pj/ss 4/22/76

MEMORANDUM

TO: Mr. Justice Powell DATE: April 22, 1976

FROM: Phil Jordan

No. 75-44 Burrell v. McCray

This problem of "containing" § 1983 has proven as intractable for me this year as it has for the courts during the past decade. After the decision in Paul v. Davis, in which Justice Rehnquist relied upon an "interpretation" of the Fourteenth Amendment rather than any fundamental re-examination of § 1983 doctrine, I have given more thought to the question of whether there is any method of cutting back on the use of the statute without overruling some of this Court's major decisions. I emphasize that I have looked for ways to reduce the use of the statute without affecting the basic interpretation of constitutional guarantees - in other words, some way to deal with the problem of § 1983 other than the method Justice Rehnquist chose in Paul.

My conclusion at the moment is the same one I reached last summer: there is no principled way to cut back on the statute itself, as opposed to cutting back on the guarantees of the Constitution, without overruling cases. A few commentators have suggested ways of "re-interpreting" § 1983, but none of them make much sense to me, and all of them would seem to require overruling some cases.

I have tentatively decided that the most sensible move for the Court - but also the most earth-shaking - would be to overrule Monroe v. Pape on the meaning of the phrase "color of law," and to adopt the position of Justice Frankfurter in his Monroe dissent. Part I of this memorandum is a brief outline of some of the effects of such a change upon § 1983 litigation, as well as an explanation of other possible changes that I find less sensible. In Part II I discuss the issue in this case: whether state prisoners should have to exhaust "adequate" administrative remedies before bringing § 1983 suits.

(I shall refer at points to my earlier memos on § 1983. The term "summer memo" refers to the 28-page memo tracing the development of current § 1983 doctrine. The term "fall memo" refers to the 13-page memo on this case that I wrote at the time the Conference was considering whether to grant certiorari.)

I. Current Status of § 1983 Doctrine, and Possible Changes

A. Current Doctrine

As my summer memo pointed out, there are four significant "facts" of current § 1983 jurisdiction:

(a) The first is the interpretation of the phrase "color of law." As interpreted in Monroe, § 1983 provides a cause of action whenever any state official acts to deprive someone

of a constitutional right, regardless of whether the official's act is sanctioned or prohibited by state law. See Memo 10-12. The only exception to this blanket applicability of § 1983 is that it does not cover actions by an official that clearly are outside the scope of his official duties. See Memo 14.

(b) The second major facet of § 1983 jurisprudence, also traceable to Monroe is that the statute is co-extensive with the Constitution, i.e., it gives a cause of action for the violation of any constitutional provision that has been made applicable to the states. See Memo 9.

(c) Third, from Lynch v. Household Finance comes the principle that § 1983 and its jurisdictional statute, 28 U.S.C. § 1343(3), cover deprivations of both "personal" and "property" rights. See Memo 18-19.

(d) Any fourth and finally, from McNeese and Damico and their interpretations of Monroe comes the principle that state judicial and administrative remedies do not have to be "exhausted" before § 1983 is invoked. See Memo 14-18.

B. Possible Changes

A change in any one of these four facts would have a significant impact upon § 1983 litigation, but the nature of the impact would differ markedly in the case of each facet:

(a) If "color of state law" were reinterpreted to mean only actions that conformed to state law, the impact would be the disappearance of the great bulk of current § 1983 litigation,

i.e., cases in which a state official's acts that are alleged to be in violation of the federal Constitution also are in violation of state tort law. This change is the interpretation of "color of law" would not remove from § 1983 those cases in which a state official's actions either were mandated be a state statute, or were clearly within the area of "official" discretion" vested in him by state statute, or were for some reason "privileged" and thus not subject to state tort law.

Some examples might aid in understanding the change that would be wrought. An allegation that a state officer attached the plaintiff's wages as authorized by state law, but in violation of the due process clause of the Fourteenth Amendment, would be cognizable under § 1983. A claim that the officer ransacked the plaintiff's home in violation of the Fourth Amendment would not be cognizable under § 1983 if the action also was in violation of state law. (This was the situation in Monroe itself.) A claim that a policeman inflicted "cruel and unusual punishment" while effecting an arrest might or might not be cognizable under § 1983 depending upon the status of his action under state law: if he enjoyed official immunity from a tort action for battery, there would be a § 1983 claim, but if he was liable in a tort action there would be no § 1983 claim.

As noted earlier, this seems the best place to make a change. My suggestion - tentative of the moment - is discussed in subsection "C" below.

(b) If § 1983 were re-interpreted as not co-extensive with the Constitution, there would be a significant reduction in the types of constitutional claims that could be brought under the statute. The only logical line to draw in any such re-interpretation would be the line that was rejected in Monroe: include Fourteenth Amendment due process and equal protection claims within § 1983, but exclude claims based on the Bill of Rights provisions that have been "incorporated" into the Fourteenth Amendment. The result would be that plaintiffs could not bring, e.g., "freedom of speech" or "cruel and unusual punishment" or "illegal search and seizure" claims, but could continue to bring the Sniadach-Fuentes or the Roth-Sinderman due process claims and any type of equal protection claim.

At the moment, I believe the current doctrine is correct on this point, i.e., that the phrase "rights, privileges, and immunities" in § 1983 is co-extensive with that part of the Constitution that has been made applicable to the states. Professor Monaghan in his letter to you, as well as a couple of commentators, have suggested that the statute and the Constitution may not be co-extensive, but no one has explained to my satisfaction why not. Furthermore, even Justice Frankfurter, dissenting in Monroe, agreed with Justice Douglas insofar as he held that § 1983 made actionable the deprivation of Bill of Rights guarantees that had been incorporated into the Fourteenth Amendment.

(c) In Lynch were overruled so that only claimed deprivations of "personal" rights were cognizable under § 1983 and § 1343(3), the result would be that claim of deprivation of "property" without due process (e.g., the Di-Chem case from last Term) could not be brought. I do not believe Lynch should be overruled, primarily because such an overruling would lead to pressure to find a "personal" right in every case that seemed to involve only a "property" right. The pressure would be intense, and probably successful, because almost any "property" right has some flavor of a "personal" right. For example, in Sniadach and Fuentes the right was the "property" right to money or goods, but the cases had the flavor of "personal" rights cases because the "right to personal subsistence" was intertwined with the property rights. In short, any distinction between "personal"and "property" rights probably is unworkable, and it is best to maintain the position adopted in Lynch.

(d) Finally, if exhaustion of state remedies were required the effect would be to postpone consideration of a claim under § 1983 until the plaintiff had sought relief in state court or before a state agency. No one ever has suggested that plaintiffs should have to exhaust state court remedies (since the effect - assuming applicability of res judicata - would be to make the state court decision final) so realistically the only type of "exhaustion" requirement that might be possible

would be exhaustion of administrative remedies.* This is discussed in Part II, infra.

C. Changing the Meaning of "Color of Law"

As stated earlier, my tentative suggestion is that the Court eventually overrule Monroe and adopt Justice Frankfurter's position in his dissent in that case. Frankfurter set out his analysis of the statute and the historical interpretation of "color of law" at some length, and it would serve little purpose to attempt to paraphrase it here. Suffice it to say that he demonstrated to my satisfaction that the phrase should reach only actions of an official taken either pursuant to statutory authority, or within his permissible discretion and in violation of no state law. I note at this point that Frankfurter's position would reduce significantly the number of § 1983 suits, for it would largely remove from § 1983 coverage the "common torts" of state officials. (In fact, Frankfurter warned prophetically that Douglas' interpretation of "color of law" would result in simple torts by state officials becoming federal cases under § 1983. See 365 U.S., at 238-242).

I would make only one change in Frankfurter's position, and it is a procedural change. Frankfurter would have

*The decision last Term in Huffman v. Pursue may be a "first step" toward such a requirement, but its holding still is a long way from a rule that a §1983 plaintiff must bring his suit in state court instead of federal court. I see no way for the Court to get to such a rule.

had the federal district court determine in each instance whether a defendant's action was sanctioned by state statute or custom and thus was "under color of law." He didnnot contemplate a § 1983 plaintiff's having to prosecute a state suit to adverse judment, thus establishing that the state sanctioned the official conduct, in order to bring his § 1983 suit. See 365 U.S., at 245-246. I would require the plaintiff to prosecute a state suit in any case in which there is an arguable question of whether the state law sanctions the official conduct. This would entail a form of "abstention" by the federal court. After the plaintiff filed his § 1983 claim, the defendant could move to have the federal court abstain from decision on the ground that the alleged action of the defendant was arguably in contravention of state law. The plaintiff then would be forced to file suit in state court in an effort to recover from the defendant under state law. If the plaintiff were successful in the state suit, it would establish that the defendant's action had not been "under color of law." If the plaintiff were unsuccessful in state court because of a determination that the defendant's conduct violated no state law, the plaintiff could return to federal court and pursue his § 1983 claim, with the "under color of law" question settled in his favor.

Two points should be emphasized about this suggested procedure. First, the plaintiff would have to be permitted to reserve his § 1983 claim for the federal court, and not

have it passed upon by the state court along with the state law claim. Thus, there would be no res judicata bar to this pursuing his § 1983 claim once he had lost his state law claim. Second, the state court's findings of fact would have collateral estoppel effect in the subsequent § 1983 suit. Thus, in the great majority of cases there would be no need to conduct factual inquiries in the federal court, since the facts already would have been determined by the state court. Moreover, if the plaintiff lost his state law suit because of a failure to prove that the defendant had acted as plaintiff claimed, he would lose on the § 1983 claim for the same reason.

I emphasize that my suggested procedure is not an "exhaustion of state remedies" suggestion. It is based on the theory that there is no cause of action until it has been determined that the defendant's action in fact was sanctioned by state law. If this determination could be made without resort to a state court, e.g., if the defendant clearly acted pursuant to a mandate of a state statute, then there would be no requirement that the plaintiff pursue a state court action. In other words, there would be no requirement that a plaintiff still "exhaust state remedies" even after he had established that the defendant acted "under color of law."*

*Although my suggestion is not an "exhaustion" theory, the interrelationship between the exhaustion and the "color of law" issues, see summer memo 10-12, 14-18, can be seen in the fact that my suggestion could be framed as a type of "exhaustion" requirement. In one sense I am suggesting that a plaintiff must "exhaust" his state court remedies if there is any possibility that they might be "adequate," i.e., that he might obtain relief in state court. If it is clear that the defendant's action was

II. Exhaustion of Administrative Remedies in State Prisoner Litigation

The precise question presented by this case is whether a state prisoner claiming a constitutional violation be prison officials can bring a § 1983 action immediately, or must first negotiate an administrative process set up by the state for the consideration of prisoner grievances. It is important to note that these prisoners claim "completed" constitutional violations, i.e., violations by prison officials that occurred previous to, and have nothing to do with the administrative procedures that the state wants them to follow. This case does not involve the hypothetical situation mention in Gibson v. Berryhill, in which no constitutional deprivation would occur until the completion of the administrative proceedings. In that hypothetical situation, e.g., a state license revocation proceeding, the § 1983 action would not be "ripe" until the administrative proceeding was complete and the constitutional violation accomplished. In the instant case, however, the violations have occurred and the § 1983 case is ripe for adjudication. The issue is whether adjudication will be postponed until the prisoners have sought relief from the state administrative body.

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sanctioned by state law, then it would be futile for plaintiff to go to state court - the state remedy would be "inadequate" - and there would be no exhaustion requirement. But so long as there is some chance that plaintiff might win in state court - because the defendant's action arguably was not sanctioned by state law - then plaintiff must "exhaust" the state remedy.

You and I both wanted to get this case before the Court so that there would be a focusing upon the policies involved in the question of whether there should be an "exhaustion" requirement in these circumstances. The pressure to require exhaustion obviously stems from the burden imposed upon federal courts by prisoners' § 1983 litigation. Thus, the fundamental policy question for us should be whether an exhaustion requirement would reduce the burden from such cases.

I tentatively have concluded that an exhaustion requirement probably would not reduce the burden significantly. I also believe that the burden from § 1983 cases will lessen in the future whether or not there is an exhaustion requirement. Thus, as explained in subsection "C" below, my recommendation is that you vote against an exhaustion requirement.

Aside from the ultimate issue of whether an exhaustion requirement should be imposed, there are two "sub-issues". First is the question of whether this Court's previous decisions foreclose the possibility of imposing such a requirement. As discussed in subsection "A" below, I do not believe any decision would have to be overruled to impose exhaustion, although it is clear that the import of this Court's previous decisions is that prisoners do not have to exhaust administrative remedies. The second issue is whether a particular administrative remedy is "adequate". For the reasons discussed in subsection "B" below, I have concluded

that Maryland's administrative remedy is "inadequate" and thus should not have to be exhausted even if there is a requirement that "adequate" administrative remedies must be exhausted.

A. Previous Cases

It is important to distinguish three separate "exhaustion" questions: (1) must a § 1983 plaintiff exhaust state court remedies; (2) must a § 1983 plaintiff, in general, exhaust "adequate" state administrative remedies; (3) must a state prisoner exhaust "adequate" state administrative remedies.

I do not believe anyone ever has suggested that a § 1983 plaintiff must exhaust state court remedies. See Part I.B(d), supra, at p. 6. Thus, even if the Court were to hold that state prisoners must exhaust their administrative remedies, I would assume that the prisoners would not have to seek review in state court of an adverse administrative determination before bringing their § 1983 suit in federal court.

Nor do I think an honest argument could be made that § 1983 plaintiffs in general must exhaust even "adequate" state administrative remedies. The decision in Damico v. California settled that question. In Damico this Court held that a 3-judge district court erred in dismissing a social security recipient's § 1983 suit solely on the ground of failure to exhaust "adequate" administrative remedies. Damico has been followed in several per curiams discussed in the briefs. It is possible to read Damico and the other per

curiams, in the context of theif fact situations, as having held only that resort to administrative remedies would not be required when such resort obviously would be "futile." Thus, in Damico the plaintiff was challenging the constitutionality of a social security regulation; it was clear, I should assume, that the administrative body would not itself produce a definitive ruling on constitutionality of the regulations under which it operated. Carter v. Stanton and King v. Smith can be "explained away" in the same manner. But the honest approach is to admit that the Court's opinions have established the general proposition that administrative remedies need not be exhausted.

This leaves the third issue, the one in this case: do state prisoners have to exhaust "adequate" administrative remedies even though other plainiffs need not? There appear to be only three cases that are directly relevant - Houghton, Wilwording and Preiser v. Rodriguez - and except for one statement in Wilwording do not seem to foreclose the possibility of requiring administrative exhaustion by state prisoners even though it is not required of other § 1983 plaintiffs.

The statement in Wilwording is difficult to "explain away". Wilwording was decided after Damico had held that § 1983 plaintiffs did not have to exhaust even "adequate" administrative remedies. The Court in Wilwording stated that "state prisoners are not held to any stricter standards of exhaustion than other civil rights plaintiffs." 404 U.S., at

252. The necessary implication is that prisoners, like other § 1983 plaintiffs do not have to exhaust even "adequate" administrative remedies.

Except for that statement, however, it is possible to contend, honestly, that in the three relevant opinions the Court has not foreclosed an exhaustion requirement for prisoners. In Houghton a prisoner challenged the confiscation of his legal materials. In reaching its conclusion that exhaustion of administrative remedies was unnecessary, the Court emphasized that the confiscation was mandated by a prison regulation that was "strictly enforced throughout [the state]," and that in this situation requiring exhaustion would be to require a "futile act." 392 U.S., at 640. The Court did end its discussion with the statement that "in any event" exhaustion would not be required in light of Monroe, McNeese, and Damico; but the opinion as a whole easily can be interpreted as applying a well-recognized exception from any exhaustion requirement, namely, that exhaustion will not be required when it clearly would be futile.

Wilwording, the second case, can be distinguished on the ground that it presented no issue of exhaustion of administrative remedies, but only exhaustion of judicial remedies. CA8 had held that prisoners bringing habeas corpus actions to challenge their living conditions had to "exhaust all available state judicial remedies" before bringing a § 2254 petition. 439 F.2d, at 1337. This Court made alternative holdings: (1)

(1) that insofar as the prisoners' petitions were treated as suits in habeas, their attempt to get relief by one state habeas petition constituted sufficient "exhaustion" of state remedies to permit them to pursue their federal habeas remedy; and (2) that the papers also could be read as complaints under § 1983, and as such there was no need for exhaustion of state remedies. In context, Wilwording could have held no more than that it was unnecessary for the § 1983 plaintiffs to pursue further state judicial remedies.

The third case is Preiser v. Rodriguez, where the Court developed the concept of the "core of habeas corpus" and held that actions falling within that "core" must be brought in habeas, with its § 2254 exhaustion requirement, rather than under § 1983. At first blush, Preiser seems devastating to any argument that prisoners yet might be forced to exhaust administrative remedies, for the fundamental premise in Preiser was the difference between habeas corpus and § 1983 with respect to an exhaustion requirement, i.e., there is such a requirement in habeas but not under § 1983. But Preiser can be distinguished on the same ground as Wilwording - the only type of exhaustion at issue in the case was exhaustion of state judicial remedies. This is clear from the CA2 opinions in Presier. See 456 F.2d, at 82 (opinion of Kaufman J., concurring). Although this Court's opinion mentions both administrative proceedings and state court remedies when discussing the "no exhaustion" rule under § 1983, the case

ultimately can stand for nothing more than "no exhaustion of state court remedies," since that was the only kind of exhaustion at issue.

In sum, if the Court in this case should decide that exhaustion is a good policy, an opinion could be written that requires such exhaustion without overruling a previous case. There is no denying, however, that such an opinion would run counter to the "drift" of the Court's previous opinions - and counter to broad dicta in several opinions to the effect that there is never an exhaustion requirement under § 1983.

B. "Adequacy" of the Maryland Procedure

I have placed the word "adequate" in quotation marks throughout this memo because I am not sure of its content. It is clear from this Court's previous opinions that no exhaustion requirement can be imposed if the administrative procedure that is to be exhausted is not "adequate." But I have not been able to gain much of a feel for what "adequate" means. The parties in this case seem to have little grasp of what it should mean, either. Respondents, for example, spend many pages contending that the Maryland procedure fails to measure up to minimum standards of due process for an adjudicatory procedure (e.g., lack of counsel, absence of cross-examination, ex parte communications), but I do not believe the concept of "adequacy" in the context of an exhaustion requirement means the same thing as "due process" in an adjudicatory procedure.

It seems to me there probably are three fundamental requirements for an "adequate" administrative proceeding: (1) it must be able to give the relief that the plaintiff wants; (2) there must be a realistic chance that plaintiffs will receive a relief in meritorious cases, i.e., that they will not be foreclosed from relief by totally biased or completely incompetent decision-makers; (3) the procedure must operate with reasonable speed so that later resort to a § 1983 suit, if necessary, will be meaningful.

The parties disagree over whether the Maryland procedure meets standards # 2 and # 3, and I think it's probably impossible for the Court to make a clear determination one way or the other on those issues. For example, the question of whether there is a realistic chance of relief in meritorious cases - # 2 - involve the questions of whether the administrative decision-maker is biased or the fact-finding process inadequate, and those are close questions in any case. And the issue of delay - # 3 - is not developed very well by this record, although the parties do give us some statistics on the average and/or mean time required to process a grievance. See Brief for Respondents at 91-92.

Even assuming the Maryland procedure meets standards # 2 and # 3, however, it fails standard # 1: the Commission has no power to award money damages, and each of the prisoners in this case specifically sought money damages.

I see no way around a determination that the administrative remedy is "inadequate," and thus need not be exhausted, because it cannot grant the relief requested by the plaintiffs. (The situation is analogous to the case of a prisoner who brings a claim that normally would fit within the core of habeas corpus under Preiser, but seeks money damages - under Preiser, and Wolff, he could bring his claim under § 1983 insofar as he sought such damages, for damages are not available in habeas corpus. Similarly, even if the Maryland procedure normally is "adequate," it is not adequate when damages are sought for an alleged constitutional violation, because damages are unavailable.)

C. Policy Considerations

Assuming arguendo that the Maryland procedure is "adequate," and that the Court must reach the ultimate issue of whether exhaustion should be required, it will be necessary to balance policy considerations. I have laid out most of the policy considerations in favor of exhaustion in my fall memo, at 6-12, and I refer you to it rather than repeating those arguments here. In this memo, I shall discuss a couple of argument that seem to cut the other way, and that, for the moment at least, have convinced me that exhaustion probably should not be required.

Most of these arguments can be grouped under the overall heading that "exhaustion will not accomplish the desired

result of reducing the load on federal courts from § 1983 prisoner litigation." The first reason is that exhaustion at most can only delay the entry of the vast bulk of cases into the federal courts. Some few grievances will be found meritorious and thus disposed of favorably to the inmate by the grievance commission, and these will not proceed on to federal court. But the great majority will be found frivolous by the commission, probably even at the "preliminary" stage without a hearing, and the inames will be able to proceed immediately into federal court. The second reason that exhaustion may not benefit the courts is that the administrative record produced in the grievance proceedings probably is not admissible in federal court. See Brief for Respondents 50-51. If not, the federal court would have to consider every complaint de novo once it reached litigation. The third reason that exhaustion may not accomplish its desired result is the most substantial of all: the federal court may be forced to spend much of its time deciding whether the administrative remedy is "adequate," so that exhaustion is necessary. In fact, litigation over the "adequacy" of state administrative proceedings could come to consume just as much or more time than does the processing of frivolous § 1983 suits today. The net result could be two stages in a lot of § 1983 suits: the first stage would be litigation over the "adequacy" of the administrative remedy, and the second would be the actual investigation into the § 1983 complaint.

Aside from the arguments that an exhaustion requirement would not accomplish its desired result, there are two other arguments against it that carry some weight with me. First, an exhaustion requirement may be unnecessary as a means of cutting down on the burden of § 1983 suits, because the number of them may diminish substantially in the next few years anyway. One reason is the decision in Preiser: many prisoners seek restoration of good time credits when they sue over something that happened to them, and those suits must be brought in habeas corpus (except insofar as damages are sought). Another reason is that many of the constitutional issues arising from prison life have been settled in recent years, and the bulk of the major remaining ones are likely to be settled reasonably soon; the number of suits raising obviously losing issues can be expected to fall off once these issues have been settled. (Admittedly, this argument includes lots of implicit assumptions - for instance, that most of the issues will be settled against the prisoners.) Finally, prisoners can be expected to choose an "adequate" administrative procedure over a § 1983 suit even if they are not forced to do so by an exhaustion requirement. In other words, if a procedure is reasonably quick and capable of granting the desired relief, so that it would be "adequate" for purposes of an exhaustion requirement, it probably would be unnecessary to require its use in order to get prisoners to use it.

The other argument of some substance is that there is no exhaustion requirement on the face of § 1983, and Congress must be presumed to have been aware that the "accepted rule" has been "no exhaustion"; therefore, this Court should not impose an exhaustion requirement but should await congressional action. (If the Court should hold that exhaustion is not necessary, you might consider writing, in order to urge Congress to investigate the problem of prisoner litigation and to consider the possibility of requiring exhaustion - a la your footnote in Procunier).

D. Conclusion re Exhaustion

My conclusions are (1) that an opinion requiring exhaustion would not have to overrule previous cases, but would certainly go against the drift of previous decisions and against a few flat statements in dicta; (2) that the Maryland procedure is "inadequate" because it provides for no money damages; (3) that, on balance, the policies probably cut against an exhaustion requirement, primarily because such a requirement is likely not to have the desired effect of reducing the load on federal courts from § 1983 litigation.

III. The Merits of the McCray Suits

If the Court finds exhaustion not required in these cases (either as a general rule or because of the "inadequacy" of the Maryland procedures), it will be necessary to reach

McCray's claims based on his two commitments to isolation. As I understand the papers, McCray claims both a violation of due process, and cruel and unusual punishment. The two claims seem to be intertwined, but I shall try to treat them separately.

I preface my short discussion with a general observation. The two incidents from which McCray's suits arose must be representative of what goes on in prisons all the time. Ten years ago it would have been unheard of for a federal court to scrutinize the guards' behavior for possible constitutional violations, but the constant pressure of § 1983 filings by prisoners has resulted in the gradual acceptance by the courts of an active role in prison life. I have no doubt that the Court will reverse CA4 on the merits, by holding that these facts do not show constitutional violations. I agree with that disposition; furthermore, I believe these fact situations give the Court an opportunity to lay down some general principles concerning the application of the Eighth Amendment and the Due Process Clause to prison discipline and conditions. My discussion, therefore, will be confindd to pointing out the "general principles" that seem worth emphasizing.

A. Cruel and Unusual Punishment.

The first point that strikes one about the CA4 holdings is that they applied the Eighth Amendment to facts that

concededly did not involve punishment: everyone agrees that the purpose of the treatment accorded McCray was his personal protection and the protection of other inmates, not discipline or punishment. CA4 considered the Eighth Amendment applicable on the ground that it is applicable to everything that goes on in a prison. Although nothing in this Court's opinions refutes that position, it seems at least suspect to me. I think the Court could say that the Eighth Amendment was not even applicable to this case because there was no punishment involved. I recognize, of course, that this approach would run counter to the general rule that "labels don't count." Also, even if the Eighth Amendment did not apply, the conditions of the confinement could receive the same scrutiny under the Due Process Clause. Nevertheless, the Court should consider holding that "cruel and unusual punishment" has nothing to do with this case.

Second, I am struck by the fact that CA4 considered the conditions of the M.O. cell to be "cruel and unusual punishment" per se, although the I.C. cell presented almost the same conditions yet was held not to be such punishment. About the only differences between the cells was that the M.O. cell had no sink, no concrete slap for a bed, no mattress, and no "modern" toilet, while the I.C. cell did have these things. But both were concrete and cold and barren, and McCray was naked in both cases. If the differences in the two cells are enough to yield different constitutional results,

then federal judges have a license to look into all details of an individual prisoner's day-by-day existence, and spot a constitutional violation whenever the conditions cross over some "line" that corresponds roughly to the individual judge's "outrage line."

I suggest the Court lay down some guidelines on what can and cannot constitute "cruel and unusual punishment" when only the conditions of confinement are involved. My suggestion is that the Court draw a distinct line between temporary conditions, like short administrative and punitive isolations, and the permanent conditions of a prison. If the standards for finding an Eighth Amendment violation in the conditions of temporary confinement were extremely tough - almost unprovable - prisoners would stop bringing § 1983 suits based on claims like, e.g., there was a roach in the isolation cell, or the toilet wasn't clean in administrative segregation. But class action suits based on the conditions of the prison as a whole - for instance, like that brought against the Alabama prison systems - still would be possible. I can justify the latter type of suit much more easily: when the legislature imposes a particular penalty for a crime, it is reasonable to require that it impose only segregation from society and confinement for that period of time, and not impose inhumane conditions upon the person for the duration of his confinement.

A third point is that CA4 relied upon the apparent failure of petitioner Smith to follow the prison directives about

notifying medical personnel, and the failure of petitioner Burrell to take steps to "alleviate" the conditions of McCray's confinement when medical aid was not forthcoming within a "reasonable" time. (CA4 found an Eighth Amendment violation in these failures. Respondents appear to contend that they also amounted to due process violations. See infra.) This seems ridiculous to me: surely it is not "cruel and unusual punishment" every time a prison guard fails to follow the letter of a prison directive.

B. Due Process

Although CA4 did not discuss the case in due process terms, McCray did raise a due process claim and respondents seem to make due process arguments in support of CA4's judgment. There appear to be two theories: (1) that the guards' failure to follow the prison directive and failure to secure medical help quickly, violated due process because McCray suffered the deprivations of the isolation cells for an unnecessary length of time; (2) the conditions of the cells were unrelated to the purpose of the isolation, i.e., protection of McCray. I buy neither of these theories. In essence, they are both arguments that prison guards are required to insure that a prisoner suffer only that discomfort which is absolutely necessary for the purpose at hand. This much too strict a standard. The most that the courts should demand of prison administrators is that their acts not be patently arbitrary -

and nothing these petitioners did was arbitrary. On the contrary, the actions taken in both instances seem more or less reasonable responses to crisis situations. It is important that the Court make clear that federal courts are not to second-guess prison officials on isolated instances of prison administration under some vague due process test. Because of the unusual nature of prison life, administrators must have substantial leeway in individual instances - patterns and practices of unreasonable administrative actions may present a different issue.

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