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

Tentative Report

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Introduction

For years federal courts followed what was known as a "hands-off" doctrine in responding to complaints about correctional practices.[1] 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.[2] The "hands-off" doctrine had the advantage of leaving decision-making to those most knowledgeable about the needs of the correctional 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

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1. 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.

2. 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.

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 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.

The door to the judicial process, which was for a long time closed, is now wide open. This is 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 of judicial.[3]

3. 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 16, 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 (5th Cir. 1975).

The Supreme Court repeated its nonexhaustion ruling in Ellis v. Dyson, 416 U.S. 954, 95 S. Ct. 1691 (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, supra, and McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert. granted, 44 LW 3072 (1975). But see Morgan v. LaVallee, 18 Cr L 2143, 2144 (2d Cir. Oct. 14, 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 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.

An inmate of a federal correctional institution usually brings his action in mandamus.[4] Some federal circuit courts of appeal have held that the federal prisoner

4. See 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.A. §§ 701 et seq.

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

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

is required first to exhaust his administrative remedies.[5]

The inmate may 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.[6]

5. 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.'" 517 F.2d at 296. This is the latest in a 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 upon in Cravatt v. Fenton, --- F. Supp. --- (W.D.Wis., Aug. 1975). See Discussion of ripeness, infra, note 23. 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. 1974).

A helpful discussion of the requirement of exhaustion in federal prisoner cases is found in Cravatt v. Fenton, supra. In that case the policies in favor of exhaustion are identified as: (1) the facilitating of subsequent judicial review after the agency has exercised its administrative expertise; (2) the development of a factual record; (3) agency opportunity to correct its own errors; and (4) possible saving of judicial time if administrative relief is granted.

Exhaustion ought not to be required where (1) to do so would be futile or (2) only issues of constitutional or statutory interpretation are involved.

In the Cravatt case, the court concluded that the federal prison grievance procedure lacked adequate assurance that adequate investigation would be made or that adequate factual records would result.

6. See Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Ariz. State U. L.J. 557, especially 573 et seq. [hereafter cited as Aldisert].

This change in access to the federal courts can be explained in large part by an increased skepticism about the benevolence of government and increasing doubts about our ability to rehabilitate offenders even if therapists are available, are well trained and highly motivated, and have wide discretion as to methods and duration of treatment. Fairness and equal treatment have become goals with priority as high as or higher than effectiveness in correctional treatment.

The abolition of the "hands-off" doctrine has created problems, particularly for the United States district judges. The prisoner rights cases are numerous, are difficult, and often are frustrating for the judge who must decide them. The result has been increasing concern about this field of litigation.[7]

7. See Aldisert, supra note 6. Illustrative of recent law review comment are: Stanton, Convicts and the Constitution in Indiana, 7 Ind. L. Rev. 662 (1974); Prisoner and the First Amendment: Freedom Behind Bars, 4 Loyola U. L.J. 109 (1973); Prisoners' Redress for Deprivation of a Constitutional Right: Federal Habeas Corpus and the Civil Rights Act, 4 St. Mary's L.J. 315 (1972); Prisoners' Rights: Evolution Without Direction, 37 Albany L. Rev. 545 (1973); Prisoners' Rights, 17 Vill. L. Rev. 980 (1972); Prisons-Civil Rights, 6 Suffolk U. L. Rev. 1138 (1972); 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' 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).

This increasing concern 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 civil rights cases and to propose procedures for the more effective handling of these cases. Other members of the committee are Griffin B. Bell (Circuit Judge, Fifth Circuit), Robert C. Belloni (Chief Judge, United States District Court, Oregon), Robert J. Kelleher (District Judge, C. D. Cal.), and Frank J. McGarr (District Judge, N. D. Ill.).

The committee has made a careful study of current methods of handling prisoner cases in the federal courts. The chairman of the committee, Judge Aldisert, wrote every federal district and circuit judge asking for suggestions as to how prisoner civil rights cases could better be handled. Most judges responded, making suggestions that have been carefully reviewed by the committee. Where appropriate the suggestions are reflected in the procedures recommended in this report. The committee has found variations in the procedures currently being utilized by various United States district judges. In some districts innovative methods have been developed, such as the use of the special writ clerk (referred to in this report as a "staff law clerk")

in the Northern District of California and the use of the "Special Report" in New Jersey. In its "Standards," the committee has tried to incorporate the best features found in current use. In the process of their development, these recommended procedures were widely circulated and were discussed at several conferences of judges and numerous seminars at the Federal Judicial Center. The procedures have thus been subject to continuing review; changes have been made when ways of improving the proposed procedures became apparent. As a consequence, the recommended procedures reflect the views and experience not only of the committee but also of a broad segment of the federal judiciary.

This report is tentative. The study of prisoner cases will continue, and changes will be made in the standards whenever it appears that improvements in them can be made. The Federal Judicial Center will work with several "pilot districts" that will adopt innovative procedures such as the "staff law clerk." The Center will evaluate the effect of the new procedure upon the handling of prisoner cases. Depending upon the results of the evaluation, the committee may want to recommend the wider adoption of procedures such as the "staff law clerk."

There will be also a continuing study of various procedures currently being utilized in some districts.

Included will be an examination of the utility of the "Special Report" in New Jersey, a study of the benefits derived from using a recommended "form" in prisoner cases, and an inquiry into the effect of having counsel available to represent the prisoner-plaintiffs.

The committee has under consideration the desirability of making procedural changes that would first require change in law, either through the rule-making process or by act of Congress. Included are suggestions that 42 U.S.C. § 1983 be amended to require exhaustion of state remedies (administrative and perhaps judicial);[8] that the jurisdiction of the United States magistrate be amended to make clear his

8. In the view of the committee, it is extremely difficult to justify the major procedural differences which may result from what may be, in a particular case no more than a choice of the form of the pleading. For example, a challenge to a condition of confinement may be brought either as a federal habeas under 42 U.S.C. § 2254 or as a civil rights action under 42 U.S.C. § 1983. If the former, the prisoner must exhaust his state remedies, but also has the right to counsel in the federal court. If the latter, the prisoner does not have to exhaust his state remedies, administrative or judicial, but he has no right to be represented by counsel furnished at government expense. One way to resolve this is to make the exhaustion and counsel aspects of federal habeas also applicable to prisoner civil rights cases. Doing this, however, creates a new classification problem with different requirements applicable to prisoner 1983 cases that are not applicable to non-prisoner 1983 cases. The current situation seems unsatisfactory, and there is need for careful study of alternative ways of improving the situation. See note 3, supra.

authority to take testimony and make recommended findings of fact and conclusions of law in prisoner cases;[9]

9. On March 7, 1975, the Judicial Conference of the United States, upon recommendation of the Committee on the Administration of the Federal Magistrates System, proposed an amendment to 18 U.S.C. § 631 (b) which reads:

"It is recommended that existing section 636(b) be repealed and that a new section 636(b) be adopted to read as follows:

"'(b)(1) Notwithstanding any provision of law to the contrary, a judge may designate a magistrate to hear and determine, subject to review as hereinafter provided, any pretrial matter pending before the court except motions which are dispositive of the litigant, the disposition of which the magistrate may recommend, but not order. A judge may also designate a magistrate to conduct evidentiary hearings and make recommendations for the disposition of applications for post-trial relief made by individuals convicted of criminal offenses and prisoner petitions challenging conditions of confinement. Upon timely request, as fixed by local rule of court, by any party who has appeared before the magistrate, either personally or by submission of affidavits or brief, the court shall hear de novo those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made.

"'(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

"'(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

"'(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.'"

In explaining the enlargement of the authority of the magistrate in prisoner cases, the report of the Judicial Conference states:

"Subsection (b)(1) - second sentence - Prisoner petitions.

"In addition, proposed subsection (b)(1) of 28 U.S.C. § 636 specifically authorizes the designation of a magistrate to conduct

and that the Criminal Justice Act be amended to provide for compensation of counsel in prisoner cases.[10] Because most

evidentiary hearings and make recommendations for the disposition of applications for post-trial relief by individuals convicted of criminal offenses and of petitions challenging the conditions of confinement. The reference to the type of post-trial relief tracts the language of the existing statute and covers applications by both state and federal prisoners for habeas relief under 28 U.S.C. §§ 2254 and 2255. It does not cover applications for reduction of sentence, made to the judge who originally imposed the sentence, pursuant to Rule 35 of the Federal Rules of Criminal Procedure. Both federal and state prisoners are covered when the conditions of confinement are challenged.

"The growing volume and increasing complexity of prisoner petitions have seriously burdened the federal courts. During the fiscal year 1974, petitions by federal and state prisoners accounted for 18 percent of all the civil cases filed in the district courts. The problem is heightened by the fact that most of these petitions are unevenly distributed among the courts.

"Although petitions filed by prisoners challenging their conviction or conditions of confinement may raise serious legal and constitutional questions, the great majority of those filed in the federal courts are eventually dismissed for lack of merit. Proposed subsection (b)(1) expands the jurisdiction of United States magistrates by explicitly authorizing them to conduct evidentiary hearings on the factual merits of prisoner controversies and to make recommendations to the district court for appropriate disposition. In light of the recent Supreme Court decision in the Wedding case, it is necessary that the power of magistrates to conduct evidentiary hearings in these cases be set forth explicitly in the statute.

"The proposal will expedite prisoner litigation in the district courts and give prisoners prompt access to a competent judicial officer. In civil rights cases filed by inmates, for example, a magistrate will be able to conduct proceedings at the prison facility for the court, by acting as an ombudsman or arbitrator, by promoting settlement of the dispute, or by conducting an evidentiary hearing where necessary. Following a prompt evidentiary hearing by a magistrate, moreover, a prisoner litigant is entitled as a matter of right to a de novo hearing of his petition before a district judge upon the filing of specific and timely objections to the magistrate's proposed findings of fact and conclusions of law."

The proposal is now pending before the Senate Subcommittee on Improvements in Judicial Machinery.

10. The staff of the newly formed Legal Services Corporation (P.L. 93-355, 88 Stat. 378) intends to put the matter of representation

of these changes would require action by Congress, they are not being addressed by the committee at this time.

The committee has given primary attention to the development of a set of recommended procedures for use in prisoner cases. Giving special attention only to prisoner cases is appropriate at this time for a number of reasons.

(1) 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 separately tabulated for the past four 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; and 6,128 in the fiscal year ending June 30, 1975.[11] The numbers are large and continue

in prisoner civil rights cases on an early agenda of the corporation. See letter from Carl Imlay, General Counsel of the Administrative Office of United States Courts, dated June 10, 1975. The American Bar Association has recommended that the Legal Service Corporation "...assure that civil legal services are made available no less to the poor in institutions than to other poor people." 17 Cr L 2419 (1975)

11. For a discussion of the trend, see Kimball and Newman, Judicial Intervention in Correctional Decisions: Threat and Response, 14 Crime and Delinquency 1 (1968).

to increase.[12] The caseload is not only large numerically, but is also difficult to handle, especially because the plaintiff is usually unrepresented. As a consequence, a great deal of judge time and effort are devoted to the "weeding out" of the nonmeritorious cases.[13] Because of this, the best possible system for identifying the meritorious case must be developed.

(2) Importance of the Individual Case. It is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the most liberal of definitions of frivolity. What to most people would be a very insignificant matter becomes, because of the nature of prison life, a matter of real concern to the inmate. To have a United States district judge spending time on what, at best, would be a small claims court matter for the ordinary

12. 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; and 1766 in 1975. State habeas corpus cases showed a decrease: 7949 in 1972; 7784 in 1973; 7626 in 1974: but 7843 in 1975. The figures may be somewhat distorted by factors such as the bringing of federal prisoner complaint cases as habeas corpus in order to allow for the appointment of counsel under the Criminal Justice Act.

13. See Bailey, The Realities of Prisoners' Cases under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois, 6 Loyola U. L.J. 527 (1975). The study shows that some judges spend little time on 1983 cases, usually dismissing the case on the basis of the inmate's complaint. Other judges give more time and require responsive pleadings and make findings of fact and conclusions of law.

citizen, seems inappropriate given the small size of the federal judiciary. For this reason, some have urged drastic limitations on the access to federal court by the prisoner-litigant. However, there is another characteristic of the prisoner rights case that makes drastic limitation difficult to accept. Although a high percentage of the claims are indeed frivolous, there are many that raise constitutional issues of great difficulty and of great importance. These seem, to most, to clearly merit the attention of the federal judiciary.[14] Federal judge attention to these issues over the course of the past decade has had a profound effect on prison management and on prison life. Viewed in this perspective, the prisoner rights cases clearly have in the aggregate, great significance both for the individual inmate and for the correctional system generally.

(3) Difficulty in Handling the Prisoner Rights Case. It is difficult, in practice, to handle the prisoner rights case because most are brought by the inmate

14. See Doyle, The Court's Responsibility to the Inmate Litigant, 56 Judicature 406 (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." Supra, at 411.

himself without benefit of counsel;[15] most contain a large variety of allegations that are difficult to separate and to evaluate; and commonly the allegations are contained in a long, difficult to read, handwritten letter from the inmate. In current practice, initial responsibility for "deciphering" the allegations is given usually to a law clerk or, in some districts, to a more specialized writ or pro se clerk.

There are other complexities. Where witnesses are required, they are often other inmates who must be transported to the court, creating both financial costs and, in some cases, serious security risks.

(4) Direct Access to Federal Courts. In the area of federal review of state convictions, through habeas corpus, the trend has been in the direction of greater reliance upon state courts. This has

15. The adverse effect that the absence of counsel has upon 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). The committee recommends the appointment of counsel at an early stage of every pro se prisoner 1983 case.

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, 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.

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

No comparable trend has taken place in prisoner cases brought under 42 U.S.C. § 1983. The prisoner 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 there is no requirement of exhaustion of state remedies.[16] This

16. See Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537 (1974); P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 983-985 (2d ed. 1973); 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.R. 479 (1975); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) cert. granted 44 L.W. 3072 (1975).

In holding that there is no requirement that a state prisoner exhaust his administrative remedies, the Supreme Court has not indicated in any detail the reasons for this conclusion. There has not been, for example, any explanation of:

(1) why is there a different standard for federal prisoners who, some courts have held, do have to exhaust their administrative remedies

bypassing of state processes has led some state judicial officials to urge that all prison matters be turned over to federal courts, a position that reflects their obvious irritation[17] and that tends to further complicate the task of federal judicial administration.

and state prisoners who do not? See P. Bator et al., hart and Wechsler's The Federal Courts and the Federal System (2d ed. 1973) at 985 quoting Kenneth Davis: "Because the McNeese 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 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 (1974). 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.

(3) why would it not be wise to give state correctional agencies a first opportunity to reconsider and perhaps change their administrative rules? See P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (2d ed. 1973), 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?"

17. See Aldisert, supra note 6, at 581 n.105.

The Use of Administrative Grievance Procedures

However much judicial procedures are improved, reliance on federal 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.[18]

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, or who thinks he has, a grievance or complaint can be heard promptly, fairly and fully.[19]

18. J. Michael Keating, Jr., et al., Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions 4 (Center for Correctional Justice, 1975) [hereafter cited as Keating--Seen But Not Heard]. See also Gamble v. Estelle, 516 F.2d 937 (5th Cir. 1975) 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."

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

Increasingly, correctional departments throughout the country are adopting inmate grievance procedures.[20] 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

20. See the excellent study of current inmate grievance procedures in J. Michael Keating, Jr., et al., Toward a Greater Measure of Justice: Grievance Mechanisms in Correctional Institutions (Center for Correctional Justice, May 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

is desirable.[21] At the present, this is an issue that remains unresolved. Most existing 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, also are resolved at the administrative appeals level.[22]

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 18; 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); Vincent O'Leary et al., 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). For a description of the use of Department of Justice mediation in prison disputes, see 17 Cr L 2466 (Sept. 3, 1975).

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

22. 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

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. Secondly, resorting to the grievance procedure first avoids the risk that the issue 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.[23] Though the argument may fail, it is easier for the plaintiff's counsel if the issue is avoided altogether.

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.

23. See Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), in which plaintiff prisoner based his claim under 42 U.S.C. § 1983 in part on the alleged negligence of the guards in leaving plaintiff's cell open and unguarded. Property, including a court transcript, was taken from the cell. In his majority opinion at 1320, Judge Stevens concluded: "There is simply no need to provide a federal tort remedy for property damage caused by the negligence of state agents if a state remedy is not only adequate in theory but also readily available in practice."

In distinguishing this situation from the usual nonexhaustion requirement situation, Judge Stevens said: "This is not to suggest that the plaintiff in a § 1983 action must exhaust his state remedies before seeking federal relief. Rather, it seems to us that the availability of an adequate state remedy for a simple property damage claim avoids any constitutional violation." 517 F.2d at 1319.

It is the opinion of the committee that effort should be made to encourage the continued development by the states of adequate inmate grievance procedures as a preferable procedure for handling a wide variety of prisoner complaints.

Availability of Counsel

Presently there is no statutory authority for compensating counsel in 1983 cases.[24] Most federal judges do appoint counsel in some cases, but the appointment is either of a student from a law school clinic or program,

The state remedy involved in the Bonner case was presumably a tort action in an Illinois state court to recover damages caused by the negligence of the guards. It is arguable that the same result should follow when a readily available, adequate administrative remedy can be used to obtain appropriate relief from an action of a guard.

The Bonner case is scheduled for an en banc rehearing by the Seventh Circuit Court of Appeals.

In Cravatt v. Fenton, --- F. Supp. --- (W.D.Wis., Aug., 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 (ed.)] 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."

24. Decision, the Comptroller General of the United States, file B-139703, Feb. 28, 1974.

or from a panel of lawyers who have agreed to serve without compensation.[25] In either case, reliance on uncompensated counsel is not totally satisfactory.

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, will more carefully limit and define the issues presented, and will present the case in a way that will make it easier for the judge to make a decision on the merits.[26]

25. 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 Wisconsin, the Corrections Legal Service Program, a project funded with LEAA and state monies, 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.

26. 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: "there 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 apparently does 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 (1975) at 32: "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 experience, to differentiate adequately between the meritorious and the frivolous prisoner complaint.

In places where counsel is readily available, it does appear that cases are more ably presented; some frivolous cases are "weeded out" and "shotgun" allegations are eliminated in favor of more specific, limited allegations. However, experience is as yet too limited to make a definitive judgment.

The Proposed Standards

Because of the importance and the difficulty of prisoner cases, it seems obviously desirable to develop the most effective procedures possible for the handling of prisoner cases. It is expected that these procedures will both improve the efficiency of the federal judiciary in the handling of prisoner cases and, at the same time, help ensure that meritorious cases are given the careful attention they deserve. Achieving these objectives will be particularly important when the new requirements of the "Speedy Trial Act of 1974"[27] go into effect.

27. 18 U.S.C. §§ 3161-3174.

There follows a set of proposed standards that incorporate the best of existing procedures used by federal judges throughout the country. Putting these in the form of "standards" rather than rules or statutes has the advantage of flexibility and the advantage of making it possible to speedily change the standards where experience demonstrates that further improvements can be made. Though they are in no sense binding upon courts, the committee feels that the quality of the recommended standards will result in their being used widely by members of the federal judiciary.

Standards

1. CENTRALIZATION IN MULTIJUDGE COURTS. *Each multijudge court having a substantial caseload of prisoner complaints should institute a centralized method of processing such complaints.*

(a) The Clerk's office in multijudge districts should consider the advisability of having an intake clerk to process prisoner complaints initially.

(b) In multijudge district courts, a staff law clerk or a magistrate should perform the initial screening of prisoner complaints.

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

Commentary

Standard 1 (a) 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 the prisoner litigation. Among the intake clerk's functions are: to send complaint forms (see Standard 2) to inmates requesting them, to assure that the proper number of copies of the complaint and a forma pauperis affidavit (or filing fees) have been received, to ascertain that the complaint form has been properly and legibly completed, and to assign the case to a judge.

Standard 1 (b) 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.

In the Northern District of California a staff law clerk (an able and experienced lawyer), referred to as the

"writ clerk," receives all prisoner complaints once the intake clerk is satisfied that they are in proper form. The staff law clerk's primary function is to determine which complaints should be dismissed as "frivolous or malicious" within the meaning of 28 U.S.C. § 1915 (d) (see Standard 3) and to convey his recommendation to the judge. Because the staff law clerk's subject area is a narrow one, he is able to keep abreast of the rapidly changing field of prisoner law and is able to keep records and to develop statistics on the nature and volume of prisoner litigation.[28]

The standard leaves the choice between the use of a magistrate and the use of a special staff law clerk to the individual district court. The use of a staff law clerk in prisoner cases is the subject of a current experiment conducted by the Federal Judicial Center. The objective of the experiment is to determine the effect that such a clerk can have upon the processing of prisoner cases. Depending upon the results of that experiment, more detailed recommendations may then be developed as to the use of a staff law clerk.

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28. The Southern District of New York also uses a staff law clerk to handle all pro se matters. The nature of his work is described in Ziegler and Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, 47 N.Y.U. L. Rev. 157 (1972).

Where the magistrates are used to give initial consideration to a 1983 petition, it is important to try to ensure that the magistrates' time is not unnecessarily dissipated by giving extended attention to matters where the case law in the district is clearly established and can be applied readily to the facts of the case. To avoid this, it is very important that the district judge or judges make very clear to the magistrate what their individual standards are so that the magistrate can efficiently make a recommendation as to whether the inmate's complaint does or does not have merit.

Finally, in Standard 1 (c) the committee commends the practice of assigning all actions commenced by one prisoner to the same judge. Such a practice discourages judge-shopping and increases efficiency in processing repetitive complaints.

2. COMPLAINT FORM. *Each district court having a substantial caseload of prisoner complaints should promulgate local rules adopting a complaint form to be used for all 1983 actions. A suggested complaint form is found in Appendix A. Individual courts should make modifications of the form as are appropriate to meet the needs of the particular district.*

Commentary

The recommended complaint form consists of an instruction page, the complaint form, and a form for a forma pauperis affidavit. The committee considered attaching to the instructions copies of pertinent statutes, for example, 28 U.S.C. § 1915 (which permits the filing of actions in forma pauperis); 42 U.S.C. § 1983 (which creates a cause of action for violations of federal rights); and 28 U.S.C. § 1343 (the jurisdictional basis for 42 U.S.C. § 1983). The committee also considered including instructions describing the distinction in Preiser v. Rodriguez[29] between habeas corpus and § 1983. Each of these proposals was rejected, however, on the principle that the court's role should be confined to seeking facts from the inmate and should not include the offering of anything resembling legal advice to the inmate. It was thought, for example, that any attempt to distill a rule from Preiser might not be entirely consistent with subsequent decisions by higher courts and might therefore be misleading to the inmate.

29. 411 U.S. 475 (1973). See Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1975), holding that a 1983 action is an appropriate way to review parole procedures where there is no allegation that a change in procedures would necessarily change the date of release. Cert. granted 95 S. Ct. 2394 (1975).

The committee also considered amplifying the complaint form to apprise the inmate of the various forms of relief available. This proposal was rejected on the ground that the mention of the availability of money damages would encourage inmates to request this form of relief even though it is rarely appropriate in actions commenced under 42 U.S.C. § 1983.

Because the complaint form requires verification, it is recommended that local rules require verification of all pro se petitions and complaints, whether commenced by prisoners or others. The perjury sanction for false statements in pro se pleadings is a reasonable substitute for the sanction imposed on attorneys by Rule 11, Federal Rules of Civil Procedure.

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 prison 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 prison grievance procedures.

A series of brief, often per curiam, Supreme Court decisions[30] indicate that such procedures need not be exhausted prior to the filing of a complaint under 42 U.S.C. § 1983.[31] Nevertheless the committee felt that a question relating to grievance procedures is appropriate because it may alert the inmate to this 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.[32]

In some jurisdictions a supply of the forms would be made available at each correctional institution within the district. Doing so has the advantage of not requiring the inmate to write for the forms and does, to this extent, relieve the clerk's office of some of the clerical burden that otherwise falls on it.

3. SUA SPONTE DISMISSAL. *The district court's 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. In those cases where leave is granted, the court*

30. Ellis v. Dyson, 416 U.S. 954, 95 S. Ct. 1691 (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), Munroe v. Pape, 365 U.S. 167 (1961).

31. See notes 5 and 16, supra.

32. See notes 5 and 16, supra.

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.

Commentary

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 makes affidavit that he is unable to pay such costs or give security therefor . . . ." Section 1915 (d) provides:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Some courts have blurred the distinction between subdivision (a) and subdivision (d) by approving the practice of denying leave to proceed in forma pauperis

on the ground that the complaint is frivolous or malicious.[33] The practice observed by most courts[34] 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 court should consider whether to dismiss pursuant to § 1915 (d).

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.[35]

The committee recommends dismissal with no opportunity to respond when the complaint is irreparably

33. Reece v. State of Washington, 310 F.2d 139 (9th Cir. 1962); Wright v. Rhay, 310 F.2d 687 (9th Cir. 1962), cert. denied, 373 U.S. 918 (1963); Taylor v. Burke, 278 F. Supp. 868 (E.D. Wis. 1968); Wartman v. Wisconsin, 510 F.2d 130 (7th Cir. 1975). 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).

34. 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).

35. 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).

frivolous or malicious.[36] 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, as specified in Standard 3.[37] 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 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.[38]

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 complaint is not frivolous if "any of the legal points [are] arguable on their merits."[39] The content of the terms "frivolous"

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

37. See Potter v. McCall, 433 F.2d 1087 (9th Cir. 1970). See also Hanson 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.

38. 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).

39. 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. Ca. 1972), aff'd 480 F.2d 805 (5th Cir. 1973).

and "malicious" may also be influenced by the Supreme Court's decision in Haines v. Kerner,[40] establishing 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.'[41]

4. USE OF MAGISTRATES. *Courts should make maximum permissible use of magistrates in processing prisoner civil rights cases. Such uses include at least the following:*

(a) entering orders requiring amendment of the complaint.

40. 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 Ellinburg v. Lucas, 518 F.2d 1196 (2d 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); McDonnell v. Wolff, 519 F.2d 1030 (8th Cir. 1975). For illustrations of nonfrivolous claims, see Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Haynes v. Montogue, 505 F.2d 977 (2d Cir. 1974); Goff v. Jones, 500 F.2d 395 (5th Cir. 1974); 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; Gamble v. Estelle, 516 F.2d 937 (5th Cir. 1975); Bryan v. Worner, 516 F.2d 233 (3d Cir. 1975).

41. 404 U.S. at 520.

(b) determining in what cases counsel should be appointed and appointing counsel;

(c) establishing discovery schedules;

(d) conducting pretrial conferences and recommending pretrial orders to the judge;

(e) ordering a special report from defendant pursuant to Standard 5;

(f) conducting evidentiary hearings and entering proposed findings of fact and conclusions of law.

Commentary

The law defining the powers of magistrates is at present somewhat ambiguous, particularly with regard to the authority of the magistrate to conduct an evidentiary hearing in a prisoner case.[42]

Prior to the creation of the position of magistrate by the 1968 Federal Magistrates Act, the use of masters and other officers of the court was governed by Rule 53, Federal Rules of Civil Procedure, and by a Supreme Court decision construing that rule, La Buy v. Howes Leather Co.[43]

42. The pending legislative revision of the magistrates act would, if enacted, clarify the authority of the magistrates in prisoner cases. See note 9, supra.

43. 352 U.S. 249 (1957). For an analysis of Rule 53 (b) and the LaBuy case, see Comment, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779, 789-796 (1975).

Subdivision (b) of Rule 53 provides that a "reference to a master shall be the exception and not the rule." Subdivision (b) also permits references in jury cases "only when the issues are complicated" and in nonjury cases "only upon a showing that some exceptional condition requires it." (An exception is made in matters of account and of difficult computation of damages.) Referring to Rule 53 (b), the La Buy court stated that

> congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make reference the rule rather than the exception.[44]

Thus, reading Rule 53 and La Buy together poses a considerable obstacle to the use of masters in prisoner cases.

The portion of the Federal Magistrates Act defining the magistrate's powers, 28 U.S.C. § 636 (b), lists among the duties of the magistrate:

> (1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure . . .; (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions . . . .

The act also permits district courts to establish local rules conferring upon magistrates "such additional

44. 352 U.S. at 259.

duties as are not inconsistent with the Constitution and laws of the United States."[45]

Thus, while the act subjects the use of magistrates as masters to the limitations imposed by Rule 53 (b), it may permit more extensive use of magistrates by the clause permitting any duties consistent with the federal laws and Constitution. Moreover, by curing many of the shortcomings of the system of masters which the LaBuy court relied on in limiting the use of masters, the Magistrates Act may have diluted the force of that decision.[46] In any event it is clear that a magistrate can conduct an evidentiary hearing if both parties consent.[47]

In Wingo v. Wedding,[48] the Supreme Court held it to be improper to delegate to a magistrate the responsibility

45. 28 U.S.C. § 636(b).

46. However, see Comment, Masters and Magistrates in the Federal Courts, supra, where the conclusion is that proper reference under Rule 53 (b) are limited to "issues so esoteric as to be outside the range of ordinary judicial competence" and "administrative tasks." Should the Supreme Court revise Rule 53 (b), there could be greater authority to refer to a magistrate or a master. The only limitation would be that of the Constitution. See Comment, Masters and Magistrates in the Federal Courts, supra at 780-789.

47. See Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. at 796 n. 113. See also Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 587 (1973).

48. 418 U.S. 461 (1974).

of conducting an evidentiary hearing in a habeas corpus case. The court based its decision largely upon the ground that the Magistrates Act[49] provided expressly that the magistrate's report and recommendations were to relate to "whether there should be a hearing."[50] The court said:

> We conclude that, since § 2243 requires that the District Judge personally hold evidentiary hearings in federal habeas corpus cases, Local Rule 16, insofar as it authorizes the full-time Magistrate to hold hearings, is invalid because it is "inconsistent with the . . . laws of the United States" under § 636(b)." [emphasis added][51]

Because § 636 (b) is limited to "preliminary review of applications for posttrial relief" it is arguable that the limitations of § 636 (b) do not apply to civil rights actions commenced under § 1983.

Recently, in Campbell v. United States District Court for the Northern District of California,[52] the Ninth Circuit Court of Appeals held

> that a magistrate is authorized to preside at an evidentiary hearing on a motion to suppress evidence and is authorized to make proposed findings of fact, conclusions of law and a proposed order after a hearing on a motion to supress . . . . [T]he district court must [however] make the final adjudication on the motion.[53]

49. 28 U.S.C. § 636 (b)(3).

50. 418 U.S. 461 (1974).

51. 418 U.S. at 472.

52. 501 F.2d 196 (9th Cir. 1974), as amended 8/15/74, rehearing and rehearing en banc denied 9/26/74.

53. 501 F.2d at 206.

This post-Wingo case supports the recommendation made in 4 (f) of this Standard that the magistrate conduct evidentiary hearings and make proposed findings of fact and conclusions of law.[54]

As a final point, the committee intends no inconsistency in calling for the use of a staff law clerk or magistrate to perform initial screening in Standard 1 and the other uses of the magistrate as detailed in this Standard. The use of the staff law clerk is currently being investigated by the Federal Judicial Center and a final comment as to the utility of that position must wait until the conclusion of that study. The emphasis of these two standards is the use of other means and procedures to handle the processing of the cases and to save on judge time where permissible.

5. SPECIAL REPORT FROM DEFENDANT. *In order to discover the defendant's version of the facts and in*

54. The Standard does not indicate whether it is necessary to have a de novo review of the magistrate's findings or whether the review should be that applicable to a district court's handling of a recommendation from a master appointed under civil Rule 53. Rule 53 (e)(2) provides: "In an action to be tried without a jury the court shall accept the master's finding of fact unless clearly erroneous."

The Judicial Conference has recommended that there be a right to a de novo review before the district court. See note 9, supra. The Senate Committee on Improvements in Judicial Machinery will apparently recommend that the district judge be given discretion to decide whether to grant a de novo review.

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 Special Report is found in Appendix b.

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

In Harowick v. Ault,[55] the Court of Appeals for the Fifth Circuit suggested the use of the special report, citing its advantages:

> if 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.[56]

The use of the special report originated with Judge Vincent P. Biunno of New Jersey. He reports that he has several objectives in mind:

55. 517 F.2d 295 (5th Cir. 1975).

56. 517 F.2d at 298.

(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).

(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 upon which to prepare for pretrial and trial proceedings.

(3) The special report is a useful alternative to, or supplement with, 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) The special report, in a complicated case, is less costly.

In New Jersey, the court requires the special report to be filed with the defendant's answer. No motions can be filed until the special report has been submitted.

The special report should be used selectively. It is not helpful in screening out the frivolous case. How helpful the special report will be depends upon the ability of the judge to "ask the right questions" and thus to efficiently get the information needed to deal with the particular issue or issues involved in the litigation.

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.

The use of the special report is undergoing continuing study by the Federal Judicial Center. As experience develops, it will be possible to reevaluate the usefulness of the special report and to further refine the criteria governing its use.

1983 Form

APPENDIX A

Instructions for Filing Complaint by Prisoners 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. The plaintiff or plaintiffs must sign and swear to the complaint. 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, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

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 preceed 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. After filling in the petition, you must have it notarized by a notary public or other officer authorized to administer an oath.

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 appropriate address here)

1983 Form

FORM TO BE USED BY PRISONERS 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 or plaintiffs 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 each 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: _____

   _____

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 or plaintiffs]

VERIFICATION

State of _____)

County of _____)

_____, being first duly sworn, under oath, says: that he is the plaintiff in this action and knows the content of the above complaint; that it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

_____

[Signature of affiant-plaintiff]

Subscribed and sworn to before me this _____ day of _____, 19 _____.

_____

[Notary Public or other person authorized by law to administer an oath]

_____
[Insert appropriate court]

_____
(Petitioner)

v.

_____
(Respondent(s))

AFFIDAVIT IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, _____, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, 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 further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes _____ No _____

   a. If the answer is yes, state the amount of your salary or wages 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 and wages 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 of the items 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 affidavit will subject me to penalties for perjury.

_____
(Petitioner's signature)

State of _____.

County (City) of _____.

_____, being first duly sworn
(Name of Plaintiff)

under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

_____
Signature of Plaintiff
(Required as to each plaintiff)

Subscribed and sworn to before me this

_____day of _____, 19 ____.

_____
Notary Public or other person authorized to administer an oath

Certificate

I hereby certify that the plaintiff herein has the sum of $ _____ on account to his credit at the _____ institution where he is confined. I further certify that plaintiff likewise has the following securities to his credit according to the records of said _____ institution: _____

_____

_____

_____

_____
Authorized Officer of
Institution

APPENDIX B

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 _____, 1975, 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.

D R A F T

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D. C. 20005

TELEPHONE
202/393-164

TO: Judges, United States Courts of Appeals
Judges, United States District Courts
United States Magistrates
Circuit Executives, U. S. Courts of Appeals
Clerks, U. S. Courts of Appeals
Clerks, U. S. District Courts

FROM: Judge Ruggero J. Aldisert

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

I have the pleasure of forwarding to you the enclosed report. It contains the recommendations of the Special Committee of the Federal Judicial Center created to suggest ways of improving the handling of prisoner civil rights cases in the federal courts.

As the report indicates, the recommendations reflect suggestions from a broad spectrum of the federal judiciary in response to an inquiry addressed to all federal judges; additional input came from discussions at numerous seminars at the Judicial Center and at various circuit judges' conferences. It is, therefore, accurate to say that the report reflects the collective experience of federal judges who are versed in the handling of prisoner civil rights cases.

The report is labeled "tentative" because the committee is continuing its study of procedures. The Federal Judicial Center is conducting a special research project to determine the value of additional resources including: the special "staff law clerk"; the model form for use in 1983 cases; the providing of counsel to prisoner petitioners/plaintiffs; and other possible procedural innovations. As additional experience is acquired, appropriate changes will be made in the recommended procedures. Though tentative, the procedures contain valuable suggestions that ought to be considered by every federal judge who handles prisoner 1983 cases.

The committee recommended to the Chief Justice and the members of the Board of the Federal Judicial Center that this report be circulated to every federal judge and to appropriate bar association groups and law school faculties. It is with their approval that this report is forwarded to you. The report was prepared in loose leaf form to facilitate changes and additions. This format also permits the inclusion of the report in a benchbook, thus enhancing its utility as a reference tool.

GPO 898-551

END