INMATES' CIVIL RIGHTS CASES AND THE FEDERAL COURTS: INSIGHTS DERIVED FROM A FIELD RESEARCH PROJECT IN THE EASTERN DISTRICT OF CALIFORNIA[1]

TABLE OF CONTENTS

INTRODUCTION 1256
I. BACKGROUND ON INMATES' CIVIL RIGHTS LITIGATION 1261
A. SECTION 1983 1261
B. CRIPA 1263
II. THE CHALLENGE TO THE FEDERAL COURTS 1268
III. THE CASELOAD DESCRIBED 1271
A. ORIGINS AS DEPARTMENT OF CORRECTIONS GRIEVANCES 1271
1. *Grievance Process Described* 1271
2. *Numbers and Types of Grievances* 1272
B. PROCEEDING TO FEDERAL COURT 1275
1. *Caseload Management System* 1275
2. *Case Filing and Workload Statistics* 1278
3. *Factors with Special Significance: Pro Se and IFP Status, and Duration* 1280
C. THE QUESTION OF "MERIT": HOW MANY INMATE CASES REALLY MAKE A DIFFERENCE? 1282
1. *Numbers of Cases* 1282
2. *Types of Cases* 1285

---

1. This student Comment was written based on the student's externship with the United States District Court for the Eastern District of California. The author is a 1995 graduate of the Stanford School of Law. The author gives special thanks to Professor Barbara Babcock; Eastern District judiciary and court personnel, especially United States District Judge David F. Levi and his staff, Magistrate Judges John F. Moulds and Gregory G. Hollows, Staff Attorneys Haven Gracey and Rebecca Landis, Pro Se Writ Clerk Tim Hinkle, Carla Wright, Carol Davis, Dona Norton, and many others who helped with answers to questions, access to files, and useful advice; Deputy Attorneys General David Stirling and Kenneth C. Young, and Supervising Attorney General Joan Cavanagh, of the California Attorney General's Office; McGeorge School of Law Professor Brian Landsberg; California Assemblymember Phil Isenberg; Jim Moore of Moore Methods, Inc.; Richard Lauranzano; Marion Miller and as always, friend and partner Bob Slobe for moral support and countless hours sacrificed with the goal of getting this right. Of course, she retains full responsibility for the final product published here.

a. Medical Cases 1286
b. Excessive Force Cases 1288
D. EASTERN DISTRICT CASES REVIEWED 1288
IV. OPTIONS FOR RESPONDING TO THE INMATES' CIVIL RIGHTS CASELOAD 1289
A. EXPANDED DATA COLLECTION 1289
B. ATTACKING ROOT CAUSES CLOSE TO HOME 1290
1. *Preventive Management* 1290
2. *Expanded Work and Rehabilitation Programs* 1291
C. IMPROVED OR ENHANCED GRIEVANCE PROCEDURES 1292
1. *CRIPA-Certified Procedures* 1292
2. *California's Non-CRIPA-Certified Procedure* 1294
3. *Judicial Certification under CRIPA* 1296
D. POST-GRIEVANCE ADMINISTRATIVE APPEAL 1297
E. LITIGATION STAGE OPTIONS 1301
1. *Filing Fees* 1302
2. *Case Management Systems* 1303
a. Medical Cases 1304
b. Excessive Force Cases 1305
3. *Use of Pro Bono and Student Attorney Panels* 1305
4. *Phone Triage* 1307
CONCLUSION 1307

INTRODUCTION

In the Spring of 1994, crime topped the public's list of concerns.[2] In response, measures designed to lock more people up — like "three strikes and you're out" — moved to the top of political agendas.[3] Rid-

2. A nationwide poll conducted in February 1994, found that 90% of Americans felt that crime was a "very serious" problem for the nation, and that the percentage of those who put crime at the top of the country's problems was 43%, up from 21% in June 1993. Ted Johnson, *Voters Edgy Over Crime Issue*, L.A. TIMES, Mar. 6, 1994 at B12. *See also* Steve Daley, *Beating the Drums of Fear — Americans Are Terrified of Being Caught in the Crime Wave*, TORONTO STAR, Feb. 3, 1994, at A17 (noting that January 1994 polls by USA Today/CNN and CBS News found that "more Americans believe crime had exceeded health-care reform" as the most important issue, and that a CBS/New York Times poll found 73% of those surveyed believed that crime was up in the previous year, even though FBI reports showed decreases in most categories, including violent crime). As this Comment goes to press, the public mood is similar to that in Spring 1994. *See, e.g., Poll: Americans Are Questioning GOP Goals*, CHIC. TRIB., Feb. 28, 1995, at 12 (stating, based on a New York Times/CBS News Poll, that "[m]ost Americans believe Congress should stress jobs and crime"); *Poll Shows Crime Ranks Higher Than Schools And Housing*, FRESNO BEE, Feb. 12, 1995 at E9 (noting that 74% of those polled by the Gallup Organization for the National Association of Realtors felt neighborhood crime-rate information was more important than school quality in deciding where to live).

3. Congress considered and ultimately passed a "three strikes" provision as part of the federal crime bill of 1994, H.R. 3355. *See, e.g.,* 140 CONG. REC. S. 12557, 12600 (1994) (noting that the Senate approved the conference committee report on H.R. 3355

ing on the same wave of anti-crime and anti-criminal fervor, elected officials nationwide introduced a range of measures to eliminate rights and privileges previously enjoyed by inmates already incarcerated.[4] A special target of the political wrath was inmates' civil rights litigation filed under 42 U.S.C. § 1983 ("Section 1983").[5] State legislatures

on Aug. 18); *see* Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 3559) (1995)). *See also* Ben Smith III, *The 1994 Legislature — Politicos Getting Too Tough on Crime?*, ATLANTA J. & CONSTITUTION, Jan. 27, 1994, at C3 (noting Georgia Governor Zel Miller's proposed legislation to lock up violent second offenders for life, and a three strikes ballot measure passed by Washington State voters in November 1993); Philip J. Berg, Esq., *Democratic Candidate for Lt. Governor Calls For "Get Tough" on Crime Measures*, BUS. WIRE, Mar. 16, 1994 (reporting that a candidate called for new Pennsylvania anti-crime law, incorporating six month maximum period for signing of death warrants, enhanced mandatory sentences for use of assault weapons in commission of a crime, and three strikes); Jaret Seiberg, *Bailey's Anti-Crime Barrage*, CONN. LAW TRIB., April 11, 1994, at 1 (noting Chief State Attorney's "aggressive" crime package incorporating three strikes and authority to charge forty years for manslaughter). For an example of what otherwise would be taking things to extremes, *see* Arthur Hoppe, *One Strike and You're Dead*, S.F. CHRON., May 30, 1994, at A19 (crediting Simple Justice Party gubernatorial candidate John Flint — who would repeal three strikes as "two strikes too many" — with besting Democratic Party Primary Candidate John Garamendi who promised to ensure the execution of all 1,200 of Los Angeles' annual murderers, and noting that in the current context, "the triumph of Iron John Flint looks inevitable"). Despite the angry public mood, not all public servants jumped on the three strikes bandwagon. *See* Dan Bernstein, *Demos Push Prevention Over Detention in Fighting Crime*, S.F. EXAMINER, Jan. 15, 1994, at A8 (reporting that California Assemblymembers John Vasconcellos, Tom Bates, Julie Bornstein, and Barbara Lee decry three strikes).

4. *See, e.g.*, Jim Margolis, *No More Dumbbells Behind Bars, Ohio Lawmaker Says*, STATES NEWS SERV., April 19, 1994 (reporting that in response to an April 1993, eleven-day riot at an Ohio state prison, in which inmates used weight bars to break through prison walls, Republican Congresswoman Deborah Pryce was sponsoring legislation to eliminate weightlifting and other recreational activities from federal prisons); Ellen Perlman, *Weight Use in Prison Stirs Strong Arguments*, MEMPHIS COMMERCIAL APP., June 12, 1994, at 61A (reporting that legislators from California, Wisconsin, and New York also are sponsoring prison weightlifting bans, despite correctional professionals' concerns that behavioral problems among inmates could result); Kendall Anderson, *Proposals Are Made To Curb Prisoner Privileges*, TIMES-PICAYUNE, July 24, 1994, at A3 (noting that other proposals include cutting cable television, limiting conjugal visits and racist and pornographic mail, and smoking bans). For just one example of how inmates can adapt to restrictions, however, *see* Jill Riepenhoff, *Prisoners Had Water Bags For Weight Lifting*, COLUMBUS DISPATCH, July 18, 1993, at 3D (reporting that prison officials confiscated 3-400 gallons of water in plastic garbage bags used as weights during lockdown following April 1993 Ohio State prison riot).

5. For the text of Section 1983, *see infra* note 16. The public's tolerance for inmates' civil rights litigation was on par with its attitude towards crime, as confirmed by public opinion poll questions asked in connection with this field research project, after the conclusion of the author's judicial externship. A California statewide survey found only 21% of a representative sample of registered voters felt inmates' rights to file civil rights suits should be preserved; 63% said these rights should be abolished. MOORE METHODS, INC., PUBLIC OPINION POLL OF CALIFORNIA VOTERS (June 1-2, 1994) (stating that 13% indicated that their answer would depend on the facts). In response to questions about specific kinds of suits, 35% said inmates should be allowed to file lawsuits alleging constitutional violations based on inadequate medical care; for suits alleging excessive force by prison personnel, the percentage was 33. *Id.* Suits alleging unsafe

passed bills erecting higher barriers to inmates' access to the courts.[6] Both houses of Congress introduced similar measures, some of which became law in 1994.[7]

In the quieter chambers of the federal judicial branch, inmate cases also were the focus of attention, for different reasons and certainly not as a new sensation. For the last fourteen years at least,[8]

---

living conditions (27%) and denial of access to prison records (26%) fared somewhat less well. *Id.* The same survey of voters residing in the Eastern District of California found similar opinions. *See* MOORE METHODS, INC., PUBLIC OPINION POLL OF CALIFORNIA VOTERS (July 22-23, 1994) (reporting that 23% said preserve right to sue, 56% said abolish it; 42% supported right to sue on grounds of inadequate medical care, 39% on grounds of excessive force, 25% regarding denial of access to records, and 24% regarding quality of prison food).

6. In California, for example, the Legislature approved a bill modifying the State's "Inmates Bill of Rights," signalling a reversal of the mood which prompted its passage just thirteen years earlier. *See* 1994 CAL. STATS. 555 (amending the Califoria Penal Code sections 2600 & 2601 by incorporating a provision, styled after *Turner v. Safley*, 482 U.S. 78 (1987), that inmates' rights may be deprived as "reasonably related to legitimate penological interests" and authorizing prison authorities to exclude from prisoners' mail materials deemed obscene, violence-inciting, or concerning gambling or a lottery; and requiring payment of a three dollar ($3) filing fee at the time of initiating a civil action). Another California bill modified the state law on statutes of limitation in various civil actions, which previously provided for tolling of statutes of limitation during periods of minority, insanity, and incarceration, by limiting the tolling provision for inmates to two years. *See* 1994 CAL. STATS. 1083 (amending the California Code of Civil Procedure sections 328 & 352, and adding California Code Civil Procedure sections 328.5 & 352.1). *Cf.* Jaret Seiberg, CONN. LAW. TRIB., April 11, 1996, at 1 (reporting on Connecticut Attorney General's successful legislative package).

7. Amendments to the Civil Rights of Institutionalized Persons Act survived the conference committee on the 1994 Crime Bill and became law, including provisions extending the stay in 42 U.S.C. 1997e(a)(1) from ninety (90) days to 180 days, and providing flexibility for the United States Attorney General and federal courts to certify state grievance plans if they are "fair and effective." *See infra* notes 42-44.

As this Comment goes to press, new legislation regarding inmate litigation has been introduced in Congress. *See* 141 CONG. REC. S. 75 (Jan. 4, 1995) (providing the text of S. 3 modifying the 1994 Crime Bill, including amendments to statutes governing inmates' civil rights litigation. The proposed amendments would, inter alia, strengthen the law regarding dismissal of frivolous actions, and require that federal courts assess fees on inmate litigants based on their ability to pay); H.R. 695, 104th Cong., 1st Sess. (1995) (detailing the "Prisoner Litigation Control Act of 1995," which would bar a federal court from holding prison conditions unconstitutional under the Eighth Amendment unless the inmate plaintiff proves the conditions inflict cruel and unusual punishment; provide that punishment is not cruel and unusual unless it deprives "minimum necessities of civilized life" and prison officials are deliberately indifferent to such deprivation; and require a federal court to reopen an order or consent decree for modification or termination, at the defendant's request at least every two years). For a summary of current federal law, *see infra* notes 33-43 and accompanying text.

8. A report issued in 1980, suggests that the perceived problem goes back even earlier. *See* FEDERAL JUDICIAL CENTER REPORT, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (Jan. 1980) [hereinafter ALDISERT REPORT]. Starting in 1982, reports issued by the Administrative Office of the United States Courts ("AO") noted that prisoner civil rights petitions comprised a significant and growing segment of federal litigation. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 102 (1982) [hereinafter AO ANNUAL REPORT 1982] (finding that inmate litigation "comprised 14.2% of all civil fil-

the federal courts have faced a growing caseload and workload challenge posed by inmate cases filed under Section 1983. By 1992, these filings numbered nearly 30,000, and constituted 13% of the courts' total civil case filings nationwide.[9]

As of this writing, the federal districts with the highest numbers of annual inmates' civil rights case filings are the United States District Court for the Eastern District of Texas (1317), the United States District Court for the Eastern District of California (1306), and the United States District Court for the Southern District of Texas (1251).[10] The magistrate judges assigned the largest numbers of cases reside in the Eastern District of California,[11] where inmates' civil rights actions constitute nearly 30% of the case filings.[12]

Because the federal courts have worked over time to fashion reasoned responses,[13] the courts are a wealth of wisdom and experience

ings," and the "most significant increase in state prisoner petition litigation was in prisoner civil rights petitions (up 7.0%)"); *see also* ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES 150 (1985) (incorporating charts depicting the proportion of inmate cases devoted to civil rights in 1985); ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES 11 (1987) (same for 1987). *Cf.* REGIONAL NEWS/CALIFORNIA, UNITED PRESS INTERNATIONAL (Oct. 12, 1983) (noting an increase in inmates' federal civil rights lawsuits from 218 in 1967 to 52,000 in 1982).

9. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE TWELVE MONTH PERIOD ENDED SEPT. 30, 1992 18, 27 (1992) [hereinafter AO STATISTICAL REPORT] (calculating a percentage by dividing "Private Prisoner Civil Rights Petitions" into "Total Civil Filings"). When criminal cases are added to case filings, the percentage shifts downward slightly to 11. *Id.* at 33. The percentage of total civil case filings between 1980 and 1992 ranged from a low of 7% in 1983-85 to 1992's high of 13%. *See* Appendix B.

10. UNITED STATES DISTRICT COURTS — CIVIL CASES COMMENCED, BY NATURE OF SUIT DURING THE TWELVE MONTH PERIOD ENDED SEPTEMBER 30, 1994 (Table C-3) (provided by Bret Saxe, AO Magistrate Judges Division). The numbers of inmates' civil rights cases *disposed of* in the same year: Eastern District of California (1648), Eastern District of Texas (1285), and Middle District of Alabama (794). PROCEEDINGS AND CASES DISPOSED OF BY UNITED STATES MAGISTRATE JUDGES PURSUANT TO TITLE 28 U.S.C. SECTION 636(B) AND 636(C) DURING THE TWELVE MONTH PERIOD ENDING SEPTEMBER 30, 1994 (discussing Civil Proceedings) (also provided by Bret Saxe). With regard to numbers of inmates' civil rights case filings, the Eastern District of California consistently ranks among the top federal districts in the nation. *See* AO STATISTICAL REPORT 1982, *supra* note 8, at 32 (stating that the Eastern District is the third highest with 845 filings). Despite California's high numbers of case filings, in light of its extremely high prison population, its rate of filings per total number of inmates actually is relatively low.

11. The Eastern District of California has only two magistrates assigned to handle inmates' civil rights cases. Interview with Magistrate Judge John F. Moulds, Sacramento, Cal. (Mar. 1994) [hereinafter Moulds interview]. (Note: Unless specified otherwise, all interviews cited herein took place in Sacramento or during phone calls placed from Sacramento). By comparison, the Eastern District of Texas has five magistrate judges and the Southern District of Texas has twelve.

12. *See infra* note 93 and Appendix B.

13. *See* the ALDISERT REPORT, *supra* note 8. Also, judges in the Eastern District of California have pioneered the development of a case management system which involves "paper processing" of most inmate cases. *See infra* notes 84-90 and accompany-

for one interested in the issues raised by inmates' civil rights cases. Because the Eastern District of California is home to a large number of inmate cases and some of the nation's busiest inmates' civil rights judges, it offers a good place for in-depth scrutiny.[14]

As a legal extern in the Eastern District in the Spring of 1994, I considered the information available on inmates' civil rights actions, as well as the legal and policy issues they raise. I enjoyed direct access to the Judges and Magistrate Judges and their staff at the Sacramento, California, courthouse, and to primary source materials housed there.[15] This Comment is the product of my effort to assess the nature and extent of the problem these inmate cases represent, if indeed they are a problem at all.

Section I below sketches an historical backdrop to inmates' civil rights litigation, and sets forth possible explanations for the steady growth in caseload over the last ten to twelve years. Section II discusses the challenges inmate case filings pose for the federal courts. Section III presents detailed information on inmates' prison grievances and their civil rights cases in the Eastern District and nationwide, and discusses the Eastern District's case management system. Section IV reviews a range of responses to inmate cases implemented by federal courts and state correctional systems throughout the country. The Comment concludes with recommendations regarding those responses which federal courts generally should consider adopting. Most important among these recommendations is a call for vastly improved data collection to better inform efforts at reform.

---

ing text. Judges throughout the country have experimented with partial filing fees for inmates, instead of routinely granting in forma pauperis status. *See infra* notes 202-09 and accompanying text. A few years ago, District Judge Frank Polozola in Louisiana exercised his authority under 42 U.S.C. § 1997e to certify an inmate grievance procedure which appears to be functioning well in that state. *See infra* notes 177-81 and accompanying text.

14. By way of background, the Eastern District of California was created in 1966 to ensure fair and adequate access to the federal courts for California's fast-growing population. *See* REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA 1-2 (Nov. 21, 1991). The Eastern District covers the Central Valley, and includes the counties of Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Inyo, Kern, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba.

15. The review of courthouse records was supplemented with a study of archived materials at the Federal Records Center in San Bruno, California.

I. BACKGROUND ON INMATES' CIVIL RIGHTS LITIGATION

A. SECTION 1983

Hornbook constitutional law teaches that the United States Supreme Court in 1961 resurrected 42 U.S.C. § 1983 ("Section 1983"),[16] the Reconstruction Era statute, in deciding the case of *Monroe v. Pape.*[17] *Pape* had the effect of opening up a whole new area of law, providing a remedy "against all forms of official violation of federally protected rights."[18] Relying on Section 1983, voting rights advocates sought to enforce the right to free and fair elections.[19] Desegregationists litigated to secure access to Southern lunch counters,[20] municipal services,[21] and integrated schools.[22]

---

16. The text of 42 U.S.C. § 1983 reads, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, 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.

42 U.S.C. § 1983 (1988).

17. 365 U.S. 167 (1961) (holding in a case where an African-American father of six was arrested after warrantless search of his home and detained for ten hours without access to an attorney or a magistrate that Section 1983 supported a cause of action against the arresting police officers, and noting that when a defendant is clothed with authority of state law, Section 1983 provides federal right in federal courts to ensure enforcement of the laws). For a more complete discussion of the evolution of Section 1983 case law, *see* CONTINUING EDUCATION OF THE BAR, LITIGATING SECTION 1983 CLAIMS: CIVIL RIGHTS AND OFFICIAL MISCONDUCT CASES IN FEDERAL AND STATE COURTS 1, Sept./Oct. 1992 (Program Handbook) [hereinafter CEB].

18. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) (citing Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658, 700-01 (1978), and holding that where respondent city violated federal law by conditioning renewal of petitioner's taxicab franchise on settlement of pending labor dispute, Section 1983 provides ground for compensatory damages action). Section 1983 authorizes actions asserting violations of federal constitutional rights, but is itself not a substantive law. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 615-20 (1979) (holding in a case where petitioner filed suit under 28 U.S.C. § 1343, that Section 1983 does not satisfy the requirement of section 1343 that the suit redress deprivation of equal rights under the constitution or federal statute). Section 1983 requires that courts conduct a two-step inquiry: (1) the plaintiff must assert the violation of a federal right creating a governmental obligation; and (2) Congress must not have precluded enforcement of the right through Section 1983. *Golden State Transit*, 493 U.S. at 106-07.

19. *See, e.g.*, Sincock v. Terry, 210 F. Supp. 396 (D. Del. 1962) (detailing a class action arising in part under Section 1983, brought to nullify state legislative reapportionment in order to eliminate invidious discrimination in selection of delegates), *aff'd sub nom.*, Roman v. Sincock, 377 U.S. 695 (1964).

20. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (detailing a lunch counter integration case based on Section 1983).

21. *See, e.g.*, Hawkins v. Town of Shaw, 303 F. Supp. 1162 (N.D. Miss. Delta Div. 1969) (providing an example of class action on behalf of African-American residents of Shaw brought under Section 1983 to address alleged discrimination in provision of street paving and lighting, sanitary sewers, water mains, fire hydrants, and surface

Inmates and inmate advocates began using this new legal tool to improve the conditions of their confinement, which could be grossly inhumane.[23] Between 1961 and 1980, literally thousands of inmates filed individual actions under Section 1983.[24] High profile consolidated actions also were brought, such as one following the 1971 prison uprising at New York's Attica penitentiary.[25] In response to the inmate actions, a series of Supreme Court decisions affirmed inmates' constitutional rights, and defined them in expansive terms. As Judge Ruggero J. Aldisert explained in his 1980 report, "The door to the judi-

---

water drainage; dismissed for reasons unrelated to Section 1983), *reaff'd on reh'g*, 461 F.2d 1171 (5th Cir. 1972).

22. *See, e.g.*, Randall v. Sumter Sch. Dist. No. 2, 232 F. Supp. 786 (E.D.S.C. 1964) (explaining a Section 1983 action on behalf of thirteen children of African-American military employees attacking alleged compulsory school segregation; succeeded in obtaining injunctive relief enjoining school district from continued segregationist operations).

23. For a sample of the inhumanities appurtenant to incarceration, *see* Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (explaining a suit brought by three inmates of Arkansas State Penitentiary claiming, inter alia, severe corporal punishment due to whipping; culminating in restraining orders against prison authorities and injunctive relief for plaintiffs), and Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (detailing a suit challenging overall conditions of confinement; culminating in judicial finding that some conditions were unconstitutional, such as those in isolation units). For a collection of Arkansas and Texas prison reform cases, *see* OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 528-804 (1984). *See also* BRUBAKER (20th Century Fox 1980) (starring Robert Redford and Jane Alexander, which graphically relates the story of the Arkansas prisons, characterized by unsanitary living conditions, overrun by institutionalized corruption, and resistant to reform until litigation resulted in injunctive relief placing the prisons under the control of the courts).

More recent cases suggest that inhumane conditions are not just a thing of the past. *See* Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (involving a class action brought on behalf of 33,000 Texas state inmates; appellate court upholds district court's findings of severe overcrowding and appointment of special master to supervise prison reforms, while vacating and remanding portions of lower court order), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982); Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1992) (summarizing history of case which culminated in consent decree, originally filed to challenge overcrowding, inadequate medical and psychiatric care, and treatment of HIV-infected inmates at the California Medical Facility and the Main Northern Reception Center); Madrid v. Gomez, No. C90-3094-TEH, 1995 U.S. Dist. LEXIS 841 (N.D. Cal. 1995) (detailing a class action challenging conditions of confinement at Pelican Bay State Prison, including the use of "fetal restraints" for punitive rather than security reasons, leaving inmates in outdoor cages regardless of weather conditions, unnecessary "cell extraction" procedures using tasers, and inadequate medical and psychiatric care; culminating in appointment of a Special Master to develop and monitor implementation of remedial plan).

24. A LEXIS search of "inmates and 42 U.S.C. § 1983 and date bef 1/1/80 and date aft 1/1/61," uncovered over one thousand inmate actions.

25. *See* Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. N.Y. 1971) (directing, in aftermath of uprising, the district court to enter a preliminary injunction restraining law enforcement and prison officials from subjecting inmates to any forms of physical brutality, but upholding the district court's denial of an injunction against interrogation of prisoners except after advice of counsel). For a retrospective on Attica suggesting that prison conditions have not changed substantially since 1971, *see* David C. Leven, *Attica Remembered*, N.Y. LAW J., Aug. 29, 1991, at 2.

cial process . . . was opened wide during the . . . decade [from 1970 to 1980]."[26]

B. CRIPA

Sixteen years after Section 1983's resurrection, during the 95th Congress, the Judiciary Committee of the United States Senate reviewed the status of the civil rights of prison inmates and other institutionalized persons.[27] The Committee was prompted to conduct hearings[28] by two United States district court decisions denying standing to the United States Attorney General ("AG") to bring suit on behalf of inmates in mental institutions.[29] The Committee's eagerness to broadly empower the AG was not shared by enough members of Congress, however. The bill which would have given the Justice

26. *See* ALDISERT REPORT, *supra* note 8, at 10. For specific cases illustrative of this trend, *see, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972) (holding that free religious services and merit points should be available to Buddhists as well as to other inmates); Morissey v. Brewer, 408 U.S. 471 (1972) (ruling that due process requires that a state provide an individual an opportunity to be heard prior to revoking parole); Wolff v. McDonnell, 418 U.S. 539, 579-80 (1974) (finding that inmates' access to the courts must be meaningful, meaning that prison officials cannot prohibit jailhouse lawyering without providing an alternative; however, officials may impose reasonable time and place restrictions); Bounds v. Smith, 430 U.S. 817 (1977) (stating that inmates' right of access to the courts is premised on the Due Process Clause); Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986) (noting that California regulations create a due process right as to administrative segregation, which mandates notice to inmates of reasons for discipline, informal review of supporting evidence, and a prior opportunity for the inmate to present his or her views), *cert. denied*, 481 U.S. 1069 (1987). *See also* Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (noting that denial of outside exercise may state an Eighth Amendment claim, depending on other circumstances of confinement); Rizzo v. Dawson, 778 F.2d 527 (9th Cir. 1985) (finding that retaliation by prison personnel can be a constitutional violation); Wilson v. Superior Court, 21 Cal. 3d 816 (1978) (holding that where correctional policies create a justifiable expectation that an inmate's pro se litigant privileges will not be restricted or terminated except for cause, an inmate's privileges may be restricted only after notice and hearing).

27. Other institutionalized persons include the mentally ill, juveniles, orphaned children, and nursing home residents.

28. *See Civil Rights of Institutionalized Persons: Hearings on S. 1393*, 95th Cong., 1st Sess. 11 (1977).

29. United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976) (dismissing an action brought by the AG to challenge conditions of confinement at Rosewood State Hospital for the mentally retarded for lack of statutory grounds for filing such an action), *aff'd*, 563 F.2d 1121 (4th Cir. 1977); United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979) (dismissing an action brought by the AG, seeking injunctive relief based on deprivation of constitutional rights at a Montana facility for the mentally retarded, for lack of standing; the Ninth Circuit's affirmance relies in part on *United States v. Solomon*).

The Senate Subcommittee also seemed particularly concerned by graphic accounts of mistreatment and patient deaths in mental institutions. *Civil Rights of Institutionalized Persons: Hearings on S. 1393*, 95th Cong., 1st Sess. 11-12 (1977) (comments of subcommittee chairman Birch Bayh (D-Ind.)).

Department authority to bring actions on behalf of a range of institutional inmates[30] failed to secure passage the first time around.[31]

In the 96th Congress, the issue was revisited and new legislation presented. A Senate report explained the persistent legislative interest in expanding inmate access to the courts:

> The proliferation of Federal law and constitutional doctrine guaranteeing certain basic rights to institutionalized persons has done nothing to overcome their inherent inability to secure enforcement of those rights. For a variety of reasons . . . the institutionalized are uniquely unable to protect their constitutional and Federal statutory rights without outside assistance.[32]

In passing the Civil Rights of Institutionalized Persons Act ("CRIPA") in May of 1980,[33] Congress provided the necessary outside assistance by authorizing the AG to redress systematic deprivations of inmates' constitutional rights. Specifically, the AG was empowered to file for injunctive relief on behalf of inmates at a given institution[34]

---

30. As originally introduced, S. 1393 provided that:

> [W]hen the Attorney General has cause to believe that institutionalized persons are being systematically deprived of their rights under the Constitution or U.S. laws, he or she is authorized to bring or to intervene in a civil action in federal district court; the federal court has jurisdiction whether or not other remedies have been exhausted first; and prior to filing suit the Attorney General must certify that officials of the institution sued have been notified, and must be convinced that the suit will vindicate important rights and be in the public interest.

See Civil Rights of Institutionalized Persons: Hearings on S. 1393, 95th Cong., 1st Sess. 4-6 (1979).

31. Enough Senators were concerned about the "threat to Federal-State relations" presented by S. 1393, and the lack of restrictions on the AG's authority, to block the bill's passage in the 95th Congress. *See* 124 CONG. REC. S37927-32 (daily ed. Oct. 14, 1978) (statement of Senator Danforth explaining opposition to specific language of bill, but pledging to develop alternative legislation).

32. S. Rep. on Civil Rights of Institutionalized Persons Act, 96th Cong., 2nd Sess. (1979), *reprinted in* 1980 U.S.S.C.A.N. 801 *et seq.* [hereinafter CRIPA].

33. *See* 126 CONG. REC. S10780-83 (daily ed. May 12, 1980) (motion for previous question). For the conference report on CRIPA, *see* 126 CONG. REC. S8572-77 (daily ed. Apr. 22, 1980).

34. 42 U.S.C. § 1997a (1988). CRIPA appears to have succeeded in encouraging the AG to litigate on behalf of inmate populations deprived of their legal rights. Since the law's passage, the AG has investigated more than 125 facilities, in most cases negotiating voluntary consent decrees under which a state agrees to corrective measures to raise a facility to statutory and constitutional standards. *See Department of Justice Sues Illinois to Improve Conditions at Tinley Park Mental Health Facility*, U.S. NEWSWIRE, Jan. 28, 1992. More than one-fifth of all Department of Justice ("DOJ") initiated suits have involved facilities housing mentally ill inmates. *Id.* DOJ suits have alleged: failure to provide adequate medical and mental health care, including suicide prevention; inadequate professional training for staff; gross deficiencies in the physical structure of a facility; and inadequate security and supervision of inmates. *Id. See Justice Department Intervenes in Private Suit Challenging Conditions of Confinement at Mississippi Jail*, U.S. NEWSWIRE, Sept. 20, 1993; *Federal, State Governments Move to Dismiss Civil Rights Case Against Colorado Mental Hospital*, BUSINESS WIRE, Sept. 25, 1991;

and by intervening in actions brought by others.[35] To address the 95th Congress' concerns regarding excessive power vested in the federal government, CRIPA required that the AG notify an affected state's governor and attorney general in writing of the challenged conditions of confinement at least forty-nine (49) calendar days in advance of filing an action.[36] Further, the AG was required to make good faith efforts to resolve concerns directly with state officials, prior to commencing litigation.[37]

In passing CRIPA, Congress also responded to concerns about the proliferation of inmates' civil rights cases,[38] by providing for federally certified state inmate grievance procedures.[39] Such procedures were intended to "help to develop a sensitivity that may have been otherwise lacking,"[40] and "encourage resolution of problems by the persons involved in prison administration."[41]

Justice Department Files Complaint Alleging Unconstitutional Conditions at Pennsylvania Facility for the Mentally Retarded, U.S. NEWSWIRE, Apr. 21, 1993. In California, DOJ conducted an investigation of the California Medical Facility at Vacaville and in 1987 issued a report finding a series of constitutional deficiencies. *See Gates*, 987 F.2d at 1395 n.1. Of course, not all of the AG efforts have been successful. *See, e.g.*, *Prisons and Jails*, 52 U.S.L.W. 2024 (U.S. July 12, 1983) (regarding the United States District Court for the District of Hawaii's dismissal of a government case for failure to provide supporting facts and suggest remedial measures).

35. 42 U.S.C. § 1997c (1988).

36. 42 U.S.C. § 1997b (1988). Section 1997b requires that the AG certify that notification has occurred. *Id.* The AG also must provide at least seven (7) days' advance notice of intent to investigate conditions at a state facility. *Id.*

37. 42 U.S.C. § 1977b (1988).

38. 126 CONG. REC. S8572-77 (daily ed. Apr. 22, 1980). Exactly why this provision was added is not entirely clear from the legislative history. It may well have represented a response to early concerns about increases in rates of inmates' civil rights case filings. *See supra* note 8 and accompanying text.

39. At the time this field research project was conducted, 42 U.S.C. section 1997e(a) provided:

> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

Implementing regulations appear at 28 C.F.R. §§ 40.1 - 40.22.

The grievance procedures provision appears to be based on a pilot program of the American Bar Association conducted in New York State. *See Civil Rights of Institutionalized Persons: Hearings S. 1393* 425 [hereinafter Hearings S. 1393] (testimony of Irving R. Segal and exhibits following).

40. Hearings S. 1393, *supra* note 39.

41. CRIPA, *supra* note 32, at 816.

To achieve these goals, CRIPA prescribes criteria which grievance procedures must meet before receiving certification from the United States Department of Justice. These criteria include: an advisory role for employees and inmates in the formulation, implementation, and operation of the system; maximum time limits for provision of written, reasoned replies to grievances; priority processing for emergency grievances; provisions of safeguards against reprisal; and independent review of grievances and disposition by someone not directly involved with the allegedly offending institution.[42] Once a procedure is certified, a judge can temporarily stay an inmate action to allow exhaustion of the process.[43]

Early implementation of CRIPA's certification process left much to be desired. States submitting grievance procedures in the early 1980s experienced extensive delays.[44] Between 1980 and 1990, only six states obtained certification.[45] In the last five years, with a clearer commitment to expedited handling from the federal government,[46] fif-

42. 42 U.S.C. § 1997e(b) (1988). For explication of these standards, see the regulations at 28 C.F.R. §§ 40.2 - 40.10. Amendments to CRIPA, introduced in the 103rd session of Congress, provided an alternative to the criteria summarized above, by allowing the AG or a federal court to certify a procedure "otherwise fair and effective." 42 U.S.C. § 1997(a)(2)(1994). *See supra* note 7; *see infra* note 174.

43. 42 U.S.C. § 1997e(a)(1) (1988). This section originally provided for a ninety (90) day stay, but the time period was extended to 180 days by 1994 amendments to CRIPA. *See supra* note 7; *cf. infra* note 54 (120 days recommended).

Some federal judges have issued standing orders to notify inmate plaintiffs that they will require a stay. *See, e.g.*, Appendix E (providing a standing order from the United States District Court for the District of Kansas requiring documentation of efforts to exhaust grievance procedure at time of filing a complaint, and providing for stay of actions in which adequate documentation is not provided).

44. One of the first states to receive certification from the AG, Wyoming, waited five years after submitting its procedure before receiving a response. Telephone interview with Duane Schillinger, Administrator, Wyoming Grievance Procedure (Feb. 1994). In the early 1990s, DOJ strove to counter the impression that similarly long delays continued to hamper certification. *See* INFORMATION HANDBOOK FOR CERTIFICATION OF INMATE GRIEVANCE PROCEDURES PURSUANT TO THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (CRIPA), U.S. DEPARTMENT OF JUSTICE (1992) [hereinafter DOJ INFORMATION HANDBOOK] (clarifying that certification is not a lengthy process).

45. The states and dates of certification are: Virginia (Dec. 14, 1982), Wyoming (State Penitentiary, June 11, 1983), Iowa (Jan. 2, 1987), Ohio (Sept. 11, 1987), Nebraska (Sept. 28, 1987), Missouri (July 11, 1989). *See* CERTIFIED CRIPA APPLICATIONS UNDER TITLE 28 C.F.R. PART 40 (updated Dec. 2, 1993), provided by Mary E. McBride, Administrative Remedy Specialist of the Federal Bureau of Prisons (Feb. 15, 1994). Two local procedures in Virginia also had been certified: Roanoke County/Salem Jail (Jan. 20, 1987), and Portsmouth (Nov. 28, 1988). *Id.*

46. DOJ staff now is committed "to mak[ing] a preliminary review of an inmate grievance procedure within 15 days of receipt," and "advis[ing] the applicant of its decision on certification ordinarily within 45 days of receipt." DOJ INFORMATION HANDBOOK, *supra* note 44, at 3.

teen more states have received certification.[47] Because two states have let their procedures lapse, the current total is nineteen.[48]

Even as more states obtain certification of grievance procedures, and despite congressional good intentions that problems be solved close to the source and without litigation, the volume of inmate civil rights cases — and their proportion of the total federal caseload — continues to grow.[49]

47. The fifteen states and dates of certification include: Nevada (May 20, 1991), Missouri (Mar. 20, 1992), Florida (Mar. 25, 1992), Kansas (Oct. 15, 1993), Hawaii (Apr. 17, 1992), District of Columbia (June 12, 1992), New York (Sept. 28, 1992), Connecticut (Jan. 11, 1993), Montana (State Penitentiary, June 8, 1994), Wyoming (all but State Penitentiary, Feb. 23, 1994), Tennessee (May 26, 1993), New Mexico (Nov. 22, 1993), Arkansas (July 1, 1994), Colorado (July 1, 1994), and Georgia (Aug. 15, 1994). *See* CERTIFIED CRIPA APPLICATIONS UNDER TITLE 28 C.F.R. PART 40, *supra* note 45 (updated Mar. 20, 1995) [hereinafter CERTIFIED CRIPA APPLICATIONS]. Five other local procedures were certified: Maryland (Montgomery County, Apr. 4, 1991), Pennsylvania (Bucks County, Dec. 8, 1992), Montana (Swan River Forest Camp, Sept. 27, 1993), North Carolina (Guilford County, Feb. 23, 1994), and North Carolina (Forsyth County Detention Center, Sept. 28, 1994). *Id.* Additional applications are pending, not including Hawaii's reapplication. *Id.* For more detailed discussion of states' certified grievance procedures, *see infra* notes 151-62 and accompanying text.

48. As discussed below, Nevada certified its program for only one year and then let certification lapse. *See infra* notes 161-62 and accompanying text. Hawaii also let its certification lapse on April 17, 1993, but now has reapplied and its application for recertification is pending, with DOJ review completed on November 9, 1994. *See* CERTIFIED CRIPA APPLICATIONS, *supra* note 47.

49. *See supra* note 9 and Appendix B. For further discussion of filing rates in certified as opposed to noncertified states, *see infra* note 159.

Many factors contribute to caseload growth. Foremost is increasing prison populations nationwide. In the ten years prior to this research project, the number of prisoners in the United States doubled, exceeding one million by October 1994. Elizabeth Shogren, *Sterner Penalties Send U.S. Prisoner Count Past 1 Million*, L.A. TIMES, Oct. 28, 1994, at A36. The highest rates of incarceration are in Texas (545 behind bars compared to 100,000 in the general population), Louisiana (514/100,000), South Carolina (504/100,000), and Oklahoma (501/100,000). *Id.* California has an "average" rate of 373/100,000, but the highest total number with 124,813 inmates. *Id.* The number of inmates in California has grown by nearly sixfold since 1980, when the population was about 20,000. Interview with Joe McGrath, Program Administrator of the California Dep't of Corrections Institutions Division (Mar. 15, 1994) [hereinafter McGrath interview]. Despite aggressive prison construction programs, California state officials report serious overcrowding, which increases the likelihood that inmates will complain. *Id.* Also, most inmates today have a fair amount of unstructured time on their hands. Some may be out of their cell for twenty-three hours a day. Interview with Nino Pippitone, Litigation Coordinator, Folsom State Prison (Feb. 17, 1994). Many more inmates appear to want a prison job than have one. *Cf.* Wilbert Rideau (inmate at Louisiana State Penitentiary), *Why Prisons Don't Work*, TIME, Mar. 21, 1994, at 80 (discussing how the state penitentiary in which Rideau resides houses 4,600 men, offers academic training to about 240 of them, and vocational training to a similar number). Given the dearth of competing constructive activities, it seems inevitable that a segment of the inmate population, with the ability and inclination to read and write, will gravitate to the prison law libraries where such facilities are provided. Some inmates credit their involvement in litigation as helping to restore their self esteem and providing them with valuable job-related skills. Some former inmates have even found employment as paralegals upon release. Interview with Tim Hinkle, Pro Se Writ Clerk for

II. THE CHALLENGE TO THE FEDERAL COURTS

Because inmates are politically unpopular — classic minorities deserving of the Constitution's special guarantees — the federal courts' obligation to inmate civil rights plaintiffs is a serious matter.[50] Most inmates today appear no more able to enforce their constitutional and statutory rights than they were when Congress passed the Civil Rights of Institutionalized Persons Act ("CRIPA") in 1980.[51]

---

the Eastern District of Cal. (Aug. 3, 1994) [hereinafter Hinkle interview] (recounting visit from one such inmate-turned-paralegal); *cf.* Cathryn Creno, *Man of Conviction: Cal, Ex-con at Center of ASU Law-School Flap*, ARIZ. REPUBLIC, Sept. 5, 1993, at A1 (reporting that former inmate attends law school upon release, after being a "prisoner lawyer").

Other factors may include: (1) the length of time it takes to resolve a lawsuit — in other words, the longer the time, the greater the sustained diversion from the drudgery of prison life, Interview with Tom Farrell, Deputy Attorney General for the State of Hawaii (May 10, 1994) [hereinafter Farrell interview]; (2) gender (virtually all cases are filed by male inmates — a fact noted by several persons interviewed during this research project); and (3) "prisoner lawyers," or "writ writers," as they are known, who assist other inmates in filing lawsuits. During this project, the author had the opportunity to interview two inmates who qualify as prisoner lawyers. Both were referred to her as competent and sophisticated pro se litigators by Eastern District and California Attorney General staff attorneys. These particular "jailhouse lawyers" indicated that they advised other inmates on litigation matters, and sometimes drafted others' complaints. Interview with Richard Lauranzano, at Vacaville, Cal. (June 24, 1994) [hereinafter Lauranzano interview]. Interview with Marion Franklyn Miller, at Represa, Cal. (June 25, 1994) [hereinafter Miller interview]. Specifically, these inmates have brought suits to prevent transfer to a different facility, contesting discipline, alleging retaliation by staff, and medical problems (Lauranzano), "branding" of telephone calls and outgoing mail, challenging "sweetheart" deals covering television purchases which effectively voided warranty, diet, length of time to shower, and denial of access to a law library (Miller). *Id.*

The potential for litigation to affect the balance of power between those guarded and those who guard also provides a motive for inmates to seek judicial affirmation of their concerns. To the extent that inmates can compel the correctional bureaucracy to acknowledge and address their grievances through the courts, they achieve some degree of power in their otherwise subordinated position. Inmates Lauranzano and Miller both acknowledged the power dynamic as one factor in their litigation efforts. One inmate recalled that he did not fully appreciate the power of litigation when he filed his first action, but he has since grown to appreciate his ability to reform the conditions of his confinement from within. Another inmate recounted his experience of filing a lawsuit complaining about the length of time inmates were given to eat — sometimes eight minutes instead of the required fifteen. While his lawsuit was pending, the inmate noticed that the cafeteria guards would not release the room full of inmates until he stood up to leave, even if he took longer than fifteen minutes. He attributed his ability to control the guards' behavior to the pending litigation.

50. *See, e.g.*, Interview with Margaret Z. Johns, Professor at University of California at Davis King Hall School of Law (Feb. 4, 1994) [hereinafter Johns interview] (identifying the federal courts as the last bastion of protection for a very vulnerable inmate population, especially given the manner in which overcrowding exacerbates problems, and concluding that federal courts should retain ultimate control).

51. For an evaluation of prisoners' inability to represent themselves fully, rendered a decade after CRIPA's passage, *see* Judge William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STANFORD L. REV. 1 (Nov. 1990) (relating experience wherein shortly after becoming a federal district judge in Texas, "[t]he message was brought home forcibly to

Moreover, it is clear that at least a portion of the inmate cases filed do raise issues of constitutional concern.[52]

Of course, federal courts are not the only proper forum for 42 U.S.C. § 1983 ("Section 1983") claims, which also can be brought in state court[53] or before state administrative bodies.[54] However, to the extent that inmates' rights under the constitution and Section 1983 are violated, it is clear that federal courts are a proper forum for adjudication.[55]

---

me that prisoners who had no legal representation simply could not effectively present their grievances." Judge Justice stated that such an imbalance is a concern because "a minimal requirement for the judicial process to be legitimate is that both sides have an opportunity to be heard"). Even accepting that many inmate actions are relatively petty, if not legally "frivolous," this in itself suggests that inmates as a class are not representing their interests in the most effective way. Johns interview, *supra* note 50. *Cf.* the ALDISERT REPORT, *supra* note 8, at 6-7 (regarding difficulty of finding, and devoting proper attention to, meritorious conditions-of-confinement cases).

52. *See, e.g.*, *supra* note 23 (discussing the *Estelle*, *Gates*, and *Madrid* cases).

53. States can exercise concurrent jurisdiction under Section 1983. *See* Williams v. Horvath, 548 P.2d 1125 (1976) (reversing demurrer in tort action for damages against police officers, brought under federal Civil Rights Act and noting that a federal right cannot be frustrated by state statute of limitations). *See also* 3 B.E. WITKIN, CALIFORNIA PROCEDURE § 130, at 158 (3d ed. 1985).

54. *Cf. infra* notes 182-201 and accompanying text. The question of proper forum is asked increasingly as filings escalate. The Aldisert Report notes:

> The burden of prisoner . . . cases has fallen disproportionately upon the federal judiciary. Granting that [these] cases are important and 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 . . . cases brought by state prisoners.

ALDISERT REPORT, *supra* note 8 at 8.

In 1990, the Federal Courts Study Committee posited three problems with unchecked increases in demand for federal court services, creating pressure to increase the number of federal judges: (1) the independent, responsible and efficient performance of Article III judges is tied to limiting the total number of judges to a relatively elite cadre; (2) increasing the number of trial judges would have a "domino effect," requiring more appeals judges, potentially increasing the number of inter-circuit conflicts, and making it more difficult for the United States Supreme Court to keep pace and preserve "some minimum uniformity of federal decisional law;" and (3) caseload growth exacerbates the tension between expansion of the federal judiciary and "the fundamental constitutional concept of *limited* federal government," and requires that the court intervene only when necessary — for example, when "the protection of individual liberty against actions of the political branches of government" is at stake. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 7-8 (April 2, 1990). Despite its concern that the federal courts may now be in a state of crisis, the Committee rejected notions of radical change, and opted instead for a series of incremental reform proposals. *Id.* With regard to inmates' civil rights cases, the Committee recommended amending CRIPA to extend to 120 days the period of time for inmate claims to exhaust a state administrative process, "imposing a short delay and in exchange giv[ing an inmate] a chance to obtain swift administrative relief obviating the need to bring suit." *Id.* at 16.

55. Since passage of the Federal Judiciary Act of 1875, the federal courts have assumed primary responsibility for resolving questions of federal rights, and have maintained "a fierce independence in protecting national legal rights against occasional state encroachment." R. WHEELER & C. HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM

Because federal courts can expect to continue hearing these cases, the challenges faced by the courts will persist.[56] The challenges include finding ways to answer questions such as: how to identify those inmate cases making valid constitutional claims? Are alternative procedures available and adequate for earlier resolution of cases? Should new procedures be considered?[57] To answer these questions, one needs to go back to the beginning and first try to understand the nature of the inmates' civil rights caseload. For the reasons described,[58]

8-9 (Federal Judicial Center 1989). With the 1875 Act, Congress issued a grant of general federal jurisdiction to the federal courts. *Id.* Prior to the passage of the Act, the courts exercised jurisdiction only in cases of diversity, admiralty, treaty rights, habeas corpus, and certain patent cases. *Id.* at 7. As Supreme Court Justice Frankfurter observed, the 1875 Act made the federal trial courts "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Id.* at 18. *Cf.* Judge Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A17 (stating that the federal courts' "central function . . . [is] defining and defending constitutional values, interpreting and applying Federal statutes and conducting civil and criminal trials that fall under traditional federal jurisdiction"). Or, as one magistrate judge in the Eastern District put it in an off-the-record conversation, "[I]f the feds pass a law, shouldn't the federal court system be able and willing to enforce it?"

The *scope* of the federal courts' role presents a different question. Since the days of its "open door policy," *see supra* note 26, the Supreme Court has been reevaluating the extent of its enforcement role in inmate cases. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (reasoning that while constitutional rights are to be scrupulously observed, "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"). *See also* the ALDISERT REPORT, *supra* note 8, at 11. Some recent cases may indicate a decided shift to a more "hands-off" approach. *See, e.g.*, Heck v. Humphrey, 114 S. Ct. 2364 (1994) (rejecting damages claim filed under Section 1983 and alleging unlawful and arbitrary investigation leading to inmate petitioner's arrest; holding that to recover, "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus").

Inmates do appear to prefer federal courts in ligitating Section 1983 claims, *cf. infra* note 93, but in this regard may not be much different from other types of civil plaintiffs who perceive federal courts to be a more "impartial forum." *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 8 (1990).

56. In fact, at least some state officials predict that inmate case filings will rise as a result of the relatively new Religious Freedom Restoration Act of 1993 ("RFRA"), codified at 5 U.S.C. § 504, and 42 U.S.C. § 1988, 2000bb-2000bb-4 (1994). Farrell interview, *supra* note 49. For the congressional debate on this question, and an amendment offered to prohibit RFRA's application to inmates which ultimately was not made part of the law, *see* 139 CONG. REC. S14461 (daily ed. Wednesday, Oct. 27, 1993) (debating Amendment No. 1083 as offered by Senator Reid from Nevada).

57. In considering these questions and possible answers, the courts might bear in mind the observations of University of Southern California Law professor Judith Resnick, in her article, *The Federal Rules in Practice: Commentary on The Domain of the Courts*, 137 U. PA. L. REV. 2219 (June 1989) (regarding substantive reform masquerading as technical changes). If substantive reforms are to be made, they might as well be acknowledged as such.

58. *See supra* notes 14-15 and accompanying text.

this Comment focusses on the caseload in the Eastern District of California.

III. THE CASELOAD DESCRIBED

A. ORIGINS AS DEPARTMENT OF CORRECTIONS GRIEVANCES

1. *Grievance Process Described*

Most inmates' civil rights cases filed in California's Eastern District appear to originate as internal grievances at state prison facilities.[59] Since at least 1974,[60] the California Department of Corrections ("CDC") has provided an "inmate appeals process" with the goal of resolving grievances in a timely manner at the lowest level of review.[61] The appeals process consists of several levels of review. First, an inmate is required to attempt resolution of his or her grievance with the "appropriate" staff member.[62] If informal resolution is not achieved, an inmate may appeal a grievance to a first formal review level, where a division head or supervisor arranges for investigation and response.[63] If still dissatisfied, an inmate may appeal to the second level of formal review where the warden prepares a response.[64] Finally, a third level of formal review proceeds to the Director of the CDC.[65]

Each prison institution is required to establish time limits for response at each stage of the process, with a cap of 150 days (five

59. Interview with Haven Gracey, Eastern District Staff Attorney (Mar. 2, 1994) [hereinafter Gracey interview]. "Appear" because no recorded statistics confirm this. *Id.* Court staff believe that most cases exhaust the grievance process first, but only know this for a fact if the grievance record, or a portion thereof, is attached to a complaint, answer or other litigation document. *Id.*

60. According to California Deputy Attorney General Kenneth C. Young, the grievance procedure was in place, and substantially similar to the current procedure, when he began work for the California Attorney General's office in 1974. Interview with Kenneth C. Young, California Deputy Attorney General (Aug. 5, 1994) [hereinafter Young interview]. The authorities cited in the current version of the procedure include, *inter alia*, CRIPA and CAL. PEN. CODE § 5054 (West 1982 & Cum. Supp. 1995) (investing the supervision, management, and control of the prisons in the Director of Corrections); CAL. PENAL CODE § 5058 (West 1982 & Cum. Supp. 1995) (authorizing the Director to prescribe rules and regulations for the administration of the prisons). The latter has been law since 1944.

61. *See* CALIFORNIA DEP'T OF CORRECTIONS, OPERATIONS MANUAL § 54100.2 (Jan. 9, 1990) [hereinafter OPERATIONS MANUAL]. A parallel process applies to parolees as well. The California process is *not* certified under CRIPA. *See infra* notes 164-72 and accompanying text.

62. OPERATIONS MANUAL, *supra* note 61, § 54100.11.1. Certain types of complaints are excepted from the process, including: committee and staff classification actions, serious disciplinary infractions, departmental policies or procedures, or exceptional circumstances as defined in 15 Cal. Code Reg. § 3084.7. *Id.* § 54100.11.1.

63. OPERATIONS MANUAL, *supra* note 61, § 54100.11.2.

64. *Id.* § 54100.11.3.

65. *Id.* § 54100.11.4.

months) on total time from filing of an informal grievance to third level formal appeal.[66] Because the form for filing a grievance is numbered CDC Form 602, the grievance procedure is known within the prison system as the "602."

2. *Numbers and Types of Grievances*

The CDC does not maintain records on the number of first-stage informal grievances filed and resolved.[67] However, it does record the number of appeals at levels one through three of the formal process. According to the CDC, the rate of grievance filings currently is growing faster than California's burgeoning prison population.[68]

As Figure A outlines in a comparison between California and the Eastern District, during fiscal year 1991-92,[69] when the prison population numbered 90,960,[70] inmates statewide filed 35,659 first level formal appeals, of which 14,193 (40%) were granted. In the same year, 17,712 appeals proceeded to the second formal level, where 3,856 (22%) were granted. Also in the same year, 7,389 appeals proceeded to the third level, where 657 (9%) were granted.[71]

In 1991-92, inmates in the Eastern District of California numbered 54,316, or 59.7% of the state's total.[72] These inmates filed 19,088 first level appeals, or 54% of the statewide total.[73] Of these appeals, 7,128 (37%) were granted. Inmates filed 9,814 second level appeals, of which 2,102 (21%) were granted. They filed 3,820 third level appeals, of which 326 (9%) were granted.[74] In other words,

---

66. *Id.* § 54100.12.

67. Telephone interview with Bonnie Garabay, Chief of Inmate Appeals, CDC (May 9, 1994) [hereinafter Garabay interview].

68. STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS, INMATE APPEALS ACTIVITY: FISCAL YEAR 91/92 1 [hereinafter INMATE APPEALS ACTIVITY] (reviewing filings for last three years). "Overall, the rate of appeal per inmate is increasing faster than the constantly increasing population." *Id.* at 1.

69. The 1991-92 period represents the last period for which complete data were available at the time the field research for this Comment was conducted.

70. INMATE APPEALS ACTIVITY, *supra* note 68, at A-5. The current prison population statewide is closer to 124,000. McGrath interview, *supra* note 49.

71. INMATE APPEALS ACTIVITY, *supra* note 68, at 1. For detailed tables of grievance statistics, *see* Appendix A.

72. *See* INMATE APPEALS ACTIVITY, *supra* note 68, at A-4 (calculating figures by adding number of inmates in FY 91/92 column for those facilities located in the Eastern District, which include: Avenal State Prison, California Correctional Center (Susanville), California Correctional Institution (Tehachapi), Central California Women's Facility (Chowchilla), California Medical Facility (Vacaville), California State Prison (Corcoran), California State Prison-Solano (Vacaville), California State Prison-Sacramento (Old and New Folsom), Deuel Vocational Institute (Tracy), Mule Creek State Prison (Ione), Northern California Women's Facility (Stockton), Sierra Conservation Center (Jamestown), Wasco State Prison-Reception Center. *See also* Appendix A.

73. INMATE APPEALS ACTIVITY, *supra* note 68, at A-1-8.

74. *Id.*

grievance filing and handling patterns for the Eastern District were very similar to those in the California as whole.

FIGURE A

Inmate Grievances Within the California Department of Corrections

	California			Eastern District		
	Filed	Granted	%	Filed	Granted	%
Level One	35,659	14,193	40	19,088	7,128	37
Level Two	17,712	3,856	22	9,814	2,102	21
Level Three	7,389	657	9	3,820	326	9

Ideally, inmate grievances could be tracked from the time first filed to time resolved. Such an analysis would indicate how effective California's grievance procedure is in "winnowing out" cases at each successive level of appeal. However, the CDC only reports as a lump sum the total number of grievances filed by month and year.[75] In other words, a Level One appeal reported in 1991/92 will not necessarily be reported as an appeal to Level Two in the same reporting year. As a result, for example, in some years the number of Level Two appeals reported in some categories is higher than those in Level One. Therefore, one can only hypothesize — although it undoubtedly is true — that each successive step in the grievance process reduces the number of cases proceeding to the next level of appeal.[76]

As detailed in Figure B, major categories for appeals filed in all California facilities include disciplinary grievances, property claims, medical care, funds management, staff complaints including excessive force, and records.[77] Those categories with the highest level of appeals granted at grievance Levels One and Two are medical and funds

75. Garabay interview, *supra* note 67.

76. Alternatively, one can engage in the exercise of assuming that the numbers as currently reported give some indication of the number of grievances culled by the system. In other words, based on the statewide statistics for 1991-92 shown above, one can estimate that 82.5% of grievances not granted at the first formal level proceeded to the second (82.5% derived by dividing the number of Level Two grievances filed — 17,712 — by the number of grievances not upheld at Level One — (35,659 - 14,193)). *See* INMATE APPEALS ACTIVITY, *supra* note 68, Appendix A. Likewise, 53.3 percent of those not granted at the second level proceeded to the third formal level (7,389/(17712 - 3,856)). INMATE APPEALS ACTIVITY, *supra* note 68. The numbers are virtually identical for the Eastern District: 82% (9,814/(19,088 - 7,128)) and 49.5% (3,820/(9,814 - 2,102)) respectively. *Id.* While this exercise is not entirely responsible, statistically speaking, the current data do not support a more responsible alternative. Because the results intuitively seem close to the number which might actually be winnowed out by the grievance procedure, they are included here.

77. *See* Chart showing the volume of these appeals. INMATE APPEALS ACTIVITY, *supra* note 68, at 2.

management.[78] The highest levels granted at Level Three are in the property, mail, and medical categories.[79] Major categories of appeal for facilities in the Eastern District are property loss, disciplinary appeals, medical care, and staff complaints.[80] Although the raw data do not lend themselves to meaningful qualitative analysis, those categories with the highest rate of appeals granted are suggestive at least. They may represent the kinds of cases in which the CDC is more likely to conclude that an inmate's grievance is warranted. Or, they may represent areas in which Eastern District inmates simply tend to be more litigious.[81]

FIGURE B

Major Categories of Inmate Appeals Within the CDC

California	Eastern District
Level One	**Level One**
1. Fund Appeals (64%) 2. Medical (60%)	1. Fund Appeals (59.4%) 2. Medical (57.7%) 3. Property (37.7%)
Level Two	**Level Two**
1. Medical (42%) 2. Fund Appeals (37%)	1. Medical (41.5%) 2. Property (24%)
Level Three	**Level Three**
1. Property (14%) 2. Mail (12%) Medical (12%)	1. Property (13.6%) 2. Medical (11%)

78. *Id.* at 6-7 (demonstrating that medical issues granted at 60% rate at Level One and at 42% at Level Two; fund appeals at 64% at Level One and 37% at Level Two).

79. *Id.* at 8 (showing that property at 14%; mail and medical at 12%).

80. *Id.* at C-1 - C-23 (noting that the compilation of data on Eastern District facilities shows the following ratios of cases granted to cases filed for Level One: Property, 1251/3316; Medical, 1267/2196; Funds, 1125/1893; and Disciplinary, 294/1671. For Level Two: Disciplinary, 453/2954; Property, 293/1221; Medical, 348/837; and Staff Complaints, 96/652. For Level Three: Disciplinary, 124/1187; Property, 55/403; Staff Complaints, 14/367; and Medical, 34/309).

81. One can engage in the kind of analysis described *supra* in note 76 to arrive at an hypothesis regarding those cases Eastern District inmates feel most strongly about. Such an analysis suggests that after denial of a Level One appeal, inmates are most likely to appeal grievances seeking information on their prison case files (96% of those not granted at Level One appealed to Level Two), attacking the quality of medical care (90%), and challenging their custody classification (87%) or inter-facility transfer (85.4%). After denial of a Level Two appeal, inmates are most likely to further appeal grievances challenging inter-facility transfers (72.3%), work incentive program credit (70.1%), alleging improper treatment by prison personnel (66%), and inadequate medical treatment (63.2%). *See* Appendix A (calculating percentages based on numbers included in charts on types of appeals at each level of grievance process).

B. PROCEEDING TO FEDERAL COURT

If dissatisfied with the result at the third level of the CDC's grievance process, an inmate may bring an action in court. Most often, such actions are brought in federal court.

1. Caseload Management System

Once an inmate's civil rights complaint is filed in the Eastern District federal court, it is randomly dual assigned to a district judge and a magistrate judge. The district judge routinely refers a complaint to the assigned magistrate judge for pre-trial handling.[82] Upon consent of the parties, the magistrate also may conduct the trial and enter final judgment.[83]

To process inmate actions, the Eastern District judges over the last seven years have developed and refined a caseload management approach.[84] This approach appears to be inspired by the Aldisert Report prepared by the Federal Judicial Center in 1980.[85] It provides for processing cases almost entirely on paper until a case gets close to trial.[86] The system involves various stages at which a case either pro-

82. The practice of referring such complaints is authorized under Local Rule 302(c) (specifying as one of a magistrate judge's duties in civil matters "[c]ases brought by a person in custody who is seeking . . . any relief authorized by 42 U.S.C. § 1981 *et seq.*, including dispositive motions (nondispositive motions and matters shall be adjudicated pursuant to 28 U.S.C. § 636(b)(1)(A))") and under Local Rule 303 (noting that "a Magistrate Judge shall hear, conduct such evidentiary hearings as are appropriate, and determine all general pretrial matters referred in accordance with L.R. 302"). Local Rules of the United States Dist. Ct. (E.D. Cal. Dec. 19, 1994) (Duties to Be Performed in Civil Matters by a Magistrate Judge Pursuant to 28 U.S.C. § 636(a), (b)(1)(A), (b)(1)(B), (b)(3), or Other Law) [hereinafter LOCAL RULE].

83. A Magistrate's authority to conduct a full trial is set forth in Local Rule 301, which provides:

> Upon the consent of the appearing parties, the Magistrate Judges at Sacramento and Fresno are specially designated to . . . conduct any and all proceedings in any civil action, including the conduct of jury or nonjury trials, and to order the entry of final judgments, in accordance with Fed. R. Civ. P. 53 and 73 and 28 U.S.C. § 636(c). . . .

LOCAL RULE 301, *supra* note 82.

84. MEMORANDUM, MANAGEMENT OF A SECTION 1983 CIVIL RIGHTS ACTION (internal memorandum) (last revised October 17, 1993) [hereinafter MEMO ON § 1983 ACTIONS].

85. *See supra* note 8.

86. The court has adopted a special rule to this effect, which provides:

> All motions, except motions to dismiss for lack of prosecution, filed in cases wherein one party is incarcerated and proceeding *in propria persona*, shall be submitted upon the record without oral argument unless otherwise ordered by the Court. Such motions need not be noticed on the motion calendar. Opposition, if any, to the granting of the motion shall be in writing and shall be served and filed with the Clerk by the responding party not more than eighteen (18) days, plus three (3) days for mailing, after the date of service of the motion. A responding party who has no opposition to the granting of the motion shall serve and file a statement to that effect, specifically designating the motion in question. Failure of the responding party to file written opposition or to file a statement of no opposition may be deemed a waiver of any opposition to the

ceeds or is dismissed or otherwise terminated. It can be described in terms of ten steps as Figure C depicts.[87]

FIGURE C

Eastern District of California
CASE MANAGEMENT STEPS
I. Screening
II. Service
III. Answer
IV. Discovery
V. Dismissal/Summary Judgment
VI. Status Review
VII. Scheduling Order
VIII. Pretrial Order
IX. Trial Order
X. Trial

Step One: The complaint is screened, first by a pro se writ clerk and then by a staff attorney who makes recommendations to the assigned magistrate judge. In most cases, an application to proceed in forma pauperis is included and screened as well. After the screening stage and review by a magistrate, a complaint may be dismissed with leave to amend, dismissed as frivolous, or allowed to proceed.

Step Two: If an inmate case proceeds, the complaint is served on the defendants. An inmate plaintiff granted in forma pauperis status is ordered to complete standard forms so that the United States Marshall can effect service. If the plaintiff fails to return completed forms, the case is dismissed for failure to abide by a court order. If the plaintiff returns the form, service is ordered and the case proceeds.

Step Three: The defendant has from twenty (20) to sixty (60) days[88] from the date of service to answer. Alternatively, the defendant may file a motion to dismiss. If the defendant does not answer or

> granting of the motion and may result in the imposition of sanctions. The moving party may, not more than five (5) court days after the opposition is served, plus three (3) days for mailing, serve and file a reply to the opposition. All such motions will be deemed submitted twenty-eight (28) days after the service of the motion or when the reply is filed, whichever comes first.

Local Rules, U.S. Dist. Ct. 230(m) (E.D. Cal. Dec. 12, 1994).

87. These steps are "generic" steps, and greatly oversimplify what happens in the actual life of a case. In practice, there are many variations on each step. For a sense of variations, *see infra* notes 119-22 and accompanying text (presenting information on cases filed in April 1991); Appendix C.

88. The defendant has twenty (20) days if personal service is effected, and sixty (60) days if service is by mail. *See* Fed. R. Civ. P. 4. According to one California Attorney General, personal service is rare in the Eastern District, in contrast to the Southern District where it is common. Interview with Joan Cavanagh, Supervising Deputy, Office of Cal. Attorney General (Mar. 31, 1995) [hereinafter Cavanagh interview].

file a motion to dismiss, the court may default the case, by motion of the plaintiff or of the court, on grounds of defendant's failure to respond.

Step Four: Following filing of defendant's answer, the court issues a standing discovery order to put the parties on notice that they should conduct discovery to prepare their case for trial.

Step Five: At any time following the defendant's answer, either party may file a motion to dismiss or motion for summary judgment. The court may grant the motion on the merits or, if the opposing party fails to respond, on grounds of that party's nonopposition. Alternatively, the court may grant the motion with leave to amend, or deny the motion.

Step Six: Six months following service of the original complaint, the court conducts a status review of the case file. On the one hand, if the record reveals the plaintiff has taken steps to prosecute his or her case, the court issues an order directing both parties to file written status reports by specified dates. If the plaintiff fails to file a status report, the court issues an order of dismissal for failure to observe the court's order. If the plaintiff files the report, the case proceeds. On the other hand, if the record reveals no activity by the plaintiff for the preceding four months, the court notifies the parties that it will consider dismissal for lack of prosecution. Unless the plaintiff responds by showing an intent to prosecute the case, the matter is dismissed.

Step Seven: If the case proceeds, upon defendants' filing of the required status report, the court issues a scheduling order identifying the dates by which discovery must be completed, as well as dates for filing all dispositive pretrial motions and a pretrial statement. The order also sets a date for a pretrial conference and trial. If the plaintiff fails to meet any of the ordered deadlines, and in particular the deadline for filing a pretrial statement, the court may order dismissal for failure to observe the court's order. If both parties file pretrial statements, the case proceeds.

Step Eight: The court issues a pretrial order, and a writ of habeas corpus ad testificandum ("WHAT") so that the inmate plaintiff will be transported to the courthouse for a trial confirmation hearing ("TCH"). At the TCH, the presiding judge has a chance to meet the plaintiff and clear up any confusion regarding the record, witnesses, or other matters relevant to trial.

Step Nine: Following the TCH, the court may issue a further pretrial order and any writs required to ensure plaintiff's presence and the attendance of any witnesses at trial. If the parties settle, or if plaintiff withdraws the action, the case is dismissed.

Step Ten: A full trial is conducted, with a decision in one party's favor. If one of the parties has made a jury demand,[89] the case is tried to a jury.

At any point along the ten-step process, if an inmate plaintiff has not apprised the court of a change of address, the court may dismiss the action for this reason as well.[90]

2. *Case Filing and Workload Statistics*

Like the CDC's inmate grievances, inmates' civil rights litigation in California has grown steadily. The case filings in all four California federal districts combined jumped from 1.9% of all civil suits filed in 1981, to 8.8% in 1992.[91] In the same time period, the inmates' civil rights case filings in the Eastern District grew dramatically, from 6.5% in 1981 to 845[92] or 29% in 1992.[93]

---

89. The CDC as defendant virtually always makes a jury demand in its initial answer to an inmate complaint. According to one California Attorney General, it does so to preserve its jury right until it learns more about a case. Cavanagh interview, *supra* note 88. However, as a case proceeds and the factual scenario becomes clear, the CDC may waive a jury. Usually such a waiver does not occur until a TCH. *Id.*

90. Inmates may experience frequent changes of address due to transfer or release. In the fifty-three Eastern District cases analyzed for this project, inmate plaintiffs submitted forty-two separate address changes over the course of four years. *See* Appendix C (last page). Four cases were dismissed for failure to provide a current mailing address. *Id.*

91. A total of 21,294 cases were filed in California's federal district courts in 1992. AO STATISTICAL REPORT, *supra* note 9, at 23. As a percentage of all suits, both state and federal, filed against the State of California, inmates' civil rights cases constitute 55 percent. *See* 1994 CAL. STATS. 1083, *supra* note 6 (reporting legislative findings).

92. Telephone interview with Carol Davis, Office of the Clerk of the Court, Eastern District (Feb. 7, 1994).

93. The total number of civil cases filed in the Eastern District in 1992 numbered 2,896. AO STATISTICAL REPORT, *supra* note 9, at 23. The number of inmate cases filed in 1993 is virtually identical, 889. *Id.* If all of these cases were originally filed as 602 grievances within the CDC, and were at the third level of formal review in FY 1991/92, they represent approximately 25% of third level appeals not granted at the institutional level. INMATE APPEALS ACTIVITY: 91/92, *supra* note 68 at 1. For detailed tables on the numbers of inmate cases filed over the last decade, *see* Appendix B.

Based on information provided by the California Attorney General's office, the growth rate in inmates' civil rights filings exceeds that of the prison population. *See* charts provided by Joan W. Cavanagh with letter of Jan. 28, 1994, entitled "Growth of Inmate Population and Civil Suits Received Each Year" and "Litigation Rate: Civil Suits Received Each Year Per 1,000 Inmate Population" (charts on file with the author). The rate of suits per 1,000 inmates has increased from 3 in 1989/90 to 5 in 1991/92, with an interim jump to 6 in 1983/84 and 1984/85. *Id.* These numbers may even be low, because not all inmate cases are served after filing.

No records are kept on the number of inmate cases filed in state court. Telephone interview with staff at the California Judicial Council (Aug. 4, 1994). However, it appears to be small. According to one legislative staff person who follows inmate issues, the number is less than ten percent of all inmate civil rights cases filed. Telephone interview with Gene Erbin, Staff Counsel to Assembly Judiciary Committee (Aug. 4, 1994). However, California's use of habeas corpus petitions for conditions of confinement cases may contribute to underreporting of the latter.

No records exist to indicate how many inmate cases first exhaust the CDC's 602 appeals process.[94] Unlike CDC's grievance reports, federal court records unfortunately[95] do not classify inmates' civil rights cases by type of complaint.[96]

Case filing numbers do not necessarily indicate the size of the court's workload. Because inmates' civil rights actions usually are assigned to magistrate judges and their staffs, district judges' workload per action appears to be lower than their workload for other civil cases.[97] However, the workload per inmates' civil rights action for staff assigned to support the magistrate judges is higher than for other types of cases. Based on detailed information on staffing requirements reported by federal courts nationwide, the courts' Admin-

94. If these cases did exhaust and were at the third level of formal review in FY 1991/92, they represent approximately 27.5% of the 6,732 third level appeals not granted statewide.

95. "Unfortunately," because this information seems critical to an informed evaluation of what goes on with inmate complaints. Note that when Judge Justice wanted to "get a handle" on what was happening with inmate cases in his district, he had his law clerks first sort and group the cases by nature of complaint. *See* Justice, 43 STANFORD L. REV. at 1.

96. In the federal court system, cases are categorized by broad "nature of suit" codes. For instance, inmate civil rights suits are coded under the number 550. Noninmate cases are further classified by primary cause of action. Inmate cases are not so classified, perhaps because causes of action often are numerous and, prepared as they are by pro se plaintiffs, far less easy to decipher. Gracey interview, *supra* note 59. For the April 1991 Eastern District cases reviewed, *see infra* notes 119-22 and text accompanying, only eight references to the type of claim involved appear in the court's summary docket reports. *See* DOCKET REPORTS FOR INMATES' CIVIL RIGHTS CASES FILED APRIL 1991 (E.D. Cal.) (on file with the author) (mentioning medical and dental concerns, legal property, excessive force by staff, discrimination, administrative segregation, and denial of due process in change of job assignments).

Although the California Attorney General's office maintains a computer log of inmate cases for internal reference purposes, the log does not include information on every inmate case filed in federal court. For instance, it does not include cases which name agencies other than the CDC or the State of California, and does not include every case which names the state as defendant. *See* printouts provided by Joan Cavanagh (Aug. 12, 1994) (on file with the author) [hereinafter AG Computer Log]. Incomplete as it is, this log is perhaps the most accessible summary of information on the types of cases currently available. *Id.* However, the only method for gathering comprehensive information on inmates' complaints is to review the actual complaints themselves. *See infra* note 118 and accompanying text.

97. Based on two to three years of monitoring of select courthouses, the AO assigns district judges less staff for inmates' cases than many other kinds of cases. Staff assignments are made using a weighting system, wherein different weights are assigned to different types of cases. For inmates' civil rights cases, the weight for the relatively few cases where the United States is the defendant is 0.710; for cases where the United States is not the defendant, it is 0.4103. Telephone interview with Carol Davis, Office of the Clerk of the Court, Eastern District (Aug. 5, 1993). An example of a case with a weight close to 1 is stockholder actions (1.020). Case types with weights higher than 1 include libel and slander (1.33), insurance contract (1.25), and suits over rents or leases (1.470). *Id.*

istrative Office estimates that each inmate case takes more than twice the staff time required by other civil actions.[98]

3. *Factors with Special Significance: Pro Se and IFP Status, and Duration*

Three aspects of litigation in federal court have special significance in inmate cases. First, virtually all inmate cases are litigated by the inmates pro se.[99] While inmates may request appointment of counsel, such a request is rarely granted.[100] Some inmates develop a sophisticated understanding of the litigation process and assist other inmate litigators in addition to handling their own cases.[101] However, many inmates do not learn the process easily and do not have access to legal assistance. As a result, they often file complaints that are difficult to decipher, making an initial determination of legal merit difficult. If they persist in their litigation efforts, inmate plaintiffs often make procedural errors, engage in inappropriate ex parte correspondence with the court, or require clarification of the court's orders.[102] The challenges posed by inmates as pro se plaintiffs have led at least one observer of the process to conclude that lack of representation is "one of the most difficult aspects of prisoner conditions-of-confinement cases."[103]

---

98. For prisoner pro se petitions, the staffing factor is 16.690 hours per petition (8.345 hours for pro se law clerk functions plus (+) 8.345 hours for pro se writ clerk work). MEMORANDUM OF L. RALPH MECHAM TO UNITED STATES DISTRICT COURT CLERKS (Oct. 5, 1994). For other civil filings (all but prisoner petitions and recovery of overpayments), the factor is 6.972 hours per filing. *Id.*

Staff in the California Attorney General's office also notes that time for the defendant — who has to deal with inmates' attempts to conduct discovery — is an entirely different matter. Letter from Joan Cavanagh to the author (Sept. 30, 1994) [hereinafter Cavanagh letter].

99. Of fifty-three Eastern District cases analyzed for this project, *see infra* note 119, fifty-one were litigated by pro se plaintiffs.

100. In the fifty-three cases studied, inmates made thirty-three separate requests for appointment of counsel. *See* Appendix C (last page). Only three of these requests were granted. *Id.* In one additional case, a lawyer was appointed to handle the litigation after the pro se plaintiff died in prison. *See* McCoy v. Thor, No. 2:91-CV-0500 (E.D. Cal. Apr. 24, 1991) (appointing Amitai Schwartz attorney for plaintiff (order of Oct. 23, 1991)).

101. *See supra* note 49 (discussing interviews with Lauranzano and Miller).

102. *See, e.g.*, Wilkes v. Rowland, 2:91-CV-468 (E.D. Cal. filed Apr. 19, 1991) (advising plaintiff not to file discovery with court (order of July 10, 1992)); Gallon v. Borg, 91-CV-382 (E.D. Cal. filed Apr. 2, 1991) (ordering plaintiff to not file objections on behalf of plaintiffs in related cases (order of Oct. 19, 1992) and striking plaintiff's opposition on grounds it was untimely filed (order of Mar. 11, 1994); order granting defendants' motion for summary judgment based in part on plaintiff's violation of Rule 11 requiring plaintiff's own signature on complaint); Hazen v. Borg, 91-CV-530 (E.D. Cal. filed Apr. 30, 1991) (informing plaintiff that his certified mail return receipts do not function as notices of acknowledgement for purposes of service of process (order of July 1, 1991)).

103. *See* ALDISERT REPORT, *supra* note 8, at 21 (noting also that "[n]ot appointing counsel in some cases results in a situation where a pro se plaintiff, who may have a

Second, due to their low income status, most inmates are granted in forma pauperis ("IFP") status,[104] meaning that many court costs and fees are waived.[105] Statewide statistics are not available,[106] but in the Eastern District in 1992, 93% of all inmate plaintiffs proceeded IFP.[107]

To request IFP status, a plaintiff must complete an application form provided by the Eastern District. The form requests information on the amount of money the plaintiff has in his or her trust fund account and on his or her access to other resources.[108] Upon completing

---

meritorious case, is unable adequately to represent himself," and that "[a]t present, there is no satisfactory solution to this problem").

104. Authority to grant IFP status is provided by 28 U.S.C. § 1915, which reads in pertinent part:

> (a) Any court of the United States may authorize the commencement . . . of any suit, action or proceeding . . . without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor.
>
> . . . .
>
> (d) The court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. § 1915 (1988).

Theoretically, if all the inmate IFP plaintiffs in 1992 had paid the standard court filing fee of one hundred twenty dollars ($120), the court would have received an additional ninety-nine thousand dollars ($99,000) in revenues. Conversely, if the court had denied IFP status and imposed the standard filing fee, many cases probably would not have outlived initial filing. Partial fees may not have the same suppressant effect. *See infra* notes 202-10 and accompanying text.

105. Initial costs are waived, but many other costs cannot be forgiven, such as those associated with subpoenas, mileage, deposition copies, witness fees, and copies of court files.

106. These statistics are not available in published format. *Cf. supra* notes 59, 67, 75.

107. In 1992, 824 of 881 inmate plaintiffs proceeded IFP. In 1993, the numbers were virtually identical: 827 out of 889, or 95%. Interview with Carol Davis, Office of the Clerk of the Court, Eastern District (May 1994). Summary records are not regularly compiled to indicate how many inmate plaintiffs request IFP status. *Id.* In the select group of cases filed in April 1991 and studied closely for this project, *see infra* note 119, thirty-seven of forty-seven requesting plaintiffs were granted IFP status.

It is interesting to compare the IFP statistics for inmates with those for noninmate plaintiffs. The latter appear to request IFP status far less often. In April 1991, only nineteen out of 163 plaintiffs (less than 12%) of noninmate plaintiffs applied for IFP status. Of these, fifteen (about 80%) were granted. *See* Civil Docket Reports, Pending and Terminated Cases Filed in April 1991 (noninmate cases) (on file with author). In other words, noninmate plaintiffs' rate of IFP requests granted is not far behind the rate for inmates.

The issue of inmate IFP filings is one area that has gained a fair amount of attention in the last several years as courts search for methods of managing their caseloads. As will be discussed, most federal court districts outside California have a different approach to the application process and procedure for inmate plaintiffs than the Eastern District. *See infra* note 203 and accompanying text.

108. Trust account funds may not represent all of an inmate's assets. Some inmates appear to have friends or family members who are prepared to expend funds on their behalf, or who perhaps hold assets pending the inmate's release. *See supra* note 49 (discussing Lauranzano & Miller interviews).

the form, the plaintiff signs under penalty of perjury to verify the accuracy of the information provided.[109]

The Eastern District processes inmate IFP applications in the same manner as noninmate applications, by relying on the plaintiff's signature to verify his or her resources.[110] If the resources reported demonstrate impoverishment, then the court reviews the plaintiff's complaint to determine whether it is "frivolous" or "malicious."[111]

Third, inmates' civil rights cases appear to take longer to resolve than other types of civil cases. For a selected set of cases, the average duration of an inmate case is at least 260 days, approximately 100 days longer than other civil cases filed in the same time period.[112] As discussed below, the time delay may be significant in certain types of cases.[113]

C. THE QUESTION OF "MERIT": HOW MANY INMATE CASES REALLY MAKE A DIFFERENCE?

1. *Numbers of Cases*

Regardless of the work involved and the cost imposed, legal merit is the acid test which ought to determine whether inmate civil rights

109. Interviews with Tim Hinkle, Pro Se Writ Clerk, Rebecca Landis, Staff Attorney and John Moulds, Eastern District Magistrate Judge (Aug. 3, 1994). Jurisdictions other than the Eastern District may use different IFP applications for inmates than for noninmates. One alternative form used elsewhere in California requires that CDC staff confirm the amount in an inmate's trust account. Without such confirmation, the form and complaint are returned to the inmate for refiling. While some Eastern District inmates use this kind of form, evidently because it is stocked at state institutions, virtually no Eastern District inmate applications include actual staff confirmation, and in screening applications court staff do not look to see whether confirmation is provided. *Id.* As this Comment goes to press, legislation has been introduced in the 104th Congress which would require that a court investigate the nature of an inmate's assets with the institution where he or she is confined. *See infra* note 210.

110. *Id.* If a defendant challenges the inmate's IFP application, then the court will examine the matter more closely, with the burden on the defendant to prove the plaintiff wrong. According to the California Attorney General's office, the one time it did challenge an inmate's IFP request, its motion was dismissed for lack of standing. *See* Letter from Joan Cavanagh, *supra* note 98.

111. This determination is made under 28 U.S.C. § 1915(d). *See supra* note 104; *cf. infra* note 210. If the cases filed in April 1991 are any indication, many inmate cases are not dismissed outright as frivolous. Of the fifty-three cases filed in April 1991, only nine were dismissed as frivolous. *See* Appendix C. However, quite a few inmate plaintiffs were granted IFP status, only to have their complaints dismissed the same day with leave to amend. *Id.*

112. *Compare* PENDING AND TERMINATED CASES REPORT AS OF RUN DATE 05/19/94 (1991) (reporting inmates' civil rights cases filed April 1991; "Days Pending" reported for each case), *with supra* note 107 (providing the same information for noninmate cases). Regarding the selected set of cases, *see infra* note 119.

113. *See infra* notes 124-34 and accompanying text. This is true despite the Eastern District's current efforts to triage those cases that appear to involve serious medical claims early on.

cases belong and proceed in federal court.[114] The challenge for a dispassionate observer and researcher of inmate cases is to arrive at a reasonable definition of merit, and then to objectively measure how many inmate cases have merit as defined.

Because so few inmate cases ever reach trial, determining merit on the basis of trial outcomes would be shortsighted.[115] Such a method would overlook those cases in which an inmate plaintiff obtains some kind of relief through pretrial settlement. Because the California Attorney General does not make a practice of settling inmate cases for nuisance value,[116] settlements in the Eastern District represent some acknowledgement by the State of the potential validity

---

114. Not surprisingly, the legal merit factor often is diminished if not ignored entirely in the current public dialogue over inmate litigation. As the political debate over inmates' civil rights cases heated up in 1994, state corrections officials and attorneys general compiled lists of inmate cases for public consumption. While based on real cases, these lists included only cases deemed legally frivolous, and failed to include any meritorious cases. *See, e.g.*, MEMORANDUM, "FRIVOLOUS" LAWSUITS BROUGHT BY CALIFORNIA INMATES, CALIFORNIA ATTORNEY GENERAL'S OFFICE (provided by Deputy Attorney General Kenneth C. Young) (July 19, 1994) (noting foremost Denton v. Hernandez, 504 U.S. 25 (1992), in which an inmate alleged twenty-eight separate rapes but could not remember any details — a particularly complex case, in part because the inmate plaintiff, a graduate of University of California at Berkeley, was an involuntarily medicated schizophrenic; *Denton* was remanded twice to the Ninth Circuit by the Supreme Court; also noting Howard v. Marshall, No. C-90-0152 (N.D. Cal.), in which inmate alleged the correctional officials implanted an electronic device in his brain to control his thoughts). *See also* FRIVOLOUS LAWSUITS WE HAVE HANDLED, NEVADA ATTORNEY GENERAL'S OFFICE (provided by Deputy Attorney General Ann Cathcart) (Mar. 1994) (featuring a "hacked up cake" case, a "small shoes" case, and the well-publicized "peanut butter" case, in which an inmate reportedly ordered two jars of chunky peanut butter and sued when he received one jar each of creamy and chunky); *but see* Telephone interview with Richard Owens, Staff Attorney, Nevada District Court (Mar. 1994) (stating that claim underlying peanut butter case was one of theft; evidently, the inmate's trust account was charged but he did not receive the peanut butter until well after his suit was filed). Several major television programs have produced features on frivolous cases, implying that most if not all cases filed by inmates are petty and absurd. *See, e.g.*, *20/20; The Great Prison Pasttime* (ABC television broadcast, July 29, 1994) (suggesting as reported by John Stossel, that the cost of inmate litigation hindered the rebuilding after Hurricane Andrew and the expansion of the national Head Start program; interviewing inmates who filed suits over a lunch served without salad, a broken lens in a pair of glasses, and excessive force when it turned out an inmate used an ice pick to stab the officer who hit him with a flash light).

115. In other words, a traditional understanding of legal merit does not fully illuminate what is going on with inmate cases. *See* BLACK'S LAW DICTIONARY 843-44 (6th ed. 1995) (defining judgment on the merits as "one rendered after argument and investigation, and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or formal or merely technical or procedural point, or by default and without trial"). However, the same is true for civil cases filed by noninmate plaintiffs, of which more than 95% are disposed of prior to trial through summary judgment and dismissal. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 202-05 (1992) (stating that only 3.5% of all civil cases reach trial; 2.7% of all federal question actions reach trial; 3.5% of private inmates' civil rights cases reach trial).

116. Cavanagh interview, *supra* note 88.

of an inmate's claim. Therefore, for the purposes of this Comment, meritorious inmate cases are understood to mean those cases in which an inmate secures a judgment at trial or a pretrial settlement of his or her case.[117]

Because summary statistical information is not kept on the outcomes of inmate cases, the most accurate method for measuring how many inmate cases have merit, as here defined, is to identify a manageable set of cases, pull the case files, and record objectively each step and endpoint in the life of those cases.[118] This method, which can be called the "objective recording method," exposes the researcher to unique wrinkles in inmate litigation, and can provide insights into the hurdles faced by inmates as pro se plaintiffs.

The "manageable set" of inmates' civil rights cases for the purposes of this field research is the fifty-three actions filed in the Eastern District of California in April 1991.[119] As outlined in Figure D, of these actions, five were transferred to another district shortly after initial filing, and six were still pending at the time the field research for this article was conducted. Therefore, results were available for forty-two cases.

Applying the objective recording method to these cases reveals that at least six of the forty-two cases, or more than 14%, appear to have made some kind of difference for their inmate plaintiffs.[120] One

117. One magistrate judge in the Eastern District suggests that the inquiry should be framed in terms of: "How many cases ultimately make a difference for the inmate, once all is said and done?" Interview with John F. Moulds, Eastern District Magistrate Judge (Jan. 20, 1994).

118. This method was suggested by Eastern District staff attorney Haven Gracey, telephone interview (May 1994) [hereinafter Gracey interview]. For detailed tables demonstrating the results of this analysis, *see* Appendix C. For a discussion of the steps in the Eastern District's management of inmate cases, *see supra* notes 84-90 and accompanying text.

119. The author chose April 1991 with the assistance of court administrative staff, to ensure that most cases filed had been resolved. This month was selected based on a review of the court's hearing docket. Because case numbers begin with the last two digits of the year in which a case is filed, it is relatively easy to get a sense of when cases currently being heard were filed. The majority of cases being heard in the Eastern District in the Spring of 1994 were filed in 1992, with a few filed in 1991. Interview with Carol Davis, Office of the Clerk of the Court, Eastern District (Feb. 15, 1994).

120. Other "shortcut" methods for evaluating case filings are available, but far less precise. For example, as noted, comparing the fate of inmate cases with that of other types of cases heard in federal court, inmate cases seem to have similar overall "success." *See supra* note 115.

Another method would attempt to assess how many cases would result in judgment for the plaintiff if pursued on grounds other than civil rights. Such alternative grounds might include state medical malpractice and personal injury claims. Letter from Joan Cavanagh, *supra* note 98. Even though the plaintiff's burden is much lower in California, inmates tend not to pursue these kind of state actions, perhaps due to procedural hurdles. *Id.* For instance, a personal injury claim must first be submitted to the California Board of Control within prescribed time limits. Medical malpractice claims can

FIGURE D

SUMMARY OF OUTCOMES: INMATES' CIVIL RIGHTS CASES
FILED IN THE EASTERN DISTRICT IN APRIL 1991

53 total cases filed

5 Transferred to other district

6 Cases still pending

Cases resolved against plaintiff or abandoned

5.5 Summary judgment granted

9 Dismissed as frivolous

5 Dismissed for failure to state valid claim

1 Dismissed for lack of prosecution

4 Dismissed for lack of proper mailing address

10.5 Dismissed for plaintiff's failure to respond to court order

1 Trial, with decision for defendant

Cases in which plaintiff obtained some relief

6 Dismissed based on settlement of case

went all the way to trial, although the inmate plaintiff ultimately lost the jury decision.

Analyzed another way, at least 31% survived summary judgment or dismissal on a range of grounds in the early stages after filing.[121] Of noninmate civil cases filed in the same month, 42% survived dismissal or summary judgment.[122] In other words, for the month analyzed at least, inmate cases are somewhat less likely than the caseload as a whole to survive dismissal or summary judgment.

2. *Types of Cases*

Looking to the types of cases filed, a review of actual complaints for the fifty-three cases filed in April 1991 reveals the following breakdown:

- Ten cases challenging inadequate medical or psychiatric care.

---

be prosecuted through the CDC's 602 process, but it requires notice to the named doctor. *Id.*; Cavanagh interview, *supra* note 88.

121. In this case, "survival" includes cases settled (6), heard at trial (1), and pending (6). *See* Figure D. If cases transferred to other districts are included, the percentage climbs to 43.

122. *See* CIVIL DOCKET REPORTS, PENDING AND TERMINATED CASES FILED IN APRIL 1991 (noninmate cases) (on file with author).

- Six cases each attacking confinement in Administrative Segregation, complaining of inadequate physical protection from other inmates making multiple claims, or Eastern District files not available at the time this research was conducted.
- Five cases alleging excessive force by prison personnel.
- Four cases alleging confiscation of legal property.
- Three cases challenging denial of access to law libraries.
- Two cases each attacking custody classifications, and seizure of personal property.
- One case each complaining of sexual harassment of a female prisoner by male guards, unfair discipline, and breach of privacy.[123]

a. Medical Cases

While acknowledging the lack of comprehensive quantitative information on the types of cases which tend to have the most merit, Eastern District judges, staff attorneys, and staff at the California Attorney General's Office agree that medical and mental health cases as a class are deserving of special attention.[124] This belief is informed by a deep appreciation for the law on inmates' medical care,[125] and supported by anecdotal experiences with cases in which an inmate's condition was sufficiently critical or obviously in need of treatment and

---

123. *Cf.* AG COMPUTER LOG, *supra* note 96 (including information on twenty-seven of the fifty-three cases filed in April 1991). A summary of the types of underlying claims for these cases is as follows:

Administrative Segregation or Other Discipline - 6 cases
Deliberate Indifference to Threat of Injury - 4 cases
Denial of Access to Courts - 4 cases
Excessive Force by Staff - 4 cases
Inadequate medical care - 3 cases
Retaliation by Staff for Filing of Grievances - 1 case
Violation of Privacy/Sexual Harassment - 1 case
Multiple claims - 4 cases

Id. For a more detailed summary of these cases, also including information on how many requested damages, *see* Appendix D.

124. Interviews with Eastern District Judge David F. Levi, Magistrate Judges Moulds and Hollows (Spring 1994); Attorneys General David Stirling and Kenneth C. Young (May 2, 1994).

125. Denial of medical treatment to inmates, or provision of inadequate treatment, is one of five categories of actionable constitutional wrongs against inmates recognized by the Supreme Court. *See* LEON FRIEDMAN, NEW DEVELOPMENTS IN CIVIL RIGHTS LITIGATION AND TRENDS IN SECTION 1983 ACTIONS, *in* 1 SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEYS' FEES 1992: CURRENT DEVELOPMENTS 325 (PLI Litig. & Admin. Practice Course Handbook Series No. H-448, 1992). Other categories are excessive force, improper conditions of confinement, denial of claims of entitlement without due process, and restriction of the right to communicate and to worship. *Id.*

the CDC had notice of the condition, yet failed to act promptly and appropriately.[126]

In one case, filed in April 1991, an inmate sought a bone marrow transplant for his leukemia, as an alternative to the chemotherapy prescribed by CDC medical staff.[127] One of the inmate's complaints was that the chemotherapy made him ill. The CDC responded that bone marrow transplants were experimental and therefore unjustifiable. Within three months of filing his suit, the inmate died, reportedly choking on his own vomit after becoming ill, possibly as a result of a chemotherapy treatment. After his death, the inmate's case was prosecuted by appointed counsel who secured a settlement for the inmate's estate.[128]

In another relatively recent medical case, CDC medical staff failed for nearly two years to administer treatment to an inmate with a severe but curable hemorrhoid condition, despite a doctor's instructions to provide urgent care. While the inmate was not able to offer the proof required for a damages award, the magistrate judge in the case issued a strongly worded order of injunctive relief.[129]

In yet another case ultimately settled by an Eastern District judge, a transsexual inmate filed suit after being denied hormone treatments.[130] The CDC fought the action for an extended period, ap-

---

126. *See* Gates v. Deukmejian, 987 F.2d 1395 (9th Cir. 1982). Cases elsewhere suggest that the Eastern District's anecdotal experiences are part of a more widespread pattern. *See, e.g.,* Madrid v. Gomez, No. C90-3094-TEH, 1995 U.S. Dist. LEXIS 841 (N.D. Cal. 1995). *See also* Kim Christensen, et al., *Inmate Deaths: Treatable Ailments Have Proven Fatal in a Prison Infirmary That Sometimes Doesn't Provide Prompt or Adequate Medical Care,* ORANGE COUNTY REGISTER, July 30, 1990 (reporting on series of deaths at Frontera women's institution in cases where women inmates died due to treatable complaints including eating disorders, asthma, and diabetes); Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard,* 45 VAND. L. REV. 921, 922 n.7, 931-32 (1992) (noting news reports and cases involving inadequate medical care).

127. *See* McCoy v. Thor, No. 2:91-CV-0500 (E.D. Cal. Apr. 24, 1991). Details on this case were obtained in a telephone interview. Telephone interview with Rebecca Landis, Eastern District Staff Attorney (July 27, 1994).

128. San Francisco attorney Amitai Schwartz, a Section 1983 litigation specialist, served as court-appointed counsel. The case was settled for $55,000 in October 1992.

129. *See* Asgari v. Textor, No. CIV-S-88-0071 (E.D. Cal. Sept. 1992). The court dismissed the action against individual defendants, because the plaintiff was unable to prove that the Chief Medical Officer and other personnel he named in his complaint actually knew for two years that he needed care, as required by *Monell v. Department of Social Serv.,* 436 U.S. 658 (1978). Having determined that CDC's treatment of plaintiff amounted to "deliberate indifference" and "the medical services delivery system . . . was breaking down — at least for plaintiff," the court directed the Medical Officer to arrange for immediate consults and treatment as medically necessary. The court maintained the action against the defendants in their official capacity so that further injunctive relief could be ordered if necessary. *Id.* (Mem. and Order, Judgment as Matter of Law (Sept. 1992)).

130. Interview with David F. Levi, Eastern District Judge (March 1994) [hereinafter Levi interview].

parently concerned about the liability associated with potential adverse consequences of the treatment.[131] As a result of settlement discussions, the inmate released the CDC from liability, in exchange for the desired treatment. The story suggests that the case could have been resolved easily, earlier, and more cheaply out of court.

b. Excessive Force Cases

Cases other than those attacking prison medical care also may deserve early attention. Use of excessive force by prison staff is a second category of claim worthy of close examination.[132] In alleging excessive force, an inmate usually also is seeking damages to compensate for injury.[133]

In these cases, a determination of merit often depends on the credibility of both the plaintiff and the defendant, their accounts of what happened, and the credibility of eye-witnesses. For these reasons, to counter the additionally confounding effects of time on parties' and witnesses' memories, independent fact-finding would be enhanced by a review as close in time as possible to the alleged event.[134]

D. Eastern District Cases Reviewed

To summarize what we now know about Eastern District inmates' civil rights cases: (1) some number begin as grievances in the CDC — it is not clear exactly how many, most persons involved with the caseload believe it is "most"; (2) virtually all cases are filed pro se and proceed in forma pauperis; (3) cases may take longer to resolve than other types of civil cases.

Based on the April 1991 sample studied for this Comment, quite a few cases are dismissed or otherwise resolved against the inmate plaintiff. However, as many as fourteen may state a claim sufficient to induce some form of relief through settlement. At least 31% withstand dismissal or summary judgment.

These conclusions are necessarily tentative, based on the small sample size evaluated here, and the lack of comprehensive statistics

131. The CDC also may have felt it should not be required to provide treatments that would not be covered by standard Health Maintenace Organization or health insurance plans. Letter from Joan Cavanagh, *supra* note 98.

132. Levi interview, *supra* note 130. As noted, excessive force is one of the categories of actionable constitutional wrongs against inmates recognized by the Supreme Court. *See supra* note 125.

133. *See* Appendix D.

134. As noted, despite the conscientious current process, timely review is not necessarily guaranteed. *See supra* note 113.

otherwise available. However tentative, they at least are founded on empirical information and analysis.[135]

IV. OPTIONS FOR RESPONDING TO INMATES' CIVIL RIGHTS CASE FILINGS

A. Expanded Data Collection

Given the lack of systematic data on inmates' civil rights cases, the most pressing need is for better data collection efforts. A first helpful step would institute enhanced data collection efforts at federal courthouses, and arrange for "matching" of federal court data with grievance statistics maintained by state agencies like the California Department of Corrections ("CDC"). Specific information which ought to be developed includes the number of cases in which inmates voluntarily exhaust existing state grievance procedures before filing in federal court,[136] and the types of inmates' civil rights cases filed.[137]

Furthermore, if any modification to existing inmate case management procedures is made, information should be gathered to allow an informed evaluation of the modification's results. For instance, if a jurisdiction implements a filing fee for inmates, it should monitor the number of inmates who proceed after paying the prescribed fee, and evaluate overall increases or decreases in the rate in inmate filings, as well as the effect on the number of "meritorious" cases filed. Particularly, in light of the newly-amended provision in the Civil Rights of Institutionalized Persons Act ("CRIPA") authorizing a stay of 180 instead of ninety (90) days if an inmate has not exhausted a certified grievance procedure,[138] the federal courts ought to monitor the effect of this provision on the rate of inmates' civil rights case filings. Of course, not all correctional institutions and courts have felt constrained by a lack of data in fashioning responses to the inmates' civil rights caseload. A range of responses currently being pursued or discussed throughout the country is discussed below, beginning with those responses closest to the source of the inmates' complaints.

---

135. In the course of this project, the author did not find anyone else who has conducted the kind of empirical analysis have attempted in this Comment. One staff attorney in Utica, New York, has analyzed the effect of filing fees on inmate filings, *see infra* note 207. Otherwise, practitioners seem to rely on the separate and incompatible summaries of grievances and court cases filed each year, *see supra* notes 67-81 and 91-98 and accompanying text, as well as their own "gut sense" of how things ought to be improved.

136. *See supra* note 94.

137. *See supra* note 96.

138. *See supra* note 43.

B. ATTACKING ROOT CAUSES CLOSE TO HOME

1. *Preventive Management*

To the extent inmates' civil rights complaints reflect real problems in prison facilities, one way to preclude litigation is for a state department of corrections to solve those problems close to home. A department head can incorporate a "preventive" philosophy in his or her management style.[139] Alternatively, the department can institutionalize a program of preventive management and require all staff to participate in implementation.[140]

A preventive management program could use grievance logs, like the CDC's 602 records, as management tools.[141] Prison administrators could be required to review the logs on a periodic basis to see if any trends are apparent.[142] For those types of grievances that are particularly numerous, the prison administration could determine whether and how to address the underlying problem. For example, because medical grievances are among the most common in California's Eastern District,[143] administrators there could consult with independent medical and legal experts to determine if changes are needed to meet medical and legal standards sufficient to pass constitutional muster.[144]

139. According to one off-the-record source, the late CDC manager Jack Reagan took this approach: "He had the guts to tell prisons to clean up their acts when they needed to. They didn't necessarily like it, but he was willing to stare them down."

140. Currently, the CDC appears to engage in limited preventive management. For example, when an access problem at one prison library arose, the CDC set up a task force to review access at all existing and planned institutions. McGrath interview, *supra* note 49. One local California prison administrator who has received recent attention for his unique preventive management approach is Michael Marcum, a former inmate now serving as assistant sheriff in San Francisco. *See* 60 Minutes: *Michael Marcum* (CBS television broadcast, Mar. 26, 1995) (reporting that physical design of facility and prison programs are geared to severely limit the time that inmates have to interact solely with each other and thus prevent development of an inmate culture permanently set against the prison administration).

141. If CDC were to start logging informal grievances as well, it could enhance its ability to identify problems even closer to the source. *But see supra* note 67 (noting that such information is not currently maintained).

142. *See* INMATE APPEALS ACTIVITY, *supra* note 68 (alluding to this possibility on page 1: "Significant statistical variations between years, between institutions of similar size and mission, between appeal levels, and in the rate of appeals filed and appeals granted can underscore program and policy areas that should be examined for potential revision").

143. *See supra* note 80.

144. Evidently, this approach would represent a significant departure from current management practices at some facilities. *See supra* note 140. Even if the CDC does identify issues proactively, bureaucratic hurdles can delay development and approval of plans.

2. Expanded Work and Rehabilitation Programs

Another prison management approach to reducing inmate litigation might address inmates' "free time" and the lack of constructive alternatives as contributors to civil rights filings.[145] Such a solution would include elements such as a vastly expanded work program or other structured rehabilitation efforts for all inmates.[146] Because it would involve fundamental prison reform, and require increased public expenditures on inmates rather than on the walls that house them, such a solution has not been embraced by policymakers in the current political climate.[147]

Despite the hurdles, state correctional officials ought to feel some incentive to manage preventively. By doing so, they can decrease the "threat" of federal courts managing the prisons for them.[148] And this threat is not an idle one. There is no shortage of examples — including recent cases in the Eastern District — where the courts have intervened and exercised their powers of declaratory and injunctive relief to raise prison standards.[149]

---

145. *See supra* note 49.

146. Although beyond the scope of this Comment, such a reform effort would have to be designed to meet legal standards for inmate work programs articulated in statutory and case law. For example, according to Deputy Attorney General Ken Young, inmates must be provided "meaningful" work and not "make work." Young Interview, *supra* note 60.

147. *But see* new federal legislation which would require work programs in prisons. *See* S. 3, *supra* note 7; *see infra* note 210.

148. Given CDC officials' aversion to court interference, this would seem a very powerful incentive. Joe McGrath is probably typical when he says, "Corrections should be left to Corrections people." McGrath interview, *supra* note 49.

149. *See, e.g., Gates*, 987 F.2d at 1395 (issuing a consent decree requiring a minimum three year reporting and mediation process for development of a prison operating plan in a case attacking medical and psychiatric care, conditions of confinement, and handling of HIV-infected inmates at the California Medical Facility and the Main Northern Reception Center); Coleman v. Wilson, CIV-S-90-0520 (E.D. Cal. June 6, 1994) (finding constitutional violations based in part on the housing of inmates on psychotropic drugs in severely overheated facilities and recommending appointment of a special master for three years to monitor compliance with court-ordered injunctive relief in a case challenging quality of mental health care in California penal institutions); Madrid v. Gomez, No. C90-3094-TEH, 1995 U.S. Dist. LEXIS 841 (N.D. Cal. Jan. 10, 1995) (regarding high security Pelican Bay facility, culminating in the court's appointment of a Special Master to oversee development of a remedial plan to correct constitutional deficiencies in medical and psychiatric care, and in the form of repeated use of excessive force).

As noted above, under CRIPA, the DOJ may seek injunctive or declaratory relief if prison conditions are extremely serious, affect a prison population as a whole, and are not addressed in a timely manner by a state corrections administration. Even prior to CRIPA, the DOJ initiated high profile actions in the states of Arkansas and Texas. The Arkansas case in particular was addressed to egregious examples of systemic abuses, including cruel and unusual punishment in the form of whippings with a leather strap, extremely hazardous living conditions, not to mention widespread corruption. For the cases demonstrating the evolution of the courts' response to the Arkansas and Texas cases, *see* OWEN FISS & DOUG RENDLEMAN, INJUNCTIONS, 529-804.

C. Improved or Enhanced Grievance Procedure

1. CRIPA-Certified Procedures

In originally passing CRIPA, Congress envisioned that many inmate complaints could be resolved, and litigation precluded, through an inmate grievance procedure.[150] Currently, correctional authorities in nineteen jurisdictions[151] administer a CRIPA-certified grievance procedure. Several of these states had some kind of procedure in place before CRIPA was passed.[152] Almost all certified procedures share certain virtually identical features,[153] including: specific "exclusions" for types of complaints not covered by the program;[154] a standard form for reporting a grievance; at least one level of informal appeal and three levels of formal appeal; written responses to appeals; conflict of interest provisions governing employees and inmates; emergency provisions; confidentiality guarantees; and prohibitions against reprisals based on use of the procedure.

At the same time, while all certified states define some role for inmates, as required by the law,[155] the exact roles vary greatly. Some states allow inmate representatives to sit on a committee with prison personnel, and to participate in decisions regarding inmate grievances.[156] Most, however, do not give inmates any decision-making authority, and instead allow only written input. The written input may

---

150. *See supra* notes 38-43 and accompanying text.

151. *See supra* note 48 and accompanying text. For a chart summarizing these state programs, *see* Appendix F.

152. Nine jurisdictions responded to a request for information on their procedures before CRIPA certification. Of these, six indicate that their procedures were substantially similar before as now (District of Columbia, Florida, Montana, New York, North Carolina, and Ohio). Three jurisdictions had different, less formal procedures (Connecticut, Montgomery County, and Louisiana). *See* responses to mailed request (on file with the author); *see also* Appendix F; results of a 1977 nationwide survey of state inmate grievance programs reported summarily in the Aldisert Report, *supra* note 8, at n.41 (noting that in 1977, fourteen states had some kind of grievance procedure, and eleven had programs using ombudsmen).

153. These shared features reflect the federal requirements found in the CRIPA statute and regulations. *See supra* note 42 and accompanying text.

154. For example, procedures may exclude complaints regarding: state and federal laws and regulations, state or federal court decisions, disciplinary measures, classification decisions, parole decisions, work release assignments, publications review, property loss, personal injury, lockdown review, concerns of other inmates, sentencing board decisions, professional actions of employees performing their assigned duties, time credit matters, use of profanity, or other matters beyond the control of the department of corrections. *See* grievance procedures for the jurisdictions listed *supra* notes 45 & 47 (originals on file with the author).

155. *See supra* note 43 and accompanying text.

156. Montana and New York give inmates a limited decision-making role through participation of inmate representatives on a committee which reviews grievances related to general policy matters. *See* Montana State Prison Inmate Grievance Procedure 5-6 (effective Jan. 1993) (describing the Grievance Advisory Board); State of New York Department of Correctional Services Inmate Grievance Program 3-5 (effec-

be in the form of comments on a proposed grievance procedure,[157] or a petition process.[158]

In the same way that California does not monitor the effects of its 602 procedure on inmate litigation, most states with certified procedures do not maintain records to demonstrate the impact of certification on the number of inmates' civil rights suits filed in their federal district courts. However, most officials feel that their procedure either has reduced civil rights case filings or at least slowed the growth in litigation.[159] Even states which had a grievance procedure in place

---

tive Nov. 27, 1991) (providing for the Inmate Grievance Review Committee with two voting inmates, two voting staff, and one nonvoting chair).

157. *See, e.g.*, IOWA DEPARTMENT OF CORRECTIONS, DIVISION OF INSTITUTIONS, GRIEVANCE PROGRAM 3 (Mar. 1983) (allowing for written comment on grievance policy itself, implemented by posting copy of policy at least thirty days prior to initial implementation); KANSAS DEPARTMENT OF CORRECTIONS, GRIEVANCE PROCEDURE FOR INMATES AND PAROLEES § 44-15-105a (1993) (providing for written comments on effectiveness and credibility of grievance process once a year). With regard to Iowa's procedure, the program's coordinator was adamant: "We had no intention of giving inmates any decision-making authority." Telephone interview, Fred Scaletta, Iowa Dep't of Corrections, Grievance Coordinator (May 2, 1994).

158. *See* NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, INMATE GRIEVANCE PROCEDURE 5 (1987) (establishing requirements for petitions which may be circulated to challenge "general department policies and practices").

159. The office of the Attorney General of Missouri perhaps says it most clearly: "At best, we can compare the number of cases filed and conclude that the certified grievance procedure was one of many factors contributing to the reduction in the inmate lawsuits." Letter from Bruce Farmer, Deputy Chief Counsel, Litigation Division, Attorney General of Missouri, June 9, 1994, at 1. The State of Iowa has prepared a chart showing the raw numbers of Section 1983 actions filed both before and after certification of its grievance procedure, but does not offer definitive conclusions regarding the procedure's impact. *See* CORRECTIONS' LAWSUITS FILED UNDER CIVIL RIGHTS ACT, 42 U.S.C. § 1983 (showing 176 (1984) and 114 (1985) lawsuits filed annually for the two years preceding initial certification; and for the eight years following certification, 161 (1986), 157 (1987), 125 (1988), 166 (1989), 188 (1990), 177 (1991), 245 (1992), and 227 (1993) lawsuits filed respectively). At this writing, the New York grievance procedure has been in effect just over one year. During that year, the New York Correctional Services Department reports increased grievance activity and appeals. However, "it is too early to determine the impact of the [grievance procedure's] certification on . . . litigation." NEW YORK STATE CORRECTIONAL SERVICES, INMATE GRIEVANCE PROGRAM YEAR END REPORT 1 (1993). A few summary notes on officials' views of the effect of certification on inmates' civil rights litigation are included in Appendix F *infra*. Additionally, the Federal Courts Study Committee Report also notes the value of even slight reductions in caseload. *See supra* note 54 and accompanying text.

At least two states note that the grievance procedure appears to have helped reduce the rate of grievances filed within their departments of correction. *See* SUMMARY OF INMATE GRIEVANCE STATISTICS, MISSOURI DEPARTMENT OF CORRECTIONS (attached to letter from Shirley Marquez to the author of May 16, 1994) (noting that between 1989 and 1991 total grievances filed fell by 64%, and total internal appeals by 36%); INMATE POPULATION VS. LEVEL 1 LINE GRIEVANCES (attached to letter from Thomas Rodriguez to the author of Mar. 11, 1994) (showing that "although our incarcerated population has increased dramatically [between 1990 and 1994] inmate activity in those areas are [sic] pretty stable"). In 1994, the Ohio Department of Rehabilitation and Correction started tracking the number of grievances filed by each inmate, and in the process determined that one inmate in particular had filed fifty-three grievances. Telephone interview with

before certification report an improved process of resolution following approval by the United States Department of Justice ("DOJ") of their procedure.[160] Only one state, Nevada, experienced problems following adoption of its procedure,[161] which led to its abandoning certification altogether.[162]

No states with certified grievance procedures report problems associated with federal government "surveillance" or interference, either in the operation of their grievance programs or in their prison systems as a whole.

2. California's Non-CRIPA-Certified Procedure

California's 602 procedure[163] is similar to procedures certified by the DOJ, with one major disqualifying exception: California does not provide for inmate participation in the grievance process in any form whatsoever, whether advisory or through written comments.[164] On the other hand, California excludes fewer issues from its 602 process than those states with certified procedures.[165]

However, California officials resist CRIPA certification,[166] for at least four reasons. First, Attorneys General argue that without a requirement of full exhaustion, rather than a temporary stay, certification is not worth the effort.[167] Second, corrections officials express

---

Jeff Mathew, Assistant Chief Inspector, Ohio Department of Rehabilitation and Correction (May 11, 1994).

160. This improvement was noted by Tim Madden of the Kansas Department of Corrections, who observed that "[b]ecause all of our facilities are accredited, they are doing a lot of paperwork anyway. The paperwork generated as a result of the [grievance] procedure is particularly helpful in preparing defenses in civil rights litigation." Telephone interview, Tim Madden, Kansas Dep't of Corrections (May 1994). *See* Appendix F.

161. According to one well-placed observer, Nevada inmates organized to "bust" the grievance system. The prison population of less than 6,000 inmates filed more than 7,000 grievances the first year the system was in place. Evidently they were protesting the ninety day continuance provision in CRIPA. Telephone interview with Frankie Sue Del Papa, Nevada Attorney General (Mar. 11, 1994).

162. Even though Nevada has abandoned CRIPA certification of its grievance procedure, it maintains a grievance procedure at its prisons. Interview with Ann Cathcart, Nevada Deputy Attorney General (Aug. 5, 1994). To reduce its litigation workload, Nevada now has turned to a "phone triage system," described below. *See infra* notes 226-30 and accompanying text.

163. *See supra* notes 60-66.

164. McGrath interview, *supra* note 49. For comparison purposes, California's procedure is summarized in the table included as Appendix F. For CRIPA's requirement that inmates participate, *see supra* note 42 and accompanying text.

165. *See supra* notes 62 & 154 and accompanying text.

166. One staff Attorney General admitted that "the only way to find out [if it would make a difference] is to try it." Interview with Joan Cavanagh, Supervising Deputy, Office of Cal. Attorney General (Jan. 27, 1994).

167. *See* Letter from Deputy Attorney General David Stirling to District Judge David F. Levi at 1 (Nov. 20, 1992) (written when the federal statute authorized a ninety

concern that federal DOJ staff will require too high a level of inmate participation, compared to the state's notion of proper prison administration which relies on minimizing inmate autonomy.[168] Third, the state generally is unwilling to cede any degree of control over prison operations to the federal government, particularly when federal prisons are not held to the same standards.[169] Finally, some officials are concerned that modifying the existing grievance procedure to make it appear more responsive[170] could lead to even more grievances, and ultimately more lawsuits.[171] The experience of most other states with CRIPA-certified procedures suggest that this latter concern at least is unwarranted.[172] But unless or until data are available to demonstrate whether certified grievance programs clearly are more effective

(90) day stay). *Cf.* This is similar to Nevada's experience, the view of the staff of the Maryland federal court that "a [ninety] day stay simply means a [ninety] day delay before we start working on the cases." Interview with Chief Magistrate Judge John F. Moulds (Jan. 20, 1994). No other states' representatives report that the stay provision is ineffective or counterproductive. Moreover, courts generally cannot require exhaustion as an absolute precondition to bringing a Section 1983 claim. *See* Patsy v. Board of Regent, 457 U.S. 496 (1982).

168. *See supra* note 167 (discussing letter from David Stirling to Judge Levi); McGrath interview, *supra* note 49. *But see supra* notes 156-58 and accompanying text (setting forth information on the DOJ's recent certification of procedures with a bare minimum of inmate participation). *See supra* notes 173-81 and accompanying text (discussing the more localized alternative available in judicial certification].

169. McGrath interview, *supra* note 49. Federal prisons are exempted from coverage by CRIPA, which defines "institutions" covered by law as those facilities operated by a "State or political subdivision of a State." *See* 42 U.S.C. 1997a(1)(A) (1988); 126 CONG. REC. H. 8575 (daily ed. Apr. 22, 1980) (Representative Kastenmeier's presentation of the conference committee report, explaining that the requirement of relationship to a state is "drawn from cases which already have been decided under the State action provisions of the fourteenth amendment. It is the intention of Congress that institutions covered by this Act partake in some significant respect of the qualities of a State or public institution."). The specification of state institutions in the law appears to respond to concerns regarding private facilities. *See* 126 CONG. REC. H 10782 (1980) (statement of Representative Gudger preceding floor vote, commending the conference committee for "narrow[ing] the right of action by the Department of Justice to the situation where the institutionalized are only those who are in a facility operated by a State or one of its political subdivisions as distinguished from a State licensed private facility").

CRIPA does address federal institutions by requiring that the AG include information on these institutions' compliance with constitutional standards in an annual report to Congress. 42 U.S.C. § 1997f (1988). *See* 126 CONG. REC. H 8577 (daily ed. Apr. 22, 1980) (Representative Kastenmeier notes "the Attorney General will be expected to report on the progress made in each Federal institution toward meeting the standards expected of the State institutions").

170. This would be accomplished by incorporating some form of inmate involvement, however minimal, in the grievance process.

171. *See supra* note 124 (discussing interviews with California Deputy Attorneys General Dave Stirling and Ken Young). Moreover, in an off-the record conversation, one staff attorney for the state half-joked that he used to think it was better to have inmates in the law library than rioting in the prison yard, but now he's starting to wonder.

172. *See supra* note 159.

than noncertified programs, there is no compelling reason for states like California to pursue federal certification.

3. Judicial Certification under CRIPA

As an alternative to DOJ certification, CRIPA grants federal district judges the authority to certify a grievance procedure.[173] This option allows for more localized development of a procedure. Under current law,[174] a federal judge still must determine that a procedure meets the same federal standards which guide DOJ certification.[175] But at least judicial certification occurs without any physical intervention or interaction with the federal bureaucracy located in Washington, D.C., which some state representatives would consider a plus.[176]

To date, only one federal district court judge — Judge Frank Polozola from the United States District Court for the Middle District of Louisiana — has exercised his authority to certify a procedure.[177] Both the judge and state corrections staff in his jurisdiction report great satisfaction with the results.[178] Because the procedure was adopted in 1993, it is too early to tell whether the procedure will have an effect on the rate of case filings in Louisiana.[179]

173. 42 U.S.C. § 1997e(a)(2) (1994). This section provides that "[t]he exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified *or the court has determined* that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated . . . or are otherwise fair and effective." *Id.* (emphasis added). While it appears that California representatives have discussed certification with the DOJ, there is no record of the state ever having submitted its procedure formally for certification purposes. Interview with Kenneth C. Young, Deputy Attorney General (May 1994).

One commentator believes that judicial certification could be problematic if a state previously submitted its procedure to the DOJ and was denied certification. *See* Sarira Alexander, *Can Courts Impose a Requirement of Exhaustion of Administrative Remedies in Section 1983 Cases?* (Spring 1993) (unpublished seminar paper, Hastings School of Law). Alexander suggests that this is the situation confronting the state of California, but does not offer proof of California's official rejection by DOJ. *Id.*

174. As this Comment goes to press, bills have been introduced in the 104th Congress which would modify current law. *See* S. 3, *supra* note 7.

175. *See supra* note 42 and accompanying text.

176. *See supra* note 169 and accompanying text.

177. *See* ADMINISTRATIVE REMEDY PROCEDURE (M.D. La. 1993). Some believe that Polozola's status as a former elected official gave him the contacts and a mantle of popular support which aided him in persuading the Louisiana prison system to develop a program for certification. Levi interview, *supra* note 130. For summary information on Louisiana's experience with certification, *see* Appendix F.

According to Deputy Attorney General Ken Young, California did seek judicial certification "a decade or so ago." The district judge approached, however, refused to grant certification without federal approval. Interview with Kenneth C. Young, California Deputy Attorney General (May 5, 1994).

178. *See* Letter from Judge Frank Polozola to Judge David F. Levi (Feb. 25, 1994) (on file with author); Telephone interview with Dora Rabalais, Legal Programs Director at Louisiana State Penitentiary (Apr. 20, 1994).

179. *See supra* note 177 and accompanying text.

One key to Louisiana's early satisfaction with judicial certification may be the availability of damages through the State's grievance procedure.[180] While most state procedures do not provide for damages, some think their availability could be the most important factor in reducing inmates' case filings in federal court.[181]

D. Post-Grievance Administrative Appeal

Another approach to inmates' civil rights cases would establish through legislation a new state level of appeal,[182] based on the United

180. Specifically, Louisiana's procedure provides:

> The Internal Affairs Section of the Department of Public Safety and Corrections, Corrections Services, based upon credible facts within a grievance or complaint filed by an offender, may determine that such an offender is entitled to monetary damages where monetary damages are deemed by the Department as appropriate to render a fair and just remedy. Internal Affairs shall consult with the Legal Section of the Department of Public Safety . . . to determine if monetary damages are appropriate for a fair and just remedy.
>
> Upon a determination that monetary damages should be awarded by the Department, the remaining question is quantum, or the determination as to the dollar amount of the monetary damages to be awarded to an offender. The matter of determining quantum shall be transferred to the Office of Risk Management . . . which shall then have the discretionary power to determine quantum. The determination reached by the Office of Risk Management shall be returned to the Legal Section . . . for final decision on the . . . recommendation. If a settlement is reached, a copy of the signed release shall be given to Legal Programs on that same date.

Administrative Remedy Procedure, *supra* note 177, at 32.

181. *See* Audio Tape of Workshop for U.S. Magistrate Judges of the 2nd, 6th and 9th Circuits on Handling Prisoner Pro Se Litigation (May 28, 1994) (on file with author) [hereinafter Workshop Tape] (comments of Ira Robbins, stating that damages alone would have an "almost overnight effect" on inmate litigation). Given the importance of damages in excessive force cases, *see supra* note 133 and accompanying text, an administrative damages provision could be expected to have a big impact on the filing of these types of cases at least.

182. This option was first suggested to me by Judge Levi. Levi Interview, *supra* note 130. *Cf.* Report of the Federal Courts Study Committee, *supra* note 54, at 27, 48-49 (recommending that a program be sponsored by the State Justice Institute — now the State-Federal Judicial Council — to encourage and possibly fund effective systems of prison administrative remedies, including appointment of ombudsmen and assistance of counsel in administrative proceedings; predicting that the result could be as dramatic as a forty-nine percent reduction in the number of federal inmate civil rights lawsuits). *See also* Howard Mintz, *No Pay, No Play; A Federal Court Drowning in Prisoners' Petitions is Watching the Fate of One Docket-Clearing Plan*, The Recorder, July 23, 1993, at 1 (reviewing recommendations regarding inmates' civil rights actions made by Criminal Justice Reform Act committee for the Northern District of California, and noting one recommendation as "[a] more drastic proposal . . . to convince the state to set up an administrative appeals process in the state prison system"). *But cf.* the Aldisert Report, *supra* note 8, at 51 n.41 (favoring an enhanced administrative process, but noting that "[m]any 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").

States Supreme Court's determination in 1986 that 42 U.S.C. § 1983 does not necessarily mandate a federal forum.[183]

Under this approach, following the third formal level in the CDC's 602 process,[184] inmates would be able to file appeals with an independent state administrative board or commission. To enhance the likelihood of inmates' voluntary participation in the administrative process, the composition of an administrative body would be structured to be perceived by inmates as fair.[185] The new board would retain final authority to grant or deny an appeal, but would be staffed by

183. *See* University of Tennessee v. Elliott, 478 U.S. 788, 196-97 (1986) (finding that Congress's intent in passing Title VII prevents giving preclusive effect to unreviewed state administrative proceedings, but seeing "no reason to suppose that Congress, in enacting the Reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent development as the burgeoning use of administrative adjudication in the 20th century"). With regard to cases in California's Eastern District, *see* Eilrich v. Remas, 839 F.2d 630 (9th Cir. 1988) (following *Elliott* in denying federal forum to police officer who previously litigated claim of wrongful discharge before administrative law judge, and noting that the "hearing officer and the district court had the same excessive conduct before them and the hearing officer actually and necessarily decided the identical issue"), *cert. denied*, 488 U.S. 819 (1988).

In *Elliott*, the Supreme Court found that giving preclusive effect to state administrative determinations served the interests of sound policy by "serv[ing] the value underlying general principles of collateral estoppel: enforcing repose," which ensures conservation of judicial resources. *Elliot*, 478 U.S. at 797-98. The Court also found that giving such preclusive effect serves the value of federalism, and noted that while the Constitution's Full Faith and Credit Clause does not bind the federal courts, "we can certainly look to the policies underlying the Clause in fashioning federal common-law rules of preclusion." *Id.* at 778-99. The Court further reasoned that the Clause's major purpose of acting as a "nationally unifying force" is served "by giving preclusive effect to state administrative factfinding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results." *Id.*

In his dissent, Justice John Paul Stevens, joined by Justices William Brennan and Harry Blackmun, argued that in looking for express or implied views on preclusion, the majority had ignored Congress's "broad purpose" in passing Section 1983, which was "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.* at 802-03 (Stevens, J., concurring in part, dissenting in part) (*quoting* Monroe v. Pape, 365 U.S. 167, 180 (1961)). Justice Stevens also argued that "sound policy" was not served in this case, at least, because Title VII claims could still come forward to federal court, requiring the expenditure of judicial resources. *Id.* Justice Stevens further argued that the value of federalism is not necessarily promoted, because future litigants are likely to simply forgo a state level appeal in order to preserve their right to federal adjudication. *Id.* Recall, however, that courts generally cannot require exhaustion as an absolute precondition to bringing a Section 1983 claim. *See* Patsy v. Board of Regents, *supra* note 167.

184. *See supra* note 65 and accompanying text.

185. Inmate Miller's immediate response to this suggestion was positive. *See* Miller interview, *supra* note 49. In fact, he indicated he would feel comfortable with a board appointed by the Director of Corrections, but comprised of at least half non-Corrections members. *Id.*

administrative law judges ("ALJs") who would hear appeals and make recommendations to the board.[186]

The board's procedures would be designed to mimic the adversarial nature of a trial, so as to qualify for collateral estoppel.[187] Damages could be provided to maximize the potential efficacy of an administrative option.[188] As long as an inmate participated voluntarily in a state administrative process designed to meet collateral estoppel standards,[189] federal courts would be required to give collateral estoppel effect to the body's findings.[190]

A state level administrative process is appealing in several ways. A panel of ALJs could facilitate hearings at prison sites where inmates may feel more at home and thus be more effective in articulating their claims. Through on-site hearings, the costs of transporting inmates with security guard escorts could be avoided. Even with adversarial-type procedures, an administrative hearing is by nature less formal than a courtroom proceeding,[191] which also could facilitate an inmate's communication regarding his or her complaint. If designed properly to attract inmate appellants, such a process could perform

---

186. In this way, the administrative process would be similar to that developed for state level claims of employment or housing discrimination. *See, e.g.*, California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12990 et. seq. (West 1992 & Cum. Supp. 1995).

187. Relative to the Eastern District, the United States Court of Appeals for the Ninth Circuit follows the California Supreme Court's two-part test in determining whether collateral estoppel applies. *See Eilrich*, 830 F.2d at 633 (articulating the California test as set forth in *People v. Sims*, 651 P.2d 321 (1982)). This test assesses whether: (1) "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"; and (2) (a) "the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated;" (b) "the previous [proceeding] resulted in a final judgment on the merits;" and (c) "the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." *Id.* The Ninth Circuit also recognizes an exception to collateral estoppel "when injustice would otherwise result." *Id.* at 635 (citing Rutherford v. State, 188 Cal. App. 3d 1267, 1285 (1987), and suggesting that a plaintiff could qualify for the exception in cases of "manifest injustice," or where a "legal issue of public importance" is at issue).

For collateral estoppel standards followed in other jurisdictions, *see* Romualdo P. Eclavea, *State or Federal Law as Governing Application of Doctrine of Res Judicata or Collateral Estoppel in Federal Court Action*, 19 A.L.R. FED. 709 (1994).

188. *See supra* note 181 and accompanying text.

189. Setting aside for the moment the cost of such a process, the only hurdle associated with collateral estoppel might be the court's preference that parties be represented by counsel. *See supra* note 182 (ALDISERT REPORT quote).

190. *See Sims*, 651 P.2d at 326-28 (noting that "[v]oluntary exhaustion of state administrative remedies may have serious adverse consequences for plaintiffs because federal courts must give collateral estoppel effect to the adverse findings — legal and factual — of . . . agencies acting in a *quasi-judicial capacity*, even if those findings are not reviewed by a state court"). *See* Plaine v. McCabe, 790 F.2d 742 (9th Cir. 1986), *superseded*, 797 F.2d 713 (9th Cir. 1986).

191. In administrative hearings, usually there are no courtroom clerks, no "all rise" instructions, no judges on daises in black robes.

the same kind of "winnowing" function as the CDC's internal grievance procedure,[192] and thereby reduce the number of cases filed in federal court. While an administrative decision could still be appealed, the court's job would be simplified through the application of collateral estoppel and corresponding limited review of the process by which an administrative decision was reached.

On the other hand, a state administrative proposal raises some concerns. It could lure an unwitting inmate into filing a "voluntary" appeal without realizing that, in effect, he or she is waiving the right to a jury and substantive judicial review on appeal.[193] The status of most inmates as pro se plaintiffs increases the likelihood of this result. If an administrative apparatus were established, standard filing forms and informational fact sheets ought to clearly advise inmate plaintiffs of the consequences of voluntarily filing an administrative appeal.

Practically speaking, even if conceptual support for a new administrative body were unanimous, such a proposal would be a very tough sell in the current climate.[194] Given budgetary and political constraints, and the dearth of data to justify a new approach, an alternative course would be to pursue authorization of a pilot project.[195] The pilot could target one court district, and perhaps even one type of case,[196] and run a sufficient length of time to gather meaningful results. A small panel of ALJs[197] could be convened to conduct hearings at prison sites. As with the statewide program described above, collateral estoppel standards would be incorporated,[198] and damages provi-

192. *See supra* notes 75-76 and accompanying text.

193. *See* the "warning" provided in the CEB handbook on Section 1983 claims which cites the passage from *People v. Sims*, *supra* note 191. *See* CEB, *supra* note 17 and accompanying text.

194. *Cf.* Howard Mintz, *No Pay, No Play, A Federal Court Drowning in Prisoners' Petitions is Watching the Fate of One Docket-Clearing Plan*, RECORDER July 23, 1993, at 1 (noting that "Judges and lawyers, however, are not optimistic that cash-strapped California would get behind this expensive and problematic suggestion"). Despite practical hurdles, Deputy Attorneys General David Stirling and Ken Young expressed interest in the Spring of 1994 in approaching select members of the California Legislature to determine whether they would carry legislation establishing some kind of administrative apparatus. *See supra* note 124 (discussing Stirling and Young interviews).

195. Judge Levi also deserves credit for initially suggesting the concept of a pilot project. Telephone interview with David F. Levi, Eastern District Judge (Sept. 2, 1994).

196. For instance, given the potential value in earlier review, medical or excessive force cases could be the subject of a pilot program in the Eastern District. *See supra* notes 124-34.

197. Presumably, ALJs could be retained on a short-term basis through a state's Office of Administrative Hearings or the equivalent agency.

198. *See supra* note 187 and accompanying text.

sions included as well.[199] The pilot could be reviewed by a balanced, volunteer ad hoc review committee comprised of corrections management staff, federal judicial personnel, members of the academic legal community, attorneys general, and practicing defense counsel. Major direct costs would involve compensation for the ALJs, and possibly funding for damage awards.[200]

If pursued, a pilot should provide for a comprehensive evaluation of results. Objective records should be kept, indicating how cases resolve at the administrative level, and whether inmates proceed to court after resolution. A careful assessment of program costs as well as cost savings should be made. ALJs, ad hoc committee members, and inmates should be surveyed regarding their views of the process and suggestions for improvements. Based on such an evaluation, a state legislature could determine whether to authorize and fund a more permanent administrative appeals structure.[201]

D. Litigation Stage Options

For those inmate complaints that proceed in federal litigation, the court has a range of optional responses, presented below.

---

199. *See supra* notes 180-81 and accompanying text. Alternatively, damage awards could be offered to inmates in one or two facilities in a court district, and not offered to another "control group" of facilities.

200. However, if paid from an existing risk management fund, damage awards ought not to represent a substantial cost.

201. Alternatively, less elaborate processes could be tested, such as convening a panel of ALJs or other qualified third parties to conduct settlement discussions at prison sites. Such a process, which would dispense with an administrative oversight commission, could be modeled on the simple ground rules included in the federal law promoting alternative means of dispute resolution. *See* Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-574 (1988) (authorizing federal agencies to use independent "neutrals" to mediate disputes in certain matters which are nonprecedential in nature or where a public record need not be maintained). *Cf.* Howard Mintz, RECORDER, July 23, 1993, at 1 (reporting that Judge Thelton Henderson "is considering sending a judge to Pelican Bay on occasion to act as an ombudsman who might hear prisoner grievances and short-circuit litigation at an early stage").

Also, a federal "small claims" court procedure could be instituted. Such a procedure could be modeled on state municipal court small claims procedures, designed to provide "a speedy, inexpensive and informal method of settling small claims, without attorneys or conventional legal procedure." 2 B.E. WITKIN, CALIFORNIA PROCEDURE § 215, at 239-40 (citing CAL. CIV. PROC. CODE § 116). In California, small claims matters are defined as those involving $25,000 or less. CAL. CIV. PROC. CODE § 86. A plaintiff cannot appeal a decision in a small claims matter if he or she appeared at hearing. However, a plaintiff who did not appear can move to vacate the court's order. *Id.* § 116.710 (a) & (b). A defendant may appeal a judgment even if he or she appeared. *Id.*

1. Filing Fees

Rather than simply allowing most inmate civil rights litigants to proceed in forma pauperis ("IFP"),[202] quite a few federal courts impose partial filing fees on inmate plaintiffs.[203] Various formulae are used to calculate fees, including a "totality of circumstances" standard,[204] a mechanical flat rate test,[205] and a sliding scale approach which assesses a fee proportionate to an inmate's trust fund assets.[206]

---

202. *See supra* notes 107-11 and accompanying text.

203. In fact, according to one expert, all but the Ninth and Tenth Circuits use or allow partial fee payment schemes in inmate cases. *See* WORKSHOP TAPE, *supra* note 181 (comments of Ira Robbins). In a recent study focused on partial fees, a federal court staff attorney specifically identified the following non-California jurisdictions as imposing fees: Northern District of New York (first adopted in 1985/86); Western District of New York (adopted in 1991); Eastern and Western Districts of Missouri; Nevada (fee newly instituted); and Middle District of Florida. *Id.* The Southern District of New York reportedly discontinued its partial fee plan in May 1993, and Tennessee also has abandoned use of partial fees. *Id.* More comprehensive data on partial fee plans nationwide is being prepared by the Federal Judicial Center in 1995. Telephone interview with A.J. Bosman-Moore, Staff Attorney, Western District of New York (Apr. 5, 1995) [hereinafter Bosman-Moore interview].

204. This standard is applied when taking account of factors beyond trust fund account balance. *See* WORKSHOP TAPE, *supra* note 181 (comments of Ira Robbins).

205. *Id.* The Sixth Circuit reportedly imposed a fifteen dollar ($15) fee in 1989, based simply on its sense of what was appropriate in light of one inmate litigant's litigation history. *See* Bosman-Moore interview, *supra* note 203. During its 1994 session, the California Legislature passed and the Governor signed into law a flat fee of three dollars ($3). *See* 1994 CAL. STATS. 555; *see supra* note 6 and accompanying text.

206. In the early 1990s, one federal district judge in California's Northern District began to apply the sliding scale model. The judge is Vaughn R. Walker, who applies a "percentage of costs" rule if the inmate has any income whatsoever. For instance, one inmate who had seventy-five dollars ($75) in his trust fund was assessed a fee of thirty dollars ($30); another inmate was assessed twenty dollars ($20), to be paid out of his eleven to sixteen dollars ($11-$16) monthly prison salary. *See* Howard Mintz, THE RECORDER, July 23, 1993, at 1. Nevada's relatively new partial fee requirement incorporates a sliding scale approach, wherein any inmate with five dollars ($5) or more in assets must pay a percentage fee. *See* U.S. DIST. COURT, DIST. OF NEV., PLAN FOR THE IMPLEMENTATION OF A PARTIAL FILING FEE SCHEDULE FOR CIVIL RIGHTS COMPLAINTS FILED PURSUANT TO 42 U.S.C. § 1983 (1992) (attached schedule provides for a fee ranging from 11 to 20% for inmates with assets ranging from five dollars ($5) to nine dollars ($9); from 10 to 30% for those with assets ranging from ten dollars ($10) to twenty-nine dollars ($29); and so on).

Represented by civil rights lawyer Sanford Rosen, inmates Steve Olivares and James Stehouwer challenged Judge Walker's imposition of fees. Howard Mintz, THE RECORDER, July 23, 1993, at 1 (calling partial fees "the most controversial remedy" for inmate civil rights litigation caseloads). Rosen's goal was to create a split in the circuits and force Supreme Court consideration of the question. *Id.* According to Rosen, "[t]he fact that a prisoner litigant may have some small amount of income does not make him ineligible for a waiver of . . . costs and fees. . . . a litigant need not demonstrate absolute destitution nor spend his or her last dollars on filing fees before permission to proceed in forma pauperis will be granted." *Id.* In January of 1994, following a decision by the Ninth Circuit in *Alexander v. Carson Adult High School*, 9 F.3d 1448 (9th Cir. 1993), which "strongly implied that a partial filing fee is permissible," Judge Walker affirmed his decision to impose filing fees. *See* Stehouwer v. Hennessey, 841 F. Supp. 316, 320-21 (N.D. Cal. 1994) (stating that "the proper rule is that reasonable costs may be imposed

Despite widespread application, there are limited data on the actual effect of partial fees on inmates' civil rights litigation. One federal staff attorney has conducted a modest empirical analysis of several district's fee plans, and concludes that partial fees appear to be effective in reducing workloads. The reduction occurs not through decreasing inmate filings, however, but rather as a result of the court's refusal to commence a case without payment.[207] But the analysis does not take account of other factors which also may affect litigation rates.[208] Those districts which do assess partial fees currently are not collecting their own information in a form which lends itself to in-depth analysis.[209]

Even without comprehensive data, some kind of fee plan seems fair as long as it allows for the possibility that certain inmates with potentially meritorious cases may not be able to afford any fee. Because it is the most sensitive to an inmate's actual resources, a sliding scale approach seems the most appropriate.[210]

2. *Case Management Systems*

A case management system such as that used by California's Eastern District appears to function smoothly, and provide uniform consideration of inmates' civil rights cases.[211] However, given that

---

on persons who want to sue," and applying this rule "encourages IFP plaintiffs to evaluate the worth of their claims").

Interestingly enough, the two inmates interviewed for this project professed to have no problem with a partial fee requirement. One inmate recommended a fee of thirty dollars ($30). *See* Lauranzano interview, *supra* note 49. Another simply felt that fees were a "good idea." *See* Miller interview, *supra* note 49.

207. Bosman-Moore interview, *supra* note 203. *See supra* note 181 (unpublished informal survey conducted as part of preparing for remarks). Bosman-Moore believes that inmate's civil rights filing rates are a function of the prison population, with prison facilities in urban areas producing higher rates of filing. Bosman-Moore interview, *supra* note 203.

208. For a list of other factors, *see supra* note 49 and accompanying text.

209. Although the District Court for the Northern District of California apparently is not keeping a record of the number of cases affected by Judge Walker's new approach to inmates' fees, Judge Walker himself reports that most inmates simply pay the partial fee and proceed. Levi interview, *supra* note 130.

210. A court clearly has the authority to dismiss an action on grounds of frivolousness under 28 U.S.C. section 1915(d). *See supra* note 104 and accompanying text (text of § 1915(d)).

Furthermore, S. 3, introduced in the 104th Congress, at least in its original version, would *require* that a court dismiss an action that fails to state a claim upon which relief may be granted, even if partial filing fees have been imposed. *See supra* note 7. S. 3 also would require, with regard to an inmate's statement of assets on an application for IFP status, that "[t]he court shall make inquiry of the correctional institution in which the prisoner is incarcerated for information available to such institution relating to the extent of the prisoner's assets. The court shall require full or partial payment of filing fees according to the prisoner's ability to pay." *See supra* note 7.

211. *See supra* notes 84-90 and accompanying text.

the life of a case may average 260 days,[212] and can stretch out for three years or more,[213] properly swift attention may not be paid to certain types of cases. This is particularly true if the cases have legal merit, and if an inmate's health or life is at stake.[214]

a. Medical Cases

The filing of a medical case poses at least the possibility that an inmate is in imminent need of proper health care. To address these cases more swiftly, a case management system could be modified to target all cases which allege inadequate medical treatment for expedited screening.[215] Apparently serious cases, as determined by a judge, could be put through a structured alternative dispute resolution ("ADR") process to facilitate earlier resolution and, if necessary, medical treatment.

One form of ADR could utilize Federal Rule of Evidence 706, which allows the court to appoint its own medical expert, paid with court funds, to evaluate a case.[216] If the expert's report favored an

---

212. *See supra* note 112 and accompanying text.

213. *Id.*

214. *See supra* notes 124-34 and accompanying text.

215. A federal judge could direct his court clerk to conduct this screening, at least during an initial period of testing this approach. Levi interview, *supra* note 130. This resembles the approach developed by Judge Justice, described in *Origins of Ruiz v. Estelle*. *See supra* note 51 and accompanying text.

According to the California Attorney General's office, the Eastern District does at times request early "informal oppositions" in cases with serious life and health concerns. Cavanagh letter, *supra* note 98.

216. Fed. R. Evid. 706 provides, in pertinent part:

> (a) The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> (b) Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
>
> . . . .

Id. Eastern District Magistrate Judge Gregory Hollows has used this technique on a couple of occasions. *See, e.g.*, Williams v. Borg, CIV-S-89-1636 (order of Oct. 5, 1993) (directing payment of expert from court funds, and reimbursement by the plaintiff if he prevails, receives a significant monetary recovery, and is awarded costs of suit). In *Wil-*

inmate's case, the state department of corrections would be encouraged to pursue early settlement to address the inmate's concern. On the other hand, if the report favored the department of corrections, the department could proceed without further delay to file a motion for summary judgment to dispose of the case.[217]

Another form of ADR would adapt a court's Early Neutral Evaluation ("ENE") process to inmate cases. In California, the Southern District federal court is using this process for all inmates' civil rights cases and reportedly is pleased with the results.[218] The ENE process involves a judge meeting with the parties within forty-five days of the answer being filed. At that meeting, the judge determines whether to send the case to arbitration, or let it proceed. Before a case proceeds to trial, the parties are required to participate in a mandatory settlement conference. This conference involves assessment of a case by a third party panel of attorneys, with the goal of giving both parties a "reality check" as to their chance of success if the litigation proceeds to trial.

b. Excessive Force Cases

Excessive force cases also may represent past and future threats to an inmate's physical safety. These too could be screened out early in a case management system, and referred to an ADR or settlement-type process. However, these cases may be much less "black and white" than medical cases, and depend heavily on witness credibility.[219] For these reasons, a state level administrative hearing with adversarial features — held close in time to the alleged event before memories blur and entrenched positions develop — may be preferable in these cases.[220]

3. Use of Pro Bono and Student Attorney Panels

A case management system such as that used in the Eastern District could be complemented by expanding another approach already

liams, the appointed court expert concluded there was no evidence of deliberate indifference on the part of the CDC. Nonetheless, the court found a trial warranted. As of this writing, a pretrial hearing is scheduled for August 1995, and a trial for October 1995.

217. The CDC often waits quite a long time after a complaint is filed before filing a motion for summary judgment and sometimes never files such a motion, *see* Appendix C, apparently for reasons related to understaffing. *See* Cavanagh interview, *supra* note 88.

218. Interview with Ruben Brooks, Magistrate Judge (Mar. 2, 1994). However, the California Attorney General's office complains that the process shifts the work burden to them without the corresponding benefit of early resolution. Cavanagh interview, *supra* note 88.

219. *See supra* note 134 and accompanying text.

220. *See supra* notes 184-90 and accompanying text.

in limited use, that of using panels of pro bono or student attorneys to assist inmates with pending cases.[221]

A pro bono panel consists of local attorneys who have offered to review cases of any kind at the request of the court. If a strong inmates' civil rights case presents itself, a member of the pro bono panel may volunteer to handle the matter on behalf of the inmate plaintiff.

In the Eastern District, a special student panel has been convened specifically to review inmates' civil rights cases. This panel screens referrals from the court[222] and accepts representation of selected cases.[223] Student attorneys prosecute the cases accepted under the guidance of supervising attorneys, and thus help move cases through the process without the stops and starts often associated with pro se litigation. In exchange for live litigation experience, the students provide inmates with a level of legal representation they would not otherwise enjoy.[224]

If funding is not otherwise available to cover the costs of a student attorney panel, special mechanisms could be considered to generate the resources required. For instance, local bar associations or legal services offices could help seek foundation or philanthropic funding. Or, a court might request authorization to deposit all court fees paid

221. Professor Margaret Z. Johns at King Hall School of Law in Davis has established a student panel in the Eastern District. Professor Johns' efforts are funded by the Department of Education for a three year period beginning in 1994. Margaret Johns, Telephone interview (Mar. 1994).

222. According to staff attorney Haven Gracey, cases are referred to the panel based on courthouse staff attorneys' sense of merit, complexity, and degree of assistance required by pro se inmate. Gracey interview, *supra* note 118.

223. Currently, the panel turns away more cases than it accepts. Johns interview, *supra* note 50. The reasons for denial include: apparent lack of merit, distances to prison facilities exceeding the project's resources, and reluctance on the part of supervising attorneys to take cases even if they are meritorious, because "they are difficult and often impossible to win even when they do seem to have merit." Johns interview, *supra* note 50.

224. This option thus responds to inmates' need for effective counsel in handling civil rights claims. *See supra* notes 50, 51, 103 and accompanying text. Consider also the approach applied in North Carolina since 1989, wherein the State meets its obligations under *Bounds v. Smith*, 430 U.S. 817 (1977), not through the provision of law libraries, but rather under a contract with the State's Legal Services offices. *See* NORTH CAROLINA PRISONER LEGAL SERVICES, INC. (June 1994 brochure). In 1993, the North Carolina project received by mail 5,701 inmate requests for assistance, 3,000 of which were referred to attorneys for legal analysis. *Id.* Staff attorneys report that they usually have about 1,000 open case files and 100 cases in litigation at any one time. *Id.* In screening requests, Legal Services staff gives top priority to complaints involving excessive force, failure to protect one inmate from another, inhumane conditions or prison overcrowding, and inadequate medical care. *Id.*

by inmates into a separate fund which would be used to defray the costs incurred in providing a panel.[225]

4. Phone Triage

Following Nevada's unsatisfactory experience with a CRIPA-certified grievance procedure,[226] Nevada's federal court began testing a "phone triage" system for early communication with inmate plaintiffs.[227] Shortly after a case is filed, the assigned federal judge convenes a courtroom hearing. Both the inmate plaintiff and the Attorney General on behalf of the defendant Nevada Department of Corrections attend the hearing by telephone conference call. At this hearing, the federal judge attempts to narrow the issues in the case, and determine whether the inmate is receptive to settlement.

In its first eleven months of use, the phone triage approach has demonstrated significant potential for resolving problems and effecting dismissal of cases.[228] A key to its success may be the personal contact and attention afforded an inmate plaintiff by the court early on, before his or her adversarial position solidifies.[229] Nevada's approach also may be working because of the state's relatively small size and small inmate population; in other words, "all of the players know[ing] each other" may make personal contact early on that much more meaningful.[230]

CONCLUSION

Inmates' civil rights cases represent a significant percentage of the federal courts' case filings. They do pose a major challenge for the

225. But the practice of earmarking court funds is rare, and would require congressional authorization. Telephone interview with Dan Cunningham, AO's Governmental Affairs Division (Apr. 7, 1995).

226. *See supra* note 161 and accompanying text.

227. The court did so in cooperation with the Nevada Attorney General, Frankie Sue Del Papa. Interview with Ann Cathcart, Nevada Deputy Attorney General (Mar. 15, 1994).

228. Interviews with Ann Cathcart, Nevada Deputy Attorney General (Mar. 15, 1994 & Aug. 5, 1994). *See also* MEMORANDUM FROM TRIAGE SUBCOMMITTEE TO PRISONER LITIGATION COMMITTEE 1, 5 (Feb. 10, 1995) (providing that based on experience with more than seventy cases, the Attorney General's office reports "a reduction of nearly 60% of the original counts, and more than 50% of the original number of defendants. . . . the triage hearings have succeeded, on average, in cutting in half the size of each action . . . . most dismissals (counts and defendants, as well as entire actions) were voluntary on the part of the plaintiffs.").

229. MEMORANDUM FROM TRIAGE SUBCOMMITTEE TO PRISONER LITIGATION COMMITTEE 1, 5. The Eastern District's case management system also provides for personal contact, albeit later in the process at the TCH. *See supra* notes 84-89 and accompanying text.

230. Interview with Ann Cathcart, Nevada Deputy Attorney General (Mar. 31, 1995).

federal courts. While the right to file cases could be restricted or eliminated legislatively, such a "solution" is extreme and could have an unintended "backlash" effect inside prison facilities. Furthermore, efforts to restrict inmates' rights to prosecute frivolous civil rights actions fail to recognize that some serious and meritorious inmate cases may appear insubstantial at first glance.

Properly framed, the challenge for the federal courts, corrections officials, and legislative policymakers working together is to identify preventive and grievance procedure approaches to preclude full-blown inmate litigation where possible. For those inmates' civil rights cases that are filed in court, the challenge is to create case management and ADR systems to respond to cases fairly, at the same time allowing the court to allocate its time to those cases most deserving of undivided judicial attention.

Given the limited data available, several approaches appear worthy of consideration where they are not already being implemented. These approaches include:

- Imposition of a sliding scale filing fee, proportionate to the amount of funds in an inmate's trust fund account. However, the court should reserve the option to refrain from imposing a fee in cases where an inmate is truly unable to pay and an apparent injustice would result from blocking his or her commencement of a case.
- A form of alternative dispute resolution, involving referral to a third party expert or mediator, applied in medical cases and perhaps excessive force cases selected through an early screening process.
- Seeking legislative authorization for a pilot project to test the efficacy of a new state level of administrative review, whereby administrative law judges would conduct hearings at prison sites. This review process would be designed to satisfy collateral estoppel standards, and could allow for damages awards.
- To ensure adequate representation in cases which appear to have the most valid claims and which proceed to full litigation, an expanded role for student attorney panels.

This said, the most significant finding of this field research is that information on inmates' civil rights litigation currently is not maintained so as to facilitate a good understanding of the cases and their handling.[231] What information is available often is not subjected to

231. As Eastern District Magistrate Judge Moulds told an audience recently, there is a lot of quantitative work that remains to be done in this area. *See* WORKSHOP TAPE, *supra* note 181. Regarding the importance of careful quantitative work in shaping "progressive" reforms, *see* SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA

rigorous review by those quick to make assertions about the way in which inmates' civil rights litigation should be reformed. Given the limited data, the dearth of careful analysis, and the difficulty of instituting reforms without unintended consequences, any changes ought to be made cautiously. If changes are instituted, their effects should be evaluated consciously and carefully.

Finally, reform ought to be inspired not by short-term political considerations, but rather by the goal of making constructive and lasting contributions to an area of the law that will continue posing special challenges to the courts and the American legal system. The good news is there *are* examples within the federal judiciary where thoughtful proposals have facilitated constructive change. The interplay between the Aldisert Report's recommended procedures,[232] and the Eastern District of California's "case management system,"[233] is one good example. Hopefully, the information on the Eastern District's experiences, and the other materials presented here, will serve to assist those dedicated public servants struggling with the challenges posed by inmates' civil rights litigation.

Kim Mueller—'95

16-19 (1992) (advocating a form of policy analysis and presenting examples of how it can work in areas such as federal Occupational Safety and Health Act and Clean Air Act reform).

232. *See supra* note 8 and accompanying text.

233. *See supra* notes 84-90 and accompanying text.

APPENDIX A

EASTERN DISTRICT: LEVEL ONE APPEALS FY 1991/92

Facility	Inmates	No. Filed	Rate	No. Grtd	Grtd
ASP	4889	1675	0.34	576	0.34
CCC	5552	1330	0.24	617	0.46
CCI	5150	2021	0.39	840	0.42
CMF	3095	2102	0.68	611	0.29
COR	5363	2356	0.44	1067	0.45
FOL	6382	3331	0.52	803	0.24
SOL	4250	950	0.22	260	0.27
CCWF	2312	683	0.3	310	0.45
DVI	3420	571	0.17	248	0.43
MCSP	3683	1790	0.49	762	0.43
NCWF	727	176	0.24	79	0.45
SCC	5551	707	0.13	336	0.48
WSP	3942	1396	0.35	619	0.44
TOTAL	54316	19088	0.35	7128	0.37

EASTERN DISTRICT: LEVEL TWO APPEALS FY 1991/92

Facility	Inmates	No. Filed	Rate	No. Grtd	Grtd
ASP	4889	867	0.18	235	0.27
CCC	5552	655	0.12	190	0.29
CCI	5150	1001	0.19	216	0.22
CMF	3095	860	0.28	193	0.22
COR	5363	1606	0.3	400	0.25
FOL	6382	2013	0.32	223	0.11
SOL	4250	372	0.09	92	0.25
CCWF	2312	235	0.1	81	0.34
DVI	3420	325	0.1	39	0.12
MCSP	3683	984	0.27	182	0.18
NCWF	727	64	0.09	15	0.23
SCC	5551	353	0.06	107	0.3
WSP	3942	479	0.12	129	0.27
TOTAL	54316	9814	0.18	2102	0.21

EASTERN DISTRICT: LEVEL THREE APPEALS FY 1991/92

Facility	Inmates	No. Filed	Rate	No. Grtd	Grtd
ASP	4889	257	0.05	26	0.1
CCC	5552	217	0.04	17	0.08
CCI	5150	417	0.08	34	0.08
CMF	3095	305	0.1	20	0.07
COR	5363	831	0.15	92	0.11
FOL	6382	772	0.12	52	0.07
SOL	4250	120	0.03	19	0.16
CCWF	2312	91	0.04	6	0.07
DVI	3420	149	0.04	20	0.13
MCSP	3683	438	0.12	28	0.06
NCWF	727	19	0.03	1	0.05
SCC	5551	82	0.01	4	0.05
WSP	3942	122	0.03	7	0.06
TOTAL	54316	3820	0.07	326	0.09

Note: FOL, or Folsom, includes both old and new Folsom.

EASTERN DISTRICT: TYPES OF FIRST-LEVEL APPEALS FY 1991-92

Facility	Disciplinary		Custody/Class		Mail	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	262	19	77	9	76	16
CCC	31	6	95	27	61	24
CCI	94	16	35	7	150	49
CMF	361	71	47	10	79	21
COR	96	24	56	15	145	75
FOL	431	56	193	69	181	43
SOL	183	30	34	6	61	32
CCMF	30	13	9	2	27	17
DVI	14	5	17	4	27	10
MCSP	80	33	49	14	110	57
NCWF	10	2	3	2	7	4
SCC	42	10	29	11	31	17
WSP	37	9	11	2	105	41
TOTAL	1671	294	655	178	1060	406

EASTERN DISTRICT: TYPES OF SECOND-LEVEL APPEALS FY 1991-92

Facility	Disciplinary		Custody/Class		Mail	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	272	49	58	24	39	11
CCC	225	56	39	11	25	6
CCI	281	33	45	11	51	8
CMF	167	21	18	5	22	3
COR	494	86	61	12	71	22
FOL	679	72	89	16	70	8
SOL	94	8	4	0	18	9
CCWF	62	12	6	1	8	2
DVI	89	8	22	3	5	2
MCSP	292	46	46	1	27	3
NCWF	17	2	5	0	3	0
SCC	165	41	18	4	6	5
WSP	117	19	4	0	20	8
TOTAL	2954	453	415	88	365	87

EASTERN DISTRICT: TYPES OF THIRD-LEVEL APPEALS FY 1991-92

Facility	Disciplinary		Custody/Class		Mail	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	54	9	17	3	18	1
CCC	64	8	12	0	9	0
CCI	125	7	19	3	23	1
CMF	75	5	11	1	4	2
COR	336	40	39	1	33	6
FOL	231	23	39	3	30	3
SOL	27	5	0	0	6	5
CCWF	26	2	4	0	5	0
DVI	61	10	8	2	3	0
MCSP	122	11	14	0	15	2
NCWF	2	0	2	0	0	0
SCC	29	2	2	0	5	0
WSP	35	2	2	0	3	0
TOTAL	1187	124	169	13	154	20

Source: California Department of Corrections, Inmate Appeals Activity

TYPES OF FIRST-LEVEL APPEALS (cont.)

Facility	Visiting		Property		Case Info.	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	31	10	174	82	101	32
CCC	26	7	218	119	53	11
CCI	58	20	333	157	144	57
CMF	42	11	316	112	99	25
COR	12	4	572	227	150	56
FOL	63	14	536	32	168	47
SOL	25	7	126	37	48	12
CCMF	8	3	121	64	27	12
DVI	5	3	109	48	48	16
MCSP	27	8	377	188	46	23
NCWF	0	0	28	8	7	4
SCC	19	6	126	64	2	0
WSP	9	4	280	113	63	30
TOTAL	325	97	3316	1251	956	325

TYPES OF SECOND-LEVEL APPEALS (cont.)

Facility	Visiting		Property		Case Info.	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	19	6	58	16	43	16
CCC	13	4	60	24	27	6
CCI	21	3	104	28	60	14
CMF	22	3	124	27	36	8
COR	10	1	244	53	144	23
FOL	31	2	245	26	153	26
SOL	10	2	43	10	40	11
CCWF	3	1	43	22	4	2
DVI	9	0	39	3	19	1
MCSP	10	4	133	43	58	19
NCWF	1	0	8	5	1	0
SCC	6	3	30	12	4	0
WSP	4	1	90	24	18	2
TOTAL	159	30	1221	293	607	128

TYPES OF THIRD-LEVEL APPEALS (cont.)

Facility	Visiting		Property		Case Info.	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	10	0	10	0	13	1
CCC	7	1	14	1	6	0
CCI	9	0	26	4	30	2
CMF	7	0	34	3	18	0
COR	7	1	95	20	59	0
FOL	17	1	97	9	58	1
SOL	5	0	19	5	10	1
CCWF	2	0	15	1	1	0
DVI	4	0	7	0	12	1
MCSP	2	0	52	7	25	0
NCWF	2	0	5	1	0	0
SCC	1	0	9	1	7	0
WSP	1	0	20	3	4	0
TOTAL	74	3	403	55	243	6

Source: California Department of Corrections, Inmate Appeals Activity FY 1991-92

TYPES OF FIRST-LEVEL APPEALS (cont.)

Facility	Staff Complaints		Medical		Living Conditions	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	81	18	121	83	139	96
CCC	83	22	124	52	34	18
CCI	161	38	194	98	94	39
CMF	204	42	327	146	90	25
COR	255	52	280	237	289	125
FOL	156	11	421	218	292	98
SOL	110	16	98	50	31	7
CCMF	72	37	105	59	37	22
DVI	75	25	51	24	24	8
MCSP	207	37	217	139	153	64
NCWF	13	4	11	7	21	14
SCC	74	25	69	40	10	3
WSP	135	35	178	114	120	59
TOTAL	1626	362	2196	1267	1334	578

TYPES OF SECOND-LEVEL APPEALS (cont.)

Facility	Staff Complaints		Medical		Living Conditions	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	21	5	52	32	13	8
CCC	29	4	48	21	14	8
CCI	69	14	80	32	22	5
CMF	78	10	143	57	39	7
COR	120	18	125	102	85	18
FOL	103	2	168	31	120	8
SOL	39	10	39	17	4	0
CCWF	15	5	23	11	13	7
DVI	36	6	16	6	7	2
MCSP	87	3	86	13	39	3
NCWF	2	1	1	0	2	2
SCC	12	4	26	13	2	2
WSP	41	14	30	13	24	11
TOTAL	652	96	837	348	384	81

TYPES OF THIRD-LEVEL APPEALS (cont.)

Facility	Staff Complaints		Medical		Living Conditions	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	27	0	24	4	5	1
CCC	10	0	20	4	8	1
CCI	35	0	24	6	12	1
CMF	44	1	34	4	18	0
COR	68	4	58	9	31	3
FOL	76	3	71	2	40	0
SOL	16	2	9	0	2	0
CCWF	7	0	3	1	5	0
DVI	11	2	13	2	5	2
MCSP	50	0	38	1	17	1
NCWF	1	0	1	0	1	0
SCC	8	0	6	1	1	0
WSP	14	2	8	0	9	0
TOTAL	367	14	309	34	154	9

Source: California Department of Corrections, Inmate Appeals Activity FY 1991-92

TYPES OF FIRST-LEVEL APPEALS (cont.)

Facility	Legal		Program		Segregation	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	21	8	89	8	7	1
CCC	6	2	61	25	9	3
CCI	29	15	249	83	20	5
CMF	10	4	163	30	10	2
COR	61	29	106	45	0	0
FOL	77	17	325	103	34	10
SOL	2	0	45	5	4	1
CCMF	3	1	26	8	0	0
DVI	4	2	57	18	0	0
MCSP	18	4	108	27	0	0
NCWF	0	0	3	1	1	0
SCC	8	5	38	21	3	1
WSP	13	2	230	82	0	0
TOTAL	252	89	1500	456	88	23

TYPES OF SECOND-LEVEL APPEALS (cont.)

Facility	Legal		Program		Segregation	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	13	8	37	9	2	1
CCC	2	0	14	3	0	0
CCI	9	5	102	24	13	1
CMF	3	1	66	16	3	0
COR	30	4	44	8	2	1
FOL	37	3	148	11	15	0
SOL	1	1	21	8	2	0
CCWF	0	0	9	3	0	0
DVI	4	1	25	1	1	0
MCSP	7	0	57	9	0	0
NCWF	0	0	1	0	0	0
SCC	17	2	12	3	7	4
WSP	4	1	72	23	0	0
TOTAL	127	26	608	118	45	7

TYPES OF THIRD-LEVEL APPEALS (cont.)

Facility	Legal		Program		Segregation	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	6	0	4	1	0	0
CCC	3	0	5	0	0	0
CCI	9	1	34	4	2	0
CMF	2	0	8	0	2	0
COR	13	2	9	1	6	0
FOL	14	0	27	1	3	0
SOL	0	0	3	0	0	0
CCWF	0	0	3	0	0	0
DVI	3	0	5	0	0	0
MCSP	6	0	19	0	2	0
NCWF	0	0	0	0	0	0
SCC	1	0	2	0	0	0
WSP	2	0	7	0	0	0
TOTAL	59	3	126	7	15	0

Source: California Department of Corrections, Inmate Appeals Activity FY 1991-92

TYPES OF FIRST-LEVEL APPEALS (cont.)

Facility	Work Incentive		Reentry		Transfer	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	117	30	49	14	65	3
CCC	105	28	38	17	76	1
CCI	74	15	53	14	38	1
CMF	101	29	12	3	37	0
COR	82	34	16	6	51	3
FOL	42	13	1	1	113	4
SOL	61	18	5	1	10	0
CCMF	83	12	59	19	17	1
DVI	18	7	5	2	13	1
MCSP	176	44	15	5	63	1
NCWF	6	2	21	8	4	0
SCC	53	16	36	14	9	0
WSP	44	15	12	6	34	0
TOTAL	962	263	322	110	530	15

TYPES OF SECOND-LEVEL APPEALS (cont.)

Facility	Work Incentive		Reentry		Transfer	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	52	6	24	8	82	8
CCC	48	7	12	7	54	26
CCI	44	7	16	5	38	20
CMF	36	8	6	1	36	8
COR	45	17	6	2	82	15
FOL	27	1	1	1	45	35
SOL	26	7	2	0	12	1
CCWF	5	3	21	6	16	4
DVI	9	1	1	1	27	8
MCSP	98	22	2	1	22	21
NCWF	7	0	7	3	3	0
SCC	11	3	2	0	12	1
WSP	27	4	1	0	11	22
TOTAL	435	86	101	35	440	169

TYPES OF THIRD-LEVEL APPEALS (cont.)

Facility	Work Incentive		Reentry		Transfer	
	Filed	Granted	Filed	Granted	Filed	Granted
ASP	27	2	2	1	33	20
CCC	14	0	5	0	32	8
CCI	43	4	4	0	12	8
CMF	27	2	3	0	8	6
COR	27	1	1	0	36	16
FOL	19	0	2	1	30	4
SOL	17	0	1	0	2	2
CCWF	4	0	1	0	12	3
DVI	5	0	1	0	6	1
MCSP	49	1	0	0	15	3
NCWF	3	0	1	0	1	0
SCC	2	0	1	0	4	4
WSP	9	0	0	0	5	3
TOTAL	246	10	22	2	196	78

Source: California Department of Corrections, Inmate Appeals Activity FY 1991-92

TYPES OF FIRST-LEVEL APPEALS (cont.)

Facility	Funds		Other	
	Filed	Granted	Filed	Granted
ASP	4	0	3	0
CCC	8	1	0	0
CCI	9	0	1	0
CMF	10	2	0	0
COR	9	1	4	0
FOL	12	1	6	0
SOL	2	1	1	0
CCMF	3	1	0	0
DVI	5	0	0	0
MCSP	7	2	5	2
NCWF	0	0	0	0
SCC	4	0	0	0
WSP	3	0	0	0
TOTAL	76	9	20	2

TYPES OF SECOND-LEVEL APPEALS (cont.)

Facility	Funds		Other	
	Filed	Granted	Filed	Granted
ASP	131	101	134	23
CCC	285	216	25	14
CCI	280	196	15	11
CMF	157	66	47	6
COR	185	123	0	0
FOL	207	4	91	32
SOL	89	31	19	6
CCWF	56	36	3	1
DVI	104	68	0	0
MCSP	122	91	22	7
NCWF	39	22	2	1
SCC	116	87	42	15
WSP	122	84	3	1
TOTAL	1893	1125	403	117

TYPES OF THIRD-LEVEL APPEALS (cont.)

Facility	Funds		Other	
	Filed	Granted	Filed	Granted
ASP	27	10	55	6
CCC	33	20	12	5
CCI	39	17	7	1
CMF	44	17	17	3
COR	42	17	0	0
FOL	42	5	40	7
SOL	16	6	1	1
CCWF	7	4	0	0
DVI	13	3	3	0
MCSP	10	7	10	5
NCWF	6	2	0	0
SCC	10	4	13	3
WSP	11	3	5	3
TOTAL	300	115	163	34

Source: California Department of Corrections, Inmate Appeals Activity FY 1991-92

APPENDIX B

UNITED STATES FEDERAL COURTS: INMATES' CIVIL RIGHTS CASE FILINGS

1980 to 1992

Year	Inmates' Filings	Civil Filings	% Civil Filings	Total Filings	% Total Filings
*1980	12996	171074	8	200461	6
1981	16561	190430	9	221996	7
1982	17358	223581	8	256400	7
1983	17557	255546	7	292182	6
*1984	18401	259956	7	297785	6
1985	18969	278793	7	319767	6
1986	22553	243946	9	285366	8
1987	23298	233292	10	276553	8
1988	24131	240232	10	283902	8
1989	25035	223113	11	269840	9
1990	25069	211626	12	258961	10
1991	25917	217656	12	263563	10
*1992	29589	229075	13	277441	11

EASTERN DISTRICT COURT: INMATES' CIVIL RIGHTS CASE FILINGS

1980 to 1992

Year	Inmates' Filings	Civil Filings	% Civil Filings	Total Filings	% Total Filings
*1980	116	1485	8	1887	6
1981	86	1405	6	1845	5
1982	131	1671	8	2122	6
1983	325	2182	15	2579	13
*1984	383	2411	16	2883	13
1985	506	2636	19	3203	16
1986	437	2198	20	2658	16
1987	649	2598	25	3051	21
1988	551	2428	23	2990	18
1989	723	2656	27	3353	22
1990	521	2359	22	2948	18
1991	594	2455	24	3176	19
*1992	845	2896	29	3653	23

Source: Federal Judicial Workload Statistics, Administrative Office of the U.S. Courts
Years ending 1980 through 1992
Data compiled through December 31 of year unless otherwise indicated.

* Reporting based on federal fiscal year ending September 30, 1992.

Note on Method: "Inmates' Filings" represents the total number of private inmates' civil rights cases filed, shown in Table C-3 of the Workload Statistics report. "Civil Filings" equals the total civil cases commenced, also shown in Table C-3. "% Civil Filings" is calculated by dividing "Inmates' Filings" by "Civil Filings." "Total Filings" represents the total number of civil cases commenced *plus* the total number of criminal cases commenced; the latter figure is shown in Table D of the Workload Statistics Report. "% Total Filings" is calculated by dividing "Inmates' Filings" by "Total Filings."

APPENDIX C

DISPOSITION OF INMATES' CIVIL RIGHTS CASES FILED IN APRIL 1991 EASTERN DISTRICT OF CALIFORNIA

Case Management Step	4/91	5/91	6/91	7/91	8/91	9/91	10/91
I. Screening							
a. IFP							
1. Request	46			1			
2. Granted	13	12	2	2	3	0	1
3. Denied		1	1				
b. DM/friv.			1		2	1	1
c. DM/amend	6.5	9	2	2	1		
d. P amends[1]		2	4	3	1	2	
e. DM'd[2]					2	1	1
f. Stay	1	1		1			1
II. Service							
a. USM 285	2	6	5		3	1	
b. Ordered	1	2	4	6	4	2	1
c. Effected	2	3	1	4	4	3	1
III. Answer							
a. Filed[3]			1	3	3	4	2
b. Jury demand			1	3	3	4	1
IV. Disc'vry							
a. Ct order				1	3	4	
b. P requests		1	1			1	
1. Gr'ted							
2. Denied			1			1	1
V. Motion							
a. Dismiss							
1. D files			1	1.5		0.5	
a) Gr'ted					1.5		
b) Denied							
2. Ct DM's	0.5		1		1		2
b. SJ							
1. D files							
a) Gr'ted							
b) Denied							
2. P files				1			
a) Gr'ted							
b) Denied				1			
VI. Status							
a. Order to file			1				1
b. DM/LOP							
VII. Scheduling order							
VIII. Pretrial order							
a. Issued							
b. TCH							
IX. Trial order							
a. Setlmt		2	1				
b. Trial							
a. Held							
b. For P							
c. For D							

1. Includes second and third amended complaints.
2. Dismissed after amendment, or for fail to amend.
3. Includes answers filed in response to second and third amended complaints.

Case Management Step	11/91	12/91	1/92	2/92	3/92	4/92	5/92
I. Screening							
a. IFP							
1. Request							
2. Granted		2	1				
3. Denied							
b. DM/friv.	1						
c. DM/amend		1	1				1
d. P amends				1	1	1	
e. DM'd		1			1	1	
f. Stay	1						
II. Service							
a. USM 285		2		1	1		2
b. Ordered	1	1	2	1	1		
c. Effected	3		2	1		3	
III. Answer							
a. Filed	4			2	3	3	
b. Jury demand	4			2	3	2	
IV. Disc'vry							
a. Ct order	2	2			2		1
b. P requests			1	1	3		1
1. Gr'ted							
2. Denied				1	1		
V. Motion							
a. Dismiss							
1. D files							
a) Gr'ted			1				
b) Denied							
a) Gr'ted							
2. Ct DM's	2	1				0.5	
b. SJ							
1. D files							
a) Gr'ted							
b) Denied							
2. P files							
a) Gr'ted							
b) Denied							
VI. Status							
a. Order to file					2	2	
b. DM/LOP							
VII. Scheduling order	1	1		1		1	1
VIII. Pretrial order							
a. Issued							
b. TCH							
IX. Trial order							
XA. Setlmt							
XB. Trial							
a. Held							
b. For P							
c. For D							

Case Management Step	6/92	7/92	8/92	9/92	10/92	11/92	12/92
I. Screening							
a. IFP							
1. Request							
2. Granted					1		
3. Denied							
b. DM/friv.			1				2
c. DM/amend							
d. P amends		1					
e. DM'd							
f. Stay							
II. Service							
a. USM 285							
b. Ordered	1		1	1	1		
c. Effected		1	1	1	1		
III. Answer							
a. Filed	1			1			
b. Jury demand	1			1			
IV. Disc'vry							
a. Ct order							
b. P requests	1	2	2	3[4]		1	3
1. Gr'ted			1				
2. Denied	2				1		
V. Motion							
a. Dismiss							
1. D files			1	0.5			
a) Gr'ted							
b) Denied							
2. Ct DM's		0.5		0.5			3
b. SJ							
1. D files			1			2	3
a) Gr'ted						1	
b) Denied							
2. P files							
a) Gr'ted							
b) Denied							
VI. Status							
a. Order to file	1	2	2	1	1	1	
b. DM/LOP							
VII. Scheduling order		2	1		1		
VIII. Pretrial order							
a. Issued							
b. TCH							
IX. Trial order							
XA. Setlmt					1		
XB. Trial							
a. Held							
b. For P							
c. For D							

4. All requests in this month made by the same plaintiff.

Case Management Step	1/93	2/93	3/93	4/93	5/93	6/93	7/93
I. Screening							
a. IFP							
1. Request							
2. Granted							
3. Denied							
b. DM/friv.							
c. DM/amend							
d. P amends	2				1		
e. DM'd							
f. Stay							
II. Service							
a. USM 285		1					
b. Ordered				1			
c. Effected				1		2	
III. Answer							
a. Filed		1	1		3	1	
b. Jury demand		1	1		3	1	
IV. Disc'vry							
a. Ct order						1	2
b. P requests	1	1	3	1	1		2
1. Gr'ted	1						2
2. Denied	1	1		1			
V. Motion							
a. Dismiss							
1. D files		1					
a) Gr'ted	0.5			0.5	0.5		
b) Denied			1	0.5	0.5		
2. Ct DM's		1		2			
b. SJ						0.5	
1. D files	1						
a) Gr'ted							0.5
b) Denied							
2. P files							
a) Gr'ted							
b) Denied							
VI. Status							
a. Order to file		1			1	1	1
b. DM/LOP							
VII. Scheduling order		1	1				2
VIII. Pretrial order							
a. Issued							
b. TCH							
IX. Trial order							
a. Issued							
b. Setlmt							
X. Trial							
a. Held							
b. For P							
c. For D							

Case Management Step	8/93	9/93	10/93	11/93	12/93	1/94	2/94
I. Screening							
a. IFP							
1. Request							
2. Granted							
3. Denied							
b. DM/friv.							
c. DM/amend							
d. P amends							
e. DM'd							
f. Stay							
II. Service							
a. USM 285							
b. Ordered							
c. Effected							
III. Answer							
a. Filed		1					
b. Jury demand		1					
IV. Disc'vry							
a. Ct order							
b. P requests	1	4	1	1			
1. Gr'ted		1.5	1		0.5		
2. Denied	1	0.5	1	1	0.5	2	1
V. Motion							
a. Dismiss							
1. D files							1
a) Gr'ted		0.5					
b) Denied		0.5					
2. Ct DM's		1					1
b. SJ							
1. D files		1		1			
a) Gr'ted		0.5[5]		1			
b) Denied		0.5					
2. P files							
a) Gr'ted							
b) Denied							
VI. Status							
a. Order to file							
b. DM/LOP							
VII. Scheduling order	2		1	1	2		
VIII. Pretrial order							
a. Issued	1				1		
b. TCH							
IX. Trial order							
a. Issued							1
XA. Setlmt							2
XB. Trial							
a. Held							
b. For P							
c. For D							

5. Also in this month, one motion for summary judgment was deemed moot, based on dismissal of the case.

Case Management Step	3/94	4/94	5/94	6/94	7/94	8/94	TOTAL
I. Screening							
a. IFP							
1. Request							47
2. Granted							37
3. Denied							3
b. DM/friv.							9
c. DM/amend							23.5
d. P amends							19
e. DM'd							7
f. Stay							5
II. Service							
a. USM 285							24
b. Ordered							31
c. Effected							35
III. Answer							
a. Filed							34
b. Jury demand							32
IV. Disc'vry							
a. Ct order							18
b. P requests							35
1. Gr'ted							6
2. Denied							16
V. Motion							
a. Dismiss							
1. D files							7.5
a) Gr'ted							5
b) Denied							2.5
2. Ct DM's							16
b. SJ							
1. D files	1						11.5
a) Gr'ted	1.5		1				5.5
b) Denied	0.5						1
2. P files							1
a) Gr'ted							0
b) Denied							1
VI. Status							
a. Order to file							18
b. DM/LOP							1
VII. Scheduling order		1					20
VIII. Pretrial order							
a. Issued	2		1				5
b. TCH		1					1
IX. Trial order							2
XA. Setlmt							6
XB. Trial							1
a. Held	1--	----	--1				1
b. For P							0
c. For D			1				1

DISPOSITION OF INMATES' CIVIL RIGHTS CASES FILED IN APRIL 1991: EASTERN DISTRICT

Additional Statistics	
Appointment of Counsel	
No. of Requests	33[6]
Granted	3
Denied	20
Injunctive Relief	
No. of Requests	23[7]
Granted	0
Denied (inc. withdrawn as moot)	11
Appeals	
To District Judge	1
Granted	0
Denied	1
To Appeals Court	9
Granted	0
Denied	7
Pending	2
Address Changes	
Filed by P	42
Filed by D	1
DM/Fail to provide	4
"Instructional" Orders[8]	48
Plaintiff requests and complaints[9]	138

6. 10 requests made by one plaintiff alone.
7. 4 made by one plaintiff alone.
8. Special orders issued to clarify proper procedure for inmate plaintiff. They include, e.g., warnings that ex parte communications will not be tolerated by court, orders to show cause why complaint should not be dismissed, notices that complaint has been dismissed with instructions regarding initiation of new complaint, notices that discovery documents should not be filed with court, notices that letters are being construed as motions, and notices that failure to provide proper certificate of service will result in dismissal.
9. Requests, in letter or motion form, are for: forms, file-endorsed copy of complaint, clarification of a court order, a second chance to serve, extensions of time, status reports on a case, access to copy machine or legal supplies, access to law library, continuance, substitution of defendants, and review of medical files. Complaints include: reports of corrections' intent to destroy records, police brutality, denial of access to law library, and improperly opened legal mail.

APPENDIX D

INMATES' CIVIL RIGHTS CASES BY TYPE OF CLAIM CASES FILED IN APRIL 1991 (27 of 53 Cases filed)

Type of Claim	# Filed	Injunx/Gen'l Damages	Punitive Damages
Administrative Segregation	6	0	1
Deliberate Indifference to Threat of Serious Injury	4	0	2
Denial of Access to Courts	4	0	3
Excessive Force by Staff	4	1	4
Inadequate Medical Care	3	0	2
Retaliation for Grievances	1	0	1
Sexual Harassment	1	0	1
Multiple Claims[1]	4	2	3

Source: Computer log maintained by the California Attorney General's office. *See supra* note 96.

1. Includes: Staff threat to shoot/cell search; Medical care withheld to force compliance; Excessive force/inadequate medical/denial of access to courts; Ad Seg/ excessive force/transfer to Pelican Bay.

INMATES' CIVIL RIGHTS CASES BY TYPE OF CLAIM CASES FILED IN APRIL 1991

Type of Claim	# Filed	Injunx/Gen'l Damages	Punitive Damages
Administrative Segregation or	6	3	4
Breach of privacy (medical records)	1	1	1
Classification/custody	2	2	0
Confiscation of legal property	4	3	3
Deliberate indifference to Threat of Serious Injury	6	6	4
Denial of Access to Courts or Law Library	3	1	1
Excessive Force by Staff	5	4	3
Inadequate Medical or Psychiatric Care	10	9	6
Property (seizure of personal)	2	1	0
Retaliation for Grievances	1	0	1
Sexual Harassmen	1	1	1
Multiple Claims[2]	6	6	2
Unknown (including cases transferred)	6	0	0

Source: Court dockets and individual case files for inmates' civil rights cases filed in the Eastern District of California in April 1991.

2. Includes: Staff threats/cell search; Medical care withheld to force compliance; Excessive force/inadequate medical/denial of access to courts; Administrative Segregation in combination with one or more of excessive force, legal access, and transfer to Pelican Bay; Personal injury/inadequate medical; Improper detention/ unconstitutional living conditions/denial of access to 602 process; Fact of imprisonment/ police brutality.

INMATES' CIVIL RIGHTS CASES FILED IN APRIL 1991 IN THE EASTERN DISTRICT OF CALIFORNIA
Outcomes by Type of Claim

Type of Claim	Stay	DM	SJ	Settle	Trial	Transfer
Administrative Segregation		5[3]	1			
Breach of privacy (medical records)		1[4]				
Classification/custody		2				
Confiscation of legal property			1			
Deliberate indifference to Threat of Serious Injury	1	3[5]			1 (for D)	
Denial of Access to Courts or Law Library		2[6]				1
Excessive Force by Staff	1	1		3		
Inadequate Medical or Psychiatric Care		8[7]	1	2		
Property (seizure of personal)		2[8]				
Retaliation for Grievances	1					1
Sexual Harassment				1		
Multiple Claims[9]	1	4[10]				
Unknown (including cases transferred)		3[11]				3

Note: At this writing the following types of cases still are pending: legal property confiscation (3), deliberate indifference to threat of physical injury (1), multiple claims (1), and unknown claims (1).
Source: Court dockets and individual case files for inmates' civil rights cases filed in the Eastern District of California in April 1991.

3. Includes 1 frivolous.
4. Frivolous.
5. Includes 1 frivolous; 1 for lack of current address; 1 for lack of prosecution.
6. 1 based on immunity of state court judge defendant; one for lack of current address.
7. Includes 2 frivolous.; 1 lack of address; 1 failure to file proper status report.
8. 2 frivolous.
9. Includes: Staff threats/cell search; Medical care withheld to force compliance; Excessive force/inadequate medical/denial of access to courts; Administrative Segregation in combination with one or more of excessive force, legal access, and transfer to Pelican Bay; Personal injury/inadequate medical; Improper detention/unconstitutional living conditions/denial of access to 602 process; Fact of imprisonment/police brutality.
10. 1 lack of address; 1 frivolous.
11. 2 frivolous.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

NOTICE

On October 15, 1993, the United States Department of Justice granted full certification, as defined in 28 C.F.R. § 40.15, to the Kansas Department of Corrections Inmate Grievance Procedure.

In order to assure that the remedy provided by this procedure is used before claims are presented for judicial review in an action brought pursuant to 42 U.S.C. § 1983 and assigned to the undersigned, it is hereby ORDERED and ADJUDGED:

1. That all pleadings presented for filing pursuant to 42 U.S.C. § 1983 by an adult confined in the custody of the Secretary of the Kansas Department of Corrections and arising from the party's incarceration shall include documentation of the party's efforts to present these claims for review under the Inmate Grievance Procedure. This requirement may be satisfied by presenting copies of the grievance form submitted by the inmate and any responses issued by the principal administrator of the facility and by the Secretary of the Department of Corrections or designee.

- 1 -

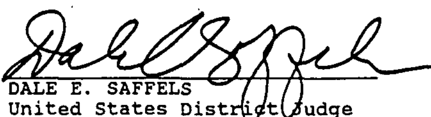
Author's note: The Kansas Notice was issued before Congress amended CRIPA to extend the authorized period for a stay from ninety (90) to one hundred eighty (180) days. *See supra* note 43.

This requirement shall not apply to those matters specifically excluded from the Inmate Grievance Procedure by Kansas Administrative Regulation 44-15-101a(d)(2), namely, the inmate disciplinary process, classification decisions, property loss, or personal injury claims. However, where the inmate challenges the procedure rather than the decision in these matters, exhaustion of the grievance procedure may be required.

2. That any action filed which does not demonstrate exhaustion of the Inmate Grievance Procedure will be continued for a period not to exceed ninety (90) days, as provided by 42 U.S.C. § 1997e, to allow the inmate to exhaust this administrative remedy, if the court believes this requirement is appropriate and in the interests of justice.

This requirement shall become effective on January 1, 1994, in all matters assigned to the undersigned and shall remain in effect until the further order of the court.

DATED this 13th day of December, 1993, at Topeka, Kansas.



DALE E. SAFFELS
United States District Judge

APPENDIX F

]STATE AND LOCAL INMATE GRIEVANCE PROCEDURES CERTIFIED UNDER 42 US.C. § 1997e

Summary of Key Provisions Effective in 1994

Feature\State	CT	D.C.	FLA	HI
Policy as management tool	Yes	No	Yes	Yes
Inmates' role				
- Decision-making	No	No	No	No
- Comment/advice	Yes	Yes	Yes	Yes
- Other	No	Yes	No	No
Number of steps in process	3	3	2	2
- Including informal	+1	+1	+1	+1
Length for entire process (in days)	135	85	90	64
Remedies specified		None	None	
- Modify policy/practice	Yes			Yes
- Restore property/provide restitution	Yes			Yes
- Discipline offending prison employee	No			Yes
- "Assurance" (won't happen again)	No			Yes
- Other	Enforce or make new policy		(Case by case, based on facts)	
Emergency provisions	8 hrs.	72 hrs.	48 hrs.	72 hrs
Year Procedure Certified	1993	1992	1992	1992
Procedure before certification?	Yes	Yes	Yes	n/a
- Similar or Different?	Diff't	Sim'r	Sim'r	
Grievances upheld	11.95% (Step 1 - 1/94)[1]	n/a	7.3 % (1992)	9.6 % (1993)
Reduction in § 1983 litigation?	n/a	n/a	n/a	n/a

1. In addition to those upheld, 11.49% of grievances filed were "compromised" in January 1994.

Feature\State	IA	KS	LA	MD[2]
Policy as management tool	Yes	No	Yes	Yes
Inmates' role				
- Decision-making	No	No	No	No
- Comment/advice	Yes	Yes	Yes	Yes
- Other	No	No	No	No
Number of steps in process	3	2	3	4
- Including informal	+1	+1	+1	+1
Length for entire process (in days)	90	58[3]	90[4]	60
Remedies specified	None			
- Modify policy/practice		Yes		Yes
- Restore property/provide restitution		No		Yes
- Discipline offending prison employee		No		Yes
- "Assurance" (won't happen again)		No		Yes
- Other		Yes	Inc. money damages	Yes
Emergency provisions	1/2 normal time	"ASAP"	"ASAP"	72 hrs
Year Procedure Certified	1987	1993	1993	1991
Procedure before certification?	Yes	n/a	Yes	Yes
- Similar or Different?	Similar		Diff't	Diff't
Grievances upheld	n/a	6.4% (Step 1 - 1993)[5]	n/a	n/a
Reduction in § 1983 litigation?	n/a	n/a	No growth[6]	Yes[7]

2. Montgomery County.
3. With one year statute of limitations.
4. With possible 25 day extension.
5. 3.5% were upheld at Step 2 in 1993.
6. Out of approximately 6500 grievances filed in one year, an estimated 20 may end up in federal court. Telephone interview witih Dora Rabalais, Legal Programs Director, Louisiana State Penitentiary (Apr. 20, 1994).
7. In the past 5 years, only 3 inmates have initiated court action after exhausting the grievance procedure. Memorandum from Charles E. Hessling, Department Investigator, to Devon Brown, Director, Montgomery County Department of Corrections and Rehabilitation, of May 19, 1994.

Feature\State	MO	NE	MT	NM[8]
Policy as management tool	No	No	Yes	Yes
Inmates' role				
- Decision-making	No	No	Yes[9]	No
- Comment/advice	Yes	No	Yes	No
- Other	No	Yes	Yes	No
Number of steps in process	2[10]	2	3	2
- Including informal	+1	+0	+1[11]	+0
Length for entire process (in days)	115-215	n/a	41	19-21
Remedies specified				
- Modify policy/practice		Yes	Yes	
- Restore property/provide restitution		Yes	Yes	
- Discipline offending prison employee		Yes	No	
- "Assurance" (won't happen again)		No	Yes	
- Other	Yes	Yes	Yes	Yes
Emergency provisions	7 days	24 hrs.	48 hrs.	"ASAP"
Year Procedure Adopted	1992	1993	1987	1989
Procedure before certification?	Yes	n/a		Yes
- Similar or Different?	Sim'r			
Grievances upheld	n/a	n/a	6.4% (1993)	n/a
Reduction in § 1983 litigation?	n/a	n/a	n/a	n/a

8. Bernalillo County.
9. Serve on committee; constitute minority of voting members.
10. Plus one additional optional step.
11. Mandatory.

Feature\State	NY	NEV[12]	NC	OH
Policy as management tool	Yes	Yes	No	Yes
Inmates' role				
- Decision-making	Yes[13]	No	No	No
- Comment/advice	Yes	Yes	No	Yes
- Other	Yes	Yes	Yes	Yes
Number of steps in process	3	4	3	2
- Including informal	+1	+1	+1	+1
Length for entire process (in days)	68	90	90	90
Remedies specified			None	
- Modify policy/practice		Yes		Yes
- Restore property/provide restitution		Yes		Yes
- Discipline offending prison employee		Yes		Yes
- "Assurance" (won't happen again)		Yes		No
- Other	Yes	Yes		Yes
Emergency provisions	"ASAP"	8 hrs.	"ASAP"	5 days
Year procedure adopted	1992	1992	1994	1987
Procedure before certification?	Yes		Yes	Yes
- Similar or Different?	Sim'r		Sim'r	Sim'r
Grievances upheld	20.89% (1993)		133.4% (1991-1992)	
Reduction in § 1983 litigation?	n/a	No	n/a	n/a

12. Procedure lapsed 1993. *See supra* notes 164-65 and text accompanying.
13. *See* note 5 *supra*.

Feature\State	PA[14]	TN	VAI[15]	VAII[16]
Policy as management tool	Yes	No	Yes	Yes
Inmates' role				
- Decision-making	No	No	No	No
- Comment/advice	Yes	Yes	Yes	Yes
- Other	Yes	No	No	No
Number of steps in process	2	3	3	4
- Including informal	+1	0	+1[17]	+1
Length for entire process (in days)	40	90	90	85
Remedies specified		None		None
- Modify policy/practice			Yes	
- Restore property/provide restitution			Yes	
- Discipline offending prison employee			Yes	
- "Assurance" (won't happen again)			No	
- Other	Yes		Yes	
Emergency provisions	72 hrs.	"ASAP"	8 hrs.	"ASAP"
Year procedure adopted	1992	1993	1982	1987
Procedure before certification?	n/a	n/a	n/a	n/a
- Similar or Different?				
Grievances upheld	n/a	n/a	n/a	12.8% (1993)[18]
Reduction in § 1983 litigation?	n/a	n/a	n/a	n/a

14. Bucks County.
15. State of Virginia.
16. Portsmouth County.
17. Mandatory.
18. In addition, 46% of all grievances filed in 1993 were resolved through mediation.

Feature\State	WYO	CALIFORNIA (for comparison)
Policy as management tool	No	Yes
Inmates' role		
- Decision-making	No	No[19]
- Comment/advice	Yes	No
- Other	No	No
Number of steps in process	2	3
- Including informal	+1	+1
Length for entire process (in days)	118	150
Remedies specified		
- Modify policy/practice	Yes	
- Restore property/provide restitution	Yes	
- Discipline offending prison employee	Yes	
- "Assurance" (won't happen again)	Yes	
- Other	Yes	
Emergency provisions	3 days	
Year procedure adopted	1983	
Procedure before certification?	n/a	Not applicable
- Similar or Different?		
Grievances upheld	n/a	
Reduction in § 1983 litigation?	n/a	n/a

Sources: Individual state grievance plans and staff coordinators; state corrections departments annual grievance summaries (on file with author).

19. It is this aspect of California's procedure — its failure to provide for inmate participation — that currently disqualifies it from CRIPA certification. *See supra* note 43.