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## Section 1983 Decisions in the Second Circuit

Cover Page Footnote

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**AN ANALYSIS OF SECTION 1983 OPINIONS  
FILED IN THE SECOND CIRCUIT  
BETWEEN JUNE 1, 1998 AND MAY 31, 1999**

*George C. Pratt\**

This article presents an overview of the sixty-four opinions in cases brought under 42 U.S.C. §1983 that were written in the United States Court of Appeals for the Second Circuit during the one year from June 1, 1998, to May 31, 1999 at the end of this article is an alphabetical list of the cases with a brief description of the §1983 issues decided. The article itself focuses on what kinds of disputes are being brought to the court, who brings them, what are the current problems in Section 1983 litigation, and how is the Second Circuit handling these problems.

**I. CASES CONSIDERED**

In all of the 64 cases described and discussed here, the court wrote formal opinions; thus, the article does not consider the large number of section 1983 appeals that were decided by summary order. (A summary order is used when the panel members believe “that no jurisprudential purpose would be served by a written opinion.” See Section 0.23 Rules of the Second Circuit) We do not know exactly how many such summary dispositions of section 1983 cases there were. In general, however, approximately 70% of the court’s dispositions for the fiscal year ended September 30, 1998, were by summary order. This figure is consistent with the pattern over the past several years.

If that pattern held true for section 1983 during the period examined here, then in addition to the 64 opinions filed there were approximately 149 other section 1983 cases decided by summary order, probably all of which were affirmances. Thus, the total number of Section 1983 cases decided during the year was approximately 213, out of approximately 1724 cases briefed during the year. This would represent over 12% of the court’s docket.

## II. STATISTICAL OVERVIEW

The total number of section 1983 opinions found was 64. The court reversed wholly or partially in 35 cases and affirmed completely in 29. If you factor in the approximately 149 summary-order affirmances this would produce an overall reversal rate of about 16.4%.

Plaintiffs *appealed* in 49 of the opinion cases (76%), defendants in 15 (23%). Plaintiffs *prevailed* in 27 cases (42%), defendants in 37(58%).

### A. WHO WAS SUING ?

PRISONERS: 12 cases (19%)

CITIZENS ARRESTED OR PROSECUTED: 8 cases (13%).

EMPLOYEES: 8 cases (12%), including claims of retaliation, due process, and discrimination.

PROPERTY AND BUSINESS OWNERS: 10 cases (15%)

PHYSICIANS: 3 cases (5%)

OTHERS: 26 cases (40%). Plaintiffs in this miscellaneous category included such diverse parties as students, taxpayers, contractors, and tenants.

### B. WHO WERE THE DEFENDANTS?

By and large, the defendants are the ones to be expected opposing the various types of plaintiffs—police, corrections officers, municipal employers, school boards and officials, and zoning authorities.

**C. PROCEDURAL CONSIDERATIONS**

Procedural issues were prominent, sometimes dispositive, in 17 cases (26%):

*Appealability: Tolbert.*

*Collateral estoppel and res judicata: Hickerson and Doe.*

*Standing: Gregg and Latino Officers Association .*

*Pleading: Johnson, Carr, and Jones.*

*Evidence: Catone.*

*Discovery: Okunieff and McPherson.*

*Jurisdiction: Murray and Hachamouitch*

*Inconsistent verdicts: Turley*

*Retroactivity of PLRA: Salahuddin*

*Abstention: Dittmer*

*Mootness: Knaust .*

Ten of the appeals (15%) were taken from judgments entered after trial. Summary judgments accounted for 24 (37%), and 7 (10%) involved dismissals under rule 12(b)(6). 7 appeals (10%) were from preliminary injunction orders. Denial of immunity was the basis for 9 interlocutory appeals (14%),

Of the 64 cases, 46 (72%) were heard by panels on which one of the three judges was a “visiting judge”, either from one of the district courts in the second circuit or from a district or circuit court outside the circuit. Only 4 of the 64 opinions were written by visiting judges. These statistics still reflect the extraordinary burdens placed on the judges of the circuit as a result of the four vacancies on the court that prevailed through a good part of the year. To ease those burdens the court necessarily sought help from visitors. Fortunately, all but one of the vacancies has now been filled and the circuit will have less need to call on visiting judges.

The year involved 7 (11%) First Amendment cases.

Prisoner litigation continues to command considerable attention from the Second Circuit. The trend of an increasing number of cases filed by pro se appellants seems to be continuing. Nine of the circuit court's opinions in these section 1983 cases were written where the appellant was a pro se litigant. *Covington, Carr, Grieg, Grune, Hawkins, Johnson, McPherson, Montero, and Walker*. In four of them, *Covington, Grieg, McPherson, and Walker*, the pro se's were successful, continuing from last year the rather remarkable improvement in the quality of litigation coming out of our prisons.

### III. OPINIONS OF SPECIAL IMPORTANCE

Some of the Second Circuit's opinions deserve special comment because of their new or unusual rulings.

*Amato v. City of Saratoga*, 170 F.3d 311 (2d Cir. 1999). The circuit court considered bifurcation of the trial of police officers from that of the municipality in a police brutality claim. Section 1983 actions are well suited to bifurcation. Even though plaintiff recovered only nominal damages in first trial, he was still "entitled to seek symbolic vindication from the municipality for violation of constitutional rights." Dismissal of the claim against the municipality because plaintiff could recover only nominal damages was error.

*Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998). As a matter of first impression, the Second Circuit decided, on a claim of sexual harassment of a school child by other children, that Title IX subsumed possible claims under section 1983, either to enforce Title IX or to protect equal protection rights directly. Thus Second Circuit joined Third and Seventh Circuits in denying relief under §1983, and departed from the Sixth, Eighth, and Tenth Circuits.

*Connell v. Signoracci*, 153 F.3d 74 (2d Cir. 1998). In a case where the operator of a topless bar claimed harassment by municipal officials, the second circuit interpreted *Behrens v. Pelletier*, 516 US 299 (1996), to require a §1983 plaintiff to plead

a violation of clearly established law, and entertained an appeal from a denial of a Rule 12(b)(6) motion on qualified immunity grounds. The circuit court considered the city's interest in gathering information about the impact of topless bars on the neighborhood as possibly justifying defendants' establishment of surveillance cameras at plaintiff's premises. However, because issues were so confused in the "profoundly equivocal and repetitive" complaint, the circuit court remanded with permission to the district court to require an amended complaint, or conduct discovery, or both, and then reconsider the qualified immunity issue. It also said the qualified immunity issue could be appealed again.

*Covington v. City of New York*, 171 F.3d 117 (2d Cir. 1999). Considering the interaction of *Heck v. Humphrey*, 512 US 477 (1994) with the statute of limitations on a false arrest claim, the circuit court held that if success on the plaintiff's section 1983 claim would necessarily have implied the invalidity of any conviction which may have resulted from the state criminal proceedings relating to the arrest (such as when the only evidence to convict resulted from a search incident to the challenged arrest), then the false arrest claim would not accrue, for limitations purposes, until after the criminal prosecution was dismissed.

*Doe v. Pfromner*, 148 F.3d 73 (2d Cir. 1998). The circuit court concluded that the district court's sua sponte application of collateral estoppel to unreviewed decision of Administrative Law Judge was not error.

*Dittmer v. County of Suffolk*, 146 F.3d 113 (2d Cir. 1998). In a facial challenge to the constitutionality of the Long Island Pine Barrens Protection Act, the circuit court concluded that the district court abused its discretion in dismissing on grounds of *Burford* and *Colorado River* abstentions.

*McPherson v. Coombe*, 174 F.3d (2d Cir. 1999). Continuing the trend to provide special protections to pro se litigants, the circuit court adopted a principle that summary judgment may not be

granted against a pro se litigant unless there is a clear indication that he or she “understands the nature and consequences of Rule 56 . . . [H]e or she must be so informed by the movant in the notice of motion or, failing that, by the district court.”

*Smith v. Garretto*, 147 F.3d 91 (2d Cir. 1998). Despite the Supreme Court’s directive that before reaching the issue of qualified immunity a court should first decide that there was a violation of a constitutional right, *Siegert v. Gilley*, 500 US 226 (1991), the circuit court found the novel question of whether a retaliatory entrapment by a district attorney violated first amendment rights to be unclear, but held that whatever the contours of such a right might be, they were not yet clearly established, so qualified immunity applied.

*Smith v. Edwards*, 175 F.3d 99 (2d Cir. 1999). Without discussing the dubious concept of pendent *party* appellate jurisdiction, the circuit court dismissed the complaint against a Town on the interlocutory, qualified-immunity appeal of its police officer.

#### IV. ALPHABETICAL SUMMARY OF CIVIL RIGHTS OPINIONS IN THE SECOND CIRCUIT WITH FULL CITATIONS JUNE 1, 1998 TO MAY 31, 1999

*Amato v. City of Saratoga*, 170 F.3d 311 (2d Cir. 1998). Jury finding of excessive force in a section 1983 action against law enforcement officials does not automatically entitle claimant to compensatory damages as a matter of law. Nominal damages award against individual officers does not preclude a trial against the municipality, which had been bifurcated.

*Ayers v. Ryan*, 152 F.3d 77 (2d Cir. 1998). An inmate who was not provided substantial assistance, and who was deprived of his right to call witnesses in a Tier III disciplinary hearing may have had his due process rights violated. No qualified immunity because rights were clearly established.



*Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1998); Court construes impact of Prison Litigation Reform Act on several consent decrees entered in the 1970's with respect to prison conditions.

*Blissett v. Casey*, 147 F.3d 218 (2d Cir. 1998). Where prisoner's attorneys performed services (in part) before PLRA became effective, PLRA's restrictions did not apply. Court rejects argument that PLRA's fee limitation should be applied to all awards of fees made after the effective date.

*Breen v. Garrison*, 169 F.3d 152 (2d Cir. 1998). Issues of material fact precluded summary judgment on false arrest and excessive force claims. Dismissal of criminal charge because of facial insufficiency was not a dismissal on the merits; malicious prosecution claim was properly dismissed.

*Bruneau v. South Kortright Cent.*, 163 F.3d 749 (2d Cir. 1998); Availability of remedy under Title IX precludes relief to female plaintiff under section 1983 for sexual harassment by fellow students, either to enforce Title IX or rights under equal protection clause. Agrees with CA3 and CA7; disagrees with CA6, CA8, and CA10.

*Carr v. Dvorin*, 171 F.3d 115 (2d Cir. 1999). Statute requiring district courts to screen prisoner's civil actions against government officials applied regardless of whether prisoner was proceeding in forma pauperis or paid filing fees.

*Catone v. Spielmann*, 149 F.3d 156 (2d Cir. 1998). Qualified immunity for dismissal without a due process hearing depended on whether plaintiff was a deputy, which presented contested issues of fact. Appeal dismissed.

*Charette v. Town of Oyster Bay*, 159 F.3d 749 (2d Cir. 1998). Disputed factual issues rendered denial of preliminary injunction to a topless bar an abuse of discretion. Remanded for evidentiary

hearing as to whether municipal regulation imposed a constitutional violation and whether there was irreparable harm.

*Connell v. Signoracci*, 153 F.3d 74 (2d Cir. 1998). Police officer, who is prohibited from owning taverns, cannot claim violation of his first amendment right to free expression in connection with topless dancing performed at bars. Court considered qualified immunity on motion to dismiss under Rule 12(b)(6), and authorized a second immunity motion.

*Covington v. City of New York*, 171 F.3d 117 (2d Cir. 1999). False arrest claim does not accrue for statute of limitations purposes until dismissal of underlying criminal charges, if success on plaintiff's false arrest claim, would necessarily imply the invalidity of a possible conviction resulting from the criminal proceeding. This case relied on *Heck v. Humphrey*.

*Davis v. Kelly*, 160 F.3d 917 (2d Cir. 1998). Pro se prisoner who brings a section 1983 action should have opportunity for discovery to determine who is responsible for retaliatory transfer, before case can be dismissed for lack of participation in transfer by the named defendant.

*DeMichele v. Greenburgh Central School District No 7*, 167 F.3d 784 (2d Cir. 1998). There is no denial of due process in prosecuting the disciplinary hearing of a teacher 24 years after the events, when teacher shows no prejudice from the delay.

*Deshawn v. Safir*, 156 F.3d 340 (2d Cir. 1998). It is not a violation of rights merely to question without Miranda warnings; violation does not occur until information is sought to be used in court proceedings.

*Diamond Stone v. Macaluso*, 148 F.3d 113 (2d Cir. 1998). The fact that on a prior traffic stop plaintiff refused to produce proof of insurance did not provide reasonable suspicion or probable cause two months later for subsequent traffic stops for lack of insurance.

*Dittmer v. County of Suffolk*, 146 F.3d 113 (2d Cir. 1998). District court's dismissal on abstention grounds of landowners' challenge to facial constitutionality of L.I. Pine Barrens Protection Act was not supported by either *Burford* or *Colorado River* doctrines.

*DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124 (2d Cir. 1998). Real property owner did not have substantive due process right in existing zoning of property, because owner's rights in existing classification were not vested under New York law.

*Doe v. Pfrommer*, 148 F.3d 73 (2d Cir. 1998). Client was not required to exhaust state administrative remedies before bringing a section 1983 claim challenging agency's alleged failure to provide him with adequate IWRP (Individualized Written Rehabilitation Program). Decision of ALJ collaterally estops plaintiff's claim here.

*Gierlinger v. Gleason*, 160 F.3d 858 (2d Cir. 1998). If district court disallows attorney's fees for particular items of work, it should state specifically the reasons why they are not awarded so as to allow for meaningful appellate review. Opinion includes a detailed analysis of prejudgment interest and attorney's fee issues.

*Greenwood v. State, Office of Mental Health*, 163 F.3d 119 (2d Cir. 1998). Clinical staff privileges guaranteed by state law at a state hospital are a property interest protected by the Due Process Clause. For qualified immunity, interest was clearly established even though CA2 had not directly ruled on the point. Also, the property interest satisfies the "plus" of the "stigma plus" requirement so that there was also a deprivation of a liberty interest, although that interest was not clearly established.

*Greig v. Goord*, 169 F.3d 165 (2d Cir. 1998). Litigants who file prison condition actions after release are no longer "prisoners" for purposes of exhaustion requirements of PLRA.

*Grune v. Rodriguez*, 176 F.3d 27 (2d Cir. 1999). Plaintiff must demonstrate that the defendants acted with more than mere negligence. Prisoner's claims against parole officials were rejected for various reasons.

*Gubitosi v. Kapica*, 154 F.3d 30 (2d Cir. 1998). When plaintiff, on summary judgment immunity motion, failed to present evidence that police chief engaged in first amendment retaliation, qualified immunity protected police chief.

*Gudema v. Nassau County*, 163 F.3d 717 (2d Cir. 1998). Neither a warrant nor probable cause is required when a governmental entity conducts a reasonable search acting in its capacity as employer rather than law enforcer. Plaintiff in a procedural due process claim based on a random, unauthorized act, must show under *Parratt v. Taylor* that there is no adequate state remedy.

*Hachamovitch v. Debuono*, 159 F.3d 687 (2d Cir. 1998). Because physicians' challenge to state rule precluding the reopening of disciplinary hearing for newly discovered evidence raises due process concerns, *Rooker-Feldman* doctrine does not bar federal jurisdiction; nor does *Burford* abstention.

*Hawkins v. 1115 Legal Service Care*, 163 F.3d 684 (2d Cir. 1998). Pro se attorney is not entitled to attorney's fee under section 1988, notwithstanding that she proceeded pro se due to necessity.

*Hickerson v. City of New York*, 146 F.3d 99 (2d Cir. 1998). In a case challenging zoning restrictions on adult entertainment establishments, plaintiffs who had the opportunity to litigate identical issues in state court, are collaterally estopped from bringing suit in federal court. *England* reservation is not available to plaintiffs who initially brought suit in state court and, after removal to federal court, sought a remand to state court.

*Horne v. Coughlin*, 155 F.3d 26 (2d Cir. 1998). Qualified immunity granted because law was not clearly established that

prison officials have to provide mentally retarded inmates with “counsel substitute” for disciplinary hearing.

*Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999). A section 1983 suit brought by a prisoner challenging the validity of a disciplinary or administrative sanction that does not affect the overall length of his confinement, is not barred by *Heck* and *Edwards*.

*Johnson v. Morgenthau*, 160 F.3d 897 (2d Cir. 1998). Claim of pro se section 1983 plaintiff survives his death. Appeal dismissed without prejudice to reinstatement on application of decedent’s representative.

*Jones v. NYS Div. of Military and Naval Affairs*, 166 F.3d 45 (2d Cir. 1998). Eleventh amendment bars Major’s claim of improper reassignment by N.Y. National Guard. Because plaintiff failed to exhaust the National Guard’s procedures for appealing discretionary decisions, district court was correct in denying the plaintiff’s motion to amend complaint and to add individual defendants.

*Kessler v. Grand Cent. Dist. Management Ass’n, Inc.*, 158 F.3d 92 (2d Cir. 1998). Deviations from one-person one-vote are subject to close scrutiny. Because a NYC Business Improvement District is created only for a special limited purpose and has a disproportionate effect on certain constituents, its weighted-voting provision is exempt from one-person one-vote requirement of the equal protection clause.

*King v. Town of Hempstead*, 161 F.3d 112 (2d Cir. 1998). Federal Housing and Community Development Act, 42 USC section 5301(c), designed to create affordable housing, does not create a federal right enforceable under section 1983.

*Knaust v. City of Kingston, NY*, 157 F.3d 86 (2d Cir. 1998). In an action challenging federal funding of a local program, preliminary injunction was denied on the ground of mootness.

*Koppell v. New York State Board of Elections*, 153 F.3d 95 (2d Cir. 1998). As long as state's system of ballot placement treats all candidates in nondiscriminatory manner, there is no constitutional right to preferred position on ballot. Lottery system for ballot placement is constitutional.

*Latino Officers Association v. Safir*, 170 F.3d 167 (2d Cir. 1999). Police officers' association had standing to challenge department's procedure requiring advance permission to speak publicly on police matters. Injunction reversed because officers are not likely to succeed against requirements of permission and reporting on speeches.

*Lewis v. Cowen*, 165 F.3d 154 (2d Cir. 1998). *Pickering* balancing of a public employee's right to freedom of speech against the state's interest in promoting public concerns is an issue of law for the court.

*Marchi v. Board of Cooperative Educational Services Albany*, 173 F.3d 469 (2d Cir. 1999). BOCES teacher could constitutionally be prohibited from using religion and religious references as part of his instructional program. School board had legitimate interest in avoiding claims of establishment-clause violations.

*McPherson v. Coombe*, 174 F.3d 276 (2d Cir. 1999). District court cannot grant summary judgment against pro se litigant unless there is in the record a clear indication that he understands the nature and consequences of Rule 56. He must be informed by the movant in the notice of motion or, failing that, by the district court.

*Mederros v. O'Connell*, 150 F.3d 16 (2d Cir. 1998). Accidental shooting of hostage is not a seizure within the meaning of the 4th amendment.

*Million Youth March, Inc. v. Safir*, 155 F.3d 124 (2d Cir. 1998). Any parade permit scheme that controls the time, place and manner of speech must not be based on content of message but

instead based on governmental interests. However, when denial of permit is unconstitutional, court need not grant the precise relief requested by plaintiff, but should adapt its injunction to the circumstances.

*Montero v. Travis*, 171 F.3d 757 (2d Cir. 1999). Absolute immunity against 1983 actions afforded officials acting in a judicial capacity extends to N.Y. parole commissioner when granting, denying, or revoking parole.

*Murray v. McDonald*, 157 F.3d 147 (2d Cir. 1998). As long as state courts give a plain, speedy, and efficient remedy for constitutional tax claims, Tax Injunction Act bars federal-court jurisdiction.

*Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999). Denying building permit does not violate substantive due process unless municipality's is "so outrageously arbitrary as to constitute a gross abuse of government authority." Plaintiff failed to establish a "federally protected property right" in the permits applied for.

*Okunieff v. Rosenburg*, 166 F.3d 507 (2d Cir. 1998). Involuntary commitment to private hospital is not state action.

*Pikulin v. City University of New York*, 176 F.3d 598 (2d Cir. 1999). CUNY's entitlement to 11<sup>th</sup> amendment immunity depends on extent of supervision exercised by the state and whether the state must satisfy a judgment against CUNY. Statute requiring indemnification of CUNY's officers is not enough to establish 11<sup>th</sup> amendment immunity. Remanded to develop fuller record.

*Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999). Claims based on disclosure in prison of plaintiff's HIV status and transsexualism. Held, there is a constitutional right to privacy re both, and it is protected in the prison context, but since it was not clearly established, qualified immunity for the privacy claim. On 8th amendment claim, disclosure of the status may expose plaintiff

to violent conduct by other inmates, and no qualified immunity here.

*Prestia v. O'Connor*, 178 F.3d 86 (2d Cir. 1999). New York Elections Law, which requires 5% or 1250 signatures for designating petitions, when viewed in light of the state's overall election scheme, does not preclude viable candidates or write-in campaigns, and therefore does not violate 1st or 14th amendment.

*Robinson v. Cattaraugus County*, 147 F.3d 153 (2d Cir. 1998). Weight of the evidence is not reviewable on appeal. Punitive damages may be based on nominal damages.

*Rodriguez by Rodriguez v. DeBuono*, 162 F.3d 56 (2d Cir. 1998). Whether 42 USC section 1396a(a)(10)(B) provides an enforceable right of action pursuant to Sec. 1983, does not implicate subject matter jurisdiction. It presents a question of whether the plaintiff has stated a claim for relief.

*Salahuddin v. Mead*, 174 F.3d 271 (2d Cir. 1999). District court improperly applied the exhaustion requirement of the amended Sec. 1997e(a) to an action that was pending as of the effective date of the PLRA.

*Scott v. Albury*, 156 F.3d 283 (2d Cir. 1998). In performing the required analysis under *Sandin v. Conner* to determine if a prisoner's liberty interest is implicated, a court should look at actual penalty imposed at disciplinary hearing and not at the maximum penalty that could be imposed.

*Seneca Nation of Indians v. State of New York*, 178 F.3d 95 (2d Cir. 1999). The 11th amendment does not bar Indian Tribe's claims against the state when U.S. has intervened, asserting the same claims for relief.

*Smith v. Edwards*, 175 F.3d 99 (2d Cir. 1999). There was sufficient evidence of probable cause to issue warrant, even if the omitted exculpatory evidence had been before the magistrate



judge. Therefore, there was no constitutional violation and the complaint should be dismissed against the officer and the town.

*Smith v. Garretto*, 147 F.3d 91 (2d Cir. 1998). Prosecutor who orchestrated bribery sting operation in retaliation for plaintiff's exercise of free speech rights was not entitled to absolute immunity, but was entitled to qualified immunity.

*Sullivan v. County of Suffolk*, 174 F.3d 282 (2d Cir. 1999). DSS was entitled to satisfaction of its medicaid lien before a supplemental needs trust was funded from proceeds of settlement of plaintiff's §1983 excessive-force action.

*Thomas v. Roach*, 165 F.3d 137 (2d Cir. 1998). Issues of material fact precluded summary judgment as to whether the police officer used excessive force in arrest of the plaintiff.

*Tolbert v. Queens College*, 164 F.3d 132 (2d Cir. 1998). Generally, refusal to grant summary judgment based on qualified immunity is immediately appealable. However, where court has denied summary judgment because resolution of the immunity defense requires adjudication of issues of fact that are inseparable from the merits, appeal is not immediate and must be dismissed.

*Townes v. City of New York*, 176 F.3d 138 (2d Cir. 1999). Police lacked qualified immunity for unconstitutional stop and search of taxicab, a search that led to discovery of guns and drugs. But plaintiff is not entitled to damages for the subsequent criminal trial, conviction (later vacated), and incarceration, because (1) he did not claim malicious prosecution, and (2) he conceded that he was not seeking damages for an unreasonable search. The fruit of the poisonous tree doctrine is not available to assist a section 1983 plaintiff.

*Turley v. Police Department of the City of New York*, 167 F. 3d 757 (2d Cir. 1998). NYC's licensing scheme for street musicians was upheld over claims of excessive fee, discrimination in favor of

government-sponsored musicians, impermissible discretion in police officers, and illegal confiscation of amplifiers of violators.

*Walker v. Jastremski*, 159 F.3d 117 (2d Cir. 1998). Whether statute of limitations for a pro se prisoner alleging malicious prosecution may be tolled for the amount of time between the time plaintiff requests record and the time he receives record on the ground that it was impossible for plaintiff to get to the courthouse, should be considered after district court determines whether the additional time from tolling would make the claim viable.

*Warner v. Orange County Dept. of Probation*, 173 F.3d 120 (2d Cir. 1999). Mandatory attendance in Alcohol Anonymous as a condition of probation may violate probationer's first amendment establishment clause right. No waiver here. \$1.00 nominal damages.

*Wimmer v. Suffolk County Police Department*, 176 F.3d 25 (2d Cir. 1999). Probationary police officer's claim of retaliation by commissioner failed for lack of proof of personal involvement or of a municipal policy or custom.

*Young v. County of Fulton*, 160 F.3d 899 (2d Cir. 1998). Individual defendants get qualified immunity because at time mother placed her children into foster care there was no clearly established federal right to pretermination hearing before suspension of her visitation rights. Violation of state requirement for a pretermination hearing does not give rise to a section 1983 claim. No failure to train claim against municipality because deliberate indifference requires that the right be clearly established.