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*Recommended Procedures For Handling
Prisoner Civil Rights Cases In The Federal Courts*

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Tentative Report No. 2

1977



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PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS

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Federal Judicial Center

THE FEDERAL JUDICIAL CENTER
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TO: The Chief Justice of the United States
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United States Circuit Judges
United States District Judges
United States Magistrates
Circuit Executives, United States Courts of Appeals
Clerks, United States Courts of Appeals
Clerks, United States District Courts

FROM: Ruggero J. Aldisert, United States Circuit Judge,
Chairman, Prisoner Civil Rights Committee of The
Federal Judicial Center

SUBJECT: Tentative Report on Recommended Procedures for Handling
Prisoner Civil Rights Cases in the Federal Courts

In January 1976, I forwarded a report containing recommendations of the Special Committee of The Federal Judicial Center created to suggest improvements in the handling of prisoner civil rights cases in the federal courts. Since then, the Committee has continued to identify and refine procedures that will help judges, magistrates, and staff personnel deal efficiently with these difficult matters and insure that prompt relief is given to meritorious cases. This new report is the product of those efforts. I am again pleased to present it to you.

Our revised report contains a more extensive set of recommendations, with detailed suggestions for handling these cases from initial filing through the pretrial stages. A number of additions reflect the new expansion of the magistrates' jurisdiction, as well as other recent developments. The section of recommended forms has been expanded.

The initial report was labeled "tentative" because the Committee felt that its recommendations needed further study and refinement. This second report is also labeled "tentative" to reflect our continuing commitment to monitor the experience of the courts and to respond to the needs of the judiciary.

The response to the first report was gratifying. We hope that this new effort proves as useful.

RECOMMENDED PROCEDURES FOR HANDLING
PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS

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PREFACE

Concern over prisoner "conditions-of-confinement" cases led the Federal Judicial Center to appoint a special committee, under the chairmanship of Judge Ruggero J. Aldisert (Circuit Judge, United States Court of Appeals for the Third Circuit), to study the handling of prisoner cases in the federal courts and to propose procedures for the more effective handling of these cases. Other members of the committee are Robert C. Belloni (District Judge, Oregon), Robert J. Kelleher (District Judge, C. D. Cal.), Frank J. McGarr (District Judge, N. D. Ill.), John H. Wood, Jr. (District Judge, W. D. Tex.), and Ila Jeanne Sensenich (United States Magistrate, W. D. Pa.).

Griffin B. Bell (formerly Circuit Judge, Fifth Circuit; now Attorney General of the United States) is no longer in active status as a member of the committee.

The staff for the committee are Frank J. Remington, Professor of Law, University of Wisconsin; and Attorney Alan Chaset, Assistant Director of Research, Federal Judicial Center.

In January 1976 the committee published its first report in which it recommended various procedures for the handling of prisoner "conditions-of-confinement" cases. That first report reflected a year-long study by the committee during which the committee solicited the views and suggestions of every member of the federal judiciary. The committee prepared early drafts of its first report which were widely circulated and which were discussed at several judges' conferences and at numerous seminars at the Federal Judicial Center. This process resulted in a report which reflected the views not only of committee members, but also of a wide spectrum of the federal judiciary. In its first report the committee recommended experimentation with certain innovative procedures such as the special writ clerk used in the Northern District of California and the "Special Report" used in New Jersey.

The first report was labeled "tentative," reflecting the committee's view that the recommended procedures needed continuing study as a basis for their further improvement. During 1976 the Federal Judicial Center furnished a "staff law clerk" to several "pilot districts" to determine whether this method could contribute significantly to the better handling of prisoner conditions-of-confinement cases, particularly in districts which have a large volume of such cases. The early favorable reports on the work of the staff law clerk have led the Administrative Office of the United States Courts to fund staff law clerks in a number of additional districts.

This second report is also labeled as tentative. Although a great deal has been learned since the publication of the first report, the committee believes more can be learned before stating that these are the best procedures that can be devised. The committee is continuing its study of the staff law clerk, of the processing of conditions-of-confinement cases by magistrates, of various procedures such as the "Special Report From Defendant," of the model form for use in prisoner cases brought under 42 U.S.C. §1983,¹ of systems for making counsel available in prisoner conditions-of-confinement cases, and in general of methods of alleviating the burden in the district courts in which approximately one out of every seven civil cases filed is from a prisoner seeking various forms of relief.²

The committee has also concluded that changes in practice are needed, particularly at the state level. Administrative grievance procedures must be developed in state prisons--procedures which will resolve the

1. 42 U.S.C. §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."

2. In 1976, there were 19,809 prisoner petitions or 15.2% of all civil cases. The committee notes an apparent leveling off of this category. In 1975 there were 19,307 or 16.5%. In 1974, 18,410 or 17.8%. In two years the percentage has been reduced by 2%. Annual Report of the Director of the Administrative Office of the United States Courts, 1976.

majority of prisoner complaints, especially those of a minor nature. Also needed is increased recognition that the federal judiciary does not have exclusive jurisdiction to grant judicial relief to state prisoners.³

State judges are in fact sensitive to the rights of prisoners who have legitimate conditions-of-confinement complaints. Recent decisions of the United States Supreme Court have given emphasis to the fact that a prisoner's liberties are not a product of the decisions of federal courts, but rather are a creation of state law.⁴ And state courts have given increasing indication of their willingness to grant relief to prisoners under circumstances in which federal courts are unwilling to do so.⁵ Recognition of the increasing reliance upon state courts to grant relief to meritorious complaints is reflected in a recent statement of Mr. Justice Brennan: "[S]tate courts no less than federal are and ought to be the guardians of our liberties."⁶

We hope that progress will be made in a greater assumption of responsibility at the administrative and at the state court levels. If so, the recommended procedures for the federal courts will need further re-evaluation in the context of change in volume and change in the nature of the cases which reach the federal courts.

3. See, e.g., Comment, Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size, 15 *Duquesne L. Rev.* 49, 87 n.212 (1976); *Kish v. Wright*, 21 *Crim. L. Rep.* 2108 (Utah S.Ct., 3-30-77); *Evans v. Copins*, 26 *Ariz. App.* 96, 546 P.2d 365 (1976); *Zisk v. City of Roseville*, 56 *Cal. App.* 3d 41, 127 *Cal. Rptr.* 896 (1976); *Knight v. Board of Education*, 38 *Ill. App.* 603, 348 *N.E.2d* 299 (1976).

4. See generally Comment, Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size, 15 *Duquesne L. Rev.* 49 (1976). See discussion at pp. 31-35, infra.

5. See Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 63 *Va. L. Rev.* 873 (1976); Comment, Individual Rights Within the School System, 74 *Mich. L. Rev.* 1420 (1976); Comment, Constitutional Law--Prisoners' Right to Mutual Assistance and Reasonable Access to the Courts, 16 *Santa Clara L. Rev.* 665 (1976).

6. Brennan, State Constitutions and the Protection of Individual Rights, 90 *Harvard L. Rev.* 489, 491 (1977).

In its first tentative report the committee recommended increased use of the United States magistrate at a time when the authority of the magistrate was at best unclear. Since the publication of the first report, the Congress has clarified and expanded the authority of the magistrate, and this recent development is reflected in the procedures set forth in this second tentative report.

The purpose of this report is, in the main, threefold:

First, to evaluate the handling of prisoner conditions-of-confinement cases with the purpose of recommending such changes as are desirable to increase the capacity to give prompt relief to meritorious prisoner cases.

Second, to help those federal judges, magistrates, and staff personnel to deal effectively and efficiently with these difficult-to-handle cases.

Third, to try to apportion responsibility between federal and state courts with respect to matters which ought to be of concern to the state judiciary.

Prisoner Civil Rights Committee
of the Federal Judicial Center
Ruggero J. Aldisert, Chairman
Robert C. Belloni
Robert J. Kelleher
Frank J. McGarr
John H. Wood, Jr.
Ila Jeanne Sensenich

5/20/77

Part I. INTRODUCTION

This report deals primarily with the role of the federal court in the handling of "conditions-of-confinement" complaints by both state and federal prisoners.⁷ Although the committee has concerned itself with the larger issue of state and federal prisoner conditions-of-confinement cases, the report concentrates primarily upon the handling of state prisoner conditions-of-confinement cases brought under 42 U.S.C. §1983. The pressure of federal prisoner cases has been largely

7. The report does not deal with postconviction attacks on state convictions by means of habeas corpus under 28 U.S.C. §2254 or postconviction attacks on federal convictions under 28 U.S.C. §2255. It is recognized that some state conditions-of-confinement cases are brought under 28 U.S.C. §2254. The Advisory Committee on Rules of Criminal Procedure has recommended against the use of habeas corpus (28 U.S.C. §2254) as a way of bringing conditions-of-confinement cases:

"It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement (not related to the propriety of the custody itself), can better be handled by other means such as 42 U.S.C. §1983 and other related statutes. In *Wilwording v. Swenson*, 404 U.S. 249 (1971), the court treated a habeas corpus petition by a state prisoner challenging the conditions of confinement as a claim for relief under 42 U.S.C. §1983, the Civil Rights Act. Compare *Johnson v. Avery*, 393 U.S. 483 (1969).

"The distinction between duration of confinement and conditions of confinement may be difficult to draw. Compare *Preiser v. Rodriguez*, 411 U.S. 475 (1973), with *Clutchette v. Procunier*, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (1975)." H.R. Doc. 94-464, 94th Cong., 2d Sess. 113 (1976).

This committee concurs in the judgment of the Advisory Committee on Criminal Rules. However, this is a matter which will have to be resolved either through a decision of the United States Supreme Court or by a congressional amendment to 28 U.S.C. §2254.

reduced by the implementation by the United States Bureau of Prisons of an administrative grievance procedure.

In recent years the number of state prisoner conditions-of-confinement cases brought in the federal courts has substantially increased. The volume of cases, the difficulty of handling these pro se cases, and the importance of ensuring that careful attention is given to the meritorious prisoner complaints make this an aspect of the work of the federal court which deserves careful evaluation on a continuing basis. The need is to develop a definition of the proper role of the federal court in state prisoner cases and to develop procedures which will ensure that the federal court can effectively identify the meritorious case which is brought by a state prisoner.

The typical conditions-of-confinement case is brought directly into federal court by a pro se prisoner who has not first exhausted available administrative remedies or available judicial remedies in the state court. The cases range from those which involve constitutional questions of great importance to the individual prisoner and to the correctional system, on the one hand, to the most trivial or frivolous type of issue, on the

other hand. The usual restraint on unwarranted litigation, expense, is absent in a field where prisoners can usually proceed in forma pauperis and where the expenditure of time in preparation is a welcome relief from the tedium of prison life.

The fact that the cases are pro se complicates the task of the judge, the magistrate, the clerk, and other court personnel and makes it more difficult for them to effectively and efficiently identify the meritorious conditions-of-confinement case.

Presently there is no way of guaranteeing compensation of a lawyer for representing a prisoner in a typical conditions-of-confinement case. This increases the risk that the petitions will be dealt with summarily and that meritorious petitions will be overlooked in the process.

Improvement in the effective handling of these cases requires actions of various kinds:

(1) There is need for a proper definition and limitation of the role of the federal court in conditions-of-confinement cases. Many meritorious grievances possibly remediable under state law do not constitute a violation

of federal constitutional rights. This issue is discussed in part III of this report.

(2) There is need for an effective and prompt resolution of conditions-of-confinement cases at the administrative level. It is recommended that each state develop a workable administrative grievance procedure. This is discussed in part II.

(3) There is need for a greater involvement of state courts in conditions-of-confinement cases. Meritorious complaints should receive judicial attention even though the complaint may not constitute a violation of federal constitutional rights. This is also discussed in part III.

(4) There is need for additional resources to handle conditions-of-confinement cases which are brought in federal court. Increased use of magistrates and staff law clerks is recommended. This is discussed in part IV.

(5) Finally, there is need for the development of more effective and efficient procedures for handling conditions-of-confinement cases to ensure that meritorious complaints are identified and also to ensure that those cases which lack merit are identified and dismissed. This is the objective of the procedural standards recommended in part IV.

Part II. RATIONALE FOR GIVING SPECIAL CONSIDERATION TO
PRISONER CONDITIONS-OF-CONFINEMENT CASES

There are reasons for giving special attention to prisoner conditions-of-confinement cases.⁸ The volume of cases is large, and many of the cases are without merit, making it difficult to ensure that the meritorious complaint will not be overlooked. The cases sometimes raise constitutional questions of great significance to prisoners and to the nation's correctional systems. Because lawyers are typically not involved, a very difficult task confronts judicial personnel, particularly at the early stages of this class of pro se litigation. Finally, the burden of dealing with complaints from prisoners has fallen disproportionately on the federal

8. See Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 *Law and Social Order* 557, 573-577. Illustrative of recent law review comment are: Bailey, *The Realities of Prisoner Cases under 42 U.S.C. §1983: A Statistical Study in the Northern District of Illinois*, 6 *Loyola U. L.J.* 527 (1975); Stanton, *Convicts and the Constitution in Indiana*, 7 *Ind. L. Rev.* 662 (1974); *Prisoners' Rights: Evolution Without Direction*, 37 *Albany L. Rev.* 545 (1973); *Prisoners' Rights--Limiting Remedies for Restoration of State Prisoners' Good-Time Credits*, 23 *De Paul L. Rev.* 778 (1974); *Prisoner Rights Litigation: An Examination into the Appurtenant Procedural Problems*, 2 *Hofstra L. Rev.* 345 (1974); *Prisoner and the First Amendment: Freedom Behind Bars*, 4 *Loyola U. L.J.* 109 (1973); *New Barrier to Federal Court Review: The Habeas Corpus Exhaustion Requirement as Applied to Prisoners' Conditions of Confinement*, 9 *New England L. Rev.* 615 (1974); *Prisoners' Redress for Deprivation of a Constitutional Right: Federal Habeas Corpus and the Civil Rights Act*, 4 *St. Mary's L.J.* 315 (1972); *Prisons--Civil Rights*, 6 *Suffolk U. L. Rev.* 1138 (1972); *Prisoners' Rights*, 17 *Vill. L. Rev.* 980 (1972).

judiciary as a result of the failure to develop adequate administrative grievance procedures and the failure to utilize state court remedies which are available.

A. Volume.

Prisoner rights cases occupy a significant percentage of the time of federal courts, particularly of the United States district judges. The Administrative Office of the United States Courts has been keeping statistics on prisoner cases for the past few years. "Civil rights" cases have been tabulated separately for five years. Those statistics show that state prisoner civil rights cases totaled 3,348 in the fiscal year ending June 30, 1972; 4,174 in the fiscal year ending June 30, 1973; 5,236 in the fiscal year ending June 30, 1974; 6,128 in the fiscal year ending June 30, 1975; and 6,958 in the fiscal year ending June 30, 1976.⁹ The numbers are large and continue to increase.¹⁰

9. Annual Report of the Director of the Administrative Office of the United States Courts, 1976. For a discussion of the trend, see Kimball and Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 *Crime and Delinquency* 1 (1968).

10. During the same period the number of federal prisoner cases (civil rights and mandamus, principally) were 1220 in 1972, 1519 in 1973, 1447 in 1974, 1675 in 1975, and 1766 in 1976. State habeas corpus cases showed a decrease: 7949 in 1972, 7784 in 1973, 7626 in 1974; but 7843 in 1975 and 7833 in 1976. Annual Report of the Director of the Administrative Office of the United States Courts, 1976, as amended.

It is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the most liberal definition of frivolity. The Freund Report¹¹ concluded that: "The number of these petitions found to have merit is very small, both proportionately and absolutely."¹² This is reflected in the fact that 5,355 of 5,858 or 91 percent of the cases brought in federal court in fiscal year 1976 were dismissed or terminated prior to pretrial.¹³

What to most people would be a very insignificant matter becomes, because of the nature of prison life, of real concern to the prison inmate. Most of the money damage claims, realistically evaluated, could be handled by a small claims court at the state level. Most requests for injunctive relief involve issues which would seem to most people to be quite trivial.

B. The Importance of Identifying the Meritorious Case.

The fact that the volume of conditions-of-confinement cases is large and the fact that many are frivolous make

11. Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972), popularly known as the Freund Report, named for its chairman, the distinguished Professor Paul Freund of Harvard University.

12. Id. at 587.

13. Annual Report of the Director of the Administrative Office of the United States Courts, 1976.

it difficult to ensure that the meritorious complaint is found and given careful attention. The Freund Commission concluded: "But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with."¹⁴

A significant number of conditions-of-confinement complaints raise constitutional questions of great difficulty and of great importance.¹⁵ Judicial involvement in this class of litigation over the course of the past decade has had a very substantial impact on prison management and on prison life. It is therefore of obvious importance that procedures be designed not only to eliminate the frivolous cases but also to identify those cases which have merit.

C. Difficulty in Handling the Prisoner Rights Case.

Handling the prisoner rights cases, in practice, is difficult because most are brought by the inmates themselves without benefit of counsel; most contain a large variety of allegations that are difficult to separate and

14. Freund Report, supra note 11, at 587.

15. See Doyle, the Court's Responsibility to the Inmate Litigant, 56 Judicature 406, 411 (1973), in which Judge Doyle says in part: "It seems eminently just that the courts' response to suits under §1983 by unrepresented prisoners should be no less and no more painstaking, searching, and respectful of the litigants than their response to other constitutional litigation."

to evaluate; and commonly the allegations are contained in a long, often illegible, handwritten letter from the inmate. As a consequence, it is difficult for the court to know the nature of the prisoner's complaint.

Presently there is no statutory authority to appoint counsel or to compensate those who agree to represent indigent prisoners in conditions-of-confinement cases.¹⁶ Most federal judges do request that counsel serve in some cases, but the request is of either a student from a law school clinic or a lawyer from a panel of lawyers who have agreed to serve without compensation.¹⁷ In either case, reliance on uncompensated counsel is not totally satisfactory. Courts have experienced a reluctance

16. The Comptroller General of the United States has held that existing legislation (18 U.S.C. §3006A; 39 Comp. Gen. 133) does not provide for the appointment and compensation of counsel in 42 U.S.C. §1983 cases. The opinion of February 28, 1974, (53 Comp. Gen. 638) rejects the argument of the Department of Justice that §1983 cases are similar to §2254 habeas cases and therefore should be treated the same with respect to right to counsel. See also S.2278, 94th Cong., 2d Sess., "The Civil Rights Attorney's Fees Awards Act of 1976," amending 42 U.S.C. §1988.

17. For example, law students from the University of Pennsylvania and Temple University Law Schools represent indigent prisoners in §1983 cases in the Eastern District of Pennsylvania. In the Western District of Texas, prisoners may be represented by an assistant professor of law from the University of Texas Law School, assisted by qualified law students. In the Western District of Wisconsin, the Corrections Legal Services Program, a project funded with LEAA and state money, handles about 10% of the §1983 prisoner matters filed in that court. Judge Elmo Hunter of the Western District of Missouri has arranged with the bar associations in his division to handle state prisoner cases on a no-fee basis.

of counsel to serve. Counsel express the fear that unsuccessful representation will result in a malpractice action.

Making compensated counsel available is urged on two quite different grounds. One is that the prisoner will be more adequately represented and will be more likely, therefore, to be successful in presenting important constitutional issues. Another is that counsel will be able to discourage frivolous cases and will more carefully limit and define the issues presented.¹⁸

18. The Report of the Committee on Federal Courts of the Association of the Bar of the City of New York (1974) at page 2 concludes: "[T]here is substantial ground for concluding that the present system is not working effectively on behalf of prisoners in one area of pro se litigation, namely civil actions brought by prisoners under 42 U.S.C. §1983 for alleged violations of their constitutional rights in matters relating to the conditions of their incarceration. The basic reason for this situation is the lack of counsel who would press these cases to a meaningful and prompt disposition."

Availability of counsel may serve to lessen the number of clearly frivolous law suits. See Ault, Legal Aid for Inmates as an Approach to Grievance Resolution, 1 Resolution of Correctional Problems and Issues 28, 32 (Spring 1975): "The claims of most inmates wishing to file an action before a Federal court under 42 U.S.C. §1983 are nonmeritorious. Project attorneys spend a considerable amount of interviewing time listening to inmates who wish to initiate such action. The attorneys have been successful in discouraging most frivolous suits." The "Project" is a joint undertaking of the Georgia Department of Offender Rehabilitation and the Georgia Law School.

The experience of the Prison Project of Florida Legal Services, Inc., has led its director to conclude that prisoner cases should be handled by an organization like the Prison Project rather than by assignment of individual private attorneys, because it is difficult to travel to the prison and difficult, without

In places where counsel is readily available, cases appear to be more ably presented; some frivolous cases are "weeded out"; "shotgun" allegations are eliminated in favor of more specific, limited allegations; and counsel is often able to bring about an administrative resolution of the complaint.

As yet the new Legal Services Corporation has not given prisoner conditions-of-confinement cases a sufficiently high priority to make its limited funds available for representation in these cases.¹⁹

During the second session of the 94th Congress, S. 2278, an amendment to 42 U.S.C. §1988, was passed and was later signed by the President. This gives the court the authority to award attorney fees to the prevailing party in certain civil rights cases. However, this is of limited assistance in the appointment of

experience, to differentiate adequately between the meritorious and the frivolous prisoner complaint.

The adverse effect that the absence of counsel has on the handling of 42 U.S.C. §1983 cases is discussed in a Report of the Committee on Federal Courts of the Association of the Bar of the City of New York (1974). That committee recommends the appointment of counsel at an early stage of every pro se prisoner §1983 case.

19. See a report in *The Third Branch*, vol. 8, p. 7 (March 1976). The need is for counsel who view their responsibility as serving the interest of the prisoner-client. This is a field where it has been popular for some lawyers to use the prisoner-client as an opportunity to pursue an issue thought important by the lawyer without due regard for the client's interest.

counsel to represent a prisoner-petitioner at an early stage before it is known whether the complaint may have merit. Although experience with the new legislation is lacking, it seems doubtful that it will have significant effect upon conditions-of-confinement cases.²⁰

There are other procedural complications in prisoner conditions-of-confinement cases. Where witnesses are required, they are often other inmates who must be transported to the court, creating financial costs and, in some cases, serious security risks.²¹ There is some confusion and some disagreement as to who has the responsibility to produce the prisoner-witness and who is to pay the cost of the transportation of the prisoner-witness to court. The Administrative Office of the United States Courts is of the opinion that the burden of producing the prisoner is on the state and that the state must pay the costs of transportation,

20. See Rodriguez v. Jimenez, -- F.2d --, 21 Crim. L. Rep. 2016 (1st Cir., March 23, 1977), upholding award of attorney's fees in jail conditions-of-confinement case. See also Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977). In Willis v. Robinson, --- F.2d ---, Civil Action No. 75-1637 (W.D. Pa., April 5, 1977), the court denied attorney fees of \$1,675 to volunteer counsel who represented an inmate and obtained damages in the amount of \$1.00 against one of several defendants.

21. See, e.g., Moeck v. Zajackowski, 385 F. Supp. 463 (W.D. Wis. 1974), 541 F.2d 177 (7th Cir. 1976).

at least where funds are available to do so.²² State officials report that the burden thus placed on them is difficult not only because of the cost involved but, more importantly, because guard staff is typically limited and the use of guards to transport prisoner-plaintiffs or prisoner-witnesses seriously weakens security at the prison or requires guard staff to work an undesirable amount of overtime without days off.²³

D. Direct Access to Federal Courts.

The burden of prisoner conditions-of-confinement cases has fallen disproportionately upon the federal judiciary. Granting that conditions-of-confinement cases are important and are deserving of the attention of the federal judiciary does not compel the conclusion that judicial relief ought to be available without prior resort to state administrative remedies or the conclusion that state courts should not also be available to hear

22. See memorandum dated February 8, 1977, from Carl H. Imlay, General Counsel, Administrative Office of the United States Courts, to Alan J. Chaset (on file at the Federal Judicial Center).

23. When the state is unable to pay the cost of transportation, the only alternative would seem to be the taking of a deposition at the institution or the use of a magistrate or a special master, appointed under Rule 53 of the Federal Rules of Civil Procedure, to take the evidence at the institution. See memorandum from Carl H. Imlay, supra note 22.

and adjudicate conditions-of-confinement cases brought by state prisoners.

In federal review of state convictions through habeas corpus, the trend has been in the direction of greater reliance upon state courts. This has been done without limiting the inmates' right to ultimate review in federal court. The result apparently has been a greater responsiveness on the part of state courts and a corresponding reduction in the burden imposed on the federal court system. Even if the case does ultimately end up in a federal district court, the task is simplified because the issues have been defined and dealt with at the state court level.

In contrast, the prisoner proceeding under 42 U.S.C. §1983 can go directly into federal court without first exhausting state administrative or judicial remedies. The United States Supreme Court has held a number of times that exhaustion of state remedies is not required.²⁴

24. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 983-985 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]; D. Currie, *Federal Courts* 686-692 (2d ed. 1975); Comment, 42 U.S.C. §1983 Prisoner Petitions--Exhaustion of State Administrative Remedies, 28 Ark. L. Rev. 479 (1975); Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537 (1974); *McCray v. Burrell*, 516 F.2d 357 (4th Cir.), cert. granted, 423 U.S. 923 (1975), dismissed as improvidently granted, 426 U.S. 471 (1976).

In holding that there is no requirement that a state prisoner exhaust his administrative remedies, the Supreme Court

This bypassing of state processes has led some state judicial officials to urge that all prison matters be

has not indicated in any detail the reasons for this conclusion. There has not been, for example, any explanation of the following:

(1) Why is there a different standard for federal prisoners who, some courts have held, do have to exhaust their administrative remedies and state prisoners who do not? See Hart & Wechsler at 985 quoting Kenneth Davis: "Because the McNeese [McNeese v. Board of Education, 373 U.S. 668 (1963)] opinion fails even to consider such questions as these, it seems much more in the nature of judicial fiat than a reasoned analysis of the problem . . . [K. Davis, Administrative Law Treatise §20.01 at 646 (1970)]."

(2) Why is there a difference between prisoner complaints brought under 42 U.S.C. §2254 and those brought under 42 U.S.C. §1983? See H. Friendly, Federal Jurisdiction: A General View 101-103 (1973). Judge Friendly would require exhaustion of both state administrative and state judicial remedies in prisoner §1983 cases, arguing that to do so is reasonable given the special nature of prisoner cases. It is true that state judicial action in §1983 cases is res judicata. See, e.g., Spence v. Latting, 512 F.2d 93 (10th Cir. 1975); Davis v. Towe, 379 F. Supp. 536 (E.D. Va. 1974); Note, Constitutional Law--Civil Rights--Section 1983--Res Judicata/Collateral Estoppel, 1974 Wis. L. Rev. 1180. If this is the major reason for the different treatment, a change in the applicability of res judicata can be made by statute if necessary.

The United States Court of Appeals for the Fifth Circuit holds that a state prisoner may not avoid the exhaustion requirements for federal habeas corpus actions by filing a civil rights action under §1983 and seeking money damages rather than release from custody. Grundstrom v. Darnell, 531 F.2d 272 (5th Cir. 1976); Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976); Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976). But see Rheuark v. Shaw, 547 F.2d 1257 (5th Cir. 1977).

(3) Why would it not be wise to give state correctional agencies a first opportunity to reconsider and perhaps change their administrative rules? See Hart & Wechsler at 985 citing McKart v. United States, 395 U.S. 185 (1969).

(4) Why is there no requirement that readily available administrative remedies be exhausted as a prerequisite to a finding that there has been a denial of civil rights and that there is therefore a case and controversy? See D. Currie, Federal Courts (2d ed. 1975) at 688: "But do you really want a prisoner to be able to get a federal-court order against his guard without bothering to ask the warden to correct the problem?"

turned over to federal courts, a position that reflects their obvious irritation²⁵ and that tends to further complicate the task of federal judicial administration.

However much judicial procedures are improved, primary reliance on courts to resolve prisoner grievances will remain less than satisfactory. A recent study by the Center for Correctional Justice reported:

[T]he length of time and the resources required to pursue a case through the courts, the continued reluctance of judges to deal with the problems that do not rise to constitutional dimensions, and the difficulty of enforcing court orders in closed institutions all have led to growing disillusionment with the judicial process as the primary vehicle for resolving prisoners' grievances.²⁶

In a 1970 speech to the National Association of Attorneys General, Chief Justice Warren E. Burger observed:

What we need is to supplement [judicial actions] with flexible, sensible working mechanisms adapted to the modern conditions of overcrowded and understaffed prisons . . . a simple and workable procedure by which every person in confinement who has,

25. See Aldisert, *supra* note 8, at 581 n.105.

26. J. Keating, K. Gilligan, V. McArthur, M. Lewis, & L. Singer, *Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions* 4 (Center for Correctional Justice, 1975) [hereinafter cited as Keating--Seen But Not Heard]. See also *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975), *rev'd*, 97 S.Ct. 285 (1976), at 940: "While the bench has time and again suggested that administrative procedures be established to handle complaints . . . the response from the States has been minimal. As a result, we are obliged to hear and decide such cases under somewhat broad constitutional principles."

or thinks he has, a grievance or complaint can be heard promptly, fairly and fully.²⁷

Increasingly, correctional departments throughout the country are adopting inmate grievance procedures.²⁸

27. Washington, D.C., February 8, 1970.

28. See the excellent study of current inmate grievance procedures in J. Keating, V. McArthur, M. Lewis, K. Sebelius, & L. Singer, *Toward a Greater Measure of Justice: Grievance Mechanisms in Correctional Institutions* (Center for Correctional Justice, Sept. 1975). See also Lesnick, *Grievance Procedures in Federal Prisons: Practices and Proposals*, 123 U. Pa. L. Rev. 1 (1974). (This is a thoughtful analysis of the problem and various ways of responding. It is a particularly helpful presentation of the argument that correctional administrators ought to be involved in the grievance procedure if the procedure is to result in reevaluation of current correctional policies.)

There is increasingly adequate literature. Some of the recent and best include: Monograph, *Inmate Grievance Procedures*, South Carolina Department of Corrections (1973); *Prison Grievance Procedures*, Special Report of the National Association of Attorneys General (May 6, 1974); Keating--*Seen But Not Heard*, *supra* note 26; Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 Geo. Wash. L. Rev. 175 (1970); Singer and Keating, *Prisoner Grievance Mechanisms*, 19 *Crime and Delinquency* 367 (1973); *Ombudsman/Grievance Mechanism Profiles--nos. 1-3: The Minnesota Correctional Ombudsman* (1973), *South Carolina Correctional Ombudsman* (April 1974), *Maryland Inmate Grievance Commission* (August 1974) (ABA Resource Center on Correctional Law and Legal Services); V. O'Leary, T. Clear, C. Dickson, H. Paquin, & W. Wilbanks, *Peaceful Resolution of Prison Conflict* (National Council on Crime and Delinquency, 1973) (This contains a very helpful analysis of the shortcomings of informal methods of resolving inmate grievances. It also explores in a helpful way the possibility of applying labor mediation and arbitration procedures to the resolution of inmate grievances.); series of articles in *Corrections Magazine* (vol. 1, January/February 1975); *Prisoners' Rights--The Need for an Inmate Grievance Procedure in West Virginia*, 78 W. Va. L. Rev. 411 (1975-76); *California Program Listens to Inmate Complaints*, 6 LEAA Newsletter, p. 12 (Feb. 1977); *Controlled Confrontation, The Ward Grievance Procedure of the California Youth Authority* (Office of Technology Transfer, NILECJ, LEAA, August 1976). For a description of the use of Department of Justice mediation in prison disputes, see 17 *Crim. L. Rep.* 2466 (Sept. 3, 1975).

Usually the procedure affords the inmate an opportunity to present his grievance in writing, to have it decided, and to be informed in writing of the decision reached. Typically an opportunity is provided to appeal the institutional decision if the inmate is dissatisfied with it.

Existing grievance procedures differ widely in some important respects. There are differences in the time limits within which the administrative process must reach a final decision. There are also differences in the allocation of responsibility for deciding whether a grievance has merit. Some commentators urge that the decision-making process include input from both inmates and persons outside the correctional system. Others urge that it is more realistic to ask correctional personnel to make the decisions because to do so will make the process more acceptable to those responsible for the running of correctional institutions and will make the process more likely to result in policy change where grievances demonstrate that change is desirable.²⁹ At present, this issue remains unresolved. Most existing

29. Lesnick, *Grievance Procedures in Federal Prisons: Practices and Proposals*, 123 U. Pa. L. Rev. 1 (1974).

grievance procedures leave decision-making responsibility to correctional officials, totally or in large part.

The apparent result of the adoption of grievance procedures has been encouraging. A significant percentage of the grievances are resolved at the institutional level; and an additional percentage, again significant in number, are resolved at the administrative appeals level.³⁰

30. See Director's Report to the Judicial Conference of the United States on the Business of the United States Courts (Administrative Office of the United States Courts, March 10, 1977) at p. 2: "Prisoner petitions were also down as 17% fewer Federal prisoner cases were filed and 4% fewer State petitions. It appears as though the grievance procedure established by the Bureau of Prisons and the recent approval of the Parole Commission Act (May 14, 1976) are effectively reducing these prisoner cases."

One of the arguments in favor of a requirement that state administrative procedures be first exhausted is that the federal judge would then have the benefit of such factual record as was made in the course of the exhaustion of the grievance procedure. This hoped-for result has apparently not as yet occurred. Many federal judges have had such poor experience with administrative fact finding in areas such as social security that they doubt that it is realistic to expect a grievance procedure to develop a factual record that will be helpful. On the other hand, such record would seem clearly better than the usual handwritten letter from an inmate. In any event this question is as yet unresolved.

A recent inventory by CONTACT Inc. of state inmate grievance procedures produced the following state-by-state reports [unless otherwise indicated, ombudsmen have no official enforcement authority]:

- Alabama--no ombudsman or formal grievance procedure.
- Alaska--statewide ombudsman for complaints from any person.
- Arkansas--formal grievance procedure including an administrative review officer at each institution.
- California--formal in-house grievance procedure, departmental appeal possible.
- Delaware--no ombudsman or formal grievance procedure.
- District of Columbia--no ombudsman or formal grievance procedure.

The Center for Community Justice is working with the Kentucky Bureau of Corrections in the design and implementation of an inmate grievance procedure. As

Florida--no ombudsman or formal grievance procedure.
 Georgia--no ombudsman or formal grievance procedure.
 Hawaii--statewide ombudsman concerned with impropriety of any type in government services.
 Idaho--no ombudsman or formal grievance procedure.
 Indiana--statewide ombudsman; drafting a nondisciplinary appeals process.
 Iowa--statewide ombudsman for complaints from any person.
 Louisiana--no ombudsman or formal grievance procedure.
 Maine--statewide Office of Advocacy, represents inmates at hearings before the Commissioner of Corrections.
 Maryland--statewide inmate grievance commission.
 Michigan--legislative corrections officer hears appeals from decisions of the director of the Department of Corrections.
 Minnesota--statewide ombudsman.
 Mississippi--grievance committee at state penitentiary.
 Missouri--administrative review with recommendations from a three-member citizen committee.
 Montana--formal in-house grievance procedure; staff-inmate committee and institutional complaint investigator make recommendations to the warden.
 Nevada--prison mediator, procedures being revised.
 New Jersey--statewide ombudsman.
 New York--formal in-house grievance procedure, staff-inmate hearings.
 Ohio--statewide grievance office; investigator in each institution; ombudsman eliminated in 1975.
 Oklahoma--formal grievance procedure.
 Oregon--statewide ombudsman.
 South Carolina--statewide ombudsman; one institution has a formal grievance procedure.
 South Dakota--no ombudsman or formal grievance procedure.
 Tennessee--no formal grievance procedure; one institution has an ombudsman.
 Texas--administrative review with appeal to Director of Corrections.
 Utah--formal in-house grievance procedure.
 Vermont--investigating grievance officer at each institution.
 Virginia--ombudsman to be established by April 1, 1977.
 Washington--no ombudsman or formal grievance procedure.
 West Virginia--inmates advisory council at each institution.
 Wisconsin--formal grievance procedure; investigators and staff-inmate committees at each institution.

See generally J. Keating, Prison Grievance Mechanisms (Center for Community Justice, 1977).

part of the evaluation an effort will be made to determine "whether availability of an effective grievance mechanism will lessen the frequency with which inmates seek solutions to problems through the courts." Adequate assessment of the contribution of inmate grievance procedures requires the kind of knowledge which the Center for Community Justice's project is designed to produce.³¹

William B. Robinson, Commissioner of the Bureau of Corrections of the state of Pennsylvania, reports that the newly instituted Inmate Complaint Review System has resulted in a substantial reduction of costly frivolous court cases and has brought about several significant policy changes in the system of correction in Pennsylvania.³²

In some jurisdictions, exhaustion of the administrative grievance procedure before going into federal court is common. Knowledgeable lawyers urge clients to do so for two reasons. First, the grievance procedure may satisfactorily resolve the question. Second,

31. Letter to Frank J. Remington from Michael K. Lewis dated April 5, 1977 (copy on file at the Federal Judicial Center).

32. Letter to Judge Ruggero J. Aldisert from William B. Robinson dated March 10, 1977 (copy on file at the Federal Judicial Center).

resorting to the grievance procedure first avoids the risk that the issue of exhaustion may arise in a later judicial proceeding. It is, for example, possible to argue that there is no deprivation of civil rights under 42 U.S.C. §1983 until readily available, prompt administrative recourse is tried.³³ Though the argument may fail, it is easier for the plaintiff's counsel if the issue is avoided altogether.

The practical importance of utilizing available administrative remedies is also reflected in Rizzo v. Goode.³⁴ In Rizzo the court held that the nonfeasance of a high managerial official is not a sufficient basis for assessing damages against that official or granting injunctive relief against that official. There is a necessity of showing an actual involvement of the official in the actions upon which the action under

33. In Cravatt v. Thomas, 399 F. Supp. 956, 965 (W.D. Wis. 1975), Judge Doyle held that the "ripeness" doctrine applied. He said: "I hold that a petition for a writ of habeas corpus [and presumably a 1983 petition] challenging a specific condition of physical imprisonment is ripe and justiciable in a court only if at the time the petition is filed, the specific condition is actually being imposed upon the petitioner and if either of the following conditions are met: (1) the petition shows that the person or persons responsible for the imposition of the challenged condition are aware of the condition and have failed or refused to remove or modify it, or (2) the petition shows that petitioner's attempts to make its existence known to the person or persons responsible for the imposition of the condition have been thwarted."

34. 423 U.S. 362 (1976).

42 U.S.C. §1983 is based. By analogy, a prison guard's misconduct will not entitle a prisoner-plaintiff to relief, either damages or an injunction against the warden, unless it can be shown that the warden was somehow involved in the misconduct. The most practical way of involving the warden is through the administrative grievance procedure which requires the warden to decide whether the conduct complained of is a proper correctional practice or whether it is not and should therefore be changed. If not changed, it would seem then proper, under Rizzo, to argue that the warden's participation was sufficient to make him a party to any subsequent litigation.

In any event, at the present time, the task of dealing with prisoner conditions-of-confinement cases falls disproportionately on the federal judiciary, a fact which makes it important that the procedures used in such cases be as effective as it is possible to make them.

Whether the burden on the federal judiciary will be lessened by an increased reliance on administrative remedies and on state courts, is a question which can be answered only when there is greater experience with

administrative grievance procedures and with state court involvement in conditions-of-confinement cases. The answer will no doubt lie in the capability of the various alternatives to grant prompt and effective relief in meritorious cases and upon developments in the law defining the relative jurisdiction of federal and state courts in conditions-of-confinement cases.

Finally, it can be argued that giving attention to prisoner conditions-of-confinement cases does not go far enough. Nonprisoner pro se cases present problems of volume, of identifying the meritorious case, of procedural complications; and these cases come also directly into federal court.³⁵ The confinement of the pro se prisoner-plaintiff does complicate his physical access to the court; there are allegations in some cases of discipline because of litigation against prison officials; there is limited access to library resources;³⁶ prisoners are frequently transferred and are hard to keep track of and to serve with papers; and generally the problems of all pro se plaintiffs are

35. See letter from the clerk of the Western District of Wisconsin, Joseph W. Skupniewitz, to Frank J. Remington, March 25, 1977 (copy on file at the Federal Judicial Center).

36. See *Bounds v. Smith*, --- U.S. ---, 21 Crim. L. Rep. 3017 (April 27, 1977).

complicated by the fact and uncertainties of prison life.³⁷ To conclude this is not to assert that other

37. These factors are discussed in greater detail by Magistrate Ila Jeanne Sensenich of the Western District of Pennsylvania in a letter of April 6, 1977, to Frank J. Remington (copy on file at the Federal Judicial Center): "One problem unique to prisoner cases which is covered in our report is the difficulty in transporting the prisoner plaintiffs to court. There is confusion as to the persons responsible for bringing them to court and the persons responsible for the cost of their transportation, in addition to security problems. In pro se prisoner cases it is more difficult to schedule oral arguments, status conferences, pretrial conferences, and hearings or trials than in non prisoner pro se cases.

"Another problem unique to prisoner cases is that the plaintiff is usually being held in 24 hour custody by the persons he is suing. I believe this creates serious problems. On the one hand institution officials may not punish or harass a prisoner for filing a lawsuit. On the other hand, they must have the power to maintain security and punish prisoners for misconduct and violations of the rules of the institution. When a prisoner is disciplined after filing a lawsuit in court, the court frequently becomes involved in determining whether the punishment resulted from the plaintiff's misconduct unrelated to his lawsuit, as claimed by the officials, or whether it constituted harassment for filing the lawsuit, as claimed by the plaintiff. The plaintiff frequently complains that both he and his witnesses are being harassed. The institution officials, on the other hand, assert that the plaintiff and his witnesses have, by misconduct unrelated to the lawsuit, required disciplinary action. This problem is not covered in our report and I have not yet resolved it. When it comes up during a hearing I usually conduct a 'sub-hearing' into the plaintiff's allegations of harassment and determine immediately whether the plaintiff and his witnesses have actually been harassed. While such allegations by the plaintiff could constitute separate lawsuits, I feel it is better to hear and determine them immediately. These allegations appear to require an evidentiary hearing and they sometimes assume a greater importance to the prisoner than his original lawsuit.

"Additional problems occur when the prisoner is placed in solitary confinement for valid institutional reasons. His access to the law library and assistance from other prisoners is usually limited. This limits his access to the court and a question for judicial determination is whether it constitutes an unconstitutional limitation. However, before that issue can be judicially determined, the fact is that the prisoner's access to the court is being limited in a way not imposed upon non prisoners. Even as to the prisoners in general population, the

pro se litigation does not also deserve careful and continuing attention. This committee's mandate was to

institution law library is generally substantially inferior to public law libraries available to non prisoner litigants. Further, the prisoner may also have limited access to writing paper, pens, and pencils.

"Still another problem in handling prisoner cases is that prisoners are frequently transferred to other institutions for purposes of court proceedings and for administrative and disciplinary reasons. The transfers may be temporary--for anywhere from a few days to a few months--or may be permanent. The prisoner frequently does not receive advance notice of the transfer and therefore is unable to notify the court and other parties of his new address. Even after the transfer he frequently does not know when or even whether he will be returned to the original institution. When the defendants are represented by the Attorney General of the state, he can be advised of the plaintiff's whereabouts by the Department of Corrections. But frequently the defendants are represented by city and county solicitors, insurance and retained counsel, who have difficulty discovering the plaintiff's whereabouts and have trouble serving motions and pleadings on them. Mail sent to the institution from which the plaintiff has been transferred is frequently returned with a notation that he is no longer incarcerated there. Since I am handling so many of these cases, my secretary and clerical assistant then conduct an investigation to determine whether the plaintiff has been released on parole or transferred to another institution. Upon discovering the plaintiff's correct address, they notify the parties. Sometimes they learn he has been transferred to another institution, but by the time our mail arrives at that institution the plaintiff has either been returned to the original institution or transferred to still another institution.

"In addition to the problems in locating the institution in which the plaintiff is incarcerated, there are further problems in determining the correct date of service. Certified mail is frequently accepted at the institution on a certain date but not actually delivered to the plaintiff until much later. Sometimes, if the plaintiff is on a temporary transfer, the mail will be held until he returns to the institution. This is particularly critical when the document is an order or a recommendation of the magistrate and the plaintiff has a limited number of days from the date of service to appeal or file objections. The certified receipt gives the date of service as the date the document was delivered to the institution, rather than the date it was given to the plaintiff. Sometimes I receive a letter from the plaintiff complaining because of the delay and in those cases I always treat the date he actually received the document as the date of service, rather than the date it was received by the institution. The circumstance of the pro se

study and report on prisoner conditions-of-confinement cases.

Other prisoner cases also present problems. Special procedural rules have been adopted for the handling of prisoner cases brought under 28 U.S.C. §2254 or §2255. These new procedural rules became effective on February 1, 1977.

plaintiff's incarceration requires the judge or magistrate and staff to be particularly watchful for the plaintiff's address changes and service of documents upon him. While non prisoner plaintiffs can easily notify the court of changes of address in advance, prisoners usually do not know precisely when they will be transferred to another institution and when they will be returned to their original institution. While this problem is not discussed in our report, it is a real problem which requires particular care in the handling of prisoner cases. Possibly I should have mentioned these problems in our report but they did not occur to me, probably because they seem to involve sensitivity to the prisoner's status rather than 'forms and procedures.'¹¹¹

Part III. THE FUNCTION OF FEDERAL AND STATE COURTS IN
PRISONER CONDITIONS-OF-CONFINEMENT CASES

A. The Role of Federal Courts in State Prisoner Cases.

Prisoner access to federal courts has gone through three significantly different stages during the relatively recent past.

(1) "Hands-off" Doctrine. For years federal courts followed what was known as a "hands-off" doctrine in responding to complaints about correctional practices.³⁸ This meant that federal courts generally refused to become involved in decisions about the propriety and the constitutionality of methods for dealing with persons convicted of crime.³⁹ The "hands-off" doctrine had the advantage of leaving decision-making to those most knowledgeable about the needs of the correctional

38. The unwillingness to review correctional practices was in contrast to a traditional willingness to review the validity of a state judgment which resulted in the offender being placed in custody. Review of a state judgment by federal habeas corpus requires prior exhaustion of state remedies. Although *Preiser v. Rodriguez*, 411 U.S. 475 (1973), recognizes that some state correctional practices can be challenged by federal habeas, the more common method of challenging correctional practices is by means of a civil rights action under 42 U.S.C. §1983.

39. State courts also followed a "hands-off" policy. Although state courts have jurisdiction to apply 42 U.S.C. §1983, most of the prisoner cases go directly into federal court. In recent years, federal courts have been more receptive to state prisoner cases than have state courts.

system. It had the disadvantage of leaving arguably important constitutional issues to be resolved at the administrative rather than the judicial level. And the correctional process was such that the administrative decisions were largely invisible, reasons were seldom given, and formal policies were largely nonexistent.

The rationale for keeping "hands off" was, in part, that the convicted offender had an opportunity to exercise his "rights" during his day in court. When he became legally convicted he was subject to the maximum term in prison. If he received less, through parole or the awarding of good time, for example, it was a privilege and therefore not a right enforceable through the judicial process. The "hands-off" doctrine can also be explained by the fact that it was commonly assumed that correctional decisions were guided by rehabilitative goals, were therapeutic in nature and thus did not need, or were inappropriate subjects for, judicial review. There was a prevalent commitment to the indeterminate sentence that allowed broad opportunity to make those correctional decisions thought appropriate to achieve rehabilitative objectives.

(2) The "Open-Door" Policy. The door to the judicial process, which was for a long time closed, was opened wide during the past decade. This was particularly true of access to the federal courts. An inmate of a state correctional institution has immediate access to the federal court if his claim is one properly asserted under 42 U.S.C. §1983. He is not required to first exhaust his state remedies, either administrative or judicial.⁴⁰

40. Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537 (1974). For an analysis of the problem of exhaustion of state remedies, see note 24, supra.

Because the Supreme Court opinions were so cryptic, some courts concluded that they were free to require exhaustion of state administrative remedies. See, e.g., Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); see reference to a September 18, 1974, opinion of the Fifth Circuit requiring exhaustion in Hardwick v. Ault, 517 F.2d 295, 296 (5th Cir. 1975).

The Supreme Court repeated its nonexhaustion ruling in Ellis v. Dyson, 421 U.S. 426 (1975). The circuits clearly now seem to be holding that a state prisoner does not have to exhaust state administrative remedies before bringing a federal court action under 42 U.S.C. §1983. See Hardwick v. Ault and McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert. granted, 423 U.S. 923 (1975), dismissed as improvidently granted, 426 U.S. 471 (1976). But see Morgan v. LaVallee, 526 F.2d 221, 224 (2d Cir. 1975), in which the court concludes: "Before the court below may relinquish its §1983 jurisdiction it must, on the most narrow reading of the cases, be positively assured--it may not presume--that there are speedy, sufficient and readily available administrative remedies remaining open to pursue, an assurance certainly not attainable on this record."

The Attorney General of the United States has recommended legislation that would allow the Attorney General to initiate a prison case where it appears that there is a pattern of deprivation of inmate constitutional rights or to intervene in such a

The inmate could raise issues that range from the most fundamental and complex constitutional questions to matters that would seem hardly to merit the serious attention of a small claims judge.⁴¹

(3) A Period of Reevaluation. Recent Supreme Court decisions have clearly indicated that the court is re-evaluating the role of federal courts in state prisoner conditions-of-confinement cases.

Recent decisions have significantly limited the situations in which a state prisoner can properly bring a challenge to his conditions of confinement under 42 U.S.C. §1983. The limitations are of four general kinds:

First, the interest of the prisoner-plaintiff must be one recognized under 42 U.S.C. §1983. This may be either a "property" interest⁴² of the prisoner or an interest in "liberty" defined as a right given by the United States Constitution and binding upon the states

case if brought by an inmate. (See a comparable proposal in H.R. 2323, 94th Cong., 1st Sess. (1975).) The Attorney General also proposes that Congress require exhaustion of administrative remedies in prisoner cases brought under 42 U.S.C. §1983. See The Third Branch, vol. 8, p. 7 (March 1976).

41. See Aldisert, Judicial Expansion of Federal Jurisdiction, supra note 8.

42. Lynch v. Household Finance, 405 U.S. 538 (1972). Compare opinion of Mr. Justice Stone in Hague v. C.I.O., 307 U.S. 496 (1939), holding that under §1331 a plaintiff would have to show \$3,000 damages (now it would be \$10,000). See Aldisert, supra note 8, at 568.

through the Fourteenth Amendment or a right given the prisoner by state law.

Second, the interference with the "property" right or the "liberty" of the prisoner must be as a result of intentional or reckless conduct on the part of the state official.

Third, the deprivation of liberty or property must be without "due process of law" (or in violation of a specific provision of the Constitution such as the Eighth Amendment prohibition of cruel and unusual punishment). In some situations the existence of a common law remedy in state court is adequate to afford due process.⁴³

Fourth, the prisoner must not have a right to present the federal claim in an ongoing state proceeding.⁴⁴

(a) The definition of "liberty." The Supreme Court has addressed this question in several recent cases, including Paul v. Davis,⁴⁵ Meachum v. Fano,⁴⁶ Montanye v. Haymes,⁴⁷ and Baxter v. Palmigiano.⁴⁸

43. Ingraham v. Wright, 45 U.S.L.W. 4364 (April 19, 1977).

44. Juidice v. Vail, 45 U.S.L.W. 4269 (March 22, 1977).

45. 424 U.S. 693 (1976).

46. 427 U.S. 215 (1976).

47. 427 U.S. 236 (1976).

48. 425 U.S. 308 (1976).

In Paul v. Davis, the issue involved the action of a police official who published the plaintiff's name as an "active shoplifter." In holding that the injury to the plaintiff's reputation was not an adequate basis for an action under 42 U.S.C. §1983, the Court said:

It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law,⁵ [Footnote 5: "There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment."]⁴⁹

As applied to prisoner cases in Meachum v. Fano and Montanye v. Haymes, the doctrine of Paul v. Davis resulted in a holding that a transfer from one prison to another does not entitle a plaintiff to bring an action under 42 U.S.C. §1983 where state law does not confer upon the inmate a "right" not to be transferred.

In Wolff v. McDonnell,⁵⁰ the Court said:

But the State having created the right to good time and itself recognizing that its deprivation

49. Paul v. Davis, 424 U.S. 693, 710-711 (1976).

50. 418 U.S. 539, 557, 558 (1974).

is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. . . .

We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government.

The distinction then between Wolff, on the one hand, and Meachum and Montanye, on the other, is that the interest of inmate Wolff in his good time was an interest recognized by state law, whereas this was not true in Meachum or Montanye. The Court said in Meachum:

The liberty interest protected in Wolff had its roots in state law, and the minimum procedures appropriated under the circumstances were held required by the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." . . .

Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.⁵¹

51. Meachum v. Fano, 427 U.S. 215, 226, 228 (1976). Several cases have been decided since Meachum. In Lombardo v. Meachum, 548 F.2d 13, 15 (1st Cir. 1977), the court said, "The regulations . . . simply provide that an inmate will receive a certain type of a hearing before he is reclassified. The regulations contain no standards governing the Commissioner's exercise of his discretion, and they, therefore, can not create the kind of substantive

In Baxter v. Palmigiano⁵² the Court reserved for future consideration "the degree of 'liberty' at stake in loss of privileges and . . . whether some sort of procedural safeguards are due when only such 'lesser penalties' are at stake."

(b) The requirement of fault. Even if the prisoner has a "liberty" or "property" interest which is properly asserted in a 42 U.S.C. §1983 action, not every infringement of that liberty or property under color of state

interest which is required before a state created 'liberty' interest can be said to exist."

Compare Four Unnamed Plaintiffs v. Hall, 424 F. Supp. 357, 360 (D. Mass. 1976), in which the court held that there was a right of action under 42 U.S.C. §1983 when the inmates were transferred to segregation: "plaintiffs have a reasonable expectation, rooted in state law, that they will not be moved from general population cells to segregated cells absent particular conditions and specified procedures."

The court found the "liberty" interest in state correctional regulations requiring notice and hearing and concluded: "if inmates cannot rely on the Department's own regulations, what purpose do the regulations serve?" Id. at 361.

Left unresolved by these cases is the question of whether state law must create substantive rights (e.g., not to be transferred unless there is a violation of specific rules of conduct) or whether it is enough that there are procedural requirements (notice and hearing).

A "liberty" interest is alleged if the claim is a violation of the United States Constitution. For example, in French v. Heyne, 547 F.2d 994 (7th Cir. 1976), the inmate was held to have a right to proceed under 42 U.S.C. §1983 if there was a proper showing of a denial of equal protection in the prison educational or rehabilitation program or if there was an interference with a First Amendment right of the inmate to solicit funds for an educational program.

52. 425 U.S. 308, 323 (1976).

law will call for federal court intervention.⁵³ In Estelle v. Gamble,⁵⁴ the Court held that not all medical malpractice entitles a prisoner to bring an action under 42 U.S.C. §1983. The Court said:

Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute a "wanton infliction of unnecessary pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.⁵⁵

The distinction between intentional and reckless conduct, on the one hand, and "mere negligence," on the other, is not limited to assertions that the

53. But see Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972).

54. 97 S.Ct. 285 (1976).

55. Id. at 292. See Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976); Russel v. Shefer, 528 F.2d 318, 319 (4th Cir. 1975); Willbrun v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); Newman v. Alabama, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974), cert. denied sub nom. Thomas v. Cannon, 419 U.S. 879 (1974); Dewell v. Lawson, 489 F.2d 877, 881-882 (10th Cir. 1974); Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970); Gittlenacker v. Presse, 428 F.2d 1, 6 (3d Cir. 1970).

conduct was "cruel and unusual conduct" violative of the Eighth Amendment. In Bonner v. Coughlin,⁵⁶ the Seventh Circuit rejected a claim under 42 U.S.C. §1983 alleging that a trial transcript had been lost as a result of the negligence of a guard. In part the court said:

Neither the language of the statute nor its history shows that Congress was providing a federal remedy for damages caused by the simple negligence of a state employee. In enacting the Civil Rights Act, Congress was obviously intending to provide a deterrent for the type of conduct proscribed. If an officer intentionally causes a property loss, a remedy under Section 1983 might deter similar misconduct. On the other hand, extending Section 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct. Consequently, the majority of Circuits hold that mere negligence does not state a claim under Section 1983. Otherwise the federal courts would be inundated with state tort cases in the absence of Congressional intent to widen federal jurisdiction so drastically.⁵⁷

The issue is again before the United States Supreme Court in Navarette v. Enomoto,⁵⁸ in which the question is whether negligent failure to mail certain of a prisoner's outgoing letters in 1971-1972 states a cause of action for damages under §1983.

56. 545 F.2d 565 (7th Cir. 1976).

57. Id. at 568. Compare Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976).

58. 536 F.2d 277 (9th Cir. 1976), cert. granted, 97 S.Ct. 783 (1977).

(c) The existence of an adequate state, common law remedy. In Ingraham v. Wright,⁵⁹ the Court held that a Florida school child had a constitutionally protected interest to be free from corporal punishment except as that punishment is administered in accordance with due process of law. The Court went on to hold, however, that the traditional common law remedies, civil and criminal, available in Florida afforded adequate due process. In his majority opinion, Mr. Justice Powell cites with approval Bonner v. Coughlin,⁶⁰ in which then Circuit Judge Stevens said:

We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.⁶¹

(d) The existence of an available state forum. In Judice v. Vail⁶² the Court said:

We must decide whether, with the existence of an available forum for raising constitutional issues in a state judicial proceeding, the United States District Court could properly entertain

59. --- U.S. ---, 45 U.S.L.W. 4364 (April 19, 1977).

60. 517 F.2d 1311 (7th Cir. 1975), modified en banc, 545 F.2d 565 (7th Cir. 1976).

61. 517 F.2d 1311, 1319 (7th Cir. 1975). But see Ingraham v. Wright, 45 U.S.L.W. 4364, 4377 (April 19, 1977) (Stevens, J., dissenting).

62. --- U.S. ---, 45 U.S.L.W. 4269, 4270 (March 22, 1977).

appellees' § 1983 action in light of our decisions in Younger v. Harris, 401 U.S. 37 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). We hold that it could not.

How often a prisoner will have "an available forum for raising constitutional issues in a state judicial proceeding" is unclear. However, the Judice case does represent another limitation on the authority of a federal court to bring an action under 42 U.S.C. §1983 when there is an available remedy in state court.

B. The Role of State Courts in State Prisoner Conditions-of-Confinement Cases.

It seems increasingly evident that state courts do in fact share responsibility for the enforcement of the rights guaranteed by 42 U.S.C. §1983.⁶³ In Aldinger v. Howard,⁶⁴ Mr. Justice Brennan said, in dissent:

The Court today appears to decide sub silentio a hitherto unresolved question by implying that §1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts. [Citation omitted.] This is a conclusion with which I agree.⁶⁵

63. See Aldisert, supra note 8, at 575-576 n.90; and Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922 (1976).

64. 427 U.S. 1 (1976).

65. Id. at 36 n.17. See also Long v. District of Columbia, 469 F.2d 927 (D.C. Cir. 1972); Luker v. Nelson, 341 F. Supp. 111 (N.D. 111. 1972).

Some issues must be raised in state, rather than federal court. Under Ingraham v. Wright,⁶⁶ the existence of an adequate, available state judicial remedy will satisfy the requirements of federal due process. In those situations it is obvious that a prisoner-plaintiff must seek relief in the state court. Under Juidice v. Vail,⁶⁷ the opportunity to raise a constitutional issue in an ongoing state proceeding will preclude resort to federal court. Most importantly, a large number of prisoner conditions-of-confinement complaints may have merit, but are not of a kind which give rise to federal constitutional issues. This has been the case for a long time but is particularly true after the limitations on the definitions of "liberty" in Meachum⁶⁸ and Montanye⁶⁹ and the requirements of "fault" set forth in Estelle v. Gamble.⁷⁰ It is obviously in the interest of the plaintiff-prisoner to raise these issues at the state level, either administratively or judicially or, where appropriate, by both means.

66. 45 U.S.L.W. 4364 (April 19, 1977).

67. 45 U.S.L.W. 4269 (March 22, 1977).

68. 427 U.S. 215 (1976).

69. 427 U.S. 236 (1976).

70. 97 S.Ct. 285 (1976).

C. The Role of Federal Courts in Federal Prisoner
Conditions-of-Confinement Cases.⁷¹

An inmate of a federal correctional institution usually brings his action in mandamus, although actions for injunctive relief or in damages under the Federal Tort Claims Act may also be brought.⁷²

Those federal courts of appeal which have spoken to the issue have held that the federal prisoner is required first to exhaust his administrative remedies.⁷³

71. See Wood, Federal Prisoner Petitions, 7 St. Mary's L.J. 489 (1975).

72. See Wood, Federal Prisoner Petitions, 7 St. Mary's L.J. 489, 491-492 (1975); Thompson v. United States, 492 F.2d 1082 n.5 (5th Cir. 1974). In Thompson, Judge Bell held that judicial review of a refusal to "back compensation" and good time should be brought under the Administrative Procedure Act, 5 U.S.C. §§701-706.

The Administrative Office of United States Courts reports the following statistics on "mandamus" cases brought by federal prisoners:

1969 - 795	1973 - 1105
1970 - 856	1974 - 1002
1971 - 1115	1975 - 1197
1972 - 968	1976 - 1164

Annual Report of the Director of the Administrative Office of the United States Courts, 1976.

In District of Columbia v. Carter, 409 U.S. 418 (1973), the Court held that a federal prisoner must prove at least \$10,000 in damages. See Aldisert, supra note 8, at 568-571, especially 569 n.54.

73. See Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975). The Hardwick opinion states: "It is, of course, true that the federal courts have imposed upon federal prisoners the requirement that they 'exhaust their administrative remedies in accordance with Bureau of Prisons policy.'" Id. at 296. This is the latest in a

Because of the lack of authority to appoint and compensate counsel in federal prisoner conditions-of-confinement cases, there is a tendency in some districts to bring such cases on the theory of habeas corpus under 28 U.S.C. §2241, thus qualifying the case for the appointment of counsel under the Criminal Justice Act. This distortion of the remedy of habeas corpus seems an unfortunate way of achieving the otherwise desirable result of making counsel available in federal prisoner conditions-of-confinement cases.

series of cases in the Fifth Circuit requiring federal prisoners to use the administrative grievance procedure before raising conditions-of-confinement issues in court.

The Third Circuit has also apparently imposed an exhaustion of administrative remedies upon federal prisoners. See *Waddell v. Alldredge*, 480 F.2d 1078 (3d Cir. 1973); *Green v. United States*, 283 F.2d 687 (3d Cir. 1960). Some of the decisions probably can also be explained as applying the "ripeness doctrine." See *Soyka v. Alldredge*, 481 F.2d 303 (3d Cir. 1973), commented on in *Cravatt v. Thomas*, 399 F. Supp. 956 (W.D. Wis. 1975). See discussion of ripeness, supra note 33. Exhaustion is not required if recourse to administrative remedies would be fruitless. See *United States ex rel. Marrero v. Warden*, 483 F.2d 656 (3d Cir.), cert. granted, 94 S.Ct. 865 (1974). But see *Cravatt v. Thomas*, 399 F. Supp. 956 (W.D. Wis. 1975).

Part IV. PROPOSED PROCEDURAL STANDARDS FOR HANDLING
PRO SE PRISONER PETITIONS

A. Forms.

Each district court having a substantial case load of prisoner complaints should adopt by local rule a complaint form and also such other forms as are helpful in processing conditions-of-confinement cases. This is particularly important in this field of litigation where most plaintiff-prisoners are proceeding pro se.

Suggested forms are found in part V of this report.

Commentary

Form 1 is a recommended complaint form. It is the committee's judgment that the complaint form, properly filled out, will contain all of the information necessary to commence an action under 42 U.S.C. §1983. The form provides for an unsworn declaration under the penalty of perjury as is authorized by 28 U.S.C. §1746.⁷⁴

Form 2 is a declaration in support of a request to proceed in forma pauperis. This form also provides for an unsworn declaration under the penalty of perjury as authorized by 28 U.S.C. §1746.

74. Pub. Law 94-550, 94th Cong., Oct. 18, 1976.

Form 3 is an order to the records office at the prison to certify the amount of funds in the prisoner-plaintiff's institutional account. It is believed that this information is not necessary in the typical case,⁷⁵ but having the form available may be helpful in the case where the accuracy or adequacy of the financial information furnished by the prisoner-plaintiff is in doubt.

Form 4 is an order granting plaintiff leave to proceed in forma pauperis.

Form 5 is an order to the United States marshal to serve the complaint and other appropriate papers on all of the party defendants.

It is assumed that forms 3, 4, and 5 will be signed by the United States magistrate, but in some instances the action may be taken by the United States district judge. In the latter instance, the forms may be presented to the judge for his signature by the staff law clerk in districts where staff law clerks are assigned the responsibility of handling the early stages of prisoner conditions-of-confinement cases.

75. The United States District Court for the Southern District of Texas has established a system of partial payment for forma pauperis petitions under General Order No. 77-1. This system was approved in *Braden v. Estelle*, 21 Crim. L. Rep. 2056 (S.D. Tex. 3/17/77).

Form 6 affords a way of ensuring that pro se plaintiffs do not have ex parte communications with the judge or magistrate. This problem arises frequently in cases in which the prisoner-plaintiff is not familiar with proper procedure. The use of the form is a way of educating such plaintiffs.

Form 7 is an order for discovery drafted with a view to its utility in pro se prisoner litigation.

Form 8 is an order for the defendant to make a special report. This enables the court to obtain additional information which may be helpful in distinguishing between the meritorious and the frivolous complaint.

Form 9 is a recommended pretrial order which magistrates have found useful in prisoner pro se cases.

B. Centralization in District Courts.

Each court should institute a centralized method of processing prisoner complaints.

(1) The clerk's office should consider the advisability of having an intake clerk to examine prisoner complaints as to the filing requirements under local rules, if any.

(2) In multijudge district courts, a staff law clerk or a magistrate should assist the district judge in the processing of prisoner complaints.

(3) In multijudge courts it is sound management practice (except where the court has a specially assigned judge for prison matters) to assign to the same judge all actions commenced by one prisoner.

Commentary

Standard B (1) recommends that responsibility for the intake of correspondence relating to prisoner complaints reside in one person or group of persons in the office of the clerk of court. For simplicity such person or group is referred to as the "intake clerk." Because the prisoner-litigant is typically uneducated and because his pleadings, motions, briefs, and correspondence are unsophisticated and often unintelligible, the intake of such materials requires considerably more judgment and labor than the intake of materials prepared by attorneys. By heavy exposure to prisoner litigation, the intake clerk should handle the task more proficiently and consistently than would a large number of administrative

personnel, each handling only a small amount of prisoner litigation. Among the intake clerk's functions are: to send complaint forms to inmates requesting them; to ensure that the proper number of copies of the complaint and a forma pauperis declaration (or filing fees) have been received; to ascertain that the complaint complies with all of the requirements of the local rules, if any, as to the form of the complaint; and to assign the case to a judge. It is recommended that a separate file be kept on each prisoner-plaintiff so that a cross-reference can be made to see if there are repetitive complaints.

There is a difference in current practice as to when a deficient complaint will be filed or when, instead, the complaint will be returned to the plaintiff without filing it. Some judges instruct the clerk not to file the complaint if it does not conform to the rules of the court. When the form is used, it is returned if not properly filled out. Other judges instruct their clerk to file even a defective complaint and then inform the plaintiff that a properly amended complaint will have to be filed. In view of the varied

practice, it is recommended that this issue be dealt with and the practice clarified by local rule. Where there is a local rule with respect to the requirements of the complaint, the clerk obviously is acting properly in refusing to file the complaint if it fails to conform to local rule requirements.

Standard B (2) suggests the use of a staff law clerk or a magistrate to perform the initial screening of prisoner complaints.

A number of district courts presently assign the initial screening function to a magistrate. This is true in the Central District of California and the Western District of Pennsylvania.⁷⁶

The standard leaves to the individual district court the choice between the use of a magistrate and the use of a special staff law clerk. The role of the staff law clerk in prisoner cases has been the subject of an experiment conducted by the Federal Judicial Center in three trial courts--Middle District of Pennsylvania,

76. For several years the Northern District of California has had a staff law clerk (an able and experienced lawyer), referred to as the "writ clerk," who has received all prisoner complaints once the intake clerk is satisfied that the complaint is in proper form.

The Southern District of New York has also used a staff law clerk to handle all pro se matters. The nature of his work is described in Zeigler and Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 159 (1972).

Southern District of Florida, and the Western District of Missouri. The objective of the program was to determine the effect that such a clerk could have on the processing of prisoner cases. After a year's experience, the participating courts felt that the project was valuable enough to warrant extension and therefore sought, with committee assistance, continued funding for the positions. The Administrative Office acquired administrative authority over the program and, in addition to continuing the three pilot positions, sponsored positions in Maryland, the Southern District of Texas, the Eastern District of Virginia, the Northern District of Illinois, and the Central District of California. Depending upon the results of the Center experiment and the continuing experience of the courts with staff law clerk positions, more detailed recommendations may then be developed as to the use of a staff law clerk.

In standard B (3) the committee commends the practice of assigning to the same judge all actions commenced by one prisoner. Such a practice discourages judge-shopping and increases efficiency in processing repetitive complaints.

C. Complaint; Leave to Proceed In Forma Pauperis.

(1) Form 1 is a suggested complaint form. Modification in the form should be made if necessary to meet the needs of the particular district.

(2) Form 2 is a declaration in support of a request to proceed in forma pauperis. It is recommended as a method of obtaining the information required to determine whether to grant plaintiff leave to proceed in forma pauperis. The decision whether to grant leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915 (a) should turn solely on the economic status of the petitioner.

(3) The court may wish to obtain further information concerning the plaintiff's economic status. An order may be entered requiring the plaintiff to submit further specified information or an order may be entered to require the records officer at the institution to furnish a certificate setting forth the balance in the plaintiff's prison account. Form 3 is a suggested order requiring the records officer at the prison to certify the present status of the prisoner-plaintiff's account.

(4) If leave to proceed in forma pauperis is granted, the complaint should be filed.

(5) Function of the Magistrate. The procedures recommended in this standard may be carried out by the magistrate, including the decision to grant or deny permission to proceed in forma pauperis. If permission is denied, the prisoner-plaintiff may appeal, in accordance with local rules, to the United States district judge. The decision of the magistrate should be sustained unless "clearly erroneous or contrary to law."⁷⁷

Commentary

The recommended complaint form requires the prisoner-plaintiff to furnish sufficient factual information to determine, in many cases, whether the complaint has merit without requiring a responsive pleading from the defendant.

The decision in Estelle v. Gamble⁷⁸ indicates that the failure to plead the necessary facts may properly result in a dismissal. The opinion of Mr. Justice Marshall indicates that the careful and complete factual allegations in the case made speculation as to what the facts might be unnecessary.⁷⁹ The committee believes

77. This is the standard prescribed in 28 U.S.C. §636 (b)(1)(A).

78. 97 S.Ct. 285 (1976).

79. See also Codd v. Velger, 97 S.Ct. 882 (1976).

that the use of the recommended form may increase the situations in which frivolous complaints can properly be dismissed sua sponte under 28 U.S.C. §1915 (d).

District courts may wish to make certain changes in the complaint form to conform to local conditions and local rules. For example, the question "Did you present the facts relating to your complaint in the state prisoner grievance procedure?" should be eliminated in districts where state prisons have no adequate, readily available grievance procedure.

The committee believes that asking the inmate whether he has used the grievance procedure is appropriate in states that have prisoner grievance procedures. A series of brief, often per curiam, Supreme Court decisions⁸⁰ indicate that such procedures need not be exhausted prior to the filing of a complaint under 42 U.S.C. §1983.⁸¹ Nevertheless the committee felt that a question relating to grievance procedures is appropriate because it may alert the inmate to this

80. Burrell v. McCray, 426 U.S. 471 (1976), writ of cert. dismissed as improvidently granted; Ellis v. Dyson, 421 U.S. 426 (1975); Carter v. Stanton, 405 U.S. 669, 671 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

81. See notes 24 and 73, supra.

nonjudicial method of resolving his complaint and because the inmate may have used the grievance procedure, and the administrative record, if available, may be helpful to the federal court.⁸²

In some jurisdictions a supply of the forms would be made available at each correctional institution within the district. This would be convenient for the inmates and would relieve the clerk's office of the burden of mailing forms in response to inmates' requests.

Section 1915 (a) of title 28 permits the commencement of a civil action without prepayment of fees and costs or security therefor by a person who is "unable to pay such costs or give security therefor." The section further provides that the court may "dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

Under 28 U.S.C. §1746,⁸³ it is sufficient if the plaintiff makes an unsworn declaration under the penalty of perjury. This is provided for in form 2. The declaration will avoid the difficulty, sometimes encountered, of finding a notary public in the prison

82. See notes 24 and 73, supra.

83. Pub. Law 94-550, 94th Cong., Oct. 18, 1976.

to notarize the request for leave to proceed in forma pauperis.

Some courts have blurred the distinction between §1915 (a) and §1915 (d) by approving the practice of denying leave to proceed in forma pauperis on the ground that the complaint is frivolous or malicious.⁸⁴ The practice observed by most courts⁸⁵ is to consider only the petitioner's economic status in making the decision whether to grant leave to proceed in forma pauperis. Once leave has been granted, the complaint should be filed and the court should consider whether to dismiss pursuant to §1915 (d). See commentary following standard D, infra.

Form 3 may be used whenever the prisoner-plaintiff is unable to determine the status of his prison account

84. *Wartman v. Wisconsin*, 510 F.2d 130 (7th Cir. 1975); *Wright v. Rhay*, 310 F.2d 687 (9th Cir. 1962), cert. denied, 373 U.S. 918 (1963); *Reece v. Washington*, 310 F.2d 139 (9th Cir. 1962); *Taylor v. Burke*, 278 F. Supp. 868 (E.D. Wis. 1968). In the Central District of California, leave to proceed in forma pauperis is denied if the complaint is unintelligible or filled with obscenities or if the claim is substantially the same as one which he has pending in the court. The case does not receive a docket number unless leave to proceed is granted under §1915 (a).

85. *Brown v. Schneckloth*, 421 F.2d 1402 (9th Cir.), cert. denied, 400 U.S. 847 (1970); *Cole v. Smith*, 344 F.2d 721 (8th Cir. 1965); *Oughton v. United States*, 310 F.2d 803 (10th Cir. 1962); *United States v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1953); *Urbano v. Sondern*, 41 F.R.D. 355 (D. Conn. 1966), aff'd, 370 F.2d 13, 14 (2 cases), cert. denied, 386 U.S. 1034 (1967).

or when the court has reason to doubt the accuracy of the information furnished by the prisoner-plaintiff.

It is common and desirable practice to also require the prisoner-plaintiff to complete the Marshal's Instructions for Service form for each defendant. Copies of this form are readily available.

D. Dismissal of Complaint.

(1) In cases in which leave to proceed in forma pauperis is granted, the court should consider the separate question, under 28 U.S.C. §1915 (d), whether the complaint should be dismissed as "frivolous or malicious." If the court determines that the complaint is irreparably frivolous or malicious, it should be dismissed without affording the plaintiff an opportunity to amend. If the court determines that the complaint is frivolous or malicious, but that this defect can be cured by amendment, the court should issue an order to show cause why the complaint should not be dismissed. The order should explain why the complaint is frivolous or malicious and should allow the plaintiff an opportunity to respond and to amend the complaint.

(2) Function of the Magistrate. The magistrate may forward to the judge the complaint and a proposed order for dismissal of the complaint.

Commentary

The committee recommends that the decision whether to dismiss pursuant to §1915 (d) be made prior to the issuance of process. In this way the defendant will be spared the expense and inconvenience of answering a frivolous complaint.⁸⁶

The committee recommends dismissal with no opportunity to respond when the complaint is irreparably frivolous or malicious.⁸⁷ If the defect in the complaint is reparable, the court should issue an order to show cause, permitting the plaintiff to respond and to amend.⁸⁸ If there are multiple defendants, the complaint should be dismissed as to those defendants against whom a frivolous or malicious cause of action is alleged

86. But see Dear v. Rathje, 485 F.2d 558 (7th Cir. 1973), reaffirmed as to the requirement that the summons issue as in Wartman v. Wisconsin, 510 F.2d 130 (7th Cir. 1975). See also Nichols v. Schubert, 499 F.2d 946 (7th Cir. 1974).

87. See Worley v. California Department of Corrections, 432 F.2d 769 (9th Cir. 1970).

88. See Potter v. McCall, 433 F.2d 1087 (9th Cir. 1970). See also Hansen v. May, 502 F.2d 728 (9th Cir. 1974), requiring the district court to allow plaintiff to cure a defect in the complaint by amendment.

and should be allowed to continue against the other defendants. In borderline cases, the court should not dismiss, but should let the case proceed and rule on a subsequent motion to dismiss if one is presented.⁸⁹

The meaning of the terms "frivolous" and "malicious" in §1915 (d) is a question of substantive law and therefore beyond the scope of these procedures. However, attention is called to the language of the Supreme Court in Anders v. California, stating that a contention is not frivolous if "any of the legal points [are] arguable on their merits."⁹⁰ The content of the terms "frivolous" and "malicious" may also be influenced by the Supreme Court's decision in Haines v. Kerner,⁹¹ establishing

89. See Urbano v. Sondern, 41 F.R.D. 355, 357 (D. Conn. 1966), aff'd, 370 F.2d 13, 14 (2 cases), cert. denied, 386 U.S. 1034 (1967).

90. 386 U.S. 738, 744 (1967). See also Williams v. Field, 394 F.2d 329 (9th Cir. 1968); Jones v. Bales, 58 F.R.D. 453, 461-464 (N.D. Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973).

91. 404 U.S. 519 (1972). See also Dickinson v. Chief of Police, 499 F.2d 336 (5th Cir. 1974). For illustrations of frivolous claims, see Sparks v. Fuller, 506 F.2d 1238 (1st Cir. 1974). See also McDonnell v. Wolff, 519 F.2d 1030 (8th Cir.), cert. denied, 423 U.S. 916 (1975); Ellingburg v. Lucas, 518 F.2d 1196 (8th Cir. 1975); Henderson v. Secretary of Corrections, 518 F.2d 694 (10th Cir. 1975); Pitts v. Griffin, 518 F.2d 72 (8th Cir. 1975); Gregory v. Wyse, 512 F.2d 378 (10th Cir. 1975). For illustrations of nonfrivolous claims, see Bryan v. Werner, 516 F.2d 233 (3d Cir. 1975); Hines v. Askew, 514 F.2d 673 (5th Cir. 1975) (a case listing the principal United States Supreme Court and Fifth Circuit cases dealing with the issue of when a dismissal is appropriate); Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974); Goff v. Jones, 500 F.2d 395 (5th Cir. 1974).

relaxed standards for pro se pleadings. Reversing the district court's dismissal of a prisoner civil rights complaint, the Court stated:

[A]llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁹²

E. Service of Complaint and Summons; Procedure to Prevent Ex Parte Communication by Pro Se Plaintiff

(1) If the complaint is not dismissed, it should be served on the defendant. See form 5 for a recommended form ordering the marshal to make service of the complaint and summons. The order may be signed by the judge or the magistrate.

92. 404 U.S. at 520-521. See also Estelle v. Gamble, 97 S.Ct. 285 (1976), but see dissent of Stephens, J.; Carter v. Thomas, 527 F.2d 1332 (5th Cir. 1976); Watson v. Ault, 525 F.2d 886 (5th Cir. 1976). See also Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976), in which the court stated at 922: "In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity." Further the court stated "[Gray v. Creamer, 465 F.2d 179, 182 n.2 (3d Cir. 1972)] suggested that the Haines standard would be applied to complaints in which 'specific allegations of unconstitutional conduct' were made, whereas Negrich [Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967)] would continue to serve as a barrier to complaints which 'contain only vague and conclusory allegations.'"

(2) Form 5 contains a paragraph instructing the plaintiff to file a copy of all documents with the clerk and to serve a copy of all documents on the defendant.

Commentary

A continual problem in handling prisoner cases is the tendency of prisoners to write letters to judges and magistrates and to file motions and various other documents without serving a copy on the defendant or his attorney. Prisoners should not be permitted to engage in ex parte communications with judges and magistrates any more than other litigants. However, it must also be realized that prisoners proceeding pro se cannot be expected to know, understand, and follow the rules as required of attorneys. Therefore, it is important for the magistrate or judge to acquaint the prisoner with the relevant rules and then to require him to follow them. This can begin when the order is entered allowing the prisoner to proceed in forma pauperis. Form 5 contains appropriate instructions.

If the prisoner sends papers directly to the judge or magistrate and fails to include a certificate of

service, the papers should be returned (a copy should be retained for the files) to the prisoner, who should be advised that it is improper to write letters to judges and magistrates about cases pending before them. A sample letter is contained in form 6. If the prisoner continues to mail documents to the magistrate or the judge, or if he mails them to the clerk but fails to include a certificate of service, an order can be entered referring to the original order and ordering that the particular document shall not be considered by the court unless filed with the clerk and accompanied by a proper certificate of service. If the prisoner writes a letter asking a question, it is suggested that no answer be given. Rather the prisoner should be advised that it is improper to write letters to judges and magistrates about cases pending before them. This policy should reduce the number of letters received from prisoners and also ensure that defense counsel will receive copies of all documents filed.

Sometimes prisoners will include a certificate of service although they have not actually made service. If this is suspected, the magistrate should enter an

order allowing defendants a specified time to respond to plaintiff's document. If defendants reply that they have not received a copy of the document, an order should be entered providing that the document will be disregarded until defense counsel acknowledges receipt of a copy from the plaintiff.

F. Counsel.

Presently there is no statutory authority for guaranteeing the compensation of counsel in conditions-of-confinement cases under 42 U.S.C. §1983.

The court may award attorney fees to the prevailing party in 42 U.S.C. §1983 cases. See 42 U.S.C. §1988:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Counsel cannot be appointed under the Criminal Justice Act.⁹³

93. 18 U.S.C. §3006A.

Commentary

The appointment of counsel is one of the most difficult aspects of prisoner conditions-of-confinement cases. Most federal judges do request counsel to serve in some cases, particularly those which are not dismissed as frivolous under 28 U.S.C. §1915 (d). Usually the request is made of a legal services program, such as those found in an increasing number of law schools, or from a panel of members of the practicing bar who have agreed to donate their services in pro bono cases. In any event, reliance on uncompensated counsel is not entirely adequate and lawyers, expressing increasing fear of malpractice suits, are less and less willing to serve as uncompensated counsel in prisoner conditions-of-confinement cases.

Not appointing a counsel in some cases results in a situation where a pro se plaintiff, who may have a meritorious case, is unable adequately to represent himself. At present, there is no satisfactory solution to this problem. There are, however, some alternatives which may be helpful in some situations.

(1) The enactment of 42 U.S.C. §1988 makes it possible to award attorney fees to the prevailing party. However, one does not know in advance who will prevail, and the appointment of counsel must therefore be on a "contingent fee" basis.

(2) Some lawyers are willing to volunteer their services without compensation. This is a method used in some districts.

(3) Some publicly funded legal services agencies are willing to handle prisoner conditions-of-confinement cases. This is true, for example, in Wisconsin where Corrections Legal Services is funded with federal LEAA and State of Wisconsin money for this purpose. The federal Legal Services Corporation, however, reports that its current funding level makes it impossible to fund a program to represent prisoners in conditions-of-confinement cases.⁹⁴

(4) There are some law student, clinical education programs which handle prisoner conditions-of-confinement cases.

The current reality is that there is no satisfactory method of providing counsel in these cases. The

⁹⁴. Letter from E. Clinton Bamberger, Jr., to Carl H. Imlay dated February 25, 1976 (on file at the Federal Judicial Center).

situation is further complicated by the fact that conditions-of-confinement cases are very difficult for lawyers to handle. Where the lawyer's advice is accepted by the prisoner, there is a gain in the elimination of frivolous complaints and in the more effective presentation of those complaints which have merit. Often, however, the lawyer's advice is not accepted. In some situations, available counsel are more interested in pursuing their own ideas of needed prison reform than in pursuing the particular interests of the prisoner-client being represented.⁹⁵

G. Motions.

(1) Motion practice is covered by Rule 12 of the Federal Rules of Civil Procedure for the United States District Courts. A court may, by local rule, extend the time periods for the making of and response to a motion. Where plaintiff's imprisonment affects plaintiff's ability to know or to comply with prescribed time limits, the court should take appropriate steps to include specific reference to prescribed time

95. The tension between law reform and client service is discussed in Krash, Professional Responsibility to Clients and the Public Interest: Is There a Conflict?, 55 Chi. B. Rec. 31 (1973).

limits in such orders as are issued and should extend the time limits whenever it is appropriate to do so.

(2) The magistrate may hear and decide any pretrial motion except "a motion for injunctive relief, for judgment on the pleadings, for summary judgment, . . . to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action."⁹⁶

With respect to motions which the magistrate has no authority to decide, the magistrate may submit to the judge proposed findings of fact and recommendations for disposition.⁹⁷ Such proposed findings and recommendations shall be filed with the court, and a copy shall be forthwith mailed to all parties, together with an explanation to the parties of their right to file written objections to such proposed findings and recommendations within ten days after being served with a copy. If either party files written objections, the judge shall make a de novo determination of those portions of the report or specified findings or recommendations to which

96. 28 U.S.C. §636 (b)(1)(A). Because this report deals with procedures in cases brought by pro se plaintiffs, attention is not given to the question of when a class action is appropriate under 42 U.S.C. §1983. A pro se plaintiff cannot bring a class action. *Oxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975). Therefore, language in §636 (b)(1) referring to class actions is omitted.

97. 28 U.S.C. §636 (b)(1).

objection is made. The judge may, but is not required to, conduct a new hearing. He may instead consider the record which has been developed before the magistrate and make his own determination on the basis of the record.

Commentary

During the fiscal year 1976, 5,858 state prisoner conditions-of-confinement cases were terminated. Of that total, there was no court action in 3 cases, and the termination was by court action in 5,855 cases. Of these, 5,352 cases were terminated before pretrial and 247 were terminated during or after pretrial, compared with 256 cases which reached trial (209 nonjury and 47 jury trials).⁹⁸ The percentage of cases reaching trial was 4.4 percent. It is obvious from these statistics that the initial stages of prisoner conditions-of-confinement cases is where most of the cases are disposed of. For that reason, procedures governing the initial stages of prisoner cases are very important.

98. Annual Report of the Director of the Administrative Office of the United States Courts, 1976, as amended.

Most cases disposed of prior to trial are dismissed under:

28 U.S.C. §1915 (d)--"the court may dismiss the case . . . if satisfied that the action is frivolous or malicious," defined in Anders v. California as not frivolous if "any of the legal points [are] arguable on their merits";⁹⁹

Rule 12 (b)(6)--"failure to state a claim upon which relief can be granted"; or

Rule 56 which provides for summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

The distinction between a motion to dismiss under Rule 12 (b)(6) and a motion for summary judgment under Rule 56 is discussed in 10 Wright & Miller, Federal Practice and Procedure: Civil §2713.¹⁰⁰ Basically a motion under Rule 12 (b)(6) will involve only an

99. 386 U.S. 738, 744 (1967).

100. West Pub. Co., 1973. See also discussion of Rule 12 (b)(6) motions in §§1355-1358, id.

examination of the pleadings, particularly the sufficiency of the complaint, while a summary judgment motion is typically based on both the pleadings and any affidavits, depositions, transcripts, and other forms of evidence properly before the court at the time the motion is made.

Some courts treat a Rule 12 (b)(6) motion where a party has filed an affidavit as a motion for summary judgment under Rule 56. In such situations the other party is given an opportunity to also file affidavits.

A dismissal under Rule 12 (b)(6) and a dismissal under 28 U.S.C. §1915 (d) differ primarily in that the dismissal under §1915 (d) can be on the court's own motion prior to requiring a responsive pleading from the defendant, whereas a dismissal under Rule 12 (b)(6) is made typically on motion of a party after the complaint and summons have been served on the defendant.¹⁰¹

H. Dismissal for Plaintiff's Failure to Prosecute.

(1) If the plaintiff fails to respond to a motion filed by the defendant, an order should be entered

101. See 5 Wright & Miller, Federal Practice and Procedure: Civil §1358 n.33 (West Pub. Co. 1969), for illustrative cases in which motions have been denied and granted in 42 U.S.C. §1983 cases.

allowing him a specified period of time to respond or suffer dismissal for failure to prosecute.

(2) Function of the Magistrate. The magistrate should prepare an order for the judge to sign, informing the plaintiff that he has a specified number of days within which to respond or his complaint will be dismissed.

Commentary

Sometimes a plaintiff loses interest in his law suit, particularly if released on parole. In such circumstances he often fails to furnish the court with a forwarding address. This standard provides for a procedure to be used in such situations. If the plaintiff has been released on parole, an effort should be made to determine his correct address. If he fails to respond after receipt of the order to show cause or if his current address cannot be obtained, the complaint should be dismissed for failure to prosecute.

It is suggested that the magistrate prepare an order for the judge to sign. This will not impose a time burden on the judge and, therefore, is recommended, although the legislative history to S. 1283 which

expands the authority of the United States magistrate indicates that the Congress is willing to have the magistrate on his own dismiss a complaint for failure to prosecute.¹⁰²

I. Procedures Following the Filing of an Answer by Defendant.

(1) An order should be entered setting a period of time to complete discovery. A recommended order is contained in form 5. The period of time can be extended on the request of either party.

(2) Each party should be required to file pretrial statements.

(3) A plaintiff may be required under appropriate circumstances to summarize his testimony and the testimony of anticipated witnesses who are incarcerated.

Commentary

Practice varies from district to district with respect to the time allowed for the completing of discovery. The committee recommends that the court

102. See Hearing Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, U.S. Senate, S. Rpt. 534, 94th Cong., 1st Sess., on S. 1283, July 16, 1975, at pp. 7 and 10.

manage the case by setting a relatively short period for discovery with extensions granted if there is reason to do so.

After the answer is filed, action should be taken to bring the case to issue as rapidly as possible. Form 7 accomplishes this purpose. In a district in which the parties generally do not engage in discovery in prisoner civil rights actions, it is suggested that the period of discovery be as short as three weeks. This notifies the plaintiff of the availability of discovery, and if either party wishes to obtain discovery, requests for additional time should be liberally granted. This procedure avoids the accumulation of several months "dead time" when the parties do not engage in discovery, but does not prevent them from obtaining adequate time for discovery, upon request.

Although the general practice at the present time appears to be not to engage in discovery, the committee recommends that state attorneys general utilize depositions in appropriate cases to assist the court in the effective disposition of the case.

Because of the cost and practical difficulties of bringing prisoner-witnesses to court,¹⁰³ it may be helpful to require the plaintiff to summarize the anticipated testimony of his witnesses so that a decision can be made as to whether the testimony will be admissible and of sufficient significance to warrant the expense of bringing the witness to court.

In Moeck v. Zajackowski,¹⁰⁴ the Court of Appeals for the Seventh Circuit found that prisoners do not have an absolute constitutional right to be present at their trials. The court found instead that in each case a discretionary decision must be made whether fulfillment of a fundamental interest of the prisoner so reasonably requires his being transported to court that it outweighs the state's interest in avoiding the risks and expense of such transportation. In Stone v. Morris,¹⁰⁵ the court again recognized that a prisoner does not have a constitutional right to appear as a witness in his own civil rights action, but held that

103. See, e.g., Moeck v. Zajackowski, 385 F. Supp. 463 (W.D. Wis. 1974), 541 F.2d 177 (7th Cir. 1976).

104. Id.

105. 546 F.2d 730 (7th Cir. 1976).

in that case the court had erred in excluding the plaintiff from his trial.

As to the plaintiff's right to call witnesses, the Court of Appeals for the Fourth Circuit has said:

In regard to Cook's request for witnesses, the district court advised him that it was necessary that he demonstrate to the court the nature and materiality of the testimony. When Cook failed to do so, the court properly declined to order such witnesses to appear at the trial.¹⁰⁶

J. Special Report from Defendant.

In order to discover the defendant's version of the facts and in order to encourage out-of-court settlement, the magistrate or court should, in appropriate cases, enter a special order requiring the defendant to investigate the case and to report the results of his investigation to the court. A suggested form for an order requiring a special report is found in form 8.

Commentary

The objective of the special report is to give the court the benefit of detailed factual information that may be necessary to decide a case involving a constitutional

106. Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975).

challenge to an important, complicated correctional practice, particularly one that affects more than the single inmate who has filed the 1983 action.

In Hardwick v. Ault,¹⁰⁷ the Court of Appeals for the Fifth Circuit suggested the use of the special report, citing its advantages:

[I]f utilized, they should serve the useful functions of notifying the responsible state officials of the precise nature of the prisoner's grievance and encouraging informal settlement of it, or, at the least, of encouraging them to give the matter their immediate attention so that the case may expeditiously be shaped for adjudication.¹⁰⁸

Proponents of the special report have had several objectives in mind:

(1) The special report gives the state an initial opportunity to remedy the allegedly defective practice and probably thus moot the case.

(2) The special report can facilitate case management in several ways:

(a) It enables the court to consolidate related cases (challenging the same administrative practices).

107. 517 F.2d 295 (5th Cir. 1975).

108. Id. at 298.

(b) It improves the quality of the information available to the court. Usually neither the pro se petition, the answer, nor a motion for summary judgment gives the court the desired information especially if the challenge is to an important correctional practice affecting a large number of inmates.

(c) If the case goes to trial, the court has useful information on which to prepare for pretrial and trial proceedings.

(3) The special report is a useful alternative or supplement to the traditional methods of discovery because:

(a) Traditional discovery is usually limited to the facts relating to the individual petitioner while the issue may have broader implications for other inmates and the correctional system generally.

(b) Traditional discovery techniques do not work very well with a pro se petitioner.

(c) In a complicated case, the special report is less costly.

In cases requiring a prompt decision, the court should require a prompt response to the order. Generally, however, the court should allow a generous amount of time to enable the defendant to conduct a thorough and careful investigation.

Magistrate Frank J. Polozola, in the Middle District of Louisiana, follows the practice of entering an order (in appropriate cases) requiring the complaint to be investigated in accordance with existing administrative grievance procedures. The magistrate sets forth the problem to be investigated. The defendant is given thirty to sixty days to file the report together with any relevant documents. If the furnished information discloses that the complaint is without merit, a report with findings of fact, conclusions of law, and a recommendation of dismissal is filed with the district judge. If the complaint is not dismissed, the defendant is ordered to file an answer or other responsive pleading.

K. Pretrial Conference.

The magistrate may conduct a pretrial conference and prepare a pretrial order or, if the plaintiff is not represented by counsel and if the magistrate does

not feel a pretrial conference will be useful, prepare a magistrate's pretrial order. A sample order is attached as form 9.

Commentary

The pro se prisoner status of the plaintiff creates particular problems in conducting the pretrial conference and preparing the pretrial order. Although the plaintiff's pretrial statement (as called for in the order submitted as form 7) is helpful, it is not equivalent to a pretrial statement prepared by an attorney. In many districts the local rules require the parties to prepare a joint pretrial order. However, the prisoner-plaintiff, proceeding pro se, generally distrusts the defendant's attorney and is unwilling to accept documents prepared by him. As to conducting the pretrial conference, there is confusion as to the party responsible for bringing the plaintiff to court, the party responsible for paying the plaintiff's transportation costs, and security problems. The plaintiff is usually skeptical of stipulations.

The decision whether to conduct a pretrial conference may best be made on a case-by-case basis. If it is determined that a pretrial conference will not be helpful, the magistrate may review the file and prepare the pretrial order (form 9). This is particularly helpful when the case is to be tried before the judge since it can simplify his review of the pleadings. If the magistrate has been handling the case as recommended in this report, he will be familiar with the issues, and preparation of the order should not be a difficult time-consuming task. Any party objecting to the issues as set forth by the magistrate may appeal the order in accordance with the Magistrates Act, 28 U.S.C. §636 (b)(1)(A), and the local rules for magistrates. If no appeal is taken, the magistrate's summary of the parties' positions and the issues for trial would bind the parties in the same manner as a stipulated order signed by the parties.

L. Evidentiary Hearing--Function of the Magistrate.

If a jury trial has been waived, the court may designate the magistrate to conduct the hearing under

two alternative procedures, each of which has special consequences.

(1) The magistrate may be designated under 28 U.S.C. §636 (b)(1)(B) to conduct the hearing and submit findings and recommendations to the judge. Within ten days after being served with a copy, either party may serve and file written objections to the proposed findings and recommendations. In this situation the judge shall make a de novo determination of those findings or recommendations to which objection is made.

(2) If both parties consent to use of the magistrate as a master, the magistrate can be designated to serve as a master. The magistrate should then make findings of fact and recommended conclusions of law. The findings may be objected to within ten days of receipt of notice of the findings. The party who objects shall do so by serving and filing written objections. The judge shall accept the findings of fact unless they are clearly erroneous. The court should, upon objection, consider de novo any conclusion of law contained in the magistrate's recommended disposition of the case.

Commentary

The authority of the magistrate to conduct an evidentiary hearing comes from 28 U.S.C. §636 (b)(1)(B) and 28 U.S.C. §636 (b)(2).

Under §636 (b)(1)(B), the magistrate can conduct "hearings, including evidentiary hearings, and submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any . . . prisoner petitions challenging conditions of confinement." If a party objects to the findings or recommendations within ten days, the judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." This "de novo determination" may be on the basis of the record or by additional hearings. Some magistrates follow the practice of summarizing the testimony of the parties and, if there is no objection to the accuracy of the summary within ten days, the judge can base his de novo determination on the summary provided by the magistrate.

No distinction is made in 28 U.S.C. §636 between cases brought under 42 U.S.C. §1983 which request

damages and those which do not. Therefore, it would seem that the magistrate can hear and recommend in such cases.¹⁰⁹

Under §636 (b)(2) the "judge may designate a magistrate to serve as a special master" in conformity with the requirements of Rule 53 of the Federal Rules of Civil Procedure or "in any civil case, upon consent of the parties, without regard to the provisions of rule 53."

Although the statute is not explicit on the point, apparently the findings and recommendations of the magistrate will have the effect prescribed in Rule 53-- the findings of the magistrate are to be sustained by the judge unless "clearly erroneous." (This is the same standard applicable to magistrates' pretrial rulings under §636 (b)(1)(A).)¹¹⁰

109. Letter from Congressman William Hungate dated October 19, 1976 (copy on file at the Federal Judicial Center).

110. The function and authority of masters under Rule 53 are helpfully discussed in 9 Wright & Miller, Federal Practice and Procedure: Civil §§2601-2615 (West Pub. Co., 1971). For a discussion of use of magistrates where parties consent, see Masters and Magistrates, 50 N.Y.U. L. Rev. 1297, 1349 (1975).

Part V. RECOMMENDED FORMS

Form 1 (April 1, 1977)

Instructions for Filing a Complaint by a Prisoner
Under the Civil Rights Act, 42 U.S.C. §1983

This packet includes four copies of a complaint form and two copies of a forma pauperis petition. To start an action you must file an original and one copy of your complaint for each defendant you name and one copy for the court. For example, if you name two defendants you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

The clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

You are required to furnish, so that the United States marshal can complete service, the correct name and address of each person you have named as defendant. A PLAINTIFF IS REQUIRED TO GIVE INFORMATION TO THE UNITED STATES MARSHAL TO ENABLE THE MARSHAL TO COMPLETE SERVICE OF THE COMPLAINT UPON ALL PERSONS NAMED AS DEFENDANTS.

In order for this complaint to be filed, it must be accompanied by the filing fee of \$15. In addition, the United States marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis. Two blank petitions for this purpose are included in this packet. One copy should be filed with your complaint; the other copy is for your records.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk of the United States District Court for the _____
[local court should insert address]

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §1983

In the United States District Court
For _____

[Enter above the full name of
the plaintiff in this action.]

v.

[Enter above the full name of the
defendant or defendants in this
action.]

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes [] No []

B. If your answer to A is yes, describe the lawsuit in the space below. [If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.]

1. Parties to this previous lawsuit

Plaintiffs _____

Defendants _____

2. Court [if federal court, name the district;
if state court, name the county]

3. Docket number _____

4. Name of judge to whom case was assigned _____

5. Disposition [for example: Was the case dismissed? Was it appealed? Is it still pending?]

6. Approximate date of filing lawsuit _____

7. Approximate date of disposition _____

II. Place of Present Confinement _____

A. Is there a prisoner grievance procedure in this institution?
Yes [] No []

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes [] No []

C. If your answer is YES,

1. What steps did you take? _____

2. What was the result? _____

D. If your answer is NO, explain why not _____

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes [] No []

F. If your answer is YES,

1. What steps did you take? _____

2. What was the result? _____

III. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of Plaintiff _____

Address _____

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

B. Defendant _____ is employed as _____
_____ at _____

C. Additional Defendants _____

IV. Statement of Claim

[State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

V. Relief

[State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.]

Signed this _____ day of _____, 19__.

[Signature of Plaintiff]

I declare under penalty of perjury that the foregoing is true and correct.

[Date]

[Signature of Plaintiff]

Form 2 (April 1, 1977)

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

Instructions to court:

This form is to be sent to the prisoner-plaintiff.

If there is reason to believe that the information received is not accurate or complete, the court may want to use form 3 in addition. Form 3 is an order asking the records officer at the institution to submit a certificate stating the current balance in the plaintiff's institutional account.

Form 2

[insert appropriate court]

[petitioner]

v.

DECLARATION IN SUPPORT OF
REQUEST TO PROCEED
IN FORMA PAUPERIS

[respondent]

I, _____, am the petitioner in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. Are you presently employed? Yes___ No___

a. If the answer is yes, state the amount of your salary per month and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

- a. Business, profession, or form of self-employment? Yes___ No___
- b. Rent payments, interest, or dividends? Yes___ No___
- c. Pensions, annuities, or life insurance payments? Yes___ No___
- d. Gifts or inheritances? Yes___ No___
- e. Any other sources? Yes___ No___

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own any cash or do you have money in a checking or savings account? Yes___ No___ (Include any funds in prison accounts)

If the answer is yes, state the total value owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No___

If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support; state your relationship to those persons; and indicate how much you contribute toward their support. _____

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury.

[Petitioner's Signature]

I declare under penalty of perjury that the foregoing is true and correct.

Signed this _____ day of _____, 19__.

[Signature]

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

_____)	
Plaintiff)	
vs.)	Civil Action No. _____
)	
_____)	
Defendant)	

ORDER

Plaintiff _____, a prisoner at the _____, has submitted a complaint for filing in this district, accompanied by a forma pauperis declaration. However, he has failed to attach a statement of his account from the prison record office. Therefore, the following order is entered this _____ day of _____, 19____:

IT IS HEREBY ORDERED that the records officer at the _____ shall submit to the clerk of this court a certificate stating the present balance in the account of plaintiff _____.

cc: Plaintiff
Records Officer

[United States District Judge
or
United States Magistrate]

Form 4 (April 1, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

_____)	
Plaintiff)	
vs.)	Civil Action No. _____
)	
_____)	
Defendant)	

ORDER

Plaintiff _____, a prisoner at the _____, has submitted a complaint for filing in this district, together with a request for leave to proceed in forma pauperis. Since it appears that he is unable to pay the costs for commencement of suit, the following order is entered this _____ day of _____, 19____:

IT IS HEREBY ORDERED that plaintiff's motion for leave to proceed in forma pauperis is granted and the clerk is directed to file the complaint.

[United States District Judge
or
United States Magistrate]

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

Plaintiff)
vs.)

Defendant)

Civil Action No. _____

ORDER

It having been determined that the plaintiff may proceed in forma pauperis, IT IS ORDERED that the United States marshal serve a copy of the complaint, summons, and order granting leave to proceed in forma pauperis upon defendant as directed by plaintiff. All costs of service shall be advanced by the United States.

IT IS FURTHER ORDERED that plaintiff shall serve upon defendant or, if appearance has been entered by counsel, upon his attorney, a copy of every further pleading or other document submitted for consideration by the court. He shall include with the original paper to be filed with the clerk of court a certificate stating the date a true and correct copy of any document was mailed to defendant or his counsel. Any paper received by a district judge or magistrate which has not been filed with the clerk or which fails to include a certificate of service will be disregarded by the court.

[United States District Judge
or
United States Magistrate]

cc: Plaintiff
United States Marshal

_____ [date]

Mr. _____
[state correctional institution]

Dear Mr. _____:

Judge _____ received your communication of _____, 19____. However, it is improper for you to communicate directly with judges and magistrates about cases pending before them. Accordingly, your communication is returned herewith.

When you wish to provide information relevant to your case, you must mail the paper to the Clerk of Court, _____ [address] _____, who will then forward it to the appropriate judge or magistrate.

You must also mail a copy of the paper to each defendant or, if they are represented by counsel, to their attorneys, and include on the original paper filed with the Clerk of Court a certificate stating the date on which you mailed a true and correct copy to each defendant or his attorney.

Very truly yours,
Clerk of the Court

by: _____
[Deputy
or
Clerical Assistant to Magistrate]

(April 1, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

_____)	
Plaintiff)	
)	
vs.)	Civil Action No. _____
)	
_____)	
Defendant)	

ORDER

On this _____ day of _____, 19____,

IT IS HEREBY ORDERED that all discovery shall be completed
by _____;

IT IS FURTHER ORDERED that on or before _____
 plaintiff shall file a narrative written statement of the facts
 that will be offered by oral or documentary evidence at trial
 and shall include a list of all exhibits to be offered into
 evidence at the trial of the case and a list of the names and
 addresses of all witnesses the plaintiff intends to call.
 Plaintiff shall include a summary of the anticipated testimony
 of any witnesses who are presently incarcerated. Plaintiff
 shall serve a copy of the statement on counsel for defendant,
 _____, at the address given for him in this
 order, and shall include on the original document filed with
 the clerk of court a certificate stating the date a true and
 correct copy was mailed to defendant's counsel.

IT IS FURTHER ORDERED that on or before _____ defendant shall file and serve a narrative written statement of the facts that will be offered by oral or documentary evidence as a defense at trial and shall include a list of all exhibits to be offered into evidence at the trial of the case and a list of the names and addresses of all witnesses the defendant intends to call.

Failure to fully disclose in the pretrial narrative statement or at the pretrial conference the substance of the evidence to be offered at trial will result in exclusion of that evidence at the trial. The only exceptions will be (1) matters which the court determines were not discoverable at the time of the pretrial conference, (2) privileged matter, and (3) matter to be used solely for impeachment purposes.

IT IS FURTHER ORDERED that plaintiff shall serve upon defense counsel a copy of every pleading or other document submitted for consideration by the court and shall include on the original document filed with the clerk of court a certificate stating the date a true and correct copy of the pleading or document was mailed to counsel. Any pleading or other document received by a district judge or magistrate which has not been filed with the clerk or which fails to include a certificate of service may be disregarded by the court.

cc: Plaintiff
Defense Counsel

[United States District Judge or
United States Magistrate]

(April 1, 1977)

ORDER REQUIRING SPECIAL REPORT

It appearing to the court that a complaint has been filed under 42 U.S.C. §1983, claiming a violation of civil rights by a person serving a custodial sentence in an institution of the state of _____; and

It appearing that proper and effective judicial processing of the claim cannot be achieved without additional information from officials responsible for the operation of the appropriate custodial institution;

It is, on this _____ day of _____, 19____, ORDERED:

- (1) The answer to the complaint, including the report herein required, shall be filed no later than _____ days from the date hereof.
- (2) No answer or motions addressed to the complaint shall be filed until the steps set forth in this order shall have been taken and completed.
- (3) Officials responsible for the operation of the appropriate custodial institution are directed to undertake a review of the subject matter of the complaint
 - (a) to ascertain the facts and circumstances;
 - (b) to consider whether any action can and should be taken by the institution or other appropriate officials

- to resolve the subject matter of the complaint; and
- (c) to determine whether other like complaints, whether pending in this court or elsewhere, are related to this complaint and should be taken up and considered together.
- (4) In the conduct of the review, a written report shall be compiled and filed with the court. Authorization is granted to interview all witnesses including the plaintiff and appropriate officers of the institution. Wherever appropriate, medical or psychiatric examinations shall be made and included in the written report.
- (5) All reports made in the course of the review shall be attached to and filed with defendant's answer to the complaint.
- (6) The answer shall restate in separate paragraphs the allegations of the complaint. Each restated paragraph shall be followed by defendant's answer thereto.
- (7) A copy of this order shall be transmitted to the plaintiff by the clerk forthwith.

[United States District Judge
or
United States Magistrate]

(April 1, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

_____)	
Plaintiff)	
)	
vs.)	Civil Action No. _____
)	
_____)	
Defendant)	

PRETRIAL ORDER

I. RELIEF SOUGHT

II. JURISDICTION

Jury trial demanded? Yes [] No []

III. PARTIES' POSITIONS

A. Plaintiff's Position

Plaintiff alleges _____

B. Defendant's Position

Defendant alleges _____

IV. ISSUES PRESENTED

A. Issues of Fact

B. Issues of Law [refer to any significant cases]

C. There is no dispute as to the following facts: _____

V. WITNESSES

A. Plaintiff's Witnesses [summarize anticipated testimony of incarcerated witnesses, including plaintiff's, so that a determination can be made whether their testimony is essential or merely cumulative]

B. Defendant's Witnesses

VI. EXHIBITS

A. Plaintiff's Exhibits

B. Defendant's Exhibits

VII. PRETRIAL RULINGS [rulings relevant to the trial]

United States Magistrate

cc: District Judge
Plaintiff
Defense Counsel

