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This Issue in Brief

Restitution As Innovation or Unfilled Promise?—Author Burt Galaway discusses what we have learned about restitution since the establishment of the Minnesota Restitution Center in 1972 and in light of the early theory and work of Stephen Schafer. Noting that restitution meets both retributive and utilitarian goals for punishment, the author finds considerable public and victim support for restitution, including using restitution in place of more restrictive penalties. He cautions, however, that we must clarify the difference between restitution and community service sentencing and discusses challenges which exist for future restitution programming.

Parole and the Public: A Look at Attitudes in California.—Describing recent events in California, Author Walter L. Barkdull stresses the need for parole authorities to develop community support for the concept of parole. Public attitudes hostile to parole have been crystalized by the release of several notorious offenders at the end of determinate sentences. Community groups have discovered the power of organized action to thwart the state's ability to locate facilities and place parolees. Resulting court decisions have provided both the public and parole authorities with new rights, while legislation has imposed severe operating limitations.

Long-Term Inmates: Special Needs and Management Considerations.—Society's response to crime has contributed to a number of trends which have resulted in longer terms of incarceration for convicted felons. Determinant sentencing, modifications in parole eligibility criteria, enhanced sentences for repeat offenders, and longer terms for violent offenders have resulted in an increase in time served and a subsequent increase in the proportion of long-term inmates in state facilities. The incarceration of greater numbers of long-term inmates brings a number of programmatic and management concerns to correctional administrators which must be addressed. Using data on Kentucky inmates incarcerated as "persistent felony offenders," authors Deborah G. Wilson and Gennaro F. Vito identify the programmatic and management needs of long-term inmates and delineate some possible strategies to address this "special needs" group.

The Use of Counsel Substitutes: Prison Discipline in Texas.—Although prison discipline has changed significantly through internally and externally initiated reforms, it remains a critical aspect

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Some Recent Trends in Civil Litigation by Federal and State Prison Inmates

By Dean J. Champion

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Introduction

It is widely acknowledged that incarceration in jails and prisons is accompanied not only by stringent restrictions on freedom of movement but also by the loss of numerous privileges (Bronstein, 1985). Despite these losses of privileges and the deliberately punitive nature of incarceration, inmates continue to enjoy several important constitutional rights. It has only been in the last few decades, however, that substantial numbers of inmates have exercised these rights successfully through Federal and state court litigation directed at administrative discretion and treatment as well as the general conditions under which inmates are housed (Palmer, 1985).

In 1985, more than 22,000 petitions were filed by inmates of local, state, and Federal correctional institutions alleging both civil and criminal violations and seeking compensatory damages, injunctions, and property claims (Hunzecker and Conger, 1985). Currently, about a sixth of all civil cases filed in Federal district courts are petitions from inmates in jails and prisons (Palmer, 1985).

Until the early 1960's, Federal and state courts were reluctant to intervene in matters of prison and jail administration. This reluctance, referred to popularly as the "hands-off doctrine," was explained in part by the general judicial belief in the separation of powers, where prison administration was believed to be a predominantly executive function. Furthermore, the lack of judicial expertise in penology and the prevalent feeling that judicial intervention would seriously undermine prison authority and discipline caused many state and Federal judges to reject inmate claims and petitions short of their full court resolution (Palmer, 1985). Yet other judges have suggested the hands-off doctrine is rightfully rooted in the principle that courts lack subject matter jurisdiction over inmate grievances (Hanson, 1984).

The hands-off doctrine deterred Federal and state court intervention in prisoner affairs for many years until the mid-1960's. In 1964, *Cooper* v. *Pate* was decided by the U.S. Supreme Court, holding that state inmates could bring lawsuits against prison authorities under Title 42, Section 1983, the Civil Rights Act. In the next few years following this holding, the prisoner litigation explosion occurred, as state and Federal prisoners deluged the courts with civil rights petitions and criminal allegations (Bronstein, 1987).

Avenues for Civil Remedies

There are three basic avenues whereby jail and prison inmates can petition the courts concerning civil wrongs. The most widely used avenue is Section 1983 of Title 42 (the Civil Rights Act) which holds that

> 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 (Palmer, 1985).

A second avenue is through Title 28, Section 2674 (the Federal Tort Claims Act of 1946) which provides that "the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment for punitive damages." The U.S. Supreme Court decided in 1963 that inmates of Federal prisons could file petitions against prison administrators and guards under the Federal Tort Claims Act in the case of *United States* v. *Muniz* (1963). Until this Supreme Court action, prison officials enjoyed sovereign immunity from suits by prisoners alleging damages or injuries through administrative negligence. Currently, officials have qualified immunity excepting them from suits under this section alleging "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" (28 U.S.C. Sec. 2680, 1988).

Section 1983 actions may challenge the conditions of confinement, but the fact and length of incarceration are not within this section's purview (*Preiser*

v. *Rodriguez*, 1973). In order for prisoners to effectively challenge their imprisonment in court, they must file a *habeus corpus* petition under the Federal Habeus Corpus Statute (28 U.S.C. Section 2241, 1988) (Haas and Alpert, 1987). In recent years, habeus corpus petitions filed by prisoners have declined appreciably, while the number of Section 1983 petitions has systematically increased (Thomas et al., 1985). Since state courts have concurrent jurisdiction with Federal courts in deciding cases based entirely upon Federal claims, state or Federal prison inmates may choose either court for their litigation.

Although it is not a prerequisite for inmates to exhaust all state remedies before filing a Section 1983 petition in Federal courts, there is an exception provided under Title 42, Section 1997 whereby a Federal judge may refer inmate lawsuits back to the state correctional systems where they originated, if a U.S. Department of Justice-certified grievance procedure exists. Virginia was the first state to establish a certified inmate grievance procedure in 1982. The administrative procedures for inmate grievances must satisfy certain minimum standards, including the provision that inmates and employees perform advisory roles, maximum time limits are established for written replies to grievances, priority processing of grievances is made on an emergency basis where undue delay might result in inmate harm, safeguards are designed to avoid reprisals against inmates filing grievances, and an independent review is made of the disposition of grievances by a person or persons not under the direct supervision or control of the correctional facility (Palmer, 1985:206; Miller, 1983). Thus, the number of inmate petitions filed in Federal courts will be affected by the presence or absence of certified administrative grievance procedures as internal remedies.

Prisoner Petitions and the Bill of Rights

The most frequent constitutional rights violations cited in civil petitions filed by prisoners under Section 1983 are the "cruel and unusual" punishment provisions of the eighth amendment (*Pugh* v. *Locke*, 1976; *Hutto* v. *Finney*, 1978; *Reynolds* v. *Sheriff, City of Richmond*, 1983), the unreasonable search and seizure provisions of the fourth amendment (*Burnette* v. *Phelps*, 1985; *Hanrahan* v. *Lane*, 1984; *Smith* v. *Montgomery County, MD*, 1986; *Cook* v. *City of New York*, 1984; *Gardner* v. *Johnson*, 1977), and the due process and equal protection under the law provisions of the 14th amendment (*Owens* v. *Brierley*, 1971; *Martinez Rodriguez* v. *Jimenez*, 1976). Other violations upon which inmate petitions are based include but are not limited to freedom of speech, privacy, and religious practices.

The Turning Point: Bell v. Wolfish

After nearly 15 years of deciding inmate suits, the U.S. Supreme Court heard the well-known case of *Bell* v. *Wolfish* (1979). Among other things, this case challenged the constitutionality of double-bunking or placing two or more inmates in cells designed to accommodate one inmate in the Metropolitan Correctional Center of New York City. Although other serious issues were involved, the U.S. Supreme Court seemed to revert to the original "hands-off" doctrine by declaring in a 6-3 decision that jail management should be left to corrections personnel. In short, deference should be extended those noted for their expertise in correctional matters, so that any particular administrative decision should not be invalidated by Supreme Court action unless extreme circumstances could be articulated in inmate petitions (Singer, 1980). Subsequently in *Rhodes* v. *Chapman* (1981), the Supreme Court determined double-bunking not to be cruel and unusual punishment under the eighth amendment, where Justice Powell said that "the Constitution does not mandate comfortable prisons."

Some observers concluded from the *Wolfish* case that more stringent standards would be applied by the courts in future cases involving constitutional rights violations by inmates (Singer, 1980, 1982). Between 1979 and 1988, however, the annual number of inmate petitions filed in state and Federal courts alleging rights violations has increased rather than decreased. One explanation is that the majority opinion in the *Wolfish* case was sufficiently vague so as to permit broad interpretation by lower courts. In the opinion of some experts, the *Wolfish* case functioned to make future inmate allegations and issues more specific and clear-cut (Powers, 1983; Koren, 1984).

The Prisoners' Movement and Prison Reform

The litigation explosion of the 1970's and 1980's has been associated with a prisoners' movement designed, in part, to bring about prison reforms (Fox, 1984). Substantial evidence exists suggesting that the prisoners' movement has been at least partially successful in this regard (Yarbrough, 1984; Hanson, 1984; Davis and Leban, 1985; Bronstein, 1987).

It is interesting to note that during the inmate litigation explosion, several other significant events have occurred to dramatically affect corrections in the United States. First, all state jurisdictions and the Federal government have undertaken to revise their existing sentencing schemes. The most prominent sentencing reforms have been the shift from indeterminate to determinate, presumptive, and mandatory sentencing schemes and greater restrictions on the autonomy of the judiciary and paroling

authorities relating to offender sentencing and inmate early release decisions (Goodstein and Hepburn, 1985). Another event has been increased reliance by corrections officials and others on inmate classification and risk assessment instruments for deciding the appropriate level of inmate custody. Thus, it would seem the stage has been set for substantial shifts in the nature and types of inmate petitions that eventually reach state and Federal courts.

However, an intervening factor has been the large-scale establishment of alternative dispute resolution mechanisms for prisoner grievances. These mechanisms include inmate grievance procedures, ombudsmen, mediation, inmate councils, legal assistance, and external review bodies (Cole and Hanson, 1984). These mechanisms were stimulated largely by the 1967 President's Commission on Law Enforcement and the Administration of Justice. Although some state corrections facilities had internal prisoner grievance mechanisms, many prisons lacked such systems. By 1982, all 50 states had created inmate grievance systems. Thus, court caseloads were eased as internal prison committees and administrative personnel responded positively to inmate grievances as an alternative to filing petitions with the court alleging civil rights violations. These internal alternative dispute mechanisms have not functioned as originally anticipated to reduce the sheer numbers of inmate petition filings in recent years, however.

The Present Study

The present study examines state and Federal inmate litigation trends for the period, 1975-87. This article is a preliminary analysis of data profiling the nature and types of filed inmate petitions in six states and four district courts. No attempt is made in this analysis to indicate the successfulness of these petitions or the favorableness or unfavorableness of rulings for the inmates involved. Furthermore, the study exclusively examines civil filings.

Six southern states were selected (Tennessee, Kentucky, Virginia, Florida, Georgia, and Alabama), and state court records inspected. The records of four Federal district courts (two selected from the 6th circuit and two from the 11th circuit) were also inspected through the method of content analysis in an effort to determine the number and nature of civil filings by inmates. Five time periods were targeted for analysis including 1975, 1978, 1981, 1984, and 1987. All civil filings in these state and Federal jurisdictions were examined, and all local, state, and Federal inmate petitions were isolated.

Among other objectives, this research sought to confirm whether noticeable shifts have occurred in the nature and types of inmate filings and allegations of civil rights violations. Has the nature of inmate litigation in state and Federal prisons changed during the period, 1975-87? A second objective was to determine whether state filings were basically different from Federal filings in terms of the proportionate representation of civil rights violations claimed. A third objective was to determine whether habeus corpus petitions have declined systematically over the years as predicted by others. A fourth objective was to examine the possible association between changes in inmate litigation and changes occurring in sentencing reform.

For the five time periods selected, there were 7,428 civil petitions filed by inmates in the six state and four Federal district courts. Categorizing these petitions according to (1) Section 1983 filings (civil rights), (2) Section 2674 filings (tort actions), and (3) Section 2241 filings (habeus corpus petitions), the distributions of filings according to these categorizations are shown in table 1 for state and Federal courts.

TABLE 1. DISTRIBUTIONS OF INMATE PETITIONS IN STATE AND FEDERAL COURTS, 1975-87.

		Court			
	Type of	State		Federal	
Year	*Petition*	N	Prop.	N	Prop.
1975	Sec. 1983	329	.476	26	.578
	Sec. 2674	301	.436	13	.289
	Sec. 2241	61	.088	6	.133
	TOTALS =	691	1.000	45	1.000
1978	Sec. 1983	356	.509	31	.544
	Sec. 2674	288	.411	19	.333
	Sec. 2241	56	.080	7	.123
	TOTALS =	700	1.000	57	1.000
1981	Sec. 1983	385	.545	29	.509
	Sec. 2674	271	.383	24	.421
	Sec. 2241	51	.072	4	.070
	TOTALS =	707	1.000	57	1.000
1984	Sec. 1983	448	.596	16	.500
	Sec. 2674	260	.346	12	.375
	Sec. 2241	44	.058	4	.125
	TOTALS =	752	1.000	32	1.000
1987	Sec. 1983	546	.693	15	.534
	Sec. 2674	205	.261	10	.358
	Sec. 2241	36	.046	3	.108
	TOTALS =	787	1.000	28	1.000
GRAND TOTALS =		3,637	1.000	219	1.000

First, considering all state inmate petitions filed, there was a systematic increase across the five sample years from 691 cases in 1975 to 787 cases in 1987. However, inmate petitions filed in the four district courts appeared to increase from 1975 to 1981, with an abrupt decrease in case filings for the 1984 and 1987 periods. It is not known from existing information how many inmate petitions were filed in Federal district courts but were referred back to originating states for administrative processing.

An interesting profile emerges for the three petition categories (e.g., civil rights, torts, and habeus corpus) examined. Among the six states examined, there was a systematic increase in both the absolute numbers of Section 1983 petitions and the proportionate representation of these petitions in relation to the other categories. Thus, there was an increase from 329 Section 1983 petitions in 1975 to 546 petitions in 1987 or a proportionate change from .476 to .693. Section 2674 petitions filed decreased systematically during these years, both numerically and proportionately. The number of Section 2674 petitions decreased from 301 in 1975 to 205 in 1987, or a proportionate decrease of .436 to .261 for these years.

The Section 2241 habeus corpus petitions in state courts decreased both numerically and proportionately for these years as well, from 61 or .088 in 1975 to 36 or .046 in 1987. Section 2241 petitions filed in the four Federal district courts during these years were slightly greater proportionately, although numerically they accounted for very few petitions filed. Only 24 habeus corpus petitions were filed in the four district courts during the five time periods examined, or an average of about five per year. The decrease in the use of habeus corpus petitions is consistent with the literature in this regard, as more inmates appear to seek relief through Section 1983 or Section 2674 avenues (Singer, 1983).

Section 1983 cases were inspected further to determine the nature of civil rights violations alleged. Specifically targeted were those cases raising the issue of classification resulting in losses of privileges through assignment to higher custody levels. No inmate filings in Federal district courts raised the classification issue. However, the proportionate number of filings citing 8th and 14th amendment violations through misclassification rose steadily from 1975 to 1987. In 1975, 38 inmate filings out of 691 in state courts or about 5.5 percent included the classification issue. However, by 1987, this figure had climbed gradually to 110 inmate petitions or about 14 percent of the 787 petitions filed in state courts. This figure increased regularly across all sample years.

Conclusions and Discussion

First, noticeable shifts have occurred in state and Federal inmate litigation during the 1975-87 period. The number of civil lawsuits filed by inmates in the state and Federal jurisdictions examined have systematically increased. However, noticeable decreases occurred regarding the proportion of lawsuits filed under Title 28, Section 2674 of the Federal Tort Claims Act for both state and Federal jurisdictions. At the same time, significant increases in the proportion and number of inmate petitions filed in state courts alleging civil rights violations under Title 42, Section 1983 occurred for the period studied. A corresponding proportionate and numerical decrease in Section 1983 petitions occurred in the Federal jurisdictions between 1975 and 1987.

Overall, the number and proportion of habeus corpus petitions filed under Title 28, Section 2241 decreased systematically in state courts. Although the proportion of Section 2241 filings was higher in district courts compared with state courts across all years, the number of Federal filings in the district courts examined were quite small. Thus, any comparisons should be cautiously viewed. It is significant that the number of habeus corpus petitions has declined steadily in the state courts examined. This is consistent with what has been found in the literature and is also supported by Title 28, Section 2254 of the U.S. Code which requires state prisoners to exhaust all state judicial and administrative remedies before they apply for the writ in Federal courts. Accordingly, of the 24 writs of habeus corpus filed by inmates in the Federal district courts studied, only three were filed by state inmates. It is assumed that in those instances, the inmates had exhausted their judicial and administrative remedies earlier.

The decrease in Section 2674 filings alleging torts such as negligence and other liability on the part of prison administrators and others may be explained, in part, by the fact that prisons in the states examined have established administrative grievance procedures and internal policies designed to nip this type of litigation in the bud. Also, the growth of guard unions during the 1970's and the increased susceptibility of prison and jail administrators to lawsuits has created an atmosphere of greater awareness of legal liabilities and responsibilities. Thus, the likelihood has increased that arbitration will be used as a tool for resolving problems and conflicts between guards, prisoners, and administrators rather than subjecting their disputes to court litigation. The systematic decrease in tort actions by inmates against prison officials and others in the jurisdictions examined might be attributable to es-

tablishment and growth of these internal grievance processes. At least this is the most likely explanation.

The increase in Section 1983 actions by inmates evidenced by a doubling of these types of petitions filed between 1975 and 1987 may be attributed to the prisoners' movement, as inmates of prisons and jails consistently strive to improve the conditions under which they are confined. However, changes in sentencing systems in various states have heightened inmate sensitivity to their sentences and general privileges. The significant increase in petitions alleging civil rights violations due to misclassification by prison officials is indicative of growing prisoner awareness of how their privileges are affected by various classification and sentencing schemes.

There are sufficient differences between the state and Federal district court filings of petitions by inmates for the years examined here to conclude that basic shifts have occurred about where an inmate will choose to file certain types of petitions. Federal district courts appeared to be used less frequently during the 1975-87 period for inmate petitions generally. Clearly a larger sampling of district and state court filings from other geographical areas is in order, since it is not known from the present findings how generalizable these results may be to northern, eastern, and western jurisdictions. Since only a portion of the materials gathered in the present study has been analyzed, only tentative conclusions may be drawn about the course of inmate litigation regionally.

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