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42 U.S.C. Section 1983: An Emerging Vehicle of Post-Conviction Relief for State Prisoners

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42 U.S.C. SECTION 1983: AN EMERGING VEHICLE OF POST-CONVICTION RELIEF FOR STATE PRISONERS

Primarily because of the federalism concept and doubt concerning judicial competence in the area, federal courts have traditionally been reluctant to intervene in the internal operation of state prisons.[1] Prisons have been viewed as components of the executive branch of government and, accordingly, the doctrine of separation of powers has been invoked to refuse examination of prisoners' complaints.[2] Concern has also been voiced that judicial scrutiny of administrative decisions would not only hinder the ability of penal officials to achieve prison goals but also unduly restrict their freedom of action because of vexatious litigation.[3] Thus, few courts have considered conditions within penal institutions as a legal issue; and even the basest conditions have often been dismissed as necessary concomitants of penal life.

Against this constricted background, 42 U.S.C. section 1983 has been interpreted to provide a private federal remedy for state prisoners by enabling courts to grant appropriate legal or equitable relief when federal rights are denied by persons acting under color of state authority. In *Monroe v. Pape*[4] the Supreme Court noted that section 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[5] Thus, state prisoners can petition the federal courts directly and avoid the delay of pursuing state remedies for post-conviction relief. The rights of personal bodily security, access to courts, and freedom of religion are the federal rights most often protected through this action.

Consistent with the Supreme Court's recent concern with individual rights, lower federal courts now review under section 1983 an increasing number of prisoners' complaints involving penal conditions. Many courts now consider section 1983 a viable alternative to state remedies for post-conviction relief and recognize an overriding need to preserve individual rights, even in the prison setting. However, judicial receptivity to these petitions remains mixed, as illustrated by one court's remarks:[6]

> Not unexpectedly to those having experience in the trial of criminal cases, persons convicted of crimes and in custody of their jailers do not look upon decisions concerning civil rights as a pronouncement of principles for the redress of genuine grievances or wrongs, but rather as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy . . . .

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1. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal To Review the Complaints of Convicts*, 72 YALE L.J. 504, 512 (1963).

2. Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178, 180 (1967).

3. Note, *42 U.S.C. §1983 — Civil Remedy — Its Circumvention and Emasculation*, 12 HOWARD L.J. 285 (1966).

4. 365 U.S. 167 (1961).

5. *Id.* at 183.

6. Roberts v. Barbosa, 227 F. Supp. 20, 21 (S.D. Cal. 1964).

NATURE OF THE ACTION

Section 1983 was originally enacted as part of the Civil Rights Act of 1871,[7] which was intended to extend federal court protection to Negroes deprived of civil rights by state officials.[8] Congress feared that state courts were too susceptible to local prejudices to protect Negroes' rights adequately; since federal courts were more insulated from local influence, they were considered more likely to adjudicate objectively.[9] The statute was remedial; thus, according to normal rules of statutory construction, relief should be freely granted and defenses narrowly construed.[10] Incident to this remedial purpose was an intended shift of power from state to federal courts to allow more effective protection of federal rights.[11] The statute reads:[12]

> 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 persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The breadth of this statutory language has resulted in its application to a wide variety of situations[13] including claims by state prisoners on account of penitentiary conditions. Under section 1983, state prisoners can initiate actions in federal district courts against employees of state prisons and county jails.[14] The relief afforded has included injunctions and money damages, but not the release of inmates from the institutions.

Numerous court decisions have failed to qualify the expansive terms of this section. The Supreme Court has held that it provides a remedy against persons who misuse state power as well as against those acting in accord with such authority.[15] Proof of specific intent has not been required to sustain the action.[16] Judicial construction of the term "State or Territory" has reached prisons in the District of Columbia.[17] The interpretation of the statute as nonexhaustive, not requiring compliance with all potential state remedies before seeking federal relief, has been extended to administrative

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7. Civil Rights Act of 1871, ch. 22, §1; 17 Stat. 13 (codified at 42 U.S.C. §1983 (1964)).
8. Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964).
9. *Id.* at 842.
10. *Id.* at 839.
11. *Id.*
12. 42 U.S.C. §1983 (1964).
13. *See generally* Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486 (1969).
14. Pennsylvania *ex rel.* Gatewood v. Hendrick, 368 F.2d 179 (3d Cir. 1966), *cert. denied*, 386 U.S. 925 (1967).
15. United States v. Classic, 313 U.S. 299 (1941).
16. 74 YALE L.J. 1462, 1464 n.10 (1965).
17. Dixon v. Duncan, 218 F. Supp. 157, 159 (E.D. Va. 1963).

as well as judicial remedies.[18] United States district courts, which exercise original jurisdiction in section 1983 actions, have required neither diversity of citizenship nor any jurisdictional amount to proceed therein.[19] Although the statute is silent as to the measure and types of damages allowable, the federal common law of damages is controlling.[20] Thus, even punitive damages have been awarded.[21]

However, the application of this section is not unlimited. For example, when another federal statute specifies means of redress for deprivation of a particular right, the section is not applicable.[22] Moreover, states and municipal corporations are excluded from the definition of "persons,"[23] and federal prisons and officials thereof are not subject to this provision because the statute does not apply to persons acting under color of *federal* law.[24] Despite these limitations, the remedy has been criticized for further burdening already congested federal dockets by inviting frivolous petitions.[25] Another objection is that this action undermines prison administration and discipline and discourages experiments and innovations.[26]

SPECIFIC AREAS OF APPLICATION

Prison Conduct and Discipline

Federal courts have examined certain facets of penal life on an ad hoc basis rather than explicitly delineating which aspects of prison conduct and discipline are subject to review. The results have not been uniform. Courts are divided concerning whether complaints involving matters related to the internal management of prisons should be recognized.[27] Actions involving allegations of unwarranted physical punishment,[28] modes of confinement,[29] and racial discrimination[30] have generally been considered.

State prisoners' complaints of physical abuse are encompassed by section 1983 as deprivations of due process.[31] The due process clause incorporates

18. Damico v. California, 389 U.S. 416 (1967).
19. Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954).
20. Basista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965).
21. *Id.*
22. Note, *supra* note 8, at 843.
23. United States *ex rel.* Gittlemacker v. Pennsylvania, 281 F. Supp. 175, 178 (E.D. Pa. 1968), *aff'd*, 413 F.2d 84 (3d Cir. 1969).
24. Johnson v. District of S. Mo. Comm'rs, 258 F. Supp. 669 (W.D. Mo. 1966), *aff'd*, 368 F.2d 184 (8th Cir. 1966); *accord*, Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1964).
25. Note, *supra* note 13, at 1493.
26. Note, *supra* note 2, at 191.
27. *Compare* Threatt v. North Carolina, 221 F. Supp. 858 (W.D.N.C. 1963), *with* Talley v. Stephens, 247 F .Supp. 683 (E.D. Ark. 1965).
28. Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).
29. Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).
30. Labat v. McKeithen, 243 F. Supp. 662 (E.D. La. 1965), *aff'd*, 361 F.2d 757 (5th Cir. 1966).
31. Jackson v. Bishop, 268 F. Supp. 804, 807 (E.D. Ark. 1967).

the eighth amendment's prohibition of cruel and unusual punishment[32] and implies a right to personal bodily security. Courts generally restrict the extent of the due process guarantee to protection from serious physical injury;[33] however, applications of this standard vary.[34] Although allegations of beating are generally reviewable,[35] corporal punishment has not been declared unconstitutional per se.[36] Utilization of an electrical shocking apparatus, teeter board, and strapping on bare buttocks have been permanently enjoined.[37] A fourteenth amendment violation also occurs when prison officials knowingly compel inmates to perform labor that is beyond their strength, dangerous to their lives or health, or unduly painful.[38] In attempting to establish standards for permissible bodily punishment, one court has said punishment must "not be excessive, inflicted as dispassionately as possible, and by reasonable people, and . . . applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment given conduct may produce."[39]

Particular modes of confinement are scrutinized by courts, but relief is granted only where cruel and unusual punishment is apparent. Inmates placed in an isolation cell in a county jail and denied food, water, and toilet paper for fifty-two hours were not considered by one court to have suffered such punishment.[40] A prisoner placed in isolation for twenty-seven hours in a concrete floored cell with the temperature at forty degrees and denied clothing, blankets, and a mattress has also been denied relief.[41]

Relief in these cases would probably have been granted under definitions of cruel and unusual punishment enunciated in *Jordan v. Fitzharris*,[42] which declared that punitive practices would not be allowed when intolerable to fundamental fairness, greatly disproportionate to the offense for which imposed, more cruel than necessary to achieve legitimate penal aims, or of such character as to shock the general conscience.[43] In *Jordan* the application of these tests resulted in a permanent injunction against use of the strip

32. *Id.* at 814.

33. Bryant v. Harrelson, 187 F. Supp. 738 (S.D. Tex. 1960).

34. *Compare* Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965), *with* Bryant v. Harrelson, 187 F. Supp. 738 (S.D. Tex. 1960).

35. Brown v. Brown, 368 F.2d 992 (9th Cir. 1966), *cert. denied*, 385 U.S. 868 (1966).

36. Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965).

37. Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967). On appeal, the Eighth Circuit Court of Appeals held that *any* use of the strap is permanently enjoined because such use violates the prohibition on cruel and unusual punishment. 404 F.2d 571 (8th Cir. 1968).

38. Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965).

39. *Id.* at 689.

40. Ruark v. Schooley, 211 F. Supp. 921, 923 (D. Colo. 1962). The court stated there was no deprivation of any right existing under the Federal Constitution and laws.

41. Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967). Petitioner's complaint had originally been brought under 18 U.S.C. §241, the criminal action comparable to 42 U.S.C. §1983. Noting that suit under §241 could only be brought by the United States, the court, sua sponte, transformed the petition to an action under §1983. *Id.* at 420.

42. 257 F. Supp. 674 (N.D. Cal. 1966).

43. *Id.* at 679.

cell.[44] Plaintiff had been confined to a strip cell for twelve days and allowed light and ventilation for only fifteen minutes daily. He was deprived of clothing for the first eight days and no means of cleaning his body were available to him for the entire period. His bathroom hole was flushed twice per day by prison personnel outside his cell.[45]

Section 1983 actions also extend the judicial concern for eliminating racial discrimination in society to penal life. This is particularly appropriate since the original purpose of this provision was to assure constitutional and legal rights for Negroes.[46] In *Lee v. Washington*,[47] the Supreme Court voided on fourteenth amendment grounds an Alabama statute requiring separation of races in prisons and jails. This decision no doubt will lead to further litigation involving racial matters in prisons. Prior to *Lee*, Negro inmates were denied relief in actions alleging that the use of segregated line formations, cells, and dining areas violated their constitutional rights.[48] Older decisions such as *Nicholas v. McGee*[49] that refused to apply the rationale of *Brown v. Board of Education*[50] because the peculiar problems of penology are not present in education are impliedly overruled by *Lee*. However, other decisions based on this rationale may remain valid if problems sufficiently peculiar to penology were involved. Prior decisions such as *Labat v. McKeithen*, which enjoined prison officials from preventing correspondence between Negro inmates and white women,[51] more accurately reflect the reasoning in *Lee* and thus remain the law.

Cases involving more narrow factual issues have also turned on due process grounds. Jurisdiction has been recognized, for example, to hear a prisoner's complaint that deprivation of parole eligibility for one and one-half years resulting from his defense against an unprovoked physical attack violates due process.[52] Additionally, the right to a fair trial is breached when an inmate is compelled to attend his jury trial in prison uniform.[53] No

44. *Id.* at 683. A strip cell is also referred to as a dry cell. In *Jordan*, petitioner's cell measured six feet by eight feet, four inches, and had no furnishings except a toilet. It had no interior source of light and was not cleaned by prison personnel during petitioner's confinement. *Id.* at 676, 677.

45. *Id.* at 687. A recent decision that also permanently enjoined use of the strip cell on the same rationale as *Jordan* is Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

46. Note, *supra* note 8, at 839.

47. 390 U.S. 333 (1968).

48. Nichols v. McGee, 169 F. Supp. 721 (N.D. Cal. 1959), *appeal dismissed*, 361 U.S. 6 (1959).

49. *Id.*

50. 347 U.S. 483 (1954).

51. 243 F. Supp. 662 (E.D. La. 1965).

52. United States *ex rel.* Hancock v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963). The court stated that the warden's action invaded an area properly reserved to the Pardon and Parole Board for decision. *Id.* at 205.

53. United States *ex rel.* Diamond v. Social Serv. Dep't, 263 F. Supp. 971 (E.D. Pa. 1967). The court said the right to a fair trial would not automatically be abridged if a prisoner is tried in his prison clothes before a judge without a jury. The court recognized, however, that a plaintiff could logically contend he had been deprived of his rights because he realized that proceeding to trial without a jury was his only hope for an unbiased trial.

violation arises from special restrictions on prisoners sentenced to death, however, if the restrictions are reasonable.[54] Thus, placing such inmates in solitary confinement, limiting their correspondence with outsiders, and restricting their visiting privileges have been upheld.[55]

The court of appeals' decision in *Adams v. Ellis*,[56] which sustained mail censorship by prison officials, is often cited to justify refusal to consider inmates' petitions under section 1983. The opinion stated that courts should refrain from supervising treatment and discipline of prisoners and should limit their actions to releasing illegally confined inmates.[57] However, *Adams* did not involve section 1983 actions,[58] and nowhere in the opinion did the court discuss the review of complaints involving prison conduct and discipline based upon deprivations of civil rights. Moreover, it is noteworthy that *Adams* recognized that a proper case might arise from unwarranted punishment or treatment,[59] precisely the subject to which section 1983 is addressed.

Practice of Law by Prisoners

Reasonable access to courts is guaranteed to state prisoners by the due process clause of the fourteenth amendment.[60] More specifically, a prisoner has "the right . . . to prepare, serve, and file legal papers and prosecute legal actions affecting his personal liberty."[61] When inmates have challenged the propriety of restrictions on their preparation of legal documents,[62] courts have generally upheld the restrictions if they did not foreclose all access to the courts.[63] The most difficult problem is presented by regulations prohibiting "jailhouse lawyers" from preparing legal papers for their fellow prisoners. In *Johnson v. Avery*,[64] the Supreme Court held:[65]

> [U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners.

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54. Labat v. McKeithen, 243 F. Supp. 662, 665 (E.D. La. 1965).

55. *Id.* at 663.

56. 197 F.2d 483 (5th Cir. 1952).

57. *Id.* at 485.

58. The statutes involved were 18 U.S.C. §1702 (1951), punishing obstruction of correspondence, and 18 U.S.C. §1708 (1951), punishing theft or receipt of stolen mail.

59. 197 F.2d 483, 485 (5th Cir. 1952).

60. Hatfield v. Bailleux, 290 F.2d 632 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961).

61. United States *ex rel.* Mayberry v. Prasse, 225 F. Supp. 752, 754 (E.D. Pa. 1963).

62. Bailleux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd* Hatfield v. Bailleux, 290 F.2d 632 (9th Cir. 1961).

63. Hatfield v. Bailleux, 290 F.2d 632 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961).

64. 393 U.S. 483 (1969).

65. *Id.* at 490. This holding does not change Florida law because in Coonts v. Wainwright, 282 F. Supp. 893 (M.D. Fla. 1968), the court used the same reasoning and voided a rule prohibiting inmates from helping other prisoners in preparing writs at a Florida road prison. In affirming *Coonts*, the Fifth Circuit Court of Appeals noted that even though the voided Florida regulation allowed inmates to help illiterate prisoners prepare legal

The Court noted that such a regulation would, in effect, deprive poorly educated or illiterate prisoners of *all* access to courts.[66] *Johnson* speaks only of the importance of allowing prisoners to prepare writs of habeas corpus and does not mention petitions under section 1983. However, such petitions are clearly within the scope of "petitions for post-conviction relief."[67] Arguably, the free flow of habeas corpus writs, which allege illegal confinement, are more important than 1983 actions, where the authors are legally imprisoned but under allegedly unlawful conditions. However, this distinction actually lacks substance, since either petition alleges unlawful treatment that cannot conscionably be permitted. *Johnson* approved, as reasonable regulations, restrictions on the time and location of preparing papers and punishments for giving or receiving consideration for performing such activities.[68] The greatest difficulty for lower federal courts attempting to follow *Johnson* will be interpreting the reasonableness of restraints. Penal regulations should be closely scrutinized to prevent denial of access to the courts by apparently reasonable, but in fact very broad regulations.

Bailleux v. Holmes[69] illustrates the most liberal approach yet taken on the right of prisoners to prepare legal documents. The court enjoined enforcement of various prison regulations that prohibited inmates from studying law; preparing legal documents in cells; or receiving treatises, statutes, and copies of cases from outside sources.[70] The practice of confiscating and retaining as contraband prisoners' legal documents found outside the prison library was forbidden by the court,[71] and persons in isolation were afforded the right to initiate court action and communicate with counsel.[72] On appeal, however, this decision was overruled.[73] The Ninth Circuit Court of Appeals held that judicial inquiry should be limited to whether the purpose of the restrictions was to obstruct reasonable access to courts and, if so, whether the practices and regulations actually interfered with such access.[74] Under this standard the regulations were held to be acceptable.

Many courts affirm rules limiting or forbidding activities of jailhouse lawyers because such conduct is viewed as illegal practice of law.[75] Other

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papers, literate inmates of low intelligence or poorly educated were still prevented from effectively petitioning courts. 409 F.2d 1337, 1338 (5th Cir. 1969).

66. Johnson v. Avery, 393 U.S. 483, 485 (1969). In a survey taken by the *Duke Law Journal*, the following statistics were compiled on inmates in Florida prisons: 48% completed less than 9 years of education, 25% had I.Q. of less than 80, and 1.2% were mentally disabled. Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 359 (1968).

67. Johnson v. Avery, 393 U.S. 483, 484 (1969).

68. *Id.* at 487.

69. 177 F. Supp. 361 (D. Ore. 1959), *rev'd*, Hatfield v. Bailleux, 290 F.2d 632 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961).

70. *Id.* at 363, 364. The regulations did permit inmates to receive copies of cases from publishers.

71. *Id.* at 364.

72. *Id.* at 365.

73. Hatfield v. Bailleux, 290 F.2d 632 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961).

74. *Id.* at 640.

75. 25 WASH. & LEE. L. REV. 281, 286 (1968).

tribunals reach the same result by acceding to arguments by prison officials that this activity fosters attitudes detrimental to rehabilitation.[76] Some administrators attribute increased inmate criticism of the institution, formation of an inmate hierarchy that exploits those of lesser intelligence, and encouragement of false hopes of release to the activities of "jailhouse lawyers."[77]

Protecting the public from the practice of law by unlearned and unskilled persons is more important outside the prison. Within penal institutions jailhouse lawyers are often the only counsel available to indigent or illiterate inmates.[78] The fact that few inmates can afford customary legal fees for preparing and filing petitions provides a compelling reason for allowing jailhouse lawyers. To the prisoners, reasonable access to courts would be a hollow right without the legal assistance of fellow inmates, for to deny them this aid would, in effect, deprive them of reasonable access to the courts. Courts should balance the need for jailhouse lawyers against the need to prevent the formation of attitudes detrimental to penal systems and the need to discourage inmates from preparing baseless petitions that aggravate already overcrowded dockets. However, in no case should judicial approval be given to regulations that deny any prisoner reasonable access to the courts.

Medical Treatment

Judicial inquiry relating to prison medical treatment has been extremely limited, with courts recognizing wide discretion in prison officials. Prisoners' 1983 petitions that have alleged deprivation of the right to personal bodily security have usually been denied,[79] and allegations of improper[80] and inadequate[81] medical care have been dismissed for failure to state a claim upon which relief could be granted. *Talley v. Stephens*,[82] which merely requires states to provide reasonable medical attention, exemplifies the limited inquiry by the majority of courts.

Religious Beliefs

Freedom of religion, encompassing two distinct concepts — freedom to believe and freedom to practice one's beliefs — is universally recognized as a right possessed by prisoners.[83] Penal limitations on the freedom to practice one's religion have been challenged under section 1983 by prisoners who are

76. Note, *supra* note 66, at 345.
77. *Id.* at 345, 346.
78. *Id.* at 355.
79. *E.g.*, Threatt v. North Carolina, 221 F. Supp. 858 (W.D.N.C. 1963).
80. United States *ex rel.* Gittlemacker v. Pennsylvania, 281 F. Supp. 175 (E.D. Pa. 1968), *aff'd*, 413 F.2d 84 (3d Cir. 1969).
81. Medlock v. Burke, 285 F. Supp. 67 (E.D. Wis. 1968).
82. 247 F. Supp. 683 (E.D. Ark. 1965).
83. *See* Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397, 419 (1965).

Black Muslims.[84] These petitions create great difficulty for the courts because the replies of prison officials usually present very cogent reasons for the restrictions.[85] The following discussion will focus solely on allegations by Black Muslim prisoners that penal authorities deprive them of freedom of religion.

The Supreme Court held in *Cooper v. Pate*[86] that Black Muslims could not be denied religious privileges solely on the basis of their religious beliefs when those prerogatives had been extended to prisoners of other religions.[87] The Court's terse opinion did not consider whether such privileges could be withdrawn if prison order and discipline were threatened. A lower federal court has upheld a regulation that barred certain Muslim publications because of their inflammatory nature.[88] However, the court cautioned prison officials that such exclusion would not be tolerated if based on religious discrimination or racial prejudice.[89] Another decision utilized a similar rationale in upholding a rule that prohibited Muslims from gathering for religious services in groups of larger than six.[90]

Prison authorities attempt to justify restrictions on Black Muslims' religious practices primarily on two grounds.[91] First, doctrines of this religion are said to be inflammatory, thus inciting violence and threatening penal order; and second, Muslims are viewed as actually a social and political group rather than a religious movement. The Supreme Court's decision in *Cooper* expressly denies the latter objection by clearly extending the first amendment protection of religious freedom to Black Muslim prisoners.[92] Until the Court considers the former ground, lower tribunals will continue to weigh the interests involved, utilizing a reasonableness standard that to date has favored penal officials.

Constitutional Rights Retained

Although section 1983 prohibits deprivation of federal statutory rights and constitutional interests, courts generally grant relief to prisoners only for denials of the latter. Apparently because of the traditional reluctance to intervene in the internal operations of prisons, courts are unwilling to grant petitions alleging deprivations of prisoners' rights except in the most demanding circumstances, such as obstruction of constitutional guarantees. Moreover, there is general agreement that the constitutional rights of pris-

84. Shapo, *Constitutional Tort*: Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U.L. Rev. 277, 303 (1965).

85. *E.g.*, Jones v. Willingham, 248 F. Supp. 791 (D. Kan. 1965).

86. 378 U.S. 546 (1968).

87. *Id.*

88. Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968).

89. *Id.* at 779.

90. Lee v. Crouse, 284 F. Supp. 541 (D. Kan. 1967), *aff'd*, 396 F.2d 952 (10th Cir. 1968).

91. Note, *Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review*, 32 Geo. Wash. L. Rev. 1124, 1128 (1964).

92. 378 U.S. 546 (1964).

oners are not as viable as those of ordinary citizens. Thus, the courts have been forced to determine which constitutional rights are forfeited by inmates and to what degree retained rights are curtailed.

To date, the judicial response may be separated into three increasingly active phases. The early twentieth century attitude was that prisoners were slaves of the state and, as such, completely lost most of their constitutional freedoms.[93] A slight change in this approach was evident in the Supreme Court's opinion in *Price v. Johnston*.[94] "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[95] The tone of this remark suggests a departure from the view that inmates are slaves. Recent decisions of lower federal courts indicate that prisoners are increasingly afforded constitutional freedoms. These decisions hold that prisoners retain all the rights afforded ordinary citizens except those denied expressly or through necessary implication of law.[96]

The apparent trend of federal court decisions is toward allowing prisoners to exercise more constitutional freedoms. Unfortunately, however, a definitive, comprehensive, and detailed statement of prisoners' constitutional rights has not yet been provided. The absence of such a declaration forces inmates to continue the unsatisfactory procedure of seeking constitutional protections on a case-by-case basis. Until such a statement is presented, courts should insure that persons entering prison forfeit constitutional guarantees only to the degree absolutely necessary for effective penal administration. Consistent with the philosophical shift in modern penology to rehabilitation and correction, such an approach will better prepare inmates to return to society.

Similarly, the Supreme Court has protected students, a group that must also function in a disciplined environment, from suppression of rights by school officials absent a finding of material and substantial interference with appropriate discipline.[97] Undifferentiated fear or apprehension of disruption is not sufficient to justify oppressive actions on the part of school officials.[98] A standard of reasonableness for construing school regulations has been rejected because such a standard might not adequately protect students' constitutional rights. However, many prisoners' petitions alleging deprivation of constitutional rights by penal restrictions are rejected on the basis of a reasonableness test. Courts should be cognizant that the reasonableness standard will sanction unwarranted constitutional deprivations in the prison setting just as it does in educational institutions.

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93. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871), said: "He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."

94. 334 U.S. 266 (1948).

95. *Id.* at 285.

96. *See, e.g.*, Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

97. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

98. *Id.* at 508.

PROBLEMS OF FEDERALISM

Federal court intervention in the administration of state prisons continually evokes protests by states claiming federal encroachment on state powers. Problems arise from public misunderstanding of state policies, potentially unfavorable disclosures concerning the operation of state prisons, and state officials' reluctance to allow federal investigations.[99] State claims to exclusive jurisdiction over their prisons and immunity of state officials from federal prosecution have been expressly rejected.[100] State laws that deny remedies available under section 1983 are voided by the preemption doctrine.[101] Federal courts, however, cannot grant relief until a person acting under state authority deprives a prisoner of his federal rights.

There is a valid state interest in maintaining control of state prisons, and there is some merit in the contention that variance in prison problems among the states necessitates local control, including local judicial review. Nevertheless, courts that are petitioned to review state prisoners' complaints under section 1983 cannot overlook the intent of Congress that federal courts protect federal rights. Federal courts are more likely to construe complaints objectively because they are detached from state pressures and influences. In any case an individual should not suffer deprivation of his rights while courts concern themselves with jurisdictional niceties.

FEDERAL HABEAS CORPUS AND FLORIDA'S MOTION TO VACATE, CORRECT, OR SET ASIDE SENTENCE

In federal courts, the primary means of obtaining post-conviction relief is the petition for a writ of habeas corpus. Enacted in response to *Gideon v. Wainwright*,[102] the motion to vacate, correct, or set aside sentence[103] has been utilized in Florida to seek post-conviction relief. The development of section 1983 for use by state prisoners not only complements these remedies but also adds a new dimension to them. A comparison of section 1983 with each of the other two remedies reveals that the civil rights statute is superior for use by prisoners who are legally confined, but under unlawful conditions.

Two aspects of federal habeas corpus support the conclusion that its use for prisoner complaints is often less adequate than the use of section 1983.

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99. Caldwell & Brodie, *Enforcement of the Criminal Civil Rights Statute, 18 U.S.C. §242, in Prison Brutality Cases*, 52 GEO. L.J. 706, 719 (1964). The authors report that in 1953, Florida's policy was to disallow inmate interviews by Federal Bureau of Investigation agents at the Florida State Road Department Prison Camp unless state representatives were present during the interviews.

100. United States v. Jones, 207 F.2d 785 (5th Cir. 1953). The court overruled the United States District Court for the Southern District of Florida, which had held that the legality of whipping or corporal punishment in state penal institutions was purely a matter of state law. 108 F. Supp. 266 (S.D. Fla. 1952).

101. *See* Page, *State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism*, 43 DENVER L.J. 480, 489 (1966).

102. 372 U.S. 335 (1963).

103. FLA. R. CRIM. P. 1.850.

First, the scope of habeas corpus is usually limited to release of persons who are illegally confined. Habeas corpus is thus inappropriate for petitions seeking permanent injunction of prison conditions or damages from penal officials. The few courts that have granted injunctive relief under this writ[104] remain a definite minority. Expanding the scope of habeas corpus may enable courts to protect prisoners' rights effectively, but this fictionalized extension is unnecessary in light of the breadth of section 1983. Moreover, habeas corpus petitioners are generally required to exhaust state remedies before seeking the writ.[105] Since section 1983 does not require this time-consuming process,[106] use of this statute accelerates access to federal courts. Section 1983 thus provides a better remedy than habeas corpus for prisoners who are legally confined.

In Florida, the motion to vacate, set aside, or correct sentence is severely criticized because it requires prisoners to seek relief from the same court that allegedly committed error.[107] If an inmate challenges his sentence on the grounds that it was imposed contrary to federal law or the Constitution, he can avoid possible bias in trial court review by petitioning the federal court under section 1983.

Under section 1983 a Florida prisoner may challenge the constitutionality of requiring utilization of the motion to vacate, set aside, or correct sentence. An inmate might argue that the motion abridges his constitutional right to procedural due process because review in the trial court deprives him of the right to be adjudged by an impartial trier of fact. In *Roy v. Wainwright*,[108] the Florida supreme court affirmed the constitutionality of the motion and noted that it was identical to a federal statute that had been consistently upheld by federal courts.[109] Most of the federal decisions concerned constitutional challenges to the federal enactment on the grounds of

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104. Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), represents the most expansive view of habeas corpus to date. The court said the writ should issue when a prisoner "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." *Id.* at 445. The court explicitly stated that habeas corpus should not be limited to a mere remand or discharge of the inmate. *Id.*

105. Bruce v. Beto, 396 F.2d 212 (5th Cir. 1968), holds that exhaustion is not required for habeas corpus in the limited instance where demanding it would be a futile act.

106. Monroe v. Pape, 365 U.S. 165, 183 (1961).

107. Brown, *Collateral Post-Conviction Remedies in Florida*, 20 U. FLA. L. REV. 306, 325-29 (1968); Clark, *Curable Ills of the Criminal Law of Florida*, 16 U. FLA. L. REV. 258, 298-99 (1963). Brown recommends that in all cases: "The senior judge of the circuit shall assign consideration of the motion to any trial judge of the court which imposed the sentence or to any trial judge of a higher court within the county having criminal jurisdiction; provided however that in no case shall the judge who imposed the sentence receive the assignment unless the sentence was imposed by a circuit court in a circuit having only one circuit judge." 20 U. FLA. L. REV. 306, 326 (1968). Clark's suggestion differs in two respects: he would retain the present procedure in misdemeanor cases and in no instance would he allow the judge who imposed the sentence to review the motion.

108. 151 So. 2d 825 (Fla. 1963).

109. *Id.* at 828. The federal statute referred to is 28 U.S.C. §2255 (1959).

double jeopardy or suspension of habeas corpus.[110] Thus, challenges to the motion on the ground of procedural due process are not foreclosed.

Organized Legal Services

As a practical matter, the continued development of section 1983 as a vehicle for post-conviction relief depends upon institutionalized legal services for prisoners, since few prisoners can finance conventional legal action. One suggestion has been to develop, within state public defender offices, a staff of attorneys to represent inmates in appeal and review proceedings.[111] By eliminating jailhouse lawyers, such a program might substantially reduce the number of frivolous appeals.[112]

In Florida, a proposal that deserves serious consideration is extending criminal rule 1.860 to allow students participating in public defender and legal aid programs to furnish legal services to prisoners.[113] This suggestion is attractive because it does not necessitate additional costs in the public defender program. This solution would also benefit courts by allowing them to hold inmates who institute actions, against the advice of law students, more susceptible to summary dismissal and contempt powers.[114] The Law Student Prison Research Council at the University of Pennsylvania could serve as a model. Since the summer of 1966 this organization has handled over 1,300 requests from prisoners in twenty-nine states.[115] The council receives an average of five letters per day from the Florida State Prison at Raiford.[116] In addition to furnishing an otherwise unavailable service to prisoners, the work has been a valuable educational experience for the students.[117]

Conclusion

Section 1983 is emerging as an important vehicle for post-conviction relief for state prisoners. The breadth of the statute's language and the limited number of prerequisites for invoking it result in its application in a variety of situations. Although problems of federalism are diminishing, courts have not yet produced a standard for determining allowable restrictions on the constitutional rights of prisoners. Section 1983 is a more attractive action than federal habeas corpus or, in Florida, the motion to vacate, correct, or set aside sentence. Although courts have not as yet expanded the enactment

110. *See* 28 U.S.C.A. §2255 n.1 (1959).

111. Note, *supra* note 66, at 359.

112. *Id.*

113. Note, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. Fla. L. Rev. 503, 514 n.64 (1969).

114. *Id.* at 515.

115. Letter from James N. Bryant, Chairman of the Law Students Prison Research Council at the University of Pennsylvania, to Frank E. Maloney, Dean of the University of Florida College of Law, Sept. 16, 1969.

116. *Id.*

117. *Id.*