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The Civil Rights Act: A Need for Re-Evaluation of the Non-Exhaustion Doctrine Applied to Prisoner Section 1983 Lawsuits

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Articles

THE CIVIL RIGHTS ACT: A Need for Re-evaluation of the Non-exhaustion Doctrine Applied to Prisoner Section 1983 Lawsuits

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I. Introduction

The recent explosion of litigation in federal courts has been noted by many judicial spokesmen and commentators,[1] including the Supreme Court Justices led by Chief Justice Burger.[2] Indeed, this litigious aspect of our society has been commented on not only by those directly involved in our justice system, but also by weekly magazines and other commentators on our daily life.[3] The federal district courts have been the targets of much of this litigation boom.[4] In the United States district courts between 1975 and 1982, there was a 75.8% increase in civil litigation. That is, the number of cases filed expanded from 117,320 to 206,193.[5] This resort to the federal courts can be explained in part by a dramatic increase in lawsuits brought by state prison-

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1. Feinberg, *The State of the Second Circuit*, 38 REC. A.B. CITY N.Y. 363, 368 (May/June 1983); Smith, *The Role of the Federal Courts*, 88 CASE & COM. 10 (1983); Glaberson, *U.S. Supreme Court Faces Heavy Calendar in New Terms*, 188 N.Y.L.J. 66 (1982).

2. W. BURGER, C.J., YEAR-END REPORT ON THE JUDICIARY 2 (1981) [hereinafter cited as BURGER REPORT].

3. *See, e.g.*, N.Y. Times, July 5, 1981, § 4 (Week in Review), at 8, col. 1.

4. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1982) [hereinafter cited as 1982 ANNUAL REPORT]; *id.* (1975). District court civil filings rose 14.2% in 1982 to reach an all time high of 206,193.

5. 1982 ANNUAL REPORT, *supra* note 4, at 218 table C3.

ers for federal habeas corpus relief[6] and for relief from alleged

6. 28 U.S.C. § 2254 (1976). The statute provides:

(a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) 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.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph

deprivation of their constitutional and civil rights pursuant to 42 U.S.C. § 1983.[7] Civil rights cases brought in federal court by state court prisoners in 1966 amounted merely to a few hundred filings.[8] By 1982, the number of filings had increased to over 17,545.[9]

A cursory review of such cases clearly shows that a paradox exists whereby a state prisoner's access to federal court is more restricted on a question of life and death than it is on an issue of trivial inconvenience or annoyance. A state prisoner attempting

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numbered (8) that the record in the State court proceeding considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Id.

7. The statute provides:

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

42 U.S.C. § 1983 (1976). Congress granted the district courts original jurisdiction to hear civil rights disputes. *See* 28 U.S.C. § 1343 (1976).

8. FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 8 (1980) [hereinafter cited as JUDICIAL CENTER REPORT).

9. The 1982 ANNUAL REPORT, *supra* note 4, does not distinguish between filings by state or federal prisoners. However, for purposes of this Article, the assumption is that the cases brought against the United States involve a federal prisoner and the cases brought privately involve a state prisoner. Of the 17,545 filed — 834 were brought against the United States and 16,739 were private cases.

to correct constitutional wrongs in his conviction or sentence is required by the mandates of statute to exhaust state remedies. The same state prisoner, by alleging an inconsequential civil rights infraction, is entitled to direct access to federal court necessitating the state to expend time and money to answer the charge.[10] The author suggests that requiring state prisoners in civil rights matters to exhaust available state administrative and judicial remedies before seeking redress in federal court will render justice more efficient and effective without sacrificing or jeopardizing the utilization of the federal forum for unresolved constitutional violations.[11]

Presently, to bring a constitutional attack on conviction or sentence in a federal forum, a state prisoner must meet the rigors of section 2254 of 28 U.S.C.[12] The requirements of exhaustion of state remedies in the federal habeas corpus statute make consummate good sense. The state has primary interest in seeing that the state prisoner has been convicted in a manner which accords with our constitutional safeguards.[13] State courts also are guardians of the federal Constitution and should be accorded a first opportunity to correct constitutional error.[14] If the populace comes to rely on federal courts for constitutional protection, state courts through disuse will be rendered incapable of safeguarding the rights of its citizens.[15] It is well recognized that withholding access to the federal courts in such a situation until state remedies have been found wanting, aids in promoting both federalism and our federal system.[16]

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10. The statutory language of 42 U.S.C. § 1983 (1976), does not contain an exhaustion requirement. *See supra* note 7. Furthermore, the Supreme Court has not interpreted § 1983 to include such a requirement. Patsy v. Board of Regents, 457 U.S. 496, 516 (1982).

11. This requirement of exhaustion in all § 1983 cases has been proposed by the United States Senate. *See* S. 3018, 97th Cong., 2d Sess. 6 (1982). This Article limits its suggestion of exhaustion to state prisoner § 1983 cases.

12. 28 U.S.C. § 2254 (1976). *See supra* note 6.

13. If a prisoner's conviction is not obtained consistently with the Constitution, the conviction is subject to reversal and the indictment is subject to dismissal and an individual convicted of a crime may go free. *See* Dunaway v. New York, 442 U.S. 200 (1979); Manson v. Brathwaite, 432 U.S. 98 (1977); Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

14. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 35 (1980).

15. *Id.*

16. Fay v. Noia, 372 U.S. 391, 415-20 (1963); Note, Rose v. Lundy *and Rule 9(b):*

Cases brought by state prisoners, however, face no such procedural winnowing even when the most insubstantial complaint is alleged to be within the purview of section 1983.[17] To gain access to the federal courts, all that a state prisoner need do is allege a violation of "civil rights" providing he is not seeking to upset a conviction or sentence. Once his complaint is filed, the state counsel must acknowledge the lawsuit and answer or move to dismiss.[18]

This uneven access to federal court is unwise and is in need of immediate correction. Requiring exhaustion of state judicial and administrative remedies by state prisoners[19] prior to permitting the institution of a civil rights action in federal court will benefit not only our overworked federal courts, but also all others involved: the state, for it would have a more direct control over the handling of its prison population; the state courts, for they would obtain justifiable jurisdiction over these cases; and the prisoner with a *bona fide* complaint would have the problem resolved in the most expeditious manner.

The Congress must re-evaluate the non-exhaustion doctrine as applied to section 1983 lawsuits. The need for prompt congressional action is imperative since our federal courts are presently being swamped by an unprecedented explosion of litigation brought by state prisoners.[20]

In support of this recommendation, Part I of this Article will discuss the history of section 1983 and its historical perspective. Part II of this Article will analyze the inadequacy of the recent congressional enactment, 42 U.S.C. § 1997e. Part III of this Article will explore the habeas corpus exhaustion rule and the need for its application to state prisoners who institute section 1983 lawsuits.

Will the Court Abuse the Great Writ, 49 BROOKLYN L. REV. 335, 343 (1983).

17. *See supra* note 10.

18. Failure to respond to a complaint subjects the defendant to entry of a default judgment. FED. R. CIV. P. 55.

19. 42 U.S.C. § 1997e (Supp. V 1981). *See infra* note 66.

20. The concept of exhaustion in § 1983 cases is not unfamiliar to the Supreme Court. Justice Rehnquist, in a dissent to a denial of certiorari joined in by Justice Blackmun and the Chief Justice, contended that exhaustion in § 1983 cases should be required when a state court proceeding has already been initiated. City of Columbus v. Leonard, 443 U.S. 905, 907 (1979) (Rehnquist, J., dissenting).

II. Historical Background of 42 U.S.C. § 1983

The Civil Rights Act of April 20, 1871[21] (Act), was enacted to combat thinly veiled attempts of the post-Civil War states to deny the constitutional rights of some of their citizens.[22] Section 1[23] of the Act, the forerunner to section 1983,[24] was established "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced."[25]

At the time of the Act's passage the southern states were actively participating in egregious violations of the fourteenth amendment.[26] Those state laws which did guarantee the constitutional tenets of equal protection were arbitrarily and discriminatorily enforced.[27] The Ku Klux Klan, a primary target of this remedial legislation, was terrorizing blacks in the South with impunity.[28] In Congress, Representative Beatty of Ohio dramatically portrayed the need for remedial legislation:

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21. Civil Rights Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1976)). This Act is also commonly called the Ku Klux Act of 1871.

22. Martinez v. Winner, 548 F. Supp. 278, 303 (D. Colo. 1982).

23. This section reads as follows:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Civil Rights Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1976)).

24. 42 U.S.C. § 1983 (1976). *See supra* note 7.

25. Monroe v. Pape, 365 U.S. 167, 180 (1961). The Act was also to provide "a federal remedy in a federal court in protection of a federal right." Birnbaum v. Trussell, 371 F.2d 672, 676 (2d Cir. 1966).

26. For example, in Kentucky, a black man was precluded from testifying in state court against a white man leaving the federal courts to "enforce the United States laws by which negroes may testify." CONG. GLOBE, 42d Cong., 1st Sess. 345 (1871).

27. Patsy v. Board of Regents, 457 U.S. 496, 505 (1982).

28. Monroe v. Pape, 365 U.S. at 174.

> [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.[29]

It was against this historical backdrop that the Act became law. The Act had three purposes: one, to override invidious state legislation; two, to provide remedies in the absence of adequate state laws; and three, to provide a remedy to replace facially adequate but unenforced state laws.[30] Congress was looking in part beyond the plight of the blacks in the post-bellum South and the influence of the Ku Klux Klan when it enacted this law: "This act is remedial, and in aid of the preservation of human liberty and human rights."[31] It was ensuring a federal forum for the protection of constitutional rights and liberties and implicit in that guarantee was a suspension of the usual exhaustion requirement.[32] Nonetheless, after fulfilling congressional intent and combatting deplorable post-Civil War conditions, the statute remained essentially dormant during its first century.[33] This inactivity was partly the result of a judicially created requirement that a section 1983 plaintiff must prove a wilful invasion of constitutional rights.[34] Moreover, the lawsuits were limited primarily to voting rights and race discrimination cases.[35] The Supreme Court's decision in *Monroe v. Pape*,[36] nearly one hundred years after the passage of section 1983, eradicated the judicially created specific intent requirement. The *Monroe* Court liberally construed section 1983 and by so doing, the Court paved the way for extensive litigation under this section.

The *Monroe* Court was presented with inexcusable behavior

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29. CONG. GLOBE, 42d Cong., 1st Sess. 428 (1871).

30. Monroe v. Pape, 365 U.S. at 173-74.

31. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 683 (1978) (comments of Rep. Shellabarger).

32. Patsy v. Board of Regents, 457 U.S. at 503, 507.

33. *See* Note, *Civil Rights: The Supreme Court Finds New Ways to Limit Section 1983*, 33 U. FLA. L. REV. 776 (1981).

34. Monroe v. Pape, 365 U.S. at 167; Note, *supra* note 33, at 777 nn.9-10. *See* Screws v. United States, 325 U.S. 91 (1945).

35. Whitman, *supra* note 14.

36. 365 U.S. 167 (1961).

by Chicago, Illinois police officers. The police, acting without a warrant, broke into petitioner's home, and ransacked every room, while the petitioner and his family were forced to stand naked in their living room. The petitioner was then taken to the police station for extended interrogation without ever appearing before the available magistrate. The petitioner was neither allowed to call his family attorney nor were charges ever pressed against him. The Court held that plaintiff's section 1983 complaint against the police officers was tenable. In so holding, the Court stated that "the federal remedy [created by section 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[37] The previous restrictions on the civil rights statute were loosened to delete proof that the constitutional violations were "wilfully" committed.[38] Despite the generous construction of section 1983, the *Monroe* Court at the same time steadfastly refused to extend the scope of the statute to include municipalities because it anticipated that there would be an antagonistic congressional response to the proposal that municipalities be held liable under section 1983,[39] a view which has since substantially changed.[40]

Justice Frankfurter, while expressing his disdain for the documented police behavior, filed a vigorous dissent. He argued that redress for the violative conduct remained in state court. According to Justice Frankfurter, section 1983 did not appoint the federal courts to the position of guardskeeper over the state's day-to-day business.[41] Rather, he contended that it was in response to the Civil War atrocities that the statute was created and made "enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom or usage' sanctioned the grievance complained of."[42] He argued that fed-

37. *Id.* at 183.

38. *Id.* at 187.

39. *Id.* at 191.

40. Monell v. New York City Dep't of Social Servs., 436 U.S. at 701. This turnabout suggests that despite what appeared in *Monroe* to be a clear legislative history to the contrary, the scope of § 1983 is not graven in stone. This re-evaluation of the legislative intent might also lead Congress to redetermine the need for exhaustion in § 1983 lawsuits.

41. Monroe v. Pape, 365 U.S. at 242 (Frankfurter, J., dissenting).

42. *Id.* at 237 (Frankfurter, J., dissenting) (quoting Civil Rights Act of Apr. 20, 1871,

eral intervention dangerously swayed the balance of power between the state and federal government and destroyed the concept of the states as primary guardians of the rights of their citizens.[43] Frankfurter's reluctance to interfere with state operations was not an example of judicial timidity but rather a recognition that the legislative necessity for section 1983 no longer held.[44] "We cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960."[45]

The *Monroe* majority emphasized the need for automatic federal review in section 1983 cases while the dissent warned against the dangers of an overbroad construction of this section. Lost in the struggle between these diametrically opposed views was a conciliatory middle ground where access to the federal courts in a section 1983 lawsuit could be restricted by requiring exhaustion of judicial and administrative remedies in state courts. This "neutral ground," which would parallel the habeas corpus statute, respects both the majority's concern for adjudication of constitutional violations in a federal forum and the dissent's concerns for comity, federalism, and strict judicial construction. Unfortunately, this "neutral ground" was neither discussed nor considered by the *Monroe* Court.

The expansive *Monroe* holding encouraged prisoners to rely increasingly upon section 1983 to resolve any disputes arguably presenting constitutional violations. From the enactment of the statute to 1960, only 250 section 1983 cases were filed.[46] In 1966, such cases numbered but a few hundred filings;[47] in 1972, there were 3348 state prisoner civil rights cases commenced;[48] but, in the one year period ending June 30, 1982, 16,739 civil rights actions were filed by state prisoners.[49] From 1970 through 1980, state prisoner petitions, brought pursuant to section 1983, rose

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ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1976)).

43. Monroe v. Pape, 365 U.S. at 237-40 (Frankfurter, J., dissenting).

44. *Id.* at 243 (Frankfurter, J., dissenting).

45. *Id.* at 244 (Frankfurter, J., dissenting).

46. Note, *Limitation of State Prisoners' Civil Rights Suits in the Federal Courts*, 27 CATH. U.L. REV. 115, 115 n.4 (1977-1978).

47. Whitman, *supra* note 14, at 6.

48. JUDICIAL CENTER REPORT, *supra* note 8, at 8 n.14.

49. 1982 ANNUAL REPORT, *supra* note 4, at 216.

451.5%.[50] Civil rights actions brought in 1982 by state prisoners under section 1983 amounted to well over twelve percent of all private civil filings in the federal district courts.[51]

This increase in utilization of section 1983 suggests that congressional intent is not being fulfilled. Instead of combatting obvious injuries, this free and direct access to federal court has produced a plethora of complaints from state prisoners which are either insubstantial or involve claims better confronted initially by state government.

It is not the magnitude of these filings alone that is disturbing. It is the frivolity of the majority of the cases when placed under constitutional analysis that calls out for reform.[52] To demonstrate the magnitude of this problem, this Article will describe a sampling of section 1983 state prisoner cases lately presented in the southern district of New York.

In *Hogarth v. Drucker*,[53] the plaintiff sought $500 million for mental anguish and physical torture suffered because he was forcibly shaven in order to appear in a court ordered line-up. Hogarth did not utilize the available grievance procedure.

In *Icesom v. Ward*,[54] plaintiff, who was transferred to a new facility, sought $10,000 in damages for not receiving the following: a *Playboy* magazine, a package containing legal materials, and a paycheck from his transferor institution.

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50. *Id.*

51. *Id.* Out of a total of 130,420 private civil filings, 17,575 were prisoner civil rights petitions.

52. There is a statutory avenue available for limitation of frivolous *pro se* § 1983 cases. The district court may dismiss a case when presented with an *in forma pauperis* application when "satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1976). The inherent problems with this statute are two-fold: first, a *pro se* complaint is to be read liberally, Haines v. Kerner, 404 U.S. 519, 520 (1972), and dismissal at this stage may discriminate against inartful plaintiffs; second, the case is still initiated in federal court while bypassing the available state remedies.

The Second Circuit Court of Appeals recently reversed a district court's § 1915(d) *sua sponte* dismissal of a § 1983 complaint holding that "a federal judge should not dismiss a prisoner's pro se, in forma pauperis claim as frivolous unless statute or controlling precedent clearly forecloses the pleading, liberally construed." Cameron v. Fogarty, 705 F.2d 676, 678 (2d Cir. 1983).

"It is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the most liberal definition of frivolity." JUDICIAL CENTER REPORT, *supra* note 8, at 9.

53. No. 82 Civ. 0433 (S.D.N.Y. filed Jan. 22, 1982).

54. No. 82 Civ. 3607 (S.D.N.Y. filed July 2, 1982).

In *James v. Walters*, [55] plaintiff sought millions of dollars in compensatory damages for the threat to his manhood caused by inadequate medical treatment of a skin rash.

In *Belton v. Books*, [56] plaintiff sought $50,000 in damages for mental stress resulting from harrassment by a correctional officer. This harrassment was allegedly manifested by the defendant's ripping a manuscript out of plaintiff's typewriter and prohibiting the plaintiff from going to the law library. The grievance procedure was not utilized.

In another lawsuit by Mr. Belton, who filed fifteen section 1983 petitions from October 5, 1982 through March 17, 1983, the plaintiff sought $1 million in damages for the misdiagnosis of gonorrhea as syphillis.[57]

In *Allende v. Cooke*,[58] plaintiff claimed $20 million in damages for injuries resulting from the New York state court system of rotating judges.

The western district of New York has also been presented with inappropriate section 1983 cases: in *Citro v. Department of Corrections*,[59] the plaintiff's complaint alleging a correction officer's failure to provide additional rolls of toilet paper upon request was dismissed as frivolous; in *Slate v. Shrar*,[60] the plaintiff brought suit against his prison medical staff for loss of a testicle.

The above sampling of cases demonstrates that many suits brought against prison personnel could benefit from an effective grievance procedure, i.e., one that is tailored to suit the recurring problems of prison life. For example, allegations of inadequate medical care should be investigated immediately and, if merited, personnel changes could be effected before the time it takes a defendant to file an answer in federal court. The danger of not having the states develop mechanisms which can efficiently and fairly adjudicate minor problems is that the federal courts become small claims courts for prisoners. This result is not only inconsistent with the congressional intent behind section 1983 but it also serves to undermine the effectiveness of the

55. No. 82 Civ. 0053 (S.D.N.Y. filed Sept. 3, 1982).
56. No. 82 Civ. 1228 (S.D.N.Y. filed Feb. 16, 1983).
57. Belton v. Bantum, No. 83 Civ. 2200 (S.D.N.Y. filed Mar. 22, 1983).
58. No. 83 Civ. 4322 (S.D.N.Y. case dismissed June 8, 1983).
59. No. 82 Civ. 588T (W.D.N.Y. case dismissed Aug. 19, 1982).
60. No. 82 Civ. 552T (W.D.N.Y. filed June 28, 1982).

federal courts to defend basic constitutional rights.

The Supreme Court has responded to the burgeoning lawsuits arising from a "statute that already has burst its historical bounds"[61] by retreating from its previously generous construction of section 1983. In 1981, in *Parratt v. Taylor*,[62] a state inmate alleging the loss of a $23.50 hobby set was found not to have alleged a violation of the due process clause of the fourteenth amendment resolvable under section 1983 when the available Nebraska tort remedy was sufficient.[63] On its facts it appears that *Parratt* is a case justly meriting dismissal. The case, however, also demonstrates a narrowing of the type of lawsuits adjudicable under section 1983.

III. 42 U.S.C. § 1997e

Dissatisfaction with an ever increasing civil calendar comprised of lawsuits brought under section 1983[64] resulted not only in the judicial restrictions on the statute's applicability[65] but also in the enactment of 42 U.S.C. § 1997e.[66] This statute pro-

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61. Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring).

62. 451 U.S. 527 (1981).

63. *Id.* at 543.

64. 42 U.S.C. § 1983 (1976). *See supra* note 7.

65. *See* Ingraham v. Wright, 430 U.S. 651 (1977); Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693 (1976).

66. The statute provides:

> (a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
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> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.
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> (b) Minimum standards for development and implementation of system for resolution of grievances of confined adults; consultation, promulgation, submission, etc., by Attorney General of standards.
>
> (1) No later than one hundred eighty days after May 23, 1980, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such pro-

vides that when an adult state convict brings a section 1983 lawsuit, district courts are given the discretion to stay the lawsuit for ninety days and order the plaintiff to pursue available state remedies. This limited legislative response to a burdensome problem demonstrates congressional recognition that some mechanism, if properly developed and maintained, offers a just and speedy resolution for prisoner complaints that otherwise will end up in federal court.[67] This statute encourages states to

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posed standards for publication in the Federal Register in accordance with section 553 of Title 5. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide —

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c) Procedure for review and certification of systems for resolution of grievances of confined adults for determination of compliance with minimum standards; suspension or withdrawal of certification for noncompliance; development, etc., by Attorney General.

(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

(d) Failure of State to adopt or adhere to administrative grievance procedure.The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 1997a or 1997c of this title.

42 U.S.C. § 1997e (Supp. V 1981).

67. In Maryland, for example, the development of an effective grievance procedure reduced prisoner filings by 66%. Note, *supra* note 46, at 124.

create appropriate grievance systems and thus promotes "resolution of problems by the persons involved in prison administration. This should help to develop a sensitivity that may have been otherwise lacking."[68] Moreover, Congress had hoped that section 1997e would reduce the existing backlog in the district courts.[69]

The numerous limitations, however, included within section 1997e render it incapable of fulfilling congressional expectations. First, even though a case may be held in abeyance for a period not exceeding ninety days, it still remains on the civil calendar.[70] Once a lawsuit has been commenced, the incentive diminishes on the part of the prisoner-plaintiff to resolve the case administratively especially if the prisoner sees an opportunity to leave the confines of the prison walls and travel to the district court.[71]

Second, exhaustion is only permitted when an existing prison grievance procedure has been certified by the United States Attorney General or when a district court judge determines that the procedure is in compliance with minimum due process standards.[72] Section 1997e is premised on a volunteer system: states are not required to establish grievance procedures or to move for certification of existing procedures. This limitation ties the hands of the federal courts. For example, in *Goff v. Menke*,[73] the Eighth Circuit urged Iowa to adopt a procedure in compliance with section 1997e to allow the statute to fulfill its purposes: "Such a procedure would provide prisoners with a more accessible and quicker remedy and remove a significant number of cases from the federal docket."[74] In conjunction with the establishment of a satisfactory method for internal adjudication of disputes, the *Goff* court recommended that Iowa work assiduously to provide equitable and humane conditions for its

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68. S. REP. No. 416, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 787, 816.

69. "Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issues in the remaining cases so as to make them ready for expeditious court consideration." *Id.*

70. *See* Kennedy v. Herschler, 655 F.2d 210, 212 (10th Cir. 1981).

71. It has been suggested that the writing of § 1983 complaints relieves the tedium of prison life. Note, *supra* note 46, at 116.

72. The minimum standards are set forth in 28 C.F.R. § 40 (1982).

73. 672 F.2d 702 (8th Cir. 1982).

74. *Id.* at 706.

prisoners and further provide legal counsel to inmates in an attempt to ferret out frivolous claims.[75] The laudable sentiments expressed in *Goff* and shared by the author, however, ring hollow as long as states do not accept the challenge to improve existing procedures. As of 1980, six states had moved for certification and only one has been certified.[76] Perhaps many states believe that their existing judicial systems are sufficient and do not want to create a duplicative procedure. The time has come, therefore, to amend section 1997e and/or section 1983 to effectuate the meaningful remedy they were intended to provide. An exhaustion requirement, similar to the one imposed on habeas corpus lawsuits, would provide that meaningful remedy. Forcing state prisoners to present their complaints in the state courts and encouraging the states to establish workable grievance procedures are principles consistent with the spirit of both section 1983 and section 1997e.

IV. Exhaustion

The suggestion that state prisoners be required to exhaust state administrative and judicial remedies before resorting to the federal courts is consistent with the general exhaustion rule applied to habeas corpus cases.[77] Both section 1983[78] and section 2254[79] cases are intimately connected to an inmate's life; the former challenges the conditions of confinement and the latter challenges the fact or duration of confinement.[80] Therefore, it seems anomalous to require exhaustion only in habeas corpus cases. Both cases require similar relief: if conditions are in violation of section 1983, these conditions should be rectified quickly,

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75. *Id.* For example, in New York, Prisoners' Legal Services exists to provide free counsel to state inmates. Although its budget has been cut by the state, expansion of its budget might well prove economically beneficial in the long run.

76. Letter from James A. Finney, United States Department of Justice, to Judge Duffy (May 6, 1983).

77. *See* Fay v. Noia, 372 U.S. 391 (1963).

78. 42 U.S.C. § 1983 (1976). *See supra* note 7.

79. 28 U.S.C. § 2254 (1976). *See supra* note 6.

80. Preiser v. Rodriguez, 411 U.S. 475, 487-88 (1973). "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody . . . ." *Id.* at 484. "[A] section 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of prison life, but not to the fact or length of his custody." *Id.* at 499.

and if the confinement itself is unlawful, the inmate should be released.

The policy reasons supporting exhaustion of available remedies in habeas corpus proceedings apply equally in a section 1983 context. Exhaustion does not deny federal jurisdiction over constitutional issues; in appropriate cases "it merely defers it."[81]

That a state prisoner must first bring his complaint to state court has been the law even predating its codification in section 2254.[82] This reflects the comity which should exist between the federal and state governments. Clearly the state is responsible for the confinement of each state prisoner. The imprisonment comes about through the processes of the state judicial system. The requirement of exhaustion is an accommodation of our federal system designed to give the state the initial opportunity to pass upon and correct alleged violations of federal rights of its prisoners.[83] Moreover, "[i]t permits the states to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings."[84] It defies logic to allow prisoners to travel to the nearest federal courthouse to resolve disputes before first being required to ask the prison administration for the requested relief.

The doctrine of federalism is equally well served by exhaus-

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81. Patsy v. Board of Regents, 457 U.S. 496, 532 (1982).

82. State prisoners were first statutorily permitted the use of habeas corpus to challenge their convictions in federal court in an early judiciary act. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86. Shortly after the Act's passage, the federal circuit court in Georgia indicated that a state prisoner who had not sought any state appellate or collateral remedies could nevertheless win immediate release on federal habeas corpus if he proved the unconstitutionality of his conviction. *Ex parte* Bridges, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1862). This holding was approved by the Supreme Court. *Ex parte* Royall, 117 U.S. 241, 253 (1886).

A multifaceted rationale of abstention and comity developed between 1867 and 1948, when the Act was codified. "[C]omity demands that the state courts, under whose process he [habeas corpus petitioner] is held, and which are equally with the Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance." Cook v. Hart, 146 U.S. 183, 195 (1892). These concerns led to enactment of an exhaustion requirement. 28 U.S.C. § 2254 (1976). *See supra* note 6.

83. Fay v. Noia, 372 U.S. at 419-20 (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

84. *Id. Accord* Picard v. Connor, 404 U.S. 270, 275 (1971).

tion.[85] The Supreme Court has often stated that federal courts are not to interfere in the day to day operation of state prisons.[86] Federal courts are empowered to correct prison conditions falling below a constitutional minimum,[87] but our dual judicial system requires that the exercise of ultimate power should be sparingly used.[88] This doctrine is particularly appropriate when both the state prisons and the state courts are well equipped to handle the ongoing complaints that arise. It is one more recognition that not all wisdom reposes solely with the federal judiciary and that the judicial systems of the states have an able judiciary seeking to administer justice fairly and expeditiously.[89] Requiring exhaustion of state remedies by state prisoners is an expression of respect for our dual judicial system and concern for harmonious relations between the two adjudicatory systems.[90]

Moreover, the Supreme Court has recognized the salutary and practical effect of enhancing the familiarity of state courts with federal doctrines.[91] The judicial efficiency resulting from exhaustion is self-evident. Federal courts need only then hear complaints that were not resolved through available administrative and judicial channels. For instance, "[i]nitial reference of private civil rights disputes to state administrative or judicial

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85. Monroe v. Pape, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting).

86. *See* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125-26 (1977); Meachum v. Fano, 427 U.S. 215, 228-29 (1976); Pell v. Procunier, 417 U.S. 817, 827 (1974); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). *See also* Bell v. Wolfish, 441 U.S. 520 (1979) (federal courts are also to defer to the expertise of the administration of federal facilities). Lower federal courts have heeded this warning. *See* Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980); *but see* Todaro v. Ward, 565 F.2d 48, 53 (2d Cir. 1977).

87. Goff v. Menke, 672 F.2d at 705.

88. Restriction of federal jurisdiction "reflects recognition that to no small degree the effectiveness of the legal order depends upon the infrequency with which it solves its problems by resorting to determinations of ultimate power." Monroe v. Pape, 365 U.S. at 241 (Frankfurter, J., dissenting).

89. The school of thought suggesting a disparity between the ability of state and federal judges has been emphatically rejected by the Supreme Court. Allen v. McCurry, 449 U.S. 90, 105 (1980); Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976). However, the concept appears to have resurfaced. In Haring v. Prosise, 103 S. Ct. 2368, 2373 (1983), the Supreme Court intimates, without any support, that the states' courts have been deficient in protecting the constitutional rights of their citizens.

90. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 76, 90 (1973). *But see* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1976-1977).

91. H. FRIENDLY, *supra* note 90, at 76.

processes may either eliminate the need for any federal judicial action or significantly affect the posture of a dispute when it does appear in federal court."[92]

Application of the exhaustion requirement is not woodenly enforced in habeas corpus cases. Exhaustion is bypassed in a habeas corpus lawsuit only when "there is either an absence of an available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[93] Similarly, these exceptions should also apply to section 1983 cases.[94] This leaves an opening for direct access to federal court when a life threatening situation or other extraordinary case prevents exhaustion.[95]

The resultant benefits to the prisoners if exhaustion is required cannot be overemphasized. Not only will the states be forced to maintain effective procedures administratively and judicially, but also inmates will obtain speedy results.[96] Although

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92. Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam) (where availability of state remedy was conjectural, further exhaustion of petitioner's habeas corpus claim was not required). *See* Gully v. Kunzman, 592 F.2d 283, 286-87 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979) (petitioner need not go through retrial when raising a double jeopardy claim in his habeas corpus petition); Montes v. Jenkins, 581 F.2d 609, 611 (7th Cir. 1978) (habeas corpus petitioners need not exhaust an ineffective state remedy); *but see* Ray v. Howard, 486 F. Supp. 638, 643 (E.D. Pa. 1980) (state's four month delay in resolving petitioner's claim is not "inordinate delay" warranting exception to habeas corpus exhaustion requirement).

93. 28 U.S.C. § 2254(b) (1976). This requirement is consistent with the traditional exceptions to the established rule mandating exhaustion of administrative avenues. *See* McKart v. United States, 395 U.S. 185 (1969). For example, if the administrative remedy is inadequate, unavailable or when the sufficiency of the remedy itself is being questioned, exhaustion is not required. Patsy v. Florida Int'l Univ., 634 F.2d 900, 902-04 (5th Cir. 1981) (en banc), *rev'd on other grounds*, 457 U.S. 496 (1982). *See also* Rucker v. Jane, 532 F. Supp. 339 (E.D. Mich. 1981).

94. The exception to res judicata principles applicable to habeas corpus cases, Fay v. Noia, 372 U.S. at 422, should apply as well to § 1983 cases. Congress could specifically withdraw res judicata effect to the exhaustion of state judicial remedies. H. FRIENDLY, *supra* note 90, at 107. Similarly, the Supreme Court's decision not to toll the applicable statute of limitations while a section 1983 case is being exhausted, Board of Regents v. Tomanio, 446 U.S. 478 (1980), would have to be overruled to allow for federal review of § 1983 cases.

95. Similarly, under § 1997e exhaustion is not required when "imminent danger to life is alleged." S. REP. No. 416, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 787, 817.

96. Prisoners need a "quick answer from a responsible decisionmaker." Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 642 (1979).

the forum may be less attractive, disputes potentially will be resolved faster and without needless expense. There is a dire need for "a simple and workable procedure by which every person who has, or thinks he has, a grievance or complaint can be heard promptly, fairly and fully."[97]

Forcing inmates to exhaust is consistent with protection of their constitutional liberties.[98] It is not suggested that serious constitutional violations do not occur behind prison walls or that some disputes cannot be resolved within the state system.[99] However, resort to the federal courts in the first instance is no more necessary in section 1983 cases than it is in habeas corpus cases. Moreover, the spirit of section 1983, to preserve the federal forum for violations uncorrectable in the state courts, will be enhanced if exhaustion is legislatively mandated. The federal courts should not now condemn the states as sluggish and discriminatory towards prisoners' constitutional rights until they are afforded a good faith opportunity to correct violations, target trouble areas and, in general, improve the quality of prison life.

This Article rejects as unfounded the arguments that suggest today's prisoners are in a position akin to the blacks in the post-bellum South and thus require immediate access to federal court.[100] Equally untenable is the proposition that state courts do not vigorously defend the constitutional rights of their citizens.[101] Until the time when the state courts are deemed incapable of resolving constitutional issues, access to the federal forum should be similarly restricted to habeas corpus petitioners and section 1983 plaintiffs.

V. Conclusion

The non-exhaustion requirement presently incorporated into section 1983[102] does not serve the federal courts, the state courts, the state prisons or the state inmates that it was

97. Address by Chief Justice Burger to the National Association of Attorneys General (Feb. 8, 1970).

98. *See* Whitman, *supra* note 14, at 10. Furthermore, "overextension of constitutional protection may dilute and thus debase constitutional values." *Id.* at 27.

99. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

100. Whitman, *supra* note 14, at 68.

101. Neuborne, *supra* note 90, at 1105.

102. 42 U.S.C. § 1983 (1976). *See supra* note 7.

designed, in part, to help. Section 1983 should be amended to require state prisoners to exhaust administrative and judicial remedies consistent with the habeas corpus statute. This is in keeping with traditional exhaustion requirements and is in the best interests of all parties. State prisoners will benefit by such an amendment; resolution of their problems, which necessarily are magnified by their incarceration, will be handled more efficiently. Prisons present an overwhelming problem today and exhaustion will force prison administration and the states to strengthen their capacity to handle their own problems without sacrificing constitutional rights. In the final analysis, with the adoption of this proposal, the federal court's ultimate protection of constitutional rights will always be available, but need not be invoked in the first instance.