

1977

## Prisoners' Rights Litigation- 42 U.S.C. §1983- Litigation: Defendant's View

Burnett Miller III

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Legislation Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Burnett Miller III, *Prisoners' Rights Litigation- 42 U.S.C. §1983- Litigation: Defendant's View*, 11 U. Rich. L. Rev. 791 (1977).

Available at: <http://scholarship.richmond.edu/lawreview/vol11/iss4/6>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## SECTION 1983 LITIGATION: DEFENDANT'S VIEW

*Burnett Miller III\**

There can be little doubt that since the late 1960's the status and conditions of our prisons have become a public issue. It can probably be said without citation that as a general proposition most states have found their prisons in a state of need. Our prisons have for many years been economically neglected in the wake of more publicly acceptable priorities. The philosophy seemed to be that prisoners were criminals that should be put away, and their lot was of their own making. There would then, of course, always be more pressing and socially acceptable purposes for which to expend public monies.

Prisoners are still criminals and they should be punished, but now the public is faced with more specific questions concerning the status of our prisons in the criminal justice system, the conditions of those prisons, and the goals, if any, to be accomplished. The change has been caused in large part by the prisoners themselves. By filing complaints with the courts these issues have been forced into the open. Complaints in the federal courts by authority of 42 U.S.C. § 1983 and under the jurisdiction of 28 U.S.C. § 1343 have been the most substantial in number and impact.

Section 1983 is itself an embodiment of section 1 of the Ku Klux Act of 1871<sup>1</sup> which was enacted to provide a federal forum for the redress of the invidious murder and purges of negroes by the Ku Klux Klan where state officials and judicial processes were unable or unwilling to provide the protection of the fourteenth amendment. The language of the act is not, however, limited to negroes or to abuses of the Ku Klux Klan. Neither is it in any degree apparent that Congress meant to provide a federal forum to air prisoner complaints and gripes. To the contrary, the intention was to provide a forum to a class of citizens who were being murdered, ravished, and outraged when the *states were not able or willing to act*.

Although "civil rights" statutes have been available for many years, there are many reasons why it took so long to bring these

---

\* A.B. Richmond College, 1963; J.D., University of Richmond, 1967; Assistant Attorney General Commonwealth of Virginia, Criminal Division.

1. Ch. 22, 17 Stat. 13 (1871); *See Monroe v. Pape*, 365 U.S. 167, 171 (1961).

issues to the courts. Prisoners were for many years thought to lose their rights as citizens upon conviction and were thought of as slaves of the state.<sup>2</sup> They were considered for the purposes of civil litigation as if they were incompetent<sup>3</sup> or even dead.<sup>4</sup>

The federal courts on the other hand declined to assert their jurisdiction over complaints sent to them asserting they were matters of state administrative concern and the federal courts should not interfere.<sup>5</sup> This "hands off doctrine," as it is called, prevailed with great force until the late 1960's when the lower federal courts began to inquire into the complaints of prisoners on a selective basis. What they began to find caused alarm. The courts found that conditions of some areas of confinement and the treatment accorded prisoners under some circumstances were "inhuman" and amounted to "physical torture"<sup>6</sup> contrary to any concept of "human dignity"<sup>7</sup> and was thus punishment in violation of the eighth amendment to the United States Constitution. Heretofore, the concept of cruel and unusual punishment was considered even broad enough to include death.<sup>8</sup> Other constitutional excesses were found in equal prevalence.

Prison officials on the other hand were stunned, defensive, and even in some cases outraged and indignant. They had become accustomed to conditions of confinement, brought about generally through lack of money and public attention. This same lack of public attention in large degree may be responsible for the problem—negative acquiescence.

Time has shown that the excesses and problems of yesterday are for the most part giving way to the very real problems of lack of facilities and money needed to develop the type of prisons the public

---

2. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 796 (1871).

3. *Almond v. Kent*, 459 F.2d 200, 202 (4th Cir. 1972); *Merchant's Adm'r v. Shry*, 116 Va. 437, 82 S.E. 106 (1914); VA. CODE ANN. § 53-305 to -307 (Repl. Vol. 1974).

4. *See e.g., Merchant's Adm'r v. Shry*, 116 Va. 437, 82 S.E. 106 (1914).

5. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944); SOUTH CAROLINA DEPT. OF CORRECTIONS, *THE EMERGING RIGHTS OF THE CONFINED*, (1972).

6. *Landman v. Royster*, 333 F. Supp. 621, 647-48 (E.D. Va. 1971).

7. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100.

8. *See Trop v. Dulles*, 356 U.S. 86 (1958); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

now for the most part supports. New concepts are being tried and developed in the treatment of prisoners, and the very purposes of corrections are being evaluated.

Whereas in the past "rehabilitation" was an oft overused word by officialdom and adversaries alike and mostly meant from the standpoint of officialdom that a criminal should be punished and made to conform and fear reimprisonment, adversaries generally use the word as an all-encompassing panacea for whatever cause is espoused. During the past five to ten years most states and certainly Virginia have placed great emphasis and experimentation in a myriad of philosophical and programmatic areas affecting the treatments of prisoners such as: work and study release programs which enable an inmate to work and continue an education in the community; prison educational programs; participation in various civic organizations such as the Jaycees; and more emphasis is placed on vocational training and other skill development to prepare an inmate for reentry into society. Other programs such as "behavioral modification" techniques on incorrigible prisoners which involve chemical or physical stimuli have, on the other hand, met with much criticism and court disapproval,<sup>9</sup> and they cannot be truly termed treatment. Although several concepts of behavioral modification were tried in Virginia, no use of physical or chemical stimuli was ever envisioned.

The point to make, I think, is that now there is affirmative emphasis in developing goals for our prisons and integrating them into the broad criminal justice system. Concepts of rehabilitation are constantly being evaluated to find meaningful ways to change the course of a prisoner's life. There is public support and public scrutiny of our prison system, and it has taken its rightful place in the priorities of public concern.

Even though conditions have improved, prisoner suits have increased. It is most often the difficult and rebellious inmate that is using the courts to gain advantage or to intimidate officials in an effort to avoid adherence to the rules or discipline within the pris-

---

9. *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973); COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: POST TRIAL RIGHTS, § 21 (1976).

ons. Petitions filed by state and federal prisoners represent a very significant portion of the work load of the federal district courts. In recent years, these cases have accounted for as much as 18 per cent of all civil filings.<sup>10</sup> Filings by state prisoners have risen from 218 in fiscal year 1966 to almost 7,000 in fiscal year 1976,<sup>11</sup> and continue to rise. Of the 278 petitions filed in Virginia,<sup>12</sup> for example, few have any merit, many more are just plain frivolous, and less than one per cent are decided adversely to the state officials in any aspect.

The time has come to give back to the states what is in reality a state problem. The collateral effects of a federal suit regardless of its merit now far outweigh the isolated instance that may offend constitutional strictures. Even then, the violations tend to be more academic than real. Few prison guards really know what is expected of them or understand the legal hairsplitting that has come to affect their lives. The recent decisions of *Meachum v. Fano*<sup>13</sup> and *Montanye v. Haymes*,<sup>14</sup> which affect prison transfers, indicated that the Supreme Court has shifted its intention from the all-encompassing affirmative language to the restrictive and make it evident that the lower courts have become too particular in their interpretations of the fourteenth amendment as it affects state prison administration.

It is difficult for courts to sufficiently visualize or place sufficient emphasis on the fact that the exercise of their jurisdiction can indirectly interfere and usurp *valid* administrative penal functions. The more refined issues become by judicial and legal involvement, it becomes more unlikely that administrators will act decisively. This indecisiveness may and does cause a breakdown in control and security within an institution. It will become necessary to confer with legal counsel on the more rudimentary of administrative functions. It is, therefore, time to reexamine the process of prison litigation in

---

10. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE DIRECTOR, 93-95 (Feb. 1976). These figures are misleadingly low in that many prisoner civil rights petitions are filed on forms provided for and headed "habeas corpus" and many are dismissed prior to filing or *sua sponte* after filing.

11. THE UNITED STATES COURTS: A PICTORIAL SUMMARY, 4 (Feb. 1976).

12. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE DIRECTOR, 21 (Feb. 1976).

13. 427 U.S. 215 (1976).

14. 427 U.S. 236 (1976).

light of its consequences and perhaps balance the need for initial federal review against those consequences. The time is ripe to go forward with prison development, but that progress is impeded by the rash of prison litigation which takes the administrator's time and compels his priorities.

In addition, to foster a system which allows an inmate to sue his keepers for money damages tends to intimidate even the most stalwart of administrators. It offends even elementary logic that a state might expect to acquire or retain the best qualified administrators if they are to be in constant fear of judicial and monetary reprisal<sup>15</sup> at the whim of state prisoners, who are more likely motivated to abuse their keepers and harass the system than to correct injustice. Needless to say, as already discussed, the impact of this unbridled source of litigation has resulted in an astronomical burden on the federal courts. Even if one does not take into account the time required for pretrial motions and conferences, and the time needed to write and issue an opinion, one prisoner may occupy as much as 20 to 25 per cent of a judge's time in one fiscal year.<sup>16</sup>

For these reasons, alternative measures are called for. The most obvious and desirable alternative would be for Congress to evaluate the impact of prison litigation in light of the intent and purpose of the act. There is no longer evidence of invidious incapability or unwillingness of the state judicial process. Congress might well consider limiting jurisdiction or requiring, on a theory of comity, ex-

---

15. See *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

*Id.* at 581.

16. *McCray v. Burrell*, 367 F. Supp. 1191, 1195 (D. Md. 1973), *rev'd*, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (June 14, 1976).

haustion of state remedies as a prerequisite to jurisdiction.<sup>17</sup> In conjunction with such a requirement due to the often frivolous and irresponsible nature of these suits, Congress might well consider a requirement that suits on behalf of inmates be brought in the name of an attorney or other responsible person appointed for him similar to the procedure Virginia has required,<sup>18</sup> although it has not been applied by the federal judiciary.<sup>19</sup>

The requirement of exhaustion of state remedies has unfortunately met with a similar fate in other federal courts. In *McCray v. Burrell*<sup>20</sup> the court in an extremely well-reasoned opinion concluded

17. See 28 U.S.C. § 2254(b) (1970).

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

*Id.* See also *Picard v. Conner*, 404 U.S. 270 (1971).

18. VA. CODE ANN. § 53-307 (Repl. Vol. 1974). The Virginia Code prohibits any action by or against any convict after judgment or conviction, and while he is incarcerated. Any suit to which the convict is a party must be brought by or against a committee appointed for the benefit of the convict.

19. In *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972), the court of appeals refused to require the appointment of a committee under Virginia law prior to bringing an action under 42 U.S.C. § 1983 indicating the procedure would "serve only to delay assertion of federal rights and to frustrate them . . ." *Id.* at 202.

20. 367 F. Supp. 1191, 1207 (D. Md. 1973). Judge Northrup's reasoning in *McCray* perfectly focuses the problem and issues:

When one evaluates the astronomical rise in prisoner civil rights litigation since 1961, and views the abuse of this right of access to the courts, it becomes apparent that not only will there be a detrimental impact upon the judicial system and its administration, but the legitimate complaints of those prisoners whose constitutional rights are in fact being violated may not be litigated for years.

However, if there is available a viable administrative remedy, then the spurious claims will be weeded out, and the district courts will be called upon to hear only those cases that are clearly of constitutional dimension. In addition, the federal district courts will have the benefit of a complete record of the administrative proceedings before the Inmate Grievance Commission, and the appeals to the state courts. Finally, when an infringement of a prisoner's rights is found, but equitable relief can be more effectively enforced by the State, this Court will be able to remand the case to the State. Under this procedure a much better record will be available to the court, the constitutional issues presented by the complaint will be definitely articulated, and the Court will not be bound to act as an advocate for the plaintiff to determine what constitutional grievances he might have.

*Id.* at 1201.

The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individ-

that Maryland's "Inmate Grievance Commission"<sup>21</sup> provided an impartial procedure comporting with all aspects of due process for the full review and disposition of inmate complaints and required the plaintiff to exhaust those remedies prior to entertaining his suit. In so doing, the court also recognized the extreme impact section 1983 actions have had on prison administrations and the court systems.

Judge Northrup discussed each of the Supreme Court's decisions concerning exhaustion as a requirement to federal jurisdiction<sup>22</sup> and found that those decisions did not preclude such a prerequisite review where the state remedies were adequate and viable. Unfortunately, the court of appeals reversed,<sup>23</sup> and the Supreme Court dis-

---

ual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone on Supreme Court Justices. Moreover—and this is at least as important—these overburdened judges and Justices, charged with so many other highly important functions, are less likely to give full and careful attention to each petition than officials whose special task it might be made to do so.

. . . It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk. The question is, would it not be better to substitute for the edifying symbol, and the illusion that it presents, the reality of actual, initial consideration by a non-judicial federal institution charged exclusively with the task of investigating and assessing prisoner complaints of the denial of federal constitutional rights.

*Id.* at 1206.

21. 41 MD. CODE ANN. § 204 F(d)(1)(Supp. 1976).

22. *McCray v. Burrell*, 367 F. Supp. 1191, 1196-98 (D. Md. 1973). In *Monroe v. Pape*, 365 U.S. 167, 183 (1961), the Court stated, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved." In *Damico v. California*, 389 U.S. 416 (1967), the Court refused to deny the plaintiffs (welfare recipients) their right to bring action in federal court because they failed to exhaust a state administrative remedy. In *McNeese v. Board of Education*, 373 U.S. 668 (1963), the Court found the administrative remedy inadequate but refused to require Negro school children to exhaust state court remedies under the authority of *Monroe v. Pape*. In *Houghton v. Shafer*, 392 U.S. 639 (1968), the Court reversed a decision of the district and appeals courts for Pennsylvania requiring a state prisoner to exhaust his resort to administrative remedies prior to entertaining his suit for return of various items of personal property. The Court stated that since the taking of these items of personal property was validly within the prison rules such a requirement would be a futile act, and that resort to administrative remedies was unnecessary under *Monroe*, *McNeese*, and *Damico*.

23. 516 F.2d 357 (4th Cir. 1975).



missed the grant of certiorari as improvident.<sup>24</sup> It is apparent that if exhaustion is to be required it must be by congressional mandate.

Another possible solution to the problem may be the use of the federal magistrate to make preliminary fact findings without requiring exhaustion. Although such a procedure was theoretically available and has been utilized in the past under authority of the Federal Magistrate's Act,<sup>25</sup> its practicality and efficacy has been seriously questioned in light of the Supreme Court's adherence to the view that the *federal judge* must personally hear evidence in a habeas corpus case under 28 U.S.C. § 2243.<sup>26</sup> The Court construed the Magistrates' Act to provide for a wide range of duties that could be detailed to a magistrate, but found that the act was only permissive where "not inconsistent with the Constitution and laws of the United States."<sup>27</sup> It was, then, at least unclear whether a magistrate could hear and determine or recommend findings in a section 1983 civil rights case since there did *not* appear specific language in 42 U.S.C. § 1983 or its jurisdictional counterpart, 28 U.S.C. § 1343, which would require the federal judge to hear the evidence personally. A magistrate could of course be appointed a "Special Master" but only under exceptional circumstances.<sup>28</sup>

This uncertainty may now, however, be eliminated with the re-enactment of section 636(b) of the Federal Magistrates' Act.<sup>29</sup> A federal judge may now appoint a federal magistrate to conduct fact finding hearings and make recommendations as to disposition of prisoner civil cases subject to a trial *de novo*. The report of the 1977 Judicial Conference recommending the legislation found that the requirement of a trial *de novo* and the ability of the magistrate to recommend disposition only would satisfy constitutional questions of delegation of judicial power since the article III<sup>30</sup> federal judge remains the ultimate determiner of fact. It is also felt that few

---

24. 426 U.S. 471 (1976).

25. 28 U.S.C. § 631 *et seq.* (1970).

26. *Wingo v. Wedding*, 418 U.S. 461, 472 (1974).

27. *Id.* at 470, *citing* 28 U.S.C. § 636(b) (1970).

28. FED. R. CIV. P. 53(b) (1975).

29. 28 U.S.C. § 636(b) (February 1, 1977).

30. U.S. CONST. art. III.

litigants will seek *de novo* trials. The role of the special master is also no longer limited by the provisions of Rule 53(b).<sup>31</sup>

Hopefully, the role of the federal magistrate will be utilized for fact finding dispositions. This procedure can greatly facilitate the airing of prisoner grievances in the absence of administrative hearing requirements without subjecting prison officials to a full federal trial with elaborate pre-trial orders and proceedings. Discovery may also be tailored to meet the needs of all concerned based upon the case at hand. Such a proceeding may also serve as a preliminary review of the potential need for further proceedings. Regardless of the extent to which the federal judge wishes to use the magistrate, this procedure can be a very flexible means to eliminate some of the problems caused by prisoner litigation.

I would hope that Congress will take a close look at section 1983 litigation and its impact on the federal courts, as well as the states' correctional systems, and take appropriate legislative action to require alternative means to air prisoner grievances. If, on the other hand, alternative means are not found and utilized, then it is apparent that the remedy created by 42 U.S.C. § 1983 has supplanted the problem.

---

31. FED. R. CIV. P. 53(b).



# UNIVERSITY OF RICHMOND LAW REVIEW

VOLUME 11

SUMMER 1977

NUMBER 4

## EDITORIAL BOARD

MARK S. GARDNER  
*Editor-in-Chief*

RONALD M. MAUPIN  
*Executive Editor*

FREDERICK R. KOZAK  
*Articles Editor*

HERSCAL P. WILLIAMS  
*Articles Editor*

BURTON F. DODD  
*Notes Editor*

JOHN E. ELY  
*Notes Editor*

LUCRETIA C. IRBY  
*Comments Editor*

CALVIN W. COLYER  
*Comments Editor*

JOHN B. RUSSELL, JR.  
*Managing Editor*

## STAFF

SCOTT D. ANDERSON  
THOMAS H. ARMSTRONG  
ROBERT B. BAUMGARTNER  
PATSY A. BICKERSTAFF  
THEODORE I. BRENNER  
GORDON M. COOLEY  
ELLIOTT H. DEJARNETTE  
VERA DUKE  
RANDOLPH C. DUVALL

DAVID D. ELSBERG  
NORMAN T. FOWLKES III  
WILLIAM C. GOODWIN  
JAMES E. GRAY  
CHARLES W. HAZELWOOD, JR.  
H. KEITH JARVIS  
JULIA KREBS-MARKRICH  
RONALD E. KUYKENDALL  
LINDA J. LONAS

GARY B. PATTERSON  
STEPHEN PAVLICK  
EVELYN GRAY SKALTSOUNIS  
THOMAS E. SNYDER  
DAN SUMMEY  
ROY M. TERRY, JR.  
WILLIAM W. TERRY III  
ERIC D. WHITESELL  
JOSEPH R. WINSTON

## BUSINESS STAFF

JAMES D. PHILLIPS  
*Assistant to Managing Editor*

FACULTY ADVISOR  
HARRY L. SNEAD, JR.

