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Forward

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FOURTH CIRCUIT REVIEW

FOREWORD

JAMES DICKSON PHILLIPS, JR.*

In his Foreword to this Survey of two years ago, my esteemed friend and colleague, Circuit Judge H. Emory Widener, Jr., rightly characterized "the substantial and unflagging increase in this circuit's calendar"[1] as the most significant feature of that Survey year. At peril of dulling the senses of readers perhaps already sufficiently aware of the problem and the dangers it poses to the system,[2] I open by observing that Judge Widener's assessment remains as valid now as it was then.

Overall filings in the Fourth Circuit for the judicial year 1980 exceeded two thousand (2,206) for the first time in history.[3] That number of filings also constituted the most on a per panel basis filed in any of the eleven circuits in that year.[4] This represented a 14.6 percent increase over the prior year.[5] While 1981 filings did not reflect so substantial an increase, the general upward trend did continue, resulting in 2,247 new filings.[6]

The most worrisome single component of the total filing figures continues to be state prisoner claims in habeas corpus and civil rights cases. In both 1980 and 1981, a vastly disproportionate number of the total of these cases filed in all of the circuits were filed in this court. In 1980, state prisoner claims filed in the Fourth Circuit constituted almost a third (32.2%) of all such cases filed nationally.[7] This figure was down

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[1] Widener, *Foreword: The Impact of Judicial Decision-Making*, 37 WASH. & LEE L. REV. 373, 373 (1980) [hereinafter cited as Widener].

[2] The general phenomenon of judicial overload has, of course, been widely noted in recent years. To the Chief Justice's persistent official and semi-official soundings of the general alarm, former Circuit Judge and Solicitor General Wade McCree recently has added his respected voice. *See generally* McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981) [hereinafter cited as McCree].

[3] THE FOURTH CIRCUIT REPORT 1980, at 18 [hereinafter cited as FOURTH CIRCUIT REPORT].

[4] *Id.*

[5] *Id.*

[6] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1981 ANNUAL REPORT OF THE DIRECTOR 46 [hereinafter cited as 1981 ANNUAL REPORT]. The circuit trend is put in longer perspective by the following incidental statistic provided the writer by William K. Slate II, Clerk of the Court of Appeals for the Fourth Circuit: whereas before 1963 there had never been more than 300 appeals filed in any calendar year, in the month of October, 1981 alone there were 356 new filings.

[7] FOURTH CIRCUIT REPORT, *supra* note 3, at 18.

some in 1981, but was still a full fourth of the national total.[8] Inevitably, given their absolute volume, these cases also continue to represent an alarmingly high percentage of this court's total filings. In 1981, state prisoner claims made up slightly more than a third (35.2%) of the total.[9] Though still high, this was down at least somewhat from an almost unbelievable forty percent (38.9%) in 1980.[10]

The unabated volume of these cases—in both absolute and relative terms—remains for me (and I think for others) the most serious ongoing problem confronting the court.[11] As everyone who is inside and close to the problem or who has studied it from outside realizes, fair handling of these cases now imposes serious strains upon the overall decisional process entrusted to the court. The rightful focus of concern is not upon any undue burden of work imposed upon the judges and their supporting personnel, but upon the risks imposed to the integrity of the judicial process itself[12] and to the rights of other litigants, including those prisoners (a very small proportion on any fair reckoning) whose claims have arguable legal and factual merit. In my opinion, it is beyond dispute that the overall energies and resources of the court are being inefficiently and distressingly diverted to the resolution of a set of cases that demonstrably now only rarely includes any that are revealed in the end to have merit.[13]

The problem is what to do about the situation other than to deplore it. The quick-fix solution (though in practical terms it cannot be counted upon to be quick) of throwing more federal judges into the breach to deal with this and other special categories of cases contributing to the general flood is but a poor answer, though it may finally be necessary.[14] As with any problem, a beginning at least is to identify its sources. In the Foreword earlier mentioned, Judge Widener suggested that the

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[8] 1981 ANNUAL REPORT, *supra* note 6, at 48.

[9] *Id.*

[10] FOURTH CIRCUIT REPORT, *supra* note 3, at 18.

[11] The emphasis here is, for obvious reasons, upon the problem as it is directly experienced at the court of appeals level, but its main impact is, of course, upon the district courts.

[12] *See generally* McCree, *supra* note 2.

[13] The writer's judgment that the number of these claims ultimately determined to have merit is small is concededly intuitive, based only upon direct experience and general observation as a sitting circuit judge and not upon a careful empirical study of a sufficient sample of cases. That such a study might well be warranted as a basis for more careful assessment of the overall problem in this and other circuits is later suggested. The general assessment is, in any event, widely shared by sitting judges. *See, e.g.*, Evans v. Croom, 650 F.2d 521, 523 (4th Cir. 1981); Carey v. Settle, 351 F.2d 483, 484 (8th Cir. 1965).

Assuming the accuracy of the general assessment, it is, of course, not advanced as any reason for failing to treat each of the claims as if it might be the rare one having merit. That this must be done is implicit in the statement of the problem.

[14] *See generally* Mikva, *More Judgeships—But Not All At Once*, 39 WASH. & LEE L. REV. 23 (1982).

cause of the high volume of state prisoner petitions in this circuit could be traced to the court's substantive expansion of prisoner privileges.[15] He thought this development was traceable in turn to the court's disposition to take Supreme Court opinions defining prisoners' rights as points of departure for doctrinal extensions rather than as end statements of doctrine.[16] Though some, including myself, might be disposed respectfully to question whether the high Court's doctrinal statements in this realm had, or were intended to have, quite the precise contours that this assessment implies, this is not the appropriate forum to pursue that interesting and important question. To the extent that substantive judicial philosophy rather than such extra-judicial factors as the number of prisoners incarcerated in state prison systems in this circuit, the energy and skill of local prisoner rights advocates, etc., explain the volume of petitions, then a simple shift in that philosophy is, of course, the indicated and perfectly effective ultimate antidote to a volume unreasonably inflated by overencouragement. This interesting possibility, advanced as it has been by thoughtful and careful judges, is obviously deserving of respectful consideration.

Another aspect of the problem is to me more daunting—for to it I see no solution so simple to prescribe as a mere shift in substantive judicial philosophy. Whatever the root cause of the volume, the fact is that though most prisoner cases are today ultimately revealed to be devoid of either factual or legal merit or both, they cannot fairly and effectively be intercepted at the threshold by the procedural devices provided for that purpose in modern federal civil procedure. The consequence is that far too many have to be wrung through one or more evidentiary hearings and appeals either to resolve technically disputed—but not fairly disputable—factual issues or to provide factual predicates for resolving legal and constitutional issues asserted only in the most baldly conclusory terms. The motions to dismiss for failure to state a claim,[17] for judgment on the pleadings,[18] and for summary judgment[19] are, for the most part—to put it bluntly—ineffectual in these cases.

Designed as critical features of the general plan to free civil procedure from the rigidities of common law and code pleading by abolishing the hypertechnical general demurrer (that marvelous interceptor both of the merely inartfully pleaded as well as the nonmeritorious claim) in favor of "notice pleading," discovery, and more subtle screening approaches, these summary devices simply do not work as intended when addressed to most pro se prisoner petitions. They were put in place on the working assumption that powerful extra-judicial constraints

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[15] Widener, *supra* note 1, at 373.

[16] *Id.*

[17] FED. R. CIV. P. 12(b)(6).

[18] FED. R. CIV. P. 12(c).

[19] FED. R. CIV. P. 56.

would operate to screen out most claims completely lacking factual or legal merit before the judicial process was invoked. The assumption, unarticulated of course, was that professional legal counseling, the expense of litigation, moral compunction, simple forbearance, the perjury sanction, and the price of diversion from more productive pursuits would operate to deter many potential claimants from becoming actual claimants. If this were a valid assumption, the only legal claims encountered by the relatively feeble threshold procedural devices would be those that had already run this extra-judicial gamut. A further assumption could, in corollary, also be indulged—that those claims which did surface would be shaped by ongoing concerns of the claimant to be basically careful with factual allegations—whether out of fear or compunction—and that the allegations would only have been made after careful weighing of the normal, generally known risks of litigation. On these assumptions, the risks to the judicial system implicit in "notice pleading" with its extremely lenient threshold screening mechanisms could prudently be accepted by the federal rules makers. But, of course, by and large, the assumptions simply do not hold for the great run of claims prepared by prisoners without benefit of responsible legal counseling, largely uninhibited by concerns of expense or diversion of energies, under no general compunction of prudence or restraint, and certainly under no particular compulsion to be scrupulously fair and careful in advancing and framing legal and factual allegations against officials of the adversary state.

Faced with this rather ironic consequence of a procedural design whose framers could not have anticipated the state prisoner proceeding pro se as a major civil litigant, there has been no responsible course for the federal courts but to apply the procedures as given. Nowhere in the Federal Rules of Civil Procedure is there any provision for treating pro se prisoner complaints and petitions more stringently than complaints filed by citizens in the free society. In fact, out of an abundance of caution and in an effort to accommodate the pro se prisoner's likely unfamiliarity with even the relatively lenient requirements of notice pleading and the fairly esoteric lore of summary judgment, the courts have gone the other way. Supplementing the general indulgence extended the inartful federal pleader by *Conley v. Gibson*,[20] a presumably even more lenient dispensation has been accorded the pro se prisoner pleader by *Haines v. Kerner*.[21] In this circuit, to aid the pro se prisoner to avoid even the modest technical snares of summary judgment, we have required district judges to give the prisoner a special notice in the form of a rough primer of the practice before entering summary judgment against him.[22]

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[20] 355 U.S. 41 (1957).

[21] 404 U.S. 519 (1972).

[22] Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975).

My own view is that the courts have acted rightly in this matter. The alternative, of somehow wrenching the rules to *make* them work as effective screeners of probably unfounded but nevertheless well-pleaded statements of claim, is unthinkable. But the consequence has been to turn what would be a still severe problem of disposing of the bulk of these claims by summary procedures into an overpowering problem of having to run great numbers of them through evidentiary proceedings that probably would not be required if the normal extra-judicial constraints were operative. The volume of raw filings is therefore merely an indicator of the more profound problem of the total effort required finally to dispose of these claims under the extant rules of procedure. As things stand, the courts, both at the district and court of appeals level, have no recourse but to apply procedures as they exist—sturdily, though with plainly increasing dismay and frustration.

Rule revision is of course a possibility. However, I am not attracted by revision aimed specially at the pro se prisoner claim or general revision to meet this special problem. More fruitful thought might go into administrative measures designed to shore up some of the extra-judicial constraints that operate in the free society. A modest move in this direction has involved the judicial plans requiring advance payment of costs out of prisoners' prison trust funds by prisoners asserting claims under 42 U.S.C. § 1983.[23] At a time when publicly funded legal aid is in question, it may seem futile to suggest that any substantial and affordable help might come from this direction. However, it is at least worth exploring whether the provision of systematic legal aid would be a wiser expenditure of public funds than attempting to meet the requirements of *Bounds v. Smith*[24] by relying exclusively upon library facilities. It would be interesting to know whether the added expense might to some extent be offset by the expense of employing the number of state attorneys required to defend against prisoner claims that with legal counseling might never have been filed or at least filed in more manageable form. In any event, I take this opportunity to suggest the problem as one worthy of systematic exploration by legal scholars with special interests in judicial administration and the jurisdiction of federal courts. Certainly more is needed than the largely intuitive and impressionistic analysis I advance here. As with most, mine would undoubtedly be revealed by careful empirical study to be flawed, but in the process we might begin to see a fair way to relieve the problem.

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Turning to the work of the court as reflected in its decisions during the past year, I confine my observations to only a few of the decisions

[23] Evans v. Croom, 650 F.2d 521, 522 (4th Cir. 1981).

[24] 430 U.S. 817, 830-32 (1977).

chosen for inclusion in the Survey. Without minimizing the possible significance of others, these seemed to present particularly interesting issues or particularly interesting examples of the newly-expanded court at work. There is undoubtedly a new set of dynamics being worked out in a court recently expanded in size from seven to ten regular judges. As Hans Zeisel has conclusively demonstrated, to me at least, the dynamics of jury decision-making is profoundly influenced by jury size.[25] I am persuaded that the same theory must be applicable to the dynamics of decision-making by a court which, though it operates essentially in panels of three, nevertheless attempts to operate collegially. What the new dynamics of this particular court may be can better be left for assessment to uninvolved outside court-watchers, but, as an insider, I can testify that the subject is a fascinating one to ponder.

Three decisions in the field of criminal procedure interested me as much for the cogency of the debates they generated within divided panels as for the issues themselves. In *United States v. Evans*,[26] the rather mundane, infrequently encountered, yet important procedural issue was whether an alternate juror could be added to a jury that has already begun its deliberations and, if so, under what circumstances. In the particular case, the alternate had been discharged but was then reinstated and substituted for a regular juror who became disqualified after the jury of twelve had deliberated for a significant period of time. Complicating the particular situation was the fact that the defendant orally consented to the substitution, though in circumstances which made it difficult to tell from the record whether he understood the options. Relying heavily on the consent, the divided panel declined to upset the defendant's ensuing conviction by this jury reconstituted in midstream. A strong dissent would have found the consent ineffectual under the circumstances as waiver of constitutional right, and the practice violative both of relevant rule and Constitution. In the process, the fundamental issue and the precedential implications of the decision were sharply defined.

In *United States v. Green*,[27] a more profound double jeopardy issue divided another panel. The question was whether retrial was barred by a mistrial ordered, on defendant's motion, because of a government witness' patently prejudicial misconduct. The witness was a law enforcement officer, but it was conceded that his misconduct could not be charged directly to the prosecutor who called him as a witness. The panel sharply divided on two questions respecting application of the rule of *United*

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[25] *See* Zeisel & Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 41 U. CHI. L. REV. 281 (1974).

[26] 635 F.2d 1124 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 3090 (1981); *see Fourth Circuit Review*: Criminal Procedure, *infra*, at 618.

[27] 636 F.2d 925 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 2005 (1981); *see Fourth Circuit Review*: Criminal Procedure, *infra*, at 583.

States v. Dinitz[28] to the facts of this case. Rather surprisingly, though fundamental, these questions arose as open ones in this circuit. The first issue was whether the *Dinitz* rule that retrial may be barred by a defense-requested mistrial for governmental misconduct applies only to prosecutorial or judicial misconduct. The second question was whether, in order to bar retrial, the misconduct must have been intended to provoke the mistrial request. The panel flatly disagreed upon the implications of *Dinitz* for both questions. The majority held that only prosecutorial or judicial misconduct could have that effect and that, in any event, only an intentional provocation sufficed. Since neither prosecutorial nor judicial misconduct could be shown in *Green*, double jeopardy was not violated. The dissent, looking to the same authoritative source, thought the *Dinitz* rule barring retrial applied to any governmental misconduct, not just that directly of prosecutors and judges, and that it applied if the misconduct provoked the request, without regard to whether it was intended to have that effect.

Finally, in *United States v. Goodwin*,[29] the issue ultimately dividing a panel was whether, under the principle of *North Carolina v. Pearce*,[30] due process was violated by indicting for a more serious offense a defendant who, following unsuccessful plea negotiations, had demanded a jury trial on a lesser-included offense originally charged. The crucial question causing division was the effect of the holding in *Bordenkircher v. Hayes*.[31] In *Bordenkircher*, the Supreme Court held that a prosecutor's decision to carry through on a specific plea bargaining threat to increase the charge if a guilty plea was not entered was not a violation of due process. The panel majority in *Goodwin* thought *Bordenkircher* distinguishable on the basis that it was explicitly confined to charge increases openly threatened as a part of the plea bargaining process. Other increases, not directly tied to specific plea negotiations, are still to be assessed under *Pearce* and its progeny. As to these, the question remains whether the increase occurred in circumstances giving rise to a genuine risk of vindictiveness; if so, a per se violation of due process is made out. Finding those circumstances present in *Goodwin*, the majority concluded that a violation had been shown. A dissenter thought that *Bordenkircher* flatly compelled the conclusion that no due process violation had been shown. In the dissenter's view, to fail so to hold leads to the anomaly that "while an expressed threat of retaliation will not suffice to set aside a conviction because of *Bordenkircher*, merely a general risk of retaliation without the expressed threat will suffice."[32]

Perhaps the most difficult set of problems presented to the court—in

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[28] 424 U.S. 600 (1976).

[29] 637 F.2d 250 (4th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3447 (Nov. 2, 1981).

[30] 395 U.S. 711 (1969).

[31] 434 U.S. 357 (1978).

[32] 637 F.2d at 257 (Widener, J., concurring and dissenting).

terms of legal complexity and ongoing social significance—arose in Title VII employment discrimination cases. In that heavily litigated field, there are a number of issues that continue to plague all the courts: proper administration of the disparate impact and disparate treatment proof schemes in a variety of factual situations; proper handling of statistical evidence; and class action representation. Each of these issues was presented to the court during the Survey year in interesting and stark form. The result was a series of decisions which revealed the court divided—either in panel or en banc—in four significant cases.

Two cases dramatically illustrate that the employer action selected as the focal point of inquiry can be decisive in assessing proof of a claim of disparate treatment under the *McDonnell Douglas*[33] proof scheme. In *Page v. Bolger*,[34] the en banc court divided on whether the proper focal point was the governmental employer's refusal to promote the claimant or a precedent violation of its own affirmative action guideline for constituting a racially representive review committee. In *Armstrong v. Index Journal Co.*,[35] a panel divided on whether the proper focal point in assessing a claim of sex discrimination was pay differential in relation to comparably employed males, or the basic classification of the female claimant into a job category whose pay potential was subject to an ultimate cap. In each case, the point of disagreement was decisive to the ultimate result.

EEOC v. American National Bank[36] found a panel divided on—among other issues—the proper way to handle static work force statistics offered to prove, prima facie, the existence of a pattern or practice of discrimination in hiring. Among the most significant points of disagreement was the propriety of the district court's use of a standard deviation analysis in assessing the probative force of the statistics. Of particular interest may be the panel's division on the utility of that mode of analysis when the deviations are within the low range of one to three.[37]

Finally, in *Abron v. Black & Decker*,[38] a panel faced and divided on what may be the most critical general question now dividing the courts at large in Title VII cases: proper representation in class actions. The problem—stated too simply to catch up its many ramifications—is the extent to which there must be an identity of employment grievances between the class representative and the class represented. In essence, the

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[33] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[34] 645 F.2d 227 (4th Cir. 1981) (en banc), *cert. denied*, 102 S. Ct. 388 (1981); *see Fourth Circuit Review*: Employment Discrimination, *infra*, at 640.

[35] 647 F.2d 441 (4th Cir. 1981); *see Fourth Circuit Review*: Employment Discrimination, *infra*, at 686.

[36] 652 F.2d 1176 (4th Cir. 1981); *see Fourth Circuit Review*: Employment Discrimination, *infra*, at 668.

[37] *Id.* at 1190-93.

[38] 654 F.2d 951 (4th Cir. 1981); *see Fourth Circuit Review*: Employment Discrimination, *infra*, at 654.

question has come down to the extent to which *East Texas Motor Freight System, Inc. v. Rodriguez*[39] has limited the practice early developed in some circuits of making so-called "across-the-board" certifications in Title VII class actions. Without attempting an analysis of the opinions in *Abron*, I simply note that the fundamental issue is perhaps as cogently explored in those opinions as it has been in any federal case decided to date. The definitive answer from the Supreme Court may be in the offing due to its recent grant of certiorari in the Fifth Circuit case of *Falcon v. General Telephone Co. of Southwest*.[40]

I conclude by observing—with profound gratitude—that, as Judge Widener noted in the Foreword of two years ago,[41] the disagreements here reported remain of the same respectful sort that has led us to consider ourselves masters at the art.

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[39] 431 U.S. 395 (1977).

[40] 647 F.2d 633 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3459 (Dec. 7, 1981).

[41] Widener, *supra* note 1, at 380.