MARYLAND LAW REVIEW
UNIVERSITY OF MARYLAND SCHOOL OF LAW
500 W. BALTIMORE ST.
BALTIMORE, MD. 21201

TELEPHONE:
528-7414
528-7218

Thank you

January 13, 1976

The Honorable William J. Brennan, Jr.
United States Supreme Court
Washington, D.C. 20543

Dear Justice Brennan:

Enclosed is a copy of the page proofs of Comment, The Maryland Inmate Grievance Commission or the Federal Courts? A Problem of Exhaustion, 35 MD. L. REV. 458 (1976), which will be published in the next issue of the Review. I hope that it will be of some assistance to you in your consideration of McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (en banc), cert. granted, 44 U.S.L.W. 3257 (U.S. Nov. 4, 1975 (No. 75-44).

Respectfully,

Cary M. Adams

Cary M. Adams
Editor-in-Chief

Comments

THE MARYLAND INMATE GRIEVANCE COMMISSION OR THE FEDERAL COURTS? A PROBLEM OF EXHAUSTION

Throughout the past decade federal courts have borne the burden of an enormous increase in the number of civil rights actions filed by state prisoners against their jailors challenging the conditions of their confinement.[1] In part due to the ready access to federal courts that is available to state prisoners[2] under the Civil Rights Act of 1871[3] and in part due to a recognition by federal judges that state prisoners enjoy a growing number of constitutional rights,[4] this increase has had a deleterious effect on

1. 1974 DIR. ADM. OFF. U.S. CTS., ANN. REP. 220–21. This report reveals that in fiscal 1956, 218 civil rights petitions were filed by state prisoners in United States District Courts. By 1974 the number had grown to 5,236, an increase of over two thousand percent. The increase from 1973 to 1974 was over twenty-five percent.

2. *See* Monroe v. Pape, 365 U.S. 167 (1961), discussed in the text accompanying notes 65–81 *supra*; Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486 (1969).

3. Act of April 20, 1871, ch. 22, 17 Stat. 13 (codified at 28 U.S.C. § 1343(3) (1970), & 42 U.S.C. § 1983 (1970)). Section 1983 provides:

> 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.

4. *See, e.g.*, Smith v. Bounds, Civil No. 74-2378 (4th Cir. Sept. 30, 1975) (state prisoners entitled to adequate legal library facilities for use in preparing *pro se* habeas corpus or civil rights actions, or an acceptable alternative); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971) (prisoners must be protected from assaults by other inmates and prison trustees and must be provided with adequate barracks); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (prisoners have an eighth amendment right to be free from corporal punishment, including whipping, as a means of discipline); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (prisoners are protected by eighth amendment from punishment in form of confinement in strip cells, in which inmates are placed without clothes or sanitary facilities and are exposed to cold, filth, and unusual punishment); Hirons v. Director, 351 F.2d 613 (4th Cir. 1965) (prisoner must be provided adequate medical and surgical treatment when necessary); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961) (prisoners must be allowed access to religious writings and may not be persecuted because of their beliefs); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) (prisoners must receive adequate notice of charges in a substantial disciplinary proceeding and must be guaranteed a relatively objective and impartial tribunal).

The federal courts' initial response to the civil rights complaints of prisoners concerning the administration of state prisons was to refuse to become involved in an area that was considered to be the sole prerogative of state officials. For example, in Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949), state prisoners complained

the operation of the courts. For example, the United States District Court for the District of Maryland has been inundated by "a mound of prisoner petitions the volume of which never seems to decrease, no matter how rapidly the pending cases are adjudicated."[5] Given this burden and the state's desire to be free from federal interference, it was inevitable that efforts would be taken to alter the procedures by which prisoners' grievances might be resolved.[6]

The Maryland General Assembly took a significant step in this alteration in 1971 by enacting section 204F of article 41 of the Maryland Code which creates the Maryland Inmate Grievance Commission.[7] Established as a separate agency within the Department of Public Safety and Correctional Services,[8] the Commission is empowered to work within the organization of the correctional system to remedy affronts to those rights which prisoners are entitled to enjoy.[9] It was hoped by the legislature that the Commission would reduce the volume of prisoner petitions to the federal district court by providing a simpler, more efficient administrative forum for resolving inmate grievances.[10] The statute, as interpreted by the Mary-

about prison conditions including beatings by guards. The court considered the allegations concerning the beatings to state a legitimate cause of action under section 1983, but refused to consider the other allegations concerning prison conditions in general. It stated that it was "not prepared to establish itself as a 'co-administrator' of State prisons along with the duly appoined State officials." *Id.* at 999. Other cases following this approach are compiled in Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508 n.12 (1963).

Another example of how inmates have been encouraged to litigate appears from Johnson v. Avery, 393 U.S. 483 (1969). There the Court held that states could not prohibit inmates from aiding other inmates in the preparation of legal documents unless the states themselves provided reasonable legal services. *See also* Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343 (1968); Rothman, *Decarcerating Prisoners and Patients*, 1 CIV. LIB. REV. 8, 12–14 (1973); Millemann, *Prison Disciplinary Hearings & Procedural Due Process — The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971).

5. McCray v. Burrell, 367 F. Supp. 1191, 1193 (D. Md. 1973). In fiscal 1973, 118 civil rights prisoner petitions were filed in the District Court for the District of Maryland, a number constituting more than ten percent of all civil filings. 1973 DIR. ADM. OFF. U.S. CTS., ANN. REP. 331.

6. For a description and analysis of the various developments in the area of procedures for resolution of prisoner grievances see CENTER FOR CORRECTIONAL JUSTICE, TOWARD A GREATER MEASURE OF JUSTICE: GRIEVANCE MECHANISMS IN CORRECTIONAL INSTITUTIONS (1975).

7. MD. ANN. CODE art. 41, § 204F (Supp. 1975).

8. MD. ANN. CODE art. 41, § 204F(a) (Supp. 1975). The Commission is also independent of the Division of Corrections, the agency immediately responsible for the daily operation of the prisons which is also within the Department. MD. ANN. CODE art. 41, § 204D (1971).

9. For a summary of these rights see note 4 *supra*.

10. The Attorney General suggested that two reasons for creating the Commission were the overcrowded federal court dockets and Mr. Chief Justice Burger's admonishment to the states that inmate grievance procedures were needed to lessen this federal caseload. 59 MD. ATT'Y GEN. REP. & OP. 438–39 (1974).

land Court of Appeals, requires exhaustion of this remedy before a prisoner may file suit in a state court.[11] Under prevailing federal law, however, prisoners were not required to exhaust state administrative remedies before filing civil rights complaints in the district courts.[12] A conflict thus arose between the efforts of the Maryland General Assembly and the federal doctrine of non-exhaustion.

In 1972 the Fourth Circuit took note of the nascent Commission, suggesting that when the Commission should become fully operational, the doctrine of non-exhaustion would be reexamined.[13] In October 1973 the United States District Court for the District of Maryland undertook this reexamination. It announced in *McCray v. Burrell*:[14]

> [t]he time has come to take a careful and critical look at the continued validity of the sweeping interpretation which caused § 1983 to be read as a mandate to federal courts and forces them to accept all but the most patently ridiculous complaints from state prisoners, no matter how hard or how successfully the state has tried to set its own prison house in order.[15]

This Comment will examine the Maryland Inmate Grievance Commission and the *McCray* litigation presently before the Supreme Court, focusing on whether state prisoners should be required to exhaust adequate state administrative remedies before bringing civil rights actions in the federal courts.[16] While an exhaustion requirement appears desirable in theory, the concept of "adequacy" must be defined before such a requirement can be implemented. A proposed test for adequacy is therefore formulated, the Maryland Inmate Grievance Commission is analyzed under it, and recommendations for improvements are made.

THE COMMISSION

In 1971 Maryland became the first state to provide a quasi-judicial proceeding for hearing inmate grievances.[17] The Maryland General Assembly, encouraged by Chief Justice Burger,[18] the Governor's Office, and the

---

11. State v. McCray, 267 Md. 111, 146, 297 A.2d 265, 283–84 (1972). *See* MD. ANN. CODE art. 41, § 204F(*l*) (Supp. 1975), which provides: "No court shall be required to entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies as provided in this section. . . ."

12. *See* text accompanying notes 65–81 *infra*.

13. Hayes v. Secretary, 455 F.2d 798 (4th Cir. 1972).

14. 367 F. Supp. 1191, 1194 (D. Md. 1973), *rev'd*, 516 F.2d 357 (4th Cir. 1975) (en banc), *cert. granted*, 44 U.S.L.W. 3257 (U.S. Nov. 4, 1975) (No. 75–44).

15. *Id.* at 1194.

16. The issue of cruel and unusual punishment with which the *McCray* court dealt is not discussed herein.

17. Tibbles, *Ombudsmen for American Prison*, 48 N.D.L. REV. 383, 418 (1972).

18. Address by Chief Justice Burger to the National Association of Attorneys General, in Washington, D.C., Feb. 6, 1970, *quoted in* State v. McCray,, 267 Md.

Attorney General of Maryland,[19] established an Inmate Grievance Commission designed to hear and resolve grievances of persons confined in state correctional institutions within the Division of Correction without the necessity of resorting to formal litigation. The Commission consists of five members appointed by the Governor with the advice of the Secretary of the Department of Public Safety and Correctional Services.[20] Two or more members of the Commission must have knowledge and experience in one or more fields under the jurisdiction of the Department; in addition, two or more Commission members must be attorneys.[21] Each member of the Commission serves a four-year term on a part-time basis and is compensated at a per diem rate.[22] The Commission is administered by an Executive Director, a salaried employee, who is appointed for a four-year term by the Secretary with the advice of the Commission and the approval of the Governor.[23] He is provided with secretarial, investigative, and clerical help by the Secretary.[24]

Any person who is confined to an institution within the Division of Correction, is otherwise in the custody of the Commissioner of Correction, or is confined to Patuxent Institution, may file a grievance with the Commission[25] against officials or employees of the Division of Correction or of Patuxent.[26] If the instituiton itself has a fair and reasonable procedure

---

111, 297 A.2d 265 (1972). *See generally* Burger, "*No Man is an Island*," 56 A.B.A.J. 325 (1970).

19. 59 MD. ATT'Y GEN. REP. & OP. 438 (1974).

20. MD. ANN. CODE art. 41, § 204F(a) (Supp. 1975). The current membership of the Commission includes one practicing attorney, a retired Director of the Federal Bureau of Prisons (also an attorney), a retired insurance executive who is also an industrial relations consultant to the Bureau of Prisons, a former probation officer and guard at the Patuxent Institution, and the retired director of the state's Division of Parole and Probation. 367 F. Supp. at 1202.

21. MD. ANN. CODE art. 41, § 204F(a) (Supp. 1975).

22. *Id.*

23. *Id.* at § 204F(b).

24. MD. ANN. CODE art. 41, § 204F(b) (Supp. 1975).

25. *Id.* at § 204F(d). This group does not include those confined in local jails or those on parole or probation because the local jails and the Division of Parole and Probation are not organized under the Division of Correction in Maryland. MD. ANN. CODE art. 25A, § 5(C) (Supp. 1975); *Id.* at art. 41, § 204D(b) (1971).

26. *Id.* at art. 41, § 204F(d) (Supp. 1975). The Attorney General has interpreted this broad authorization to include grievances in the following categories:

(1) Complaints in which the inmate alleges a deprivation of his constitutional rights. Examples of these actions are, but not limited to, objections to decisions of the adjustment (disciplinary) teams (due process violations), conditions of confinement, double jeopardy, mail censorship.

(2) Complaints in which the inmate alleges a misdeed by officials of the Division of Correction or Patuxent Institution which does not amount to a deprivation of his constitutional rights but is protected by federal or state laws. Examples of these would be alleged torts by correctional officers, the failure of the institution to deliver packages, the failure to credit time spent in other institutions,

that is appropriate for resolution of the inmate's particular grievance, the Commission may require that such procedure be exhausted prior to submission of the grievance.[27] It is the policy of the Commission to refrain from hearing any matter currently under the jurisdiction of a court of law.[28] Grievances are presented to the Commission in letter form.[29] Upon receipt of the grievance, a preliminary review of the complaint is made.[30] The complaint may be dismissed by a Commissioner or, as is usually the

---

the failure of the classification teams to approve transfers to other institutions, lost or stolen property, and other administrative actions.

(3) Complaints in which the inmate alleges an act of correctional officials or employees which do not amount to a deprivation of constitutional or legal rights but which might require administrative relief or corrective action. An example of this would be the denial by the warden to recognize a prisoner organization within the institution.

59 MD. ATT'Y GEN. REP. & OP. at 442–43. The types of grievances received are indicated in the following chart prepared by Mr. Robert H. Wolfe, Legal Assistant to the Commission. It includes all grievances received during the year ending May 31, 1975:

Type of Complaint Received	*Number*	*Percent*
Adjustment Team Appeals	299	36
Classification Actions	197	24
Property	112	13
Medical	47	6
Clerical Error	40	5
Non-physical Abuse	32	4
Living Conditions	22	2
Judicial	21	2
Parole	13	1
Commissary	9	1
Visitors	7	1
General Inquiries	6	1
Physical Abuse	13	1
Mail	5	1
Legal Assistance	4	.5
Religious	4	.5
Reading Materials	3	.5
Non-penal Institutionalization	3	.5
TOTALS	837	100

27. MD. ANN. CODE art. 41, § 204F(d) (Supp. 1975). For example, the Commission has required that where complaints arise out of a disciplinary action within the institution, the inmate must first follow all institutional adjustment procedures prior to submission of the grievance. 12 Md. Agency Rules & Reg., Inmate Grievance Comm'n, R. 12.07.00.01 (1971).

28. Interview with Mr. Robert H. Wolfe, Legal Assistant to the Maryland Inmate Grievance Commission, in Baltimore, Sept. 26, 1975.

29. 12 Md. Agency Rules & Reg., Inmate Grievance Comm'n, R. 12.07.00.02 (1971).

30. MD. ANN. CODE art. 41, § 204F(e) (Supp. 1975). It is at this point that the grievance may be informally resolved. Over half of the complaints received by the Commission have been disposed of administratively during the initial review. MD. INMATE GRIEVANCE COMM'N, STATISTICAL SUMMARY (Aug. 1975).

case, the Director, without affording the inmate a hearing if, on its face, the complaint is found to be totally lacking in merit.[31] If the complaint is dismissed at this point, the inmate must be notified within sixty days following the submission date of the grievance and this is considered the final decision of the Secretary for purposes of judicial review.[32] If the Director finds obvious merit to the grievance during the initial investigation, he is often able to remedy the situation immediately merely by calling official attention to the problem.[33]

Should the initial investigation of the facts not result in an administrative disposition, the inmate is afforded a hearing on the matter[34] which takes place at the institution where the inmate is confined.[35] The inmate, at his own expense, may be represented by an attorney[36] or by a fellow inmate.[37] He may also call a reasonable number of witnesses and may question any witness who testifies.[38] Prior to the hearing, the Commission may subpoena witnesses and documents[39] and it may require that testimony be given under oath.[40] The Commission must keep a record of the complaints and their dispositions.[41] By use of a portable tape recorder, the testimony before the Commission is preserved. At least three members of the Commission must be present at the hearing and a decision must be by a majority of those sitting.[42]

On the basis of the hearing, the Commission may find the complaint lacking in merit and issue an order dismissing it or it may find the complaint meritorious in whole or in part. In the latter instance, the Commission must then forward its order to the Secretary. Within fifteen days, the Secretary must affirm, reverse, or modify the order.[43] The Maryland Attorney General has advised that the scope of the Secretary's review is similar to that of a court of appeals with respect to the decision of a trial court.[44] It should be noted that it is only the order of the Secretary which will actually be enforced by the prisons; an order of the Commission is

---

31. MD. ANN. CODE art. 41, § 204F(e) (Supp. 1975).
32. *Id.*
33. Interview with Mr. Dene Lusby, Executive Director of the Maryland Inmate Grievance Commission, in Cockeysville, Sept. 26, 1975. According to Mr. Lusby, roughly thirty-five to forty percent of all administrative dispositions favor the inmate.
34. MD. ANN. CODE art. 41, § 204F(f) (Supp. 1975).
35. *Id.* at § 204F(j).
36. *Id.* at § 204F(h).
37. Interview with Mr. Robert H. Wolfe, Legal Assistant to the Maryland Inmate Grievance Commission, in Baltimore, Sept. 26, 1975. *See also* Johnson v. Avery, 393 U.S. 483 (1969).
38. *Id.*
39. *Id.* at § 204F(g).
40. *Id.*
41. *Id.* at § 204F(i).
42. *Id.* at § 204F(f).
43. *Id.*
44. *See* note 154 *infra.*

final only if it dismisses a complaint. If the inmate is dissatisfied with the disposition, he is entitled to judicial review in the appropriate state court.[45] The statute limits the scope of judicial review to a review of the Commission's record and the Secretary's order to determine if there occurred any violation of constitutional requirements or of any right protected by federal or state laws.[46] As interpreted by the Maryland Court of Appeals, this statutory scheme was intended by the legislature to be the exclusive method by which the state would resolve inmate grievances; therefore, inmates may not seek direct judicial relief from state courts.[47]

Recent statistics indicate that the Commission received approximately 2700 complaints in its first four years, of which more than half were disposed of administratively.[48] Of the 1065 orders issued as of August 1975, three hundred found the inmate grievance meritorious.[49]

Predictably, reaction to the Commission has been mixed. One early evaluation suggested that the Commission's history to that point was marked by unsteady and dubious achievement;[50] however, a more recent

---

45. MD. ANN. CODE art. 41, § 204F(*l*) (Supp. 1975).

46. *Id.* The scope of review under the Maryland Administrative Procedure Act, which is applicable to all state agencies unless expressly excluded, is much broader. MD. ANN. CODE art. 41, § 244 (Supp. 1975), § 255 (1971). The Administrative Procedure Act provides in part:

> [A] court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, or conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority of jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court; or
>
> (7) Unsupported by the entire record, as submitted by the agency and including de novo evidence taken in open court; or
>
> (8) Arbitrary or capricious.

Id. at § 255(g). *See generally* Tomlinson, *Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland*, 35 MD. L. REV. .... (1975).

47. McCray v. State, 267 Md. 111, 297 A.2d 265 (1972).

48. MD. INMATE GRIEVANCE COMM'N, STATISTICAL SUMMARY (Aug., 1975).

49. *Id.*

50. In Keating & Singer, *Prisoner Grievance Mechanisms*, 19 CRIME & DELINQUENCY 367, 375 (1973), the authors state:

> The vast majority of the cases handled by the Commission in its first eighteen months of existence have concerned appeals from the decisions of various prison disciplinary boards. The Commission has not addressed itself to pervasive, systemic problems. In June 1972, its first executive director resigned in frustration over what he considered the unwillingness of Maryland correctional officials to enforce and implement the Commission's "orders." During a series of summer riots in Maryland institutions in 1972, there was no mention of the grievance

report by another outside source indicated that the Commission had in fact accomplished several significant objectives, including acceptance by both prisoners and jailers, resolution of numerous complaints, and an exposure of unsatisfactory conditions and practices to official scrutiny.[51]

EXHAUSTION OF ADEQUATE STATE ADMINISTRATIVE REMEDIES BY STATE PRISONERS AS PREREQUISITE TO FEDERAL JUDICIAL RELIEF UNDER SECTION 1983

McCray v. Burrell[52]

In *McCray* an inmate at the Maryland Penitentiary filed two *pro se* complaints invoking the jurisdiction of the United States District Court for the District of Maryland pursuant to 28 U.S.C. § 1343(3)[53] and seeking relief under 42 U.S.C. § 1983[54] for deprivations of liberty without due

---

commission by either inmates or administration; even a charge of inadequacy might have indicated that both sides at least recognized the Commission's potential for resolving institutional problems.

51. In RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, ABA COMM'N ON CORRECTIONAL FACILITIES & SERVICES, MARYLAND INMATE GRIEVANCE COMM'N 7, 11 (*Ombudsman/Grievance Mechanism Profiles* — No. 3) (1974) (footnote omitted), it is stated:

> The Commission seems to have gained acceptance by correctional administrators throughout the state. It has recognized and reinforced areas of proper correctional practice and has identified numerous problem areas in the operation of the state's correctional system, assisting in their resolution. It has also become a "safety valve," in the eyes of some correctional personnel, for relieving tensions within institutions.
>
> The Inmate Grievance Commission was originally viewed by some as the means through which major change could be stimulated within Maryland's Correctional system. While this goal does not yet appear to have been achieved, the Commission has (i) validated inmate grievances in a significant number of cases, (ii) had its recommendations accepted by correctional authorities in the great majority of cases, (iii) expressed public and official concern for the care and treatment of those incarcerated and (iv) emphasized the need for correctional services to be administered fairly in a humane manner, and in harmony with statutory and constitutional guarantees.

52. 516 F.2d 357 (4th Cir. 1975) (en banc), *cert. granted*, 44 U.S.L.W. 3257 (U.S. Nov. 4, 1975) (No. 75-44). McCray's two original complaints, McCray v. Burrell, and McCray v. Smith, were later consolidated by the district court and heard jointly. 367 F. Supp. 1191, 1193 (D. Md. 1973). In both cases the defendants were prison officials.

53. 28 U.S.C. § 1343 (1970) provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

54. The text of this statute is set out in note 3 *supra*.

process of law and for imposition of cruel and unusual punishment. McCray complained that on two separate occasions he had been placed naked in an isolation cell for "mental observation."[55] On both occasions, he was confined for forty-eight hours under primitive conditions without being seen by any individual capable of performing the purported "mental observation."[56] For these alleged constitutional violations, he sought injunctive relief and damages.[57] The district court dismissed his complaints with prejudice, holding that Maryland state prisoners must exhaust the adequate state administrative remedy provided by the Commission before seeking to invoke the jurisdiction of the federal courts for actions brought under section 1983.[58] Looking to the merits of the claim, the court held that no constitutional violations had occurred in the incidents alleged,[59] and that, in any event, the defendants had acted in good faith reliance on standard operating procedures and were therefore immune from liability in damages.[60] On appeal, however, the Fourth Circuit reversed, holding that exhaustion of administrative remedies is not required in section 1983 cases.[61] On the merits the court held that McCray's constitutional right not to be subjected to cruel and unusual punishment had been violated in both instances of isolated confinement;[62] the case was remanded to the district court for additional findings on the issue of liability for damages.[63] Finally, the court found it unnecessary to rule on the efficacy of the state administrative remedy, although it did note several of McCray's arguments against the adequacy of the Commission procedures.[64]

In *McCray* the Fourth Circuit presented a cogent analysis[65] of the important cases dealing with exhaustion of remedies which can be summarized as follows. Exhaustion of state and federal administrative remedies and state judicial remedies is often held to be a prerequisite to federal

---

55. 516 F.2d at 366.
56. *Id.* at 365–67.
57. *Id.* at 360.
58. 367 F. Supp. at 1210.
59. *Id.* at 1216–17.
60. *Id.* at 1217.
61. 516 F.2d at 365. McCray's appeal was consolidated with two other cases involving Maryland state prisoners' 1983 actions which had been dismissed for failure to exhaust the remedy provided by the Commission. *Id.* at 360. These cases were remanded to the district court for hearings on the merits. *Id.* at 365.
62. 516 F.2d at 367–69.
63. The court of appeals remanded the case to the district court because that court had too hastily concluded that the defendants were immune without requiring them to sustain their burden of proof on this issue. 516 F.2d at 370. Additionally, subsequent to the district court's opinion and the preparation of the opinion by the court of appeals, as noted by Judge Winter in an addendum, *id.* at 371, the Supreme Court decided Wood v. Strickland, 420 U.S. 308 (1975), which further defined conditions under which immunity from damages would be granted to state officials in section 1983 suits. *Id.* at 321–22.
64. *See* text accompanying notes 65–81 *infra*.
65. 516 F.2d at 361–65.

judicial relief.[66] In *Monroe v. Pape*,[67] however, the Supreme Court held that victims of illegal searches conducted by state police officers were not required to exhaust state judicial remedies before seeking federal relief under section 1983. "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 first be sought and refused before the federal one is invoked."[68] Although earlier cases had held that state *judicial* remedies need not be exhausted in cases arising under section 1983,[69] the *Monroe* decision was based on an analysis of the statute and was made without reference to those cases. The broad language of the Court, quoted above, did not distinguish between judicial and administrative remedies, nor did it distinguish between adequate and inadequate remedies. It was therefore not surprising that in *McNeese v. Board of Education*,[70] where the Supreme Court was presented with the issue whether to require exhaustion of *administrative* remedies in a civil rights action seeking school desegregation, the broad language of *Monroe* was held to control and no exhaustion was required. An alternative holding in *McNeese*, that exhaustion of the particular administrative remedy was unnecessary in any event because that remedy was inadequate, was potentially important because the result in *McNeese* arguably did not foreclose the possibility that exhaustion would be required when a section 1983 plaintiff's administrative remedy was found to be adequate. *Damico v. California*,[71] however, settled this point, at least in the area of welfare litigation. A three-judge district court required exhaustion of what it found to be an adequate state administrative remedy; the Supreme Court reversed, citing *McNeese* and *Monroe* for the rule that no exhaustion is required in section 1983 actions. In *Houghton v. Shafer*[72] the Court applied its non-exhaustion doctrine to a state prisoner's civil rights action. There the Court reversed a dismissal for failure to exhaust administrative remedies on the dual grounds that the available remedy was inadequate and that, under *McNeese* and *Monroe*, exhaustion was unnecessary in section 1983 cases. *Wilwording v. Swenson*[73] strengthened the notion that the *Monroe* language is applicable in the context of a state prisoner

66. *Id.* at 361.

67. 365 U.S. 167 (1961).

68. *Id.* at 183.

69. *E.g.*, Lane v. Wilson, 307 U.S. 268 (1939). In *Lane*, the Court reaffirmed the distinction between administrative and judicial remedies first drawn in Bacon v. Rutland R.R., 232 U.S. 134 (1914), and held that exhaustion of judicial as opposed to administrative remedies is not required in cases brought under the Civil Rights Act of 1871. The justification for this distinction is "the potential res judicata and collateral estoppel effects of state court judgments." Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 551 n.68 (1974).

70. 373 U.S. 668 (1963).

71. 389 U.S. 416 (1967) (per curiam).

72. 392 U.S. 639 (1968) (per curiam).

73. 404 U.S. 249 (1971) (per curiam).

civil rights action. In *Wilwording* the prisoner's petition appeared to be a request for a writ of habeas corpus; however, the Court treated it as a civil rights action since it challenged the conditions rather than the fact or duration of confinement. Exhaustion of remedies is required by statute in federal habeas corpus actions;[74] but since this was a section 1983 action, that statutory requirement was inapplicable. The Court held that the available remedy was inadequate. It went further, however, citing *Houghton* for the principle that, as far as exhaustion is concerned, state prisoners are on a par with other civil rights plaintiffs, and therefore exhaustion is unnecessary in any event.[75]

On the basis of these and similar cases,[76] the Fourth Circuit considered the rule settled that exhaustion is unnecessary in actions brought under section 1983. It recognized that the district court in *McCray*, following another lower court decision,[77] had concluded that no case had ever presented the Supreme Court with a state prisoner's civil rights action where an adequate administrative remedy had been available.[78] While the lower court considered this an invitation to analyze the various policies involved in requiring exhaustion, the Fourth Circuit looked first for some indication that the Supreme Court would ever limit the application of the broad *Monroe* language and treat state prisoners with adequate remedies differently from other civil rights plaintiffs. A dictum in *Gibson v. Berryhill*[79] was the closest indication cited to the court by the appellees. The Supreme Court in *Gibson* stated that it was an open question whether exhaustion of a state administrative remedy might be required in a section

---

74. 28 U.S.C. § 2254(b) (1970).

75. Professor Millemann has suggested that the federal courts owe a particular duty to hear the complaints of state prison inmates. Because prisoners retain certain liberties upon incarceration, yet are in many respects totally dependent upon the state for the necessities of life, are generally disenfranchised, and have traditionally been neglected by state governments and abused by jailors, it is arguable that the need for access to a federal forum is acute. *See* Millemann, *Protected Inmate Liberties: A Case for Judicial Responsibility*, 53 ORE. L. REV. 29 (1973).

76. Carter v. Stanton, 405 U.S. 669 (1972) (per curiam), held that exhaustion was not required in welfare cases brought under section 1983. In Metcalf v. Swank, 406 U.S. 914 (1972), *vacating judgment and remanding mem.*, 444 F.2d 1353 (1971), an affirmance by the court of appeals of a dismissal for failure to exhaust *adequate* state administrative remedies was vacated and remanded for reconsideration in light of *Carter*. *Metcalf* was also a welfare case. Steffel v. Thompson, 415 U.S. 452 (1974), in which an individual sought a declaration that a state criminal statute was unconstitutional, treated the law as settled that exhaustion is not required in section 1983 cases. Preiser v. Rodriguez, 411 U.S. 475 (1973), was treated as apparently having given the Court the opportunity to impose an exhaustion requirement in section 1983 cases, which it declined to do.

77. Kochie v. Norton, 343 F. Supp. 956 (D. Conn. 1972).

78. In Morgan v. La Vallee, No. 75-2044 (2d Cir., Oct. 14, 1975), the Second Circuit also suggests that where there are adequate state administrative remedies available to state prisoners, exhaustion could be required by a federal court before hearing a section 1983 claim.

79. 411 U.S. 564 (1973).

1983 action if the plaintiffs would suffer no deprivation of protected rights until the completion of the administrative proceeding. The Fourth Circuit found this to be a question of ripeness and an insufficient basis to justify "depart[ing] from the apparent scope and the literal language of the other Supreme Court cases."[80] It therefore declined to analyze the policies surrounding the issue whether to require exhaustion of adequate state administrative remedies by state prisoners as a prerequisite to federal judicial relief under section 1983.[81]

Another line of Supreme Court cases, originating with *Younger v. Harris*,[82] suggests a different approach to the analysis of whether to require exhaustion. In *Huffman v. Pursue, Ltd.*,[83] one of the most recent in the *Younger* line of cases, a movie theatre was ordered closed as a result of the decision in a state judicial action brought by a county prosecutor under a state public nuisance statute. Rather than appeal the state court judgment, the theatre owner chose to initiate a section 1983 action in federal court seeking injunctive and declaratory relief on the theory that the statute was unconstitutional under the first and fourteenth amendments. The principal issue presented to the Supreme Court was whether the doctrine of *Younger v. Harris* applied to such a quasi-criminal state judicial proceeding. *Younger* held that absent extraordinary circumstances a federal court must dismiss when a defendant in a state criminal prosecution seeks federal relief under section 1983 to enjoin the state court proceedings on the grounds that the statute under which the prosecution is brought is unconstitutional.[84] Despite the fact that *Younger* involved a pending state criminal prosecution and that part of the rationale of that case was the ancient principle that equity will not enjoin a criminal trial,[85] the *Huffman* Court required dismissal in the case of a civil, albeit quasi-criminal, state proceeding.[86] In so doing the Court gave even greater weight to considerations of comity and federalism than it had previously. Furthermore, the *Huffman* Court recognized that it was forcing the section 1983 plaintiff to exhaust his state appellate remedies.[87] In earlier cases it was the state-initiated trial which prompted the dismissal. Because the friction that federal interference would create by declaring unconstitutional a state statute after the section 1983 plaintiff had lost in state court is less than that which would result from interruption of the trial itself, *Huffman* in a second respect represents an unprecedented degree of defer-

80. 516 F.2d at 364.
81. *Id.* at 365.
82. 401 U.S. 37 (1971).
83. 420 U.S. 592 (1975).
84. *See* Doran v. Salem Inn, Inc., 422 U.S. ..... (1975); Hicks v. Miranda, 422 U.S. ....., ... (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971); Dombrowski v. Pfister, 380 U.S. 479 (1965).
85. *See Younger*, 401 U.S. at 43–45.
86. 420 U.S. at 607–13.
87. 420 U.S. 609–10 n.21.

ence to state interests. A dissenting opinion in *Huffman* bemoans the apparent encroachment this holding works on the non-exhaustion rule of *Monroe* and its progeny,[88] and a dissent in *McCray* reads *Huffman* to illustrate that the non-exhaustion rule is no longer all-encompassing.[89]

The *Younger*-type cases do in fact involve section 1983 actions which federal courts refuse to hear in deference to state proceedings which raise the same federal constitutional issues and which the federal plaintiff is forced to exhaust before reaching a federal forum. These cases can be distinguished as a class from other section 1983 cases in that, in the *Younger*-type cases, the state has initiated the state proceedings, and the proceedings themselves, either criminal or quasi-criminal, are of high interest to the state. Federal courts consider interference in such cases to create so serious and direct a confrontation between the state and national governments as to outweigh at least temporarily the responsibility of the federal courts to adjudicate issues of federal constitutional law.[90] The fact that the Court in these cases weighs its duty to uphold individual constitutional rights against its duty to defer to legitimate state interests suggests that such a balancing should underlie all section 1983 cases.[91] Cases such as *Monroe* and *McNeese* can then be reconciled with this theory as cases in which the state interests were not high enough to justify federal deference to them. If this approach is accepted as valid, then the *McCray* litigation presents the Supreme Court with a possibly unique set of competing interests to weigh. Riding on the outcome of the *McCray* case will be the

88. 420 U.S. at 617-18 (dissenting opinion).

89. 516 F.2d at 376 (dissenting opinion).

90. Although not a case involving criminal or quasi-criminal proceedings traditional in *Younger*-type cases, Gibson v. Berryhill, 411 U.S. 564 (1973), illustrates this balancing in light of considerations of comity and federalism. The Alabama Board of Optometry began license revocation procedures against a group of non-independent optometrists on the theory that state law only allowed licensing of independents. Since the Board was made up exclusively of independent practitioners and since the independents stood to benefit economically from the elimination of the non-independents from the competitive market, the non-independents brought a section 1983 action in the federal court. They sought to enjoin the license revocation procedure on the theory that the tribunal was biased and consequently it was a denial of due process to be forced to defend themselves before the Board. The court noted the general rule that exhaustion is required before a federal court will hear a case; however, it found this case to be within *McNeese*, which held that exhaustion of state administrative remedies was not required where the case was brought under section 1983. Having thus recognized the duty of the federal courts to enforce individual constitutional rights against the state, the Court then considered the applicability of the *Younger* doctrine. In effect, the Court was balancing its duty to the individual, as represented by *Monroe* and *McNeese*, against its duty to respect the interests of the state as represented by *Younger*. (The *Gibson* Court held that the allegation of bias made abstention initially inappropriate since *Younger* assumed a competent, unbiased state tribunal to which the federal court must defer. The Court thus found it necessary to determine whether the Board was biased. Because such a determination amounted to a determination on the merits of the section 1983 claim, abstention was inappropriate altogether.)

91. *See* Comment, *Federal Equitable Restraint: A* Younger *Analysis in New Settings*, 35 MD. L. REV. ____, ____ (1975).

manner in which thousands of state prisoner complaints will be resolved in the future. In addition, should the Court require exhaustion of the remedy provided by the Maryland Inmate Grievance Commission, it is likely that other states would adopt similar procedures for their own prisons. Whatever the decision, it would seem preferable for the Supreme Court actually to weigh the particular interests involved, rather than to restrict itself to an analysis of past cases in the manner chosen by the Fourth Circuit.

Policy Considerations

The traditional justification for the non-exhaustion rule has been that the best means of insuring immediate protection of federal rights is by circumventing all state remedies in favor of immediate federal adjudication.[92] This notion is founded on the assumption that state courts and agencies are unable and unwilling to protect federal rights.[93] In truth, this traditional justification is only warranted where state administrative or judicial remedies have not in fact been able to protect federal rights.[94] Where the state has made a good faith effort to provide prompt and effective relief for prisoners alleging deprivations of federal rights, and where the state has in fact provided immediate protection of federal rights, the policy considerations supporting a non-exhaustion rule become less than compelling. Even if an exhaustion requirement were to be imposed on state prisoners where administrative remedies were adequate, state prisoners would not be deprived of a federal forum; their access to the federal courts would only be postponed.

An important consideration in favor of imposing an exhaustion requirement with respect to state prisoner petitions is the current burden on the federal courts.[95] When the federal courts serve as the initial forum for these disputes, an enormous amount of time is necessary for the disposition of the claims. As the district court in *McCray* suggested, due to the extended evidentiary hearings required in prisoners' rights cases, one prisoner may occupy a substantial percentage of a judge's time.[96]

A second consideration is the greater efficiency that results if an administrative agency initially handles these complaints.[97] Due to its

---

92. *See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1356–61 (1970).

93. Monroe v. Pape, 365 U.S. at 172–83.

94. Such would be the case where, for example, there has been a history of invidious racial discrimination by means of institutionalized racism.

95. *See* note 1 *supra*. For a summary of considerations in favor of exhaustion see Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206–09 (1968).

96. 367 F. Supp. at 1195. For example, plaintiff McCray filed thirty-seven civil rights suits in the district court from 1970 to 1973. *Id.* at 1217–18.

97. *See* McKart v. U.S., 395 U.S. 185, 193–94 (1969).

general familiarity with prisoners and prison procedures, the agency is able to resolve many grievances informally without the need for extensive proceedings.[98] If substantial proceedings are necessary, the agency provides a permanent record which will be helpful should the prisoner decide to pursue his complaint in the courts. At first blush, such a record may appear prejudicial to the inmate if used by the federal court. Two considerations, however, act to dispel this tinge of prejudice. First, federal courts apparently are not bound by the findings of state agencies;[99] second, many of these *pro se* petitions are handwritten[100] by semi-literate prisoners, so that the existence of a legible record is more likely to operate in favor of the prisoner. Prisoners' claims may well receive more knowledgeable consideration in agency proceedings because state administrators possess greater expertise in the area of prison administration than do federal courts. In-house administrative hearings avoid the expense and security risk of transporting prisoners to the federal courthouse. Finally, orders issued by state agencies will probably be more easily enforceable than federal injunctions because the agency works in close proximity with prison administrators and is in a better position to monitor the execution of its orders.

A third consideration is the state's interest in managing its own prisons. Notions of federal-state comity, so important in many areas of federal jurisdiction,[101] are in no way served by the non-exhaustion rule. Although the federal courts are justified in placing the constitutional rights of state prisoners above the interests of the state when the two cannot be adequately reconciled, they are not justified in ignoring the state's interest when deference to the state can be accomplished without sacrificing individual constitutional rights. Given the finding of the district court in *McCray* that the Maryland Inmate Grievance Commission is an adequate state remedy, the idea of federalism requires an attempt to reconcile the interest of the state in having this remedy used by its prisoners with the interests of the inmates themselves. An obvious means of accomplishing this reconciliation is to require state prisoners to exhaust state administrative remedies if the remedies adequately protect individual constitutional rights. With such powerful considerations of policy recommending exhaustion, it seems only a matter of time before such a requirement is imposed.

---

98. *See* text accompanying notes 30–49 *supra*.

99. *See* Comment, *Exhaustion of State Administrative Remedies In Section 1983 Cases*, 41 U. CHI. L. REV. 537, 551 (1974).

100. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, LAW & SOC. Q. 557, 566 (1973).

101. Three-judge courts, for example, as required under 28 U.S.C. § 2281 (1970), give effect to notions of comity by providing a more august tribunal and a direct appeal to the Supreme Court under 28 U.S.C. § 1253 (1970) whenever a plaintiff seeks to enjoin a state officer from enforcing a state statute on the grounds that the statute is unconstitutional.

ADEQUACY

A definition

Essential to a rule requiring exhaustion of adequate state remedies is a definition of "adequacy." The Supreme Court, in *Gibson*, listed several factors which have been relied upon by federal courts in judging state administrative remedies to be inadequate.[102] The Court suggested that administrative remedies were inadequate where the agency was responsible for unreasonable delay,[103] where it was doubtful that the agency possessed the power to grant effective relief,[104] or where the administrative body was biased and thus had prejudged the issue before it.[105] Each of the examples listed by the Court arose in a context different in a basic way from the context here relevant. Outside the purview of section 1983 there is a general rule that exhaustion of administrative remedies is a prerequisite to federal relief.[106] The examples enumerated by the Court in *Gibson* were cases in which some fault of the agency was raised as an excuse for not following the general rule. In section 1983 cases, however, the rule is that exhaustion is unnecessary.[107] This Comment has suggested that an exception should be recognized in the case of state prisoners where an administrative remedy is shown to be adequate.[108] Such an affirmative showing of adequacy requires the formulation of an exhaustive test for a predetermination of adequacy rather than an enumeration of past insufficiencies. Such a test is necessary if the federal courts are to delegate to the states the important duty of protecting individual rights against unconstitutional state action.[109]

Since the district court in *McCray* held that exhaustion was required where the administrative remedy was found adequate,[110] it was faced with the necessity of formulating such a test.

> [T]he test for determining the adequacy of the available administrative state remedy is three-fold. First, the court must analyze the theoretical due process adequacy of the state remedy, particularly from the standpoint of making sure the remedy does not contain the forbidden indicia of prejudgment which renders exhaustion inappropriate. Second, the court must look at the remedy in practice, to see that it is being administered in an even handed and fair manner. Finally, the third relevant consideration is one that all federal courts must bear in mind when they are called upon to interject themselves

---

102. 411 U.S. at 575 n.14.
103. *Id.*, *citing* Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).
104. *Id.*, *citing* Union Pac. R.R. v. Board of Comm'rs, 247 U.S. 282 (1918).
105. *Id.*, *citing* Kelly v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958).
106. *See McCray*, 516 F.2d at 361.
107. Monroe v. Pape, 365 U.S. 167 (1961). *See* text accompanying notes 65–74.
108. *See* text accompanying notes 77–101 *supra*.
109. Morgan v. La Vallee, No. 75-2044 (2d Cir., Oct. 14, 1975) (dictum).
110. 367 F. Supp. at 1201.

> into matters entrusted by our form of Government to the realm of the States, and that is, of course, the extent of the State's interest in the subject matter of the federal litigation.[111]

There are several problems with this approach to adequacy. For example, the reference to due process implies that the due process clause of the fourteenth amendment applies to the Commission's procedures. This appears erroneous because the amendment requires due process only when the state deprives someone of "life, liberty, or property."[112] Unlike criminal trials and other state actions which have been held subject to due process requirements, the Commission cannot deprive prisoners of anything, but instead seeks to redress deprivations. Therefore, analysis of the Commission's proceedings in terms of procedural due process would tend to confuse rather than elucidate the question of adequacy.[113] It is possible that the court used "due process" not in its constitutional sense, but as a general expression meaning fairness of procedure. Such a requirement of fairness would of course have a place in an adequacy test as a measure of the extent to which the federal court must sacrifice its duty to vindicate individual rights to its duty to respect state interests; use of "due process" to describe this requirement, however, creates the danger that criminal trial due process requirements might be imported into grievance proceedings where they may not be desirable.

There is another problem with the court's analysis: the third consideration, the extent of the state's interest in the subject matter of the litigation, appears to be irrelevant in determining adequacy. Where personal rights are involved, adequacy should depend upon the extent of the protection these rights are afforded regardless of the extent of the state's interest in the subject matter of the proceeding. The state's interest is relevant only after adequacy has been determined and the question is whether exhaustion should be required.

It is surprising that the district court omitted from its formulation the tautologous requirement that to be adequate the Commission must have the power to grant effective relief. The omission appears to have been intentional as the district court held that exhaustion would be required even where damages were sought despite the fact that the Commission has no power to grant damages.[114] While the district court attempted

111. *Id.*

112. Board of Regents v. Roth, 408 U.S. 564, 569-79 (1972); Perry v. Sindermann, 408 U.S. 593, 599-603 (1972); *see* Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *cert. granted*, 421 U.S. 998 (1975).

113. It is true that the prisoner is deprived of his right to a federal forum for the initial adjudication of his constitutional complaints if he is required to exhaust the state remedy, and that this right may be a protected "liberty" under the Constitution; however, the deprivation of this right would be accomplished, not by the state, but by the federal court. The federal proceeding requiring exhaustion could therefore be subject to procedural due process analysis under the fifth amendment; the state proceeding does not act to deprive the inmate of anything, much less "life, liberty, or property," and therefore would not be subject to due process analysis.

114. 367 F. Supp. at 1208, 1210.

to justify this on the theory that the claim would be but temporarily delayed from federal adjudication, it would seem that the district court's conclusion is unjustifiable. As stated previously, the Supreme Court has held that exhaustion is not required where the remedy is inadequate;[115] therefore, inability to grant money damages should have been considered dispositive of the question of adequacy as to McCray's damage claim.

The factors listed by the Court in *Gibson* suggest some additional criteria to be included in an adequacy test. If an agency were responsible for unreasonable delays in resolving issues brought to it, a federal court should find the agency remedy inadequate.[116] Relief postponed may be no relief at all. If, for example, an inmate were paroled or transferred during the pendency of his complaint, his action might be dismissed as moot or he might no longer wish to pursue his grievance. Furthermore, if the prisoner were suffering continuing constitutional deprivations at the hands of his jailers, his need for relief would be immediate. The fourteenth amendment and the Civil Rights Act of 1871[117] impose a duty upon the federal courts to respond to this need.[118] Therefore, in order for the administrative remedy to be good enough to justify the federal courts in deferring to it, the agency must be able to respond promptly. Otherwise, the federal court in requiring exhaustion would be derelict in its duty to the individual.

What is sufficient dispatch, however, seems impossible of precise definition. One practical means of judging promptness would be to compare the time taken by the agency with the time normally consumed by a federal court in dealing with a similar issue. If the federal court were to require the state agency to handle grievances as promptly as it itself would but for the exhaustion requirement, it would at least be insuring that a prisoner would not be delayed in any way by requiring exhaustion. This assumes, of course, that the agency is in all other respects an adequate remedy.

The district court in *McCray* suggested that the remedy should be administered in an "even-handed and fair manner."[119] This coincides with the suggestion in *Gibson* that a remedy would be inadequate if the administrative body were biased.[120] What constitutes bias on the part of an administrative body for the purpose of determining adequacy is again a difficult problem. The Supreme Court recently held in *Withrow v. Larkin*[121] that the combination of investigative and adjudicative functions in a single administrative body was not by itself a sufficent showing of bias to justify federal judicial interference with a state license revocation

115. *See* text accompanying notes 102-05 *supra*.
116. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).
117. *See* note 3 *supra*.
118. *Cf.* Monroe v. Pape, 365 U.S. 167 (1961).
119. 367 F. Supp. at 1201.
120. 411 U.S. at 577.
121. 421 U.S. 35 (1975).

proceeding. This reaffirms that due process does not require the highest level of impartiality in an administrative board, but that some indicia of partiality are constitutionally permissible in an administrative decision maker.[122] It does not necessarily follow, however, that the federal courts would or should find the same level of impartiality acceptable in the Commission for the purpose of deciding whether to require exhaustion. As with every other criterion in this discussion of adequacy, the purpose of an analysis of impartiality is to determine the extent to which the federal court must sacrifice its duty to protect the individual when it defers to the state remedy. The more partial the board, the greater would be the sacrifice should the federal court require exhaustion, and, as a consequence, the less likely will it be that such a requirement would be imposed. Given the broad language in *Monroe* and the steadfast application of this language to the differing cases which have arisen in which exhaustion could have been, but was not, required,[123] it seems likely that the federal courts will not now decide to sacrifice their duty to the individual to any great extent.[124] In other words, a greater level of impartiality may be required of the Commission than due process was held to require in the license revocation proceeding in *Withrow*.

This issue is complicated by the difficulty in measuring bias. Although a particular finding of unreasonable bias would probably suffice to justify a general finding of inadequacy, it is not enough to say that in a particular case or cases, the agency was impartial. One possible approach would be for the court first to determine that unreasonable instances of actual bias had not been shown, and then to study the make-up of the board to determine whether, by background, racial constitution, or job allegiance, it appears likely that the board will in fact be impartial.

Another factor which should be considered by the federal courts before requiring exhaustion is whether the agency proceedings produce a permanent record, complete with findings of fact and conclusions of law.[125] Such a record should be required so that federal courts might have some means of reviewing the adequacy of the state remedy as an occasional state prisoner, disappointed by the conclusion of the agency, seeks federal relief *after* exhaustion. In the analogous area of federal habeas corpus law where state prisoners are required to exhaust state remedies unless there is a lack of state process or there are circumstances rendering such process ineffective,[126] the existence of a record is one factor to be considered in deciding whether to impose an exhaustion requirement;[127] the rationale

122. *See, e.g.*, United States v. Morgan, 313 U.S. 409, 421 (1941); Note, *Prejudice and the Administrative Process*, 59 NW. U.L. REV. 216, 227-28 (1964).

123. *See* notes 65-81 and accompanying text *supra*.

124. *See* Morgan v. La Vallee, No. 75-2044 (2d Cir., Oct. 14, 1975).

125. *Cf.* Townsend v. Sain, 372 U.S. 293 (1963) (federal court required to hold evidentiary hearing in habeas corpus actions where state proceeding record was inadequate).

126. 28 U.S.C. § 2254(b) (1970).

127. *See, e.g.*, Case v. Nebraska, 381 U.S. 336 (1965) (Brennan, J., concurring).

for such a prerequisite, to facilitate federal review of the state procedure,[128] appears to be equally applicable in the context of section 1983 and the proposed exhaustion requirement.

Drawing on all the above factors, those enumerated in *Gibson*, those derived from the analogous law of federal habeas corpus, and those contained in the test formulated by the district court in *McCray*, it is now possible to formulate a new test: to be adequate, a state administrative remedy should be prompt, it should be unbiased, it should be conducive to fairness in its procedures, it should produce a permanent record, and it should be able to grant effective relief.

The Commission: adequate or not?

It is now appropriate to apply this test to the Commission, the first consideration being the element of delay. The district court concluded that the Commission provided a swift alternative to federal equitable relief.[129] The Director has sixty days after receipt of the complaint in which to make a preliminary review.[130] If he finds merit to the complaint, the Commission must schedule a hearing as soon as practicable.[131] The Commission is required to render a prompt decision.[132] If it finds the complaint meritorious, the Secretary has fifteen days after receipt of the commission's order in which to review.[133] This time sequence indicates that it should take the Commission from two to three months to dispose of a complaint. Although statistics prepared for the *McCray* appeal indicated that the actual median time between complaint and final order was approximately five to six months,[134] more recent statistics show that it presently takes an average of three months.[135] In addition, the Director is able to

128. *Id.*
129. 367 F. Supp. at 1209.
130. MD. ANN. CODE art. 41, § 204F(e) (Supp. 1975).
131. *Id.* at § 204F(f).
132. *Id.*
133. *Id.* at § 204F(f)(2).
134. *See* Exhibit D, Brief for Appellants at 88–89, McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975).
135. The Inmate Grievance Commission has compiled a statistical survey of average disposition times for grievances during the one year period from October 17, 1974 to October 17, 1975. This information indicates:

AVERAGE TIME LAPSES

Grievances Involved	*Stages of Proceedings Included*	*Number of Days*
All grievances (including administrative dispositions)	Filing to disposition	40.6
Administrative dispositions	Filing to disposition	12
Grievances not disposed of administratively	Filing to hearing	47.7
Meritorious grievances	Hearing to disposition	47.2
Non-meritorious grievances	Hearing to disposition	50

resolve informally most complaints, many of which are found to be meritorious, in a fraction of this time.[136] It can therefore be concluded that relief is in general very prompt and that the Commission compares favorably with the federal courts in this respect.[137] Although it is not expressly authorized to do so, the Commission has on rare occasion granted interim relief.[138] This power enhances the desirability of having grievances submitted initially to the Commission since even a federal temporary restraining order or preliminary injunction is unlikely to be granted any more promptly.

The second consideration is whether the agency is biased. Of the 1,065 orders issued through August 1975, three hundred held that the prisoner's grievance was meritorious.[139] Because this percentage is probably higher than the percentage of meritorious section 1983 actions brought in the federal courts by state prisoners,[140] it amounts to at least a statistical indication of impartiality. In addition, the Commission is autonomous in that its members are appointed and removed by the Governor;[141] no one within the Division of Corrections or the Department of Public Safety and Correctional Services has direct control over the membership of the Commission. Despite the finding of the district court in *McCray* that the Commission was a fair and impartial tribunal,[142] there is some room for criticism. For example, the Commission is part of the same department as the Division of Correction so that the Secretary is both responsible for the operation of the prisons and for reviewing and enforcing the orders of the Commission. While this gives the orders of the Commission, when affirmed by the Secretary, an authority they might not otherwise enjoy, situations could arise in which the Secretary would have a conflict of interests. To the extent the Secretary formulates policy, for example, any grievance arising as a result of the Secretary's policy would not be likely to receive impartial scrutiny by the Secretary himself. Institutional bias of this sort has its place in administrative adjudicatory functions in many contexts for a variety of reasons.[143] The focus here, however, is not on determining the best way for the Department of Public Safety and Correctional Services to operate, but on the extent to which the federal court must sacrifice its duty to protect individual rights to its duty to

---

136. *See* notes 30–33 and accompanying text *supra*.

137. The median time interval from filing to disposition of civil rights prisoner petitions during 1975 for all federal district courts was three months. For those going to trial, the median time was eleven months. 1974 DIR. ADM. OFF. U.S. CTS., ANN. REP. 432–33.

138. *E.g., In re* Joseph Wallace, I.G.C. No. 1521 (Dec. 4, 1972), summarized by the district court in *McCray*, 367 F. Supp. at 1208.

139. MD. INMATE GRIEVANCE COMM'N, STATISTICAL SUMMARY (Aug. 1975).

140. *See McCray*, 367 F. Supp. at 1206.

141. *See* text accompanying note 20 *supra*.

142. *See McCray*, 367 F. Supp. at 1202.

143. *See* Comment, *Procedural Due Process and the Separation of Functions in State Occupational Licensing Agencies*, 1974 WIS. L. REV. 833.

defer to the Commission as an important state function. Thus, while the Department may well operate more efficiently if the Secretary himself reviews and signs the Commission's orders, the federal court may hesitate to require exhaustion of this remedy due to a possibility of institutional bias against the inmates.

A related problem arises from the fact that the statute requires that two of the members on the Commission have expertise in fields within the realm of correctional services.[144] Because there is no concomitant requirement for a representative of the prisoner's interests, *e.g.*, an attorney who has specialized in representing prisoners or other civil rights litigants, the statute tends to promote bias by occupational background. How important this tendency will be in the Court's assessment of adequacy remains to be seen. In any event, the Maryland General Assembly could eliminate this problem either by repealing the provision which requires two members to have correctional service expertise, or by offsetting this provision with a requirement for members with a background in prisoner representation.

The third consideration is the fairness of the Commission procedures. The district court concluded that the procedures were fair,[145] and with good reason. The inmate is afforded a hearing unless his grievance is disposed of administratively. At this hearing he may be represented by a lawyer, he has the opportunity to call a reasonable number of witnesses, and he has the right to question adverse witnesses. The hearing is conducted informally with everyone seated around a table. The inmate presents his case, the institution responds, and there is questioning of the parties and the witnesses until all the evidence is obtained. No formal rules of evidence impede this process, although the Commission does attempt to gather the best evidence available. The Commission may make further necessary investigations on its own. Finally, the inmate receives notice of the decision.[146] Inmates are somewhat limited in powers of discovery, however, because their right to call a reasonable number of witnesses and to subpoena documents is subject to the Commission's discretionary determination as to the relevancy of the witnesses' testimony and the usefulness of the documents to a decision on the merits of the claim.[147] In this respect the federal courts provide procedures more favorable to the inmate. In addition, three of the commissioners are non-lawyers,[148] thus there may be some basis for faulting the fairness of the procedure for not providing a tribunal with greater legal expertise.[149]

144. MD. ANN. CODE art. 41, § 204F(a) (Supp. 1975).

145. 367 F. Supp. at 1202, 1204-05.

146. The hearing procedures are described in greater detail at notes 29–42 and accompanying text *supra*.

147. MD. ANN. CODE art. 41, § 204F(g)(h) (Supp. 1975); Washington v. Boslow, 375 F. Supp. 1298, 1301 (D. Md. 1974).

148. *See McCray*, 367 F. Supp. at 1202.

149. For example, *In re* Smithson, I.G.C. No. 3455 (Sept. 25, 1975), concerned an inmate of Patuxent Institution who complained that his brother, a former inmate

This potential fault is somewhat ameliorated by the fact that two of the commissioners as well as the Director are attorneys and the staff of the Commission includes a legal assistant who attends hearings and assists in the preparation of orders. Still, the statute requires that only two of the members be attorneys; to ensure a higher level of expertise at every hearing, perhaps the statute should be amended to require that three or more of the members be attorneys. Alternatively, the statute could require specific legal training for all members in the areas of law with which the Commission generally deals. Despite these possible faults, however, it seems fair to conclude that in general the Commission's procedures are, in fact, a fair method of resolving disputes concerning the conditions of confinement.

The fourth factor is whether the Commission provides an adequate record. Each hearing results in an order that consists of a summary of the nature of the complaint, along with the dates of filings and of the hearing; a summary of the testimony of the complainant, his witnesses and his attorneys, if any; the responses of the institutional representatives, their witnesses and attorneys, if any; findings of fact; conclusions on the merits of the claim; and the final disposition of the case.[150] Any modifications made by the Secretary, along with explanations, are appended to the order and made a part of the permanent record. In addition, the hearing itself is tape recorded;[151] in the event of judicial review, this tape is transcribed into typewritten form, thus providing a complete record.[152] In this respect, the Commission's procedures appear to be completely adequate.

The final consideration is the Commission's ability to grant effective relief. The district court concluded that the Commission offers "an effective . . . alternative to the exercise of federal equity power."[153] As noted earlier, the Commission's power consists only of its authorization to issue

---

at Patuxent, had been wrongfully excluded from the inmate's list of visitors while other inmates' relatives who were also former inmates were not so excluded. The institution claimed that to allow visitors who were wise to prison ways would amount to a substantial security risk; the Commission held that this was a reasonable security precaution. Although the facts appear to present the issue, the Commission did not consider whether this was a denial of equal protection. It is possible that many analogous factual situations arise which, when combined with some legal theory, present issues of constitutional law. Only if the tribunal is familiar with the legal theory can the inmate receive an adequate adjudication. *Cf.* Gordon v. Justice Court, 12 Cal. 3d 323, 115 Cal. Rptr. 632, 525 P.2d 72 (1974) (due process requires that where a criminal trial may result in incarceration the judge must be an attorney).

150. *See* MD. ANN. CODE art. 41, § 204F(i), (k) (Supp. 1975); 12 Md. Agency Rules & Reg., Inmate Grievance Comm'n, R. 12.07.05.01 (1971). These require that records be kept and that the order contain conclusions and findings of fact. The orders themselves, however, which are compiled and kept at the offices of the Commission, reflect a policy of greater detail in their scope.

151. *See McCray*, 367 F. Supp. at 1203.

152. Interview with Mr. Robert H. Wolfe, Legal Assistant of the Maryland Inmate Grievance Commission, in Baltimore, Sept. 26, 1975.

153. 367 F. Supp. at 1209.

"orders" which may be affirmed or denied by the Secretary; only the Secretary can order the officers and institutions of the correctional system to stop practices offensive to constitutionally protected rights.[154] However, the Secretary's power of review is limited, by opinion of the Attorney General, to that of a court reviewing an administrative proceeding.[155] The Commission has also issued interim orders granting temporary relief until such time as a hearing could be scheduled,[156] but it is not expressly authorized by statute to do this and has infrequently used this procedure. Additionally, unlike the federal courts, the Commission has no express power to grant class relief even though nothing in the statute forbids it. Finally, the Commission has no contempt power, but, unlike the courts, it can, through the Secretary, discipline or fire persons who abuse prisoners. From this, it is apparent that, through the Secretary, the Commission is able to grant effective injunctive relief.

The district court also concluded that while the Commission has no power to award damages, a prisoner must still present his grievance to the Commission whether he seeks injunctive *or* monetary relief.[157] Until recently the Commission would often order reimbursement to the inmate in what it called "property cases," *i.e.*, cases in which the negligence of an institutional employee caused property loss and damage to the inmate.[158] The Attorney General recently advised that neither the Commission nor the Secretary were empowered to grant such relief and that, in any event, the state enjoyed sovereign immunity from such claims.[159] This particular point is being litigated in several courts;[160] pending decision, the Commission is holding in abeyance all property complaints filed.[161] Moreover, the Commission has never awarded damages for personal injury, pain and suffering, emotional distress, or other damage theories not included in the notion of "property cases." The conclusion therefore seems inescapable that the Commission is unable to grant effective relief where

---

154. *See* text accompanying notes 43–44 *supra*.

155. 59 MD. ATT'Y GEN. REP. & OP. 444–56 (1974). Th Secretary should:

> (1) Accept the findings of fact as conclusive provided such findings contain a concise statement of conclusions upon each contested issue of fact; (2) determine whether the facts, as found by the Commission, support a determination that the inmate has been deprived of his constitutional and/or legal rights or that administrative relief is required; and (3) determine whether the Commission's order is appropriate.

Id.

156. 367 F. Supp. at 1208. *See* note 134 and accompanying text *supra*.

157. 367 F. Supp. at 1210.

158. *E.g.*, *In re* Tull, I.G.C. No. 2877 (Jan. 30, 1975); *In re* Taylor, I.G.C. No. 2934 (Jan. 30, 1975). Both of these cases were reversed on the advice of the Attorney General of Maryland.

159. 60 MD. ATT'Y GEN. REP. & OP. 285 (1975).

160. *E.g.*, *In re* Taylor, A 7386 (Howard County Cir. Ct.) (July 8, 1975); *In re* Tull, 097185, p. 137, Docket No. 23P (Baltimore City Ct., July 9, 1975).

161. Interview with Mr. Robert H. Wolfe, Legal Assistant of the Maryland Inmate Grievance Commission, in Baltimore, Sept. 26, 1975.

damages are sought and it is difficult to see how the prisoner can be denied his day in federal court in this situation. To require exhaustion here would be to require a futile act. Moreover, there is no easy resolution to the problem, for to amend the statute to empower the Commission to award compensatory and punitive damages against prison guards could present serious constitutional problems including questions of separation of powers and due process.[162]

In summary, the Commission may need improvement in three areas before it will be deemed an adequate grievance procedure by the federal courts. The most important and most fundamental change that should be considered is the further restriction of the power of the Secretary over the Commission in order to eliminate the suggestion of institutional bias against the inmate. Perhaps his role should be limited to a simple choice between enforcing the Commission's orders or seeking judicial review. In addition, the statute should be amended to give the Commission express authority to issue interim orders and to grant class relief. Finally, the General Assembly should explore the possibility of extending power to the Commission to award compensation for torts committed by prison officials against inmates.

CONCLUSION

The Maryland Inmate Grievance Commission was created to provide a prompt, efficient, and informal procedure for resolving inmate grievances without the need for formal litigation. The federal doctrine of non-exhaustion of state remedies in section 1983 cases, however, allows state prisoners to choose between the Commission and the federal courts. Strong considerations of comity and efficiency suggest that the rule should be changed to require exhaustion in the case of state prisoners where states provide adequate administrative remedies. What is adequate for this purpose is a difficult question, but five factors — promptness, lack of bias, procedures conducive to fairness, creation of a permanent record, and ability to grant effective relief — provide some basis for evaluating the Commission. Such an evaluation reveals that although the Commission is in fact a reasonable substitute for federal relief in most cases, there is room for improvement in certain respects, especially with regard to its autonomy and its impartiality. The General Assembly should institute these changes for the benefit of Maryland's prisons and inmates alike; the federal courts or Congress should recognize and encourage these efforts by requiring state prisoners to exhaust this remedy, once made truly adequate, before entering federal court.

---

162. *See* County Council v. Investors Funding Corp., 270 Md. 403, 312 A.2d 225 (1973); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 109-15 (1965); Tomlinson, *Constitutional Limits on the Decional Powers of Courts and Administrative Agencies in Maryland*, 35 MD. L. REV. ____ (1975).