Limitation of State Prisoners' Civil Rights Suits in the Federal Courts

Michael Noone McCarty

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol27/iss1/6

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
NOTE

LIMITATION OF STATE PRISONERS' CIVIL RIGHTS SUITS IN THE FEDERAL COURTS

In Monroe v. Pape,¹ the Supreme Court held that a person deprived of his constitutional rights by a state official acting in abuse of his position could recover damages in a civil action.² In the sixteen years since Monroe, the federal courts have been inundated with a steadily increasing number of suits³ brought by prisoners against prison officials under 42 U.S.C. § 1983.⁴ This surge in prisoner suits has put a severe strain on


Examples of prisoners' rights which have been found actionable include the eighth amendment freedom from cruel and unusual punishment in Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970); the right to essential medical attention in Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963); free access to the courts in Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert. denied, 376 U.S. 920 (1964); freedom from interference with religious beliefs in Cruz v. Beto, 329 F. Supp. 443 (S.D. Tex. 1970), aff'd, 445 F.2d 801 (5th Cir. 1971); right to assistance of counsel in Latham v. Oswald, 359 F. Supp. 85 (S.D.N.Y. 1973); and freedom from racial discrimination in Lee v. Washington, 390 U.S. 333 (1968).


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

The overall effect of Monroe v. Pape is indicated by statistics which show that in fiscal 1960 there were only 280 cases of any nature brought under § 1983; in fiscal 1970 there were 3,586, an increase of 1,100%. See Aldisert, Judicial Expansion of Federal Juris-
the federal judicial system, especially the district courts.\textsuperscript{5}

The judicial quagmire is compounded by the fact that most prisoner rights actions are brought in forma pauperis.\textsuperscript{6} As one court has noted:

persons proceeding in forma pauperis are immune from imposition of costs if they are unsuccessful; and because of their poverty, they are practically immune from later tort actions for 'malicious prosecution' or abuse of process. Thus indigents, unlike other litigants, approach the courts in a context where they have nothing to lose and everything to gain. The temptation to file complaints that contain facts which cannot be proved is obviously stronger in such a situation. For convicted prisoners with much idle time and free paper, ink, law books, and mailing privileges the temptation is especially strong.\textsuperscript{7}

"Writ writing" relieves boredom and is one of the few activities available to inmates that is beyond the administrative control of prison authorities.\textsuperscript{8} Because the threat of perjury prosecution has only a minimal deterrent effect on imprisoned felons,\textsuperscript{9} a large percentage of prisoner suits are frivolous or malicious in nature.\textsuperscript{10}

\textsuperscript{5} It is significant to note that the dramatic increase in § 1983 suits has been accompanied by only a slight decline in habeas corpus actions. The number of federal habeas corpus actions brought by state prisoners was 7,949 in 1972; 7,784 in 1973; 7,626 in 1974; 7,843 in 1975; and 7,833 in 1976. See \textsc{aldisert report}, \textit{supra} note 3, at 6 n.10 (citing Annual Report of the Director of the Administrative Office of the United States Courts, 1976).

\textsuperscript{6} 28 U.S.C. § 1915(a) (1970) provides in part:

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

A recent study of the Northern District of Illinois, Eastern Division, showed that in the two years surveyed, every § 1983 action filed by a prisoner was accompanied by a request for leave to proceed in forma pauperis under § 1915. Bailey, \textit{The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois}, 6 \textsc{loy. chi. l.j.} 527, 530 (1975).


\textsuperscript{9} One judge remarked that prisoners "do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court." Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963).

\textsuperscript{10} \textit{See} Bailey, \textit{supra} note 6, at 531. Of the 218 prisoner claims under § 1983 in the
As the number of prisoner petitions has ballooned, those courts most affected by the onslaught have begun to attack the problem, primarily by adopting procedures to streamline the processing of inmates' claims. In addition, a special committee appointed by the Federal Judicial Center has recently submitted a tentative report recommending procedures for more efficient handling of prisoners' rights cases in federal courts. A number of courts have already adopted several of the report's proposals. A very few courts have required that prisoners exhaust state administrative remedies before bringing suit in federal court. The United States District Court for the Southern District of Texas has attempted to attack the problem at its roots by assessing a "partial payment" with in forma pauperis cases when payment of all fees would work a hardship, but payment of a nominal sum would not. This approach is unique because it forces the inmate to weigh his chances of success against the cost of bringing the action, just as any other potential civil litigant must do, without unfairly impeding the prosecution of meritorious claims.

The aim of this Note is to examine the emerging state of the law regarding the handling of prisoners' section 1983 cases in federal courts and to suggest methods to more effectively limit such actions without impinging upon the prisoners' right to have their grievances heard. This article approaches the subject from a procedural standpoint and does not attempt to deal with recent court decisions which have more narrowly limited the nature of actions cognizable under section 1983.

I. ORIGINS OF THE PROBLEM

In the past, the most viable form of federal post-conviction relief available to state prisoners was a habeas corpus action brought under 28 U.S.C. § 2254. Following the Supreme Court's liberal reading of section 2254 in 1971, only seven actions were deemed meritorious enough to deserve a hearing, and in only four of these cases did the prisoner prevail.

11. See ALDISERT REPORT, supra note 3. Judge Ruggero Aldisert of the Third Circuit chaired the committee which conducted the study. He has become an authority on the need for reform in handling inmates' § 1983 cases. See Aldisert, supra note 4. See also notes 58-74 & accompanying text infra.

12. See notes 42-47 & accompanying text infra.


tion 1983 in *Monroe v. Pape* in 1961, however, prisoners rapidly began to recognize the advantages a section 1983 action has over a habeas corpus petition. Although the coverage of section 2254 and section 1983 overlaps, the civil rights statute provides for a wider range of remedies, including the granting of damages and the exercise of broad equity powers. Prisoners can also maintain class action suits under section 1983. While discovery is unavailable in habeas corpus actions, except by court order, discovery procedures are quite liberal under section 1983.

The greatest advantage of section 1983, however, is that state remedies need not be exhausted before the action is commenced in federal court. However, the no-exhaustion rule is limited to cases properly

---

16. 365 U.S. 167 (1961). See text accompanying notes 1 & 2 supra; see also note 21 infra.

17. See note 5 supra.


Examples of situations in which the courts have awarded damages under § 1983 include Carter v. Noble, 526 F.2d 677, 678-79 (5th Cir. 1976) ($1,000 plus attorney’s fees awarded against a jailer who ordered an employee to cut the inmate’s hair when the inmate was about to be released from jail); and Vargas v. Correa, 416 F. Supp. 266, 272 (S.D.N.Y. 1976) ($250 in actual damages and $300 in punitive damages were awarded against a prison guard for an unjustified beating of the plaintiff).

Courts have also exercised broad equity powers under § 1983. See, e.g., Taylor v. Perini, 413 F. Supp. 189, 194 (N.D. Ohio 1976) (prison officials enjoined from censoring mail, interfering with prisoners’ access to the courts, and engaging in racial discrimination); Tate v. Kassulke, 409 F. Supp. 651, 662-63 (W.D. Ky. 1976) (prison officials ordered, *inter alia*, to spray inmates’ cells to eradicate vermin and rodents).

Courts may also make declaratory judgments under § 1983, whether or not such pronouncements are accompanied by injunctive relief. See, e.g., Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972) (declaratory judgments rendered concerning mail censorship, food quality, solitary confinement, medical conditions, visitation rights, telephone access, etc.).


20. The general discovery procedures provided in Rules 26 and 33 of the Federal Rules of Civil Procedure are available to Civil Rights Act litigants. These procedures are inappropriate and unavailable in habeas corpus proceedings in which the district court must first authorize discovery procedures that are suitable. Harris v. Nelson, 394 U.S. 286, 290 (1969).

21. In Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court stated that “[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.” Id. at 183. The Court has confirmed on a number of occasions what it strongly suggested in *Monroe*—that “if a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum.” Preiser v. Rodriguez, 411 U.S. 475, 477 (1973). See also Ellis v. Dyson, 421 U.S. 426, 432-33 (1975); Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1969);
brought under section 1983. When the prisoner is challenging the validity or duration of confinement, habeas corpus is the appropriate mechanism, and the complainant must first resort to any state proceedings which are both adequate and available.

II. "TRADITIONAL" METHODS OF LIMITING PRISONERS'
SECTION 1983 SUITS IN FEDERAL COURTS

The in forma pauperis statute itself provides the courts with some measure of relief from the growing number of prisoner suits. Under section 1915(d), a trial court may dismiss a complaint in an in forma pauperis proceeding if the court is satisfied that the suit is "frivolous" or "malicious." Just as it is within the sound discretion of the trial judge to determine whether or not a petitioner will be accorded pauper status

2. The Supreme Court has held that when an applicant seeks release from, or challenges the duration of his custody, his sole remedy lies in habeas corpus and is subject to the § 2254 exhaustion requirement. Preiser v. Rodriguez, 411 U.S. 475, 489-91, 500 (1973). But cf. Wilwording v. Swenson, 404 U.S. 249 (1971) (claims of mistreatment and restrictive conditions, although actionable for habeas corpus, also state a cause of action under § 1983 and therefore are not subject to the exhaustion requirement). Although Wilwording can be distinguished since it involved challenges to the conditions rather than the validity or duration of incarceration, Preiser indicated a genuine shift in the Court's perspective and can be read to undercut the liberal trend of Wilwording. Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537, 546-47 (1974).

23. The habeas corpus statute, requires an exhaustion of state remedies:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.


25. 28 U.S.C. § 1915(d) provides in part that "[t]he court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

26. See, e.g., Van Meter v. Morgan, 518 F.2d 366, 368 (8th Cir.), cert. denied, 423 U.S. 896 (1975) (complaint stating causes of action duplicative of previous unsuccessful actions by same prisoner was properly dismissed as "frivolous"); Daye v. Bounds, 509 F.2d 66 (4th Cir.), cert. denied, 421 U.S. 1002 (1975) (flood of legal correspondence between plaintiff and courts supported district judge's determination that plaintiff's claim of denial of use of the mails was "patently frivolous").

The terms "frivolous" and "malicious" are not defined in the statute, and the Supreme
under section 1915, it is also within his discretion to dismiss a claim which he deems to be frivolous or malicious. Courts have exercised especially broad discretion to dismiss suits brought by prisoners against wardens and other state prison officials. A significant number of judges have also viewed section 1915(d) as a grant of discretion to dismiss a claim as “frivolous” in situations in which summary judgment under the Federal Rules of Civil Procedure was foreclosed. These courts will

27. Permission to proceed in forma pauperis is a privilege rather than a right. Brewster v. North Am. Van Lines, Inc., 461 F.2d 649 (7th Cir. 1972); Higgins v. Steele, 195 F.2d 366 (8th Cir. 1952). Nevertheless, in recent years courts appear to have used $50 in available assets as an approximate dividing line between indigency and ability to pay costs, at least in the case of prisoner suits. See, e.g., Ward v. Werner, 61 F.R.D. 639 (M.D. Pa. 1974) (two plaintiffs with $30 and $65, respectively, held not paupers); Shimabuku v. Britton, 357 F. Supp. 825 (D. Kan. 1973) (plaintiffs with $45, $51.27 and $61.41, respectively, held not indigent). The Supreme Court has stated that indigency is a relative concept not necessarily synonymous with absolute destitution. Adkins v. E.I. duPont de Nemours & Co., 335 U.S. 331 (1948).

28. See, e.g., Carter v. Thomas, 527 F.2d 1332, 1333 (5th Cir. 1976).

29. See, e.g., Torres v. Garcia, 444 F.2d 537 (9th Cir. 1971); Shobe v. California, 362 F.2d 545 (9th Cir.), cert. denied, 385 U.S. 887 (1966) (district courts’ denial of motions to proceed in forma pauperis in civil rights actions brought by prisoners not abuse of discretion). But see Simmons v. Maslynsky, 45 F.R.D. 127 (E.D. Pa. 1968) (district court must grant petitioner’s motion to proceed in forma pauperis in § 1983 action to compel trial court stenographer to provide copy of trial transcript).

30. FED. R. Civ. P. 12(b)(6) provides that a motion may be made by the defense alleging the plaintiff’s “failure to state a claim upon which relief can be granted.” The motion is treated as one for summary judgment and disposed of pursuant to Rule 56(b) which provides that “[a] party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.” Summary judgment is an “extreme remedy” which will not be entered except when the movant is entitled to its allowance beyond all doubt. City Nat’l Bank v. Vanderboom, 422 F.2d 221 (8th Cir.), cert. denied, 399 U.S. 905 (1970).

31. Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972), aff’d per curiam, 480 F.2d 805 (5th Cir. 1973). The court stated that § 1915(d) “is a grant of power to dismiss in situations where dismissal under Federal Rule of Civil Procedure 12 might be improper.” 58 F.R.D. at 463 (citations omitted). “The Federal Rules . . . are inadequate to protect the courts and defendants—who it should be remembered pay for their defense—from frivolous litigation from indigent prisoners.” Id. The Court noted that “The liberal approach of the
dismiss an in forma pauperis action if the complaint states a claim "in which the plaintiff’s realistic chances of ultimate success are slight." 32

Most courts, however, hold it improper to deny a prisoner leave to commence his action in forma pauperis in the initial stages of the suit on the ground that the complaint is frivolous. 33 Instead, if the affidavit of indigency on its face satisfies the particular court’s discretionary financial requirements under section 1915(d), the court grants leave to proceed in forma pauperis. Only after the case has been docketed does the court check whether the allegations of poverty are true and scrutinize the complaint to determine whether it is "frivolous" or "malicious." 34 This procedure insures that a sincere but impecunious prisoner’s claim will not be cursorily discarded before its potential merits can be developed. 35

Rules is probably desirable, but the rules contemplate litigants who are limited by the realities of time and expense. They also contemplate litigants with a basic respect for accuracy.”

It is plain to this Court that courts need an extra measure of authority when faced with actions proceeding in forma pauperis—particularly where the action is brought by a prisoner seeking damages. And it is this Court’s conclusion that Congress has granted that extra authority by enacting 28 U.S.C. § 1915(d).

Id. at 464. See also Daves v. Scranton, 66 F.R.D. 5, 7 (E.D. Pa. 1975).

32. Jones v. Bales, 58 F.R.D. at 464. This appears to be the case in most instances despite the Supreme Court’s apparently conflicting ruling in Haines v. Kerner, 404 U.S. 519 (1972), that pro se complaints are to be read under less stringent standards than formal pleadings drafted by attorneys, and should be dismissed only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 404 U.S. at 521 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Serna v. O’Donnell, 70 F.R.D. 618 (W.D. Mo. 1976) attempts to reconcile the facially contradictory themes of Haines and § 1915(d):

A decision as to frivolity or maliciousness is an extremely important one, because dismissal of frivolous actions pursuant to 28 U.S.C. § 1915(d) is appropriate to prevent abuses of the processes of the Court. Harkins v. Eldredge, 505 F.2d 802 (8th Cir. 1974). This responsibility to dismiss cases that are frivolous or malicious must be balanced against the predisposition in favor of liberal construction of pro se prisoner pleadings.

. . . After understanding what the prisoner is alleging, the Court must, if there is a request to proceed in forma pauperis, determine whether the case is frivolous or malicious. Whereas in understanding a pleading, leniency is necessary to counteract the plaintiff’s lack of legal expertise, the same degree of predisposition in favor of the pro se plaintiff is not called for when a determination is made under 28 U.S.C. § 1915(d).

Id. at 621.


34. See Taylor v. Gibson, 529 F.2d 709, 714 n.6 (5th Cir. 1976); Forester v. California Adult Auth., 510 F.2d 58, 60 (8th Cir. 1975); Stültner v. Rhay, 332 F.2d 314, 317 (9th Cir. 1963), cert. denied, 376 U.S. 920 (1964); Ragan v. Cox, 305 F.2d 58, 60 (10th Cir. 1962). But see Shobe v. California, 322 F.2d 545 (9th Cir. 1966) (discretion to deny state prisoners privilege of commencing and prosecuting suit in forma pauperis is "especially broad" in civil actions against prison officials).

and allows an orderly and complete record to be made in each case for the benefit of both the district court and the appeals court.\textsuperscript{36} In addition, the respondent is spared the burden of making a reply pleading in a patently frivolous action.\textsuperscript{37} However, this procedure does not solve the basic problem of cluttered dockets, since judges and magistrates are still forced to spend valuable time and energy scrutinizing the large percentage of frivolous suits.

Another process used by the courts to limit the barrage of baseless civil suits has been the injunction.\textsuperscript{38} Injunctions usually are issued against petitioners who have been excessively litigious concerning a certain subject matter or who appear intent on harassing the defendant(s).\textsuperscript{39} The appropriate use of these writs is very limited, however, as they may only be used to enjoin further frivolous litigation of a fairly specific claim against an already beleaguered defendant.\textsuperscript{40} A "blanket" injunction, foreclosing the inmate from filing further civil actions of any nature against a particular defendant, would be an unconstitutional denial of the inmate's right of access to the courts.\textsuperscript{41} Furthermore, the injunction does not remedy the primary problem of an overcrowded docket, since it is usually not issued until after the court has been subjected to a series of complaints.

III. RECENT TRENDS IN LIMITING SECTION 1983 PRISONER SUITS

A. Exhaustion of State Administrative Remedies

The great majority of lower federal courts have followed the Supreme Court's admonition in \textit{Monroe v. Pape}\textsuperscript{42} that in civil rights cases "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."\textsuperscript{43} However, several courts have factually limited the \textit{Monroe} line of deci-

\begin{itemize}
\item \textsuperscript{36} Cole v. Smith, 344 F.2d 721, 723 (8th Cir. 1965).
\item \textsuperscript{37} Forester v. California Adult Auth., 510 F.2d 58, 60 (8th Cir. 1975).
\item \textsuperscript{38} Courts base their authority to issue injunctions in such cases on 28 U.S.C. § 1651(a) (1970), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."
\item \textsuperscript{39} See, e.g., Ex parte Tyler, 70 F.R.D. 456 (E.D. Mo. 1975) (injunction issued against prisoner after filing eighteenth in a series of frivolous suits over same subject matter); Rudnicki v. McCormack, 210 F. Supp. 905 (D.R.I. 1962), \textit{appeal dismissed}, 372 U.S. 226 (1963) (litigious inmate barred from instituting further suits charging conspiracy of state and federal judges to deny inmate of civil rights).
\item \textsuperscript{40} See Adams v. American Bar Ass'n, 400 F. Supp. 219, 227 (E.D. Pa. 1975).
\item \textsuperscript{42} 365 U.S. 167 (1961). \textit{See note 21 & accompanying text supra.}
\item \textsuperscript{43} 365 U.S. at 183.
\end{itemize}
Limitation of Prisoner Civil Rights

Because res judicata and collateral estoppel may bar a federal action after a state judicial determination, but not after a state administrative proceeding, the Second and Seventh Circuits have required exhaustion if the plaintiff has available an adequate administrative remedy at the state level. These courts distinguished Monroe and subsequent Supreme Court decisions either because the only remedy available to the plaintiff at the state level was judicial, because only an inadequate or futile administrative proceeding existed, or because the action challenged the facial constitutionality of a state statute. The Supreme Court recently refused to decide whether an exhaustion requirement is appropriate when there is clearly an adequate state administrative remedy available.

The exhaustion requirement has been criticized on the ground that federally protected fundamental rights should not be sacrificed by forcing prisoners to exhaust state administrative remedies. At the heart of this argument is the fear that a state administrative system may systemat-

44. See, e.g., Spence v. Latting, 512 F.2d 93 (10th Cir.), cert. denied, 423 U.S. 896 (1975) (state judicial action in § 1983 cases is res judicata). Judge Aldisert suggests that if the res judicata - collateral estoppel problem is the main reason for the courts' refusal to impose an exhaustion requirement in § 1983 suits as they do in § 2254 habeas corpus actions, then "a change in the applicability of res judicata can be made by statute if necessary." ALDISERT REPORT, supra note 3, at 15 n.24. See generally Note, Constitutional Law—Civil Rights—Section 1983—Res Judicata/Collateral Estoppel, 1974 Wis. L. REV. 1180 (1974).


46. In Metcalf, the Seventh Circuit distinguished the Supreme Court's decisions in Monroe (only remedy available was judicial); Houghton v. Shafer, 392 U.S. 639 (1968) (exhaustion would have been futile since appropriate state administrator had already taken a position adverse to the petitioner's claim); King v. Smith, 392 U.S. 309 (1968) (administrative remedies inappropriate in both cases because state statutes were challenged as facially unconstitutional); Damico v. California, 389 U.S. 416 (1967) and McNeese v. Board of Educ., 373 U.S. 668 (1963) (only power of appropriate administrator was to recommend institution of state court proceedings).

The Fourth Circuit in McCray v. Burrell, however, recently took a much more confining view of the Supreme Court's exhaustion pronouncements. In overturning a district court order which had dismissed a prisoner's § 1983 suit for initial failure to resort to an inmate grievance procedure provided by the state, the appeals courts said, "we are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject."


48. See, e.g., McNeese v. Board of Educ., 373 U.S. 668, 674 (1963), in which Justice Douglas said, "It is immaterial whether respondents' conduct is legal or illegal as a matter
ically use its own procedures to discriminate against prisoners because of their status. While such fears may be valid in some instances, any inequities in the administrative system can just as easily be attacked on subsequent appeals to the federal courts. When the plaintiff is able to show that the state is using the administrative grievance process to harass or deter him from seeking his federally protected rights, 49 or when the plaintiff's case involves a substantial challenge to the constitutionality of a state statute or regulation, 50 the courts could forego the exhaustion requirement as futile. Otherwise, when a state provides inmates with an apparently fair and adequate grievance procedure and with methods for developing and preserving a factual record of the procedures involved, prisoners should be required to exhaust their administrative remedies. 51 "The fact is that state prisons are state institutions and needed reforms must ultimately come from the state." 52 Since there are no bars of res judicata or collateral estoppel when state administrative remedies are exhausted, "[e]xhaustion of adequate administrative remedies in section 1983 cases allows the state agency to apply its expertise, develop a factual record, and cure its own errors without prejudicing the litigant's right to a federal forum." 53

Several states have established administrative grievance procedures for prisoners, 54 with the result that a significant percentage of the grievances are resolved either at the institutional level or at the administrative appeals level. 55 In Maryland, the grievance mechanism has reduced prisoner filings in the federal district court by sixty-six percent. 56 Although this trend is encouraging, the full value of such programs cannot be realized until it is clear that exhaustion of state administrative remedies is appropriate in section 1983 cases. Since such a declaration cannot

of state law. Such claims are entitled to be adjudicated in the federal courts" (citations omitted).

49. See Comment, supra note 22, at 550.
51. Polices other than comity which favor exhaustion include: "(1) The facilitation of subsequent judicial review after the agency has exercised its administrative expertise; (2) the development of a factual record; (3) agency opportunity to correct its own errors; and (4) possible saving of judicial time if administrative relief is granted." Cravatt v. Thomas, 399 F. Supp. 956, 969-70 (W.D. Wis. 1975).
52. Aldisert, supra note 4, at 565.
53. Comment, supra note 22, at 552.
54. E.g., 4A MD. ANN. CODE § 41-204F (Supp. 1977); N.C. GEN. STAT. §§ 148-101 to 148-113 (Supp. 1975). For a bibliography of literature on different grievance mechanisms in operation today, see ALDISERT REPORT, supra note 3, at 17 n.28.
55. ALDISERT REPORT, supra note 3, at 19.
56. See Comment, supra note 50, at 488 (citing 6 THE THIRD BRANCH 4, 7 (Apr. 19, 1974)).
be expected from the Supreme Court in the near future.\textsuperscript{57} Congress might do well to consider amending section 1983 to require administrative exhaustion in appropriate instances.

B. Streamlined Handling of Prisoner Complaints under Section 1983

In addition to encouraging the expanded use of administrative grievance procedures,\textsuperscript{58} the Federal Judicial Center's Aldisert Report\textsuperscript{59} proposes several measures designed to streamline the handling of prisoners' civil rights cases. The report suggests that compensated counsel be made available to inmates with grievances.\textsuperscript{60} While such a program would not actually "streamline" the handling of an individual case, the presence of attorneys should discourage the filing of frivolous cases.\textsuperscript{61} A lawyer-drawn complaint is also usually easier for a judge or magistrate to decipher than a \textit{pro se} complaint. The committee expressed the view that reliance on uncompensated counsel or legal assistants is "not totally satisfactory" because an inmate is more likely to be successful in presenting important constitutional issues for "meaningful and prompt disposition," with paid representation\textsuperscript{62} and because only compensated counsel "will be able to discourage frivolous cases and will more carefully limit and define the issues presented."\textsuperscript{63}

Judge Aldisert's committee report does not, however, address the cost factor involved in retaining paid attorneys. Those costs make such a program unattractive to most courts in the absence of specific public funding. A far more economically feasible alternative would be to allow Legal Services lawyers or law students in legal aid programs to counsel inmates with grievances.\textsuperscript{64} Such representatives should be competent to determine whether or not the inmate has a valid cause of action. Their ability to discourage the filing of baseless actions could be strengthened

\textsuperscript{57} See note 47 & accompanying text supra.
\textsuperscript{58} See ALDISERT REPORT, supra note 3, at 17-21.
\textsuperscript{59} See note 3 & text accompanying note 11 supra.
\textsuperscript{60} See ALDISERT REPORT, supra note 3, at 10.
\textsuperscript{61} Id. The committee cites Ault, \textit{Legal Aid for Inmates as an Approach to Grievance Resolution}, 1 RESOLUTION OF CORRECTIONAL PROBLEMS AND ISSUES 28, 32 (1975), which gives the results of an empirical study showing that availability of counsel does apparently serve to lessen the number of clearly frivolous lawsuits.
\textsuperscript{62} ALDISERT REPORT at 10 n.18 (citing the REPORT OF THE COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1974) at 2).
\textsuperscript{63} ALDISERT REPORT at 10.

The Eastern District of Pennsylvania has been utilizing law students from Temple University and the University of Pennsylvania to represent indigent prisoners in § 1983 cases. In the Western District of Wisconsin, the Corrections Legal Service Program, a
by permitting the courts to subject inmates who bring frivolous or malicious suits against the advice of legal assistants to contempt charges.\(^6\)

The committee also proposed several procedural standards to accelerate and improve the processing of inmate complaints in the district courts. Essentially, these procedures would provide a separate, centralized mechanism for handling prisoners' rights cases.\(^6\) A special "intake clerk" would initially determine whether the complaint and affidavit of indigency are in proper order. Then a staff law clerk or magistrate would perform the first screening of the complaint and make recommendations to the judge as to whether the claim is frivolous or meritorious.\(^6\)

The report also contains suggested forms for use by the inmate in filing the complaint and pauper affidavit.\(^6\) The complaint form is designed to elicit from the prisoner all the relevant facts of his grievance, and at the same time eliminate the incidence of obscenities and bald conclusions of law with which prisoner complaints are often replete. The form also includes questions on whether the inmate has filed previous lawsuits dealing with the same subject matter and whether the prisoner has previously presented his problem through a state or institutional grievance procedure.\(^6\) The recommended in forma pauperis affidavit\(^7\) is project funded by the Law Enforcement Assistance Administration as well as state monies, handles about 10% of the prisoner actions filed in that court. State prisoner cases are handled on a no-fee basis by special arrangement with the local bar associations in one division of the Western District of Missouri. See Aldisert Report, supra note 3, at 29 n.27. Additionally, the Inmate Legal Services Project of the Texas State Bar provides attorneys at no cost to inmates. See Braden v. Estelle, 428 F. Supp. at 598.

\(^{65}\) See Comment, supra note 64, at 608. The power of the court to levy a contempt charge in such a case should allay the Aldisert committee's fear that uncompensated representation would be ineffectice in discouraging frivolous suits.

\(^{66}\) See Aldisert Report, supra note 3, at 45-49.

\(^{67}\) Id. Such a procedure is designed to relieve the judge of the task of poring over the typically unsophisticated, often unintelligible pleadings, motions, briefs, and correspondence of the pro se litigant. Similar programs are in use in several districts, including the Central District of California (initial screening function performed by magistrate); the Northern District of California ("writ clerk," a staff lawyer, receives all complaints from the intake clerk after they are deemed to be in order); and the Southern District of New York (staff clerk handles all pro se matters). See id. at 48 n.76.

\(^{68}\) See Aldisert Report, supra note 3, at 83-87. These forms are also reproduced in Watson v. Ault, 525 F.2d 886, 893-98 (5th Cir. 1976).

\(^{69}\) See Aldisert Report, supra note 3, at 83-84. The questions regarding the state or institutional grievance procedure should be eliminated in districts in which there is no adequate, readily available grievance procedure. Although exhaustion of these procedures is not required by the courts, the committee felt that it was appropriate to include these questions in the complaint form to alert the inmate of this nonjudicial method of obtaining relief. Id. at 52-53. See also Hill v. Estelle, 423 F. Supp. 690, 694-95 (S.D. Tex. 1976), in which the judge noted that "'[t]he questionnaire will also aid in ferreting out those instances where prisoners abuse the processes of the courts by multiple filings.'" (Citation omitted).

\(^{70}\) See Aldisert Report, supra note 3, at 86-87.
designed to prevent fraudulent misrepresentations of financial status by requiring far more specific and particularized statements than are required by the pauper affidavit form traditionally utilized in civil suits.\textsuperscript{71}

The committee also recommended the use of a “special report”\textsuperscript{72} in appropriate cases. Under this procedure, the defendant prison official is ordered to investigate and report on specific allegations of the complaint. The objective of the special report is “to discover the defendant’s version of the facts and . . . to encourage out-of-court settlement.”\textsuperscript{73} While it is still too early to evaluate fairly the effectiveness of the procedures proposed in the Aldisert Report, many of the recommendations have been received warmly by the courts, particularly in the Fifth Circuit.\textsuperscript{74}

C. The Braden Partial Payment Plan

The United States District Court for the Southern District of Texas has been burdened with an inordinate number of prisoner civil rights suits, primarily because twelve of the fifteen units of the Texas Department of Corrections are located within its jurisdiction.\textsuperscript{75} Approximately twenty percent of all civil actions, and almost all in forma pauperis actions filed in that district, are prisoner suits.\textsuperscript{76}

The district court had already implemented, with slight modifications, most of the recommendations of the Aldisert Report,\textsuperscript{77} when it received a “specific mandate” from the Fifth Circuit Court of Appeals “to develop imaginative and innovative methods of dealing with the flood of prisoner complaints and suits.”\textsuperscript{78} Recognizing that the procedures in the Aldisert Report, although helpful, are effective primarily in streamlining substan-

\textsuperscript{71} The affidavit proposed by the Aldisert committee requires the inmate to state his employment situation, salary, income from such sources as rent payments, interest, dividends, pensions, annuities, life insurance payments, gifts, and inheritances; also to state the amount of cash on hand and in prison checking, and savings accounts. \textsc{Aldisert Report, supra} note 3, at 87. Compare with the traditional affidavit form found at \textsc{American Journal of Pleadings and Practice Forms} (Rev. Ed.) Costs, Form 57.

\textsuperscript{72} \textsc{Aldisert Report, supra} note 3, at 73-76, 94-95. Credit for the concept is given to District Judge Vincent Biunno of New Jersey. \textsc{Hardwick v. Ault}, 517 F.2d 295, 298 (5th Cir. 1975).

\textsuperscript{73} \textsc{Aldisert Report, supra} note 3, at 73. \textit{See} \textsc{Hardwick v. Ault}, 517 F.2d at 298, in which the court discussed the advantages of the special report.

\textsuperscript{74} \textit{See, e.g.}, \textsc{Hardwick v. Ault}, 517 F.2d at 298; \textsc{Taylor v. Gibson}, 529 F.2d 709, 717 (5th Cir. 1976); \textsc{Watson v. Ault}, 525 F.2d 886, 891-92, 893-98 (5th Cir. 1976); \textsc{Braden v. Estelle}, 428 F. Supp. 595, 597-98 (S.D. Tex. 1977); \textsc{Hill v. Estelle}, 423 F. Supp. 690, 694-95 (S.D. Tex. 1976).

\textsuperscript{75} \textsc{Hill v. Estelle}, 423 F. Supp. at 694.

\textsuperscript{76} \textsc{Braden v. Estelle}, 428 F. Supp. at 597.

\textsuperscript{77} \textsc{Hill v. Estelle}, 423 F. Supp. at 694.

\textsuperscript{78} \textsc{Taylor v. Gibson}, 529 F.2d 709, 717 (5th Cir. 1976).
tive review measures once a case has been filed, the district court responded by instituting a plan aimed directly at "the two major problems facing the court in this area, that is, (1) the large number of prisoner cases and (2) the frivolous nature of many of them." (court's emphasis). The plan, outlined by Judge Bue, is as follows:

(a) Institution of a partial payment requirement to be employed in those cases in which payment of all the fees would work a hardship, but when the payment of a nominal sum would not; and

(b) Determination of permission to proceed in forma pauperis on a step-by-step basis as costs are incurred, rather than the present method whereby the grant or denial of pauper status applies to the entire proceedings. This policy is intended to reduce the vast number of frivolous suits by forcing the inmate to "confront the initial dilemma which faces most other potential civil litigants: is the merit of the claim worth the cost of pursuing it?" This should serve to discourage the type of "writ writing" which arises mainly from prisoners' boredom.

At the same time, the program raises certain problems. The first area of concern is the arbitrariness of the procedure. As Judge Bue himself admits, "too many variables prohibit an enunciation of even rough criteria at this time." Instead, each judge has discretion to determine whether a partial payment is warranted and, if so, the amount of such payment based on the prisoner's "financial history and present economic status." Such flexibility necessarily invites unequal treatment and may permit a judge's prejudice toward a litigant to influence his decision, particularly if the prisoner has appeared before the judge previously. Although granting leave to proceed in forma pauperis is by statute discretionary, that discretion is limited and must not be abused. Any court which adopts the partial payment plan should attempt to develop more concrete guidelines for its application.

---

80. Id. at 598.
81. Id. at 596 (quoting Carroll v. United States, 320 F. Supp. 581, 582 (S.D. Tex. 1970)).
82. See notes 7-10 & accompanying text supra.
83. Braden v. Estelle, 428 F. Supp. at 600. The judge points to the fact that the prison accounts of many inmate litigants fluctuate greatly over time, thus preventing the court from relying on an inmate's account balance at any particular date. Id.
84. Id. at 601.
87. This is, admittedly, more easily said than done. The ideal program would be to
There is also some question about the efficiency of such a system, particularly its provision for progressive determinations of cost liability as costs arise during litigation. Although the concept of reevaluating a litigant's status as a pauper as his case progresses is not new, the administrative time and expense required to reassess a plaintiff's financial position each time a new cost arises, and then to decide the portion of that cost for which the plaintiff will be liable, could negate any administrative benefits of the partial payment requirement.

Because the partial payment procedure is a judicial concept grafted onto the statutory procedures of the Civil Rights Act, there is also some question whether a partial payment requirement would take the case out of the parameters of the pauper statute. Section 1915 contemplates a complete waiver of costs and fees and has been viewed to vest an especially high degree of discretion in the judge to dismiss the action if he finds it "frivolous" or "malicious." Judge Bue supported the partial payment plan by citing an analogous provision in the criminal code which allows a court to retain or terminate appointed counsel at any point in the proceedings if the court finds that the defendant's financial circumstances have changed. However, in criminal proceedings the party seeking pauper treatment is a defendant, and there is no mechanism comparable to section 1915(d) for dismissing suits for frivolous defenses. The situation is quite different when a civil plaintiff is petitioning to sue in forma pauperis. It remains to be seen whether the liberal dismissal standard used pursuant to section 1915(d) can be properly utilized in a

establish a schedule under which each prisoner litigant would be required to pay a certain specified percentage of the costs involved, depending upon the total value of the prisoner's reasonably liquid assets at the time the cost arises. As a rough example, all prisoners with less than $40 in available assets might be allowed to proceed free of costs; prisoners with $40 to $70 would be assessed one-third of the costs; prisoners with $70 to $100 would pay two-thirds of the costs; and inmates with over $100 would pay the full amount of the costs.

The main difficulty with such a program is in ascertaining the total value of the inmates' available assets. Not only do inmates' prison account balances fluctuate greatly over short spans of time (see note 83 supra), but it is difficult for prison officials to gauge the extent of the inmates' holdings outside the institution. Furthermore, a prisoner's financial history may be more relevant to a pauper determination than his current assets at a given time. The pauper affidavit forms recommended in the ALDISERT REPORT are designed to enable the courts to gain a fairly detailed accounting of the petitioner's liquid funds. See note 71 supra. The potential value of these forms can only be realized, however, if the courts take punitive action against inmates who misrepresent their financial status, rather than merely dismissing their petitions for leave to proceed in forma pauperis.

90. See notes 30-32 & accompanying text supra.
case in which the plaintiff has in fact paid a substantial portion of the costs. It is at least arguable that under the partial payment requirement, an action should not be dismissed unless it fails to state a claim on which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).92

IV. SUMMARY AND CONCLUSIONS

Over the past decade and a half, the federal courts have experienced a dramatic increase in the number of civil rights suits filed by state prisoners against prison officials. The courts have come to realize the magnitude of the problem, but are torn between the need to limit section 1983 litigants’ access to the federal forum and the need to preserve the constitutional rights of inmates. The Supreme Court has refused to require that a state prisoner exhaust his remedies at the state level before proceeding in federal court, and the lower federal courts have largely adhered to the high Court’s policy in this regard.

The procedures recommended by the Aldisert Report, many of which have been adopted in the Fifth Circuit and in sundry district courts elsewhere, would make the processing of prisoner cases more efficient. While these recommendations mark a major step in the right direction and do not appear to endanger the opportunity for sincere litigants to have their grievances heard, they are largely ineffective in attacking the problem at its roots—that is, in curbing the tremendous volume of lawsuits and the frivolous nature of most of them.

The partial payment procedure devised by Judge Bue in the Southern District of Texas for use in pauper suits can become a valuable tool for fighting the flood of prisoner litigation at its sources, but only if a more concrete formula is developed which will assure all similarly situated inmates of substantially equal treatment. There is also a question of whether, having tendered a partial fee, the prisoner-plaintiff is technically a “pauper” within the meaning of section 1915. If not, the courts may be prevented from exercising such broad discretion to dismiss a suit as “frivolous” or “malicious” as can be done in cases properly under section 1915(d) when the entire fee is waived.

92. The United States District Court for the Southern District of Texas has not confronted the problem of whether a partial payment assessment would preclude the court from dismissing a petition under § 1915(d), “because the frivolous/malicious determination is made prior to the consideration of whether a partial payment should be required.” Letter from Craig M. Sturtevant, staff attorney, United States District Court for the Southern District of Texas (Houston Division) (Aug. 15, 1977). However, this procedure is in apparent contravention of the Fifth Circuit’s instruction that in forma pauperis cases be docketed prior to any consideration of the merits. See Taylor v. Gibson, 529 F.2d 709, 714 n.6 (5th Cir. 1976).
Until the Supreme Court agrees to decide the question of whether exhaustion of state administrative remedies can be required in section 1983 cases, the solutions will lie in the hands of the lower courts most burdened with the problem. If their solutions fail to ease the overcrowding on the federal dockets, Congress may be forced to provide a more permanent solution by amending section 1983.

Michael Noone McCarty