Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts

Federal Judicial Center

January 1980

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

This report is a product of The Federal Judicial Center's Prisoner Civil Rights Committee. The opinions, conclusions, analyses, and recommendations are those of the committee and reflect a wide range of experience in dealing with prisoner civil rights cases. Publication signifies that the Center regards this report as responsible and valuable. It should be noted, however, that on matters of policy the Center speaks only through the Board.

The Federal Judicial Center

1980

Dedicated to the

Honorable John H. Wood, Jr.,

United States District Judge,
a distinguished member of the committee,

assassinated in the line of
duty on May 29, 1979.

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PREFACE

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

John H. Wood, Jr., District Judge of the Western District of Texas, was a valued member of the committee until he was tragically assassinated on May 29, 1979. This report is dedicated to his memory as a reflection of the immensely high esteem in which he was held by the committee as a judge and as a fine human being.

Griffin B. Bell, formerly Circuit Judge, Fifth Circuit, later Attorney General of the United States, an original member of the committee, is no longer in active status.

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

In January 1976, the committee published its first report in which it recommended various procedures for the handling of prisoner "conditions-of-confinement" cases. That first report reflected a year-long study during which the committee solicited the views and suggestions of every member of the federal judiciary. The committee prepared early drafts of its first report which were widely circulated and which were discussed at several judges' conferences and at numerous seminars at The Federal Judicial Center. This process resulted in a report that reflected the views not only of committee members, but also of many members of the

federal judiciary. In its first report, the committee recommended experimentation with certain innovative procedures such as the staff law clerk used in the Northern District of California and a standard complaint form, with simple instructions, to be filed for all prisoner conditions-of-confinement cases.

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

The second report, published in May 1977, was also labeled as tentative. The committee continued its study of the staff law clerk, of the processing of conditions-of-confinement cases by magistrates, of various procedures such as the "Special Report from Defendant," of the model complaint form for use in prisoner cases brought under 42 U.S.C. §1983,[1] of systems for making counsel available in prisoner conditions-of-confinement cases, and in general of methods of alleviating the burden in the district courts in which approximately one out of every seven civil cases filed is from a prisoner seeking various forms of relief.[2]

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1. 42 U.S.C. §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. In 1979, there were 23,001 prisoner petitions filed representing 14.9% of all civil cases filed in the federal courts during the last fiscal year. The committee notes an apparent leveling off of this category. In 1970, this figure was 18.3%, and in 1975 it was 16.5%. Annual Report of the Director of the Administrative Office of the United States Courts, 1979.

After publication of the second tentative report, the committee sent a questionnaire to all United States district judges and magistrates, asking them to indicate the extent to which they were using the recommended procedures and soliciting their suggestions as to how the committee could further assist them. The responses revealed the recommended procedures were quickly being adopted throughout the country,[3] but the judiciary needed a compendium of the rapidly evolving law to shorten preliminary research time. Magistrate Sensenich was asked to expand an outline she had prepared in the performance of her official duties. Her Compendium of the Law on Prisoners' Rights was published in April 1979 and was made available to the judiciary by the committee through The Federal Judicial Center.

The committee has also concluded that two developments will enhance the ability of federal and state courts to respond to prisoner lawsuits. First, meaningful administrative grievance procedures must be developed in state prisons and other confinement facilities to fairly and quickly resolve the majority of prisoner complaints, particularly minor complaints.

Also needed is recognition that many legitimate prisoner complaints do not rise to a constitutional

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3. The procedures have been cited in the following cases:
United States ex rel. Walker v. Fayette County, Pa., 599 F.2d 573, 576 (3d Cir. 1979);
Boyce v. Alizaduh, 595 F.2d 948, 950-951 n.8 (4th Cir. 1979);
Gordon v. Leeke, 574 F.2d 1147, 1154 n.1 (4th Cir. 1978);
United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1234 (3d Cir. 1977);
Ron v. Wilkinson, 565 F.2d 1254, 1259 (2d Cir. 1977);
Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977);
Dougherty v. Harper's Magazine Co., 537 F.2d 758, 761 n.3 (3d Cir. 1976);
Sinwell v. Shapp, 536 F.2d 15, 18 n.9, 19 n.10 (3d Cir. 1976);
Taylor v. Gibson, 529 F.2d 709, 717 (5th Cir. 1976);
Covington v. Cole, 528 F.2d 1365, 1372-1373, rehearing denied, 533 F.2d 1135 (5th Cir. 1976);
Watson v. Ault, 525 F.2d 886, 891, 892, 893-898 (reprint of form) (5th Cir. 1976);
Hardwick v. Ault, 517 F.2d 295, 298 (5th Cir. 1975);
Zaragoza v. City of San Antonio, Texas, 464 F. Supp. 1163-1166 (W.D.Tex. 1979);
Johnson v. Teasdale, 456 F. Supp. 1083, 1086 (W.D.Mo. 1978);
Carter v. Telectron, 452 F. Supp. 944, 948, 949, 950-951 (S.D.Tex. 1977);
Braden v. Estelle, 428 F. Supp. 595, 597 (S.D.Tex. 1977);
Mignone v. Vincent, 411 F. Supp. 1386, 1390 (S.D.N.Y. 1976);
Green v. Garrott, 71 F.R.D. 680, 683 (W.D.Mo. 1976).

level. State courts have the power to grant judicial relief for those claims. Indeed, state courts also have jurisdiction over §1983 civil actions and, as those courts become more versed in civil rights actions, prisoners may choose to litigate their cases in the more convenient state forum.[4]

State judges are also sensitive to the rights of prisoners who have legitimate conditions-of-confinement complaints. Recent decisions of the United States Supreme Court have given emphasis to the fact that a prisoner's liberties are not a product of the decisions of federal courts, but rather are a creation of state law.[5] And state courts have given increasing indication of their willingness to grant relief to prisoners under circumstances in which federal courts are unwilling to do so.[6] Recognition of the increasing reliance upon state courts to grant relief to meritorious complaints is reflected in a recent statement of Mr. Justice

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4. The exercise of state court jurisdiction over §1983 actions won solid support in state appellate court decisions during the 1970s. In 1969, the Tennessee Supreme Court had sustained trial court dismissal of a §1983 suit on grounds, among others, that federal district court jurisdiction was exclusive. The argument for exclusive federal jurisdiction did not prove persuasive elsewhere, however. A survey of state appellate decisions disclosed that, by fall 1979, 19 states explicitly--and 4 more states implicitly--had acknowledged concurrent jurisdiction in their courts over suits under §1983. In 9 other states, appellate decisions had avoided the question of state court jurisdiction, either by concluding the plaintiff had an adequate remedy under state law or by holding that a legally sufficient claim under §1983 had not been asserted (or proved). In the remaining 18 states, no appellate decisions relevant to state court jurisdiction over §1983 suits were found.

The appendix to this volume reports on the status of state court jurisdiction over §1983 actions.

5. See generally Comment, Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size, 15 Duquesne L. Rev. 49 (1976); S. Nahmod, Civil Rights & Civil Liberties Litigation: A Guide to §1983 (1979).

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

Brennan: "[S]tate courts no less than federal are and ought to be the guardians of our liberties."[7]

We hope that progress will be made in a greater assumption of responsibility at the administrative and at the state court levels.

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

The purpose of this report is mainly threefold:

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

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

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

Prisoner Civil Rights Committee
of The Federal Judicial Center
Ruggero J. Aldisert, Chairman
Robert C. Belloni
Robert J. Kelleher
Frank J. McGarr
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Ila Jeanne Sensenich

January 1980

7. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harvard L. Rev. 489, 491 (1977). See also Utter and Cameron, Let Us Create a Judicial Services Corporation, Judges Journal 39-43 (Spring 1979), in which the authors, both state court chief justices, point to the increased willingness of state courts to assume responsibilities heretofore thought of concern only to federal courts. See also State Judiciary News, vol. 5, p. 2 (Sept. 1979).

Part I. INTRODUCTION

This report deals with the role of the federal court in the handling of "conditions-of-confinement" complaints by both state and federal prisoners.[8] Although the committee has concerned itself with both state and federal prisoner conditions-of-confinement cases, the report concentrates primarily on the handling of state prisoner conditions-of-confinement cases brought under 42 U.S.C. §1983. The state

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

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

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

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

For a more extensive comparison of habeas corpus and civil rights, see I. Sensenich, Compendium of the Law on Prisoners' Rights 17 (The Federal Judicial Center, 1979) [hereinafter cited as Sensenich], for sale by the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402; stock number 027-000-00792-9. The cost is $9.00.

prisoner cases are the greatest in number and continue to rise, while federal prisoner cases are declining.[9]

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

The typical conditions-of-confinement case is brought directly into federal court by a pro se

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9. From 1972 until 1979 the number of state prisoner petitions brought under 42 U.S.C. §1983 increased from 3,348 to 11,195. During the same period federal prisoner cases (mandamus and civil rights) fell from 952 to 928. Although the explanation cannot be reliably determined, it appears that the inmate grievance procedure in federal prisons is one reason for the decline.

See Report of Comptroller General of the United States (Oct. 17, 1977) which concludes that inmates are using grievance procedures (one-third of all federal inmates during 1976); that the rate of increase of prisoner litigation in federal court has declined; and that the use of the procedures had resulted in some correctional policy changes. See Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 633-635 (1979) [hereinafter Turner]. For a fuller discussion of federal prisoner cases, see pages 42-43 of this report.

prisoner who has not first exhausted available administrative remedies or available judicial remedies in the state court. The cases range from those that involve constitutional questions of great importance to the individual prisoner and to the correctional system, on the one hand, to the most trivial or frivolous type of issue, on the other hand. The usual restraint on unwarranted litigation, expense, is absent in a field where prisoners can usually proceed in forma pauperis and where the expenditure of time in preparation is a relief from the tedium of prison life.[10]

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

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10. See Braden v. Estelle, 428 F. Supp. 595, 597-598 (S.D. Tex. 1977): "Persons proceeding in forma pauperis are immune from imposition of costs if they are unsuccessful; and because of their poverty, they are practically immune from later tort actions for 'malicious prosecution' or abuse of process. Thus indigents, unlike other litigants, approach the courts in a context where they have nothing to lose and everything to gain. The temptation to file complaints that contain facts which cannot be proved is obviously stronger in such a situation. For convicted prisoners with much idle time and free paper, ink, law books, and mailing privileges the temptation is especially strong."

See Comment, Limitations of State Prisoners' Civil Rights Suits in the Federal Courts, 27 Cath. U. L. Rev. 115, 127-130 (1977), discussing a practice in the Southern District of Texas to impose a partial payment requirement to put the pro se plaintiff in the position of having to decide whether the litigation is "worth the cost of pursuing it."

Unlike the guarantee of counsel fees under the Criminal Justice Act, presently there is no way of guaranteeing compensation of a lawyer for representing a prisoner in a typical conditions-of-confinement case. This increases the risk that the petitions will be dealt with summarily and that meritorious petitions will be overlooked in the process.

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

(1) There is need for a proper definition and limitation of the role of the federal court in conditions-of-confinement cases. This issue is discussed in Part III of this report.

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

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

(4) There is need for additional resources to handle conditions-of-confinement cases that are brought in federal court. Increased use of magistrates is recommended. This is discussed in Part IV.

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

(6) Finally, there is need for continuing analysis and continuing judicial education in the substantive law relating to prisoner conditions of confinement. The substantive law is helpfully discussed in I. Sensenich, Compendium of the Law on Prisoners' Rights (The Federal Judicial Center, 1979) [hereinafter cited as Sensenich].[11] Cross-reference is made to that document throughout the text of this report.

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11. See Sensenich, supra note 8. See also Prison Conditions; An Outline of Cases, Correctional Services Special Report, National Association of Attorneys General (March 1979).

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

There are reasons for giving special attention to prisoner conditions-of-confinement cases.[12] The volume of cases is large, and many of the cases are without merit, making it difficult to ensure that the meritorious complaint will not be overlooked. The cases sometimes raise constitutional questions of great significance to prisoners and to the nation's correctional systems. Because lawyers are typically not involved, a very

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12. See Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law and Social Order 557, 573-577. Illustrative of recent law review comment are:

Aldridge, Bradford v. Weinstein: The Federal Courts Reopen the Door to Prisoner Civil Rights Claims, 54 N.C. L. Rev. 1049 (1976);
Baude, The Federal Courts and Prison Reform, 52 Ind. L.J. 761 (1977);
Feldberg, Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform, 12 Harvard Civil Rights-Civil Liberties L. Rev. 367 (1977);
M. Harris and D. Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings, American Bar Association Resource Center on Correctional Law and Legal Services (5 vol., 1976);
Hirschkop and Grad, Section 1983 Litigation: Plaintiff's View, 11 U. Rich. L. Rev. 785 (1977);
Johnson, The Constitution and the Federal District Judge, 54 Texas L. Rev. 903 (1976);
McKeown and Midyette, Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform, 7 Cum. L. Rev. 31 (1976);
Miller, Section 1983 Litigation: Defendant's View, 11 U. Rich. L. Rev. 791 (1977);
The National Prison Project of the American Civil Liberties Foundation, Prisoners' Assistance Directory (1977);
Robbins and Buser, Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 Stan. L. Rev. 893 (1977);
Comment, Limitations of State Prisoners' Civil Rights Suits in the Federal Court, 27 Cath. U. L. Rev. 115 (1977).

difficult task confronts judicial personnel, particularly at the early stages of this class of pro se litigation. Finally, the burden of dealing with complaints from prisoners has fallen disproportionately on the federal judiciary as a result of the failure of the state institutions to develop adequate administrative grievance procedures and the unwillingness of inmates to utilize available state court remedies.

A. Volume.

Prisoner rights cases occupy a significant percentage of the time of federal courts, especially of the United States district judges. The Administrative Office of the United States Courts has been keeping statistics on prisoner cases for the past few years. "Civil rights" cases have been tabulated separately for the last eight years. Those fiscal year statistics show the total filings of state prisoner civil rights cases as follows:

1972 - 3,348	1976 - 6,958
1973 - 4,174	1977 - 7,752
1974 - 5,236	1978 - 9,730
1975 - 6,128	1979 - 11,195 [13]

These numbers are indeed large and continue to increase.[14]

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13. Annual Report of the Director of the Administrative Office of the United States Courts, 1979. For a discussion of the earlier trend, see Kimball and Newman, Judicial Intervention in Correctional Decisions: Threat and Response, 14 Crime and Delinquency 1 (1968).

14. Since 1970, these filings have increased by 451.5%. During the last eight fiscal years, the number of federal prisoner

B. The Importance and Difficulty of Identifying the Meritorious Case.

It is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the most liberal definition of frivolity. The Freund Report[15] concluded that: "The number of these petitions found to have merit is very small, both proportionately and absolutely."[16] In fiscal year 1979, 9,943 of 10,301

"conditions" cases (civil rights and mandamus, principally) were:

1972 - 952	1976 - 1,128
1973 - 1,053	1977 - 1,025
1974 - 1,076	1978 - 1,180
1975 - 1,013	1979 - 928

State prisoner habeas corpus filings were:

1972 - 7,949	1976 - 7,833
1973 - 7,784	1977 - 6,866
1974 - 7,626	1978 - 7,033
1975 - 7,843	1979 - 7,123

Federal prisoner habeas corpus filings were:

1972 - 1,368	1976 - 1,421
1973 - 1,294	1977 - 1,508
1974 - 1,718	1978 - 1,730
1975 - 1,682	1979 - 1,577

Annual Report of the Director of the Administrative Office of the United States Courts, 1979.

In some districts the burden of prisoner litigation is very great. See, e.g., E.D.Va. where, in fiscal 1979, 923 prisoner §1983 cases were filed; M.D.Fla. where 705 cases were filed; D.Md. where 511 cases were filed; S.D.Tex. where 431 cases were filed.

Judge Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, said in a recent speech to the Third Circuit Judicial Conference (September 11, 1979): "[During the period January 15, 1979, to April 6, 1979] I logged 387 hours of work on particular identifiable cases, both in and out of court . . . . Of those 387 hours, 180.5 or 47% were devoted to prisoner work."

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

16. Id. at 587.

or 96.5 percent of §1983 cases terminated in federal court were dismissed or otherwise concluded prior to trial.[17]

What to most people would be a very insignificant matter becomes, because of the nature of prison life, of real concern to the prison inmate. Most of the money damage claims, realistically evaluated, could be handled by a small claims court at the state level. Most requests for injunctive relief involve issues that would seem to most people to be quite trivial. The Supreme Court has pointed out: "What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the state."[18]

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17. Only 358, or 3.5%, of the state prisoner civil rights cases went to trial; there were 269 nonjury and 89 jury trials. Annual Report of the Director of the Administrative Office of the United States Courts, 1979. In the most obviously frivolous cases, some courts have penalized the pro se plaintiff. In Marks v. Calendine, --- F. Supp. --- (N.D.W.Va. 1978), the court awarded costs against a pro se plaintiff who had been granted leave to proceed in forma pauperis. The court said: "It is not the intent of this court to deny or dissuade the presentation of claims, containing even minimal merit, by those persons unable to advance the necessary fees and costs. It is the apparent practice of the courts . . . to effectively treat the granting of in forma pauperis status as a complete waiver of the costs of litigation. It is only to the numerically few cases . . . when trial shows a complete absence of merit coupled with the intent to use the court as a vehicle for harassment that it is deemed necessary to impose fees and costs against a nonprevailing plaintiff proceeding in forma pauperis."

18. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

Because the volume of conditions-of-confinement cases is large and many are frivolous, it is difficult to ensure that the meritorious complaint is found and given careful attention. The Freund Commission concluded: "But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with."[19]

A significant number of conditions-of-confinement complaints raise constitutional questions of great importance.[20] Judicial involvement in this class of litigation over the course of the past decade has had an impact on prison management and on prison life.[21] It is therefore of obvious importance that procedures be designed not only to eliminate the frivolous cases, but also to identify those cases that have merit.[22]

C. Procedural Complexity of Prisoner Rights Cases.

Handling the prisoner rights cases, in practice, is troublesome because most are brought by the inmates

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19. Freund Report, supra note 15, at 587.

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

21. See Turner, supra note 9, at 639-640, where it is concluded that some prisoner litigation has resulted in increased appropriations for corrections departments.

22. For a helpful analysis of the nature of the claims and the relief sought, see Turner, supra note 9, at 622-625.

themselves without benefit of counsel; most contain a large variety of allegations that are hard to separate and to evaluate; and commonly the allegations are contained in a long, often illegible, handwritten letter from the inmate. As a consequence, the court finds it difficult to understand the nature of the prisoner's complaint.

(1) Counsel. Presently there is no statutory authority to appoint and compensate counsel who agree to represent indigent prisoners in conditions-of-confinement cases.[23] The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988 (as amended, 1976), provides for the payment of attorneys' fees to prevailing parties in §1983 and other civil rights cases. That statute offers some promise for the compensation of appointed counsel, although to date it has not been a significant factor in pro se prisoner cases.[24]

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23. The Comptroller General of the United States has held that existing legislation (18 U.S.C. §3006A; 39 Comp. Gen. 133) does not provide for the appointment and compensation of counsel in 42 U.S.C. §1983 cases. The opinion of February 28, 1974 (53 Comp. Gen. 638) rejects the argument of the Department of Justice that §1983 cases are similar to §2254 habeas cases and therefore should be treated the same with respect to right to counsel. See also S.2278, 94th Cong., 2d Sess., The Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. §1988; and Sensenich, supra note 8, at 22.

24. See letter of June 14, 1979, from Carl Imlay, general counsel of the Administrative Office of the United States Courts, to Judge Alexander Harvey II (copy on file at The Federal Judicial Center); and letter of July 3, 1979, from Magistrate Ila Jeanne Sensenich to Alan J. Chaset: "[T]his act has not resulted in any

Now most federal judges do request that counsel serve, but the request is usually of either a student from a law school clinic or a lawyer from a panel of lawyers who have agreed to serve without compensation.[25] In either case, reliance on uncompensated counsel is not totally satisfactory. Courts have found counsel reluctant to serve. Sometimes counsel express the fear that unsuccessful representation will result in a malpractice action.

Making compensated counsel available is urged on two quite different grounds. One is that the prisoner will be more adequately represented and will be more likely, therefore, to be successful in presenting important constitutional issues. Another is that

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significant movement by attorneys to represent prisoner plaintiffs" (letter on file at The Federal Judicial Center).

See Rodriguez v. Jimenez, 551 F.2d 877 (1st Cir. 1977), upholding award of attorneys' fees in jail conditions-of-confinement case; Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977), aff'd Hutto v. Finney, 437 U.S. 678 (1978), rehearing denied, Hutto v. Finney, 439 U.S. 1122 (1979). The construction and application of the Civil Rights Attorney's Fees Awards Act of 1976 are annotated in 43 ALR FED 243 (1979).

25. A number of state-funded conditions-of-confinement legal services programs have been established. There are currently such programs in Alabama, Florida, Georgia, Kansas, Minnesota, South Carolina, Vermont, and Wisconsin, many of which have been developed under LEAA grants by Studies in Justice, Inc., of Washington, D. C. See 7 LEAA Newsletter 1 (April 1978). Some of the programs try to resolve inmate grievances informally or through existing administrative grievance procedures. Others concentrate on law-reform litigation, affording representation in cases that are believed to involve important recurring issues. Apparently none of the programs have adequate resources to receive and evaluate all prisoner complaints and to afford representation to all inmates whose complaints appear to be nonfrivolous.

counsel will be able to discourage frivolous cases and will more carefully limit and define the issues presented.[26]

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

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

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

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

The Report of the Ad Hoc Committee to Study the High Cost of Litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit (May 7, 1979) at 58 states:

"[T]he committee also believes that congestion could be alleviated if the screening of pro se prisoner petitions, which now is done by the court, were handled by attorneys present at prisons to represent the prisoners. In other words, screening of habeas and other prisoner petitions currently is accomplished by attorneys at the court end of the litigation process. If an attorney specially skilled in prisoner law (i.e., a former court staff attorney) were instead located at the prison to separate the 'wheat from the chaff,' the effect conceivably would be a channeling of a quality work product to the district courts, enabling the courts to operate more smoothly and efficiently."

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

As yet the Legal Services Corporation has not given prisoner conditions-of-confinement cases a sufficiently high priority to make its limited funds available for representation in these cases.[27]

The report on Civil Rights of Institutionalized Persons of the Committee on the Judiciary of the House of Representatives urges that the Department of Justice be authorized to institute actions in behalf of institutionalized persons:

> These limitations of resources, manpower, and continuity among publicly funded legal services and privately funded public interest advocacy groups, leave no doubt that institutionalized persons must look elsewhere for legal representation. In the

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The Seventh Circuit committee, in its report, recommends that The Federal Judicial Center fund a project to test the utility of using lawyers for this purpose.

See Turner, supra note 9, at 625, pointing out that "It is apparent that it is futile for prisoners to proceed pro se."

27. See a report in The Third Branch, vol. 8, p. 7 (March 1976). The need is for counsel who view their responsibility as serving the interest of the prisoner-client. This is a field where it has been popular for some lawyers to use the prisoner-client as an opportunity to pursue an issue thought important by the lawyer without due regard for the client's interest. But see November 27, 1979, letter from Tim Ayers to Alan J. Chaset, where the Legal Services Corporation plan for asking Congress for $9.4 million in the fiscal 1981 budget to fund such projects is discussed.

absence of a massive and unlikely infusion of funds to provide legal services to the institutionalized, the vindication of their rights will continue to depend on the participation and resources of the Department of Justice.[28]

(2) Procedural Complexities. Prisoner conditions-of-confinement cases give rise to procedural questions that are particularly difficult because the plaintiff and often witnesses are in prison, usually at a substantial geographical distance from the court, and the plaintiff is unable to pay for the costs incurred in transporting the plaintiff or witnesses to court or transporting the lawyer to the prison. Included are at least five significant issues:

a. Transportation of the plaintiff to court proceedings, including depositions, pretrial conferences, and nonjury or jury trials before a district judge or magistrate.[29]

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28. H.R. Rep. 96-80, 96th Cong., 1st Sess. 14 (1979).

29. See Moeck v. Zajackowski, 385 F. Supp. 463 (W.D.Wis. 1974), rev'd, 541 F.2d 177 (7th Cir. 1976). The United States Marshals Service is of the view that it is up to the state to deliver the prisoner to the federal contract jail closest to the court. See Matter of Warden of Wisconsin State Prison, 541 F.2d 177 (7th Cir. 1976). The Marshals Service objects to having to reimburse the state for the cost of delivering the prisoner to the contract jail. See Ford v. Carballo, 577 F.2d 404 (7th Cir. 1978). It will do so when specifically ordered to do so by a court in the seventh circuit. Generally the compromise or shared expense solution worked out by the fifth circuit in Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977), seems to have become the standard. It was used in Clark v. Brewer, Civ. No. 76-54-1 (S.D.Iowa 1979). It is being used in the Ruez case, civil action H-78-987, currently being tried in Houston

b. Transportation of the plaintiff's incarcerated witnesses to a trial or hearing.[30]

c. Payment of marshal's fees and witness' fees for plaintiff's witnesses who are not incarcerated and who are subpoenaed by the plaintiff.[31]

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by Judge Justice. Texas is transporting inmates from all the different institutions around the state and delivering them to federal contract facilities in Houston. Once there, the United States Marshal takes custody, housing and transporting the prisoners to and from the trial at federal expense. See Order, USM 4530.1A, U.S. Department of Justice, U.S. Marshals Service, June 21, 1978, dealing with and authorizing the shared responsibility as ordered in Ballard v. Spradley.

In Wimberly v. Rogers, 557 F.2d 671 (9th Cir. 1977), the court rejected the solution adopted by one district court--staying all proceedings until the plaintiff was released from custody. In some districts this problem is resolved by the magistrate traveling to the prison to conduct the hearing. Although the magistrate usually takes a marshal with him, he is still dependent to some extent for his security upon the prison officials, some of whom are the defendants in the case he is hearing. This presents the very real possibility of a conflict that should be avoided. Further, civil rights plaintiffs seeking damages have the right to a jury trial. See Sensenich, supra note 8, at 46. In cases in which a jury trial is demanded by either party, disposition by hearing at the prison would not appear to be feasible.

30. Transportation of the plaintiff's incarcerated witnesses to the hearing is also resolved in some districts by the magistrate conducting the hearing in the prison. However, this solution is not available when one of the parties demands a jury trial. It is noted that rule 30 (a) of the Federal Rules of Civil Procedure provides that "The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes." However, there is no authorization for funds to pay such expenses, and testimony of plaintiff's incarcerated witnesses, therefore, cannot be submitted by deposition.

If legislation is enacted authorizing the payment of expenses for transportation of incarcerated witnesses to court, the court should have discretion to determine whether a witness' testimony, as offered by the plaintiff, is sufficiently relevant to justify the expense. See Cook v. Bounds, 518 F.2d 779 (4th Cir. 1975).

31. The payment of the marshal's fees and witness' fees for plaintiff's witnesses who are not incarcerated and who are subpoenaed by the plaintiff, is a problem in all civil cases in which the plaintiff is proceeding pro se.

d. Reimbursement of expenses incurred by attorneys who represent prisoner-plaintiffs after being requested by the court under authority of 28 U.S.C. §1915 (d).[32]

e. Obtaining a transcript of a hearing before a magistrate when objections are filed to the magistrate's proposed findings of fact, conclusions of law, and recommendation for disposition and the judge is required to make a de novo determination under 28 U.S.C. §636 (b)(1).

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32. In Allison v. Wilson, 277 F. Supp. 271 (N.D.Cal. 1967), Judge Wollenberg stated that his appointment of an attorney to represent an indigent incarcerated plaintiff "implicitly authorizes the commitment of federal funds to underwrite necessary expenses." 277 F. Supp. at 275. Attorney travel and court reporter expenses for deposition activity were among those that would be paid. This holding was recognized as dicta by the eighth circuit in Tyler v. Lark, 472 F.2d 1077, 1078 (8th Cir.), cert. denied sub nom., Beilenson v. Treasurer of the United States, 414 U.S. 864 (1973), and rejected in Clark v. Hendrix, 397 F. Supp. 966 (N.D.Ga. 1975), where Judge O'Kelley found no basis in law for the expenditure of federal funds to underwrite a private civil damage action. In Haymes v. Smith, 73 F.R.D. 572 (W.D.N.Y. 1976), Judge Curtin held that "district courts can provide for payment in the first instance of the expense of taking depositions . . . . Such a determination as to which party shall pay transportation and related expenses incurred in the course of deposing an individual rests in the court's sound discretion." 73 F.R.D. at 574. While recognizing that the general rule requires that the party seeking to take a deposition must bear the costs, Judge Curtin stated that, since this suit was initiated by a pro se complaint of an indigent prisoner, he was not going to follow the usual rule. He required the defendants to pay the reasonable expenses that would be incurred by plaintiffs in deposing a defendant who resided in a distant state. He stated that the defendants may apply to the court to have these expenses taxable as disbursements should the defendants recover costs in the action.

The inability of an attorney to obtain reimbursement of expenses incurred traveling some distance to interview the plaintiff in his prison is an impediment to obtaining counsel for prisoner-plaintiffs. While some attorneys are willing to represent a prisoner-plaintiff without charge, they are not willing to incur substantial expenses for which they cannot be reimbursed.

In addition, in some cases allegations are made of discipline because of litigation against prison officials; access to library resources is limited;[33] prisoners are frequently transferred and serving papers is difficult; and generally the problems of all pro se plaintiffs are made even more complicated by the fact and uncertainties of prison life.[34]

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33. See Bounds v. Smith, 430 U.S. 817 (1977).

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

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

"Additional problems occur when the prisoner is placed in solitary confinement for valid institutional reasons. His access to the law library and assistance from other prisoners is usually

D. Direct Access to Federal Courts.

The burden of prisoner conditions-of-confinement cases has fallen disproportionately upon the federal judiciary. Granting that conditions-of-confinement

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limited. This limits his access to the court and a question for judicial determination is whether it constitutes an unconstitutional limitation. However, before that issue can be judicially determined, the fact is that the prisoner's access to the court is being limited in a way not imposed upon non prisoners. Even as to the prisoners in general population, the institution law library is generally substantially inferior to public law libraries available to non prisoner litigants. Further, the prisoner may also have limited access to writing paper, pens, and pencils.

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

"In addition to the problems in locating the institution in which the plaintiff is incarcerated, there are further problems in determining the correct date of service. Certified mail is frequently accepted at the institution on a certain date but not actually delivered to the plaintiff until much later. Sometimes, if the plaintiff is on a temporary transfer, the mail will be held until he returns to the institution. This is particularly critical when the document is an order or a recommendation of the magistrate and the plaintiff has a limited number of days from the date of service to appeal or file objections. The certified receipt gives the date of service as the date the document was delivered to the

cases are important and are deserving of the attention of the federal judiciary does not compel the conclusion that judicial relief always ought to be available without prior resort to state administrative remedies or the conclusion that state courts should not also be available to hear and adjudicate conditions-of-confinement cases brought by state prisoners.[35]

In the review of state convictions, the trend has been to rely primarily on state courts to apply federal constitutional protections. The result has been a greater awareness on the part of state courts of federal constitutional rights and a corresponding reduction in the caseload of the federal court system. Even if the case is ultimately filed in a federal district court, the task for federal judges is simplified because the issues have been defined at the state court level.

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institution, rather than the date it was given to the plaintiff. Sometimes I receive a letter from the plaintiff complaining because of the delay and in those cases I always treat the date he actually received the document as the date of service, rather than the date it was received by the institution. The circumstance of the pro se plaintiff's incarceration requires the judge or magistrate and staff to be particularly watchful for the plaintiff's address changes and service of documents upon him. While non prisoner plaintiffs can easily notify the court of changes of address in advance, prisoners usually do not know precisely when they will be transferred to another institution and when they will be returned to their original institution. While this problem is not discussed in our report, it is a real problem which requires particular care in the handling of prisoner cases. Possibly I should have mentioned these problems in our report but they did not occur to me, probably because they seem to involve sensitivity to the prisoner's status rather than 'forms and procedures.'"

35. See footnote 4, supra.

In contrast, existing case law does not require exhaustion of state judicial or administrative remedies prior to presenting a §1983 claim in the federal court.[36]

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36. See Sensenich, supra note 8, at 21; letters of December 4, 1979, from Harold R. Tyler, chairman, Advisory Corrections Council, to Senator Kennedy and Congressman Rodino urging adoption of exhaustion of the administrative remedies requirement (letters on file at The Federal Judicial Center); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 983-985 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; D. Currie, Federal Courts 686-692 (2d ed. 1975); Comment, 42 U.S.C. §1983 Prisoner Petitions--Exhaustion of State Administrative Remedies, 28 Ark. L. Rev. 479 (1975); Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537 (1974); McCray v. Burrell, 516 F.2d 357 (4th Cir.), cert. granted, 423 U.S. 923 (1975), dismissed as improvidently granted, 426 U.S. 471 (1976). But see Griffin v. Crump, --- F. Supp. --- (D.Kan. 1977), requiring exhaustion, cert. denied, 439 U.S. 839 (1978); Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); McKeever v. Israel, --- F. Supp. ---, 26 CrL 2102 (E.D.Wis. 1979). See Comment, Limitations of State Prisoners' Civil Rights Suits in the Federal Courts, 27 Cath. U. L. Rev. 115, 122-125 (1977), urging adoption of exhaustion of the administrative remedies requirement. See also H.R. 10 (96th Cong., 1st Sess., Jan. 15, 1979) which passed the House of Representatives on May 23, 1979, which would require exhaustion of administrative grievance procedures that are certified as adequate by the attorney general of the United States. A companion bill, S.10, has just been voted out of the Senate Judiciary Committee. S.10 also requires exhaustion of prisoner grievance procedures.

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 the following:

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

(2) Why is there a difference between prisoner complaints brought under 42 U.S.C. §2254 and those brought under 42 U.S.C. §1983? See H. Friendly, Federal Jurisdiction: A General View 101-103 (1973). Judge Friendly would require exhaustion of both state administrative and state judicial remedies in prisoner §1983 cases, arguing that to do so is reasonable given the special nature of prisoner cases. It is true that state judicial action in §1983

Primary reliance on courts, state or federal, to resolve prisoner grievances will remain less than satisfactory. Often the underlying cause of conditions-of-confinement claims is the gross inadequacy of physical facilities and lack of trained personnel at state correctional institutions. Moreover, a 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

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cases is res judicata. See, e.g., Spence v. Latting, 512 F.2d 93 (10th Cir.), cert. denied, 423 U.S. 896 (1975); Davis v. Towe, 379 F. Supp. 536 (E.D.Va. 1974), aff'd, 526 F.2d 488 (4th Cir. 1975); Note, Constitutional Law--Civil Rights--Section 1983--Res Judicata/ Collateral Estoppel, 1974 Wis. L. Rev. 1180. If this is the major reason for the different treatment, a change in the applicability of res judicata can be made by statute if necessary.

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

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

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

Litigating an issue first in state court may result in a collateral estoppel defense in a subsequent federal court 1983 action. See McCurry v. Allen, --- F.2d ---, 26 Crim. L. Rep. 2069 (8th Cir. 1979).

> court orders in closed institutions all have led to growing disillusionment with the judicial process as the primary vehicle for resolving prisoners' grievances.[37]

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 thinks he has, a grievance or complaint can be heard promptly, fairly and fully.[38]

Increasingly, correctional departments throughout the country are adopting inmate grievance procedures.[39]

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37. J. Keating, K. Gilligan, V. McArthur, M. Lewis, & L. Singer, Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions 4 (Center for Correctional Justice, 1975) [hereinafter cited as Keating--Seen But Not Heard]. See also Gamble v. Estelle, 516 F.2d 937 (5th Cir. 1975) [rev'd, 429 U.S. 97 (1976)] at 940: "While the bench has time and again suggested that administrative procedures be established to handle complaints . . . the response from the States has been minimal. As a result, we are obliged to hear and decide such cases under somewhat broad constitutional principles." A discussion of the limitations on judicial effectiveness is found in Comment, "Mastering" Intervention in Prisons, 88 Yale L.J. 1062 (1979).

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

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

There is increasingly adequate literature:
South Carolina Department of Corrections, Monograph, Inmate Grievance Procedures (1973);

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.[40] The apparent result of the adoption of

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Special Report of the National Association of Attorneys General, Prison Grievance Procedures (May 6, 1974);
Keating--Seen But Not Heard, supra note 37;
Goldfarb and Singer, Redressing Prisoners' Grievances, 39 Geo. Wash. L. Rev. 175 (1970);
Singer and Keating, Prisoner Grievance Mechanisms, 19 Crime and Delinquency 367 (1973);
Ombudsman/Grievance Mechanism Profiles--nos. 1-3: The Minnesota Correctional Ombudsman (1973), South Carolina Correctional Ombudsman (April 1974), Maryland Inmate Grievance Commission (August 1974) (ABA Resource Center on Correctional Law and Legal Services);
V. O'Leary, T. Clear, C. Dickson, H. Paquin, & W. Wilbanks, Peaceful Resolution of Prison Conflict (National Council on Crime and Delinquency, 1973) (This contains a very helpful analysis of the shortcomings of informal methods of resolving inmate grievances. It also explores in a helpful way the possibility of applying labor mediation and arbitration procedures to the resolution of inmate grievances.);
Corrections Magazine, series of articles (vol. 1, January/February 1975);
Note, Prisoner's Rights--The Need for an Inmate Grievance Commission in West Virginia, 78 W. Va. L. Rev. 411 (1975-76);
California Program Listens to Inmate Complaints, 6 LEAA Newsletter, p.12 (Feb. 1977);
Controlled Confrontation, The Ward Grievance Procedure of the California Youth Authority (Office of Technology Transfer, NILECJ, LEAA, August 1976).
For a description of the use of Department of Justice mediation in prison disputes, see 17 Crim. L. Rep. 2466 (1975).

The American Correctional Association Manual of Standards for Adult Correctional Institutions 4301 (1977) provides as "essential" a "written inmate grievance procedure." A similar recommendation is in the American Bar Association Joint Committee on the Legal Status of Prisoners, 14 Am. Crim. L. Rev. 377, 578-582 (1977) (tent. draft). See also Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 113 (1976).

40. An issue that arises in the absence of exhaustion of a state remedies requirement is whether the matter is "ripe" for decision in the federal court. In Cravatt v. Thomas, 399 F. Supp. 956,

grievance procedures has been encouraging. A significant percentage of the grievances are resolved at the institutional level; and an additional percentage, again significant in number, are resolved at the administrative appeals level.[41]

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

In Paine v. Baker, 595 F.2d 197, 202-203 (4th Cir. 1979), the court said, "[W]e think that, as a jurisdictional predicate to filing an action under §1983, the inmate must allege that the prison officials have deprived him of this right. This means that application for expunction must be made in the first instance to prison authorities.

"This is not a requirement of exhaustion . . . . State prison authorities cannot be said to have denied an inmate's right to have erroneous information expunged from his file, unless they have been requested to do so and have refused."

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

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

Whatever the ultimate solution of the problem, either by statutory change or joint state and federal efforts, at the present time the task of dealing with

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A 1977 inventory by CONtact Inc. of state inmate grievance procedures produced the following state-by-state reports [unless otherwise indicated, ombudsmen have no official enforcement authority]:

Alabama--no ombudsman or formal grievance procedure.
Alaska--statewide ombudsman for complaints from any person.
Arkansas--formal grievance procedure including an administrative review officer at each institution.
California--formal in-house grievance procedure, departmental appeal possible.
Colorado--each institution has a grievance procedure, but no statewide formal mechanism.
Delaware--no ombudsman or formal grievance procedure.
District of Columbia--no ombudsman or formal grievance procedure.
Florida--no ombudsman or formal grievance procedure.
Georgia--no ombudsman or formal grievance procedure.
Hawaii--statewide ombudsman concerned with impropriety of any type in government services.
Idaho--no ombudsman or formal grievance procedure.
Illinois--grievance procedure; prisoner advocates employed to aid inmates.
Indiana--statewide ombudsman; drafting a nondisciplinary appeals process.
Iowa--statewide ombudsman for complaints from any person.
Louisiana--no ombudsman or formal grievance procedure.
Maine--statewide Office of Advocacy, represents inmates at hearings before the Commissioner of Corrections.
Maryland--statewide inmate grievance commission.
Michigan--legislative corrections officer hears appeals from decisions of the director of the Department of Corrections.
Minnesota--statewide ombudsman.
Mississippi--grievance committee at state penitentiary.
Missouri--administrative review with recommendations from a three-member citizen committee.
Montana--formal in-house grievance procedure; staff-inmate committee and institutional complaint investigator make recommendations to the warden.
Nevada--prison mediator, procedures being revised.
New Jersey--statewide ombudsman.
New York--formal in-house grievance procedure, staff-inmate hearings.
Ohio--statewide grievance office; investigator in each institution; ombudsman eliminated in 1975.
Oklahoma--formal grievance procedure.
Oregon--statewide ombudsman.
South Carolina--statewide ombudsman; one institution has a formal grievance procedure.
South Dakota--no ombudsman or formal grievance procedure.
Tennessee--no formal grievance procedure; one institution has an ombudsman.

prisoner conditions-of-confinement cases falls disproportionately on the federal judiciary. This phenomenon makes it important that the procedures used in these cases be as effective as possible.

Texas--administrative review with appeal to Director of Corrections.
Utah--formal in-house grievance procedure.
Vermont--investigating grievance officer at each institution.
Virginia--ombudsman to be established by April 1, 1977.
Washington--no ombudsman or formal grievance procedure.
West Virginia--inmates advisory council at each institution.
Wisconsin--formal grievance procedure; investigators and staff-inmate committees at each institution.

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

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

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

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

(1) "Hands-off" Doctrine. For years federal courts followed what was known as a "hands-off" doctrine in responding to complaints about correctional practices.[42] 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. 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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42. The unwillingness to review correctional practices was in contrast to a traditional willingness to review the validity of a state judgment that 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. See Lay, The 'Why' of Federal Judicial Intervention in State Correctional Institutions, Corrections Today 36-37 (May-June 1979).

decisions were largely invisible, reasons were seldom given, and formal policies were largely nonexistent.

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

(2) The "Open-Door" Policy. The door to the judicial process, which was for a long time closed, was opened wide during the past decade. This was particularly true of access to the federal courts. An inmate of a state correctional institution had immediate access to the federal court by asserting a claim under 42 U.S.C.

§1983. He was not required to first exhaust his state remedies, either administrative or judicial.[43]

The inmate could raise issues that ranged from the most fundamental and complex constitutional questions to matters that would ordinarily be encountered at the level of a small claims court.[44]

(3) A Period of Reevaluation. Recent Supreme Court decisions have clearly indicated that the court is re-evaluating the role of federal courts in state prisoner conditions-of-confinement cases. In Bell v. Wolfish,[45]

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43. 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 36, 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), vacated, 406 U.S. 914 (1972); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); see reference to a September 18, 1974, opinion of the Fifth Circuit requiring exhaustion in Hardwick v. Ault, 517 F.2d 295, 296 (5th Cir. 1975).

The Supreme Court repeated its nonexhaustion ruling in Ellis v. Dyson, 421 U.S. 426 (1975), on remand, 518 F.2d 553 (5th Cir. 1975). The circuits clearly now seem to be holding that a state prisoner does not have to exhaust state administrative remedies before bringing a federal court action under 42 U.S.C. §1983. See Hardwick v. Ault and McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), cert. granted, 423 U.S. 923 (1975), dismissed as improvidently granted, 426 U.S. 471 (1976). But see Morgan v. LaVallee, 526 F.2d 221, 224 (2d Cir. 1975), in which the court concludes: "Before the court below may relinquish its §1983 jurisdiction it must, on the most narrow reading of the cases, be positively assured--it may not presume--that there are speedy, sufficient and readily available administrative remedies remaining open to pursue, an assurance certainly not attainable on this record."

44. See Aldisert, Judicial Expansion of Federal Jurisdiction, supra note 12; Prison Reform: The Judicial Process, A BNA Special Report on Judicial Involvement in Prison Reform, 23 Crim. L. Rep. (Supp., Aug. 2, 1978).

45. 99 S. Ct. 1861 (1979).

the Court described the change from a "hands-off" approach to a period when federal courts "waded into this complex arena" to a withdrawal of the federal court from the "minutiae of prison operations":

> There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.[46]

In addition to this broad admonition, recent decisions have imposed limitations of four general kinds on federal court involvement:

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46. 99 S. Ct. at 1886. See Lay, The 'Why' of Federal Judicial Intervention in State Correctional Institutions, Corrections Today 37-38 (May-June 1979).

First, the interest of the prisoner-plaintiff must be recognized under 42 U.S.C. §1983. This may be either a "property" interest[47] of the prisoner or an interest in "liberty" defined as a right given by the United States Constitution and binding upon the states through the fourteenth amendment or a right given the prisoner by state law.

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

Third, the deprivation of liberty or property must be without "due process of law" (or in violation of a specific provision of the Constitution such as the eighth amendment prohibition of cruel and unusual punishment).[48] In some situations the existence of a common law remedy in state court is adequate to afford due process.[49]

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47. Lynch v. Household Finance, 405 U.S. 538 (1972). Compare opinion of Mr. Justice Stone in Hague v. C.I.O., 307 U.S. 496 (1939), holding that under §1331 a plaintiff would have to show $3,000 damages (now it would be $10,000). See Aldisert, supra note 12, at 568.

48. In Baker v. McCollan, 25 Crim. L. Rep. 3221 (1979), the Court held that there was no denial of "due process" when an innocent person arrested on a warrant intended for his brother was held for three days. The existence of the warrant, on the facts of the case, satisfied the federal requirement of "due process."

49. Ingraham v. Wright, 430 U.S. 651 (1977).

Fourth, the federal court must intervene where the prisoner has the right to present the federal claim in an ongoing state proceeding.[50]

(a) The definition of "liberty." The Supreme Court has addressed this question in several recent cases, including Paul v. Davis,[51] Meachum v. Fano,[52] Montanye v. Haymes,[53] and Baxter v. Palmigiano.[54]

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

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law,[5] . . . . [Footnote 5: "There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment."][55]

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50. Juidice v. Vail, 430 U.S. 327 (1977).

51. 424 U.S. 693, rehearing denied, 525 U.S. 985 (1976).

52. 427 U.S. 215, rehearing denied, 529 U.S. 873 (1976).

53. 427 U.S. 236 (1976).

54. 425 U.S. 308 (1976).

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

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

In Wolff v. McDonnell,[56] the Court said:

> But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. . . .
>
> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government.

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

> The liberty interest protected in Wolff had its roots in state law, and the minimum procedures appropriated under the circumstances were held

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56. 418 U.S. 539, 557, 558 (1974).

> required by the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." . . .
>
> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.[57]

In Baxter v. Palmigiano[58] the Court reserved for future consideration "the degree of 'liberty' at stake

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

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

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

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

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

58. 425 U.S. 308, 323 (1976).

in loss of privileges and . . . whether some sort of procedural safeguards are due when only such 'lesser penalties' are at stake."

(b) The requirement of fault. Even if the prisoner has a "liberty" or "property" interest that is properly asserted in a 42 U.S.C. §1983 action, not every infringement of that liberty or property under color of state law will call for federal court intervention.[59] In Estelle v. Gamble,[60] the Court held that not all medical malpractice entitles a prisoner to bring an action under 42 U.S.C. §1983. The Court said:

> Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.[61]

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

60. 429 U.S. 97 (1976), rehearing denied, 429 U.S. 1066 (1977); on remand, Gamble v. Estelle, 554 F.2d 653 (5th Cir. 1977), rehearing denied, 559 F.2d 1217 (5th Cir. 1977), cert. denied, 434 U.S. 974 (1977).

61. 429 U.S. at 105-106. See Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976); Russel v. Shefer, 528 F.2d 318, 319 (4th Cir. 1975); Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975); Williams

The distinction between intentional and reckless conduct, on the one hand, and "mere negligence," on the other, is not limited to assertions that the conduct was "cruel and unusual conduct" violative of the Eighth Amendment. In Bonner v. Coughlin,[62] the Seventh Circuit rejected a claim under 42 U.S.C. §1983 alleging that a trial transcript had been lost as a result of the negligence of a guard. In part the court said:

> Neither the language of the statute nor its history shows that Congress was providing a federal remedy for damages caused by the simple negligence of a state employee. In enacting the Civil Rights Act, Congress was obviously intending to provide a deterrent for the type of conduct proscribed. If an officer intentionally causes a property loss, a remedy under Section 1983 might deter similar misconduct. On the other hand, extending Section 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct. Consequently, the majority of Circuits hold that mere negligence does not state a claim under Section 1983. Otherwise the federal courts would be inundated with state tort cases in the absence of Congressional intent to widen federal jurisdiction so drastically.[63]

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v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); Newman v. Alabama, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974), cert. denied sub nom. Thomas v. Cannon, 419 U.S. 879 (1974); Dewell v. Lawson, 489 F.2d 877, 881-882 (10th Cir. 1974); Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970); Gittlenacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970).

62. 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978).

63. 545 F.2d at 568. Compare Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976).

In Baker v. McCollan[64] the United States Supreme Court said that the issue was complex and may not be subject to a "uniform answer across the entire spectrum of conceivable constitutional violations." The Court also said that it would "defer once again consideration of the question whether simple negligence can give rise to §1983 liability."[65]

(c) The existence of an adequate state, common law remedy. In Ingraham v. Wright,[66] the Court held that a Florida school child had a constitutionally protected interest to be free from corporal punishment except as that punishment is administered in accordance with due process of law. The Court went on to hold, however, that the traditional common law remedies, civil and criminal, available in Florida afforded adequate due process. In his majority opinion, Mr. Justice Powell cites with approval Bonner v. Coughlin,[67] in which then Circuit Judge Stevens said:

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64. --- U.S. ---, 25 Crim. L. Rep. 3221 (1979).

65. In Popow v. City of Margate, 26 Crim. L. Rep. 2021 (D. N.J. 1979), the court held that gross negligence or recklessness is required and that ordinary negligence is not sufficient. See Comment, Actionability of Negligence Under Section 1983 and the Eighth Amendment, 127 U. Pa. L. Rev. 533 (1978), suggesting that negligence be sufficient whenever the risk of harm is increased significantly by incarceration in a state prison.

66. 430 U.S. 651 (1977).

67. 517 F.2d 1311 (7th Cir. 1975), modified en banc, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978).

> We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.[68]

(d) The existence of an available state forum. In Juidice v. Vail[69] the Court said:

> We must decide whether, with the existence of an available forum for raising constitutional issues in a state judicial proceeding, the United States District Court could properly entertain appellees' §1983 action in light of our decisions in Younger v. Harris, 401 U.S. 37 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). We hold that it could not.

In George v. Parratt,[70] the eighth circuit court of appeals held that it was proper to dismiss a prisoner petition brought under 42 U.S.C. §1983 on grounds of federal court abstention. In doing so the court applied a five-factor test: (a) the effect abstention will have on the rights sought to be protected, (b) whether a state remedy is available, (c) whether state law has been interpreted in the state courts, (d) whether the state law could be interpreted to avoid the constitutional question, and (e) whether abstention will avoid state interference in state operations.

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68. 517 F.2d 1311, 1319 (7th Cir. 1975). But see Ingraham v. Wright, 430 U.S. 651, 700 (1977) (Stevens, J., dissenting).

69. 430 U.S. 327, 330 (1977).

70. 602 F.2d 818 (8th Cir. 1979).

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

It seems increasingly evident that state courts do in fact share responsibility for the enforcement of the rights guaranteed by 42 U.S.C. §1983.[71] In Aldinger v. Howard,[72] Mr. Justice Brennan said, in dissent:

> The Court today appears to decide sub silentio a hitherto unresolved question by implying that §1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts. [Citation omitted.] This is a conclusion with which I agree.[73]

Some issues must be raised in state rather than federal court. Under Ingraham v. Wright,[74] the existence of an adequate, available state judicial remedy may satisfy the requirements of federal due process. Under Juidice v. Vail,[75] the opportunity to raise a constitutional issue in an ongoing state proceeding will preclude resort to federal court. Most importantly, a large number of prisoner conditions-of-confinement complaints may have merit, but are not of a kind that give rise to federal constitutional issues.

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71. See Aldisert, supra note 12, at 575-576 n.90; and Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922 (1976).

72. 427 U.S. 1 (1976).

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

74. 430 U.S. 651 (1977).

75. 430 U.S. 327 (1977).

This has been the case for a long time, but is particularly true after the limitations on the definitions of "liberty" in Meachum[76] and Montanye[77] and the requirements of "fault" set forth in Estelle v. Gamble.[78] It is obviously in the interest of the plaintiff-prisoner to raise these issues at the state level, either administratively or judicially or, where appropriate, by both means.

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

Generally speaking, the substantive rights of federal prisoners in conditions-of-confinement cases track those of state prisoners. There are certain procedural differences. Unlike a state prisoner who proceeds under 42 U.S.C. §1983, an inmate of a federal correctional institution may bring his action for damages and injunctive relief in mandamus. Actions for damages under the Federal Tort Claims Act may also be brought.[79]

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76. 427 U.S. 215, rehearing denied, 429 U.S. 873 (1976).

77. 427 U.S. 236 (1976).

78. 429 U.S. 97 (1976), rehearing denied, 429 U.S. 1066 (1977); on remand, Gamble v. Estelle, 554 F.2d 653 (5th Cir. 1977), rehearing denied, 559 F.2d 1217 (5th Cir. 1977), cert. denied, 434 U.S. 974 (1977).

79. See Wood, Federal Prisoner Petitions, 7 St. Mary's L.J. 489, 491-492 (1975); Thompson v. United States, 492 F.2d 1082 n.5 (5th Cir. 1974). In Thompson, Judge Bell held that judicial review of a refusal to "back compensation" and good time should be brought under the Administrative Procedure Act, 5 U.S.C. §§701-706. See Bell v. Hood, 327 U.S. 678 (1946); Bivens v. Six Unknown Named Agents, 403 U.S. 398 (1971).

Those federal courts of appeal that have spoken to the issue have held that the federal prisoner is required first to exhaust his administrative remedies.[80]

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

In District of Columbia v. Carter, 409 U.S. 418 (1973), the Court held that a federal prisoner must prove at least $10,000 in damages. See Aldisert, supra note 12, at 568-571, especially 569 n.54.

80. See Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975). The Hardwick opinion states: "It is, of course, true that the federal courts have imposed upon federal prisoners the requirement that they 'exhaust their administrative remedies in accordance with Bureau of Prisons policy.'" Id. at 296. This is the latest in a series of cases in the fifth circuit requiring federal prisoners to use the administrative grievance procedure before raising conditions-of-confinement issues in court.

The Third Circuit has also apparently imposed an exhaustion of administrative remedies upon federal prisoners. See Waddell v. Alldredge, 480 F.2d 1078 (3d Cir. 1973); Green v. United States, 283 F.2d 687 (3d Cir. 1960). Some of the decisions probably can also be explained as applying the "ripeness doctrine." See Soyka v. Alldredge, 481 F.2d 303 (3d Cir. 1973), commented on in Cravatt v. Thomas, 399 F. Supp. 956 (W.D.Wis. 1975). See discussion on ripeness, supra note 40. 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.), rev'd, 417 U.S. 653, rehearing denied, 419 U.S. 1014 (1974). But see Cravatt v. Thomas, 399 F. Supp. 956 (W.D.Wis. 1975).

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

A. FORMS.

EACH DISTRICT COURT HAVING A SUBSTANTIAL CASE LOAD OF PRISONER COMPLAINTS SHOULD ADOPT BY LOCAL RULE A COMPLAINT FORM AND ALSO SUCH OTHER FORMS AS ARE HELPFUL IN PROCESSING CONDITIONS-OF-CONFINEMENT CASES.[81] THIS IS PARTICULARLY IMPORTANT IN THIS FIELD OF LITIGATION WHERE MOST PLAINTIFF-PRISONERS ARE PROCEEDING PRO SE.

SUGGESTED FORMS ARE FOUND IN PART V OF THIS REPORT.

Commentary

Form 1 is a recommended complaint form. It is the committee's judgment that the complaint form, properly filled out, will contain all of the information necessary to commence an action under 42 U.S.C. §1983.[82] The form

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81. See, e.g., Local Rule 20, United States District Court, E.D.N.C. (Jan. 11, 1978).

82. In Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978), the court discussed the question of the proper role of the district court in aiding the pro se prisoner plaintiff to state a claim under section 1983. Dissenting Judge Hall urged that the standard form be amplified to make clearer to the pro se plaintiff what is required by the form: "You must name the people as defendants whom you contend hurt you or caused you harm in some way. For example, if you are assaulted by guards, their names must be stated if you know them, or in the alternative you must make reference to them in some way. If you cannot name them, say so, and state why.

"In your complaint, you must state the facts (who, what, when, where and how) that support your contentions, not mere conclusions.

"If you contend that the warden, or some other supervisory official or their subordinates caused you harm, you likewise must name them if known, or you must make reference to them in some way. If you cannot name them, say so and state why. As noted, in your

provides for an unsworn declaration under the penalty of perjury as is authorized by 28 U.S.C. §1746.[83]

A sample local rule requiring the use of a complaint form follows:

> Rule --. Complaint Form for 42 U.S.C. §1983 Actions by Incarcerated Persons.
>
> All actions under 42 U.S.C. §1983 filed in this district by incarcerated persons shall be submitted on the court-approved form supplied by the Clerk unless a district judge or magistrate, upon finding that the complaint is understandable and that it conforms with local rules and the Federal Rules of Civil Procedure, in his discretion, accepts for filing a complaint that is not submitted on the approved form.

This rule is drafted to encourage the use of the form by the complainant whose complaint would otherwise be vague, verbose, and incomprehensible. However, if a complaint, not on the form, filed either pro se or with the assistance of counsel, complies with the rules of procedure and is legible, the Clerk will accept the complaint for filing. If, on the other hand, the complaint does not comply with the rules or is not sufficiently legible, it is to be returned to the prisoner by the Clerk with a copy of the approved form which

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complaint, you also must state the facts (who, what, when, where and how) that support your contentions not mere conclusions.

"Note: In order for a supervisory official, or the warden to be liable for any harm you are claiming, you must allege and have some proof that that person either expressly or implicitly authorized the conduct which you contend harmed you, or have acquiesced in it in some way." 574 F.2d at 1155.

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

should be of assistance to the prisoner in forwarding the complaint in legally proper and legible form.

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

Form 3 is an order granting plaintiff leave to proceed in forma pauperis.

Form 4 is an order to the United States Marshal to serve the complaint and other appropriate papers on all of the party defendants.

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

Form 5 affords a way of ensuring that pro se plaintiffs do not have ex parte communications with the judge or magistrate. This problem arises frequently in cases in which the prisoner-plaintiff is not familiar

with proper procedure. The use of the form is a way of educating such plaintiffs.

Form 6 is an order for discovery drafted with a view to its utility in pro se prisoner litigation.

Form 7 is an order for the defendant to make a special report. This enables the court to obtain additional information that may be helpful in distinguishing between the meritorious and the frivolous complaint.

Form 8 is a recommended pretrial order that magistrates have found useful in prisoner pro se cases.

B. CENTRALIZATION IN DISTRICT COURTS.

EACH COURT SHOULD INSTITUTE A CENTRALIZED METHOD OF PROCESSING PRISONER COMPLAINTS.

(1) THE CLERK'S OFFICE SHOULD CONSIDER HAVING AN INTAKE CLERK TO EXAMINE PRISONER COMPLAINTS AS TO THE FILING REQUIREMENTS UNDER LOCAL RULES, IF ANY.

(2) IN MULTIJUDGE DISTRICT COURTS, A MAGISTRATE SHOULD ASSIST THE DISTRICT JUDGE IN THE PROCESSING OF PRISONER COMPLAINTS.

(3) IN MULTIJUDGE COURTS IT IS SOUND MANAGEMENT PRACTICE (EXCEPT WHERE THE COURT HAS A SPECIALLY ASSIGNED JUDGE FOR PRISON MATTERS) TO ASSIGN TO THE SAME JUDGE ALL ACTIONS COMMENCED BY ONE PRISONER.

Commentary

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

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

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

it is recommended that this issue be dealt with and the practice clarified by local rule.[84] Where there is a local rule with respect to the requirements of the complaint, the clerk obviously is acting properly in refusing to file the complaint if it fails to conform to local rule requirements.

Standard B (2) suggests that magistrates should be used to perform the initial screening and the processing of prisoner complaints.

The two prior drafts of this report left to the district court the choice between the use of a magistrate and the use of a special staff law clerk to screen and assist in the handling of §1983 cases.[85] The role of the staff law clerk in prisoner cases had been the subject of an experiment conducted by The Federal Judicial Center in three trial courts (Middle District of Pennsylvania, Southern District of Florida, and the Western District of Missouri) during 1975-1976 and had been monitored by the Administrative Office of the

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84. See sample local rule, page 46 of this report.

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

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

United States Courts since the end of the pilot phase in 1976. At present, sixteen courts have a functioning staff law or pro se or writ clerk.

The experience with the staff law clerk has been uniquely positive. New methods and procedures to supplement earlier reports of this committee have been created and implemented at a minimal cost. With only one law clerk needed to develop and maintain the expertise in this expanding area of the law, consolidation of cases raising similar issues has been facilitated, thus decreasing the opportunities for disparate rulings. And, in some courts, there is evidence that the program has produced speedier disposition of pro se cases.

Notwithstanding the apparent success of the program, the committee recommends that the magistrate be the prime actor here. With their recently increased jurisdiction under the Federal Magistrate Act of 1979,[86] magistrates can handle most aspects of prisoner cases expeditiously without the need to develop a new layer of personnel. Assigning a magistrate to process all these matters for a court provides the benefits of the staff law clerk system combined with the dispositive role of the judge.

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86. Pub. Law 96-82, 93 Stat. 643.

The committee does not recommend dismantling the staff law clerk systems that are already in place.[87] We feel, however, that the magistrate, being a judicial officer, is the more appropriate person to handle and process these cases.

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

87. The future of the staff law clerk position is being debated presently by the Judicial Conference.

C. COMPLAINT; LEAVE TO PROCEED IN FORMA PAUPERIS.

(1) FORM 1 IS A SUGGESTED COMPLAINT FORM. MODIFICATION IN THE FORM SHOULD BE MADE IF NECESSARY TO MEET THE NEEDS OF THE PARTICULAR DISTRICT.

(2) FORM 2 IS A DECLARATION IN SUPPORT OF A REQUEST TO PROCEED IN FORMA PAUPERIS. IT IS RECOMMENDED AS A METHOD OF OBTAINING THE INFORMATION REQUIRED TO DETERMINE WHETHER TO GRANT PLAINTIFF LEAVE TO PROCEED IN FORMA PAUPERIS. THE DECISION WHETHER TO GRANT LEAVE TO PROCEED IN FORMA PAUPERIS PURSUANT TO 28 U.S.C. §1915 (a) SHOULD TURN SOLELY ON THE ECONOMIC STATUS OF THE PETITIONER.

(3) THE COURT MAY WISH TO OBTAIN FURTHER INFORMATION CONCERNING THE PLAINTIFF'S ECONOMIC STATUS. AN ORDER MAY BE ENTERED REQUIRING THE PLAINTIFF TO SUBMIT FURTHER SPECIFIED INFORMATION.

(4) IF LEAVE TO PROCEED IN FORMA PAUPERIS IS GRANTED, THE COMPLAINT SHOULD BE FILED.

(5) FUNCTION OF THE MAGISTRATE. THE PROCEDURES RECOMMENDED IN THIS STANDARD MAY BE CARRIED OUT BY THE MAGISTRATE, INCLUDING THE DECISION TO GRANT OR DENY PERMISSION TO PROCEED IN FORMA PAUPERIS. IF PERMISSION IS DENIED, THE PRISONER-PLAINTIFF MAY APPEAL, IN ACCORDANCE WITH LOCAL RULES, TO THE UNITED STATES DISTRICT JUDGE. THE DECISION OF THE MAGISTRATE SHOULD BE SUSTAINED UNLESS "CLEARLY ERRONEOUS OR CONTRARY TO LAW."[88]

Commentary

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

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

The decision in Estelle v. Gamble[89] indicates that the failure to plead the necessary facts may properly result in a dismissal. The opinion of Mr. Justice Marshall indicates that the careful and complete factual allegations in the case made speculation as to what the facts might be unnecessary.[90] The committee believes that the use of the recommended form will enhance the ability of the court to accurately assess the presented claim.

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

The committee believes that asking the inmate whether he has used the grievance procedure is appropriate in states that have prisoner grievance procedures. A series of brief, often per curiam, Supreme Court decisions indicate that such procedures need not be exhausted prior to the filing of a complaint under

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89. 429 U.S. 97 (1976), rehearing denied, 429 U.S. 1066 (1977); on remand, Gamble v. Estelle, 554 F.2d 653 (5th Cir. 1977), rehearing denied, 559 F.2d 1217 (5th Cir. 1977), cert. denied, 434 U.S. 974 (1977).

90. See also Codd v. Velger, 429 U.S. 624 (1976).

42 U.S.C. §1983.[91] Nevertheless the committee felt that a question relating to grievance procedures is appropriate because it may alert the inmate to this extra judicial 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.

In some jurisdictions the forms are made available at each correctional institution within the district. This is convenient for the inmates and relieves the clerk's office of the burden of mailing forms in response to inmates' requests.

Section 1915 (a) of title 28 permits the commencement of a civil action without prepayment of fees and costs or security therefor by a person who is "unable to pay such costs or give security therefor."[92] The section further provides that the court may "dismiss

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91. Burrell v. McCray, 426 U.S. 471 (1976), writ of cert. dismissed as improvidently granted; Ellis v. Dyson, 421 U.S. 426 (1975); Carter v. Stanton, 405 U.S. 669, 671 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). See notes 36 and 80, supra.

92. See Sensenich, supra note 8, at 51; In re Smith, 600 F.2d 714 (8th Cir. 1979), holding it error to refuse an inmate with $66.85 in his prison account, leave to proceed in forma pauperis. See Turner, supra note 9, at 646-647, urging that there not be increased requirements to qualify to proceed in forma pauperis.

The United States District Court for the Southern District of Texas has established a system of partial payment for forma pauperis petitions under General Order No. 77-1. This system was approved in Braden v. Estelle, 428 F. Supp. 595 (S.D.Tex. 1977).

the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."[93]

Under 28 U.S.C. §1746,[94] it is sufficient if the plaintiff makes an unsworn declaration under the penalty of perjury. This is provided for in Form 2. The declaration will avoid the difficulty, sometimes encountered, of finding a notary public in the prison to notarize the request for leave to proceed in forma pauperis.

Some courts have blurred the distinction between §1915 (a) and §1915 (d) by approving the practice of denying leave to proceed in forma pauperis on the ground that the complaint is frivolous or malicious.[95] The practice observed by most courts[96] is to consider only the petitioner's economic status in making the

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93. See Sensenich, supra note 8, at 56, 62.

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

95. Wartman v. Wisconsin, 510 F.2d 130 (7th Cir. 1975); Wright v. Rhay, 310 F.2d 687 (9th Cir. 1962), cert. denied, 373 U.S. 918 (1963); Reece v. Washington, 310 F.2d 139 (9th Cir. 1962); Taylor v. Burke, 278 F. Supp. 868 (E.D.Wis. 1968). In the Central District of California, leave to proceed in forma pauperis is denied if the complaint is unintelligible or filled with obscenities or if the claim is substantially the same as one that he has pending in the court. The case does not receive a docket number unless leave to proceed is granted under §1915 (a). See Sensenich, supra note 8, at 62.

96. 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).

decision whether to grant leave to proceed in forma pauperis. Once leave has been granted, the complaint should be filed and the court should consider whether to dismiss pursuant to §1915 (d).[97] See commentary following Standard D, infra.

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

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97. See Boyce v. Alizaduh, 595 F.2d 948, 950 (4th Cir. 1979); Mitchell v. Beaubouef, 581 F.2d 412, 415, rehearing denied, 586 F.2d 842 (5th Cir. 1978); Turner, supra note 9, at 619.

D. DISMISSAL OF COMPLAINT.

(1) IN CASES IN WHICH LEAVE TO PROCEED IN FORMA PAUPERIS IS GRANTED, THE COURT SHOULD CONSIDER THE SEPARATE QUESTION, UNDER 28 U.S.C. §1915 (d), WHETHER THE COMPLAINT SHOULD BE DISMISSED AS "FRIVOLOUS OR MALICIOUS." IF THE COURT DETERMINES THAT THE COMPLAINT IS IRREPARABLY FRIVOLOUS OR MALICIOUS, IT SHOULD BE DISMISSED WITHOUT AFFORDING THE PLAINTIFF AN OPPORTUNITY TO AMEND. IF THE COURT DETERMINES THAT THE COMPLAINT IS FRIVOLOUS OR MALICIOUS, BUT THAT THIS DEFECT CAN BE CURED BY AMENDMENT, THE COURT SHOULD ISSUE AN ORDER TO SHOW CAUSE WHY THE COMPLAINT SHOULD NOT BE DISMISSED. THE ORDER SHOULD EXPLAIN WHY THE COMPLAINT IS FRIVOLOUS OR MALICIOUS AND SHOULD ALLOW THE PLAINTIFF AN OPPORTUNITY TO RESPOND AND TO AMEND THE COMPLAINT.

(2) FUNCTION OF THE MAGISTRATE. THE MAGISTRATE MAY SUBMIT TO THE JUDGE A REPORT AND RECOMMENDATION FOR DISPOSITION. THE ORIGINAL OF THE MAGISTRATE'S REPORT OR RECOMMENDATION WILL BE FILED WITH THE CLERK AND A COPY MAILED BY THE MAGISTRATE TO THE PLAINTIFF AND ANY PARTY WHO HAS BEEN SERVED, WITH NOTICE THAT OBJECTIONS THERETO MAY BE FILED WITHIN TEN DAYS. UPON RECEIPT AND AFTER CONSIDERATION OF ANY EXCEPTIONS OR OBJECTIONS FROM THE PLAINTIFF, THE MAGISTRATE WILL SUBMIT TO THE JUDGE A PROPOSED ORDER OF DISPOSITION.

Commentary

The committee recommends that the decision whether to dismiss pursuant to §1916 (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.[98]

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98. See Sensenich, supra note 8, at 56, 62. Mitchell v. Beaubouef, 581 F.2d 412, 415 (5th Cir. 1978): "If the complaint is deemed legally sufficient under this liberal standard appropriate to this type of case, then service of process on the defendant . . . is required pursuant to Fed. R. Civ. P. 4 (a)."

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).

The committee recommends dismissal with no opportunity to respond when the complaint is irreparably frivolous or malicious.[99] 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.[100] 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.[101]

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,

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

100. See Sensenich, supra note 8, at 43. See Potter v. McCall, 433 F.2d 1087 (9th Cir. 1970). See also Hansen v. May, 502 F.2d 728 (9th Cir. 1974), requiring the district court to allow plaintiff to cure a defect in the complaint by amendment. In Gordon v. Leeke, 574 F.2d 1147 (4th Cir.), cert. denied, 439 U.S. 970 (1978), the court held: "A district court is not required to act as an advocate for a pro se litigant; but when such a litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court. If it is apparent to the district court that a pro se litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him." 574 F.2d at 1152-1153.

101. 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).

attention is called to the language of the Supreme Court in Anders v. California, stating that a contention is not frivolous if "any of the legal points [are] arguable on their merits."[102] The content of the terms "frivolous" and "malicious" may also be influenced by the Supreme Court's decision in Haines v. Kerner,[103] 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

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102. 386 U.S. 738, 744 (1967). See also Williams v. Field, 394 F.2d 329 (9th Cir.), cert. denied, 393 U.S. 891 (1968); Jones v. Bales, 58 F.R.D. 453, 461-464 (N.D.Ga. 1972), aff'd, 480 F.2d 805 (5th Cir. 1973); Boyce v. Alizaduh, 595 F.2d 948, 952 (4th Cir. 1979): "[It is] essential for the district court to find 'beyond doubt' and under any 'arguable' construction, 'both in law and in fact' of the substance of the plaintiff's claim that he would not be entitled to relief." See Turner, supra note 9, at 649-650.

103. 404 U.S. 519 (1972). See also Dickinson v. Chief of Police, 499 F.2d 336 (5th Cir. 1974). For illustrations of frivolous claims, see Sparks v. Fuller, 506 F.2d 1238 (1st Cir. 1974). See also McDonnell v. Wolff, 519 F.2d 1030 (8th Cir.), cert. denied, 423 U.S. 916 (1975); Ellingburg v. Lucas, 518 F.2d 1196 (8th Cir. 1975); Henderson v. Secretary of Corrections, 518 F.2d 694 (10th Cir. 1975); Pitts v. Griffin, 518 F.2d 72 (8th Cir. 1975); Gregory v. Wyse, 512 F.2d 378 (10th Cir. 1975). For illustrations of nonfrivolous claims, see Bryan v. Werner, 516 F.2d 233 (3d Cir. 1975); Hines v. Askew, 514 F.2d 673 (5th Cir. 1975) (a case listing the principal United States Supreme Court and Fifth Circuit cases dealing with the issue of when a dismissal is appropriate); Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974); Goff v. Jones, 500 F.2d 395 (5th Cir. 1974).

> in support of his claim which would entitle him to relief."[104]

Under Rule 8 of the Federal Rules of Civil Procedure, the complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief. Detailed factual averments are not necessary to avoid a dismissal of the complaint."[105] The court added that where the complaint is broad and sweeping in scope, the remedy is not a motion under Rule 12 (b)(6) but use of the various procedures for narrowing the issues under Rules 16, 26-37, and 56.[106]

In Mitchell v. Beaubouef, the Fifth Circuit Court of Appeals stated:[107]

> [A] district judge may refer prisoner petitions challenging conditions of confinement to a magistrate. In these cases, a magistrate is authorized "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court

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104. 404 U.S. at 520-521. See also Estelle v. Gamble, 429 U.S. 97 (1976), but see dissent of Stephens, J.; Carter v. Thomas, 527 F.2d 1332 (5th Cir. 1976); Watson v. Ault, 525 F.2d 886 (5th Cir. 1976). See also Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976), in which the court stated at 922: "In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity." Further the court stated, "[Gray v. Creamer, 465 F.2d 179, 182 n.2 (3d Cir. 1972)] suggested that the Haines standard would be applied to complaints in which 'specific allegations of unconstitutional conduct' were made, whereas Negrich [Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967)] would continue to serve as a barrier to complaints which 'contain only vague and conclusory allegations.'"

105. Bolding v. Holshouser, 575 F.2d 461 (4th Cir.), cert. denied, 439 U.S. 837 (1978).

106. Contrast Harvey v. Clay County Sheriff's Department, 473 F. Supp. 741 (W.D.Mo. 1979).

107. 581 F.2d 412, 415-416 (5th Cir. 1978).

> proposed findings of fact and recommendations for the disposition, by a judge of the court, of any [pretrial] motion." Such motions include motions "for judgment on the pleadings, for summary judgment, [and] to dismiss for failure to state a claim upon which relief can be granted."

Where a complaint fails to state a claim for which relief may be granted and for which no amendment can properly state such a claim, there are two levels in the preliminary proceedings where the complaint may be dismissed. The first may be under the authority of 28 U.S.C. §1915 (d) even prior to service of the complaint upon the defendant. After service upon the defendant, the court may entertain a motion for dismissal under Rule 12 (b)(6).

If the plaintiff files an amendment to the complaint or files objections that can be treated as an amendment, the magistrate shall consider the amendment and either prepare an order for the judge's signature or enter an order withdrawing the report and recommendation and directing service of process. Upon receipt of the order, the judge is required to consider the objections de novo in accordance with 28 U.S.C. §636 (b)(1).

E. SERVICE OF COMPLAINT AND SUMMONS; PROCEDURE TO PREVENT EX PARTE COMMUNICATION BY PRO SE PLAINTIFF.

(1) IF THE COMPLAINT IS NOT DISMISSED, IT SHOULD BE SERVED ON THE DEFENDANT. SEE FORM 4 FOR A RECOMMENDED FORM ORDERING THE MARSHAL TO MAKE SERVICE OF THE COMPLAINT AND SUMMONS. THE ORDER MAY BE SIGNED BY THE JUDGE OR THE MAGISTRATE.

(2) FORM 4 CONTAINS A PARAGRAPH INSTRUCTING THE PLAINTIFF TO FILE A COPY OF ALL DOCUMENTS WITH THE CLERK AND TO SERVE A COPY OF ALL DOCUMENTS ON THE DEFENDANT.

Commentary

A continual problem in handling prisoner cases is the tendency of prisoners to write letters to judges and magistrates and to file motions and various other documents without serving a copy on the defendant or his attorney. Prisoners should not be permitted to engage in ex parte communications with judges and magistrates any more than other litigants. However, it must also be realized that prisoners proceeding pro se cannot be expected to know, understand, and follow the rules as required of attorneys. Therefore, it is important for the magistrate or judge to acquaint the prisoner with the relevant rules and then to require him to follow them. This can begin when the order is entered allowing the prisoner to proceed in forma pauperis. Form 4 contains appropriate instructions.

If the prisoner sends papers directly to the judge or magistrate and fails to include a certificate of service, the papers should be returned (a copy should be retained for the files) to the prisoner, who should be advised that it is improper to write letters to judges and magistrates about cases pending before them. A sample letter is contained in Form 5. If the prisoner continues to mail documents to the magistrate or the judge, or if he mails them to the clerk but fails to include a certificate of service, an order can be entered referring to the original order and ordering that the particular document shall not be considered by the court unless filed with the clerk and accompanied by a proper certificate of service. If the prisoner writes a letter asking a question, it is suggested that no answer be given. Rather the prisoner should be advised that it is improper to write letters to judges and magistrates about cases pending before them. This policy should reduce the number of letters received from prisoners and also ensure that defense counsel will receive copies of all documents filed.

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

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

F. COUNSEL.

PRESENTLY THERE IS NO STATUTORY AUTHORITY FOR GUARANTEEING THE COMPENSATION OF COUNSEL IN CONDITIONS-OF-CONFINEMENT CASES UNDER 42 U.S.C. §1983.

THE COURT MAY AWARD ATTORNEY FEES TO THE PREVAILING PARTY IN 42 U.S.C. §1983 CASES. SEE 42 U.S.C. §1988:

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

COUNSEL CANNOT BE APPOINTED UNDER THE CRIMINAL JUSTICE ACT.[108]

Commentary

The appointment of counsel is one of the most difficult aspects of prisoner conditions-of-confinement cases.[109] Most federal judges do request counsel to serve in some cases, particularly those which are not dismissed as frivolous under 28 U.S.C. §1915 (d). Usually the request is made of a legal services program, such as those found in an increasing number of law schools, or from a panel of members of the practicing bar who have agreed to donate their services in pro

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108. 18 U.S.C. §3006A.

109. See Sensenich, supra note 8, at 22; Turner, supra note 9, at 650-652.

bono cases. In any event, reliance on uncompensated counsel is not entirely adequate and lawyers, expressing increasing fear of malpractice suits, are less and less willing to serve as uncompensated counsel in prisoner conditions-of-confinement cases.

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

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

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

(3) Some publicly funded legal services agencies are willing to handle prisoner conditions-of-confinement cases. Such programs can be found in Alabama, Florida, Georgia, Kansas, Minnesota, South Carolina, and Vermont.

The federal Legal Services Corporation, however, reports that its current funding level makes it impossible to fund a program to represent prisoners in conditions-of-confinement cases.[110]

(4) Some clinical education programs staffed by law students do handle prisoner conditions-of-confinement cases.

The current reality is that there is no satisfactory method of providing counsel in these cases. The situation is further complicated because conditions-of-confinement cases are very difficult for lawyers to handle. If the lawyer's advice is accepted by the prisoner, more frivolous complaints are eliminated, and those complaints that have merit are more effectively presented. Often, however, the lawyer's advice is not accepted.

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110. Letter from E. Clinton Bamberger, Jr., to Carl H. Imlay dated February 25, 1976 (on file at The Federal Judicial Center). See note 27, supra.

G. MOTIONS.

(1) MOTION PRACTICE IS COVERED BY RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS. A COURT MAY, BY LOCAL RULE, EXTEND THE TIME PERIODS FOR THE MAKING OF AND RESPONSE TO A MOTION. WHERE PLAINTIFF'S IMPRISONMENT AFFECTS PLAINTIFF'S ABILITY TO KNOW OR TO COMPLY WITH PRESCRIBED TIME LIMITS, THE COURT SHOULD TAKE APPROPRIATE STEPS TO INCLUDE SPECIFIC REFERENCE TO PRESCRIBED TIME LIMITS IN SUCH ORDERS AS ARE ISSUED AND SHOULD EXTEND THE TIME LIMITS WHENEVER IT IS APPROPRIATE TO DO SO.

(2) THE MAGISTRATE MAY HEAR AND DECIDE ANY PRETRIAL MOTION EXCEPT "A MOTION FOR INJUNCTIVE RELIEF, FOR JUDGMENT ON THE PLEADINGS, FOR SUMMARY JUDGMENT, . . . TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND TO INVOLUNTARILY DISMISS AN ACTION."[111] WITH RESPECT TO MOTIONS THAT THE MAGISTRATE HAS NO AUTHORITY TO DECIDE, THE MAGISTRATE MAY SUBMIT TO THE JUDGE A REPORT AND RECOMMENDATIONS OR PROPOSED FINDINGS OF FACT AND RECOMMENDATIONS FOR DISPOSITION.[112] SUCH PROPOSED FINDINGS AND RECOMMENDATIONS SHALL BE FILED WITH THE COURT, AND A COPY SHALL BE FORTHWITH MAILED TO ALL PARTIES, TOGETHER WITH AN EXPLANATION TO THE PARTIES OF THEIR RIGHT TO FILE WRITTEN OBJECTIONS TO SUCH PROPOSED FINDINGS AND RECOMMENDATIONS WITHIN TEN DAYS AFTER BEING SERVED WITH A COPY. IF EITHER PARTY FILES WRITTEN OBJECTIONS, THE JUDGE SHALL MAKE A DE NOVO DETERMINATION OF THOSE PORTIONS OF THE REPORT OR SPECIFIED FINDINGS OR RECOMMENDATIONS TO WHICH OBJECTION IS MADE. THE JUDGE MAY, BUT IS NOT REQUIRED TO, CONDUCT A NEW HEARING. HE MAY INSTEAD CONSIDER THE RECORD THAT HAS BEEN DEVELOPED BEFORE THE MAGISTRATE AND MAKE HIS OWN DETERMINATION ON THE BASIS OF THE RECORD.

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111. 28 U.S.C. §636 (b)(1)(A). Because this report deals with procedures in cases brought by pro se plaintiffs, attention is not given to the question of when a class action is appropriate under 42 U.S.C. §1983. A pro se plaintiff cannot bring a class action. Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975). Therefore, language in §636 (b)(1) referring to class actions is omitted. See Sensenich, supra note 8, at 472.

112. 28 U.S.C. §636 (b)(1).

Commentary

During fiscal year 1979, 10,301 state prisoner conditions-of-confinement cases were terminated. Of that total, there was no court action in 1,405 cases, leaving 8,896 where the court was involved in the termination. Of these, 8,121 cases were terminated before pretrial and 417 were terminated during or after pretrial. Only 358 cases reached the trial stage (269 nonjury and 89 jury trials).[113] The percentage of cases reaching trial was 3.5 percent. It is obvious from these statistics that the initial stages of prisoner conditions-of-confinement cases is where most of the cases are disposed of. For that reason, procedures governing the initial stages of prisoner cases are very important.

Most cases disposed of prior to trial are dismissed under:

28 U.S.C. §1915 (d)--"the court may dismiss the case . . . if satisfied that the action is frivolous or malicious," defined in Anders v. California as not frivolous if "any of the legal points [are] arguable on their merits";[114]

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113. Annual Report of the Director of the Administrative Office of the United States Courts, 1979.

114. 386 U.S. 738, 744 (1967). See Sensenich, supra note 8, at 62.

Rule 12 (b)(6)--"failure to state a claim upon which relief can be granted";[115] or

Rule 56 which provides for summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[116]

The distinction between a motion to dismiss under Rule 12 (b)(6) and a motion for summary judgment under Rule 56 is discussed in 10 Wright & Miller, Federal Practice and Procedure: Civil §2713.[117] Basically a motion under Rule 12 (b)(6) will involve only an examination of the pleadings, particularly the sufficiency of the complaint, while a summary judgment motion is typically based on both the pleadings and any affidavits, depositions, transcripts, and other forms of evidence properly before the court at the time the motion is made.

Rule 12 (b)(6) provides that where a party has filed an affidavit with the motion it may be treated as a motion for summary judgment under Rule 56. In such situations the other party is given an opportunity to also file affidavits.

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115. See Sensenich, supra note 8, at 462.

116. See Sensenich, supra note 8, at 467.

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

A dismissal under Rule 12 (b)(6) and a dismissal under 28 U.S.C. §1915 (d) differ primarily in that the dismissal under §1915 (d) can be on the court's own motion prior to requiring a responsive pleading from the defendant, whereas a dismissal under Rule 12 (b)(6) is usually made on motion of a party after the complaint and summons have been served on the defendant.[118]

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

H. DISMISSAL FOR PLAINTIFF'S FAILURE TO PROSECUTE.

(1) IF THE PLAINTIFF FAILS TO RESPOND TO A MOTION FILED BY THE DEFENDANT, AN ORDER SHOULD BE ENTERED ALLOWING HIM A SPECIFIED PERIOD OF TIME TO RESPOND OR SUFFER DISMISSAL FOR FAILURE TO PROSECUTE.

(2) FUNCTION OF THE MAGISTRATE. THE MAGISTRATE SHOULD ENTER AN ORDER ALLOWING THE PLAINTIFF A SPECIFIED NUMBER OF DAYS WITHIN WHICH TO RESPOND OR SUFFER A DISMISSAL OF HIS COMPLAINT. IF THE PLAINTIFF FAILS TO RESPOND, THE MAGISTRATE SHOULD PREPARE AN ORDER OF DISMISSAL FOR THE JUDGE TO SIGN.

Commentary

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

The legislative history to S. 1283 which expanded the authority of the United States magistrate indicates that the Congress may be willing to have the magistrate on his own dismiss a complaint for failure to prosecute.[119]

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

However, the standard suggests that the better practice may be to have the magistrate prepare an order for the judge's signature.

I. PROCEDURES FOLLOWING THE FILING OF AN ANSWER BY DEFENDANT.

(1) AN ORDER SHOULD BE ENTERED SETTING A PERIOD OF TIME TO COMPLETE DISCOVERY. A RECOMMENDED ORDER IS CONTAINED IN FORM 6. THE PERIOD OF TIME CAN BE EXTENDED ON THE REQUEST OF EITHER PARTY.

(2) EACH PARTY SHOULD BE REQUIRED TO FILE PRETRIAL STATEMENTS.

(3) A PLAINTIFF MAY BE REQUIRED UNDER APPROPRIATE CIRCUMSTANCES TO SUMMARIZE HIS TESTIMONY AND THE TESTIMONY OF ANTICIPATED WITNESSES WHO ARE INCARCERATED.

Commentary

Practice varies from district to district with respect to the time allowed for the completing of discovery. The committee recommends that the court manage the case by setting a relatively short period for discovery with extensions granted if there is reason to do so.

After the answer is filed, action should be taken to bring the case to issue as rapidly as possible. Form 6 accomplishes this purpose. In a district in which the parties generally do not engage in discovery in prisoner civil rights actions, it is suggested that the period of discovery be as short as three weeks. This notifies the plaintiff of the availability of discovery, and if either party wishes to obtain discovery, requests for additional time should be liberally

granted. This procedure avoids the accumulation of several months "dead time" when the parties do not engage in discovery, but does not prevent them from obtaining adequate time for discovery, upon request.

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

Because of the cost and practical difficulties of bringing prisoner-witnesses to court,[120] it may be helpful to require the plaintiff to summarize the anticipated testimony of his witnesses so that a decision can be made whether the testimony will be admissible and of sufficient significance to warrant the expense of bringing the witness to court.

In Moeck v. Zajackowski,[121] the Court of Appeals for the Seventh Circuit found that prisoners do not have an absolute constitutional right to be present at their trials. The court found instead that in each case a discretionary decision must be made whether fulfillment of a fundamental interest of the prisoner

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120. See, e.g., Moeck v. Zajackowski, 385 F. Supp. 463 (W.D.Wis. 1974), rev'd, 541 F.2d 177 (7th Cir. 1976). See Sensenich, supra note 8, at 37.

121. 385 F. Supp. 463 (W.D.Wis. 1974), rev'd, 541 F.2d 177 (7th Cir. 1976).

so reasonably requires his being transported to court that it outweighs the state's interest in avoiding the risks and expense of such transportation. In Stone v. Morris,[122] the court again recognized that a prisoner does not have a constitutional right to appear as a witness in his own civil rights action, but held that in that case the court had erred in excluding the plaintiff from his trial.

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

> In regard to Cook's request for witnesses, the district court advised him that it was necessary that he demonstrate to the court the nature and materiality of the testimony. When Cook failed to do so, the court properly declined to order such witnesses to appear at the trial.[123]

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122. 546 F.2d 730 (7th Cir. 1976).

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

J. SPECIAL REPORT FROM DEFENDANT.

IN ORDER TO DISCOVER THE DEFENDANT'S VERSION OF THE FACTS AND IN ORDER TO ENCOURAGE OUT-OF-COURT SETTLEMENT, THE MAGISTRATE OR COURT MAY, 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. THE USE OF THE SPECIAL REPORT SHOULD BE LIMITED TO SITUATIONS IN WHICH IT IS APPROPRIATE TO PUT THE BURDEN OF INVESTIGATION UPON THE STATE ATTORNEY GENERAL. A SUGGESTED FORM FOR AN ORDER REQUIRING A SPECIAL REPORT IS FOUND IN FORM 7.

Commentary

The objective of the special report is to give the court the benefit of detailed factual information that may be helpful in identifying a case involving a constitutional challenge to an important, complicated correctional practice, particularly one that may affect more than the inmate who has filed the 1983 action.

In Hardwick v. Ault,[124] the Court of Appeals for the Fifth Circuit suggested the use of the special report, citing its advantages:

> [I]f utilized, they should serve the useful functions of notifying the responsible state officials of the precise nature of the prisoner's grievance and encouraging informal settlement of it, or, at the least, of encouraging them to give the matter their immediate attention so that the case may expeditiously be shaped for adjudication.[125]

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124. 517 F.2d 295 (5th Cir. 1975). See Sensenich, supra note 8, at 56.

125. 517 F.2d at 298. See also Mitchell v. Beaubouef, 581 F.2d 412, 416 (5th Cir. 1978): "[T]he district court may find it advantageous to require the defendant to submit a special report to aid in the management of the case." The court cautioned, however, that an unverified report cannot serve as a basis for summary disposition of the case.

The report should be ordered only when the case presents special circumstances justifying the imposition on the defendant of the burden of investigation.

The districts where the procedure is used have reported the following advantages:

(1) The special report gives the state an opportunity to make early inquiry into the facts and to remedy the allegedly defective practice and 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, nor 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.[126]

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126. In Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978), the court approves the special report practice or, in the alternative, a requirement that the state use an administrative grievance procedure and concludes: "Either of the above requirements is comparable to the administrative law doctrine of primary jurisdiction, and we see no reason why it should not be borrowed to apply to this entirely dissimilar situation but to accomplish the same result. Thus the state prison administration, at a level where the facts can be adequately developed, first examines and considers the incident, circumstances, and conditions which gave rise to the asserted cause of action and develops a record before the court must proceed beyond the preliminary stages."

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

(d) There is early indication of whether the issue is a general conditions-of-confinement question requiring prompt attention or an individual tort action that warrants less urgent attention.

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

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

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

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

K. PRETRIAL CONFERENCE.

THE MAGISTRATE MAY CONDUCT A PRETRIAL CONFERENCE AND PREPARE A PRETRIAL ORDER OR, IF THE PLAINTIFF IS NOT REPRESENTED BY COUNSEL AND IF THE MAGISTRATE DOES NOT FEEL A PRETRIAL CONFERENCE WILL BE USEFUL, PREPARE A MAGISTRATE'S PRETRIAL ORDER. A SAMPLE ORDER IS ATTACHED AS FORM 8.

Commentary

The pro se prisoner status of the plaintiff creates particular problems in conducting the pretrial conference and preparing the pretrial order. Although the plaintiff's pretrial statement (as called for in the order submitted as Form 6) is helpful, it is not equivalent to a pretrial statement prepared by an attorney. In many districts the local rules require the parties to prepare a joint pretrial order. However, the prisoner-plaintiff, proceeding pro se, generally distrusts the defendant's attorney and is unwilling to accept documents prepared by him. As to conducting the pretrial conference, there is confusion as to the party responsible for bringing the plaintiff to court, the party responsible for paying the plaintiff's transportation costs, and security problems. The plaintiff is usually skeptical of stipulations.

CONTINUED

1 OF 2

If it is determined that a pretrial conference will not be helpful, the magistrate may review the file and prepare the pretrial order (Form 8). This is particularly helpful when the case is to be tried before the judge since it can simplify his review of the pleadings. If the magistrate has been handling the case as recommended in this report, he will be familiar with the issues, and preparation of the order should not be a difficult time-consuming task. Any party objecting to the issues as set forth by the magistrate may appeal the order in accordance with the Magistrates Act, 28 U.S.C. §636 (b)(1)(A), and the local rules for magistrates. If no appeal is taken, the magistrate's summary of the parties' positions and the issues for trial would bind the parties in the same manner as a stipulated order signed by the parties.

L. EVIDENTIARY HEARING--FUNCTION OF THE MAGISTRATE.

IF A JURY TRIAL HAS BEEN WAIVED, THE COURT MAY DESIGNATE THE MAGISTRATE TO CONDUCT THE HEARING UNDER THREE ALTERNATIVE PROCEDURES, EACH OF WHICH HAS SPECIAL CONSEQUENCES.

(1) THE MAGISTRATE MAY TRY THE CASE, WITH OR WITHOUT A JURY, UPON CONSENT OF THE PARTIES.[127]

(2) THE MAGISTRATE MAY BE DESIGNATED UNDER 28 U.S.C. §636 (b)(1)(B) TO CONDUCT THE HEARING AND SUBMIT FINDINGS AND RECOMMENDATIONS TO THE JUDGE. WITHIN TEN DAYS AFTER BEING SERVED WITH A COPY, EITHER PARTY MAY SERVE AND FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. IN THIS SITUATION THE JUDGE SHALL MAKE A DE NOVO DETERMINATION OF THOSE FINDINGS OR RECOMMENDATIONS TO WHICH OBJECTION IS MADE.

(3) THE MAGISTRATE CAN BE DESIGNATED TO SERVE AS A MASTER UPON CONSENT OF THE PARTIES. THE MAGISTRATE SHOULD THEN MAKE FINDINGS OF FACT AND RECOMMENDED CONCLUSIONS OF LAW. THE FINDINGS MAY BE OBJECTED TO WITHIN TEN DAYS OF RECEIPT OF NOTICE OF THE FINDINGS. THE PARTY WHO OBJECTS SHALL DO SO BY SERVING AND FILING WRITTEN OBJECTIONS. THE JUDGE SHALL ACCEPT THE FINDINGS OF FACT UNLESS THEY ARE CLEARLY ERRONEOUS. THE COURT SHOULD, UPON OBJECTION, CONSIDER DE NOVO ANY CONCLUSION OF LAW CONTAINED IN THE MAGISTRATE'S RECOMMENDED DISPOSITION OF THE CASE.

Commentary

The authority of the magistrate to conduct a trial, jury or nonjury, is provided in the Federal Magistrate Act of 1979.[128]

Under 28 U.S.C. §636 (b)(1)(B), the magistrate can conduct "hearings, including evidentiary hearings, and

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127. The Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643.

128. Id.

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

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

Although the statute is not explicit on the point, apparently the findings and recommendations of the

magistrate will have the effect prescribed in Rule 53--the findings of the magistrate are to be sustained by the judge unless "clearly erroneous." (This is the same standard applicable to magistrates' pretrial rulings under §636 (b)(1)(A).)[129]

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

Part V

RECOMMENDED FORMS

Form 1

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

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

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

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

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

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

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

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

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

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

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

In the United States District Court
For_____

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

v.

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

I. Previous Lawsuits

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

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

1. Parties to this previous lawsuit

Plaintiffs_____
_____

Defendants_____
_____

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

_____

3. Docket number_____

4. Name of judge to whom case was assigned_____

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

_____

6. Approximate date of filing lawsuit_____

7. Approximate date of disposition_____

II. Place of Present Confinement_____

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

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

C. If your answer is YES,

1. What steps did you take?_____

_____

2. What was the result?_____

_____

D. If your answer is NO, explain why not_____

_____

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

F. If your answer is YES,

1. What steps did you take?_____

_____

2. What was the result?_____

_____

III. Parties

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

A. Name of Plaintiff_____

Address_____

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

B. Defendant _____ is employed as _____

_____ at _____

C. Additional Defendants _____

_____

_____

IV. Statement of Claim

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

_____

_____

_____

_____

_____

_____

V. Relief

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

_____

_____

_____

_____

Signed this _____ day of _____, 19___.

_____

[Signature of Plaintiff]

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

_____ _____

[Date] [Signature of Plaintiff]

Form 2

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

Instructions to court:

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

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

Form 2

_____
[insert appropriate court]

_____
[petitioner]

v.

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

_____
[respondent]

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

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

1. Are you presently employed? Yes___ No___

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

   _____

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

   _____

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

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

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

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

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

   _____

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

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

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

   _____

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

_____
[Petitioner's Signature]

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

Signed this _____ day of _____, 19___.

_____
[Signature]

Form 3

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

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

ORDER

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

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

_____
[United States District Judge
or
United States Magistrate]

Form 4

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

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

ORDER

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

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

_____
[United States District Judge
or
United States Magistrate]

cc: Plaintiff
United States Marshal

Form 5

_____
[date]

Mr. _____
[state correctional institution]
_____

Dear Mr. _____:

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

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

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

Very truly yours,

Clerk of the Court

by: _____
[Deputy
or
Clerical Assistant to Magistrate]

Form 6

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

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

ORDER

On this _____ day of _____, 19_____,

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

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

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

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

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

_____
[United States District Judge or
United States Magistrate]

cc: Plaintiff
Defense Counsel

Form 7

ORDER REQUIRING SPECIAL REPORT

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

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

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

(1) The answer to the complaint, including the report herein required, shall be filed no later than _____ days from the date hereof.

(2) No answer or motions addressed to the complaint shall be filed until the steps set forth in this order shall have been taken and completed.

(3) Officials responsible for the operation of the appropriate custodial institution are directed to undertake a review of the subject matter of the complaint

(a) to ascertain the facts and circumstances;

(b) to consider whether any action can and should be taken by the institution or other appropriate officials

to resolve the subject matter of the complaint; and

(c) to determine whether other like complaints, whether pending in this court or elsewhere, are related to this complaint and should be taken up and considered together.

(4) In the conduct of the review, a written report shall be compiled and filed with the court. Authorization is granted to interview all witnesses including the plaintiff and appropriate officers of the institution. Wherever appropriate, medical or psychiatric examinations shall be made and included in the written report.

(5) All reports made in the course of the review shall be attached to and filed with defendant's answer to the complaint.

(6) The answer shall restate in separate paragraphs the allegations of the complaint. Each restated paragraph shall be followed by defendant's answer thereto.

(7) A copy of this order shall be transmitted to the plaintiff by the clerk forthwith.

[United States District Judge
or
United States Magistrate]

Form 8

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

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

PRETRIAL ORDER

I. RELIEF SOUGHT

_____

_____

II. JURISDICTION

_____

_____

Jury trial demanded? Yes [ ] No [ ]

III. PARTIES' POSITIONS

A. Plaintiff's Position

Plaintiff alleges_____

_____

B. Defendant's Position

Defendant alleges_____

_____

IV. ISSUES PRESENTED

A. Issues of Fact

_____

_____

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

_____

_____

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

_____

_____

V. WITNESSES

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

_____

_____

B. Defendant's Witnesses

_____

_____

VI. EXHIBITS

A. Plaintiff's Exhibits

_____

_____

B. Defendant's Exhibits

_____

_____

VII. PRETRIAL RULINGS [rulings relevant to the trial]

_____

_____

_____
United States Magistrate

cc: District Judge
Plaintiff
Defense Counsel

Appendix

STATE COURT JURISDICTION OVER ACTIONS UNDER SECTION 1983

Appendix

STATE COURT JURISDICTION OVER ACTIONS UNDER SECTION 1983

Following is a state-by-state analysis of the state appellate court cases decided prior to October 1, 1979.

I. Explicit State Appellate Recognition: 19 States.

Alaska. Tobeluk v. Lind, 589 P.2d 873, 876 (Alaska 1979), applying federal Attorney's Fees Awards Act, 42 U.S.C. §1988, to civil rights actions in state court. See also Ferdinand v. City of Fairbanks, 599 P.2d 122 (Alaska 1979).

Arizona. New Times, Inc. v. Arizona Board of Regents, 513 P.2d 960, 965 (Ariz. App. 1973), aff'd, 519 P.2d 169, 176 (Ariz. 1974).

California. Alvarez v. Wiley, 139 Cal. Rptr. 550, 553 n.4 citing prior California cases (Cal. App. 1977).

Colorado. Silverman v. University of Colorado, 541 P.2d 93, 98 (Colo. App. 1975), rev'd, 555 P.2d 1155 (Colo. 1976).

Connecticut. Vason v. Carrano, 330 A.2d 98 (Conn. Sup. 1974).

Illinois. Alberty v. Daniel, 323 N.E.2d 110, 113-114 (Ill. App. 1974).

Indiana. Reilly v. Robertson, 360 N.E.2d 171, 174 (Ind. 1977), cert. denied, 434 U.S. 825 (1977).

Massachusetts. Rzeznik v. Chief of Police of Southampton, 373 N.E.2d 1128, 1134 n.8 (Mass. 1978).

Michigan. Dudley v. Bell, 213 N.W.2d 805, 806-807 (Mich. App. 1973).

Missouri. Shapiro v. Columbia Union National Bank and Trust Company, 576 S.W.2d 310, 315-316 (Mo. 1978).

New Hampshire. MBC, Inc. v. Engel, 397 A.2d 636, 637 (N.H. 1979), dictum stating that "jurisdiction to hear § 1983 suits lies in State court."

New Jersey. Endress v. Brookdale Community College, 364 A.2d 1080, 1092 (N.J. Super. App. Div. 1976).

New York. Clark v. Bond Stores, Inc., 340 N.Y.S.2d 847 (App. Div. 1973); Bess v. Toia, 411 N.Y.S.2d 651 (App. Div. 1978).

North Carolina. Williams v. Greene, 243 S.E.2d 156, 159 (N.C. App. 1978).

North Dakota. Falkenstein v. City of Bismarck, 268 N.W.2d 787 (N.D. 1978), sustaining award of punitive damages in reliance on §1983, pp. 793-794 (and see also 789 n.1).

Pennsylvania. Commonwealth ex rel. Saunders v. Creamer, 345 A.2d 702 (Pa. 1975).

Utah. Kish v. Wright, 562 P.2d 625, 628 (Utah 1977), acknowledging concurrent state court jurisdiction over suits under §1983 but sustaining dismissal without prejudice on state forum non conveniens grounds that a federal court was a "more convenient forum" for trial of the plaintiff's claim.

Wisconsin. Terry v. Kolski, 254 N.W.2d 704 (Wis. 1977).

Wyoming. Board of Trustees, Etc. v. Holso, 584 P.2d 1009, 1017 (Wyo. 1978), rehearing denied, 587 P.2d 203 (1978).

II. Implicit State Appellate Recognition: 4 States.

The four states listed below, without discussion of the jurisdiction question, have implicitly recognized state concurrent jurisdiction in §1983 cases--either by affirming the sufficiency of claims under §1983 or by review of the case on the merits which, though denying the sufficiency of the plaintiff's §1983 claim, left little doubt about the jurisdictional sufficiency of the case.

Iowa. Gartin v. Jefferson County, 281 N.W.2d 25, 28 (Iowa App. 1979), reinstating against a defendant an action grounded in part on §1983 without discussion of state court jurisdiction.

New Mexico. Gomez v. Board of Education of the Dulce Independent School District No. 21, 516 P.2d 679, 681-682 (N.M. 1973).

Texas. City of Azle v. Baty, 553 S.W.2d 812, 814 (Tex. App. 1977), assuming §1983 claim was properly pleaded in affirming refusal of trial court to dismiss case of defendants' pleas of executive privileges. See also Bell v. Lone Oak Indpendent School District, 507 S.W.2d 636, 637-639 (Tex. App. 1974), ordering trial court to issue a temporary injunction to protect rights claimed by plaintiff under §1983. Temporary injunction vacated as moot, 515 S.W.2d 252 (Tex. 1974).

Washington. McDonald v. Hogness, 598 P.2d 707 (Wash. 1979), a review of a §1983 claim, never raising the question of state court jurisdiction but concluding the defendant should prevail on the merits. The frequent references to §1983 leave little doubt about the jurisdictional sufficiency of such claims in Washington courts.

III. State Appellate Avoidance of the Jurisdiction Issue: 9 States.

In the nine states listed below, the appellate decisions cited have avoided the issue of state court jurisdiction, either by concluding the plaintiff had an adequate remedy under state law or by holding that a legally sufficient claim under §1983 had not been asserted (or proved).

Florida. Metropolitan Dade County v. Wolf, 274 So.2d 584 (Fla. App. 1973), reversing judgment for plaintiff on grounds that no violation of §1983 had been proved. Cert. denied, 414 U.S. 1116 (1973). See also Zorick v. Tynes, 372 So.2d 133, 138-139 (Fla. App. 1979), arguing for state court abstention where disposition of case requires resolution of complex uncertainties as to the scope of federal law.

Georgia. Johnson v. Fulcher, 256 S.E.2d 145 (Ga. App. 1979). But see Backus v. Chilivis, 224 S.E.2d 370, 374 (Ga. 1976), affirming dismissal of §1983 suit on grounds, inter alia, that because 28 U.S.C. §1341 restricts federal jurisdiction in matters of local taxation to situations in which the state provides no effective remedy, a state court should decline any claim that a federal court is required to reject.

Minnesota. Brennan v. Minneapolis Society for Blind, Inc., 282 N.W.2d 515, 524-528 (Minn. 1979).

Ohio. Lakewood Homes, Inc. v. Board of Adjustment, 258 N.E.2d 470, 508-510 (Common Pleas, Ohio 1970), holding state courts could entertain jurisdiction of suits under §1983. Judgment reversed in part and in part modified and affirmed, 267 N.E.2d 595 (Ohio App. 1971), with surviving part of judgment apparently resting solely on state law and no discussion of jurisdiction over the federal issues avoided by the appellate modification.

Oklahoma. Hitchcock v. Allison, 572 P.2d 982, 986 (Okla. 1977), affirming dismissal of §1983 action for failing to state a claim for relief, with no reference to state court jurisdiction.

Oregon. Two cases holding in substance that equitable and legal rights and remedies available in Oregon courts for protection of federal rights are at least coextensive with rights and remedies to be had under §1983, making it unnecessary to consider §1983 claims in the case at hand: Schlichting v. Bergstrom, 511 P.2d 846, 847 (Ore. App. 1973), involving equity powers; and Dizick v. Umpqua Community College, 599 P.2d 444, 466 (Ore. 1979), involving damage claims against public bodies under Oregon Tort Claims Act, §30.265, providing that "tort" as used in the act "includes any violation of 42 U.S.C. §1983."

Rhode Island. Traugott v. Petit, 404 A.2d 77, 78 n.1 (R.I. 1979), finding it unnecessary to reach §1983 claim since plaintiff was entitled to relief under her state-law theory of the case.

Tennessee. Chamberlain v. Brown, 442 S.W.2d 248, 249-252 (Tenn. 1969), affirming trial court dismissal of §1983 action on dual grounds (a) that mandamus proceedings under state law provided plaintiff with an adequate remedy and (b) that federal court jurisdiction over §1983 actions was exclusive. The argument that federal court jurisdiction over §1983 actions is exclusive has not proved persuasive to appellate courts that considered the issue thereafter. And perhaps even the Tennessee Supreme Court is providing a quiet trial for the argument. The court has not subsequently cited Chamberlain for that point, and in Frye v. Crowell, 563 S.W.2d 788 (Tenn. 1978), a trial court dismissal of a §1983 action was affirmed on grounds the court lacked personal jurisdiction over the nonresident defendant (and the added issue whether the state court lacked subject matter jurisdiction over §1983 suits was not mentioned in the supreme court's opinion). But see also McDaniel v. Paty, 48 USLW 3324 (11/3/79), summarizing issues presented by petition for writ of certiorari to Tennessee Court of Appeals. For an earlier opinion of the supreme court in the same case, see 435 U.S. 618 (1978).

Vermont. Harvey v. Town of Waitsfield, 401 A.2d 900, 902 (Vt. 1979), holding that no legally sufficient §1983 claim had been stated because an assertion that state officials are acting under a statute invalid under state law involves no federal question.

Appendix

IV. No Appellate Decisions Relevant to State Court Jurisdiction: 18 States.

Alabama.
Arkansas.

Delaware. But see Pajenski v. Perry, 320 A.2d 763, 767 (Del. Super. 1974), rev'd, 363 A.2d 429 (Del. Super. 1976), a damage action asserting federal constitutional claims where dismissal was sustained on grounds of state sovereign immunity but acknowledging state courts had concurrent jurisdiction over federal constitutional questions.

Hawaii.
Idaho.
Kansas.
Kentucky.
Louisiana.
Maine.
Maryland.

Mississippi. But see Lewis v. Delta Loans, Inc., 300 So.2d 142 (Miss. 1974), requiring the state court to entertain action under federal Truth in Lending Act and stressing duty of state courts of general jurisdiction to entertain federal rights of action in the absence of circumstances in which federal court jurisdiction was exclusive.

Montana.
Nebraska.
Nevada.
South Carolina.
South Dakota.
Virginia.
West Virginia.

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THE FEDERAL JUDICIAL CENTER

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The Center's **Continuing Education and Training Division** conducts seminars, workshops, and short courses for all third-branch personnel. These programs range from orientation seminars for judges to on-site management training for supporting personnel.

The **Research Division** undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The **Innovations and Systems Development Division** designs and helps the courts implement new technologies, generally under the mantle of Courtran II—a multipurpose, computerized court and case management system developed by the division.

The **Inter-Judicial Affairs and Information Services Division** maintains liaison with state and foreign judges and judicial organizations. The Center's library, which specializes in judicial administration, is located within this division.

The Center's main facility is the historic Dolley Madison House, located on Lafayette Square in Washington, D.C.

Copies of Center publications can be obtained from the Center's Information Services office, 1520 H Street, N.W., Washington, D.C. 20005; the telephone number is 202/633-6365.

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