enforce and report parole violations, to comply with the statutes, regulations, and guidelines governing the supervision of parolees, to act in response to the parolee's dangerous behavior, and to seek to revoke his parole. Although the State asked the Alaska Supreme Court to reconsider its holding in *Division of Corrections* v. *Neakok* regarding parole officer liability, the court declined to do so and re-affirmed that the State owed a duty of care to a parolee's foreseeable victims and that the State was not immune from suit for inadequate supervision of parolees.

Nevertheless appellate courts, in examining the issue of foreseeability, have taken into consideration the risk level of the person being supervised on probation or parole. Thus the acts of violence of a parole convicted of a low level crime may be "so highly extraordinary or improbable as to be wholly beyond the range of expectations."[11] On the other hand if a parolee is deemed to be a high risk offender, then courts will generally give much closer scrutiny to the supervision of the offender and deem that the officer owes a much higher duty of care to prevent the offender from harming another.[12]

Finally even if the improper supervision of an offender results in a breach of duty to another, there still must be shown a causal connect between the breach of duty to the third party and the injury

suffered. Thus a plaintiff in a case claiming inadequate parole supervision action must show not only inadequate supervision, but must also carry the burden to demonstrate that the damages sustained by the plaintiff would have been avoided but for the inadequate supervision.[13] For example, in *Kelley* v. *State,*[14] the court stated that an inmate's community corrections officer was not [grossly] negligent for failing a arrest the inmate following his encounter with the police outside a junior high school, which occurred more than two months before the inmate assaulted a woman.

III. IMPROPER PLACEMENT

Another cause of action that has occasionally been asserted is improper placement.[15] This claim generally arises where a probation officer places an offender under supervision in a less restrictive setting where the offender then injures a third party. The case that best exemplifies a suit claiming negligent placement is *Faile* v. *South Carolina Department of Juvenile Justice.*[16] In this case a juvenile was charged in family court with grand theft of a bicycle. After pleading guilty the child was committed to a Reception and Evaluation Center for the purpose of submitting to an evaluation for a recommendation for disposition of his case. The evaluation expressed concern over the child's aggressive behavior and the trial judge ordered the child to continue probation for one year and to be placed in a therapeutic foster home.

The child was placed in a foster home but was later expelled for stealing a knife and gun from a school police officer. The child's probation officer then decided to place the child with his biological mother while initiating a hearing before the judge to show cause why the child's probation should not be revoked. Then, during the time the child was with his mother, the child violently assaulted a nine year old boy.

The question on appeal was whether the juvenile probation officer was entitled to quasi-judicial immunity for his actions in placing the child with his biological mother. The court noted that under South Carolina law, neither a judge nor other officials were entitled to judicial immunity if the act did not serve a judicial purpose. Moreover the court observed that in determining what constituted a judicial act, the court looked to the nature and function of the act. Thus the court had to determine whether the juvenile probation officer's placement of the child had the nature and function of a judicial act, thereby entitling him to quasi-judicial immunity.

The court acknowledged that if the individual was acting pursuant to a direct court order, appellate courts were more likely to grant quasi-judicial immunity for that action. Nevertheless whereas an officer might be entitled to judicial immunity when executing a court order, this case involved a situation in which an officer deviated from the explicit terms of the order. Moreover the court stated that the probation officer placed the child into a home where juvenile workers had noted there was no proper supervision. Furthermore, the court stated that the probation officer knew of the child's violent tendencies. As such the court concluded that because the Department of Juvenile Justice had custody of a known dangerous individual, it therefore had an independent duty to control and supervise the child to prevent him from harming others as long as it retained custody of him by court order.

IV. FAILURE TO WARN

The third cause of action that may be asserted against a probation or parole officer alleging an improper act resulting in the injury to a third person by a probationer or parolee is failure to warn. This situation arises where a third party unaware of the status or risk level of the parolee or probationer is injured by the criminal conduct of that individual and was never warned of the potential danger by a probation or parole officer. The situations in which a third party could come into contact with a parolee or probationer are obviously myriad. The injured third party could form a personal relationship with

the offender, the offender could work for the person, the person could accept the offender in a foster home setting or even just be a neighbor of the parolee or probationer. Moreover liability is usually premised that the probation or parole officer knew or should have known that the offender posed a threat to the person and therefore the officer should have notified the third person of the status of the parolee or probationer or that the offender might pose a danger to the person.

Nevertheless all probationers or parolees pose a potential threat to someone. This threat may be likely or highly unlikely depending on the individual characteristics of the probationer and parolee. Moreover, the whole purpose of probation and parole is that offenders engage with other people in the free world. Thus how does the probation or parole officer know what circumstances might require him or her to warn someone else and what circumstances do not?

A. The "Public Duty Doctrine" Generally Precludes Liability

One starts with the understanding that the "public duty doctrine" generally precludes officer liability for the criminal conduct of a probationer or parolee who injures a member of the public. This doctrine states that when a duty imposed by law upon a public official is owed to the public in general, the inadequate or improper performance of that duty gives rise to only a public, as opposed to private, injury.[17] Therefore in examining whether there may be officer liability for failing to inform a member of the public of the dangerous proclivities of an offender under supervision, the initial premise is that there is no liability for failure to warn.

Nevertheless although this doctrine generally insulates officers from liability, there are exceptions to this general rule. The doctrine is inapplicable where 1) officials by their actions affirmatively undertake to protect the plaintiff and the plaintiff relies on the undertaking, 2) a statute specifically provides for a cause of action against an officer or official for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or 3) plaintiff alleges a cause of action involving intent, malice, or reckless misconduct.[18] Thus an exception to the public duty doctrine exists where the officer has a "special relationship" with the victim.[19] The leading cases from the probation and parole settings are discussed separately below.

B. There Might Be Liability if a Special Relationship Exists

A special relationship can arise under three circumstances. First an officer owes a specific duty of care to an identified victim if it is reasonably foreseeable that to fail to warn the victim of a danger of which the officer is aware would result in injury to the victim. Second a statute or agency policy may require an officer under certain circumstances to warn a victim. Third, the officer may affirmatively assume an obligation to warn a victim and the failure to do so resulted in the victim sustaining an injury by the probationer or parolee being supervised by the officer.

1. Reasonably Foreseeable Risk

The duty to warn arises where, based on the probationer's or parolee's criminal background and past conduct, the officer can "reasonably foresee" a prospect of harm to a specific third party. As such "reasonably foresee" means the circumstances of the relationship between the probationer or parolee and third party suggest that the probationer or parolee may engage in conduct in a criminal or anti-social manner *similar* or *related* to the offender's past conduct.[20] Consequently a duty to warn arises only if the probation or parole officer is either aware of or should be aware of a relationship between the probationer and a parolee and the third party and the officer also knows that, based on the background and circumstances of the offender, the relationship poses a risk of harm to the third party.[21]

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 non-disclosure) should obtain a waiver in writing, if such is allowed by law or agency policy, to disclose such record to the employer.

Another instance where liability might ensue in probation/parole supervision is if there is a threat made to an identifiable victim, for example, if 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 a threat made to an identifiable victim, the police must be informed immediately or the offender be placed under temporary custody or surveillance. Courts will likely conclude that the presence of foreseeability (a threat) and an identifiable victim creates a "special relationship" between the officer and the public that can lead to liability if no action is taken.

Finally, a duty may be created if the legislature enacts a statute requiring a officer or official to notify a person belonging to an identifiable group regarding a change of status of a probationer or parolee. Under such circumstances, the duty is legislatively mandated and foreseeability is no longer an issue. Over the recent years, as part of the victims' rights movement, more and more statutes have been enacted requiring victim notification. This in turn adds liability concerns for probation and parole officers. For example, in Texas a statute provides that a probation department must immediately notify a victim of the defendant 's crime of:

(1) The fact that the defendant has been placed on community supervision.

(2) The conditions of community supervision imposed on the defendant by the court.

(3) The date, time, and location of any hearing or proceeding at which the conditions of the defendant's community supervision may be modified or the defendant's placement on community supervision may be revoked or terminated.[22]

Thus under this statute although it would still be necessary to demonstrate a causal connection between the failure to notify a victim and any injury caused to the victim, foreseeability would not be an issue if it were shown that an officer violated this notification requirement.

2. Reliance

Another manner in which a special relationship can be demonstrated is where a probation or parole officer takes some affirmative steps that place a third party in danger or gives some assurance to a third party that the officer will warn the person if the parolee or probationer being supervised ever poses a danger to the third party. Liability is created because of *reliance,* that is, the probation/parole officer undertook specific actions that contributed to the harm suffered by the victim. Of all the different legal theories involving a failure to warn claim, a successful assertion of detrimental reliance by a third party is the most likely failure to warn claim that will prevail in a jury trial and be upheld on appeal. This is because both juries and appellate courts are far less sympathetic when a probation or parole officer initiated a measure that actually imperiled the safety of an innocent third person.

This principle of reliance was central to the case of *Myers* v. *Los Angeles County Probation Department.*[23] In *Meyers,* 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 and who subsequently embezzled 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.

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 a breach of duty or a violation of policy. The better policy is to make disclosure or non-disclosure optional, as recommended above.

The other circumstance in which reliance can form the basis to support a finding of liability is where a probation or parole officer tells a third party whom the officer otherwise had no duty to warn that the officer would inform the third party of any change in status of the probationer or parolee the officer is supervising and then fails to do so. Then if the probationer or parolee subsequently injures the third party, the person can assert a negligence claim and need not demonstrate reasonable foreseeability. This is because by affirmatively assuming the duty to notify the third party and failing to do so, the third party can rely on this assurance and a duty is owed the third party without the need to establish foreseeability.

Despite the legal precepts discussed in this section for establishing and avoiding a negligence claim for failure to warn, determining liability must be done on a case-by-case basis. Probably the best way to avoid liability is to follow closely agency policies and procedures for notifying victims and other third parties regarding probationers and parolees under supervision and to comply strictly with any statutory requirements regarding victim notification. In addition, the officer should not assume any obligations that are not otherwise required. Finally, if the officer is aware of an identifiable victim and is aware of a credible threat of harm or injury to that victim by a probationer or parolee, then, if there is appropriate time the matter should be raised with the officer's supervisor and, if threat is immediate, and there is no time to staff the matter; then the officer should warn the victim of the potential threat.

C. Court Decisions Examining These Issues

Research has indicated that perhaps the best court decision examining the issues arising from a claim of failure to warn is *Rogers* v. *Department of Parole and Community Corrections.*[24] In this case a parolee had been sent to prison for breaking into the home of an individual. The parolee was later furloughed. Seventeen days after the furlough, the parolee robbed, kidnapped and killed the same victim he had earlier burglarized. The family of the victim filed a wrongful death suit alleging that the parole authorities were negligent in failing to warn the victim of the offender's furlough.

The South Carolina Supreme Court, in examining this matter, noted that an essential element in a cause of action for negligence was the existence of a legal duty of care owed by the defendant (parole officials) to the plaintiff (victim). The court further observed that generally one had no duty to control the dangerous conduct of another or to warn a potential victim of such conduct. Nevertheless, the court stated that where a defendant had the ability to monitor, supervise, and control an individual's conduct, a special relationship existed between the defendant and the individual and the defendant might have a common law duty to warn potential victims of the individual's dangerous conduct.

The South Carolina Supreme Court stated that such a duty to warn would arise when a person being released from custody had made a specific threat of harm directed at a specific individual. Nevertheless, the court found that in this case there was no evidence presented that the parolee ever made a specific threat to harm the victim. As such the defendant had no common law duty to warn the victim of the parolee's release.

Several comments can be made about this decision. Absent any evidence to the contrary, it could not be anticipated that a parolee would again break into the same home for which he was sent to prison. Moreover, the defendant was sent to prison for burglary, a serious offense, but not one of violence such as assault or murder. Thus it could not be said that the parole officials could reasonably foresee that the victim of the first offense would be the same victim of the later offense, nor that the parolees conduct would escalate to violence. Thus, absent an express threat against this victim that was

known by the parole officials, it is difficult to conceive, based on these facts, how the appellate court could have upheld a finding of negligence for a failure to warn.[25]

The second comment is that this decision makes no mention of any statutory provisions requiring victim notification and one can assume that at the time this decision was rendered there were no statutory mandates. Nevertheless even if there were, the plaintiff would still have had to demonstrate a causal connection between the failure to warn and the criminal act committed by the parolee. This causal connection would have to depend on several variables, including the likelihood the parolee would commit a crime of violence, the time delay or proximity between the release of the parole and the injury to the victim, the distance between the residence of the victim and the place where the parolee was ordered released, and so forth. This does not mean that the victim could not have prevailed but these, along with other existing factors, would have to have been established in order to show a causal connection between the omission of the parole authorities and the injury suffered by the victim. Several other courts examined negligent claims involving a failure to warn.

In *Johnson* v. *State,*[26] 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 a 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 state also argued that it owed no duty of care to the plaintiff.

The court rejected this and held the state liable, stating:[27]

> 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 consider consciously 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,*[28] 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,*[29] 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.[30]

V. IMMUNITY DEFENSES

Generally speaking, in both state and federal courts, the acts of government employees are insulated from law suits, even if the acts in question were clearly negligent.[31] In the federal system this protection is known as "qualified immunity." In most state systems this protection is known as "official immunity." Although both types of immunity are similar federal courts analyze this defense differently from state courts.[32] A successful assertion of an immunity defense not only protects an officer from a liability claim but also prevents the plaintiff from going forth with a lawsuit.[33] Finally, these two defenses apply when a governmental employee is sued in his or her individual (personal) capacity. If the employee is sued in his or her official capacity as an agent of a governmental body, then some variant form of the defense of sovereign immunity must be asserted.

A. Qualified Immunity

Qualified immunity is a defense that is asserted in a suit alleging a claim under federal law. It is the most common defense made in response allegations of a civil rights violation filed pursuant to 42 U. S. C. § 1983 (known as 1983 claims). It shields government officials from liability when they are acting within their discretionary authority and their conduct does not violate a clearly established statutory or constitutional law of which a reasonable person would have known.[34] Qualified immunity balances two important interests: the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.[35]

Traditionally, to determine whether a government agent or employee could assert the defense of qualified immunity, the federal courts have applied a two-step analysis. A court first asks the question whether, taken in the light most favorable to the plaintiff, the facts alleged showed that the officer's conduct violated a constitutional right. If no constitutional right would have been violated were the allegations established, the inquiry ends. If, however, the plaintiff alleged the violation of a constitutional right, the court then has to determine whether the right was clearly established at the time of the incident at issue. A right is clearly established when its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates the law." Finally, if the law is clearly

established, the court has to decide whether the defendant's conduct was objectively reasonable. The court would consider an official's conduct to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the conduct violated the Constitution.[36]

Nevertheless, a relatively recent United States Supreme Court opinion has modified the rules establishing the analytical framework for determining whether a government officer is entitled to qualified immunity as outlined in *Saucier* v. *Katz.*[37] After the decision in Katz, most appellate courts had assumed that the framework for determining the issue of qualified immunity was rigid. The Supreme Court re-examined its holding in *Katz* in *Pearson et al.* v. *Callahan.*[38] In this case the plaintiff had been charged with the criminal offense of unlawful possession and distribution of methamphetamine. The State later dropped charges and the plaintiff then brought a 42 U. S. C. § 1983 suit against several police officers who arrested him, alleging that they had violated his Fourth Amendment right by entering his home without a warrant.

At the time that the arrest occurred, there existed a legal theory, recognized by several appellate courts in the country, referred to as the "consent-once removed" doctrine. This theory held that a warrantless entry by police officers into a home was permissible when consent to enter had already been granted to an undercover officer or informant who had observed contraband in plain view. Moreover at the time of the arrest no court opinion, much less an opinion by the United States Supreme Court had disavowed this theory.

The United States Supreme Court re-affirmed that the doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Court further recognized that the protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Because the Court acknowledged that qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right and because at the time of the arrest in question, no clearly established constitutional right had rejected the consent-once removed doctrine, the Court held that the police officers being sued were entitled to qualified immunity. More important for this holding was that the Court also held that the two-step analytical approach outlined in *Katz* was too rigid. Although appellate courts were still able to follow this two-step approach in sequence if they wanted to, the United States Supreme Court also said that if it were clear that the defendant in the lawsuit, that is, the government officer, had not violated any clearly established constitutional right, then the appellate courts were not compelled to go through this sequential process in order to rule on this matter.

B. Official Immunity

To enjoy official immunity, a government employee being sued under state law must raise governmental immunity as an affirmative defense and establish that 1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he or she was acting, within the scope of his or her authority, 2) the acts were undertaken in good faith, and 3) the acts were discretionary, rather than ministerial, in nature.[39] Most jurisdictions usually state that good faith is a test of objective legal reasonableness. As such the test is whether a reasonable government employee, under the same or similar circumstances, could have thought his actions were justified. Under this test there is no need to determine if there was subjective good faith.[40]

Nevertheless, certain jurisdictions characterize good faith as the absence of malice. For example, in Minnesota a public official is entitled to official immunity from state law claims when the official's duties require the exercise of discretion or judgment, unless the official is guilty of willful or malicious wrong. Thus a determination of whether official immunity is available in a given context requires a

two-step inquiry: 1) whether the alleged acts are discretionary or ministerial; and 2) whether the alleged acts, even though of the type covered by official immunity, were malicious or willful and therefore stripped of the immunity's protection. Minnesota courts define malice for purposes of determining whether official immunity will protect government action as the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.[41] Nevertheless even under this standard for the purposes of determining whether official immunity is available in a given context, the question of malice is an objective inquiry into the legal reasonableness of an official's actions.[42]

Ordinarily there are two circumstances where an officer will not be entitled to a claim of official immunity. The first is where the officer performs an act that is not within the course and scope of his or her authority. In such a situation, the aggrieving party need only assert a claim of negligence and the officer is without the defense of official immunity.[43] The second circumstance is where the officer performs a ministerial act as opposed to a discretionary act. The defense of official immunity is only available in response to the performance of discretionary acts. If an officer performs a ministerial act negligently then he or she cannot assert a defense of official immunity.[44]

A "discretionary act" for which a public employee is entitled to official immunity calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. Thus discretionary acts are those that involve some type of decision making process. A "ministerial act" for which a public employee may be subject to individual liability is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. Ministerial acts are those that the law requires to be performed and that the law defines with such precision and certainty that no decision is left to the official's discretion or judgment. If the action involves the performance of a duty to which the official has no choice, it is ministerial. Consequently where an official, in the performance of a ministerial duty, commits a tort, he or she is personally responsible for the tort to the same extent as a person who holds no governmental position.[45]

The case of *Rhodes* v. *Torres*[46] is a good example of how appellate courts approach an assertion of official immunity to a claim of negligence. In this case 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. 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 intermediate 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 re-verified 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.

C. Quasi-judicial Immunity

Quasi-judicial immunity is a variant of official immunity but it stems from the officer's performance of acts that are judicial in nature (hence the term "quasi-judicial) as opposed to nonjudicial acts.[47] This defense is premised on the legal principle that judges enjoy absolute judicial immunity from liability for judicial acts, no matter how erroneous the act or evil the motive, unless the act is performed in the clear absence of all jurisdiction.[48] Appellate courts have thus reasoned that where judges delegate their authority or appoint others to perform services for the court, the judge's judicial immunity may follow the delegation or appointment.[49] This immunity is particularly important because if an officer can successfully raise this defense it is an absolute, as opposed to a qualified, bar to liability.

Appellate courts have recognized that in performing certain functions, parole or probation officers are performing judicial or quasi-judicial acts and thus can assert this defense. Thus federal probation officers who prepare and submit presentence reports have absolute immunity from suit because they act as an arm of the court and the function they perform is an integral part of one of the most critical phases of the judicial process.[50] This same legal reasoning also applies to parole officials. Parole officers are entitled to absolute immunity from liability for their conduct in parole decisions and in the exercise of their decision-making powers.[51] Thus the courts have reasoned that if a probation officer giving sentencing information to a judge is absolutely immune from liability, then a parole board employee giving parole information to a parole board enjoys absolute immunity because its quasi-judicial function should also be absolutely immune.[52]

Nevertheless, not all acts performed by a parole or probation officer will be deemed judicial acts. In *Gilmore* v. *Bostic,*[53] a federal district court held that absolute immunity generally did not protect probation officers in initiating probation or supervised release revocation proceedings and seeking arrest warrants.[54] The court concluded that these acts were more akin to that of a police officer than a supervision officer. Another federal district court held that, although parole and probation officers were entitled to quasi-judicial immunity when engaged in adjudicatory activities, they were only entitled to qualified immunity for their other actions.[55]

As one can discern from reviewing the various court decisions examined in this section, it is not always readily apparent which functions performed by a parole or probation officer would be considered judicial and which would not. Many states follow the approach of the federal courts in determining what actions of a government employee should be afforded quasi-judicial immunity and what acts should not. This is known as the functional approach.[56]

Under the functional approach, the court must determine whether the activities of the party invoking immunity are intimately associated with the judicial process, or whether the party is functioning as an integral part of the judicial system or as an "arm of the court."[57] Under this approach an act is judicial in nature by its character and not by the character of the agent performing it.[58] Finally if the acts of the party are like that of the delegating or appointing judge, then the person will be entitled to quasi-judicial immunity. If not, then the party will not be able to assert quasi-judicial immunity as a defense.[59]

SUMMARY

This chapter deals with emerging trends in liability in connection with supervising offenders. Tort liability often requires that the probation or parole officer "take charge" of the offender in order for liability to attach and, unfortunately, there is considerable disagreement among the courts as to the circumstances under which this has occurred. Once this legal hurdle has been met, liability often is predicated on improper supervision of offenders, improper placement of those offenders, or failure to warn persons with whom supervision officers have a special relationship who might foreseeably be at risk. As with other types of liability, a number of defenses are available to officers providing supervision who are alleged to have behaved in ways that caused harm to others.

NOTES

1. *Couch* v. *Washington Department of Corrections,* 54 P. 3d 197 (Wash. App. Div. 2 2002).

2. See *Sorge* v. *State,* 762 A. 2d. 816 (Vt. 2000) and *Schmidt* v. *HTG, Inc.,* 961 P. 2d 677 (Kan. – 1998); see also, *Lamb* v. *Hopkins,* 492 A. 2d 1297 (Md. 1985), *Small* v. *McKennan Hospital,* 403 N. W. 2d (S. D. 1987) and *Fox* v. *Custis,* 372 S. E. 2d 373 (Vir. 1988).

3. See *State Department of Corrections* v. *Cowles,* 151 P. 3d 353 (Alaska – 2006), *Starkenburg* v. *State,* 934 P. 2d 1018 (Mont. – 1997), and *Hertog* v. *City of Seattle,* 979 P. 2d 400 (Wash. – 1999); see also, *A. L.* v. *Commonwealth of Massachusetts,* 521 N. E. 2d 1017 (Mass. – 1988).

4. See *Couch* v. *Washington Department of Corrections,* 54 P. 3d 197 (Wash. App. Div. 2 – 2002), in which the court noted that a community corrections officer must have a court order before he or she can "take charge" of an offender; and even when he or she has such an order, he or she can only enforce it according to its terms and applicable statutes.

5. *Hickingbotham* v. *Burke,* 662 A. 2d 297 (N. H. – 1995); sometimes the elements of negligence as broken down into four parts: 1) duty, 2) breach of that duty, 3) proximate cause, and 4) actual damages; see *Champion Builders* v. *City of Terrell Hills,* 70 S. W. 3d 221 (Tex. App. – San Antonio, 2001).

6. *Kellner* v. *Lowney,* 761 A. 2d 421 (N. H. – 2001); see also, *Manchenton* v. *Auto Leasing Corp.,* 605 A. 2d 208 (N. H. 1992).

7. See *Taggart* v. *State* and *Sandau* v. *State,* 822 P. 2nd 243 (Wash. Sup. 1992).

8. *Starkenburg* v. *State,* 934 P. 2d 1018 (Mont. – 1997).

9. In *Division of Corrections* v. *Neakok,* 721 P. 2d 1121 (Alaska Sup. Ct. 1986) the Alaska Supreme Court held that the Alaska Department of Health and Social Services, Division of Corrections, was negligent in placing a parolee who had a history of alcohol abuse and violence and who subsequently killed his stepdaughter and her boyfriend and raped, strangled and beat to death another woman while in a highly intoxicated state in a small village that did not have police protection or the presence of a parole officer.

10. *State Department of Corrections* v. *Cowles,* 151 P. 3d 353 (Alaska – 2006).

11. Quoting *Estate of Jones* v. *State,* 15 P. 3d 180 (Wash. App. Div. 1 – 2000).

12. *Bell* v. *State,* 52 P. 3d 503 (Wash. 2002).

13. *Id.*

14. *Kelley* v. *State,* 17 P. 3d 1189 (Wash. App. Div. 2 2000).

15. Although causes of action for improper placement are not asserted as often as those claiming improper supervision, many of the suits filed as improper supervision could be better characterized as claims of improper placement; see, for example, *Estate of Jones* v. *State,* 15 P. 3d 180 (Wash. App. Div. 1 2000).

16. *Faile* v. *South Carolina Department of Juvenile Justice,* 566 S. E. 2d 536 (S.C. 2002).

17. *Bouguille* v. *Chambers,* 685 So. 2d 582 (La. App. 4 Cir. – 1996); see also, *Eklund* v. *Trost,* 151 P. 3d 870 (Mont. 2006).

18. *Miller* v. *Niblack,* 942 S. W. 2d 533 (Tenn. Ct. App. – 1996); see also, *DePalma* v. *Metropolitan Government of Nashville,* 40 Fed. Appx. 187 (6th Cir. – 2002).

19. See *Arthurs* v. *Aiken County,* 525 S. E. 2d 542 (S. C. – 1999), in which the South Carolina Supreme Court stated that an exception to the public duty rule, under which public officials are not liable to individuals for their negligence in discharging public duties, is recognized where the plaintiff can establish the public official owed a special duty of care to the plaintiff.

20. Based on unpublished remarks of Judd D. Ketcher to the American Probation and Parole Association (October 29, 1980).

21. 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: Probation Manual, Chapter 4, 1983 provides:

> *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.

22. Texas Government Code, § 76.016.

23. *Meyers* v. *Los Angeles County Probation Department,* 78 Cal. App. 3d 309, 144 Cal. Rptr. 186 (1978).

24. *Rogers* v. *Department of Parole and Community Corrections,* 464 S. E. 2d 330 (S. C. – 1995).

25. The decision of *Rogers* v. *Department of Parole and Community Corrections* was premised on several other previously decided court decisions. In *Sheerin* v. *State,* 434 N. W. 2d 633 (Iowa – 1989) the Iowa Supreme Court held that the duty to warn depended upon and arose from the existence of a prior threat to a specific identifiable victim. In *Cairl* v. *State,* 323 N. W. 2d 20 (Minn. – 1982), the Minnesota Supreme Court stated that a duty to warn existed only where specific threats were made against specific victims. Finally in *Thompson* v. *Alameda,* 614 P. 2d 728 (Calif. – 1980), the California Supreme Court held that a defendant had no affirmative duty to warn of the release of an inmate who had made nonspecific threats of harm directed at nonspecific victims.

26. *Johnson* v. *State,* 69 Cal. 2d 782, 447 P. 2d 352, 73 Cal. Rptr. 240 (1968).

27. *Id.* at 785, 447 P. 2d at 355, 73 Cal. Rptr. at 243.

28. *Georgen* v. *State,* 196 N.Y.S. 2d 455, 18 Misc. 2d 1085 (Ct. Cl. 1959).

29. *Rieser* v. *District of Columbia,* 563 F. 2d 462 (D. C. Cir. 1977).

30. *Id.* at 479.

31. See *Murillo* v. *Vasquez,* 949 S. W. 2d 13 (Tex. App. – San Antonio, 1997), in which an intermediate appellate court observed that a government official could act negligently and still meet the test for good faith, for purposes of an official immunity defense.

32. See *Ballantyne* v. *Champion Builders, Inc.,* 114 S. W. 3d 417 (Tex. – 2004), in which the Texas Supreme Court noted that official immunity is analogous but not identical to qualified immunity under federal law.

33. See *Pearson et al.* v. *Callahan,* 555 U.S. 223 (2009), in which the United States Supreme Court noted that qualified immunity is immunity from suit rather than mere defense to liability; see also, *M. S. ex rel. Soltys* v. *Seminole County School Board,* 636 F. Supp. 2d 1317 (M. D. Fla. – 2009), in which a federal district court noted that qualified immunity is not just a defense to liability, but it is also a defense from suit, *Poolaw* v. *Marcantel,* 565 F. 3d 721 (10th Cir. – 2009) and *Bletz ex rel. Estate of Bletz* v. *Gribble,* 2009 WL 2132729 (W. D. Mich., S. Div. – 2009).

34. *Gates* v. *Texas Department of Protection and Regulatory Services,* 537 F. 3d 404 (5th Cir. – 2008); see also, *Harlow* v. *Fitzgerald,* 457 U. S. 800 (1982).

35. *Case* v. *Eslinger,* 555 F. 3d 1317 (11th Cir. – 2009).

36. *Saucier* v. *Katz,* 533 U. S. 194 (2001); see also, *Gates* v. *Texas Department of Protective and Regulatory Services,* 537 F. 3d 404 (5th Cir. – 2008).

37. *Id.*

38. *Pearson et al.* v. *Callahan,* 555 U.S. 223 (2009).

39. *Oden* v. *Wayne County,* 760 N. W. 2d 217 (Mich. – 2008); see also, *Yanero* v. *Davis,* 65 S.W.3d 510 (Ky. 2000), in which the Kentucky Supreme Court stated that official immunity applies to negligent performance by a public officer or employee of: (1) discretionary acts or functions; (2) in good faith; and (3) within the scope of the employee's authority.

40. *Cobb* v. *Texas Department of Criminal Justice,* 965 S. W. 2d 59 (Tex. App. – Houston, 1998).

41. Under Maryland law, "malice" for purposes of defeating public official immunity, is "actual malice;" actual malice required to defeat official immunity requires an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to injure the plaintiff deliberately and willfully, see *Khan* v. *Worcester County,* 24 Fed. Appx. 183 (4th Cir. 2001); under Ohio law "malice" is the willful and intentional design to injure or harm another, usually seriously, through conduct that is unlawful or unjustified, see *D'Agastino* v. *City of Warren,* 175 F. Supp. 2d 967 (N. D. Ohio – 2001).

42. *Dokman* v. *County of Hennepin,* 637 N. W. 2d 286 (Minn. App. – 2001); Ohio employees of a political subdivision are immune from tort liability unless they act with malicious purpose, in bad faith, or in a wanton or reckless manner, *D'Agastino* v. *City of Warren,* 175 F. Supp. 2d 967 (N. D. Ohio – 2001).

43. See *Guerrero* v. *Tarrant County Mortician Services,* 977 S. W. 2d, 829 (Tex. App. – Fort Worth – 1998), in which an intermediate appellate court stated that if the acts of an official are not lawfully authorized, then a suit against that official is not a suit against the State, and the individual official is not immune. This is because unlawful or unauthorized acts are not considered acts of the State, and state officials can be sued in their individual capacities for wrongful unofficial acts.

44. *Kassin* v. *Hatley,* 887 S. W. 2d 4 (Tex. – 1994).

45. *Moore* v. *Collins,* 897 S. W. 2d 496 (Tex. App. – Houston [1st Dist.], 1995).

46. *Rhodes* v. *Torres,* 901 S. W. 2d 794 (Tex. App. - Houston [14th Dist.], 1995)

47. This defense is also sometimes referred to as "derived judicial immunity;" see *Dallas County* v. *Halsey,* 87 S. W. 3d 552 (Tex. – 2002).

48. *City of Houston* v. *Swindall,* 960 S. W. 2d 413 (Tex. App. – Houston [1st Dist.], 1998).

49. *Id.*

50. *Poe* v. *Massey,* 3 F. Supp. 2d 176 (D. Conn. – 1998); see also, *State* v. *Sanchez,* 46 P. 3d 774 (Wash. – 2002), in which the Washington Supreme Court stated that a community corrections officer acts on behalf of the court when it provides information though a presentence report.

51. *Littles* v. *Board of Pardons and Paroles Division,* 68 F. 3d 122 (5th Cir. – 1995).

52. *Johnson* v. *Kegans,* 870 F. 2d 992 (5th Cir. – 1995).

53. *Gilmore* v. *Bostic,* 636 F. Supp. 2d 496 (S. D. W. Va. – 2009); see also, *Gelatt* v. *County of Broome,* 811 F. Supp. 61 (S. D. N. Y. – 1993); see however, *Schiff* v. *Dorsey,* 877 F. Supp. 73 (D. Conn. – 1994), in which the court stated that a federal probation officer was absolutely immune from private suits for money damages predicated on a claim that he filed a groundless petition for probation revocation.

54. See *Duffy* v. *County of Bucks,* 7 F. Supp. 569 (E. D. Pa. – 1998), in which a federal district court stated that absolute immunity which protects probation officers for actions integrally related to the judicial process did not apply to a probation officer's investigative acts which were more akin to law enforcement, such as seeking an arrest warrant or preparing for a violation of probation hearing.

55. *Patterson* v. *Board of Probation and Parole Commission of Pennsylvania,* 851 F. Supp. 194 (E. D. Pa. – 1994).

56. *Imbler* v. *Pachtman,* 424 U.S. 409 (1976).

57. *Briscoe* v. *LaJue,* 460 U.S. 325 (1983).

58. *City of Houston* v. *Swindalll,* 960 S. W. 2d 413 (Tex. App. – Houston [1st Dist.], 1998).

59. *Alpert* v. *Gerstner,* 232 S.W.3d 117 (Tex. App. – Houston [1st Dist.], 2006) No. 01-05-00418-CV.

CHAPTER 10

VICARIOUS LIABILITY

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 pockets 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,*[1] 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 § 1983 of Title 42 of the 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,*[2] 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.

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 in fact are brought under tort law (state courts) and § 1983 of 42 U.S. Code (Federal courts).[3] 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. Although 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] This chapter focuses on vicarious liability, whereas the next chapter explores direct liability.

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.

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.

I. 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 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, although 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, was 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 officers' grossly negligent 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 (e.g., 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.

II. IMPROPER HIRING

Improper hiring claims stress the importance of proper background investigation before employing anyone to perform a job. Liability ensues where 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 where the act is foreseeable.[15] In one case,[16] the department hired a police officer despite a record of pre-employment 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 § 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 § 1983, claiming that the sheriff failed to review the deputy's background adequately. 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 § 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 improper hiring than even the "deliberate indifference" standard set in 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 improper hiring. It is important to note, however, that the *Brown* case is a § 1983 (federal) case. State courts may set a lower standard for liability in state tort cases for negligent hiring.

III. IMPROPER ASSIGNMENT

Improper 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 case that attracted great publicity[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.

IV. FAILURE TO SUPERVISE

Failure to supervise means improper 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, and 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, whereas 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 failure to supervise. In *London* v. *Ryan,*[24] 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]

V. 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 a claim of 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.

VI. IMPROPER ENTRUSTMENT

Improper 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 trusty 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.

VII. FAILURE TO DISCIPLINE

Failure to discipline means the failure to take action against an employee in the form of suspension, transfer, or terminations where 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 improper 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 some degree of negligence. Although 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 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.

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 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 decision makers to commit financial resources to training, despite perceived need. Such neglect carries serious legal implications for the supervisor and decision makers, and hence must be given proper and immediate attention.

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. *Brandon* v. *Holt,* 469 U.S. 464 (1985).

2. *Retenauer* v. *Flaherty,* 642 A.2d 587 (1994).

3. State courts have jurisdiction to hear civil rights suits based on 42 U. S. C. § 1983. However a state court can decline to assume jurisdiction of a "1983 suit." See *Thomas* v. *Allen,* 822 S. W. 2d 816 (Tex. App. Houston [14th Dist.]. 1992.

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,* 444 U.S. 980 (1979).

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; 156 F.3d 130 (1998).

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).

CHAPTER 11

DIRECT LIABILITY FOR SUPERVISORS

INTRODUCTION

In contrast to vicarious liability (liability of supervisors for what their subordinates do, where cases are filed by probationers or parolees), the subject of the preceding chapter, direct liability claims are 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 law.
- 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.[1]

I. 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,[2] or demonstrably affects job performance.[3] 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,*[4] 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.[5]

- **Fifth Amendment Right against Self-Incrimination**

Generally, an employee has no right against self-incrimination in an administrative investigation. Nevertheless, although public employees may be required to answer certain questions related to an employment matter, they cannot be coerced into making a statement that might be used to incriminate them in a criminal prosecution. If a public employee is placed in a position where s/he must answer a question related to employment truthfully or face termination, that person should be provided with a *Garrity* warning.[6]

This warning stems from a United States Supreme Court decision in *Garrity* v. *New Jersey.*[7] In this case, several police officers were questioned in the course of a state investigation of alleged traffic ticket "fixing." The officers were warned that anything they said might be used in a court of law against them, that they could refuse to answer the questions, but if they did refuse they would be terminated from their job. The police officers answered the questions posed to them and the answers were later used against them in a criminal prosecution.

The United States Supreme Court was asked whether these coerced statements could be used in a subsequent criminal prosecution. The Supreme Court held that, although a public employee could be required to answer any question related to the person's employment and refusal to answer could legitimately result in a termination of employment, any answer provided by the employee could not subsequently be introduced in criminal prosecution. Nevertheless, incriminating statements could be considered in a termination decision. Hence the *Garrity* rule informs an employee of the consequences of answering or refusing to answer a question related to the person's employment.[8]

- **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 when it seriously damages an employee's standing and association in the community or 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 sexual orientation appears to be that sufficient nexus must exist between sexual orientation and job performance to justify dismissal.[9] In one case, the court held that a gay junior high school teacher could not be dismissed or transferred simply because he was 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.[10] In another case,[11] the court held that civil servants could not be discharged for homosexuality unless their homosexuality was rationally related to job performance. In light of substantial increases in tolerance for diverse sexual orientations in the decades since these early cases, we have every reason to believe that courts will be even less willing to permit adverse actions on the basis of sexual orientation.

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.[12]

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.[13] In *Giglio* v. *Court of Pennsylvania,*[14] 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,[15] 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.

II. RIGHTS OF EMPLOYEES GIVEN BY FEDERAL LAW[16]

Several statutes govern direct liability of supervisors to subordinates under federal law. Most notable are the following:

A. The Equal Pay Act of 1963

In 1963 the Equal Pay Act (EPA) was added to the Fair Labor Standards Act of 1938. This Act protects women against pay discrimination based on sex, if they are performing substantially equal work in the same establishment as a male counterpart. 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.[17] Since the enactment of the Civil Rights Act of 1964, the EPA has generally fallen from favor among plaintiffs, however, resort to the APA occasionally.

To establish a prima facie case under the EPA a plaintiff must show:

1) Higher wages were paid to male employees.

2) For equal work requiring substantially similar skills, effort, and responsibilities.

3) The work was performed under similar conditions.[18]

In addition, the establishment of a prima facie case does not require a showing of intent to discriminate.[19] Finally if an employee prevails in an EPA lawsuit the individual is entitled to back pay as a result of the initial wage differential and an amount equal to the back pay as liquidated damages.[20]

B. The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act (ADEA) of 1967 protects workers aged 40 to 70 from age discrimination in hiring, discharge, pay, promotions, fringe benefits, and other aspects of employment.[21] 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.[22] A June 2000 case held that the discrimination claim must be weighed along with all other factors that precipitated the firing.[23]

To establish a *prima facie* case under the ADEA, the plaintiff must prove:

1) The individual was in the age group protected by the Act.

2) S/he was discharged or demoted.

3) At the time of the person's discharge or demotion, s/he was performing the job at a level that met the employer's legitimate expectations.[24]

In a failure to hire case, to establish a *prima facie* case, the plaintiff must show that:

1) The person was in a protected group, i. e., over 40 years of age.

2) The person was otherwise qualified for the position.

3) The person was not hired.

4) The employer hired a younger person to fill the position.[25]

Once the applicant has established a prima facie case of discrimination, direct evidence of the employer's bias is not necessary for the case to go to the jury. In other words, indirect evidence will suffice to take the plaintiff's claims to jury deliberation.

Before filing a claim under the ADEA in federal court, a plaintiff must:

1) File a discrimination charge with the Equal Employment Opportunity Commission.

2) File a charge with an appropriate state agency "if the alleged unlawful practice occurred in a State which had a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice."

If a plaintiff prevails in a suit under the ADEA, the person is entitled to back pay and liquidated damages in an amount equal to the back pay award.[26] In addition a successful plaintiff is entitled to some form of reimbursement for fringe benefits.[27] Although some district courts have allowed a plaintiff to be compensated for pain and suffering and loss of future earnings and fewer have even allowed for punitive damages, no appellate court that has confronted the issue has allowed compensatory damages for pain and suffering under the ADEA.[28]

C. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973, the precursor to the ADA, applies to Federal agencies and those receiving federal funding. Under its auspices, discrimination based on disability is prohibited, including rehabilitation, public building access, and employment. This Act provides that:

> No otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[29]

Thus this provision of the law is restricted to direct recipients of federal assistance and federal employees. In order to assert a cause of action under this measure a plaintiff must prove:

1) That the individual is a person with a disability within the meaning of the Rehabilitation Act.

2) That s/he is otherwise qualified for the job in question.

3) That s/he was discriminated against in employment by an employer that received federal funds.

4) That s/he suffered this discrimination because of his or her disability.[30]

Since the passage of the Americans with Disabilities Act, the Rehabilitation Act has largely fallen into disuse. However because plaintiffs still on occasion file a claim under this Act, supervisors need to be aware of its existence.[31]

D. The Americans with Disabilities Act of 1990

In an attempt to further the beneficial effects of the Rehabilitation Act of 1973, Congress passed the Americans with Disabilities Act of 1990. Under this act:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[32]

This Act is only applicable to employers of 15 or more employees.

The Act defines a "disability" to mean, with respect to an individual:

(A) A physical or mental impairment that substantially limits one or more major life activities[33] of such individual.

(B) A record of such an impairment.

(C) Being regarded as having such an impairment.[34]

The Act further defines a "qualified individual with a disability" to mean an individual with a disability who, with or without reasonable accommodation,[35] can perform the essential functions of the employment position that such individual holds or desires.[36] In addition the Act states that the term "reasonable accommodation" may include:

(A) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities.

(B) Job restructuring, part-time or modified work schedule, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[37]

Nevertheless that Act makes it clear that an employer is not required to make accommodations that would cause undue hardship.[38]

According to the Equal Employment Opportunity Commission's (E.E.O.C.) regulations, "substantially limited" means "unable to perform a major life activity that the average person in the general population can perform," or "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity." The E.E.O.C. further provides that "major activities" refers to those activities that are of central importance to daily life.

The ADA applies equally to job applicants as well as employees. Hence employers may not make medical inquiries or conduct physical examinations of job applicants until a conditional offer of employment is made and may make medical inquiries or conduct examinations of employees only if they are job-related and consistent with business necessity. Nevertheless employers may include in job notices what physical functions are essential to perform the job function of the position posted.[39] Moreover a job applicant (as well as an employee) must be able to perform the essential functions of the job, with or without accommodation, in order to invoke the ADA.

Despite the broad regulations issued by the E.E.O.C. in implementing the ADA and the understanding of some lawmakers and lower courts, the United States Supreme Court in a couple of holdings limited the scope of the ADA. In *Sutton* v. *United Air Lines, Inc.,*[40] two sisters who suffered from severe myopia sued an airline company because the airline had a policy that in order to be a pilot, the person had to have at least 20/100 uncorrected vision. The sisters, who did not meet this requirement, nevertheless had perfect vision when corrected by eyewear. The sisters contended that they had a disability and the airline failed to make reasonable accommodation for their disability. The Supreme Court was asked to consider whether disability was to be determined with or without reference to corrective measures.

The Court stated that for a person to be disabled under the ADA, he or she must be presently and not potentially or hypothetically substantially limited. Moreover the Court said that the use or non-use of a corrective device did not determine whether an individual was disabled; that determination depended on whether the limitations an individual with an impairment *actually* faced were in fact substantially limiting. As such the Court stated that one had a disability if, notwithstanding the use of a corrective device, that individual was substantially limited in a major life activity. The Court held in this case that since corrective lens allowed the plaintiffs to see perfectly, they did not have a disability under the ADA and as such, the airline did not discriminate against them by reason of a disability when its policy provided that in order to be employed as a pilot, the applicant had to have at least 20/100 uncorrected vision.

In another case the United States Supreme Court was asked to consider the proper standard for assessing whether an individual was substantially limited in performing manual labor. In *Toyota Motor Mfg., Ky., Inc.,* v. *Williams,*[41] a worker in an auto plant developed carpal tunnel syndrome. The employee was terminated because she had been off work too much for medical reasons and she filed suit under the ADA, claiming that her employer had failed to provide her with a reasonable accommodation.

The Supreme Court stated that in order to qualify as disabled under the ADA, a claimant 1) had to initially prove that he or she had a physical or mental impairment; 2) needed to demonstrate that the impairment limited a major life activity; and 3) further show that the limitation on the major life activity was substantial. In this case the Supreme Court noted that although the plaintiff had limited physical mobility, she could still take care of her personnel needs, such as hygiene, do housework, and even work in her garden. The Court held that to be substantially limited in performing manual tasks, an individual must have an impairment that prevented or severely restricted that individual from doing activities that were of central importance to most people's daily lives. Moreover, the Court held that the impairment's impact also had to be permanent or long-term. Finally, the Court held that when addressing a major life activity of performing manual tasks, the central inquiry had to be whether the claimant was unable to perform the variety of tasks central to most people's daily lives and not whether the claimant was unable to perform the tasks associated with her specific job.

Nevertheless these Supreme Court holdings are not the final say as to what constitutes a disability for asserting a claim under the ADA. In 2008 Congress enacted the Americans with Disabilities Act Amendment Act (ADAAA).[42] The explicit purpose of this Act was to overturn the Supreme Court's decisions in *Sutton* v. *United Air Lines, Inc.,* supra, and *Toyota Motor Mfg., Ky., Inc.,* v. *William,* supra. This Act broadened the definition of a major life activity.[43] The Act further expanded the statutory language that the Court more restrictively interpreted regarding the term "regarded as having such an impairment."[44] Finally this Act altered the Court's standard in determining whether an impairment substantially limits a major life activity.[45] The measures enacted in the ADAAA became effective with respect to charges of discrimination filed with the E.E.O.C. on or after January 2, 2009. Thus for those charges filed previous to this date, the standards and interpretations of the ADA establishes in the above-cited Supreme Court opinions still apply.

E. The Family and Medical Leave Act of 1993

The Family and Medical Leave Act (FMLA) of 1993 applies to all employers with 50 or more employees employed within 75 miles of the workplace.[46] The FMLA provides that an employee is entitled to 12 unpaid work weeks of leave during the 12 month period for:

1) The birth or placement for adoption or foster care of a child.

2) The serious health condition[47] of a spouse, child or parent.

3) The employee's own serious health condition.[48]

Nevertheless in order to be eligible for unpaid leave under this Act, the employee must have been working for at least 12 months for the employer and must have provided at least 1,250 hours of service during the 12 months period.[49]

Although the employer only has to afford the employee 12 weeks of unpaid leave, the employer may require the employee to first use his/her paid vacation, personal or sick leave for any part of the 12 week period.[50] Moreover an employee may take leave on an intermittent or reduced basis for the birth or placement of a child if the employer agrees to this arrangement.[51] Furthermore, although the Act applies equally to males and females, if both spouses are employed by the same employer, their aggregate leave is limited to 12 weeks.[52] Also, in the case of leave for birth or placement of a child, an employee must provide 30 days advance notice to the employer, or "such notice as is practicable."[53]

An employee who completes a period of leave must be returned either to the same position occupied before the leave or to a position equivalent in pay, benefits, and other terms and conditions of employment.[54] Moreover employees on leave are entitled to the continuation of heath care benefits.[55] An employer who violates the FMLA is liable to the employee for money damages and equitable relief as well as liquidated damages for a willful violation.[56] Finally, most courts which have examined the issue have held that supervisors,[57] including public employer supervisors and managers,[58] can be sued individually under the FMLA.[59]

F. The Pregnancy Discrimination Act of 1978

Due to several decisions rendered by the United States Supreme Court in the 1970s there was some question regarding whether acts of discrimination on the basis of pregnancy were covered under Title VII to the Civil Rights Act of 1964.[60] Accordingly, Congress in 1978 clarified that such forms of discrimination were in fact included in the Civil Rights Act. The Pregnancy Discrimination Act of 1978 provides that:

> The terms "because of sex" or "on the basis of sex," include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.[61]

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 occur based solely on status as pregnant or dealing with pregnancy-related issues.[62] A violation of this provision of the law may result in punitive damages if it is shown that the employer acted with malice or reckless indifference to the civil rights of pregnant employees.[63]

G. Employment Rights for Veterans and Military Service Personnel

There are several significant laws that protect veterans and military service personnel from discrimination in employment. The most important is the Uniformed Service Employment and Re-employment Rights Act (USERRA). This law establishes employment and re-employment rights for veterans. This law states that:

> one who has performed service in a uniformed service may not be denied initial employment, re-employment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that performance of services.[64]

This law further states that except under certain circumstances, a person who is absent from a position of employment by reason of service in the uniformed services will be entitled to the re-employment rights and benefits and other employment benefits.[65] Nevertheless, in order for military personnel to be protected under this law, the cumulative length of the absence and all previous absences from a position of employment with the employer by reason of service in the uniformed services must not exceed five years.

Families of military personnel have additional protection in taking time off from work in order to care for a family member in the military. The National Defense Authorization Act of 2008 amended the Family Medical Leave Act to permit a spouse, son, daughter, parent, or next of kin to take up to 26 weeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.[66] Finally the Veterans Era Readjustment Act deals with the allocation of government contracts. This Act states that any contract in the amount of $100,00 or more entered into by any department or agency of the United States for the procurement of personal and nonpersonal property must contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans.[67]

H. The Civil Rights Act of 1964[68]

One of the most significant civil rights legislation ever passed by the Congress of the United States was the Civil Rights Act of 1964. Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a) states that "it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race,[69] color,[70] religion,[71] sex, or national origin.[72] Title VII is not limited to illegal firings, it applies to all aspects of employment relationship, including hiring, assignments, promotions, compensation and work environment.

The courts have recognized two basic theories of discrimination under Title VII: individual disparate treatment (involving intentional discrimination) and adverse impact (involving unintentional discrimination). Individual disparate treatment applies to cases where it is alleged that an employer treated an employee differently *on purpose* because he or she is a member of a protected category.[73] In these types of cases intent must often be proven indirectly or circumstantial evidence. Such proof typically involves evidence of a "comparator," an employee who is similarly situated to the plaintiff but outside the protected category at issue who can be "compared" with the plaintiff.

A plaintiff bringing a claim for disparate treatment must initially establish a *prima facie* case. A *prima facie* case is established by a showing of the following elements:

1) That the employee is a member of a protected class.

2) Was qualified for the job sought or performed the requirements of the job.

3) Was subjected to an adverse employment action.

4) The job or benefits remained open after the harm occurred or was filled by a person from outside the protected category.[74]

Once a plaintiff establishes a *prima facie* case, it creates a rebuttable presumption of discrimination. At that point the burden of production shifts to the employer to state a legitimate, non-discriminatory reason for the job action.[75] However if the employer produces this evidence, the burden of production shifts back to the plaintiff to produce some evidence that the reason given by the employer is false, a mere "pretext" for illegal discrimination.[76]

Nevertheless, in a disparate treatment case, although the burden of production shifts, the plaintiff ultimately has the burden of persuasion, that is, the burden of proving to the fact finder that the protected category was the real reason for the challenged action. However, now when the burden of production shifts back to the plaintiff to produce some evidence that the reason given by the employer is false, the plaintiff may satisfy this last step by proving either:

1) That the employer's explanation is not true but is a pretext for discrimination or

2) That even if the employer's explanation is true, unlawful discrimination was another motivating factor in the job decision[77] (the mixed-motive alternative).[78]

In *Reaves* v. *Sanderson Plumbing Products, Inc.,*[79] the Supreme Court held that a plaintiff in an individual disparate treatment case need only show that the employer's explanation was pretextual to defeat a motion for summary judgment. The Court stated that:

> A plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

The second basic theory of discrimination under Title VII, the adverse impact theory of discrimination, also known as "disparate impact" discrimination, can be used by employees when an employer adopts an employment practice that is neutral on its face but disproportionately affects those in a protected category.[80] This theory is most often used to prove discrimination where there is no evidence that the employer intended to discriminate based on the protected categories.

The burden of proof in the adverse impact theory case shifts in a manner similar to that with intentional discrimination cases. First, the employee must offer evidence of a *prima facie* case. This can be done by showing a statistical imbalance resulting from the policy or practice at issue.[81] Once the plaintiff has articulated a *prima facie* case, the burden shifts to the employer to prove one of two things: either that the practice does not in fact result in an adverse impact, or that the practice has a "manifest relationship to the employment in question."

The "manifest relationship" between the criteria and the employment in question is often called a "business necessity," hence the "business necessity defense." This defense can generally be shown in three ways:

1) By evidence that the criteria at issue related to the actual work being performed on the specific job in question.

2) By evidence that the criteria measures skills or knowledge required on the job in question or

3) By evidence that the criteria identifies a psychological trait essential to the job in question.[82]

When the employer claims a "business necessity," the burden shifts back to the employee. She or he can still prove illegal discrimination upon proof that an "alternative employment practice" exists that would fulfill the business necessity to the same degree with a smaller discriminatory effect.

Before an employee can file a suit under Title VII in federal court, the employee must first exhaust all administrative remedies by filing a complaint with the E.E.O.C.[83] For employees who live in states that have no appropriate state or local agency authorized "to grant or seek relief from such practices or to institute criminal proceedings with respect to," a discrimination charge must be filed with the E.E.O.C. within 180 days of the act complained of.[84] For those employees who do live in states with an appropriate state or local agency, (known as deferred states) the charge must be filed with the E.E.O.C. within 300 days.[85] If the administrative charge is not resolved, either by the filing of a civil suit by the E.E.O.C. or through conciliation within the 180 or 300 day time period, then the employee can file suit in federal court. Also, if the E.E.O.C. makes a finding that there has been no substantiation

that a discriminatory act has occurred, the agency will issue the complainant a "right to sue letter."[86] Once this letter has been sent the employee then has 90 days to file a lawsuit in federal court.[87]

There are several remedies available to a plaintiff who successfully proves a discrimination case under Title VII. A winning employee is entitled to back pay, which gives the plaintiff the money he or she has lost as a result of adverse job action up to the time of trial. Back pay includes lost wages as well as the value of other employment benefits.[88] An employee is also entitled to front pay, which refers to lost wages from the date of trial into the future. Front pay serves as a substitute remedy for reinstatement when that option is unavailable.[89] In addition either party, although usually the plaintiff may be entitled to attorney's fees and court costs. Moreover, a successful plaintiff may be entitled to compensatory damages, which are for pecuniary and non-pecuniary harms other than back pay and front pay caused by the illegal employment decision, including mental anguish.[90] Nevertheless, although a plaintiff can recover punitive or exemplary damages from a private employer upon a finding that the employer engaged in the discriminatory conduct "with malice or with reckless indifference to the state-protected rights" of the plaintiff,[91] punitive damages cannot be recovered against any government defendant.

I. Sexual Harassment

Even though suits alleging sexual harassment are based on Title VII of the Civil Rights Act of 1964, because of the frequency of suits filed for sexual harassment and because of the seriousness of the liability that would attach to a determination of sexual harassment, this subject deserves it own section. 42 U. S. C. § 2000e-2(a) (1), makes it an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex…." The Courts recognize two types of sexual harassment.

One form is referred to as *quid pro quo.* This consists of an employer, supervisor or someone with authority or control over a subordinate staff person who demands sexual favors in exchange for an employment benefit or taking adverse employment action for refusing to provide a sexual favor. Sometimes this is referred to as a tangible employment action. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

The second form of sexual harassment is referred to as a hostile work environment. This occurs when a co-worker or supervisor subjects an employee to sexual innuendoes, remarks, and physical acts so offensive as to alter the conditions of the employee's employment and creates an abusive work environment.[92]

Activities that may constitute sexual harassment include the following:[93]

a. Touching.

b. "Off color" jokes.

c. Unwanted, unwelcome, and unsolicited propositions.

d. Use of inappropriate language.

e. Holding up to ridicule.

f. Leaving sexually explicit books, magazines, and so forth in places where female employees can find them.

g. Notes, either signed or anonymous, placed on bulletin boards, in lockers, in desks, and so forth.

h. Transfer, demotion, dismissal, or other adverse action after refusing or resisting sexual advances.

i. Sexually demeaning comments or actions.

j. Unwanted, unwarranted, and unsolicited "off duty" telephone calls, contacts, and so on.

The foregoing are illustrative, not exhaustive, examples of harassing activities. Not all sexually oriented acts constitute sexual harassment. In order to be unlawful, the sexual harassment must "be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[94] Thus 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.

In order to assert an actionable claim the work environment must be one that "a reasonable person" would have found to be hostile, looking at all the circumstances,[95] and that, additionally, the plaintiff must have subjectively perceived the environment as hostile. Moreover the Supreme Court has held that if the work environment becomes so hostile that the employee is forced to quit, this will be considered as a "constructive" discharge and the employment can sue for damages as if the individual had actually been discharged.[96] Finally, even if a plaintiff is not the direct target of the conduct, an employee may still claim that observing others being sexually harassed created a hostile work environment for the plaintiff.[97]

Liability exposure for the employer differs depending on whether the sexual harassment is *quid pro quo* in nature or constitutes a hostile work environment. There is no affirmative defense available if a tangible job detriment has occurred, that is, the sexual harassment was *quid pro quo.* The employer is strictly liable for the actions of a supervisor against a subordinate. Nevertheless the employer can still minimize the liability incurred for a *quid pro quo* form of sexual harassment. In order to do so, an employer, upon receiving notice or otherwise becoming aware of alleged sexual harassment must take "prompt remedial action reasonably calculated to end the sexual harassment.[98] "Prompt remedial action" entails conducting a thorough investigation of sexual harassment complaints to determine their validity and fashioning appropriate remedies designed to end any sexual harassment.

However for suits alleging a hostile work environment, the employer does have an affirmative defense. The defense comprises two necessary elements:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, generally by proving the existence of an anti-harassment policy with an adequate complaint procedure, and:

(b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[99]

Thus in order to avoid liability for having a hostile work environment the employer needs to:

- Have a written policy against sexual discrimination, including sexual harassment.
- Disseminate the policy to all staff within the organization.
- Have a process for handling such complaints.
- Ensure that an aggrieved party can by-pass the alleged harassing supervisors when making a complaint.
- Undertake a thorough and immediate investigation of the allegation.
- Come to a conclusion and take appropriate actions as expeditiously as possible.[100]

Hence an employer is negligent with respect to the creation of a hostile work environment if it knew or should have known about the conduct and failed to stop it.[101]

J. The Civil Rights Act of 1991

In the 1980s there was a series of United States Supreme Court decisions that restricted the application of parts of the Civil Rights Act of 1964.[102] Mainly in response to these decisions, Congress amended the Civil Rights Act in 1991 effectively to overturn these decisions. The 1991 Act:

- Broadened protections against private race discrimination in making and enforcing contracts.
- Added compensatory and punitive damages for religious, sex and disability discrimination.
- Provided jury trials where compensatory and punitive damages were sought.
- Codified the disparate impact theory[103] of proving discrimination under Title VII and specified how it was to be applied where multiple factors affected the racial composition of work forces.
- Permitted liability to be established under Title VII on a disparate treatment theory[104] when a prohibited factor played any role in employment decisions.
- Authorized the award of expert witness fees to successful plaintiffs.
- Required the Equal Employment Opportunity Commission to issue "right to sue letters" under the Age Discrimination in Employment Act.[105]

K. Polygraph Examinations

Although the Employee Polygraph Protection Act of 1988[106] prohibits private employers engaged in commerce or in the production of goods for commerce from requiring any employee or prospective employee to take a lie detector test, this Act does not apply to employees of the United States, any state or local government, or any political subdivision. Nevertheless, States may have legal provisions that would prevent or restrict the use of polygraph examinations on government employees. For example, in *Texas State Employees Union* v. *Texas Department of Mental Health and Mental Retardation,*[107] the Texas Supreme Court struck down the policy that the Texas Department of Mental Health and Mental Retardation had issued requiring all staff of a residential facility to undergo a polygraph examination whenever a patient was injured at a facility on privacy grounds because it was too overbroad and overreaching.

L. Drug Testing

In the late 1980s the United States Supreme Court was called upon to examine the propriety of conducting drug tests on public employees. In *Skinner* v. *Railway Labor Executives' Association,*[108] the Federal Railroad Administration (FRA) promulgated regulations requiring railroads to conduct blood and urine tests on employees following certain major accidents or incidents. These regulations were predicated upon the belief that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant train accidents. A railroad labor union brought suit to enjoin these regulations.

In this case the Supreme Court recognized that breath and urine tests required by private railroads in reliance on a government regulation implicated the Fourth Amendment to the United States Constitution. Moreover, the Supreme Court noted that the collection and testing of urine intruded upon expectations of privacy that society had long recognized as reasonable. Nevertheless, the Supreme Court further observed that even though the Fourth Amendment was applicable to the drug and alcohol testing prescribed by governmental regulations, this was only the beginning of the inquiry into the standards governing such intrusions.[109]

The Supreme Court stated that the Fourth Amendment did not proscribe all searches and seizures, but only those that were unreasonable.[110] Moreover what was reasonable, of course, "depends on

all of the circumstances surrounding the search or seizure and the nature of the search of seizure itself."[111] Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[112]

In addition, the Court stated that the Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."

In this case the Supreme Court upheld the regulations promulgated by the FRA. The Court stated that, in limited circumstances, where the privacy interests implicated by the search were minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search could be reasonable despite the absence of such suspicion.

During this same term the Supreme Court examined another case dealing with the testing of public employees for drug consumption. In *National Treasury Employees Union* v. *Von Raab,*[113] the United States Customs Service, which had as its primary enforcement mission the interdiction and seizure of illegal drugs smuggled into the country, implemented a drug-screening program requiring urinalysis tests of Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle "classified' material. An employees' union filed suit in federal court, alleging that this drug testing program violated the Fourth Amendment.

The Court noted that where a Fourth Amendment intrusion served special governmental needs, beyond the normal need for law enforcement, it was necessary to balance the individual's privacy expectations against the Government's interests to determine whether it was impractical to require a warrant or some level of individualized suspicion in the particular context. The Court further stated that it was plain that certain forms of public employment might diminish privacy expectations even with respect to such personal searches. Hence, in light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Court held that the Service's policy of deterring drug users from seeking such promotions could not be deemed unreasonable. Nevertheless, the Court further held that the application of this program to certain categories of employees might be unjustified and remanded the case for a determination as to whether the Government had a compelling interest to require these other categories of employees to be tested as a condition of promotion.[114]

In examining the propriety of drug testing public employees, generally there are three types of testing that must be considered: 1) testing as a condition of being initially hired or promoted; 2) testing based upon a suspicion of drug use; and 3) random drug testing. It should be noted that this is a very volatile area of law and issues involving these types of testing are still in litigation in many jurisdictions. Moreover, there are numerous state laws prescribing drug testing under certain circumstances and some state laws proscribing drug testing under other circumstances.[115] Thus, while this chapter can offer some general directions regarding the propriety of conducting drug testing in the workplace, one must consult local counsel for a precise answer regarding this topic.

What can be said definitively regarding drug testing is that since 1988 a federal statute has allowed drug testing of federal employees and has required federal contractors entering into contracts with a federal agencies in an amount of $100,000 or more and all federal grantees to agree that they will provide drug-free workplaces as a condition of receiving the contract or grant.[116] This, in turn, has led many private and state employers to implement their own drug-free workplace polices. Thus, it is a common practice for a person, upon being initially hired, to be required to submit to a drug test.

In addition, if an employer has a reasonable suspicion that an employee is consuming an illegal drug or is using alcohol on the job then the employer can require that person to submit to a drug test without violating the Americans with Disabilities Act or the Rehabilitation Act of 1973.[117] Nevertheless, random drug testing is much more problematic. Such testing not only entails issues concerning privacy and the Fourth Amendment, but also such testing may be considered as having been administered in an arbitrary or unfair manner.

The case law in both *Skinner* v. *Railway Labor Executives' Association* and *National Treasury Employees Union* v. *Von Raab* indicate that random drug testing of public employees is permissible, provided the governmental entity can show a compelling interest in so doing. Obviously, employees in positions requiring a security clearance can be required to undergo random drug tests. Also, employees in positions that could compromise the integrity of the governmental agency or entity can most likely be required to submit to random drug testing. Thus, probation or parole officers who supervise persons convicted for dealing in drugs can probably be administered random drug tests. However, in all likelihood, this would not be the case with clerical staff or people who do not see probationers or parolees. Finally, in order to have any drug testing policy upheld as valid, there needs to be written and well-thought out policy that is included in the employee's personnel manual.

M. Genetic Information Nondiscrimination Act of 2008

In 2008 President George W. Bush signed into law the Genetic Information Nondiscrimination Act (GINA). This law makes it illegal for employers to use an employee's genetic information when making any type of personnel decision, including hiring, firing, placement, or promotion of an employee. Not only does GINA prohibit discrimination in employment on the basis of genetic information but it also prohibits an employer from requesting or acquiring genetic information from an employee. In addition, any genetic information that may be possessed must be maintained in a separate medical file and treated as confidential medical records. Moreover, genetic information can only be disclosed under limited circumstances. Finally, violations of this Act may result in fines of up to $300,000.[118]

III. RIGHTS OF EMPLOYEES GIVEN BY STATE LAW

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. Where 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.

IV. 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 § 1983, which is a source of legal action under state tort law.

V. RIGHTS OF EMPLOYEES GIVEN BY COLLECTIVE BARGAINING AGREEMENTS

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.

SUMMARY

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.

NOTES

1. *Garrity* v. *New Jersey,* 365 U.S. 493 (1967).

2. *See Pickering* v. *Board of Education,* 391 U.S. 563 (1968).

3. *See New York* v. *Onofre,* 48 U.S.L.W. 2520 (N.Y. App. Div. January 24, 1980).

4. 391 U. S. 563 (1968)

5. *O'Connor* v. *Ortega,* 480 U.S. 709 (1987).

6. Although the United States Supreme Court has never addressed the issue concerning whether an employer has an affirmative duty to administer a *Garrity* warning to an employee prior to questioning the individual about an employment related matter or prior to questioning the individual pursuant to a disciplinary matter and although the circuit courts are split regarding this matter, the better practice is to provide the employee with the *Garrity* warning in situations in which there is a reasonable chance the information elicited from the questioning could be used in a subsequent criminal action. See *Atwell* v. *Lisle Park Dist.,* 286 F. 3d 987 (7th Cir. 2002) and *Weston* v. *Department of Housing and Urban Development,* 724 Fed. 2nd 943 (Fed. Cir. 1983) (holding that a government employer has an affirmative duty to apprise an employee of both the application and consequences of *Garrity* immunity) and *Hester* v. *City of Milledgeville,* 777 F. 2nd 1492 (11th Cir. 1985) and *Gulden* v. *McCorkle,* 680 F. 2nd 1070 (5th Cir. 1982) (holding that there is no duty of the employer to advise the employee of the application and consequences of a *Garrity* warning); see also, *Sher* v. *United States Department of Veterans Affairs,* 488 F. 3rd 489 (1st Cir. 2007).

7. 385 U. S. 493 (1967).

8. The *Garrity* warning is usually followed by the *Garrity* rule, in which the questioned employee makes it known that the person objects to answering the question, that s/he is only answering the question because it is a condition of the person retaining his/her job, and that any statement given can only be considered for employment purposes and cannot be used in a later criminal proceeding.

9. *Safransky* v. *State Personnel Board,* 215 N.W.2d 379 (1974).

10. *Acanfora* v. *Board of Education,* 359 F. Supp. 843 (D. Md., 1973).

11. *Norton* v. *Macy,* 417 F.2d 1161 (D.C. Cir., 1969).

12. *Shuman* v. *City of Philadelphia,* 470 F. Supp. 449 (E.D. Pa. 1979).

13. There are federal and state laws restricting the political activities of certain public officers. *See, in general, BRANCATO, supra* note 31, at 78.

14. 675 F. Supp. 266 (1987).

15. *MacKenzie* v. *Snow,* 675 F. Supp. 1333 (1987).

16. 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).

17. 29 U.S. Code, § 206 (1976).

18. See *Cullen* v. *Indiana University Board of Trustees,* 338 F. 3d 693 (7th Cir. 2003); see also, *Warren* v. *Solo Cup Co.,* 516 F. 3d 627 (7th Cir. 2008).

19. *Ottman* v. *City of Independence, Mo.,* 341 F. 3d 751 (8th Cir. 2003).

20. The Equal Employment Opportunity Commission is now responsible for the enforcement and administration of the Equal Pay Act.

21. The Age Discrimination in Employment Act does not apply to employers with fewer than 20 employees. See *E.E.O.C.* v. *Monclova Tp,* 920 F. 2d 360 (6th Cir. 1990).

22. 42 U.S. Code, § 2000e (1976).

23. *Reeves* v. *Sanderson Plumbing Products,* No. 99-536 (2000).

24. *O'Conner* v. *Consolidated Coin Caterers Corp.,* 517 U. S. 308 (1996).

25. *Wingate* v. *Gage County School District,* 528 F. 3d 1074 (8th Cir. 2008).

26. 29 U. S. Code, § 626 (b).

27. *Greene* v. *Safeway Stores, Inc.,* 210 F 3d 1237 (10th Cir. 2000).

28. See Manual on Employment Discrimination and Civil Rights Actions, 2nd ed. Vol. 1. Section 3.124. By the Honorable Charles R. Richey. Eagan, MN. Thomson Reuters/West (2010).

29. 29 U.S. Code, § 794.

30. *Kinsella* v. *Rumsfield,* 320 F. 3d 309 (2nd Cir. 2002).

31. There is no significant difference in the analysis of rights and obligations created by the Americans with Disabilities Act and the Rehabilitation Act. See *Jarvis* v. *Potter,* 500 F. 3d 1113 (10th Cir. 2007).

32. 42 U. S. Code. § 12122 (a).

33. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U. S. Code §12102 (2) (A).

34. 42 U. S. Code, § 12102 (1) states that even if a employee does not have an impairment that substantially limits one or more major life activities, the individual can still be "regarded as" having a disability if the person:

> 1) has an impairment that is not substantially limiting but which the employer perceives as substantially limiting;

2) has an impairment that is substantially limiting only because of the attitudes of others, or

3) has no impairment but is perceived by the employer as having a substantially limiting impairment.

35. 29 C. F. R. § 1630.2 (o) states that an accommodation is "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." Reasonable accommodations generally fall into one of three categories:

1) accommodations that are required to ensure equal opportunity in the application process;

2) accommodations that enable the employer's employees with disabilities to perform the essential job functions of the position held or desired; or

3) accommodations that enable the employer's employees with disabilities to enjoy benefits and privileges of employment as are enjoyed by employees without disabilities.

36. 42 U. S. Code § 12111 (8).

37. 42 U. S. Code § 12111 (9).

38. 42 U. S. Code § 12111 (10) states that employers are not required to place an employee in a position where he or she would pose a direct threat to safety or health of other employees. The determination that an employee would pose a threat should be made advisedly on the basis of current medical information.

39. The ADA allows employers to establish physical criteria; an employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imaged, that it regarded as substantially limiting a major life activity. See *Sutton* v. *United Air Lines, Inc.,* 527 U. S. 471 (1999).

40. 527 U. S. 471 (1999).

41. 534 U. S. 184 (2002); see also, *Murphy* v. *United Parcel Services, Inc.,* 527 U. S. 516 (1999); see further, *Albertson's Inc.,* v. *Kirkingburg,* 527 U. S. 555 (1999).

42. Pub. L. No. 110-325 (2008).

43. The ADAAA amended the definition of major life activity to provide that for purposes [of a physical or mental impairment that substantially limits one or more major life activities] major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The Act added a further amendment to the definition of major life activity to provide that for purposes [of a physical or mental impairment that substantially limits one or more major life activities] a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

44. Under the ADAAA an individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. Nevertheless the ADAAA specifies that the 'regarded as' prong of the definition of disability shall not apply to impairments that are transitory and minor. The Act states that a transitory impairment is an impairment with an actual or expected duration of six months or less. Finally the Act states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

45. Under the standard established by the ADAAA, a determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as:

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

Note: Under the ADAAA, the ameliorative effects of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

46. For employers in the public sector, the Act does not apply if there are fewer than 50 employees within a 75 mile radius of the employment site.

47. A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves either (1) inpatient care in a hospital, hospice, or residential medical facility or (2) continuing treatment by a health care provider. See 29 U. S. Code § 2611 (11).

48. 29 U.S. Code § 2612 (a) (1).

49. 29 U. S. Code § 2611 (2) (a) (2000).

50. 29 C. F. R. § 825.207 (2005).

51. 29 U. S. Code, § 2612 (b) (2000).

52. 29 C. F. R. § 825.202 (2005).

53. 29 U. S. Code, § 2612 (e) (2000).

54. 29 C. F. R. § 825.214 (2005).

55. http://fmlaonline.com/.

56. 29 U. S. Code, § 2617 (a) (1) (A).

57. See *Stubl* v. *T. S. Systems, Inc.,* 984 F. Supp. 1075 (E. D. Mich. 1997); see also, *Knussman* v. *State of Maryland,* 935 F. Supp. 659 (D. Md. 1996).

58. See *Cantley* v. *Simmons,* 179 F. Supp. 654 (S. D. W. Va. 2002); see also, *Darby* v. *Bratch,* 287 F. 3d 673 (8th Cir. 2002); see further, Manual on Employment Discrimination and Civil Rights Actions, 2nd ed. Vol. 1. Section 9.36. By the Honorable Charles R. Richey. Eagan, MN. Thomson Reuters/ West (2010).

59. See, however, *Michell* v. *Chapman,* 343 F. 3d 811 (6th Cir. 2003), in which the Sixth Circuit Court of Appeals held that an "independent examination of the FMLA's text and structure reveals that the statute does not impose individual liability on public agency employees."

60. *Geduldig* v. *Aiello,* 417 U. S. 484 (1974) and *General Electric Co.* v. *Gilbert,* 429 U. S. 125 (1976).

61. 42 U. S. Code, § 2000e-(k).

62. 42 U.S. Code, § 2000k (1976).

63. *E.E.O.C.* v. *W & O, Inc.,* 213 F. 3d 600 (11th Cir. – 2000).

64. 38 U. S. Code, §§ 4301 through 4334.

65. 38 U. S. Code, § 4312.

66. 29 U. S. Code, § 2601.

67. 38 U.S. Code, § 4212.

68. The circuit courts have held that Title VII cannot be used to sue supervisors or other individual employees because they are not "employers." See *Grant* v. *Lone Star Co.,* 21 F. 3d 649 (5th Cir. 1994); see also, *Lissau* v. *Southern Food Service,* 159 F. 3d 177 (4th Cir. 1998), *United States EEOC* v. *AIC Sec. Investigations,* 55 F. 3d 1276 (7th Cir. 1995), *Lenhardt* v. *Basic Inst. of Technology,* 55 F. 3d 377 (8th Cir. 1995), and *Butler* v. *City of Prairie Village,* 172 F. 3d 736 (10th Cir. 1999). Nevertheless most states, if not all, have state anti-discrimination laws in employment which are similar, if not mirror, the federal Civil Rights Act of 1964. Since individual liability might be premised on state statutes and because there might be employment repercussion if a supervisor violated federal anti-discrimination laws, it would be wise for a supervisor to understand theories of liability arising under Title VII.

69. The E.E.O.C.'s Compliance Manual § 15-II, includes ancestry, physical characteristics, race-linked illnesses, culture, perception, association, subgroup or "race-plus," and "reverse" race discrimination as factors in defining race.

70. The Courts and the E.E.O.C. have read "color" to have its commonly understood meaning – pigmentation, complexion, or skin shade or tone. Thus, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Even though race and color clearly overlap, they are not synonymous. Moreover, color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity.

See E.E.O.C. Compliance Manual, § 15-III.

71. The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business; see 42 U. S. Code, § 2000e (j).

72. The E.E.O.C. defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group; see, Title 29 C. F. R. § 1606.1.

73. *Texas Department of Community Affairs* v. *Burdine,* 450 U. S. 248 (1981).

74. *McDonell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973).

75. *Texas Department of Community Affairs* v. *Burdine,* supra.

76. *McDonell Douglas Corp.* v. *Green,* supra.

77. A mixed motive case is one where there is a mixture of legal and illegal motives. Generally a job decision resulting from mixed motives is an illegal decision.

78. *Desert Palace, Inc.* v. *Costa,* 539 U. S. 90 (2003).

79. 503 U. S. 133 (2000).

80. *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971).

81. Courts often apply a "four-fifths or 80 %" test in this regard: a disparate impact occurs if the excluded group (those within the protected category) is selected at a rate of less than 80 % of the selection rate for those outside the protected category. See *Bernard* v. *Gulf Oil Corp.,* 841 F. 2d.547 (5th Cir. 1988).

82. See E.E.O.C. Uniform Guidelines on Employment Selection Procedures.

83. *Taylor* v. *Books A Million, Inc.,* 296 F. 3d 376 (5th Cir. 2002).

84. 42 U. S. Code, § 2000e-5 (e).

85. 29 C. F. R. § 1601.13.

86. *Jorge* v. *Rumsfeld,* 404 F. 3d 556 (1st Cir. 2005).

87. 42 U. S. Code, § 2000e-5 (f) (1).

88. Back pay awards against private employers and against state and local governments cannot extend back more than two years before the date the initial charge was filed with the E.E.O.C.; see, 42 U. S. Code, § 2000e-5(g).

89. *Fitzgerald* v. *Sirloin Stockade, Inc.,* 624 F. 2d 945 (10th Cir. 1080).

90. A plaintiff's damages (excluding back pay and front pay) are capped based on the number of people employed by the defendant-employer, as follows:

1) 15-100 employees - $50,000;

2) 101-200 employees - $100,000;

3) 201-500 employees - $200,000; and

4) 501 or more employees - $300,000.

Kramer v. *Logan County School District,* 157 F. 3d 620 (8th Cir. 1998); see also, 42 U. S. Code, § 1981a (b) (3).

91. *Kolstad* v. *American Dental Association,* 527 U. S. 526 (1999).

92. The guidelines issued by the Equal Employment Opportunity Commission states that:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Both federal and state courts look to the guidelines of the United States Equal Opportunity Employment Commission (EEOC) as a source of guidance, even though they do not constitute binding precedent. See *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S. 57 (1986).

93. See Americans for Effective Law Enforcement, Legal Defense Manual, 1982, p. 49.

94. *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S. 57 (1986). In this case the United States Supreme Court recognized that "hostile environment" sexual harassment was sex discrimination, actionable under Title VII, even if it did not cause a direct financial injury. In *Cuesta* v. *Texas Dept. of Criminal Justice,* 805 F. Supp. 451 (1991) a federal district court held that harassment that affects the psychological wellbeing of the employee is enough, although the defendant could not prove that a term or condition of her work was affected.

95. In *Oncale* v. *Sundowner Offshore Service,* 523 U. S. 75 (1989) the United States Supreme Court held that same-sex harassment, including the creation of a hostile work environment, is actionable under Title VII if it occurs "because of sex."

96. P*ennsylvania State Police* v. *Suders,* 542 U. S. 129 (2004).

97. Ch. 19II.B.5.c. Employment Discrimination Law. 4th Ed. (2007) C. Geoffrey Weirich, Editor-in-Chief. BNA Books, Washington, D. C.

98. *Katz* v. *Dole,* 709 F. 2d 251 (4th Cir. 1983).

99. *Burlington Industries, Inc.* v. *Ellerth,* 534 U. S. 742 (1998).

100. *Faragher* v. *City of Boca Raton,* 524 U. S. 775 (1998).

101. *Burlington Industries, Inc.* v. *Ellerth,* supra.

102. In *Patterson* v. *McLean Credit Union,* 491 U. S. 164 (1989), the United States Supreme Court held that 42 U. S. Code, § 1981 only protected the right to make contracts and the right to enforce them; it did not cover racial harassment; in *Wards Cove Packing Co.* v. *Atonio,* 490 U. S. 642 (1989), the Supreme Court held that in a disparate impact case, a plaintiff could not make out a *prima facie* case by showing statistical disparity in employment practices; in *Price Waterhouse* v. *Hopkins,* 490 U. S. 228 (1989) the Supreme Court held that an employer could escape Title VII liability by proving that motives not prohibited by Title VII would have caused the adverse employment action even in the absence of a Title VII prohibited motive; and in *Crawford Fitting Co*. v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987) and *West Virginia University Hospital, Inc.,* v. *Casey,* 499 U.S. 83 (1991) the Supreme Court held that expert witness fees were not recoverable as a part of costs or as a part of attorney's fees under the Civil Rights Act of 1964.

103. The disparate impact theory permits a plaintiff to recover under Title VII even without showing that the employer intended to discriminate.

104. The disparate treatment theory imposes liability under Title VII for intentional discrimination.

105. See Civil Rights Act of 1991 – Special Report by Henry H. Perritt, Jr. Wiley Law Publications, John Wiley & Sons, Inc. New York, N. Y. 1992 Section 1.1.

106. 29 U. S. Code, § 2001 et seq.

107. 746 S. W. 2d 203 (Tex. 1987).

108. 489 U. S. 602 (1989).

109. See *O'Connor* v. *Ortega,* 480 U. S. 709 (1987).

110. *United States* v. *Sharpe,* 470 U. S. 675 (1985).

111. *United States* v. *Montoya de Hernandez,* 473 U. S. 531 (1985).

112. *Delaware* v. *Prouse,* 440 U. S. 648 (1979).

113. 489 U. S. 656 (1989).

114. The constitutionality of drug testing has moved from the area of employment to the testing of students in public schools. While the *Skinner* v. *Railway Labor Executives' Association* and *National Treasury Employees Union* v. *Von Raab* decisions have been cited as supporting authority, the Supreme Court has generally upheld the testing of students on the basis of the "special needs" of the students. In *Vernonia School District 47J* v. *Acton,* 515 U. S. 646, (1995) a small rural school district in Oregon that had been experiencing serious drug problems implemented a random drug testing policy

for all student athletes. The United States Supreme Court noted that a search unsupported by probable cause could be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." Moreover the Court found that such "special needs" existed in the public school context. Nevertheless although the Supreme Court found a compelling governmental need to conduct random drug tests of student athletes and upheld the school district's policy, the Court cautioned against the assumption that suspicionless drug testing would readily pass constitutional muster in other contexts. The Court stated that the most significant element in this case was that the policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.

In *Board of Education of Independent School District No. 92 of Pottawatomie County* v. *Earls,* 536 U. S. 822 (2002) a school district implemented a policy requiring all students who participated in competitive extracurricular activities to submit to drug testing. A student affected by this policy brought suit to declare it illegal. The Supreme Court, in examining the propriety of this policy once again noted that in the context of safety and administrative regulations, a search unsupported by probable cause could be reasonable "when 'special needs, beyond the normal need for law enforcement, made the warrant and probable cause requirement impracticable.'" Moreover the Court rejected the need for individualized suspicion in order to require the submission of a drug test. Finally the Court, in upholding the policy of the school district, found that the need of the school district for implementing such a policy was sufficiently compelling and the invasion of privacy on the part of the students affected sufficiently minimally intrusive. Nevertheless as with the holding in *Vernonia School District 47J* v. *Acton,* this case offers limited guidance in determining the propriety of conducting drug testing of employees in the public sector.

115. For an overview of the different states laws dealing with drug testing the United States Department of Labor has a link on its website at: http://www.dol.gov/asp/programs/drugs/said/StateLaws.asp.

116. 41 U. S. Code, § 701 et seq.

117. See the United States Department of Labor link to drug testing and the ADA and Rehabilitation Act at: http://www.dol.gov/asp/programs/drugs/workingpartners/regs/ada.asp.

118. The Equal Employment Opportunity Commission is charged by law with administering GINA and issuing rules to implement this law.

CHAPTER 12

AGENCY LIABILITY FOR ACTS OF SUPERVISORS

INTRODUCTION

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,[1] although neither the state nor state officials may be sued in state court under § 1983, when they were acting in their official capacity.[2] An employee's act is within the scope of employment if the following are present: a) the act is of the kind he or she is employed to perform; b) it occurs within the authorized time and space limits; and c) it is performed, at least in part, with the intent of serving the employer.[3] 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.[4]

In an earlier case, *Monroe* v. *Pape,*[5] the United States Supreme Court decided that the plaintiff could not recover from the municipality in § 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,*[6] the Court reversed itself, holding that municipalities and other local government units are "persons" that can be sued directly under § 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."[7]

In *Quern* v. *Jordan,*[8] the Court reiterated that 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 to 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.[9] The federal legislature does not have the authority to override a state's 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 § 1983.[10]

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. Neither 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. Although some states provide representation as a matter of right, surveys have shown that legal representation in many states is largely unstructured.[11] 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 often 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 where 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.

I. STATE LIABILITY UNDER THE ELEVENTH AMENDMENT

One of the emerging legal issues over the last decade in regards to liability in the public sector concerns whether the Eleventh Amendment to the United States Constitution bars suit against the state governmental entity. This amendment provides that a state has immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[12] In addition Court opinions have extended the language in this amendment to also barring a citizen from suing his/her own State.[13] The exception to the rule is that under the Fourteenth Amendment to the United States Constitution, States may be sued under certain situations. However, a series of United States Supreme Court decisions have examined what types of actions affording public employees certain federal employment rights can be brought against a State.

In *Alden* v. *Maine,*[14] a group of probation officers filed suit against their employer, the State of Maine, alleging that the State had violated the overtime provisions of the Fair Labor Standards Act. The State claimed sovereign immunity pursuant to the Eleventh Amendment and asked the court to dismiss the lawsuit. The issue concerning when the State could be sued over an alleged violation of the Fair Labor Standards Act was eventually raised before the United States Supreme Court.

The opinion in *Alden* contained a lengthy discussion of original constitutional design and examined the text and history of the Eleventh Amendment. The Court understood that the authority to enact the Fair Labor Standards Act came from Article 1 of the Constitution, which enunciates the powers of the legislative branch of the Federal Government, to-wit: Congress. By a five member majority, the Supreme Court concluded that the powers delegated to Congress under Article 1 did not include the power to subject nonconsenting States to private suits for damages in state courts.[15]

Although the Supreme Court in *Alden* sided with the State of Maine's contention that it could assert sovereign immunity in this matter, the Court further noted that in adopting the Fourteenth Amendment, the States were required to surrender a portion of the sovereignty that had been preserved to them by the original Constitution. As such Congress could under certain circumstances authorize private suits against nonconsenting States pursuant to its Section 5 enforcement powers as found

in the Fourteenth Amendment. Because federal laws dealing with discrimination in employment may be authorized under Section 5 of the Fourteenth Amendment, the Supreme Court in subsequent decisions would examine what causes of actions filed by a public employee against a state employer would defeat a claim of sovereign immunity.

Following its decision in *Alden* v. *Maine* the Supreme Court had the opportunity to examine an Eleventh Amendment immunity claim under Section 5 of the Fourteenth Amendment in *Kimel* v. *Florida Board of Regents.*[16] In this case the plaintiffs filed suit against the Florida University Board of Regents, a state agency, under the Age Discrimination in Employment Act (ADEA). The defendant moved to dismiss the suit on the basis of Eleventh Amendment immunity. When this case was eventually brought before the United States Supreme Court, the Court was asked to consider whether Congress, in amending the ADEA in 1974, intended to abrogate the States' Eleventh Amendment immunity, and if so, whether the ADEA was a proper exercise of Congress' constitutional authority.

The Court noted that Section 5 to the Fourteenth Amendment gave Congress the authority to enforce its provisions that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Nevertheless the Court further noted that, in order to enact a law under Section 5 of the Fourteenth Amendment that abrogated a State's immunity from suit, there had to be a clear showing by Congress that it intended to do so and for the remedial legislation enacted pursuant to Section 5 of the Fourteenth Amendment to be appropriate, there had to be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. The Court in this case found that the ADEA's legislative record as a whole revealed that Congress had virtually no reason to believe that state governments were unconstitutionally discriminating against their employees on the basis of age. As such in light of the indiscriminate scope of the Act's substantive requirements and the lack of evidence of widespread and unconstitutional age discrimination by the States, the Supreme Court held that the ADEA was not a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment and therefore the ADEA's purported abrogation of the State's sovereign immunity was accordingly held to be invalid.

Immediately following the *Kimel* decision the Court decided *Board of Trustees of the University of Alabama* v. *Garrett.*[17] In this suit an Alabama state employee filed a lawsuit seeking money damages against the State of Alabama under the Americans with Disabilities Act (ADA). As in other lawsuits discussed here the State claimed immunity under the Eleventh Amendment. Eventually this case reached the United States Supreme Court, where the Court examined whether the ADA could be enforced against the States through Section 5 of the Fourteenth Amendment.

The Court applied the same two standards for determining whether enactment of the ADA abrogated the States' immunity as it did in *Kimel.* The Court first recognized that there was no dispute that Congress unequivocally intended to abrogate the States' Eleventh Amendment immunity. Nevertheless, the question remained as to whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA.

In order to answer this question the Supreme Court stated that it had to examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against people with disabilities. In examining this matter the Court found that the legislative record on the ADA simply failed to show that Congress did in fact identify a pattern of irrational state discrimination in employment against people with disabilities. Moreover, the Court found that the remedy imposed against the States under the ADA was incongruent and disproportional to the targeted violation. As such the Court held that passage of the ADA did not abrogate the States' immunity under the Eleventh Amendment.[18]

At this point one might assume that any claim of discrimination based on Federal statute could not be asserted against a State. However that is an incorrect assumption. In *Nevada Department of Human Resources* v. *Hibbs,*[19] the Supreme Court held that Congress could abrogate the States' Eleventh Amendment immunity from suit in federal court for an action filed pursuant to the Family and Medical Leave Act. Moreover the Court has long held that passage of the Civil Rights Act of 1964 abrogated the States' Eleventh Amendment immunity.[20]

The reason it is important for supervisors of public employees to be aware of the application of Eleventh Amendment immunity in employment suits arising under Federal law is because, if a plaintiff is barred from going against a state entity, then that increases the likelihood that the plaintiff will file suit against an individual supervisor. Sovereign immunity bars suits against States but not against state officers for money damages where sued in their individual capacities.[21] Moreover, Eleventh Amendment immunity only applies to the state and not political subdivisions such as cities or counties. Thus, whether a supervisor works for a state level entity or a political subdivision may determine whether the governmental entity itself will be sued or whether the supervisor in his/her individual capacity will be sued. Finally, even though private lawsuits against a state may be barred by the Eleventh Amendment, anti-discrimination laws such as the ADEA may still be enforced by the Federal Government in actions for monetary damages.[22]

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 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 decision makers to commit financial resources to training, despite perceived need. Such neglect carries serious legal implications for the supervisor and decision makers, and 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 particular concern for supervisors. Agencies must have policies on sexual harassment, and complaints should be promptly investigated. Liability is absolute if the sexual harassment was quid pro quo. Liability will also be incurred for a hostile work environment if there is no strong internal policy banning behaviors that create a hostile work environment and allegations are not properly investigated or addressed.

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. *Hafer* v. *Melo,* 502 U.S. 21 (1991).

2. *Will* v. *Michigan Department of State Police,* 491 U.S. 58 (1989).

3. See AELE Special Report, supra note 15, at 14-1.

4. *McMillan* v. *Monroe County,* Alabama 520 U.S. 781 (1997).

5. 365 U.S. 167 (1961).

6. 436 U.S. 658 (1978).

7. 476 F. Supp. 1237, at 1245 (1979).

8. 440 U.S. 332 (1979).

9. *Alden* v. *Maine* 527 U.S. 706 (1999).

10. *Owen* v. *City of Independence,* 445 U.S. 622 (1980).

11. *See, in general,* R. del Carmen, "Legal Responsibilities of Probation and Parole Officers; Trends, General Advice, and Questions," *Federal Probation* 45 (3) (Sept. 1981).

12. The Eleventh Amendment only bars suits filed by private individuals for monetary damages. A state cannot assert Eleventh Amendment immunity where the private plaintiff is only requesting injunctive relief or a declaratory judgment. See *Board of Trustees of the University of Alabama* v. *Garrett,* 531 U. S. 356 (2001).

13. *Hans* v. *Louisiana,* 134 U. S. 1 (1890).

14. 527 U. S. 706 (1999).

15. *See also, Seminole Tribe of Florida* v. *Florida,* 517 U. S. 54 (1996).

16. 528 U. S. 62 (2000).

17. 531 U. S. 356 (2001).

18. In *Tennessee* v. *Lane,* 541 U. S. 509 (2004) the Supreme Court held that Title II to the Americans with Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity, constituted a valid exercise of Congress' Section 5 authority to enforce the guarantees of the Fourteenth Amendment and therefore the enactment of the ADA abrogated the States' Eleventh Amendment immunity.

19. 538 U. S. 721 (2003).

20. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976).

21. See *Alden* v. *Maine,* 527 U. S. 706 (1999).

22. *Board of Trustees of the University of Alabama* v. *Garrett,* 531 U. S. 356 (2001); see also, *E. E. O. C.* v. *Board of Regents of the University of Wisconsin System,* 288 F. 3d 296 (7th Cir. 2002).

CHAPTER 13

THE NATURE OF INMATES' RIGHTS

INTRODUCTION

At the end of 2008, there were an estimated 828,169 federal and state parolees in the United States under conditional supervised release.[1] That number is higher than the approximate 723,000 individuals on parole in 2000 and about 7000 more than at yearend 2007.[2] In 2008, there were approximately 581,000 persons entering parole supervision and about 574,000 exiting.[3] The parole population has grown each year since 2000 as the number of parole entries has exceeded the number of parole exits.[4] Federal and state parole officials are familiar with the successes and failures of parolees. Of 574,000 individuals discharged from parole in 2008, 49 percent had met their conditions of supervision and served a full-term sentence or were discharged early.[5] About 36 percent had been reincarcerated.[6] The majority of those who returned to prison were the result of parole revocation, and more parolees had absconded than had been reincarcerated with new sentences.[7] These numbers are more than mere statistics. They represent the volume of work of that federal and state parole agencies have been flooded with for almost a decade. Moreover, they indicate the potential for hundreds of thousands of lawsuits to be filed against parole officials each year.

In a 2006 census conducted by the Bureau of Justice Statistics, there were 52 state adult parole supervising agencies in the United States in different types of administrative structures.[8] There is no standardization of parole procedures among the state agencies and no "uniform system of parole" in the United States.[9]

Parole officials make decisions that affect a number of individuals and groups within and outside of the criminal justice system. Although the individual inmate is the immediate focus of a parole board decision, the effect of the decision also includes the inmate's family, members of the community-at-large, victims and their families, law enforcement officials, prosecutors, judges, parole officers, and any number of other agencies, entities, and individuals in governmental and non-governmental roles.[10] Parole board executives and members need specific knowledge, skills and abilities (KSAs) in order to craft lawful, fair, and effective release decisions. Among these KSAs is the capability to comprehend and utilize several concepts and techniques, including (1) assessment tools and guidelines; (2) effective interviewing techniques, (3) appropriate general and special conditions of release, and (4) effective responses to violations.[11] Along with keeping KSAs current, proactive risk management is an excellent approach to reducing exposure to legal liability.

A state parole board may use one of three strategies for decision making: (1) an individual, clinical approach; (2) an individual, evidence-based approach, or (3) a policy-driven, evidence-based approach.[12] In the individual, clinical approach, a parole board member makes a decision independently from the other board members on the basis of his or her individual values and beliefs about the goals and purposes of the criminal justice system.[13] In the second approach, the member still makes an independent decision, but may consider the research-based information (e.g., risk assessment instruments) rather than his or her philosophy about punishment, retribution, or the objectives of the criminal justice system.[14] The third approach is a consensus approach in which the members attempt to agree on the goals of the release decisions which may include "normative" goals (e.g., fundamental fairness, equity, and proportionality) and "system" goals (e.g., reducing overcrowding, efficient use of correctional resources, and agency accountability and credibility).[15]

The use of risk assessment instruments is a relatively contemporary development in the criminal justice sciences. Their importance for evidence-based decisionmaking in corrections has been recently emphasized in parole decision processes. A 2001 National Institute of Corrections Community Corrections Division survey indicated that some form of risk assessment tools were being used for parole release consideration in 24 states, and 8 other states were planning to use them.[16] Parole boards have adopted evidence-based release decisions that may enhance supervision for higher-risk offenders who pose a greater danger to the public.[17] Focusing supervision on high-risk offenders,

rather than on relatively low risk offenders, is a form of risk management that is increasingly employed by parole authorities.

For more than 20 years, there was a gap in empirical research on parole release decision making prior to the re-emergence of discretionary release. The most recent research was conducted in the late 1990s and early 2000s.[18] However, a review of empirical articles found that the factors that primarily affected parole release decisions were "institutional behavior, crime severity, criminal history, incarceration length, mental illness, and victim input."[19] Of these factors, victim input was "highly significant in explaining the denial of parole for parole-eligible inmates when controlling for other significantly influential factors."[20] A team of researchers who studied the parole decision-making process from the perspective of inmates in Colorado found that "the factors inmates believe affect release decisions are different from the factors the parole board considers. This may explain why inmates fail to understand why their parole is deferred despite compliance with the prerequisites imposed upon them.[21]

Scholarly empirical research on parole release decisionmaking is difficult in that, much like grand jury proceedings, the release hearings are somewhat "secret" and confidential in nature. Data from release decision outcomes allow little more than descriptive statistical analysis. A few legal scholars have argued that parole release and revocation processes are within the purview of a line of U.S. Supreme Court case law that applies to sentencing.[22] Within this group of cases, the Court has determined that sentencing guidelines are advisory and that any fact that enhances a penalty must be submitted to a jury.[23] These scholars suggest that juries, and not parole boards which perform discretionary quasi-judicial functions, should assess "the current state of the criminal"[24] to determine if they are ready to return to the free-world or if their parole should be revoked. These authors surmise that parole determinations are well within the constitutional scope and power of a jury. The effects of giving a jury the power to parole are questionable at best. More empirical research or program and process evaluations are needed in order to draw inferences about the effectiveness, efficiency, and fairness of parole boards and the parole release hearing's processes, procedures, and outcomes.

Parole officials have access to legal advice from a range of sources: agency counsel, their Attorneys General, or retained private attorneys.[25] Officials should consult legal counsel when they have questions about statutes, rules, regulations, and policies that govern parole. Moreover, anytime a parole official receives a document or correspondence that appears to be related to a lawsuit or other legal proceeding (e.g., summons, complaint, subpoena, discovery request, or other suspected legal document), he or she should immediately contact designated counsel and deliver the document without delay.[26]

Inmates are the source of most legal action against parole officials, and this is certainly true in parole release decisions. However, victims and their families have also filed suits against parole officials in the aftermath of release decisions, especially when a victim was harmed or killed by a parolee. Depending on the bases of their claims and the laws under which the suit is filed, plaintiffs may seek monetary damages; and/or equitable, injunctive, or declaratory relief; costs, and attorneys fees. If a parole board or commission officials are sued, there are several defenses available: absolute immunity, quasi-judicial immunity, qualified immunity, or sovereign immunity. The available defense depends on whether the parole officials are sued in their official or individual capacities and on whether the act or omission occurred while they were performing a discretionary quasi-judicial function. If a parole board member, commissioner, or examiner is held liable in an official capacity and damages are awarded, indemnity may apply if the board's jurisdiction has a statute or rule of indemnification or an insurance contract.

A civil cause of action can be brought in either a state or federal court, depending on the plaintiff's claim(s). Suits involving federal laws or constitutional rights in parole hearing decisions are filed in federal district courts. Otherwise, a suit will be filed in state court, unless it is a § 1983 action in which

case the plaintiff may file in either a federal or state district court, although such suits are usually filed in a federal court.

The U.S. Supreme Court has held that prison inmates are not necessarily entitled to the full range of due process rights under the Constitution in parole release decisions.[27] At the very least they may be entitled to diminished or minimal due process protections in some jurisdictions. *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex* (1979) stemmed from a class action lawsuit filed 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 on their behalf; be represented by retained or appointed counsel; and be notified in writing of the reasons for denial of parole. Given these administrative procedures, the Court held that although 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 for granting 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 interest 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.

In *Board of Pardons* v. *Allen* (1987),[28] the U.S. Supreme Court reiterated that the Constitution does not require states to have a parole system. The Court found that a Montana statute using mandatory language, similar to the Nebraska statute in *Greenholtz,* created a liberty interest in parole release and required some protection under the Due Process Clause of the Fourteenth Amendment. The Montana statute states that the parole board "shall" release an inmate when it determines that the release will not be harmful, unless specified conditions preclude the release. In *Allen,* as in *Greenholtz,* the Court recognized that parole boards have broad discretion in making release decisions. The Court upheld their prior decision in *Greenholtz* and cited the case in opining that "parole release is an equity-type judgment involving 'a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community."[29]

The Court stated in a footnote in *Allen* that there were four categories of Federal Courts of Appeals' decisions. First, courts may find a liberty interest where statutes or regulations contain mandatory language or explicitly create a presumption of release. Next, courts have held that statutes or regulations that contain "may" release language does not create a liberty interest in release. Third, courts have divided on the issue of liberty interest in parole for statutes that provide that a person "shall not be released unless," or shall be released "only when certain conditions are met;" however, most courts have determined that these statutes have criteria that "must be met before release, but …they do not require release if those findings are made. Finally, courts hold that a liberty interest exists where a statute or regulatory parole release scheme "uses elaborate and explicit guidelines to structure the exercise of discretion."[30]

By 1995, in *Sandin* v. *Conner,* the Court seemed to have taken a different stance on the issue of the wording of statutes or regulations, but *Conner* involved a prison disciplinary hearing, not a parole release hearing. Because parole boards have broad discretionary authority, it appears that *Conner* does not apply to parole release decsionmaking. *Greenholtz* and *Allen* seem to remain the Supreme Court precedents for parole release hearings. However, given the diversity of state statutes and rules regarding parole release and of decisions among the Federal Courts of Appeals, parole officials

should be certain that they are operating under the proper state release hearing schemes and binding court decisions in their jurisdictions.

This chapter discusses some of the more frequent types of lawsuits brought against state parole board executives and members, and federal commissioners and examiners. The discussion generally focuses on case law developed in the U.S. Supreme Court and Federal Circuit Courts of Appeal. State court cases will be discussed and noted where applicable. The U.S. Supreme Court precedents are the most important precedents, followed by federal circuit court cases that affect states within their jurisdictions. State cases may be exemplary in some instances for use in this chapter, but they are only binding in the state jurisdiction where they were decided. In other words, a state court parole case decided in Austin, Texas has no bearing on a parole official in St. Louis, Missouri.

Legal issues pertaining to parole release procedures and release decisions, liability of parole board members to the general public for crimes committed by parolees, and liability for violations of inmates' rights will be analyzed in this chapter. The topics of parole decisionmaking processes and procedures are of significant interest to prospective parolees and to a host of other individuals and entities. They are also areas of prolific litigation.

In order to simplify the language used in this chapter, the term "parole officials" will be used when discussing state parole board members and executives and federal commissioners and examiners in general. For the purposes of this chapter, this term does not include parole officers. Where statutes, rules, regulations, or cases refer to a specific type of parole official, that particular term will be used in the discussion.

I. SUBSTANTIVE RIGHTS

A substantive right is "[a] right that can be protected or enforced by law; a right of substance rather than form."[31] Two cases involving § 1983 claims against parole boards alleged that inmates were deprived of fundamental civil liberties that are protected by law. The first case involves a claim of racial discrimination and the second revolves around religious freedom and discrimination.

In *United States* v. *Irving,*[32] a Federal Seventh Circuit decision, the inmate claimed systematic racial discrimination against black inmates with respect to parole releases. In *Jones* v. *Eagleville Hospital and Rehabilitation Center,*[33] a 1984 Pennsylvania District Court case, the plaintiff brought suit against the parole board alleging that his parole was revoked because of his refusal to remove a skullcap that had religious significance to him while he participating in a drug treatment program.

The *Irving* court found absolute immunity for parole board members. However, the court noted that the plaintiff's claim for declaratory relief could still be addressed because the 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 § 1983. With regard to the hospital that terminated treatment upon the plaintiff's refusal to remove his skullcap, the court found that the parolee could possibly make a claim against the entity should he establish that the action taken was "state action."

II. PROCEDURAL RIGHTS

A procedural right is "[a] right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right."[34] Parole boards are also subjected to suits by offenders for alleged procedural due process violations. Due process ensures that a person's rights are not violated in a legal or administrative proceeding—for instance, in a parole release hearing. What must be remembered, however, is that inmates have diminished, minimal constitutional rights.

Where a liberty interest has been created, an inmate cannot suffer deprivation without due process of law. The interests at stake in a parole release hearing are not the same as those at stake in a revocation hearing which requires greater due process protections. In *Greenholtz,* the Supreme Court found that procedural due process was satisfied where an inmate was afforded the opportunity to present letters and statements that had been written on his behalf.

Some case law demonstrates relatively uncomplicated compliance within the contexts of procedural due process and immunity. *Partee* v. *Lane*[35] held that a summary of the evidence relied on for denial of parole was not required by due process. Parole decisions are based on broad discretion that is statutorily granted to the parole authority. Furthermore, the *Partee* court determined that parole boards are absolutely immune from § 1983 suits for actions taken when processing parole applications.

Adams v. *Keller*[36] was a § 1983 action against a federal 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's setting of the plaintiff's parole date. The court found no evidence of bad faith or of action outside the scope of authority by the parole commissioner. However, the plaintiff's claim of the right to a new parole hearing was affirmed based on the parole commission's failure to consider the plaintiff's response to rehabilitation when setting a parole date. The court found that although Congress intended to apply concepts of punishment, retribution, and deterrence in passing the Youth Corrections Act, there was no indication that Congress intended to abandon totally any consideration of potential for an inmate's rehabilitation.

In *Corby* v. *Warden,*[37] the plaintiff charged that the state parole hearing officer violated his constitutional rights by intercepting the inmate's mail that contained explanations of mitigating circumstances for the alleged violation of parole. The court found that 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 § 1983 suits against parole boards,[38] courts easily found immunity for decisions relating to granting, denying, or revoking parole. *Walker* v. *Prisoner Review Board*[39] held that although the 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 that the parole 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 in them. The court also determined that 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 Federal 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 legal analysis and similar results for issues that involve inmates' substantive and procedural rights. Parole board members and counsel may find that careful analysis of the statutes under which they operate will be a useful guide to satisfying substantive and procedural due process requirements.

SUMMARY

This chapter discusses issues related to the liability of parole boards to inmates for violation of substantive and procedural rights. Parole officials must exercise caution and observe the procedural guidelines prescribed by law or agency policy in their jurisdiction because deviation from these laws and policies can raise issues of violations of a number of rights that are due an inmate, even if these rights are minimal.

NOTES

1. Lauren E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2008,* Bureau of Justice Statistics: Washington, DC (NCJ 228230) (December 2009) available at http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Thomas P. Bonczar, *Characteristics of State Parole Supervising Agencies, 2006,* Bureau of Justice Statistics: Washington: DC (NCJ 222180) (Aug. 2008; rev. Mar. 2009) *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cspsa06.pdf (The census report states that there were 52 adult parole agencies at mid-year 2006. Thirty-eight of these agencies were within a Department of Corrections and 11 were independent parole agencies. Three others were under different forms of administration: the Arkansas Department of Community Corrections, the Nevada Department of Public Safety, and Oregon's county-based parole system, p. 1.).

9. Margaret C. Johns, *A Black Robe is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil Rights Cases,* 59 SMU L. Rev. 265, (2006) citing Julio A. Thompson, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions,* 87 Mich. L. Rev. 241, 249 (1988).

10. Richard P. Stroker, "Legal and Ethical Issues," The Association of Paroling Authorities International & the National Institute of Corrections, *A Handbook for New Parole Board Members,* ch. 6, (Peggy B. Burke, ed., April 2003) *available at* http://www.apaintl.org/documents/CEPPParole Handbook.pdf.

11. Richard P. Stroker, Presentation at the Association of Paroling Authorities International, 2009 Annual Training Conference, *Constructing a Framework for Success: Enhancing Core Competencies for Parole Board Members and Parole Board Executives,* (April 20, 2009); available at http:/www.apaintl.org/documents/training/2009/stroker.ppt.

12. *See supra* note 9, *A Handbook for New Parole Board Members,* ch. 4, pp. 37-38.

13. *Id.* at p. 37.

14. *Id.* at pp. 37-38.

15. *Id.* at p. 38.

16. Survey results *available at* http://nicic.org/pubs/2001/017178.pdf

17. *See e.g.,* The Pew Center on the States, *Maximum Impact: Targeting Supervision on Higher-Risk People, Places and Times,* Public Safety Policy Brief No. 9 (July 2009) *available at* http://www.pewcenteronthestates.org/uploadedFiles/Maximum_Impact_web.pdf; *See also* The Association of Paroling Authorities International & the National Institute of Corrections, *A Handbook for New Parole Board Members,* ch. 4, (Peggy B. Burke, ed., April 2003) *available at* http://www.apaintl.org/documents/CEPPParole Handbook.pdf.

18. Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research,* 71 Fed. Sent'g Rep. 1 (2007).

19. *Id.* at 16.

20. *Id.* at 18.

21. Mary West-Smith, Mark R. Pogrebin, and Eric D. Poole, *Denial of Parole: An Inmate Perspective,* 64 Fed. Probation 2, 9 (2000).

22. *Apprendi* v. *New Jersey,* 530 U.S. 466 (2000); *Blakely* v. *Washington,* 542 U.S. 296 (2004); *United States* v. *Booker,* 543 U.S. 220 (2005).

23. *See e.g.,* Laura J. Appleman, *Retributive Justice and Hidden Sentencing,* 68 Ohio St. L.J. 1307 (2007); W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi Indeterminate Sentencing, and the Meaning of Punishment,* 109 Colum. L.Rev. 893 (2009); Note, Elizabeth C. McBride, *Policing Parole: The Constitutional Limits of Back-end Sentencing,* 20 Stan. L. & Pol'y Rev. 597 (2009).

24. *See* Ball *supra* note 23 at 972.

25. *See supra* note 10, Richard P. Stroker, "Legal and Ethical Issues," ch. 6.

26. *Id.* at 58.

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

28 482 U.S. 369 (1987).

29. *Id.* at 375, citing Greenholtz *supra* note 11 at 8.

30. *Id.* at 378, n.10.

31. Black's Law Dictionary (9th ed. 2009).

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

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

34. Black's Law Dictionary (9th ed. 2009).

35. *Partee* v. *Lane,* 528 F. Supp. 1254 (S.D. Ill. 1982).

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

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

38. *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 (S.D.N.Y. 1984); *Walker* v. *Prisoner Review Board,* 594 F. Supp. 556 (S.D. Ill. 1984).

39. Walker at *supra* note 168.

CHAPTER 14

INMATES' RIGHTS AT PAROLE RELEASE HEARINGS

INTRODUCTION

I. RIGHT TO COUNSEL

As a matter of constitutional law, the general rule on representation at parole release hearings is that there is no Sixth Amendment right to either retained or to appointed counsel.[1] Any state or federal jurisdiction may allow representation by statute, rule, or agency policy; but most jurisdictions do not permit attorneys to represent inmates as adversary legal counsel in parole application or release hearings. Several states have experimented with retained counsel at the release hearing, and most states historically allow inmates access to an attorney in preparation for the hearings.[2]

Where a claim of right to counsel in parole release hearings is made, the three-pronged balancing test in *Mathews* v. *Eldridge* (1976)[3] may be applied. The test usually applies where courts attempt to determine what process is due where an individual's life, liberty, or property is at stake. The three factors to be weighed are: (1) the private interest at stake, (2) the governmental interests of providing a procedural safeguard in a decisionmaking process, and (3) the risk of erroneous deprivation of a private interest if the safeguard is not provided. The lack of right to counsel in parole release hearings may be contestable where a case is extremely complex and the inmate is illiterate or has some other disability that would prevent him or her from having a basic understanding of the process.

The right to counsel at parole release hearings is rarely litigated because inmates generally have the right to have at least one non-attorney representative appear with them or on their behalf in parole release hearings. It is certain that a § 1983 case cannot be brought in connection with the issue of right to counsel at a state parole release hearing, because there is no violation of a federal law or the Constitution under color of state law where statutes are silent on the issue. Despite the availability of the *Mathews* balancing test, many cases of inmates' right to counsel are decided on the U.S. Supreme Court's analysis in *Turner* v. *Safley* which is discussed below.

A. Federal

The right of a federal prisoner to retain counsel to accompany him or her to a the parole release hearing was at issue prior to the enactment of the Parole Commission and Reorganization Act of 1976 (PCRA) before the Board of Parole was renamed the United States Parole Commission (USPC).[4] The PCRA provided that a prisoner, before a parole determination commences, may consult with a representative who qualifies under the rules and regulations of the Commission, and that attorneys were not to be excluded as a class of representatives.[5] The Sentencing Reform Act of 1984,[6] part of the Comprehensive Crime Control Act of 1984,[7] abolished parole for federal offenders who committed offenses on or after November 1, 1987.[8] However, until 2011, pursuant to the United States Parole Commission Extension Act of 2008,[9] the USPC is authorized to remain an independent agency within the U.S. Department of Justice with oversight of parole-eligible inmates who committed their offenses prior to November 1, 1987.

The USPC does not maintain a parole board. Instead, unless a Regional Commissioner orders an initial hearing to be conducted by two hearing examiners, the hearing is conducted by a single examiner at the facility in which the inmate is confined.[10] The examiner's recommendation is forwarded to a commissioner and the Commission establishes a release date if the parole-eligible prisoner is granted release.[11] An inmate may request an interview with the Commission, or any of its representatives, but such interview shall not be granted unless the inmate's name is docketed for a non-public hearing pursuant to the Commissions procedures.[12]

Under the current USPC rules (as of June 30, 2010), an inmate may choose an individual to function as a representative at an initial or statutory interim release hearing.[13] Although representation is normally limited to one person, the hearing examiner has discretion to permit the appearance of additional representatives.[14] The *USPC Rules and Procedures Manual* (§ 2.13) is silent as to whether an attorney can be a representative at an initial or interim release hearing, but the rule permits attorneys to be representatives at local or institutional revocation hearings. In view of the fact that case law has established that inmates have no constitutional right to parole, there is no presumption that he or she has a right to an attorney at a federal parole release hearing. This does not mean that an inmate cannot seek the advice of and correspond with an attorney before or after a parole release hearing. It simply means that the inmate has no right for an attorney to appear at a parole release hearing to act as adversarial legal counsel. However, this does not necessarily apply to all classes of inmates overseen by the USPC.[15]

In *Settles* v. *United States Parole Commission* (2005),[16] the Federal Court of Appeals for the District of Columbia considered an appeal by inmate Settles who had brought a cause of action against the USPC and the warden. The USPC has retained oversight of parole-eligible felons who were convicted and sentenced under the District of Columbia Code. Settles was convicted and sentenced under the code and was a parole-eligible prisoner under the USPC's regulation that permitted him to be accompanied by counsel at parole hearings in certain specified facilities. He was not allowed to have a representative present at his first parole release hearing because he was housed at a private correctional facility in Ohio. He requested declaratory and injunctive relief that would invalidate a rule that (1) disallowed inmates from having representatives at their parole release hearings if they were D.C. Code offenders housed in facilities under contract with the D.C. Department of Corrections, and (2) not permit him the opportunity to have a representative present at a new parole hearing. A lower federal court dismissed Settles' case for lack of standing and entered summary judgment for the defendants The Circuit Court stated that [a]lthough the Commission has revised its regulations to permit all D.C. Code offenders to have representation at parole hearings (citation omitted), this case is not moot because Settles has not yet been released and seeks injunctive relief in the form of a new parole hearing."[17]

The court determined that Settles had standing and they turned to his § 1983 and Administrative Procedures Act claims. The court held that Settles' § 1983 claim was barred because the Commission, whom Settles had named as the defendant, had sovereign immunity. Although Settles was not a *pro se* litigant, he requested that the court liberally construe his complaint as a complaint against the Commission's individual members, but the court noted that case law did not extend the liberality approach to renaming defendants.

As to Settles' claim that he was entitled to a representative at his release hearing, the appellate court upheld the summary judgment against Settles. The court said that the Commission had chosen to adopt an interim rule that took into account a review of security concerns and structural constraints of the non-federal contract facilities prior to permitting representatives to be present at parole hearings; therefore the Commission's General Counsel had opted to apply the rule to certain facilities on a case-by-case basis. The court applied a "rational relationship" test that is usually reserved for prison litigation and reasoned that "[b]ecause the Commission was concerned about resource constraints at the relevant facilities and received comments on the restriction of representatives, the record reveals the required 'rational connection between the facts found and the choice made.'"[18]

The "rational relationship" test has been applied to a number of correctional litigation holdings after it was first enunciated in *Turner* v. *Safley* (1987)[19] where the U.S. Supreme Court held that a prison regulation which restricts an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. The key issue in *Safley* is that the rule or regulation must bear a rational

relationship to a legitimate penological interest, The Court determined that four factors should be affirmed when determining "reasonableness":

- Is there a valid, rational connection between the regulation and a legitimate governmental interest put forth to justify it?
- Are there alternative means of exercising the constitutional right available to inmates?
- Was the allocation of resources considered to determine the impact that accommodating the inmate's asserted right will have on the facility and its users?
- Do any current alternatives to the restricting regulation exist?

B. State

The question of whether a state inmate should be afforded the right to counsel at a parole release hearing remains basically a state question. The role of counsel in most states has traditionally been restricted to advising the prisoner before the hearing, or making oral or written arguments to the parole board after the hearing.[20] In the past, courts that have considered the issue on constitutional grounds have determined there is no constitutional right to assistance of counsel at the release hearing.[21] Several Federal Circuit Courts of Appeals have held that the Constitution does not require the appointment of counsel in a civil appeal from a parole board hearing decision,[22] does not require that counsel be permitted to attend parole hearings,[23] and does not require the assistance of counsel at a parole application proceeding.[24]

State parole release hearings are governed by each state's statutes and rules. However, if a state's laws permit an inmate to have a representative at a parole release hearing, and the statute does not expressly exclude attorneys as a class of representatives, then an inmate may have an attorney present, but counsel cannot act as the inmate's legal representative.[25] The attorney would simply act as any other representative would be allowed to act on the inmate's behalf.

In *Cruz* v. *Skelton,*[26] the Fifth Circuit Federal Court of Appeals found that a Texas state inmate's argument that he was entitled to appointed counsel at a parole application hearing was defeated by the prior holdings in two cases[27] in which the court had ruled that due process did not require the appearance of counsel at parole application proceedings. The court attempted to answer the question of whether the Equal Protection Clause of the Fourteenth Amendment[28] would apply to an indigent inmate who had requested that counsel be appointed by the state in a non-revocation hearing. After considering the Texas parole statutes and rules, nowhere could the court find that the board's policy of allowing inmates to have representatives at an application hearing be interpreted to require the state to appoint counsel to an indigent inmate. The court also looked to the Seventh Circuit's ruling in *Ganz* v. *Bensinger*[29] in which an indigent inmate also had requested that he have counsel to represent him before a parole board in Illinois. The *Ganz* court considered this question under the Equal Protection Clause and held that at parole release hearings, a lawyer's presence would not bear on the effective demeanor of the hearing for any inmate. In these two cases, indigent inmates without lawyers were not subject to differential treatment at the parole application or release hearings, thus their equal protection claims were baseless.

II. RELEASE CRITERIA

Parole officials are generally granted wide latitude as to what information is to be considered in release decisions. There are several factors on which release decisions may rely: (1) record of time served, (2) risk/needs assessments related to risk of reoffending, (3) history of institutional behavior and disciplinary records, (4) the input of victims and/or their families, (5) an inmate's record of program participation and treatment, (6) a release and transition plan, and (7) recommendations, if any,

from the sentencing judge or prosecutor.[30] Criteria for release decisions vary between federal and state jurisdictions, and between states. Parole officials must have current working knowledge of the release criteria developed for their jurisdictions. These criteria are published in statutes and/or rules and inmates are entitled to know what types of criteria will be used in a parole release hearing. Most jurisdictions have inmate handbooks or other printed access available to inmates to advise them of the factors that will be relied on in whether to grant or deny parole.

Where a statute has created a cognizable liberty interest in parole: (1) the parole authority must make its release criteria easily available to inmates,[31] and (2) inmates must be advised of any information in their institutional files which may lead to a denial of parole at a hearing.[32] Due process requires that they be given an opportunity to rebut any inaccuracies in the file that may bear on the parole decision in order to lessen the risk that the parole board or commission's decision will be based on erroneous information.[33] By contrast, in jurisdictions where there is no statutorily established liberty interest in parole, there is no constitutional provision for an inmate's access to the file.[34]

A. Federal

Federal statute sets out the criteria that the U.S. Parole Commission uses in determining whether to release a prospective parolee.[35] Publication of the criteria provides a guide to the USPC's commissioners and examiners, and offers some assurance that decisions are not arbitrary and capricious.[36] Correctly using the criteria and following the USPC guidelines steps toward narrowing the discretion of the USPC without stripping it of its discretionary authority.[37]

The USPC criteria for release are set out by statute and are covered with extensive annotations in the *USPC Rule and Procedures Manual* (2010) (manual) intended for use by federal parole officials.[38] The criteria are also codified under the statute that is set to expire on November 1, 2011.[39] However, the manual includes explanations about additional information that can be considered in release decisions under the statute's codified provision that "[t]here shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available."[40]

The criteria for parole determination in 18 U.S.C. § 4206 (1976) that pertain to certain federal inmates whose offenses were committed before November 1, 1987 are as follows:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided,* That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

Section 2.18 of the manual states:

> The granting of parole to an eligible prisoner rests in the discretion of the U.S. Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).[41]

This rule is effective for certain inmates whose offenses occurred on or after November 1, 1987. Other release criteria exist for the special categories of offenders who are under the jurisdiction of the USPC (e.g., DC Code offenders) and these criteria are set forth in the manual.

Liability in the areas of release criteria and the information used to determine release in the federal system focuses on the discretionary powers of the USPC. The USPC cannot be held liable under the Federal Tort Claims Act (FTCA)[42] for a decision made in the exercise of its discretionary function. However, FTCA liability may exist when required steps of the decision making process are ignored.[43] Recall that federal parole officials cannot be sued under § 1983 because the USPC is protected by such claims under sovereign immunity.[44] This leaves only a few avenues of redress for inmates who file a cause of action against a federal parole official. For instance, in *Settles,* the inmate filed his complaint pursuant to violation of the Sixth Amendment and the Federal Administrative Procedure Act (APA).[45] His § 1983 claims were dismissed, along with the APA claim, even though he had standing to sue under § 1983.

Payton v. *United States,*[46] a case involving the former United States Board of Parole, suggests at least two bases for liability: negligent release and negligence in fashioning the conditions of release. In *Payton,* federal probation officers were found to have a duty to furnish the federal parole board with information concerning prisoners, as well as, wherever not incompatible with public interest, their views and recommendations with respect to parole disposition.

This ruling in *Payton* indicates that federal commissioners and examiners and state parole board officials may have a duty to acquire and read pertinent reports that would inform them of inmates' violent propensities. The liability in a case such as this would turn on whether the parole board was performing a discretionary or a nondiscretionary function. The *Payton* court found that the U.S. Board of Parole had no liability because the facts of the case against the board were construed by the court to involve discretionary acts for which the board was not liable under law.

Liability for abuse of discretion may require a showing of bad faith or an action outside the scope of the USPC's authority.[47] For example, in the context of the Federal Youth Corrections Act[48] the Commission's failure to consider the inmate's response to rehabilitative programs might reasonably constitute abuse of discretion.[49]

B. State

The question as to whether a state prisoner is entitled to know what criteria parole officials use in making release determinations is an issue of state law because states differ in the criteria used for determining when an inmate "may" or "shall" be released. The release criteria in the parole official's jurisdiction will likely dictate the types of lawsuit that will be filed by inmates concerned with this issue. Most federal and state inmate lawsuits involving release criteria are brought within a cause of action concerning release decisions and/or explanations of denial of parole. Additionally, a violation of the *Ex Post Facto Clause* of the U.S. Constitution, as in cases against the USPC, can be the basis for a lawsuit if state statutes, rules, or regulations governing release criteria have changed since the date of an inmate's offense or sentence. (*Ex post facto* claims are discussed *infra.*)

Where the issues regarding state parole release criteria were brought to the courts in the past, the prospective parolee was usually under the jurisdiction of a state that did not require publication of the release criteria. Allegations involving release criteria in inmates' lawsuits were usually based in due process of law. Inmates are usually unsuccessful in claiming that due process mandates that 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.[50] 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.[51]

Although Federal Courts of Appeals have determined that a federal constitutional right does not require state parole release criteria to be published, this does not prevent a court from finding otherwise under a state constitution. The basic principle is that a state is not restricted to rights granted by the U.S. Constitution in extending rights to its under its own constitution. States which publish release criteria are providing what the federal courts have declined to require.

III. EXPLANATION FOR DENIAL OF PAROLE

There is no specific constitutional requirement of due process that requires parole officials to give inmates explanations of the particular reason(s) for parole denial. However this remains an area of considerable litigation; hence, it deserves discussion. As a practical matter, this is rarely an issue because surveys have shown that most parole jurisdictions routinely give written explanations for denials of release.[52] Prisoner complaints in some cases have been based on a due process theory and on an administrative procedure act.[53]

The general guidelines for denial of parole by state parole boards are (1) if a liberty interest in parole exists, a parole board is required to satisfy due process by providing a written statement of the reasons for denial, or (2) if no liberty interest in parole is created, there is no due process requirement that a board provide an inmate with written documentation at all. The USPC must give written notice of denial to the inmate which states the specific and particular reasons why parole was denied.[54]

In *Greenholtz,* the U.S. Supreme Court rejected the argument that inmates are entitled to know the evidence that a parole board used in denying release, although the Court did not comment on Nebraska's practice of parsimoniously advising inmates of the reasons that the paroled board had denied release. In fact, the Court expressed that this advisement was a procedural due process safeguard in the absence of a formal hearing.

Following *Greenholtz,* in an appeal involving denial of parole the Federal Second Circuit Court of Appeals determined that

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision … and the essential facts upon which the Board's inferences are based.[55]

This view of due process with regard to denial of parole was later adopted by the Seventh Circuit in at least two appeals in its jurisdiction.[56] The Seventh Circuit Court stated:

> Greenholtz makes clear that, even when the Due Process Clause applies to a parole release determination, there is 'nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release.[57]

It is enough to provide the inmate with a statement of reasons or a summary statement as to why parole was denied.

Inmates have brought causes of action concerning denial of parole and its accompanying administrative procedures based in administrative law. 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 legislative body of a set of generally applicable rules in these areas. Congress originally enacted the federal Administrative Procedures Act[58] in 1946. Most states have some form of the federal APA and have modeled it after the federal APA.

Usually, causes of action are filed where there is no provision for an explanation of denial or when a denial or explanation for denial is contested after other remedies are exhausted.[59] Generally, an APA provides for judicial review of administrative agency decisions where an agency's statutes, rules, or regulations fail to address certain procedural issues. Most cases against parole officials are not brought under an APA. Instead, the cases rely on constitutional and/or § 1983 claims.

A. Federal

The USPC promulgates rules and regulations regarding its parole powers, its ability to carry out the federal parole policy, and the purposes of federal parole statutes.[60] The USPC parole system includes reconsideration and appeal of its parole release decisions in its *Rules and Procedures Manual.* Some specific actions of the USPC are subject to provisions of the Federal APA. In 1974, 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.[61] 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 was of heightened interest with the creation of the USPC in 1984. Under the prior statutes governing the U.S. Board of Parole, which continue to govern the USPC until 2011, 18 U.S.C. §§ 4206 and 4208(g) provide that if parole is denied, a personal conference shall be held at the conclusion of the proceedings to explain the reasons for denial, if feasible. Furthermore, 18 U.S.C. § 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.

Currently, USPC Rule (2010x) § 2.13(c), p. 20 states

> At the conclusion of the hearing, the examiner shall discuss the decision to be recommended by the examiner and the reasons therefor, except in the extraordinary circumstance of a complex issue that requires further deliberation before a recommendation can be made. Written notice of the decision shall be mailed or transmitted to the prisoner within 21 days of the date of the hearing,

> except in emergencies. Whenever the Commission initially establishes a release date (or modifies the release date thereafter), the prisoner shall also receive in writing the reasons therefor.

The guidelines for provisions of reasons for denial are stated as follows in the *Rules and Procedures Manual* at 2.13.-04, p. 21:

> Reasons following the appropriate guideline format will be typed on all Notices of Action denying a parole date or granting a presumptive or effective parole date. However, repetition of the reasons already given is not required (a) when an effective date is granted as a result of a pre-release review of a previous presumptive date order and the date of release has not been changed; and (b) on any other Notice of Action where no change in the previous decision is made.

B. State

Where due process is required by the finding of a liberty interest in state parole, a federal district court in Illinois ruled that due process required the Prisoner Review Board to furnish a statement of reasons for parole denial.[62] The statement would have to be sufficient enough to enable a reviewing body to determine whether the parole had been denied for an impermissible reason.[63] The Illinois court followed a Federal Seventh Circuit Court of Appeals ruling that "…a statement of reasons for the denial of parole is included among the minimum procedural protections required by due process in the context of parole release determinations."[64] In *Sellars* v. *Procunier,*[65] a Ninth Circuit case involving California's parole laws, the court found that a prisoner has a right to apply for parole and receive consideration of the request from the parole board. The inmate has the right to a statement of why parole was denied and to reconsideration of the denial. A West Virginia state court specified that a person denied parole was entitled to more than "mechanistic" written reasons.[66] But use of a checklist to inform an Illinois state inmate of the reasons for parole denial, instead of elaboration on the reasons for denial, was deemed proper by a federal district court.[67]

If there is a liberty interest in parole, state inmates are entitled to some explanation of denial of parole, but this can range from a contemporaneous summary explanation[68] to a written statement[69] of the reasons for denial. In *Vann* v. *Angelone,*[70] a letter to a state inmate from the Virginia parole board stating that his criminal history was the main reason for denial sufficed for due process. A parole board's basis of a statement that an inmate has been denied parole due to the seriousness of the nature and the circumstance of the crime may be sufficient evidence for denial in some jurisdictions.[71]

With regard to a state's APA, where the interpretation of state statutes is in issue, federal rulings on related federal statutes have some influence, but no binding precedential value. Moreover, unlike the Federal APA, some state laws have a specific exemption for parole decisions. It is best to be familiar with the state's APA and with case law precedent for guidance that is pertinent to a parole official's state or local jurisdiction.

Under a state APA, whether a statement of reasons for denial is required is not a totally independent issue but 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 Procedure Act, the presumption is that there is no right to an explanation of a parole decision. However, as mentioned above, the majority of states do provide oral or written explanations to inmates for denial of parole.

IV. OTHER AREAS OF LITIGATION

There are several other litigious areas involving inmates and parole officials. These topics are briefly discussed here in order to apprise readers of the multitude of reasons inmates have for bringing causes of action against them. The availability of immunity for defendants depends on the type of case. Some of the cases discussed in this section do not involve immunity defenses, but such cases are instructive on the legal issues that could lead to litigation involving immunity.

A. Rescission of Parole Prior to Release

Parole authorities may rescind parole after it has been granted and a release date has been set. There need only be some evidence to support a rescission of parole.[72] There are several factors in determinations to rescind an inmate's grant of parole. For instance, evidence of institutional misconduct occurring after parole is granted is a common factor. Evidence that indicates that parole was granted in error may also be a factor.

Federal circuit courts have held that in cases involving federal inmates, a liberty interest in parole has been established once parole has been granted, but due process does not require rescission hearings to be held to the same standard as revocation hearings.[73] In cases involving state inmates, some states have required that rescission hearings be conducted in accordance with due process afforded in revocation hearings. However, there is little consensus among states as to the resolution of this matter.[74] The Supreme Court has ruled that no rescission hearing is required in states where there is no liberty interest in parole.[75]

B. Conditions of Parole

Just as courts have allowed parole officials broad discretion in release decisions, courts permit parole officials fairly wide latitude in fashioning conditions of parole.[76] A number of parole jurisdictions have standardized conditions that are applicable to all inmates. Some states permit statutory or regulatory special conditions for particular classes of offenders (e.g., electronic monitoring, substance abuse treatment, sex offender registration and treatment, and/or travel and residential restrictions for certain offenders).

Cases involving contested parole conditions may turn on several issues: (1) whether the condition has an appropriate nexus to the inmate, (2) whether the condition is too broad or so vague that the parolee cannot comprehend it or understand how to abide by it, and/or (3) whether the requirement of the condition cannot reasonably or possibly be met.[77] A nexus means that the purpose of the condition, and its relationship to the offender and the goals and purposes of parole itself must be clear, not overly broad, and legitimately connected.[78]

Some rights that are available to ordinary citizens may be prohibited by parole conditions because parolees remain under the custody of the U.S. or a state's Attorney General while they are on supervision. Travel restrictions on parolees are one such example.[79] Conditions that violate a fundamental constitutional right are generally not permitted. For instance, a Kansas state court found a constitutional violation where a Kansas parolee was prohibited from attending certain religious events and was prohibited from establishing a religious affiliation.[80] In *Arciniega* v. *Freeman,* the U.S. Supreme Court reversed the Ninth Circuit's decision to uphold a parole condition that forbade a parolee to associate with ex-convicts. The Supreme Court found that although the federal parole board had wide discretion and authority to set conditions of parole, the parolee could not be restricted from incidental on-the-job contacts with ex-convicts during legitimate employment.[81]

One of the most recently litigious areas of release conditions is that of conditions for sex offenders. State and lower federal courts are divided on many of the issues surrounding special conditions

placed by parole officials on those who have a sex offense in their criminal histories. Courts are exploring the constitutional contours of sex offender release criteria and conditions including, but not limited to sex offender treatment, registration, and electronic monitoring. Parole officials must be cognizant of the current laws and regulations with regard to the release of sex offenders. Parole officials must be vigilant because case law in this area may affect the release conditions for inmates who have committed a sex offense at any time during their lives, even if they were not charged with or convicted of the offense.

For example, in *Meza* v. *Livingston,* (2010)[82] the Fifth Circuit Court of Appeals applied the *Mathews*[83] balancing test in reviewing regulations of the Texas Board of Pardons and Paroles that permitted parole officials to add sex offender registration and treatment conditions of parole for offenders who had not been convicted of a sex offense, but whose offenses in their criminal histories contained an element of a sexual nature. The Fifth Circuit Court held that when weighing the State's interest in controlling resources and costs with the high risk of error that may occur when using the State's current due process protections, Meza's liberty interest in being free from sex offender registration and treatment prevailed. The court held that the State of Texas must afford Meza the following due process procedural protections: "(1) written notice that sex offender conditions may be imposed as a condition of his mandatory supervision; (2) disclosure of the evidence being presented against Meza to enable him to marshal the facts asserted against him and prepare a defense; (3) a hearing at which Meza is permitted to be heard in person, present documentary evidence, and call witnesses; (4) the right to confront and cross-examine witnesses, unless good cause is shown; (5) an impartial decision maker; and (6) a written statement by the factfinder as to the evidence relied on and the reasons it attached sex offender conditions to his mandatory supervision."[84]

In *U.S.* v. *Comstock* (2010)[85] the United States Supreme Court upheld 18 U.S.C. § 4248, the federal statute that permits the U.S. Department of Justice to seek civil commitment by a federal district court for certain mentally ill, sexually dangerous federal inmates beyond the date they would otherwise be released from the custody of the Federal Bureau of Prisons. The Court decided this case on the grounds of the Necessary and Proper Clause of the Tenth Amendment. The Court did not decide any claim that the statute or its application denies equal protection, procedural or substantive due process, or any other constitutional rights; therefore plaintiffs contesting the federal law can continue to make claims on these bases. The Court had previously considered cases[86] regarding similar state statutes under the Due Process Clause and held that the Kansas statute governing civil commitment of certain sex offenders met the requirements of substantive due process. In *Kansas* v. *Crane,* the Court disagreed with the state over definitions of whether offenders should be committed for volitional behaviors or non-volitional mental disorders. Although parole officials were not made part of these court decisions, the officials may have an important role in making recommendations for civil commitment after an inmate's release.

C. *Ex Post Facto* Claims

Causes of action filed by inmates under the *Ex Post Facto* Clauses of Sections 9 and 10 of Article 1 of the U.S. Constitution are not uncommon. Statutes and administrative rules and regulations regarding parole do not, for the most part, remain the same as they were when they were first adopted. Many statutes are repealed and replaced or amended by newer versions in which legislative purpose and statutory language has evolved. Generally, the controlling parole statute or regulation that is applicable to a specific inmate is the one that is in effect on the date of the offense for which he or she is being considered for release, rescission, or revocation. If an inmate is parole-eligible at the time of the offense, then he or she will be eligible in the future, even if parole or parole eligibility was altered by statute or regulation, or is abolished. The *Ex Post Facto* Clauses forbids lawmakers to pass retroactive legislation with relation to criminal laws. The provisions against retroactive laws

also apply to certain parole laws and procedures, but only if such changes increase the punishment for the inmate's current parole-eligible offense. Parole officials have been sued under *ex post facto* claims, but absolute immunity is granted in most of these cases.

The U.S. Supreme Court, in *Garner* v. *Jones* (2000),[87] considered the question of whether a retroactive application of a Georgia parole rule was violative of the U.S. Constitution's *Ex Post Facto* Clause. Jones was serving a parole-eligible life sentence for murder, but had escaped from a Georgia state prison and committed another murder for which he received another life sentence. During his second life term, the State's Board of Pardons and Paroles was statutorily required to consider Jones for parole initially after seven years, and then every three years thereafter. Jones had been denied parole several times before the Board amended its rule to allow parole reconsideration once every eight years. The Eleventh Circuit Court of Appeals determined that the rule's retroactive application was an *ex post facto* violation. The Supreme Court held that such retroactive application of the rule did not necessarily violate the *Ex Post Facto* Clause. The Court found that the key element is whether the extension of intervals between parole reconsiderations created a sufficient risk of increasing the punishment for the crimes that Jones committed. The Court recognized that "[s]tates must have due flexibility in formulating parole procedure and addressing problems associated with confinement and release."[88]

In similar Tenth Circuit case, a state prisoner brought a § 1983 claim contending that the parole board's requirement that he complete a sexual abuse treatment program (SATP) was a violation of the Due Process and *Ex Post Facto* Clauses.[89] The inmate complained that the parole board had denied his release because he refused to participate in the program. The parole board was not named as a defendant because Kansas law stated that only the Secretary of Corrections could affect a grant of parole by stating in writing to the parole board that the inmate has satisfactorily completed the program(s) pursuant to a written agreement between the Secretary and the inmate that the inmate complete the required programs in order to obtain release. In order to show a violation of the *Ex Post Facto* Clause, an inmate has to show that he or she has been subjected to retroactive penal or criminal law that imposes[90] greater punishment than the original crime. Thus, the definition of the crime must be changed, or the new law must result in an increase of punishment.[91] The law that required that the inmate satisfy the terms of the written agreement had been passed after he was convicted. The Kansas state Court of Appeals had determined that the provisions of the new law could not be applied retroactively in violation of the *Ex Post Facto* Clause. The parole board had noted in three separate release hearings that the inmate had not participated in the SATP, but denied his release on other grounds. The court concluded that the inmate had not provided sufficient evidence that his parole denial had been based solely on the fact that he did not participate in the SATP.

In *Nolan* v. *Thompson,*[92] the Eighth Circuit Court of Appeals considered the § 1983 claim of an inmate against the Missouri Board of Probation and Parole. The inmate was serving a parole-eligible life term for kidnapping and murder. The Missouri law in effect at the time of his offense provided that if parole was denied, the parole board could deny further parole consideration, consider a setback or continuance of up to five years, or request additional information or planning. A new law, passed after his conviction, eliminated the board's discretion to schedule reconsideration hearings at intervals of less than three years. At release hearings over a period of 20 years, the board repeatedly denied parole and stated the reason for denial was that it would "depreciate the seriousness" of the crime and its circumstances. The inmate argued that the new law created a risk of increasing the length of his incarceration. The court reasoned that the question of whether retroactive application of this law created a sufficient risk of increasing the inmate's punishment was "'a matter of degree' and must be considered within the context of the entire parole system."[93] The circuit court affirmed the lower court's dismissal of the inmates *ex post facto* claim because the board's scheduling of the inmate's reconsideration hearings at three-year intervals, as required by the new law, did not create a sufficient risk of increasing the length of his incarceration.

SUMMARY

Case law holds that inmates have diminished and minimal constitutional rights in parole release hearings. In parole release hearings, they do not have a constitutional right to counsel, although the right may be conferred by state law or agency policy. Inmates have no constitutional right to be informed of the release criteria; however, that right may also be recognized by state law or agency policy. There is no constitutional right requiring parole officials provide inmates an explanation for denial of parole, but most jurisdictions in fact routinely give inmates contemporaneous feedback or a written explanation.

NOTES

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

2. 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).

3. 424 U.S. 319 (1976).

4. 18 U.S.C. §§ 4201-4218 (1976).

5. 18 U.S.C. Sec. 4208(d)(1) (1976).

6. Pub. L. No. 98-473, 98 Stat. 1987 [1984] [codified in 18 U.S.C. §§ 3551–3556 and at various sections throughout the U.S. Code.

7. (Pub. L. No. 98-473 § 218(a)(5), 98 Stat. 1837, 2027 (1984) [repealing 18 U.S.C.A. §§ 4201-4218]).

8. *See generally* United States Department of Justice, United States Parole Commission's [hereinafter USPC] website at http://www.justice.gov/uspc/ (the USPC still retains jurisdiction and responsibility for federal offenders who committed offenses prior to November 1, 1987 who are eligible for parole; certain District of Columbia Code offenders; Uniform Code of Military Justice offenders; certain offenders in transfer-treaty cases; and state probationers and parolees who are placed in the Federal Witness Protection Program).

9. Pub. L. No. 110-312, 122 Stat 3013 (2008).

10. *See infra* note 84, USPC Rules and Procedures Manual § 2.13 (2010).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See supra* note 54 for the varied classes of offenders under the USPC's jurisdiction.

16. 429 F.3d 1098.

17. *Id.* at 1101.

18. *Id.* at 1109, citing *Bowman Transp., Inc.* v. *Ark.-Best Freight Sys.,* 419 U.S. 281 (1974) and quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962).

19. 482 U.S. 78.

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

21. *Id.* at 499.

22. *Ganz* v. *Bensinger,* 480 F.2d 88 (7th Cir. 1973). *See also Bergee* v. *South Dakota Bd. of Pardons and Paroles,* 608 N.W.2d 636 (S.D. 2000).

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

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

25. *See e.g., Francosi* v. *Michigan Parole Board,* 604 N.W. 2d 675 (2000).

26. 543 F.2d 86 (5th Cir. 1976).

27. *See Cook* v. *Whiteside,* 505 F.2d 32 (5th Cir. 1974); Buchanan *supra* note 70.

28. U.S. Const. amend XIV § 1. Black's Law Dictionary, 9th ed. (2009) defines the "equal protection clause" as a "14th Amendment provision requiring the states to give similarly situated persons or classes similar treatment under the law." In these cases the indigent inmates would be the class of persons who were alleging that the clause was violated because an attorney was not appointed for them at a parole application or release hearing.).

29. *Supra* note 68.

30. *See supra* note 10, p. 38.

31. *Franklin* v. *Shields,* 569 F. 2d 784 (4th Cir. 1977).

32. *Williams* v. *Missouri Bd. of Probation and Parole,* 661 F.2d 697 (8th Cir. 1981).

33. *Walker* v. *Prisoner Review Bd.,* 694 F.2d 499 (7th Cir. 1982).

34. *Schuemann* v. *Colorado State Bd. of Adult Parole,* 624 F.2d 172 (10th Cir. 1980)

35. 18 U.S.C § 4206 (1976) (effective until November 1, 2011).

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

37. *Id.* at 113.

38. *See* USPC Rules and Procedures Manual pp. 30-34 *available at* http://www.justice.gov/uspc/rules_procedures/uspc-manual111507.pdf; last updated June 30, 2010 (from the USPC website at http://www.justice.gov/uspc/rules_procedures/rulesmanual.htm).

39. 18 U.S.C. §§ 4206-4207.

40. *Id.* at § 4207.

41. *Supra* note 82 at p. 30.

42. 28 U.S.C. §§ 1346(b), 2671-2680 (2010).

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

44. Settles, *supra* note 62 at 1103, 1104 ("Section 1983 permits suit against a 'person' acting under color of State or District of Columbia law…," but Section 1983 does not apply to federal officials acting under color of federal law").

45. 5 U.S.C. §§ 500-596 (2010) (originally enacted by Congress in 1946); ((Black's Law Dictionary, 9th ed. (2009) defines the Administrative Procedure Act as follows: "Administrative Procedure Act. 1. A federal statute establishing practices and procedures to be followed in rulemaking and adjudication. The Act was designed to give citizens basic due-process protections such as the right to present evidence and to be heard by an independent hearing officer. 2. A similar state statute.")

46. *Supra* note 89.

47. *Adams* v. *Keller,* 736 F.2d 320 (6th Cir. 1984).

48. The Federal Youth Corrections Act was enacted to provide a system for the treatment and rehabilitation of youthful offenders and to improve the administration of criminal justice. The Act was repealed in 1984. [18 USCS § 5005].

49. *Supra* note 93.

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

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

52. V. O'Leary and K. Hanrahan, *Parole Systems in the United States: A Detailed Description of Their Structure and Procedures,* p. 44 (3d ed. 1976).

53. *Supra* note 62.

54. 18 U.S.C. § 4206 (b) and (c). *See also supra* note 84, p. 80-90 §2.20-01 (b) & (c) – 2.20.06.

55. United States ex rel. *Johnson* v. *Chairman of New York State Board of Parole,* 500 F.2d 925, 934 (2d Cir 1974), *vacated as moot* 419 U.S. 1015 (1974).

56. *See* United States *ex rel. Richerson* v. *Wolff, supra,* 525 F.2d at 797 (7th Cir. 1975) *cert. denied,* 425 U.S. 914 (1976); Walker supra note 79.

57. *Supra* note 27.

58. *Supra* note 91.

59. *See e.g., Ladd* v. *Missouri Board of Probation and Parole,* 292 S.W.3d 33 (2009); *Ditter* v. *Nebraska Board of Parole,* 655 N.W. 2d 43 (2002).

60. 59 A. Jur. 2d Pardon and Parole § 76; 18 U.S.C. § 4203(a)(1) (referring to 18 U.S.C. §§ 4201 et seq.).

61. *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).

62. *Horton* v. *Irving,* 553 F. Supp. 213, (N.D. Ill. 1982).

63. *Id.*

64. United States *ex rel. Scott* v. *Illinois Parole & Pardon Board,* 669 F.2d 1185, 1192 (7th Cir. 1982).

65. *Supr*a note 34.

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

67. *Partee* v. *Lane,* 528 F. Supp. 1254 (S.D. Ill. 1982).

68. *Kindred* v. *Spears,* 894 F. 2d 147 (5th Cir. 1990).

69. Greenholtz *supra* note 27 ; *Zural* v. *Regan,* 550 F.2d 86 (2d Cir. 1977); *Poore* v. *Underwood,* 4 Fed. Appx. 155 (4th Cir. 2001); U.S. *ex rel.* Richerson *supra* note 99.

70. 73 F. 3d 519 (4th Cir. 1996); *See also generally Parker* v. *Corrothers,* 750 F.2d 653 (8th Cir. 1984).

71. *Powell* v. *Johnson,* 2010 U.S. Dist. LEXIS 115875 (E.D. Va. 2010)

72. *In re* Powell, 755 P.2d 881 (1988).

73. *Drayton* v. *McCall,* 584 F.2d 1208 (2d Cir. 1978); *Christopher* v. *U.S. Bd. of Parole,* 589 F.2d 924 (7th Cir. 1978).

74. *In re* Prewitt, 503 P.2d 1326 (1972) (California); *Demar* v. *Wainwright,* 354 So. 2d 366 (1977) (Florida); *Florida Institutional Legal Services, Inc.* v. *Florida Parole and Probation Commission,* 391 So. 2d 247 (Fla. Dist. Ct. App. 1st Dist. 1980); *Monohan* v. *Burdman,* 530 P.2d 334 (1975) (Washington).

75. *Jago* v. *Van Curen,* 454 U.S. 14 (1981).

76. *See e.g., Arciniega* v. *Freeman,* 404 U.S. 4 (1971).

77. *Supra* note 10 at p. 63.

78. *See e.g., Christopher* v. *United States Board of Parole,* 509 F.2d 924 (7th Cir. 1978).

79. *See e.g., Bagley* v. *Harvey,* 718 F.2d 921 (9th Cir. 1983).

80. *State* v. *Evans,* 796 P.2d 178 (1990).

81. *Supra* note 122.

82. 607 F.3d 392 (5th Cir. 2010).

83. *Supra* note 49.

84. *Supra* note 128 at 412.

85. ___ F.3d ___, 130 S.Ct. 1939 (2010).

86. *Kansas* v. *Hendricks,* 521 U.S. 346, 356-358, (1997); *Kansas* v. *Crane,* 534 U.S. 407 (2002).

87. 529 U.S. 244 (2000).

88. *Id.* at 245.

89. *Reed* v. *McKune,* 298 F.3d 946 (10th Cir. 2002).

90. *Dyke* v. *Meachum,* 785 F.2d 267 (10th Cir. 1986).

91. *Fultz* v. *Embry,* 158 F.3d 1101 (10th Cir. 1998).

92. 521 F.3d 983 (8th Cir. 2008).

93. *Id.* quoting *Garner* v. *Jones,* 529 U.S. 244, 250 & 252.

CHAPTER 15

LIABILITY OF PAROLE OFFICIALS FOR CRIMES COMMITTED BY RELEASED OFFENDERS

INTRODUCTION

Parole officials' liability for the release of an offender 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. As the U.S. Supreme Court stated in the *Greenholtz* opinion, "[no] ideal, error-free way to make parole release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior."[1] The legal issues in this realm are centered on possible liability of parole officials as to victims or their families for crimes, particularly of a violent and predatory nature, committed by parolees.[2] The public deduces that, because public protection is one consideration of granting parole, the parole officials should be held liable if a parolee injures a member of the public because, if the parolee had not been released, the injury would not have occurred. This means that most cases against parole board officials for crimes committed by parolees are based on claims of negligent release.

Plaintiffs are required to prove four elements of a negligence claim:

- The defendant owed a legal duty to the plaintiff.
- The defendant breached that duty by act or failure to act.
- The plaintiff must have suffered recognizable harm or injury as a result of the breach.
- The defendant's act must have been the proximate cause of the injury.

The duty owed to the plaintiff by the defendant will be construed under a "reasonable person" standard that courts use to determine "whether someone acted with negligence; [specifically], a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests."[3] Proximate cause means more than that the injury would not have occurred "but for" the defendant's action or failure to act. Proximate cause is "cause" that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor."[4]

Generally parole officials are entitled to absolute immunity for actions or omissions within the proper scope of their official duties and authority. Courts have held that because parole officials perform functions comparable to those of a judge, officials are entitled to absolute immunity.

Case law in the area of negligent release suggests that most courts will honor the immunity principles for parole officials, but they may find some limited liability or rely on an argument for potential limited liability. Judicial analyses focuses on a parole official's discretion in decisionmaking. Where a parole board or commission is seen by a court to omit a required step in its discretionary decisionmaking process or to abuse discretion, parole officials may be exposed to liability and jeopardize their claims of immunity.

I. THE GENERAL RULE IS NO LIABILITY

In *Santangelo* v. *State,*[5] an action for negligent release was brought in the New York Court of Claims against the State's Department of Corrections Temporary Release Committee (TRC) by a woman who was sexually assaulted by an inmate on temporary release. The TRC was unrelated to a parole board or commission; however the case is instructive as to the manner in which a state court considers a negligent release claim. The state court conceded that there is a valid public interest in protecting society from the depredations of known dangerous individuals. The court adduced that there also exists a recognized public interest in rehabilitating and reforming offenders. The court said that the TRC had a duty to exercise reasonable care to avoid detaining a prisoner where release would

not be justifiable solely because subsequent events might prove a release decision to be harmful. In *Santangelo,* the record reflected that the release decision did not entail a thorough examination into the releasee's background or character. The inmate was never interviewed personally by the TRC and had 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 *Santangelo* 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 of the releasee's character and medical or mental conditions 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 even 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.

Another case from a New York court is similarly illustrative of the considerations of state courts in negligent release claims. In *Welch* v. *State,*[6] action was brought against the State of New York claiming damages caused by the state parole board's negligence in paroling an inmate who had a history of violent antisocial and deviant behavior and who had been incarcerated for viciously attacking and sexually assaulting young women. It was further alleged that the state was negligent in supervising him 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 state release authorities could never be held liable for their actions. 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. In *Welch,* it was the failure of the plaintiff to bring forth evidence sufficient to prove negligence on the part of the parole board and parole officers.

The cases of *Thompson and Larson* discussed below also serve to demonstrate the issues considered by state courts in cases of negligent release. Both of these cases involved the release of juveniles—one by a probation department, and the other by a parole board, both of whom were not held liable for release.

In *Thompson* v. *County of Alameda* (1980),[7] the California Supreme Court considered the case a 5-year-old boy who was sexually assaulted and killed by a delinquent within 24 hours after the delinquent's release by the county probation department. The victim's parents filed action against Alameda County for reckless, wanton, and grossly negligent conduct by department in: (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 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:[8]

> 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 be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons.

In *Larson* v. *Darnell,*[9] a juvenile parolee sexually assaulted and murdered a 12-year-old girl. The court found immunity for the board even if its decisions over who 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 by the parole officials. *Larson* draws the boundaries of responsibility between parole officials' supervisory decisions and the parole officers who administer those decisions.

By contrast, in the next two cases, *Grimm* and *Payton,* the potential liability for negligent release was proved; hence, liability attached to parole officials. These two cases indicate that parole officials cannot always expect to be immune from liability in cases of negligent release. All of the cases discussed above and below in this section are examples of the types of claims that may be made by plaintiffs, the manner in which state and federal courts consider the elements of negligence, and the application of immunity to state officials.

In *Grimm* v. *Arizona Board of Pardons and Paroles,*[10] 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?[11] There is no definitive answer. Courts tend to use the standards of duty and foreseeability—meaning whether there was a legal duty of care imposed on the parole officials and whether, given the facts of a case, the danger could be foreseeable. 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.[12]

The Fifth Circuit Federal Court of Appeals held in *Payton* v. *United States* (1981),[13] that the USPC could be sued for negligence because of the release of a federal prisoner who then kidnapped, sexually assaulted, 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 a 20 years term of imprisonment for severely beating a woman. Despite these warning signals, the prisoner's sentence was reduced to 10 years, and he was later granted parole and released into the custody of a priest. He subsequently killed the three women. The court said that the release of a prisoner with 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 Fifth Circuit court distinguished between the Commission's role as the promulgator of parole guidelines and its responsibilities in applying the guidelines to individual cases. The court of 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:

> 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.[14]

However, on the circuit court's subsequent rehearing, 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 could be also actionable where the Board could be shown to have breached a duty sufficiently separable from the decisionmaking function to be considered as a nondiscretionary function and, therefore, fall outside the judicial immunity exception to the FTCA. The court, speculated as to arguments not made by the plaintiffs and 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 Sixth Circuit Federal Court of Appeals held in *Janan* v. *Trammell,*[15] that members of the Tennessee State Parole Board enjoyed absolute immunity from a § 1983 and § 1985[16] 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 two months when he accompanied a prison escapee to Florida and committed murder. The family of the murdered victim filed a § 1983 action claiming that the parole board's action deprived the victim of his life without due process of law. The court held 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 and the defendant's were not held liable.

The Federal Court of Appeals for the Eighth Circuit held that parole officials enjoyed immunity from § 1983 suits involving a parolee's crime. In *Nelson* v. *Balazic,*[17] a Missouri parolee kidnapped and sexually assaulted 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 to which he was referred upon parole. The defendants were two members of the Missouri Board of Probation and Parole and the supervising parole officer. The court held the two parole board members to be absolutely immune from suit in performing the quasi-judicial function of deciding to grant parole. The parole officer was found to have qualified immunity because her duties were not "intimately associated with the judicial process." Although the probation officer was granted qualified immunity, the court

held that her conduct did not violate clearly established statutory or constitutional rights, thus she could not be sued under § 1983.

In summary, 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 parole officials, parole officers or other government agents, but such negligence must rise to the level of gross negligence or recklessness. Mere negligence is not sufficient for liability to attach in negligent release cases. Gross negligence or recklessness, however, cannot be precisely defined and must be decided on a case-by-case basis. The preceding cases merely suggest general boundaries of negligence in cases where released inmates caused injury to or death of the victims.

A. Legislative Remedy if There Is Liability Exposure

Martinez v. *California* (1980),[18] decided by the U.S. Supreme Court, invites special attention because it is an indication of what might be and can be done legislatively to enable parole board members to avoid state tort liability for negligent release. In *Martinez,* 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 state court under state law and § 1983 claiming that state officials, by their action in negligently releasing the parolee, subjected the murder victim to a deprivation of her life without due process of law and were therefore liable for damages. The trial court dismissed the complaint. The case eventually reached the U.S. Supreme Court. The 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 a 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 the parole board's action to hold the officials thereof responsible under § 1983.[19]

Note that *Martinez* involved, among other issues, the constitutionality of a California statute 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. The crux of *Martinez* was simply that a state immunity statute is constitutional when applied to defeat a tort claim against state officials arising under state law. The Supreme 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 by the Court. Other states may pass a similar statute if they want to fully protect their parole officials from possible liability for official acts under state law.

The plaintiffs in *Martinez* contended that liability ensued under the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court responded that the amendment only protects persons from deprivation of life by the state 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 five months after release could not be fairly characterized as state action. The death in this case was too remote in time to be considered a consequence of the parole officials' action and to hold them responsible under § 1983. This implies that, in federal litigation, a negligent initial decision to release is attenuated by the passage of time from release until harm by a releasee occurs. In other words, the harm or injury in this case was too remote in time for negligence to attach.

It should be noted that the Supreme Court decided *Martinez* prior to its decision in *Daniels* v. *Williams* (1986) where the Court made clear that official negligence does not trigger a due process violation.[20] It could be argued that official negligence was at issue in any of the negligent release cases discussed in this chapter. In a § 1983 suit against a prison official, a state prisoner alleged a Fourteenth Amendment deprivation by bodily injury caused by the official's negligent conduct. The Court concluded that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property."[21] Although this case is not directly on point with *Martinez,* it does suggest that cases could be decided on the grounds of acts of official negligence that have unintended consequences. A plaintiff would have to prove that parole board officials had intent to cause harm or other deprivation by releasing an inmate.

SUMMARY

This chapter discusses issues related to the liability of parole boards for release or nonrelease. It addresses the following concerns: (1) the rights, if any, to which inmates are entitled in parole release hearings; (2) the civil liability of parole boards for crimes committed by inmates who are released and who commit crimes while on parole; and (3) the liability of parole boards to inmates for violation of substantive and procedural rights.

Case law holds that inmates have diminished and minimal constitutional rights in parole release hearings. In parole release hearings, they do not have a constitutional right to counsel, although the right may be conferred by state law or agency policy. Inmates have no constitutional right to be informed of the release criteria; however, that right may also be recognized by state law or agency policy. There is no constitutional right requiring parole officials provide inmates an explanation for denial of parole, but most jurisdictions in fact routinely give inmates contemporaneous feedback or a written explanation.

Parole officials' 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 and the public in the form of negligent release lawsuits. The public infers that public protection is one purpose of parole, thus the board should be held liable if a parolee injures a member of the public because the injury would not have occurred but for the gross negligence of parole officials. Generally negligent release claims have failed because courts hold that parole officials are entitled to absolute immunity when engaged in actions similar to those performed by a judge—quasi-judicial discretionary acts. Some courts have found liability in cases where gross or reckless negligence is proved by plaintiffs.

In lawsuits involving alleged violations of inmates' constitutional rights related to parole, courts have usually held that parole officials are not liable and have afforded them immunity in the performance of their official discretionary duties and responsibilities. Parole officials must exercise caution and observe the procedural guidelines prescribed by law or agency policy in their jurisdiction because deviation from these laws and policies can raise issues of violations of a number of rights that are due an inmate, even if these rights are minimal.

NOTES

1. *Greenholtz* v. *Inmates of Nebraska Penal Complex,* 442 U.S. 1, 13 (1979).

2. *See generally, Johnson* v. *Wells,* 566 F.2d 1016 (5th Cir. 1978); *Franklin* v. *Shields,* 569 F.2d 784 (4th Cir. 1972); *Thompson* v. *Burke,* 566 F.2d 231 (DC Cir. 1977).

3. Black's Law Dictionary (9th ed. 2009).

4. *Id.*

5. 426 N.Y.S.2d 931 (1980).

6. 424 N.Y.S.2d 774 (1980).

7. 614 P.2d 728 (1980).

8. *Id.* at 732.

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

10. *Grimm* v. *Arizona,* 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.

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

12. *Id.* at 1314.

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

14. *Id.*

15. *Janan* v. *Trammell,* 785 F.2d 557 (6th Cir. 1986).

16. 42 U.S.C. 1985.

17. *Nelson* v. *Balazic,* 802 F.2d 1077 (8th Cir.1986).

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

19. *Id.*

20. 474 U.S. 327 (1986).

21. *Id.* at 328.

CHAPTER 16

IMMUNITY FOR PAROLE BOARD OFFICIALS

INTRODUCTION

I. ABSOLUTE OR QUASI-JUDICIAL IMMUNITY

The U.S. Supreme Court has not ruled on the issue of absolute or quasi-judicial immunity for parole board officials but there is general consensus among lower courts that parole board officials should enjoy these immunities, at least where they are performing adjudicatory or quasi-adjudicatory, discretionary functions.[1] Parole board officials have enjoyed absolute immunity in a number of lawsuits filed against them. Absolute immunity or quasi-judicial immunity not only protects parole board officials from liability for damages, it reduces the chances that officials will be viewed by the courts as viable parties to a lawsuit. In most cases, claims are dismissed or summary judgment is granted in favor of parole board officials.

Absolute immunity stems from the quasi-judicial functions of parole board officials with regard to discretionary release decisions. The immunity does not attach to judicial or quasi-judicial actions performed in clear absence of all jurisdiction, but does apply even if parole officials act with malice, in bad faith, or corruptly.[2] The Supreme Court has taken what is known as a "functional view" in extending absolute immunity to parole officials who perform quasi-judicial functions.[3] In this chapter, the term "absolute immunity" will be used, unless otherwise indicated in the language of legislation, administrative rules and regulations, or case law.

In *Sellars* v. *Procunier,*[4] the functional view was taken by the Ninth Circuit Federal Court of Appeals by using the "functional comparability" test set forth by the U.S. Supreme Court in *Butz* v. *Economou.*[5] The circuit court held that this test, under the functional view, requires a court to "look not just to the title of a state or federal official, or to his or her location within the bureaucratic superstructure, but to the official's function as well in determining the question of immunity.[6] The court opined:

> We believe that parole board officials perform functionally comparable tasks to judges when they decide to grant, deny, or revoke parole. The daily task of both judges and parole board officials is the adjudication of specific cases or controversies. Their duty is often the same: to render impartial decisions…. [Parole board officials] face the same risk of constant unfounded suits by those disappointed by the parole board's decisions.[7]

A. Federal

Recall that Federal officials cannot be sued under § 1983. However, inmates have other avenues for asserting claims against the parole commissioners and examiners of United States Parole Commission (USPC) (see discussion in part II(a)(1) for clarification of USPC structure and procedures.)

In a Massachusetts Federal District Court Case,[8] the "functional view" was the basis for dismissing an inmate's claim against the Chairman of the USPC, and several of its parole commissioners and hearing examiners. Although this case was in response to a parole revocation, it illustrates how the functional view is applied to federal parole commissioners and examiners. The parolee filed a *Bivens* action[9] against the USPC officials in their individual capacities and sought compensatory and punitive damages from each defendant. The case turned on whether the defendants were entitled to absolute immunity and if their actions were "closely associated with the judicial process."[10] The Court found that all of the defendants performed quasi-judicial functions and that there was a consensus among Federal Circuit Courts of Appeals that parole board members are absolutely immune from civil liability when performing functions of a judicial nature.[11]

In *United States ex rel. Powell* v. *Irving*[12] the Federal Seventh Circuit Court of Appeals found federal parole officials absolutely immune from liability claims under § 1983. 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, despite immunity principles.

B. State

A state official who is sued in his or her individual capacity for injunctive relief in a § 1983 cause of action is considered to be a "person" under § 1983, which may serve as the basis for liability.[13] On the other hand, if a state is sued or a state officer is sued in an official capacity, actions for prospective relief or monetary damages are not cognizable under § 1983.[14] Service on a parole board is generally considered a quasi-judicial function; hence, under the functional approach to absolute immunity, state parole board members are entitled to absolute immunity when sued in their official capacities. However, such protection may not be afforded when a member is sued in an individual capacity.

The Federal Ninth Circuit Court of Appeals' opinion in *Sellars* affords an apt explanation of absolute immunity for state parole officials in their official capacities. In California, an inmate has a right to apply for parole release and is afforded due process considerations in a release hearing. The court determined that state parole board officials enjoyed absolute immunity in § 1983 lawsuits stemming from the processing of an inmate's parole release application.

Similarly, in *Malek* v. *Haun,*[15] an inmate filed a § 1983 action against the Chairman and members of the Utah Board of Pardons and Parole in their official and individual capacities. Malek sought compensatory damages and injunctive and declaratory relief in his claim that parole board officials failed to grant him parole by not crediting his sentence, using an improper criterion and determination scheme, and retroactively applying the release criteria. Utah's statutes do not create a liberty interest in parole. Thus, Utah state prisoners are not legitimately entitled to parole release, but the state's constitution grants due process protection for an initial parole release hearing in which the parole board determines the conditions under which an inmate may be released on parole. The state had made changes to the parole system that existed when Malek was sentenced and he complained that he was denied protection under the Eighth Amendment (cruel and unusual punishment), the Fifth Amendment (double jeopardy), and the *Ex Post Facto* Clause[16] of the Constitution for denial of parole based on the system that was put in place after he was sentenced. Following the *Greenholtz* holding that states are not obligated to establish a parole system, the Tenth Circuit Federal Court of Appeals found that Utah could alter its parole system and not necessarily invoke the need for Constitutional protections. Although Malek's case was dismissed as frivolous, the court stated that the defendants were immune from liability for damages and entitled to absolute immunity in their official capacities and qualified immunity in their individual capacities.

SUMMARY

The public infers that public protection is one purpose of parole, thus the board should be held liable if a parolee injures a member of the public because the injury would not have occurred but for the gross negligence of parole officials. Generally negligent release claims have failed because courts hold that parole officials are entitled to absolute immunity when engaged in actions similar to those performed by a judge—quasi-judicial discretionary acts. Some courts have found liability in cases where gross or reckless negligence is proved by plaintiffs.

NOTES

1. For a comprehensive list and explanation of cases from the 11 Federal Circuit Courts of Appeal and the District of Columbia Circuit regarding their consensus view of absolute immunity for parole board officials, *see* Johns, *supra* note 9 at 302-304, n. 285-298.

2. *See* 15 Am Jur. 2d Civil Rights § 105 (July 2010).

3. *See Cleavinger* v. *Saxner* 474 U.S. 193, 200 (1985) (absolute immunity extended to officials "closely associated with the judicial process"); *Buckley* v. *Fitzsimmons,* 509 U.S. 259 (1993) (the function performed, not the rank or status of an official is examined); *Butz* v. *Economou,* 438 U.S. 478 (1978) (federal hearing examiners are immune from suit).

4. 641 F.2d 1295 (9th Cir. 1981).

5. 438 U.S. 478 (1978); *See also* Greenholtz *supra* note 27.

6. *See supra* note 34 at 1303.

7. *Id.*

8. *Namey* v. *Reilly,* 926 F.Supp. 5 (D. Mass. 1996).

9. "A lawsuit brought to redress a federal official's violation of a constitutional right…. A *Bivens* action allows federal officials to be sued in a manner similar to that set forth at 42 USCA § 1983 for state officials who violate a person's constitutional rights under color of state law." Black's Law Dictionary (9th ed. 2009). *See e.g., Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

10. *Supra* note 27 at 8.

11. *Supra* note 38 citing *Johnson* v. *Rhode Island Parole Board Members,* 815 F.2d 5 (1st Cir. 1987); *Walrath* v. *United States,* 35 F.3d 277 (7th Cir. 1994); *Russ* v *Uppah,* 972 F.2d 300 (19th Cir. 1992) (suggesting that the scope of immunity encompassed any action taken under official duties by parole board members whether adjudicatory or administrative).

12. 684 F.2d 494 (7th Cir. 1982).

13. *Hafer* v. *Melo,* 502 U.S. 21 (1991).

14. *Will* v. *Michigan Department of State Police,* 491 U.S. 58 (1989).

15. 26 F.3d 1013 (10th Cir. 1994).

16. See U.S. Const. art. I, § 9, cl. 3 and Art. I § 10, cl. 1 (granting that no ex post facto law shall be passed). ((Black's Law Dictionary (9th ed. 2009) defines the tern "ex post facto" as "[d]one or made after the fact; having retroactive force or effect." The dictionary explains that an ex post facto law is "A law that impermissibly applies retroactively, [especially] in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed. Ex post facto criminal laws are prohibited by the U.S. Constitution. But retrospective civil laws may be allowed.")).

CHAPTER 17

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.

The chapter also addresses five concerns: legal representation, indemnification, professional liability insurance, immunity statutes, and sources 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 and parole officers on how legal liability might be minimized 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 edition. It is not meant, however, to preempt the advice of a legal counsel who is more familiar with the law in specific jurisdictions.

I. QUESTIONS

For better legal protection and deeper awareness, listed below are important questions probation and 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 of interests 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 or 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 or 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?

II. SPECIFIC CONCERNS FOR PROBATION/PAROLE OFFICERS

A. Legal Representation

Legal representation should rank as a major concern of probation and 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 for denial of representation based on political or personal considerations. States use various guidelines in deciding the kinds of acts they will defend. Although 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. 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 at the local government level is much less reassuring than representation for state officers. This is significant because although parole agencies in a great majority of states are administered and funded by the states, probation offices are typically under much more local control, 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 and parole officers are advised to look into their specific state statutes covering legal representation and indemnification. Part of the lack of protection comes from a definitional problem. Although 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 laid out 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 the scope of his or her duty and in the absence of good faith not be dispositive of representation or, especially, indemnification. An independent assessment should be undertaken by the state authority that represents and indemnifies (usually the attorney general's office for state officers and the district attorney or county attorney for local officers), based on circumstances as determined by that agency. Only cases that are egregious 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 and 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 and 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.

The problems associated with professional liability insurance, however, are myriad. First, although law enforcement officers can easily obtain insurance, only a few insurance companies carry liability insurance for corrections personnel. Second, who pays the premium? 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 at 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 Statutes

Another possible source of protection that should be explored by probation and 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 (§ 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 terms and conditions of his parole or release or from determining whether to revoke his parole or release.[2]

A similar statute may be enacted by other states at the initiative of probation or parole officers.

It is worth remembering, however, that a state-enacted exception from civil liability does not apply to § 1983 cases because the latter are based on federal law. Despite this limitation, a state immunity statute does extend considerable 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 and parole officers in each state need a source to which they can turn for authoritative information on the topics addressed here. It is suggested that, at the very least, each state develop a manual, perhaps focused on the topics discussed in this monograph. Some states have already done this, focusing on 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 state's attorney general.

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.

On one hand, it behooves probation and parole officers to take to heart 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 excessive caution amounting to inaction. This should be avoided because reluctance or failure to perform one's duties can be more damaging than acting incorrectly. In case of doubt, the general rule is to be guided by the principle of fundamental fairness in decision- making, whether that decision is made by a probation or 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.

A FINAL WORD

Lawsuits are a burden. They cause anxiety, drain time, cost money, and exact a heavy toll on all of the parties involved. A countersuit by the probation or parole officer in retaliation is, at times, an attractive possibility. The prudent officer should be aware that this may actually exacerbate the problem, generating more anxiety, cost, time, and so forth. Avoidance of lawsuits through proper job performance and fundamental fairness is the wiser option as probation and parole officers continue to discharge their duties and responsibilities in a time of legal challenge and constant change. It appears as though most lawsuits against probation and parole officers and agencies do not succeed. Moreover, a thoughtful and careful review of the cases where officers and agencies do lose reveals that a little common sense and a lot of good faith go a long way toward protecting against liability.

NOTES

1. 444 U.S. 275 (1980).

2. Cal. Gov. Code, § 845.8(a) (1995).

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