Prisoners' Rights Litigation: An Examination into the Appurtenant Procedural Problems

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol2/iss1/11

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
Experience teaches that nothing so provokes trouble for the management of a penal institution as a hopeless feeling among inmates that they are without opportunity to voice grievances or to obtain redress for abusive or oppressive treatment.¹

Although a prisoner has been duly tried, convicted, and sentenced, he is not divested of all constitutional rights after the prison gates close behind him. Except to the extent that the rescission or restriction of certain rights is a necessary concomitant of incarceration, justified by considerations underlying the penal system, all other constitutionally protected rights are retained in prison. When these rights are violated by conditions of confinement, federal judicial review of internal prison practices may be sought by invoking one of two procedures provided by Congress for the redress of such violations.

This paper explores the emerging procedural issues confronted by state prisoners seeking vindication of their constitutional rights in the context of a habeas corpus petition² and a suit under the Civil Rights Act.

I. BACKGROUND


More than a decade ago, in a monumental decision which was to materially alter the plight of prison inmates who could not protect themselves against even the most onerous of prison practices, the United States Supreme Court brought the Civil Rights Act into the field of tort litigation by holding that § 1983 of that Act gave individual citizens a viable federal remedy, utilizing federal courts, for the deprivation of federally secured rights by

---

¹ Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966).
³ 42 U.S.C. § 1983 provides that:
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.

345
persons acting under color of state law.\textsuperscript{4} Writing for the Court, Justice Douglas summarized the purpose of § 1983:\textsuperscript{5}

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Lower federal courts, faced with assessing the propriety of a prisoners' rights suit brought under § 1983, have affirmed its use in permitting redress in federal court for the tortious deprivation of rights secured by the fourteenth amendment by any state official acting under color of state authority.\textsuperscript{6}

Persons in prison are within the protection of § 1983 and violations of the constitutional rights of inmates are cognizable in federal court under this section of the Civil Rights Act.\textsuperscript{7} However, lest it appear that the Civil Rights Act is a panacea for abuses often inflicted upon prison inmates, § 1983 does prescribe two elements as prerequisites for recovery: (1) the conduct complained of must be by someone acting under color of state law and (2) the conduct must have subjected the complainant to the deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States.\textsuperscript{8}

1) Under Color of State Law: Action taken by a state official purporting to exercise the power vested in him by virtue of state law and made possible only due to the fact that he is clothed with the authority of state law is action under color of state law for purposes of the Civil Rights Act.\textsuperscript{9} It has, however, been held

\begin{itemize}
\item[5.] Id. at 180.
\item[7.] Haines v. Kerner, 404 U.S.519 (1972); Cooper v. Pate, 382 F. 2d 518 (7th Cir. 1967); Brown v. Brown, 368 F. 2d 992 (9th Cir. 1966); Stiltner v. Rhay, 322 F. 2d 314 (9th Cir. 1963), cert. denied, 376 U.S. 920 (1964); Weller v. Dickson, 314 F. 2d 598 (9th Cir. 1963); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); United States ex rel. Diamond v. Social Service Dep't., 263 F. Supp. 971 (E.D. Pa. 1967).
\end{itemize}
that to act “under color” of state law does not require that the misconduct complained of be by an officer of the state. It is sufficient that it was effected by a willful participant in joint activity with the state or its agents.\textsuperscript{10}

2) Deprivation of Constitutional Rights: Where the conduct complained of does not infringe upon fundamental constitutional rights, federal courts will not interfere with the internal affairs of a state or federal penal institution.\textsuperscript{11} Only deprivations of individual rights derived from the Federal Constitution or federal laws give rise to actions under the federal Civil Rights Act. Thus, a violation of a state constitution or statute is not a basis for an action under § 1983.\textsuperscript{12}

A brief survey of what is and is not actionable may serve as a guide. Generally, the right infringed upon must be one secured by the due process or equal protection clauses of the fourteenth amendment. Among the most important of these rights is the right to be free from cruel and unusual punishment of the sort that contravenes the eighth amendment thereby going beyond matters exclusively and legitimately related to prison discipline and administration.\textsuperscript{13} However, isolated incidents of negligent failure to protect one inmate from an attack by another, do not amount to cruel and unusual punishment and, absent a showing of bad faith and the existence of an oppressive motive, do not subject an inmate to a denial of the equal protection of the laws.\textsuperscript{14}

Intentional deprivation of essential medical care is actionable,\textsuperscript{15} but improper medical care is not\textsuperscript{16} unless it rises to the proportions of cruel and unusual punishment.\textsuperscript{17} Interference with


\textsuperscript{15} Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963).

\textsuperscript{16} Gittlemacker v. Prasse, 428 F. 2d 1 (3d Cir. 1970).

\textsuperscript{17} Haines v. Kerner, 404 U.S. 519 (1972), rev'd 427 F. 2d 71 (7th Cir. 1970); Martinez v. Mancusi, 443 F. 2d 921 (2d Cir. 1970); see Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb.)
a prisoner's right of access to the courts,8 interference with the adherence to religious beliefs,9 the denial of statutory good time behavior credit,20 and interference with the right to the assistance of counsel, including the opportunity for full and private communications between attorney and client,21 are generally actionable violations. Interference with a prisoner's attempts to remain knowledgable of world affairs,22 regulations requiring shaving and hair cutting,23 and conduct which may be tortious, but does not violate the Federal Constitution, and is therefore, of interest to the state only, such as intentional assaults on prisoners by guards, do not give rise to actions under § 1983.24 Furthermore, even when a prison regulation infringes on fundamental constitutional rights retained by inmates, a federal court must balance the asserted need for the regulation in the context of prison security and orderly administration against the claimed constitutional right and the degree to which it has been impaired.25

3) Nature of the Liability: According to one court, two elements of personal liability are requisites to recovery: (1) violation of a federally secured right and (2) requisite degree of culpability.26 Liability under the federal Civil Rights Act is personal; one is liable only if he had a direct connection with the alleged deprivation. Thus, a warden was not held liable to a former prisoner for personal injuries and the deprivation of civil rights, when he was not yet warden when the injuries were sustained.27 In a lengthy examination of the nature of the §1983 liability, one federal court expressed reluctance to subject officials to the fear of

---

23. Daugherty v. Reagan, 446 F. 2d 75 (9th Cir. 1971); Blake v. Pryse, 444 F. 2d 218 (8th Cir. 1971).
Prisoners' Rights

reprisal for honest misunderstandings of statutory authority and mere errors in judgment. This court interpreted the United States Supreme Court's decision in Monroe v. Pape\(^2\) to indicate that § 1983, as a basis for a civil suit, must be read against the background of tort liability which holds a man responsible for the natural consequences of his actions. The Court held that under general principles of tort liability, it is sufficient that a reasonable man might have foreseen the result of his actions.\(^2\) Section 1983 affords recovery to citizens injured by the conduct of state officers whether such conduct is willful, negligent or irresponsible.\(^3\) The necessary element for recovery is the same as that required in other actions. That element is negligence, the failure to act as a reasonable man. The only difference is that in suits under the Civil Rights Act, the determination of reasonableness is left to the courts: the community does not set the standards of care which reasonably prudent men should exercise. The court further held that good faith reliance on a state statute later declared invalid is available as a defense to a tort action brought under § 1983, because the natural consequences do not include the invalidation of a statute. However, reckless or unreasonable action taken under color of state law subjects a state official to liability regardless of the validity of the statute. The Supreme Court subsequently announced an identical holding in a different case.\(^4\)

B. The Scope of Habeas Corpus

Initially the writ of habeas corpus permitted only a challenge to the jurisdiction of the trial court over the subject matter and the person. The scope of the Great Writ gradually expanded and, in 1942, the Supreme Court announced that the writ applied to all cases where a conviction had been obtained in violation of constitutional rights and where the writ is the only adequate means of preserving those rights.\(^5\) After a federal circuit court

Hofstra Law Review

acknowledged that:

A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits,

the permissibility of challenging prison conditions by means of a habeas corpus petition was given recognition by the Supreme Court. Treating a “motion for lawbooks and a typewriter” as a petition for a writ of habeas corpus, the Supreme Court declared that a prison regulation prohibiting inmates from assisting other inmates in the preparation of writs was violative of federally secured and protected rights and therefore invalid. Citing this landmark decision, the Supreme Court later held that pleadings challenging conditions of confinement are cognizable in federal habeas corpus.

Thus, habeas corpus relief is currently available to one who claims he should be freed of all restraints and also to one who protests his confinement in a certain place or attacks the conditions of his confinement. Indeed, habeas corpus proceedings have been successful in securing to prison inmates many of the same constitutional rights vindicated by litigation brought by way of a § 1983 suit. Further, several courts have implied that, assuming procedural requirements are met, habeas corpus could be used in suits inappropriately brought under the Civil Rights Act.

38. Preiser v. Rodriguez, 411 U.S. 475 (1973) (habeas corpus proceeding is exclusive means to seek restoration of good time credits); De Witt v. Pail, 366 F. 2d 682, 688 (9th Cir. 1966) (Allegation that prison officials had confiscated legal papers necessary to prisoner’s appeal from his conviction as a disciplinary measure might be the basis for commencing a proceeding for writ of habeas corpus).
Prisoners' Rights

Nevertheless, § 1983 is still generally considered preferable to habeas corpus for several reasons:

1. Exhaustion of state remedies is probably not a prerequisite to the commencement of a federal action under § 1983;
2. The propriety of proceeding as a class in a habeas corpus action is subject to considerable dispute;
3. Courts have the power to fashion remedies and grant equitable relief in a § 1983 suit;
4. Discovery techniques provided by the Fed. R. Civ. P. can be resorted to routinely in suits brought pursuant to the Civil Rights Act.

In the sections which follow, an examination of the relative utility of § 1983 and habeas corpus, in the context of the aforementioned procedural problems and virtues should reveal which, if either, should take precedence in prisoners' rights litigation.

II. EXHAUSTION OF STATE REMEDIES

A. Habeas Corpus

Federal courts have refused to consider habeas corpus applications by state prisoners until they have exhausted all remedies available in state courts.39 This qualification is now codified in the federal habeas corpus statute.40 The requirement is grounded in the doctrine of comity between courts, a doctrine that teaches that one court should defer action on cases properly within its jurisdiction until courts of another sovereignty, with concurrent powers and already cognizant of the litigation, have had an opportunity to pass on it.41 However, the doctrine of exhaustion gives states only an initial opportunity to pass upon and correct alleged violations of an inmate's constitutional rights. An applicant is not required to file repetitious applications in the state courts.42 Once a claim has been presented to the highest state court on direct appeal of the conviction, an applicant need not, prior to obtaining federal habeas corpus relief, request collateral relief based on the same issues already decided,43 as long as the claim advanced in federal court was presented for consideration to the state court.44

39. Ex parte Hawk, 321 U.S. 114 (1944); Ex parte Royall, 117 U.S. 241 (1886).
42. Wilwording v. Swenson, 404 U.S. 249 (1971); Brown v. Allen, 344 U.S. 443 (1953);
Ross v. Craven, 476 F. 2d 240 (9th Cir. 1973).
A petitioner barred from further state relief due to his failure to make a timely appeal of his conviction was not denied federal habeas corpus relief despite the exhaustion requirement, inasmuch as that requirement applies only to currently available state remedies. Federal courts have the power to grant relief despite a failure to pursue state remedies not available at the time the application for federal habeas corpus was filed. Nevertheless, where an adequate state post-conviction remedy becomes available after a habeas corpus proceeding has begun, even though state remedies existing previously had been exhausted, principles of comity require a federal court to dismiss without prejudice and remand the cause to the state courts for their consideration.

Still, the mere possibility of success in an additional state proceeding does not bar federal habeas corpus relief where the availability of further state remedies is uncertain. Where the state courts have consistently refused to hear challenges by prisoners to the conditions of their confinement, regardless of the remedy sought, an applicant is not required to pursue any alternative procedure before seeking federal habeas corpus.

B. § 1983

The Supreme Court's decision in Monroe v. Pape indicated that the federal remedy provided by § 1983 is supplementary to state remedies and thus, the latter need not be sought and refused before the federal remedy is invoked. Defining the purposes of § 1983, in Monroe, as being, (1) to override certain kinds of state laws, (2) to provide a remedy where the state law is inadequate or a state remedy is not available in practice and (3) to provide a remedy supplementary to those furnished by the state, the Supreme Court later noted that these purposes would be frustrated by application of the exhaustion doctrine. The Court therefore held that relief under the Civil Rights Act is not defeated because relief was not first sought under a state law which provided a remedy. Thereafter, the Supreme Court has consistently held

46. Id.
47. Stepp v. Beto, 398 F. 2d 814 (5th Cir. 1968); Texas v. Payton, 390 F. 2d 261 (5th Cir. 1968).
the doctrine of exhaustion inapplicable in civil rights actions.\textsuperscript{51}

Generally, where an action is brought under the Civil Rights Act, exhaustion of state remedies is not a condition precedent to federal jurisdiction.\textsuperscript{52} Further, while one federal circuit court previously entertained doubts as to whether the exhaustion requirement should not be imposed when equitable relief is sought and there is a plain, adequate and complete remedy at law,\textsuperscript{53} it later held that exhaustion of state legal or equitable remedies is not necessary before commencement of a civil rights action.\textsuperscript{54}

Nevertheless, three federal courts have required that inmates either exhaust state administrative remedies or make a showing that they are unavailable before resorting to the federal judiciary.\textsuperscript{55} In another federal circuit, the exhaustion of state remedies is not required unless there is an adequate remedy set up to provide a speedy and fair hearing of prisoners’ grievances.\textsuperscript{56} Moreover, in still another federal circuit, the exhaustion of administrative remedies generally has been required before federal prisoners may resort to judicial relief.\textsuperscript{57}


\textsuperscript{53} Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967) (here, however, civil death statutes precluded adequate relief in New York).

\textsuperscript{54} Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971).


\textsuperscript{57} Paden v. United States, 430 F. 2d 882 (5th Cir. 1970) (petition by federal prisoner for an order directing prison administration to permit formation of a black culture organi-
Gaining popularity in the past couple of years is the filing of a civil rights action in combination with a habeas corpus petition. New York has been adamant in arguing the need for the exhaustion of state remedies and the lack of federal jurisdiction over such proceedings. Its courts, however, have held that though a habeas corpus petition alone requires exhaustion, when it is used in combined form with a civil rights action and relied upon for federal jurisdiction, failure to exhaust state remedies is not a bar to seeking federal review of alleged unconstitutional prison practices. The Second Circuit, in *Rodriguez v. McGinnis*, failed to understand "... how a state prisoner [complaining of the manner of custody] who is entitled to relief by habeas corpus under 28 U.S.C. § 2254 can opt out of the section, with its attendant requirement of exhaustion of state remedies when these are available, simply by styling his petition as one under the Civil Rights Act." Noting that under the broad scope given habeas corpus, prisoners can use habeas corpus petitions to attack the length or condition of their confinement, the court concluded that all such complaints were really petitions for habeas corpus and under the guise of the Civil Rights Act, prisoners should not be able to circumvent the exhaustion requirement of § 2254(b). Under the authority of *Wilwording v. Swenson*, however, the court was "constrained" to hold that they could.

In *Wilwording*, the Supreme Court declared that the complaint, challenging the living conditions and disciplinary measures at Missouri State Penitentiary, although cognizable in federal habeas corpus, also stated a cause of action under § 1983, to which the exhaustion requirements were not applicable. The Supreme Court of the United States faced this issue again when it granted certiorari in the *Rodriguez* case. The arguments advanced before the Supreme Court on behalf of New York State...
were that challenges to custody or conditions of custody are really petitions for habeas corpus and thus subject to the exhaustion requirements when seeking release or amelioration, and extensions of § 1983 to include equitable relief to state prisoners were inappropriate, especially where adequate state procedures exist and therefore the only way prisoners could get into federal court is by way of habeas corpus. New York insisted that prisoners could not use § 1983 to enjoin state prison practices and acknowledged that there is no injunctive aspect to habeas corpus. New York asserted that an injunction could be obtained in state court.

On behalf of the original petitioners, it was argued that under the authority of Wilwording a litigant does have a choice of two different actions, the difference between them being that § 1983 could not be used to obtain release or to challenge a conviction or sentence.

The Supreme Court did, however, avoid reaching this issue by a narrow holding that in a suit praying for the restoration of forfeited good time credit, where restoration of these credits would result in his immediate release, an inmate is in effect seeking release from custody, and therefore, on the facts of this case the action could be maintained only as a habeas corpus proceeding subject to the exhaustion requirement. In this opinion the Court sought to clearly delineate challenges to the very fact or duration of the confinement itself from constitutional challenges to the conditions of confinement. While concluding that a suit to restore forfeited good time credit constitutes a challenge to the length of confinement and thus "... is just as close to the core of habeas corpus as an attack on the prisoner's conviction...", the Court also reaffirmed that "... a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison..." and may be sought without any requirement of prior exhaustion of state remedies.

Before leaving Rodriguez, it should be noted that in order to reach its holding the court had to re-examine the reasons for the exhaustion requirement in federal habeas corpus actions. To an argument by respondents that the purpose for the exhaustion requirement was to give state courts an initial opportunity to correct constitutional errors made by the courts themselves and that therefore the requirement was inapplicable in this case, the

63. Id. at 489.
64. Id. at 499.
Court replied that the comity considerations which underly the exhaustion requirement "... [have] as much relevance in areas of particular state administrative concern as [they do] where state judicial action is being attacked. ..."65 The Court found it "... difficult to imagine an activity ... that is more intricately bound up with state laws, regulations, and procedures than the administration of its prisons."66 However, this view of comity, as the dissent points out, should lead to a conclusion that exhaustion should be required before an attack on prison conditions could be commenced in federal court.

The next section of the paper should serve to make clear, as indeed the Rodriguez Court's reliance on Younger v. Harris revealed, that the foregoing is an established reason for invoking not the doctrine of exhaustion but the doctrine of abstention. Other portions of the opinion, discussed later, indicate that it will serve to further exacerbate federal-state court relations, rather than ameliorate them.67

III. THE DOCTRINE OF ABSTENTION

One problem that may, on occasion, still have to be confronted in a § 1983 suit is judicial sensitivity to the problems created by the intervention of a federal court into matters involving internal prison discipline and administration. Abstention is, simply, a decision by a federal court not to decide a case properly

65. Id. at 491.
66. Id. at 491-92.
67. Chief Justice Warren E. Burger, in considering alternative procedures to be followed in civil rights actions which would avoid the unnecessary use of the federal judiciary, suggested:

One—Create a statutory procedure for federal prisons to provide for hearing prisoner complaints administratively within the prison and require that these procedures be exhausted before any proceeding can be filed in federal courts. I believe many states would follow the federal example.

Second—Establish informal grievance procedures—by state authority—to hear prisoner complaints as many enlightened prison administrators, including federal prisons, have done. As the ABA Commission dealing with correctional problems continues its very important work, I commend the subject of prisoner grievances to that Commission's attention.

A third possible course:

Federal judges, acting within their existing authority, might well consider referring habeas corpus and civil rights cases brought by prisoners for preliminary consideration to a United States Magistrate sitting as a Special Master and reporting to the court.

Prisoners' Rights

within its jurisdiction. The doctrine is usually invoked for reasons of maintaining workable federal-state relations and the economy of efforts. The doctrine is generally applicable in three types of cases:

(1) Under the *Pullman* doctrine, federal courts abstain from passing on a constitutional issue in a case which also involves a question of state law which of itself might be dispositive of the litigation; 68

(2) Under the *Burford* doctrine, federal courts abstain when necessary to avoid needless entanglement in complex state regulatory schemes; 69

(3) Federal courts abstain where appropriate to allow state courts, by expeditious use of available state remedies, to save a constitutionally questionable statute.

The latter type of abstention is usually reserved for challenges to a statute on the grounds that it is unconstitutionally vague or overbroad and therefore amenable to a construction which eludes a finding of constitutional infirmity. Thus, where a statute or regulation must either stand or fall on its face, abstention to allow it to be saved is not appropriate. 70

Abstention seemed more appropriate prior to the Supreme Court's decision in *Robinson v. California* when the eighth amendment was not yet applicable to the states, and before the decision in *Monroe v. Pape* and *McNeese v. Board of Education* when it was still believed that there existed a need to utilize state remedies in the first place. Yet some courts remain reluctant to interfere with what they deem to be the function of the executive branch of government, especially in cases involving matters exclusively of internal prison administration and within the wide discretion of prison administrators. Thus, it is said that the doctrine operates properly to prevent judicial review of those deprivations which reasonably and necessarily accompany incarceration. 71

The difference between the exhaustion and abstention doctrines has been said to be that exhaustion of state remedies, as a prerequisite to a federal court's consideration of the merits of a case, is a jurisdictional or pseudo-jurisdictional requirement, while the abstention doctrine assumes that the court has jurisdiction. Abstention does not involve the abdication of federal jurisdiction but only the postponement of its exercise. Where the doctrine is invoked, the proper course is for federal courts to retain jurisdiction, rather than to dismiss, pending proceedings in the state court.

The decisions of the United States Supreme Court in Monroe v. Pape, McNeese v. Board of Education, Dombrowski v. Pfister, Zwicker v. Koota, and Damico v. California should have dispelled any doubts concerning the inapplicability of abstention to civil rights cases. In Zwicker, the Supreme Court noted probable jurisdiction to determine the question of the scope of discretion of federal courts to abstain from deciding a civil rights claim on its merits. The Court held that in expanding the power of the federal judiciary by enacting 42 U.S.C. § 1983 and 28 U.S.C. § 1343, Congress imposed upon federal courts the duty to give due respect to a litigant's choice of a federal forum for a hearing and decision of his federal constitutional claim.

Still, several courts have persisted in availing themselves of the doctrine, proclaiming it applicable except in cases of extreme maltreatment, or where paramount constitutional rights are involved. In Argentine v. McGinnis, allegations of inadequate medical care, harassment, and demotion to a lower paying job, as a result of petitioner’s complaints of deprivations of civil rights, the confiscation of petitioner’s drinking cup, clothing, and

76. Moreno v. Henckel, 431 F. 2d 1299 (5th Cir. 1970).
80. 380 U.S. 479 (1965).
82. 389 U.S. 416 (1967).
other personal items, and the regulation of his mail were all considered matters of internal prison administration and did not present the sort of extreme case which would justify a court's inquiry into matters of prison administration. Similarly, the rules and regulations regarding the maintenance of prison discipline and security have been considered executive functions with which the federal courts are loathe to interfere. 86

In New York, on the other hand, federal courts, while pleading for the exercise of a little abstention in appropriate cases, have been finding the doctrine inapplicable to the case before them or else have felt obliged to resist employing it in the wake of the Supreme Court's decisions in Monroe, McNee, Dombrowski, Zwickler, and Damico, and an accompanying trend toward less abstention. In Carothers v. Follette, 87 a federal district court warned that courts should proceed cautiously when asked to enjoin or reverse state prison practices and favor abstention, especially if the state has a system of administrative review available. In this instance, however, the court observed that no system was in effect. In Kritsky v. McGinnis, 88 Chief Judge Foley took the opportunity to reaffirm the opinion he had expressed in Rodriguez v. McGinnis, 89 that "... it may be that the doctrine of temporary abstention should be applied to veer these challenges into the State Courts where I think they belong. However . . . the trend seems to the contrary." 90

Amidst wide acceptance of the view that it is not the function of the judiciary to run prisons or to undertake the supervision of day to day treatment or discipline of inmates, 91 one federal court declared that federal courts must distinguish between mere disciplinary matters and arbitrary and capricious disregard of prisoners' rights. 92 Where prison authorities have so greatly impaired the constitutional rights of inmates so as to give rise to a cause of action under the Civil Rights Act, complete deference in deter-

90. Id. at 630.
91. Sawyer v. Sigler, 445 F. 2d 818 (8th Cir. 1971).
mining necessary and appropriate prison practices should no longer be given to prison administrators.  

For the most part the doctrine of abstention should no longer pose any major obstacles to § 1983 suits. The doctrine itself is one which is to be applied only in narrowly limited, special circumstances. Cases involving vital issues of civil rights are the least likely candidates for application of abstention. When fundamental constitutional rights are involved, the state's interest in the internal operation of its penal institution is inferior to the preservation of those federally protected rights. The doctrine of abstention, which is to be used only in exceptional circumstances, does not permit the federal courts to defer to state courts for decision on a federal constitutional question.

Federal courts have refused to abstain from deciding cases involving challenges to maximum security procedures and conditions, the adequacy of essential medical care, the denial of non-subversive newspapers, placement in solitary confinement, obstruction to the adherence or exercise of religious beliefs, prison disciplinary procedures, and interference with a prisoner's right of access to the courts. Even the availability of a state remedy has not deterred courts from passing on a suitor's claim in a civil rights action. And, though still adhering to the belief that abstention in appropriate cases would be in the best interests of justice, one federal court, considering that ..., the harshest blow to the old 'hands-off' doctrine was struck by

93. Ross v. Blackledge, 477 F. 2d 616 (4th Cir. 1973); Cooper v. Pate, 382 F. 2d 518 (7th Cir. 1967).
95. Zwickler v. Koota, 389 U.S. 241 (1967); Moreno v. Henckel, 431 F. 2d 1299 (5th Cir. 1970); Holmes v. N.Y.C. Housing Auth., 398 F. 2d 262 (2d Cir. 1968); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Pierce v. LaVallee, 293 F. 2d 233 (2d Cir. 1967); Rivers v. Royster, 360 F. 2d 592 (4th Cir. 1966); Jones v. Wittenburg, 323 F. Supp. 93 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F. 2d 854 (6th Cir. 1972); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963).
99. Pierce v. LaVallee, 293 F. 2d 233 (2d Cir. 1967).
100. Id.; Cooper v. Pate, 382 F. 2d 518 (7th Cir. 1961).
101. Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967).
103. Moreno v. Henckel, 431 F. 2d 1299 (5th Cir. 1970); Rivers v. Royster, 360 F. 2d 592 (4th Cir. 1966).
Monroe v. Pape,” acknowledged that “... it is now settled beyond question that claims of this kind alleging federal constitutional deprivation by State prisoners, if not frivolous on their face, are within the jurisdiction of the federal courts... and must be entertained and determined.”

An examination of the doctrine of abstention should include some mention of the Supreme Court’s fairly recent decision in Younger v. Harris, which held that federal courts should not enjoin a state prosecution in the absence of harassment or the threat of great and immediate harm as to do so would violate “the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.”

Its stated policy was “... to permit state courts to try state cases free from interference by federal courts.”

Though Younger severely limited the circumstances in which federal courts should intervene in pending state criminal prosecutions, it expressed “... no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.”

In Younger the Court observed that even federal intervention in civil cases was not limited by the same restrictions applicable in criminal prosecutions because “[t]he offense to state interests is likely to be less in a civil proceeding.”

Certainly the offense to state interests would be even less if no proceedings at all were pending in state courts.

Accordingly, the principles of Younger should not be viewed as requiring abstention in a prisoners’ rights suit begun when criminal proceedings in state court have already terminated. Further, the federal anti-injunction statute applicable in Younger has been held not applicable to suits brought under § 1983. It does not appear that federal courts have relied on Younger to

---

106. Id. at 41.
107. Id. at 43.
108. Id. at 41.
109. Id. at 55 n.2 (1971).
110. 28 U.S.C. § 2283 provides:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
abstain from deciding § 1983 claims. In a class action challenging the validity of a state involuntary commitment statute a federal court refused (over defendant's insistence) to apply the decision in Younger so as to preclude the exercise of jurisdiction in a civil rights action seeking declaratory and injunctive relief against the enforcement of certain portions of the Wisconsin statute.\textsuperscript{112}

IV. CLASS ACTIONS

Section 1983 suits are attractive due to the relative ease with which class actions can be maintained, assuming the requirements of Fed.R.Civ.P. 23 can be met.\textsuperscript{113} Usually a suit challenging general prison conditions or practices will meet those requirements and the class will usually be too numerous for joinder.

The maintainability of a class action has several crucial advantages. It eases court congestion by reducing the number of individual petitions and the risk of inconsistent adjudication with respect to plaintiffs in similar situations raising identical claims. It eliminates the need to appoint counsel for individual petitioners and insures a hearing for prisoners whose claims might otherwise have gone unconsidered. It is especially useful when members of the class are poor or there is no time to identify and contact all members of the purported class.\textsuperscript{114} A class action provides the basis for the granting of broad equitable relief going beyond the situation of a particular plaintiff. It can thus serve to reimburse for deprivations of constitutional rights where individual damages are too small to warrant redress and to provide relief where it is difficult to make a case for specific individual relief. In Holt v. Sarver, though awarding broad declaratory relief to inmates confined in the Arkansas state prison system, the court noted:\textsuperscript{115}

As far as the individual claims of the individual Petitioners are


\textsuperscript{113} Fed. R. Civ. P. 23 requires for the maintenance of a class action: (1) numerosity (23 (a)(1)), (2) common questions of law or fact (23 (a)(2)), (3) typicality of claims (23 (a)(3)), (4) representative ability of named plaintiffs (23 (a)(4)). In addition, one of the following: risk of inconsistent adjudication (23 (b) (1) (A) (B)); action or refusal to act on the part of party opposing the class in a manner generally applicable to the class (23 (b) (2)); questions of law or fact predominate over questions affecting individual members and class action is superior to other available methods (23 (b) (3)).

\textsuperscript{114} All members of a class need not be identified and contacted until they succeed on common claims.

Prisoners' Rights

concerned, including the individual complaints of inmates now in isolation, the Court does not consider that any of the Petitioners has made a case for specific individual relief. However, all of the Petitioners are subject to the overall situation which renders the Penitentiary unconstitutional and all are entitled to class relief with respect to that situation. [footnote omitted]

The class action is also vital as a means of avoiding the problem of mootness which occurs if a particular plaintiff is released.\textsuperscript{116} In \textit{Jones v. Wittenburg},\textsuperscript{117} the court held that where it appeared that the claims of any particular individual plaintiff could easily become moot at any time and where it would be very difficult to demonstrate that any particular inmate had suffered a specific wrong which could be righted without regard to the totality of wrongs in the jail system, an action under the Civil Rights Act by prisoners could only be maintained as a class action. In \textit{Jenkins v. United Gas Corp.},\textsuperscript{118} the court held that the promotion of the named plaintiff in a class action alleging systematic racial discrimination does not render the suit moot as to the individual or to the class he represents.

Class actions are widely recognized in § 1983 suits and have generally been successful in eliminating a number of unconstitutional practices. They have brought relief from widespread brutality. A § 1983 suit, brought on behalf of 2,000 inmates was successful in obtaining injunctive relief against real or threatened brutality from state officials. In that case, the Second Circuit also directed the district court, on remand, to consider ordering specific measures to implement the injunction, including the appointment of federal monitors.\textsuperscript{119} \textit{Valvano v. McGrath},\textsuperscript{120} a class action, brought on behalf of all persons incarcerated in the Queens House of Detention for Men, was based on alleged deprivations of first, fourth, fifth, sixth, and fourteenth amendment rights. The inmates were granted injunctive relief against the use of violence, strip searches, the denial of essential medical care, interference with mail, excessive lock-ins, unsanitary conditions, and the withholding of bedding and toilet articles by correctional

\textsuperscript{118} 400 F. 2d 28 (5th Cir. 1968).
\textsuperscript{119} Inmates of Attica Correctional Facility v. Rockefeller, 453 F. 2d 12 (2nd Cir. 1971).
\textsuperscript{120} 325 F. Supp. 408 (E.D. N.Y. 1971).
officers. Inmates confined at the Arkansas State Penitentiary, in a class action attack upon the entire penal system, received broad equitable relief to correct prison conditions and practices including the trusty system whereby inmate trustees ran the prison, the open barracks system, the conditions of isolation cells, and the absence of any meaningful rehabilitation program.\textsuperscript{121}

Proceeding as a class, Arkansas state prisoners won relief from the use of corporal punishment as a disciplinary measure. In \textit{Jackson v. Bishop},\textsuperscript{122} the court held that the use of a strap to whip prisoners was unconstitutional per se as violative of the prohibition against cruel and unusual punishment, irrespective of any safeguards surrounding its use.

Class actions have also served as a vehicle to eliminate racial segregation in prisons,\textsuperscript{123} to grant relief from oppressive prison conditions such as overcrowdedness, filth, starvation,\textsuperscript{124} the inability to communicate privately with counsel,\textsuperscript{125} and to correct prison disciplinary practices. A federal court, in \textit{Landman v. Royster},\textsuperscript{126} held that due process rights must be afforded prisoners in disciplinary proceedings. Elaborating, the court declared that among the procedural rights due an inmate is a right to cross-examine adverse witnesses, to present evidence on his own behalf, to receive timely notice of the charges against him, to have a hearing by an impartial tribunal and a decision based on the evidence, and the right to solicit advisors to present his case if he is intellectually unable to do so. Further, the court ordered prison authorities to set specific standards for inmate conduct to replace a board discretionary policy through which, until the court's decision, inmates could be penalized for "misconduct." Similar due process rights for inmates were declared in \textit{Bundy v. Cannon}.\textsuperscript{127}

Although the requirements of Fed.R.Civ.P. 23 had not been met, the court still granted declaratory relief which would benefit all persons similarly situated though not parties to the action. Regu-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{121} Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd 442 F. 2d 304 (8th Cir. 1971).
\item \textsuperscript{122} 404 F. 2d 571 (8th Cir. 1968).
\item \textsuperscript{124} Jones v. Wittenburg, 323 F. Supp. 93 (N.D. Ohio 1971); \textit{aff'd, sub nom.} Jones v. Metzger, 455 F. 2d 854 (6th Cir. 1972); \textit{see} Lake v. Lee, 329 F. Supp. 194 (S.D. Ala. 1971).
\item \textsuperscript{126} 333 F. Supp. 821 (E.D. Va. 1971).
\item \textsuperscript{127} 328 F. Supp. 165 (D. Md. 1971).
\end{itemize}
\end{footnotesize}
Prisoners' Rights

lations governing discipline and classification procedures, negotiated by the parties to the class action in arms-length good faith bargaining, were adopted as the interim decree of the court in *Morris v. Travisono*.128

One obstacle to class actions is the difficulty of defining the class. This problem is mainly encountered in attempts at bringing a class action on behalf of those confined in temporary detention facilities where two characteristics of the facility seem to mitigate against the efficacy of a class action. The first is the rapid turnover of inmates imprisoned within them. Secondly, this type of facility restrains two different categories of inmates, each with different rights: convicted and non-convicted.

Indeed, one federal court refused to permit inmates of a city jail to proceed as a class where it could not be established that the individual plaintiffs were representative of the class for whom they would purport to act, adequate notice could not be given reasonably to this class, and there was a great turnover of inmates within the jail.129 Nevertheless, several such suits have been allowed. In *Royster v. McGinnis*,130 a federal court permitted a class action to be brought on behalf of state prisoners similarly situated who had served terms of incarceration in a city jail prior to their transfer to state prison but had not received good time credit for the period of pre-sentence incarceration. Another federal court, in *Valvano v. McGrath*,131 held that a suit brought on behalf of inmates confined in the Queens House of Detention for Men was maintainable as a class action despite continuous changes in the composition of the inmate population. *Jones v. Wittenburg*132 involved a class action challenge by prisoners to conditions in a city jail, brought on behalf of themselves and as representatives of the class of persons who were or might be confined in the facility. The court permitted the suit to be maintained as a class action, with the class consisting of those who at any given point in time were confined in the city jail. In another case, a federal court held that it retained jurisdiction over the action even if some inmates were transferred.133 Moreover, the maintenance of a class action chal-

---

Challenging conditions and practices at a state prison has been permitted even though not all plaintiffs were, at the time the proceeding began, incarcerated within it, on the grounds that when all plaintiffs showed past use and the expectation of future use, all had standing to challenge existing conditions at the prison.\(^\text{134}\)

Class actions in habeas corpus proceedings are rarely attempted. In *Hill v. Nelson*,\(^\text{135}\) the federal court, while deeming a class action impracticable in the instant case because of procedural problems, refused to hold that a class action could never be maintained in a proceeding on a habeas corpus petition. The court, however, did order all executions stayed so that all members of the attempted class could file individual petitions. Transforming a suit brought under the Civil Rights Act to a petition for habeas corpus, the court in *James v. Headley*\(^\text{136}\) held that injunctive relief would not be granted where a legal remedy was available and therefore there was no reason to make the action a suit for class relief. This issue was never reached in *Mitchell v. Schoonfield*,\(^\text{137}\) where the suit was dismissed for failure to exhaust state remedies, but the court observed that it is not at all clear whether a habeas corpus proceeding could be entertained as a class action. The class action issue was also not decided in *Mead v. Parker*.\(^\text{138}\) The Ninth Circuit did, however, remand the case to the district court for a hearing to determine the propriety of permitting the petitioners to bring a habeas corpus class action.

The issue, however, was reached and resolved by federal courts in proceedings to determine the propriety of maintaining a habeas corpus proceeding as a joint or class action. One court held that a habeas corpus proceeding attacking the death penalty and practice in capital cases could not be maintained as a joint action where there was in excess of fifty prisoners in the class sought to be represented, and the size of the class was unstable and subject to constant fluctuation. However, the proceeding could be maintained as a class action where it presented questions of law or fact common to the class and where the claims of the individuals were typical of the claims of the class. Viewing the *Hill* decision as reached solely on the basis of practicability, the


\(^{136}\) 410 F. 2d 325 (5th Cir. 1969).


\(^{138}\) 464 F. 2d 1108 (9th Cir. 1972).
court held that Fed.R.Civ.P. 23 is applicable in habeas corpus proceedings. Whether this case survives the Supreme Court decision in Harris v. Nelson is questionable. While habeas corpus is generally considered a civil action, in Harris the Court implicitly ruled that the Fed.R.Civ.P. are not automatically applicable in habeas corpus proceedings by virtue of Fed.R. Civ.P. 81(a)(2), by holding that the application of Rule 33 (interrogatories for discovery purposes) is excluded in habeas corpus proceedings.

However, the Supreme Court "... intimates no view with respect to class actions." Another federal court, in an action challenging conditions at the United States Medical Center, held that under certain circumstances a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial effects in considering multiple petitions, holding multiple hearings, and writing multiple opinions. Other courts which have dealt with the issue have not presented a single compelling reason why class actions ought not to be permitted in habeas corpus proceedings. The reasons which are offered include the following: a commitment to prison acts individually on each person committed and a writ seeking discharge from confinement must likewise be individual. No one can have an interest in the illegal restraint of another. "The very nature of habeas corpus forfends class actions." Ordinarily, class actions are permitted in equitable actions only.

However, the Mead Court took note of these reasons: Certainly the usual habeas corpus case relates only to the individual petitioner and to his unique problem. But there can be cases, and this is one of them, where the relief sought can be of

142. Williams v. Richardson, 481 F. 2d 358 (8th Cir. 1973).
147. 464 F. 2d 1108, 1112-13 (9th Cir. 1972).
immediate benefit to a large and amorphous group. In such cases . . . a class action may be appropriate.

The unique status of *Royster v. McGinnis*\(^{148}\) should also be considered. *Royster* began as a § 1983 class action challenging on equal protection grounds a New York statute which denied to certain state prisoners good-time credit for parole eligibility for the period of their pre-sentence incarceration in the county jail. The litigation proceeded to the United States Supreme Court which made a dispositive ruling against the inmates on the merits. According to *Preiser v. Rodriguez*,\(^{149}\) this case could only have been brought on a petition for habeas corpus. There appears to be no evident reason why the action could not have proceeded as a class had the form of the suit been a habeas corpus proceeding.

Whether proceeding under the Civil Rights Act or by way of a petition for habeas corpus, the relief requested need not be expensive, as in *Jackson*, supra. However, proceeding by means of a class action may tend to overemphasize the scope of the abuse and sometimes require relief requiring the expenditure of exorbitant sums. Recognizing that such expenditures would be necessary to bring the Arkansas state penitentiary system up to constitutional standards, the court in *Holt v. Sarver*,\(^{150}\) refused to grant injunctive relief or to order that all constitutional infirmities be corrected immediately. It did say, however:\(^{151}\)

> If there are things that Respondents can do now with available personnel, they will be expected to do them now. If necessary steps cost money, and they will, Respondents must move as rapidly as funds become available.

While acknowledging the obligation of prison authorities to eliminate unconstitutional conditions in the penal institutions, the courts also recognize the financial handicaps under which most are obliged to operate. At a time when prison budgets are inadequate and when state revenue is limited, it is doubtful whether courts will continue to grant such broad and costly relief.

V. Remedies

Relief in a prisoners’ rights suit generally calls for the exercise of the federal courts’ broad equitable powers. Redress in such

---

151. Id. at 385.
Prisoners’ Rights litigation usually takes the form of damages, injunctive relief, declaratory relief, or release from custody. The decision to proceed under the Civil Rights Act or the federal habeas corpus statute will in part depend on the type of relief desired.

A. § 1983:

Broad equitable relief is obtainable in a § 1983 suit.

1. Damages

Money damages can be awarded to prisoners for violations of their constitutional rights by prison officials. A claim for damages can be useful in preventing recurrence of the objectionable conduct and to avoid the problems of mootness created when remedial action is taken by a defendant subsequent to the filing of a claim seeking only individual injunctive relief. In Jenkins v. United Gas Corp., a class action by black employees alleging systematic racial discrimination, the promotion of the named plaintiff did not moot the proceeding even as to him, because of his claim for back pay differential.

Section 1983 is well-suited to compensate individuals for damages arising from the unconstitutional acts of state officers. In Roberts v. Williams, a minor severely injured at a county farm was awarded $85,000 against the trustee at the farm and the county farm superintendent who entrusted the inmate trustee with firearms. The petitioner, convicted of petty larceny for the theft of articles with a retail value of two dollars and eleven cents, was blinded and suffered possible brain damage upon being shot by an inmate trustee who had been convicted of assault and battery with intent to kill. The actions of the inattentive and careless administrator who gave the trustee guns without even instructing him on their use was held not to meet the standard.


of care required and therefore concurrent tortious conduct was found.

The injury sustained need not be physically severe in order to claim damages. In Sigafus v. Brown, a complaint charging that legal papers essential to petitioner's post-conviction hearing had been confiscated and destroyed and seeking $25,000 in damages caused by the loss of such papers, was held to state a cause of action under the Civil Rights Act.

Unlike a suit for injunctive relief, a claim for damages remains viable even though the petitioner is no longer in a position to be subjected to the complained of abuses. Though not requesting money damages, one plaintiff was held entitled to recover them in Richey v. Wilkins, wherein the court announced:

It is beyond question that a plaintiff suing under the Civil Rights Act may seek money damages as well as injunctive relief and a right to such damages of course cannot be conditioned upon the plaintiff's being, at the time he brings suit, in a situation where he is subject to further invasion of his rights.

The basis for recovery of ordinary tort damages was laid by the Supreme Court in Monroe v. Pape. The Fourth Circuit Court, in Jenkins v. Averett, held that the grossly culpable negligence of a state police officer in shooting an eighteen year old black youth was a constitutional violation within the purview of the Civil Rights Act and that an award limited to out-of-pocket expenses would be inadequate. While leaving open the question of whether punitive damages were appropriate in the instant case, the court further held that the pain and suffering accompanying the personal injury should be compensated.

Recovery for pain and suffering and mental anguish have on several occasions accompanied the recovery of tort damages. In an action under the Civil Rights Act based on a charge of false imprisonment, a federal court permitted recovery for both physical and mental anguish. In Rhoads v. Horvat, the federal court left it to the jury to determine the amount, apart from specific monetary damages, that the plaintiff was entitled to be

155. 416 F. 2d 105 (7th Cir. 1969).
156. 335 F. 2d 1, 6 (2d Cir. 1964).
158. 424 F. 2d 1228 (4th Cir. 1970).
awarded for the deprivation of civil rights, including his subjective pain, suffering, and humiliation. In Rhoads, the deprivation claimed by the plaintiff was that of being arrested without a warrant and being held for thirty to forty minutes.

Evidence establishing the use of greater force than necessary by city police officers in placing the plaintiffs under arrest, the refusal to permit them, once in jail, to call an attorney or friend, and the conducting of an illegal exploratory search of their trucks was held to justify an award of $5100 total damages for violations of plaintiffs' civil rights. Each plaintiff had sustained approximately $1800 in out-of-pocket expenses, in addition to $1600 loss of wages, as well as mental suffering, humiliation, and injury to personal reputation in MacArthur v. Pennington.161

Compensatory damages of $25 per day for every day spent in segregation were awarded by a federal court to prisoners who had been placed in solitary confinement due to their political beliefs. On appeal the punitive damages were held not recoverable but the Second Circuit Court of Appeals did affirm the award of compensatory damages.162

An award of punitive damages is made to a plaintiff, based on the willfullness or wantonness of the defendant's act and its purpose is punishment, rather than compensation. Such an award must bear a relationship to the extent of culpability of the defendant's acts.163

The Second Circuit's decision in Sostre v. McGinnis,164 while not permitting the recovery of punitive damages on the grounds that the improper conduct of the warden did not reflect a general pattern of behavior and that therefore its deterrent effect would be minimal, nevertheless recognized that in appropriate cases, punitive damages could be recovered in civil rights actions. On many occasions, where the conduct was sufficiently outrageous and the defendant acted on an improper motive, punitive damages have been recovered in civil rights suits.165 Conduct viewed

165. Casperci v. Huntoon, 397 F. 2d 799 (1st Cir. 1968), cert. denied, 393 U.S. 940 (1968); Mansell v. Saunders, 372 F. 2d 573 (6th Cir. 1967); Basista v. Weir, 340 F. 2d 74
by the court as justifying an award of punitive damages has included the removal of an inmate from a county jail to a state prison for purposes of preventing him from conferring with counsel and preparing a defense for his upcoming murder trial in addition to forcing him to plead guilty;\textsuperscript{166} an unlawful arrest, detention, prosecution, and physical attack by a magistrate’s constable;\textsuperscript{167} and a series of house searches conducted without warrants or probable cause.\textsuperscript{168} Even where no actual damages are shown, punitive damages can be recovered.\textsuperscript{169}

Nominal damages are presumed from the wrongful deprivation of civil rights and are proved, as a matter of federal common law, by proof of the deprivation.\textsuperscript{170} Federal courts have recognized that a wrong under the Civil Rights Act may consist solely of the deprivation of constitutional rights and have held that nominal damages may be recovered where no actual damages were sustained.\textsuperscript{171} In \textit{Whirl v. Kern},\textsuperscript{172} in which damages were sought for false imprisonment, the court observed that in some cases a man’s freedom is worth only nominal damages, but regardless of his indigency a man’s freedom is not valueless and, therefore, the courts will grant damages to any man for false imprisonment.

However, in deciding to commence litigation of a damage claim it should be realized that a judicial grant of monetary relief might be an empty award. The usual defendants in prisoners’ rights suits, are rarely, if ever, in a financial position to discharge their indebtedness if any large sum of money is awarded. Even small sums, though, may be of great importance to a prisoner. However, the real culprit behind the oppressive prison conditions, the State, is immune from liability.

2. \textit{Injunctive Relief}

Injunctive relief can be granted in a civil rights action to the

\textsuperscript{166} Lewis v. Brautigam, 227 F. 2d 124 (5th Cir. 1955).
\textsuperscript{168} Caperci v. Huntoon, 397 F. 2d 799 (1st Cir. 1968), cert. denied, 393 U.S. 940 (1968).
\textsuperscript{170} Basista v. Weir, 340 F. 2d 74 (3d Cir. 1965).
\textsuperscript{172} 407 F. 2d 781, 798 (5th Cir. 1968).
Prisoners' Rights

The mere cessation of the illegal conduct is not sufficient to justify the denial of injunctive relief where "... there exists some cognizable danger of recurrent violation." Thus, the Second Circuit Court granted preliminary injunctive relief while acknowledging that the major wave of reprisals against inmates by guards for a prison uprising had most likely terminated because similar misconduct and harassment had continued over an extended period of time. Similarly, the transfer of an inmate, who challenged the validity of a state statute under which he was removed from prison to a mental hospital, back to the state prison, did not render the suit moot where the inmate was still subject to the state's continuing policy of commitments to mental hospitals. The transfer to another prison does not render an action for injunctive relief moot due to the possibility of return. In Lankford v. Gelston, a federal court enjoined a police commissioner from conducting any further searches based on uncorroborated, anonymous tips and, therefore, without probable cause even though the commissioner had already ordered the cessation of such conduct, because the court believed that the practice of indiscriminate searches had been renounced only "obliquely" and the danger of repetition had not been removed. The issuance of an injunction against conducting searches without a warrant, however, was not deemed necessary. Moreover, because the administration of a state prison was not in complete control of subordinates and it was shown that in the past prison guards had acted on their own, injunctive relief was granted, in Landman v. Royster, in spite of the fact that new regulations had been formulated to correct constitutional infirmities.

Nevertheless, "... there are situations where an enforce-

177. Richey v. Wilkins, 335 F. 2d 1 (2d Cir. 1964).
178. 364 F. 2d 197 (4th Cir. 1966).
ment proceeding will become moot because a party can establish that 'there is no reasonable expectation that the wrong will be repeated.' ”\(^{180}\) No recurrence of the misconduct could be expected where, after police had failed on one occasion to protect anti-war demonstrators from assaults, the success of correctional procedures initiated by the mayor and police commissioner was shown by police handling of two subsequent demonstrations.\(^{181}\) Even where the court held that the conditions under which inmates were confined amounted to cruel and unusual punishment (denuded for substantial periods of time, deprived of basic elements of hygiene, i.e. soap and toilet paper) which the court felt were “subhuman” and which operated to “undermine sanity”, it denied injunctive relief due to the absence of any indication that such practices would continue in the future.\(^{182}\) In another case, the state’s adoption of adequate rules governing disciplinary procedures warranted the denial of injunctive relief though individual relief was granted.\(^{183}\)

Where the burden of proving the danger of recurrence can be met, applications for injunctive relief can be very successful in obtaining relief from unconstitutional prison practices.

Injunctive relief has been granted to eliminate widespread brutality in prisons,\(^{184}\) to invalidate prison regulations restricting inmates’ access to legal assistance,\(^{185}\) to prevent interference with attorney-client communications,\(^{186}\) to prohibit the unlawful housing of inmates in accordance with a discriminatory policy in a federal reformatory,\(^{187}\) to suspend disciplinary proceedings until they meet constitutional requirements,\(^{188}\) to remove obstructions to the exercise of religious beliefs,\(^{189}\) and to eliminate corporal punishment.\(^{190}\) But, where the entire penal system is in violation


\(^{181}\) Belknap v. Leary, 427 F. 2d 496 (2d Cir. 1970).


\(^{189}\) Cooper v. Pate, 382 F. 2d 518 (7th Cir. 1967).

\(^{190}\) Jackson v. Bishop, 404 F. 2d 571 (8th Cir. 1968).
of the Federal Constitution, and the costs of an overhaul would be great, injunctive relief is not appropriate. Prison officials in violation of a prior injunction can be fined for contempt.

There is one serious drawback to the utility of injunctive relief. The responsibility for unconstitutional prison practices and conditions does not rest solely on prison administrators. The eleventh amendment forbids the issuance of an injunction against a state government. Yet, it is the state government which holds the purse strings and controls the money sorely needed for prison reform.

3. Declaratory Judgments

Regardless of what other relief a plaintiff may be entitled to, all federal courts are empowered to issue a declaratory judgment designating the legal rights and relations of the interested parties. In the context of prisoners' rights litigation, declaratory relief is most often granted when the deprivation alleged pertains to one of the following prison policies: (1) inadequate disciplinary procedures, (2) racial discrimination and segregation and (3) general prison conditions and practices.

A declaratory judgment to the effect that the disciplinary procedures employed at San Quentin were in violation of the due process and equal protection clauses of the fourteenth amendment was issued in Cluchette v. Procunier. The court there found that prison authorities by failing to provide for adequate notice of the charges involved, by the calling of favorable witnesses and the cross-examination of accusatory witnesses, counsel or counsel-substitute, a decision by an objective factfinder, a

---

193. U.S. Const. amend. XI:
The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

See Hans v. Louisiana, 134 U.S. 1, 11 (1890).
194. 28 U.S.C. § 2201 provides:
In the case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
written statement of the findings of fact, or uniform notice of any right to appeal the decision, when such procedures could result in grievous loss to the inmate concerned, deprived the inmate of constitutionally protected rights. The court further declared that disciplinary punishment, including but not limited to (1) indefinite confinement in the adjustment center, or segregation, (2) possible increase in sentence due to referral of disciplinary action to the Adult Authority, (3) fine or forfeiture of accumulated or future earnings, (4) confinement in isolation longer than ten days and (5) referral to the District Attorney for criminal prosecution, constituted such a grievous loss.\footnote{195}

To the extent that a state statute required the segregation of the races in the state penal system, such statute was declared violative of the fourteenth amendment in \textit{Washington v. Lee}.\footnote{196} Racial discrimination, including segregation, was also declared unconstitutional in \textit{Holt v. Sarver}.\footnote{197} In \textit{Holt}, the court gave additional declaratory relief as to the overall conditions in the Arkansas Penitentiary System, declaring that the cumulative effect of four grievances, (the trusty system, the open barracks system, the conditions in the isolation cells, and the absence of a meaningful rehabilitation program) was that confinement in the penitentiary system amounted to a cruel and unusual punishment which was prohibited by the eighth and fourteenth amendments.

Mainly because of financial considerations, the court, however, did not grant injunctive relief to enforce its judgment. In view of the history of the case this seems unfortunate. \textit{Holt} was actually eight cases consolidated for trial. Three of these cases had previously been consolidated for an earlier trial. The case, called \textit{Holt I},\footnote{198} was never actually terminated. The court there had found that the overcrowded conditions in isolation cells was unconstitutional and that the state had failed in its constitutional duty to use ordinary care in providing for the safety of inmates. Some improvements in prison conditions followed the court's decree. However, shortly thereafter, limited funds caused a retro-
gress to former conditions prompting the court to withhold approval of the report filed by the Commissioner in *Holt I* and to further consider the overall conditions in the institutions. It appears that in the absence of an injunction to enforce it, a declaratory judgment alone might bring only slight and short-lived relief, perhaps another instance of too little, too late.

4. **Further Relief**

In addition to the forms of relief already discussed, federal courts are authorized to grant any further relief found necessary. Aside from enjoining oppressive prison conditions or declaring them unconstitutional with the goal being their elimination, federal courts have sufficient equitable power to direct affirmative changes in the prison system. It is appropriate for a court upon finding an unconstitutional practice in a penal system, to require officials to develop and propose for approval by the court new plans of operation in conformance with guidelines as set by the federal courts, as well as regular reports to the court describing the progress made in rectifying constitutional deficiencies. It is usual in this situation for the court to retain jurisdiction over the case. Such orders have been issued regarding disciplinary procedures, legal assistance, religious exercise, racial segregation, prisoners’ mail, and general prison conditions.

It is usual for a court to require that approved copies of new rules be furnished to all inmates. In *Morris v. Travisono*, the court also ordered that each inmate affected by the rules governing the disciplinary and classification procedures be allowed to send to the judge, in writing, their uncensored comments, objections, or approval of the new procedures.

---

200. 28 U.S.C. § 2202 provides:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.


204. *Sostre v. McGinnis*, 442 F. 2d 178 (2d Cir. 1971); *Cooper v. Pate*, 382 F. 2d 518 (7th Cir. 1967).


Federal courts have also appointed monitors to enforce their decrees and to investigate the complaints of inmates. In addition these courts have the power to order the expungement of prisoners’ records. Courts have the authority and obligation to fashion affirmative relief so as to provide an effectual federal remedy where the Civil Rights Act is violated.

5. Release

Probably the most significant remaining difference between habeas corpus and § 1983 is that the Civil Rights Act may not be invoked by a state prisoner to gain release from custody. In *Johnson v. Walker*, an action brought under §1983 was dismissed for failure to exhaust state remedies because the complaint prayed for relief in the form of release from custody. While § 1983 and habeas corpus were merging as vehicles for prisoners’ rights litigation, a distinction was advanced, both judicially and on oral argument before the Supreme Court in *Preiser v. Rodriguez*, for the presence of the exhaustion requirement in habeas corpus and its absence in the Civil Rights Act. The distinction is that if a prisoner is not seeking redress for alleged civil rights violations incurred in his state criminal proceeding and he does not seek release from custody, § 1983 may be properly invoked without first exhausting state remedies. If the challenge is to the validity of the origin conviction and the fact of confinement, the proper remedy is habeas corpus. Due to concern over the circumvention of the exhaustion requirement by prisoners using the Civil Rights Act as an alternative to habeas corpus, release from custody is not available as a remedy under § 1983.

213. 317 F. 2d 418 (5th Cir. 1963).
B. Habeas Corpus

As the scope of habeas corpus expanded, remedies other than release had to be made available in order for habeas corpus to be an appropriate means of challenging prison conditions. Habeas is suitable for challenging the manner of one's custody only because it may now be used even when release is not the remedy sought.216 As early as 1941 the Supreme Court, noting that a court is not required to compel release, merely invalidated a prison regulation which impared the right of access to federal courts by requiring the submission and favorable action by the institutional welfare officer before a writ could be filed.217 Relying on the former 28 U.S.C. § 461 (now part of 28 U.S.C.§ 2243), which authorized the court to dispose of a party to a habeas proceeding "as law and justice requires," a federal court held that where a prisoner, though in lawful custody, has suffered bodily injury from assaults by guards and other inmates “... the judge is not limited to a simple remand or discharge of the prisoner, but he may remand with directions that the prisoner's retained civil rights be respected.”218 Even before the Supreme Court decision in Johnson v. Avery,219 invalidating a prison regulation prohibiting inmates from assisting other inmates in the preparation of writs, on a petition of habeas corpus, a federal court declared that a regulation prohibiting “jailhouse lawyers” was unconstitutional.220 Here, though the petitioner asked for injunctive relief against the regulation under the Civil Rights Act, because he additionally requested release from solitary confinement, the court considered the pleadings as a petition for habeas corpus, and granted both requests for relief. Habeas corpus proceedings have also obtained for inmates the right to enjoy the assistance of counsel at parole revocation hearings.221

Habeas corpus has, on several occasions, been invoked to gain release from a maximum security, segregation, or similar unit of a prison and restoration to the general population.222

216. Ex parte Hull, 312 U.S. 546 (1941); Coffin v. Reichard, 143 F. 2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).
217. Ex parte Hull, 312 U.S. 546 (1941).
221. Cottle v. Wainwright, 477 F. 2d 269 (5th Cir. 1973).
222. E.g., Landman v. Peyton, 370 F. 2d 135 (4th Cir. 1966).
In *Preiser v. Rodriguez*, the Supreme Court ruled that while habeas corpus is the exclusive remedy for restoration of forfeited good time credit, had the inmates sought money damages, a § 1983 action would be the only appropriate remedy.

Four days after the decision of the Supreme Court was announced, a federal court ruled in a civil rights action to recover on a monetary claim for restoration of good time credit that a prison warden is immune from damages under § 1983 when he reasonably relies upon the validity of prison practices, subsequently determined unconstitutional, and acts without malice. The defense of good faith defeated the inmate’s claim for monetary relief.

VI. Discovery

The purpose of discovery is to insure a fairer law contest, to promote justice and truth, and to eliminate surprise by the disclosure of relevant facts.

Generally, significant use of prisoners’ rights litigation will require extensive use of the liberal discovery techniques provided by the Federal Rules of Civil Procedure resorted to without pomp and ceremony in civil rights actions. Discovery in a habeas corpus proceeding is far more doubtful. Rule 81 (a)(2) of the Federal Rules of Civil Procedure provides that the Federal Rules are applicable to habeas proceedings to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. In *Harris v. Nelson*, the Supreme Court held that this rule excludes the application of the discovery techniques provided in the Federal Rules of Civil Procedure to habeas corpus. The Court further held that the district courts may authorize an interrogatory or other discovery device where reasonably fashioned to elicit facts to help the court “dispose of the matter as law and justice require.” Though 28 U.S.C. § 2246 provides for interrogatories only in limited circumstances, the Court held that this restriction

---

226. 28 U.S.C. § 2246 provides:
   On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.
Prisoners' Rights was applicable only to litigants and not to the courts.²²⁷

Having deciphered the language of Rule 81 (a) (2), Harris left the lower federal courts with the task of setting guidelines for determining the difference between a deposition taken for evidence and one taken for purposes of routine discovery under § 2246.²²⁸

One reason for narrowly construing any provisions for discovery in habeas corpus proceedings is that since the petitioner had only limited discovery available to him during the state criminal proceedings, it would not be consistent with that policy for complete discovery to be available on a collateral attack of the conviction. However, when habeas corpus is used to challenge prison conditions, in the same manner as civil rights actions are used, it is just as inconsistent to allow routine discovery in one action and not the other. This issue appears to assume the posture of yet another battle between form and substance.

Expedience, therefore, requires avoiding the necessity of obtaining a court order for routine discovery, by bringing a prisoners' rights action under § 1983. However, a prisoner is handicapped by the nature of his confinement and it is often difficult for him to get the evidence necessary on his own.²²⁹


²²⁸ Some federal courts had, prior to Harris, permitted discovery to the petitioner: see, e.g., Wilson v. Weigel, 387 F. 2d 632 (9th Cir. 1967) (oral deposition allowed, but only because it constituted evidence within § 2246, not discovery); United States ex rel. Seals v. Wiman, 304 F. 2d 53 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963) (admission of fact under Rule 36 on the grounds that habeas corpus is a civil procedure.) Others had not; see e.g., Sullivan v. United States, 198 F. Supp. 624 (S.D. N.Y. 1961) (interrogatory); United States v. Burdette, 161 F. Supp. 326 (E.D. Mich. 1957), aff'd, 254 F. 2d 610 (6th Cir. 1958), cert. denied, 359 U.S. 976 (1959) (medical examination).

²²⁹ The Advisory Committee on Criminal Rules appointed by the Chief Justice for a study of procedural rules has suggested the following:

Rule 6. Discovery

(a) LEAVE OF COURT REQUIRED. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A.

(b) REQUESTS FOR DISCOVERY. Requests for discovery shall be accompanied by a statement of the questions, interrogatories, or requests for admission sought to be answered and a list of the documents, if any, sought to be produced.
CONCLUSION

In deciding whether to contest prison conditions or practices by means of habeas corpus or the Civil Rights Act, considerations must include both the relief desired and the type of petitioner. The doctrine of exhaustion applicable to habeas corpus and the restrictive discovery techniques available in habeas corpus proceedings, make it attractive only if release is the remedy sought. While class actions may be permitted in a habeas corpus proceeding, it is doubtful whether any court would grant such extraordinary relief to an entire class of inmates. However, as the scope of habeas corpus relief expands and penetrates the traditional breadth of civil rights actions it will be permitted in those habeas proceedings which could have been brought as § 1983 actions as well. The question then will be which members of the class will be subject to the exhaustion requirement.

The right of litigants to choose which action to pursue and to choose a forum for the hearing of their claims has recently been severely impeded. The concern over permitting prisoners to use § 1983 as an alternative to habeas corpus, thereby circumventing the exhaustion requirement, has manifested itself in a Supreme Court decision that has only added to the confusion of prisoners who most often must commence any action pro se. The Rodriguez court attempted to make a distinction between actions challenging the fact or duration of imprisonment and those challenging the conditions of confinement. While it is quite true that the respondents were seeking restoration of good time credits which, if granted, would result in their immediate release from custody, this analysis defines the type of relief sought rather than the challenged aspect of his confinement. Indeed, the respondents were challenging the constitutionality of the disciplinary procedures which resulted in the cancellation of their earned good conduct time credit. It is well established that challenges to prison disciplinary procedures are cognizable in § 1983 actions. Indeed, the court ruled that had the respondents sought monetary relief their only course would be to pursue a civil rights suit. Thus it is

(c) EXPENSES. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

clear that it is not whether the attack is one based on the fact of
length of the detention or the conditions under which a prisoner
is held in custody that determines the appropriate action to be
commenced. What matters is only the bottom line: what type of
relief is sought. While the Court did not achieve the distinction
it sought to make, a distinction it missed entirely is that between
the unconditional release of an inmate who was unlawfully im-
prisoned in the first place, and preserving for an inmate, who was
lawfully convicted and imprisoned, the right to enjoy whatever
privileges are provided for in the state statutory scheme. It is the
difference between challenging the validity of an entire sentence
and challenging the adequacy of prison disciplinary procedures
and the arbitrary revocation of that which was earned by an
inmate pursuant to state regulations. It is the difference between
the “core of habeas corpus” and the kernel of § 1983. As the
Rodriguez dissent ably made manifest, the Court’s approach to
prisoners’ rights litigation results in a panoply of pragmatic pro-
cedural problems when a prisoner seeks several forms of relief for
the same constitutional infirmity. When the consequences of an
unconstitutional disciplinary procedure include the forfeiture of
good time credit an inmate can seek monetary relief in federal
court but must begin in state court to have the lost credit re-
stored. The factual determinations necessitated by both actions
are the same. This is overburdensome on the court and a waste
of the court’s time. Worse, it can serve only to further aggravate
federal-state court relations. The doctrine of comity militates
against this result. Indeed, the Court in deciding that § 1983 is
not an appropriate vehicle for a suit seeking restoration of can-
celled good time credit should have borne in mind their own
words: “The very purpose of § 1983 was to interpose the federal
courts between the States and the people as guardians of the
people’s federal rights . . . .”
