State Prisoners, Federal Courts, and Playing by the Rules: An Analysis of the Aldisert Committee's *Recommended Procedures for Handling Prisoner Civil Rights Cases*

In the past fifteen years, prisoners in state correctional facilities and local jails filed more than seventy-five thousand petitions in federal courts[1] under the Civil Rights Act of 1871, 42 U.S.C. § 1983.[2] Section 1983 complainants seek relief for depri-

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1. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1971 ANNUAL REPORT OF THE DIRECTOR 135 (1971) (Table 17) [hereinafter cited by appropriate year, *e.g.*, 1971 ANNUAL REPORT]; 1975 ANNUAL REPORT 207 (Table 24); 1980 ANNUAL REPORT 62 (Table 21). Annual Reports have reported state prisoner civil rights petitions as a separate statistic since 1966, when 218 petitions were filed. The 15 year total is 75,101. *In forma pauperis* denials are not docketed, and thus not reported to the Administrative Office. The number of prisoner cases actually presented to the federal courts is, therefore, higher. See discussion of *in forma pauperis* screening at notes 84-104 *infra*.

2. 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, *as amended by* Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284 (codified at 42 U.S.C. § 1983 (Supp. III 1979)). The 1979 amendment extended the Act's protection to the District of Columbia. *See* District of Columbia v. Carter, 409 U.S. 418, *rehearing denied*, 410 U.S. 959 (1973). In extending civil rights protection, Congress affirmed the desirability of a "neutral Federal forum in which to air [a] complaint, instead of being forced to sue . . . state officials in State Courts." H.R. REP. No. 548, 96th Cong., 1st Sess. 1, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 2609, 2609. State officials (but not agencies) and municipalities (but not state governments) are "persons" under 42 U.S.C. § 1983. Owen v. City of Independence, 445 U.S. 622 (1980); Monnell v. Dep't of Social Servs., 436 U.S. 658 (1978); Monroe v. Pape, 365 U.S. 167 (1961).

Over Justice Powell's dissent, joined by Chief Justice Burger and Justice Rehnquist, the Supreme Court has held that section 1983 encompasses claims based on purely statutory violations of federal law as well as constitutional deprivations. Maine v. Thiboutot, 448 U.S. 1 (1980) (deprivation of welfare benefits under Social Security Act).

The essential elements of a section 1983 action are "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, 101 S. Ct. 1908, 1913 (1981). Unlike its criminal counterpart, 18 U.S.C. § 242 (1976), the civil remedy does not require

vations of constitutional rights by persons acting under color of state authority. State prisoners challenge the conditions of their confinement, such as living space, sanitation, medical care, and food.[3] The petitions allege acts by state employees violating such rights as free exercise of religion,[4] access to the courts,[5] communication,[6] and freedom from cruel and unusual punishment.[7] The constitutional deprivation may be grave — more than a year in solitary confinement as retaliation for unpopular Black Muslim beliefs and jailhouse lawyering activity[8] — or slight — seven packs of cigarettes taken by a guard without due process of law.[9] In either case, broad statutory language permits the

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specific intent to deprive a person of a federal right. 101 S. Ct. at 1913; Baker v. McCollan, 443 U.S. 137, 139-40 (1979). *See generally* I. SENSENICH, COMPENDIUM OF THE LAW ON PRISONERS' RIGHTS 69-121 (1979), 16-26 (Supp. 1981).

3. Preiser v. Rodriguez, 411 U.S. 475 (1973). When a state prisoner asserts that violation of constitutional rights in his criminal trial proceedings requires his release from custody, he brings a habeas corpus action under 28 U.S.C. § 2254 (1976). Although the lines sometimes blur, habeas corpus actions challenge the fact or length of custody, while section 1983 actions challenge the conditions of custody. Analysis of 644 cases filed in district courts in Massachusetts, Vermont, the Eastern District of Virginia, and the Northern and Eastern Districts of California showed that medical care, property loss or damage, and interference with access to the courts were the most frequently raised claims, while censorship of reading, racial and ethnic discrimination, grooming restrictions, search and shakedown, religious problems, sexual and other harassment were infrequent (each category presented less than five percent of the claims). Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 622-23 (1979).

4. *See, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972). A Buddhist prisoner sought access to the prison chapel and the right to correspond with his religious advisor. The lower court's denial, with no hearing or findings of fact, was reversed *per curiam*.

5. *See* Wolff v. McDonnell, 418 U.S. 539 (1974). Prisoners have a right "to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579. Prison authorities must provide either adequate law libraries or assistance from persons trained in the law. Bounds v. Smith, 430 U.S. 817, 828 (1977).

6. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974). In general, limitations on prisoners' mail must be no greater than necessary to protect an articulated government interest unrelated to the suppression of expression. *Id. See generally* I. SENSENICH, *supra* note 2, at 125-38, Supp. at 28-30.

7. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976). The eighth amendment, applicable to the states through the fourteenth amendment, "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' . . . against which we must evaluate penal measures." *Id.* at 102.

8. Sostre v. McGinnis, 442 F.2d 178 (2d Cir.), *cert. denied sub nom.* Sostre v. Oswald, 404 U.S. 1049 (1971), and Oswald v. Sostre, 405 U.S. 978 (1972).

9. Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973). Chief Justice Burger cited the case with dismay for engaging the attention of "one District Judge twice, three Circuit Judges on appeal and six other circuit judges in a secondary sense — to say nothing of lawyers, court clerks, bailiffs, court reporters and all the rest." Speech delivered to the American Bar Association, Washington, D.C. (Aug. 6, 1973), *quoted in* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and*

state prisoner to take his complaint directly to a federal court. He is not impeded by a minimum amount in controversy,[10] nor must he exhaust either administrative or state judicial remedies.[11] By 1980, one out of fourteen civil cases filed in federal district courts was a prisoner section 1983 petition.[12]

Prisoner section 1983 complaints are a recent and distinctive phenomenon in the federal courts. In the past fifteen years,

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the Federal Caseload, 1973 LAW & THE SOCIAL ORDER 557, 569-70 n.55.

In Lynch v. Household Finance Corp., 405 U.S. 538 (1972), the Supreme Court held that section 1983 protects property as well as personal rights. In the 1980 October term, the Court rejected the notion that *any* property loss inflicted by a state employee constitutes a constitutional deprivation. Parratt v. Taylor, 101 S. Ct. 1908 (1981). The Court stressed that Nebraska's tort claims procedure was sufficient to satisfy due process when the loss of the prisoner's mail order package arose because of a state employee's negligence. *Id.* at 1917. The State had argued that *de minimis* property loss ($23.57) can not be protected by the fourteenth amendment; the Court did not follow this suggestion.

10. 28 U.S.C. § 1343(3)-(4) (1976). Congress has never required section 1983 plaintiffs to meet a minimum amount in controversy. "The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; . . . and yet by this section jurisdiction of that civil action is given to the Federal courts . . . ." CONG. GLOBE, 42d Cong., 1st Sess. app. 216 (1871) (remarks of Sen. Thurman), *quoted in* Monroe v. Pape, 365 U.S. 167, 179-80 (1961). In contrast, most plaintiffs asserting federal questions had to plead a minimum $10,000 claim. 28 U.S.C. § 1331 (1976). Congress abolished this amount in controversy requirement in 1980. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (codified at 28 U.S.C.A. § 1331 (West Supp. 1981)).

11. Monroe v. Pape, 365 U.S. 167, 183 (1961), established that Congress intended the federal statute to supplement existing state remedies for deprivations of constitutional rights. The general rule is that exhaustion of state judicial or administrative remedies is unnecessary. *See, e.g.*, Wilwording v. Swenson, 404 U.S. 249, 251 (1971); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. denied as improvidently granted*, 426 U.S. 471 (1976). This is so even when the state has adopted a grievance procedure. *See, e.g.*, Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975). *But see* Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978).

Congress created a limited exhaustion of remedies mechanism under the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C.A. § 1997 (West Supp. 1974-80)). Courts may continue section 1983 cases for up to 90 days under certain criteria. *See* notes 118-24 *infra* and accompanying text. In light of this legislation, the Supreme Court vacated judgment and remanded a prisoner's complaint of loss of property during a shakedown. Jenkins v. Brewer, 101 S. Ct. 1338 (1981). The Seventh Circuit Court of Appeals, in an unpublished opinion, had affirmed dismissal of the section 1983 action for failure to exhaust administrative remedies. Jenkins v. Brewer, 624 F.2d 1106 (7th Cir. 1980). The Supreme Court granted certiorari, but by its later disposition once again avoided analysis of an exhaustion requirement in prisoner section 1983 cases.

For discussion of arguments against an exhaustion requirement, especially for prisoners, who "may be in an even more vulnerable position than a black man in the post-war South," see Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 68 (1980).

12. In 1980, state prisoners filed 12,397 section 1983 petitions, as compared with a total 168,789 civil filings, a ratio of 1:13.6. 1980 ANNUAL REPORT, *supra* note 1, at 62 (Tables 20 & 21).

finite judicial resources were strained by a 138% increase in civil filings,[13] while during the same period prisoner civil rights petitions increased over 5500%.[14] This disproportionate statistic is not the whole picture, however. Prisoner civil rights cases actually consume minimal court time. Judges dismiss over ninety percent before pretrial.[15] The cases are only half as likely to go to trial as other civil actions.[16] One district, for example, reported 833 prisoner section 1983 cases, nearly thirty percent of its civil caseload. Those petitions, however, consumed only five trial days.[17]

The expeditious removal of almost all prisoner section 1983 cases from the docket before pretrial is evidence of a distinctive procedural response. Frequently, judges and court personnel have moved away from the uniform Federal Rules of Civil Procedure, proceeding instead under local court rules or unwritten practices not applicable to other civil cases. This Comment examines that response, and in particular the procedures recommended by a Federal Judicial Center committee.[18] The Aldisert

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13. *Id.* at 62 (Table 20). Civil filings increased 138%, from 70,906 cases in 1966 to 168,789 cases in 1980.

14. 1971 ANNUAL REPORT, *supra* note 1, at 135 (Table 17); 1980 ANNUAL REPORT, *supra* note 1, at 62 (Table 21). Prisoner civil rights petitions increased 5586%, from 218 petitions in 1966 to 12,397 in 1980. Concern about the federal court caseload should not obscure a fundamental purpose of those courts: adjudication of constitutional and federal statutory claims. The administrative burden, however, is of great practical concern, and becomes a constitutional problem if the "crushing weight of cases—whatever their worth—ultimately denigrates all rights." Whitman, *supra* note 11, at 27.

15. 1971-1980 ANNUAL REPORT, *supra* note 1, at Table C4. The actual figures are 81% in 1980, 79% in 1979, and then a remarkable uniformity of 90.1 to 91.9% for the years 1970 to 1978. *Id.*

Turner's study showed that the predominant reason (68% of all cases filed in 1978) for the termination of prisoner actions before pretrial was court dismissal prior to service of process on the named defendant. Turner, *supra* note 3, at 618. The Annual Report does not break down the statistic.

16. The Administrative Office of the United States Courts has reported terminations of state prisoner civil rights petitions as a separate statistic since 1971. 1971-1980 ANNUAL REPORT, *supra* note 1, at Table C4. The 11 year average of prisoner cases reaching trial is 4.3%, compared with 8.3% of all civil cases. *Id.* In 1980, 3.7% of prisoner section 1983 actions went to trial, compared with 6.5% of all civil actions. 1980 ANNUAL REPORT, *supra* note 1, at A-26 (Table C4).

17. In 1978, the Eastern District of Virginia had the heaviest caseload in the nation. Prisoner section 1983 cases comprised 29.3% of all civil cases. Five trial days sufficed for the 833 cases filed in 1978. Turner, *supra* note 3, at 660, 662 app. B. In the 664 cases examined by Turner, only 21 had either an evidentiary hearing or a trial. *Id.* at 663. In a two and a half year period, the Eastern District of California devoted one court day to prisoner section 1983 complaints. *Id.* at 624.

18. Circuit Judge Ruggero J. Aldisert (U.S. Court of Appeals Third Circuit) chaired The Prisoner Civil Rights Committee, formed in 1975 to examine the handling of section

Committee published its final report[19] in 1980, concluding that both judicial economy and the just disposition of individual prisoner cases can best be accomplished by singling out section 1983 suits for treatment different from that accorded other civil actions.[20] This Comment disagrees. Where the procedures conflict with statutes or the Federal Rules of Civil Procedure, they exceed the limits of courts' rule-making authority, calling into question the legitimacy of disposing of prisoner cases in this manner. Further, local court rules responding to one category of civil litigation undermine the uniformity of procedure sought by the Federal Rules. If, additionally, the recommendations do not effectively promote the purpose of procedure in federal courts, "the just, speedy, and inexpensive determination of every action,"[21] the Committee's procedural response to the perceived problem of prisoner section 1983 complaints may be shortsighted and less appropriate than some existing statutory alternatives.

The Comment first will recapitulate the full range of procedural initiatives proposed by the Aldisert Committee for adoption as local court rules. Then it will analyze the Committee's recommendations relating to pleading forms and screening the complaints before service of process, the critical stage at which courts dispose of most prisoner complaints. Although concluding that important aspects of the recommended procedures are fun-

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1983 cases in federal court. Three district court judges, a magistrate, and a law professor served on the committee.

19. PRISONER CIVIL RIGHTS COMMITTEE, FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (1980) [hereinafter cited as ALDISERT REPORT].

20. *Id.* at 4, 7-28. In addition to the recommended procedures and forms, the focus of this Comment's analysis, the Aldisert Report emphasized the need for development of administrative grievance procedures within correctional institutions, and the importance of increasing the use of state courts, particularly to deal with meritorious prisoner complaints that do not rise to the level of a constitutional violation. *Id.* at Intro. ix-x, 29-42.

21. FED. R. CIV. P. 1. The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature . . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action." The original grant of rule-making authority to the courts contained these precepts. In 1793, Congress authorized courts to make rules "in a manner not repugnant to the laws of the United States, to regulate the practice of said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335 (adapted from Act of March 8, 1792, ch. 36, § 2, 1 Stat. 276, and from Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83).

For discussion of the limits of courts' rule-making authority, see notes 47-50 *infra* and accompanying text.

damentally inconsistent with federal statutes and rules, this Comment acknowledges the valid concerns generating the Committee's proposals, and then suggests alternative judicial actions responsive to the phenomenon of state prisoner civil rights complaints in federal courts.

A SUMMARY OF THE ALDISERT COMMITTEE PROPOSALS

At the initiative of Chief Justice Burger, the Federal Judicial Center, research arm of the federal courts,[22] formed a committee to study the prisoner petition phenomenon. After a five-year study, solicitation of district judges' and magistrates' views, and two draft reports, the Aldisert Committee published Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts.[23] The procedures are used in at least half the circuits.[24] The Federal Judicial Center has circulated the

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22. Congress established the Federal Judicial Center in 1967 as the research, development, and training arm of the federal judiciary. 28 U.S.C. §§ 620-629 (1976). The Center recommends improvements in court administration and management to the Judicial Conference of the United States. The Chief Justice of the United States serves as chairperson of both entities. The Center operated with a staff of 136 and an $8.5 million budget in fiscal year 1980. 1980 ANNUAL REPORT, *supra* note 1, at 19 (Table 19), 28 (Table 20).

23. ALDISERT REPORT, *supra*, note 19. The Federal Judicial Center circulated two tentative drafts to the bench and bar (May 1977 and Jan. 1978) and distributed a one page questionnaire (Sept. 15, 1977). *See* note 24 *infra*. The final Report is available on request from the Federal Judicial Center's Information Services, 1520 H St. N.W., Washington, D.C. 20005.

24. A Federal Judicial Center survey in September, 1977, indicated that a judge or magistrate in 57 of 94 judicial districts used at least the *in forma pauperis* procedures in 77.3% of the prisoner civil rights cases filed. Memorandum from Alan J. Chaset, research staff to members of the Aldisert Committee, at 7 (Feb. 15, 1978) (on file at the University of Puget Sound Law Review offices). While admitting the low return rate's effect on reliability (23.2% of the 976 questionnaires sent to district judges and magistrates were returned), Chaset concluded there was "broad acceptance of our report and wide use of our recommended standards and procedures." *Id.* at 9.

Courts in five circuits cite the Aldisert procedures specifically: Second Circuit, Ron v. Wilkinson, 565 F.2d 1254, 1259 (2d Cir. 1977) *cert. denied*, 436 U.S. 970 (1978); Mignone v. Vincent, 411 F. Supp. 1386, 1390 (S.D.N.Y. 1976); Third Circuit, United States v. Fayette County, Pa., 599 F.2d 573, 576 (3d Cir. 1979); United States v. Lightcap, 567 F.2d 1226, 1234 n.1 (3d Cir. 1977); Dougherty v. Harper's Magazine Co., 537 F.2d 758, 761 n.3 (3d Cir. 1976); Sinwell v. Shapp, 536 F.2d 15, 18 n.9, 19 n.10 (3d Cir. 1976); Fourth Circuit, Boyce v. Alizaduh, 595 F.2d 948, 950-51, 952 n.8 (4th Cir. 1979); Gordon v. Leeke, 574 F.2d 1147, 1154 n.1 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978); Fifth Circuit, Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977); Taylor v. Gibson, 529 F.2d 709, 717 (5th Cir. 1976); Covington v. Cole, 528 F.2d 1365, 1372-73, *rehearing denied*, 533 F.2d 1135 (5th Cir. 1976); Watson v. Ault, 525 F.2d 886, 891-98 (5th Cir. 1976) (reprint of form); Hardwick v. Ault, 517 F.2d 295, 298 (5th Cir. 1975); Zaragoza v. City of San Antonio, 464 F. Supp. 1163, 1166 (W.D. Tex. 1979); Carter v. Telectron, 452 F.

report to the bench, and distributes it to magistrates as part of the training for which the Center is statutorily responsible.[25] Thus, although the Judicial Conference has neither adopted the Committee's recommendations nor endorsed the underlying premises,[26] the report is an influential document warranting thoughtful analysis.

The Aldisert Committee encourages districts with a heavy prisoner caseload to delegate the complaints to their magistrates, and to adopt procedures and forms by local court rule.[27] A special staff law clerk, or, preferably, a magistrate, would centrally process a mandatory complaint form.[28] Most prisoners request waiver of court fees;[29] a required form would present the prisoner's request to file *in forma pauperis*.[30] The magistrate

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Supp. 944, 948-51 (S.D. Tex. 1977); Braden v. Estelle, 428 F. Supp. 595, 597 (S.D. Tex. 1977); Eighth Circuit, Johnson v. Teasdale, 456 F. Supp. 1083, 1086 (W.D. Mo. 1978); Green v. Garrott, 71 F.R.D. 680, 683 (W.D. Mo. 1976). Other courts refer generally to special forms for prisoners' use. Hughes v. Rowe, 101 S. Ct. 173, 175 (1980) (petitioner filed section 1983 complaint in Northern District of Illinois on the form used by *pro se* prisoners).

25. 28 U.S.C. §§ 620(b)(3), 637 (1976). The Federal Judicial Center conducts training programs for new magistrates within one year of their appointment.

26. On matters of policy, the Federal Judicial Center speaks only through its board. *Id.* § 623 (1976). The Aldisert Committee has not submitted the final report to the Judicial Conference for formal endorsement or adoption of the forms and procedures. Telephone conversation with Alan J. Chaset, Assistant Director of Research and Staff to the Prisoner Civil Rights Committee (Oct. 24, 1980). The Judicial Conference is continuing the study of prisoner litigation through an ad hoc committee: Ninth Circuit Judge Goodwin, and district court judges Rubin (Southern District of Ohio) and Teitelbaum (Western District of Pennsylvania).

27. ALDISERT REPORT, *supra* note 19, at 45, 51-53. Forms include a complaint form; declaration in support of request to proceed *in forma pauperis*; order to the court clerk to file the complaint; order to the marshal to serve process; letter to a prisoner returning communication mailed directly to a judge; order to plaintiff and defendant to file narrative statement of the facts, witnesses, and exhibits; order requiring a special report by prison officials; pretrial order. *Id.* at 87-106 (Recommended Forms).

28. *Id.* at 49-53.

29. 28 U.S.C. § 1914(a) (Supp. II 1978) (filing fee); *id.* § 1921 (1976) (marshals' fees for service of process). In Turner's five-district sample, 85 to 95% of the prisoners filed *in forma pauperis*. Turner, *supra* note 3, at 661 app. B. Any party may ask the court to waive fees and costs. The federal pauper's statute provides in part:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, 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. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

28 U.S.C. § 1915(a) (1976). For discussion of screening these requests for waiver of fees under the Aldisert procedures, *see* notes 84-104 *infra* and accompanying text.

30. 28 U.S.C. § 1915 (1976). ALDISERT REPORT, *supra* note 19, at 54-58, 93-94

would grant or deny the request only on the basis of the prisoner's economic status.[31] Once the magistrate grants leave to proceed *in forma pauperis*, the clerk would file the complaint.[32] Magistrates would then decide whether process should issue, or whether to recommend to the judge that the filed complaint be dismissed before service of process on the defendant.[33] The plaintiff could object within ten days to the magistrate's recommendation[34] and the court would have discretion to permit amendment of the complaint.[35]

If the complaint were not dismissed, the marshal would serve process[36] and the court would mail the prisoner-petitioner instructions to send copies of all future documents to the defendant and to the clerk of the court.[37] During pretrial, magistrates would hear and decide any nondispositive motion.[38] Under the Aldisert Committee recommendations, local court rules could extend time periods for making and answering motions,[39] as well as limit discovery to a short period.[40] The plaintiff would use a form to summarize the anticipated testimony of his witnesses so that the court could decide whether to go to the expense of bringing a witness or the petitioner to the court.[41] The court could also use a special report form to discover defendant's version of the facts.[42]

(Form 2).

31. ALDISERT REPORT, *supra* note 19, at 54, 57-58.

32. *Id.* at 54, 58.

33. *Id.* at 59-63. The magistrate could report to the district court judge that the complaint should be dismissed under 28 U.S.C. § 1915(d) (1976). The *in forma pauperis* statute states two grounds for dismissal: "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." *Id.*

34. 28 U.S.C. § 636(b)(1) (1976). ALDISERT REPORT, *supra* note 19, at 59.

35. ALDISERT REPORT, *supra* note 19, at 60, 63.

36. *Id.* at 64, 97 (Form 4).

37. *Id.* at 64-65, 99 (Form 5). Letters to the judge or magistrate would be returned with a form letter explaining the impropriety of such communication.

38. 28 U.S.C. § 636(b)(1)(A) (1976). The judge may reconsider pretrial orders that are clearly erroneous or contrary to law. *Id.* The statute does not permit magistrates to decide a dispositive motion (*e.g.*, a motion to dismiss for failure to state a claim, or a motion for summary judgment). *Id.* They may, however, submit findings of fact and recommendations to the district court judge, with copies to the parties, who may file written objections. *Id.* § 636(b)(1)(B)-(C).

39. ALDISERT REPORT, *supra* note 19, at 70.

40. *Id.* at 76-78, 101-02 (Form 6).

41. *Id.* at 77, 101-02 (Form 6).

42. *Id.* at 103-04 (Form 7). The defendant would file this form, an alternative or

For the prisoner petitions not dismissed at the pleading and motion stages, magistrates could determine that the difficulties of a pretrial conference outweigh its benefits. In that case, they would review the case file and prepare a pretrial order without participation of the parties or their attorneys.[43] If no appeal were taken, the order would bind the parties in a subsequent hearing.[44] Magistrates could try the case, or serve as a special master, if the parties consent.[45] Alternatively, the magistrates could conduct an evidentiary hearing and submit findings and recommendations to the district court judge, who has broad authority to reach his own decision.[46]

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supplement to traditional discovery, along with his answer to the complaint, within a time set at the court's discretion. *Id.* at 79-81. Unlike the forms required of the prisoner-plaintiff, the defendant's Special Report need not be signed under penalty of perjury. This recommended procedure may "give the court the benefit of detailed factual information . . . involving a constitutional challenge to an important, complicated correctional practice, particularly one that may affect more than the inmate who has filed the 1983 action." *Id.* at 79. However, the procedure also raises serious questions of a compromised judicial role. The form authorizes the defendant to interview plaintiff and witnesses before filing an answer, and authorizes medical or psychiatric examinations "wherever appropriate." *Id.* at 104 (Form 7). The court's blanket permission to one party could seriously infringe the rights of the other. Under the Federal Rules, for example, the court requires a motion showing good cause and specific notice before it will permit a physical or mental examination. FED. R. CIV. P. 35.

Several courts, however, have approved the special report practice. *See, e.g.*, Mitchell v. Beaubouef, 581 F.2d 412, 416 (5th Cir. 1978) (but the unverified report cannot serve as basis for summary judgment); Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978) (equating use of procedure with the administrative law doctrine of primary jurisdiction); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975) (Special Report notifies officials and encourages informal settlement of grievance).

43. ALDISERT REPORT, *supra* note 19, at 82-83, 105-06 (Form 8). *Cf.* FED. R. CIV. P. 16 ("[T]he court may in its discretion direct the attorneys for the parties to appear before it for a conference . . . . The court shall make an order which recites the action taken at the conference . . . .").

44. 28 U.S.C. § 636(b)(1) (1976); ALDISERT REPORT, *supra* note 19, at 83.

45. 28 U.S.C. § 636(b)(2) (1976); *id.* § 636(c) (Supp. III 1979); ALDISERT REPORT, *supra* note 19, at 84-85. Appointment of a special master is appropriate under section 636 even if it would not meet the tests under the Federal Rules. FED. R. CIV. P. 53(b).

46. 28 U.S.C. § 636(b)(1)(B) (1976). "The judge is given the widest discretion to 'accept, reject, or modify' the findings and recommendations proposed by the magistrate, including the power to remand with instructions. Thus, . . . the ultimate adjudicatory power over . . . prisoner petitions . . . is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate." H.R. REP. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162, 6171 [hereinafter cited as H.R. REP. No. 94-1609]. The Aldisert Committee incorrectly concludes that the judge is to sustain the recommendation unless it is clearly erroneous or contrary to law. ALDISERT REPORT, *supra* note 19, at 85-86.

THE LIMITS ON COURTS' RULE-MAKING AUTHORITY

Because the Aldisert Committee recommends adoption of procedures by local court rules, the first issue raised by the preceding overview is the scope of federal courts' rule-making authority. Local district courts do have statutory authority to make and amend rules by majority action of their judges.[47] Those rules, however, must not be inconsistent with Acts of Congress or with the Federal Rules of Civil Procedure,[48] nor may procedural rules change any litigant's substantive rights[49] or the court's jurisdiction.[50] The following analysis tests the recommended procedures against these limits.

Analysis of Pleading Under the Aldisert Procedures

Several provisions in the proposed mandatory complaint form[51] exceed the court's rule-making authority. Although the report states that a prisoner's failure to conform to the local rule requirements of this form would justify a court's refusal to file the complaint,[52] if the provisions are not valid, it is the prisoner, rather than the court, who would be justified in rejecting the complaint form.

A venue limitation is a clear example of a provision in the

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47. FED. R. CIV. P. 83 provides:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

48. 28 U.S.C. § 2071 (1976), sets limits on courts' rule-making authority: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." The relevant rules of practice and procedure are the Federal Rules of Civil Procedure.

49. Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064, authorized the Supreme Court to prescribe general rules for the practice and procedure in all civil actions, with the proviso that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." This limitation is codified at 28 U.S.C. § 2072 (1976).

50. FED. R. CIV. P. 82 provides in pertinent part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

51. ALDISERT REPORT, *supra* note 19, at 89-92 (Form 1).

52. *Id.* at 51. The instructions on the recommended form emphasize: *"The clerk will not file your complaint unless it conforms to these instructions and to these forms." Id.* at 89. In the commentary, the Report states that, by local court rule, a complaint not on the form but legible and complying with the rules of procedure can be accepted by the clerk for filing. The Report does not reconcile these inconsistencies. *Id.* at 46.

recommended complaint form that conflicts with federal statute, abridging a substantive right and modifying jurisdiction. The complaint form instructs the prisoner-plaintiff that he may bring his action in the court "only if one or more of the named defendants is located within this district."[53] This conflicts with Congress' mandate that venue for claims arising under the Constitution and laws of the United States is proper in the district in which the claim arose, as well as where all defendants reside.[54] Generally, prisoners bring suit in the district where they are incarcerated because that is where a state employee allegedly deprived them of a constitutional right. The venue statute would not place a transferred or fired employee beyond the reach of the prisoner-plaintiff, as would the Aldisert procedure. Because a local rule cannot repeal the venue statute, the committee's recommendation is invalid.

The complaint form's affidavit requirement and special pleading standards are examples of inconsistencies with the Federal Rules of Civil Procedure, not addressed by the Committee's report, but of significant dimension. Under the recommended procedure, the complainant must sign his pleading declaring, under penalty of perjury, that the facts are correct.[55] The Federal Rules, however, abolished a general affidavit requirement in 1938.[56] Under the Federal Rules, an attorney's signature on a pleading means that "to the best of his knowledge, information, and belief there is good ground to support it."[57] The resurrection of the affidavit is especially unfortunate because it is coupled with a fact pleading requirement. The mandatory complaint form asks prisoners to declare the facts of the case in greater detail than plaintiffs generally know at the pleading stage of

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53. *Id.* at 89 (Form 1).

54. 28 U.S.C. § 1391(b) (1976). If defendants reside in different districts in the same state, venue lies in any of those districts. *Id.* § 1392.

55. ALDISERT REPORT, *supra* note 19, at 89, 92 (Form 1). The Report does not acknowledge the inconsistency with Federal Rule 11. *See* notes 56 & 77 *infra*.

56. FED. R. CIV. P. 11 provides in part: "A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."

See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1335 (1969) [hereinafter cited as WRIGHT & MILLER], for a discussion of the verification requirement. State practice is irrelevant; a specific federal statute or rule must require the affidavit (*e.g.*, petition for writ of habeas corpus, 28 U.S.C. § 2242 (1976); shareholder's derivative suit complaint, FED. R. CIV. P. 23.1). Wright & Miller does not discuss requiring affidavit by local court rule.

57. FED. R. CIV. P. 11.

their suits.[58] This fact pleading standard is inconsistent with the Federal Rules' "short and plain statement of the claim showing that the pleader is entitled to relief"[59] giving the defendant notice of the claim against him.[60] The Aldisert recommendation demands verified facts to facilitate trial by pleadings, because the pleading information could be sufficient for the court "to determine, in many cases, whether the complaint has merit without requiring a responsive pleading from the defendant."[61] By contrast, the Federal Rules expect development of the facts and legal issues during discovery, pretrial conference, and hearings on the merits.[62]

If the prisoner-petitioner clears the verification and fact pleading hurdles, he faces other restrictions that do not appear in the Federal Rules. Under the Aldisert procedures, for example, he may not state all his separate complaints against the defendant on one form.[63] The Federal Rules, however, specifically encourage joining independent or alternate claims,[64] and

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58. The mandatory complaint form directs the prisoner: "Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes." ALDISERT REPORT, *supra* note 19, at 92 (Form 1). Other parts of the form require facts about previous lawsuits and recourse to prison grievance procedures. *Id.* at 90-91. Consistently with FED. R. CIV. P. 10, Form 1 requires the name of all parties and a statement of the relief sought. ALDISERT REPORT, *supra* note 19, at 92.

59. FED. R. CIV. P. 8(a)(2). The Rules stress clear presentation by using a separate paragraph to state a single set of circumstances. *Id.* 10(b). The Rules implicitly require plaintiff to state some occurrence, transaction, or circumstance upon which he founds his claim. 5 WRIGHT & MILLER, *supra* note 56 at § 1215.

60. Charles Clark, a central figure in the drafting of the Federal Rules of Civil Procedure, disliked the term "notice pleading," but affirmed the beneficial reform that replaced detailed fact pleading with the requirement for a general statement. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958). The uniform federal pleading standard rescued litigants from the task of pleading "ultimate, material, operative facts" constituting their "cause of action," avoiding "evidentiary facts" or "conclusions." C. CLARK, CODE PLEADING § 38 (2d ed. 1947).

61. ALDISERT REPORT, *supra* note 19, at 54. *See also id.* at 46, 89-92 (Form 1).

62. The fact pleading *versus* notice pleading controversy surrounded promulgation and adoption of the Federal Rules in 1938, and resurfaced in 1955 when the Advisory Committee on Proposed Amendments to the Rules of Civil Procedure for the United States District Courts rejected an amendment to Rule 8(a)(2). 12 WRIGHT & MILLER, *supra* note 56, at 591-92 app. F (1973). The language of the proposal required "a short and plain statement of the claim showing that the pleader is entitled to relief, *which statement shall contain the facts constituting a cause of action.*" JUDICIAL CONFERENCE OF THE JUDGES OF THE NINTH CIRCUIT, CLAIM OR CAUSE OF ACTION, 13 F.R.D. 253, 253 (1952) (emphasis added) (discussion on the need for amendment of Federal Rule 8(a)(2)).

63. ALDISERT REPORT, *supra* note 19, at 89 (Instructions to Form 1).

64. FED. R. CIV. P. 18(a).

permit pleading alternate, hypothetical, or inconsistent claims, on legal or equitable grounds.[65] Because the prisoner must prepare multiple, identical copies of the lengthy complaint form, an instruction that he must repeat the project for each claim not related to the same incident or issue not only conflicts with procedure under the Federal Rules, but also deters the speedy and inexpensive determination of every action that liberal joinder rules promote.

Practical problems generated the imposition of special pleading rules for one class of cases, but cannot justify solutions that conflict with federal law. Typically, prisoner-plaintiffs come to the court without attorney representation (*pro se*).[66] Court personnel face complaints that they characterize as "exasperating, frequently disrespectful, sometimes trivial, and often without legal merit."[67] The Aldisert Committee, therefore, proposed the complaint form for the *pro se* litigant whose pleading "would otherwise be vague, verbose, and incomprehensible."[68] Prolix and illegible *pro se* pleadings may, in fact, be the exception rather than the rule.[69] An empirical study of prisoner cases found that the pleadings were mostly typewritten and concise.[70] Even if the pleaded complaints are unattractive, however, discriminatory handling by some courts is an unfortunate precedent in a uniform judicial system. Furthermore, the Supreme Court has given clear direction that lower courts should not

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65. *Id.* 8(e). The plaintiff raising inconsistent claims faces a dilemma because he can not attest to the truth of his facts as the Aldisert Report requires. *See* notes 55-62 *supra* and accompanying text, discussing the affidavit and perjury requirements.

66. Federal statute permits parties to plead and conduct their cases without counsel. 28 U.S.C. § 1654 (1976). Attorneys rarely file these complaints. The range of attorney participation was 0 to 22% in Turner's five districts in 1978. Turner, *supra* note 3, at 661 app. B.

67. Memorandum from Judge James E. Doyle, Western District of Wisconsin, to the Chief Justice of the United States and the Judicial Conference of the United States (March 4, 1975), *quoted in* Turner, *supra* note 3, at 617 n.46. Judge Doyle is an articulate advocate of recognition of prisoners' constitutional rights. *See* Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis.) (Doyle, J.), *rev'd*, 489 F.2d 1335 (7th Cir. 1973); Doyle, *The Court's Responsibility to the Inmate Litigant*, 56 JUDICATURE 406 (1973).

68. ALDISERT REPORT, *supra* note 19, at 46.

69. An example from the case law is the 24 page, handwritten complaint in Gamble v. Estelle, 516 F.2d 937 (5th Cir. 1975), *rev'd and remanded*, 429 U.S. 97 (1976), *on remand*, 554 F.2d 653 (5th Cir. 1977). The literature generally assumes that *pro se* complaints are prolix and illegible. *See, e.g.*, ALDISERT REPORT, *supra* note 19, at 12.

70. Turner observed that most of the 644 case files he reviewed contained typed, legible, and relatively short pleadings. Turner, *supra* note 3, at 617 n.46.

reject any pleading for technical deficiencies.[71] Courts apply this standard to all cases, whether they be antitrust actions[72] or prisoner complaints.[73] Courts must construe *pro se* pleadings liberally so as to do substantial justice.[74]

Furthermore, judicial self-help is unnecessary because legitimate methods exist to manage the practical problems of *pro se* pleadings. Judges can screen the pleadings using the Federal Rules themselves, rather than resort to special standards whose adoption is of questionable validity. On its own initiative, in all civil actions under the Federal Rules, the court may strike from pleadings any matter that is "redundant, immaterial, impertinent, or scandalous."[75] Although the court should not dismiss prisoners' (or any other) complaints unless assured "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"[76] the court should require that complaints meet two threshhold standards set out in the Federal Rule requiring that the party or his attorney sign the pleading.[77] The first standard is that, to the best knowledge, information, or belief of the signer, there are good grounds to

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71. Haines v. Kerner, 404 U.S. 519 (1972). *Haines* reversed an Illinois district court's dismissal, on defendant's motion, of a 60 year old prisoner's *pro se* complaint that he was placed in solitary confinement without a hearing and suffered physical injury. He was entitled to an opportunity to offer proof, although his allegations were inartfully pleaded. Conley v. Gibson, 355 U.S. 41 (1957), states that courts should not dismiss a complaint unless assured "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46. It has been suggested that this is not so much a precise test as an evocation of an attitude toward the function of pleading in the federal procedural scheme. F. JAMES, CIVIL PROCEDURE 86-88 (1965).

72. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

73. Haines v. Kerner, 404 U.S. 519, 520 (1972).

74. FED. R. CIV. P. 8(f) states: "All pleadings shall be so construed as to do substantial justice." A *pro se* complaint should be held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972).

75. FED. R. CIV. P. 12(f).

76. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

77. FED. R. CIV. P. 11 requires in part:

> Every pleading of a party represented by an attorney shall be signed . . . . A party who is not represented by an attorney shall sign his pleading and state his address. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilfull violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

support the pleading. The second is that the pleading should not be interposed for delay. The court may strike the entire pleading if it fails to meet these standards. Rule 11 also permits the court to discipline an unscrupulous, irresponsible lawyer for willful violation of pleading standards. By analogy, a person who acts as his own attorney should also be subject to the court's inherent power to control proceedings.[78]

In addition to these provisions for judicial oversight of the pleadings, the Federal Rules of Civil Procedure also provide other mechanisms for the parties to eliminate inappropriate issues. Defendants can protect themselves from an incomprehensible or vague pleading by moving for a more definite statement,[79] or to strike redundant or immaterial matters.[80] By motion, or in the answer, the defendant can seek dismissal of the prisoner's complaint for failure to state a claim upon which relief can be granted.[81] The defendant can answer and simultaneously move for judgment on the pleadings.[82] Summary judg-

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78. The disciplinary language refers to attorneys, not *pro se* litigants. A draft of the Rules provided that an unrepresented party "shall sign the pleadings and shall be subject to the obligations and penalties herein prescribed for attorneys." 5 WRIGHT & MILLER, *supra* note 56, at § 1331 n.6. Although this language was dropped, logic suggests that the purpose and effect of the Rule is intended to extend to unrepresented parties, although recognizing that the court has a substantive disciplinary relationship with attorneys different from its authority over litigants. A proposed amendment of Rule 11 would make this explicit:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed primarily for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. . . . If a pleading is signed in violation of this rule, the court, upon motion or upon its own inititative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 90 F.R.D. 451, 462-63 (1981).

Courts have, in fact, disciplined *pro se* litigants who have abused the standards of Rule 11. *See* In re Green, 586 F.2d 1247 (8th Cir. 1978); Carter v. Telectron, 452 F. Supp. 944 (S.D. Tex. 1977) (multiple filings, forgery of proof of service and defendant's answer; plaintiff enjoined from future proceedings in court *in forma pauperis*).

79. FED. R. CIV. P. 12(e).

80. *Id.* 12(f).

81. *Id.* 12(b)(6).

82. *Id.* 12(c).

ment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to relief as a matter of law,[83] although this motion will almost certainly involve the parties in some discovery and filing of affidavits.

Analysis of the Screening of Complaints Under the Aldisert Procedures

Because the prisoner-plaintiff usually requests waiver of court fees,[84] court action granting or denying the *in forma pauperis* petition precedes the filing of his complaint. The two statutory grounds for dismissal of a case at this stage are an untrue allegation of poverty, or a frivolous or malicious action.[85] The statutory description of the *in forma pauperis* privilege[86] is ambiguous and courts have not clarified either the mechanics or the standard. A study of prisoner complaints revealed that all district courts used the statute to screen and dismiss cases *ex parte,* but that the screening practices were not uniform and were seldom published for the information of the litigant or counsel.[87]

The Aldisert Committee recommends a two-step screening process of section 1983 complaints filed *in forma pauperis.*[88] The first step is a magistrate's decision to file the complaint, based on the economic status of the petitioner.[89] This standard conforms to the *in forma pauperis* statute, giving courts discretion to waive fees when a person "makes affidavit that he is unable to pay such costs or give security therefor."[90] Under the Recommended Procedures, completion of this first step is insuf-

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83. *Id.* 56(c).

84. In Turner's sample, *in forma pauperis* filings ranged from 85 to 95%. Turner, *supra* note 3, at 661 app. B.

85. 28 U.S.C. § 1915(d) (1976) (text at note 33 *supra*).

86. *Id.* § 1915(a) (text at note 29 *supra).* The statutory language permits, but does not obligate, a court to waive fees. Indigents do not have a constitutional right of access to civil courts, although Justices Douglas and Brennan have argued the right under an equal protection analysis. Boddie v. Connecticut, 401 U.S. 371, 385-86, 388-89 (1971) (Douglas, J., concurring in result, and Brennan, J., concurring in part). The *Boddie* plaintiffs sought a divorce. The Court held that, under a due process analysis, states may not bar indigents from court when the state monopolizes the means for legal dissolution of marriage. *Id.* at 374.

87. Turner, *supra* note 3, at 618.

88. ALDISERT REPORT, *supra* note 19, at 59-63, 93-97 (Forms 2-4).

89. *Id.* at 54, 57-58.

90. 28 U.S.C. § 1915(a) (1976). Congress raised the filing fee from $15 to $60 in 1978. *Id.* § 1914(a) (Supp. II 1978).

ficient to commence a section 1983 action even if the magistrate grants the *in forma pauperis* petition and orders filing of the complaint. In the second step, the magistrate can still recommend to the judge the simultaneous dismissal of the complaint without service of process on the defendant.[91]

This second step conflicts with the Federal Rules of Civil Procedure and places a new burden on the courts. Under the Federal Rules, service of process is not discretionary.[92] Once a complaint is filed with the court, a civil action commences[93] and "the clerk shall forthwith issue a summons and deliver it for service to the marshal . . . ."[94] Service of process requires no affirmative act by the judge. If the flood of prisoner cases threat-

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91. ALDISERT REPORT, *supra* note 19, at 59-63. The Aldisert Committee believes this is the best procedure when the magistrate concludes that the complaint is frivolous or malicious after reading the prisoner's pleading. The two-step process seems little different from the practice, criticized by the Aldisert Report, of denying leave to proceed *in forma pauperis* not only on the ground that the allegation of poverty is untrue, but also on the ground that the action is frivolous or malicious. *Id.* at 57-58. *See* Wartman v. Branch 7, Civil Div., County Court, Milwaukee County, Wis., 510 F.2d 131 (7th Cir. 1975).

The prison law literature does not acknowledge the critical effect of filing *in forma pauperis*. The American Civil Liberties Union, for example, states: "Sometimes . . . [U.S. Marshal's] fees amount to $75.00-$100.00 and this is why it is wise to proceed in forma pauperis, even if you have money in your prison account." J. POTTS, PRISONERS' SELF-HELP LITIGATION MANUAL 9 (1976). A prisoner should try to pay court fees to avoid premature dismissal of the complaint. A petition accompanied by the filing fee would not be screened before service of process on the defendant. *See* Turner, *supra* note 3, at 618.

92. *See* FED. R. CIV. P. 4(a). This unstartling observation is, nonetheless, a subject of disagreement among the circuits. *Compare* Nichols v. Schubert, 499 F.2d 946 (7th Cir. 1974) (requiring immediate service of process) *with* Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973). The *Nichols* court stated that there is "no reason for circumventing the mandate of Rule 4(a) . . . simply because the matter proceeded in forma pauperis. Such cases must proceed through the adversary system with live defendants properly served as in all other cases." 499 F.2d at 947. The *Jones* court, however, found the Federal Rules "inadequate to protect the courts . . . from frivolous litigation from indigent prisoners." 58 F.R.D. at 463. "Frivolous" refers to "an action in which the plaintiff's realistic chances of ultimate success are slight." *Id.* at 464. The Supreme Court has rejected this standard, at least with regard to recovery of attorneys' fees when a prisoner's action is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Hughes v. Rowe, 101 S. Ct. 173, 178 (1980) (citing Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1980)). "The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." 101 S. Ct. at 178.

93. FED. R. CIV. P. 3 states: "A civil action is commenced by filing a complaint with the court."

94. *Id.* 4(a). The *in forma pauperis* statute also uses mandatory language: "The officers of the court shall issue and serve all process, and perform all duties in such cases." 28 U.S.C. § 1915(c) (1976).

ens efficient judicial administration, as the Committee premises, it is illogical to recommend that the court undertake an additional job. The Aldisert recommendation to dismiss *in forma pauperis* petitions prior to service of process seeks to spare the defendant the expense and inconvenience of answering a meritless complaint.[95] By intercepting service of process, however, district courts cut off the operation of the multiple options available to a harassed defendant under the Federal Rules.[96] If served, the defendant will have notice of the claim and may choose to attempt to resolve the problem within the prison, to seek dismissal of the action, or to litigate. When the court interposes procedural steps to shield state employees from perceived harassment, the judiciary adds to its own burdens by shouldering decisions which the adversary system allocates to the parties.

In addition, the two-step screening procedure and the magistrate's recommendation for dismissal of the complaint before service of process appear to exceed the scope of magistrates' authority. The statutory language and congressional intent of the 1976 amendments to the Federal Magistrates Act[97] indicate that magistrates should hold hearings, including evidentiary hearings, on section 1983 complaints before recommending disposition.[98] Magistrates hear, but are foreclosed from determining, dispositive pretrial matters such as motions to dismiss for failure to state a claim upon which relief can be granted and

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95. ALDISERT REPORT, *supra* note 19, at 59. The Report apparently agrees that "indigents, unlike other litigants, approach the courts in a context where they have nothing to lose and everything to gain." Jones v. Bales, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973). This perspective ignores a viable counter analysis: the "cost" to the prisoner-plaintiff is the threat of retaliation by those who control his environment. This possibility is not hypothetical. In drafting the Civil Rights of Instutionalized Persons Act, Congress mandated safeguards to avoid reprisals as an essential element in a prison grievance resolution system. 42 U.S.C.A. §§ 1997d, 1997e(b)(2)(D) (West Supp. 1974-80). *See* notes 118-24 *infra* and accompanying text.

96. *See* text accompanying notes 79-83 *supra*.

97. Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976) (codified at 28 U.S.C. § 636(b) (1976)).

98. 28 U.S.C. § 636(b)(1)(B) (1976), states in part: "[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, . . . of prisoner petitions challenging conditions of confinement." The authority under this section "is clearly more than authority to make a 'preliminary review.' It is the authority to conduct hearings and where necessary to receive evidence relevant to the issues involved in these matters." H.R. REP. No. 94-1609, *supra* note 46, at 11, [1976] U.S. CODE CONG. & AD. NEWS at 6171.

motions to dismiss an action involuntarily.[99] By analogy, *in forma pauperis* dismissal of a prisoner's filed complaint before service of process on the defendant should also be precluded. Congress expanded magistrates' jurisdiction, in part, to give prisoners prompt access to an officer of the court.[100] The statute defines that access as a hearing, not, as the Aldisert Committee recommends, as an *ex parte* judgment on the pleadings.

Thus, like the mandatory complaint form, the recommended screening procedure exceeds the limits of courts' authority to act under local rules.[101] The procedural approach recommended by the Aldisert Committee also undermines the uniformity and purposes of procedure in federal courts. Furthermore, the Federal Rules already provide several responses to the difficulties characteristic of state prisoner civil rights actions. Shielding defendants by dismissing section 1983 complaints before service of process, therefore, is both inherently inefficient and compromises the judicial role.[102]

The screening procedure may be criticized on constitutional grounds as well. Two Texas prisoners brought a class action challenging the methods by which the court refers the *in forma pauperis* petition to a magistrate for screening.[103] They alleged as much as twenty-one month intervals between the complaint and the filing. The circuit court reversed the lower court's dismissal for failure to state a claim upon which relief could be granted, and agreed that substantially different treatment of indigent and non-indigent litigants stated a claim under the due process and equal protection clauses. It remanded the case to consider the question of the court's discretion not to issue process.[104]

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99. 28 U.S.C. § 636(b)(1)(A) (1976).

100. *Proposed Amendments to the Federal Magistrates Act: Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 36 (1975) (statement of Judge Metzner for the Judicial Conference of the United States) [hereinafter cited as *1975 Hearings*].

101. *See* notes 47-50 *supra* and accompanying text.

102. A Ninth Circuit judge observed that screening the *in forma pauperis* petition for the peripheral question of frivolousness forces decision-makers to be "both inquisitors, to protect the revenue and the possible victims of vexatious suits, and advocates, to protect the poor litigant." Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1284 (1966).

103. Carter v. Thomas, 527 F.2d 1332 (5th Cir. 1976).

104. *Id.* at 1333-34. Nine months later, the district court denied plaintiff Carter's pauper status, and ultimately dismissed him from the suit for failure to pay fees. Procedural history noted in Carter v. Telectron, 452 F. Supp. 944, 977 (S.D. Tex. 1977). The

LEGITIMIZING THE ALDISERT COMMITTEE'S PROCEDURES

The analyses of the Aldisert Committee's complaint form, pleading standards, and screening and dismissal procedure disclose conflicts with statutes, with the uniform Federal Rules of Civil Procedure, and with Supreme Court direction. Because courts may not adopt or amend rules inconsistent with the law or the Federal Rules, adopting the proposals by local court rule would exceed judicial authority. If Congress enacted the Aldisert proposals as statutory rules, that demerit would be remedied.[105]

Three reasons caution against congressional enactment of the Aldisert procedures. The first, discussed in the preceding analyses, is that the Federal Rules and relevant statutes are appropriate tools to deal with many of the concerns which prompted the Aldisert proposals. Second, the Committee has not measured the efficiency of the proposals. Third, the Committee has sidestepped a fundamental question: defining the standard by which courts will determine that a complaint is frivolous or malicious. Congressional enactment would legitimize the procedures, but would not cure these defects in the Report.

The Aldisert Committee's goals are judicial administrative efficiency and fairness in individual cases.[106] The goal of procedural rules in federal courts is "the just, speedy, and inexpensive

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court did not deal with the question on remand. The constitutional question has merit, but unfortunately it was raised by a plaintiff with a history of abuse of court processes. When a records-search showed 178 actions characterized by forgery and perjury, the court enjoined Carter from future proceedings *in forma pauperis* unless able to satisfy the court that he acted for good cause. *Id.*

105. The Supreme Court promulgated and Congress enacted procedural rules and model (but not mandatory) forms for habeas corpus actions, responding to some of the same difficulties characteristic of state prisoner civil rights complaints. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (codified at 28 U.S.C. § 2254 (1976 & Supp. III 1979) (effective Feb. 1, 1977)).

In a 1973 article expressing concern about the federal courts' handling of section 1983 cases and the "drift towards a national court system," Judge Aldisert acknowledged that procedural reforms restricting the scope of section 1983 should come from Congress. Aldisert, *supra* note 9, at 571.

> Assuming that Congress may be persuaded to act, a state prisoner should, at the very least, be required to identify by name the person he alleges deprived him of his constitutional rights. Prisoners should also be required to set forth factual allegations of the deprivations. Rather than going to the extremes of *Haines v. Kerner* [404 U.S. 519 (1972)], a special type of pleading similar to that employed by Pennsylvania practice should be required in civil pro se prisoner cases instead of allowing the more liberal standards of the Federal Rules of Civil Procedure.

Id. at 575 (footnotes omitted).

106. ALDISERT REPORT, *supra* note 19, at 2, 7-28.

determination of every action."[107] Ascertaining whether practices contribute to meeting these goals requires measurement. On their face, the Aldisert procedures would seem to prolong the adjudicatory process, because the court must initiate and evaluate eight forms, in effect conducting its own discovery and motions practice. Prior court experience with procedural streamlining cautions that procedural changes often escalate costs, or simply do not produce the expected results; the liberal discovery rules are an example of the former,[108] and pretrial conferences demonstrate the latter.[109]

Another relevant measurement is the effect on other levels of the judiciary if district courts implement procedures designed to affect their own caseload. A statistical reduction in the trial court's work is illusory if the cases simply reappear in the Court of Appeals. Over ten percent of the appeals filed in federal courts are state prisoner section 1983 cases,[110] and the number has doubled in the last two years.[111] Many appeals challenge procedural rulings rather than seek review of the merits, leading circuit courts to criticize precipitous dismissal of viable prisoner complaints.[112] The increasing burden on the appellate courts

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107. FED. R. CIV. P. 1.

108. *See, e.g.*, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 389-93 (1973) (Burger, C.J., dissenting).

109. *See* M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 67-70 (1964).

110. 1980 ANNUAL REPORT, *supra* note 1, at 46 (Table 4) (11.5%).

111. *Id.* at 45 (Table 3); 1978 ANNUAL REPORT, *supra* note 1, at 46 (Table 4). This category of appeals from district courts jumped from 753 cases in 1978 to 1578 cases in 1980. The circuits are not equally affected. In 1980, more than one in three appeals in the Fourth Circuit, but less than one in one hundred in the District of Columbia Circuit, were state prisoner section 1983 cases. 1980 ANNUAL REPORT, *supra* note 1, at 46 (Table 4).

112. The "defendants" in Lewis v. State, 547 F.2d 4 (2d Cir. 1976), refused to participate in the appellate proceeding because they had not been served with process in an action brought by a prisoner alleging removal of funds from his prison commissary account. The District Court for the Northern District of New York had granted leave to file *in forma pauperis*, and simultaneously dismissed for failure to state a constitutional claim. "Untimely dismissal may prove wasteful of the court's limited resources rather than expeditious, for it often leads to a shuttling of the lawsuit between the district and appellate courts." *Id.* at 6. The Second Circuit vacated the order of dismissal and remanded for service of process. The Fifth Circuit Court of Appeals observed:

> [P]recipitous dismissal may only add the expense and inconvenience of appellate litigation to whatever burden appropriate development of the case at the trial level might entail. The exhumation and resurrection of viable prisoner complaints which have been summarily given final rites and buried by district courts has become a major occupation of this court.

Covington v. Cole, 528 F.2d 1365, 1373 (5th Cir. 1976). The court, however, did not

may indicate the failure of district court strategies to stem the flow of prisoner suits by using local rules to facilitate *ex parte* dismissals.

Reducing the number of prisoner petitions in the federal district court could affect other parts of the governmental structure as well. Any analysis of the prisoner civil rights petition phenomenon should acknowledge that problems in prisons generate the complaints,[113] and that reducing the district court caseload does not eliminate the problems. Indeed, if prisoners find that courts set up barriers to petitioning for redress of constitutional deprivations, they may be more likely to resort to violent grievance resolution tactics.[114] The costs of one prison riot surely exceed the cost of innumerable section 1983 complaints. Analysts should scrutinize procedure at the district court level in terms of its apparent or foreseeable impact on other parts of the judicial or administrative structure.

The third reason to caution against congressional validation of the Aldisert Committee procedures is their failure to define the "frivolous or malicious" standard against which magistrates would measure the merits of a complaint. Merely specifying *who* will handle *what* required form *when* still leaves judicial personnel and prisoner litigants without guidance about a crucial determination: *how*. The Aldisert Committee should have defined the frivolous or malicious standard, rather than avoiding it as "a question of substantive law and therefore beyond the scope of these procedures."[115] Just as the court will not dismiss

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require filing of responsive pleadings. The court can elicit the record supporting dismissal solely from the plaintiff prisoner. *Id.* at 1373 n.19.

113. *See* Turner, *supra* note 3, at 628. Turner analyzes several factors affecting the volume of prisoner litigation: prison population, prison conditions and rules, substantive law, receptivity of individual judges, change of prison administration or policy, availability of administrative remedies, jailhouse lawyering activity, availability of legal assistance, prison riots or disturbances. *Id.* at 625-37.

114. "Underlying most recent major prison riots . . . were festering, unanswered grievances. Rioting prisoners repeatedly lament that, under normal circumstances, no one will listen to their complaints or that, once heard, their grievances are ignored." M. KEATING, IMPROVED GRIEVANCE PROCEDURES 28 (1976). The investigators of the New Mexico State Penitentiary riot (Feb. 2-3, 1980) stressed that prison policies had " 'undermined inmates' self-interest in keeping order and disrupted the non-violent power sources of convict leaders.' " N.Y. Times, Sept. 26, 1980, § A, at 12, col. 1.

115. ALDISERT REPORT, *supra* note 19, at 60. Almost half the Supreme Court docket is filed *in forma pauperis* (in the 1979 October term, 2249 cases as compared with 2509 paid cases, 1980 ANNUAL REPORT, *supra* note 1 at A-1). Nonetheless, no uniform standard of "frivolous or malicious" guides the lower courts. Anders v. California, a criminal case, uses a frequently cited guideline: a contention is not frivolous if "any of the legal

on defendant's motion unless "it appears 'beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief,' "[116] so the court should not dismiss a prisoner's claim as "frivolous" unless statute or controlling precedent forecloses the pleading, liberally construed.[117] Local courts should not be encouraged to devise their own tests, or to dismiss cases on the basis of unarticulated standards.

The problems addressed by the Aldisert Committee urgently require both state and federal legislative consideration. However, congressional implementation of the Committee's procedural solution to the prisoner civil rights petition phenomenon would be shortsighted, particularly without measurement of impacts and without articulation of a substantive standard for dismissal of frivolous actions. Perhaps the Federal Judicial Center is equipped to conduct these investigations. In the meantime, seeking to lighten federal court burdens by singling out prisoner section 1983 suits for different treatment described in locally adopted rules not only destroys the uniformity and predictability of federal procedure, but also exceeds authority granted to courts. Courts should abjure the proposed solution, and avoid creating a lamentable precedent. Concerned judges need not be passive, however. Congressional actions suggest some alternative directions.

Alternative Directions for Court Response to Prisoner Civil Rights Petitions

Deferring to the Institutional Remedy

The Ninety-sixth Congress created a limited exhaustion of remedies requirement under the Civil Rights of Institutionalized Persons Act.[118] A federal court may continue a section 1983 case for up to ninety days to require exhaustion of "such plain, speedy, and effective administrative remedies as are avail-

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points are arguable on their merits." 386 U.S. 738, 744 (1967). In Hughes v. Rowe, 101 S. Ct. 173, 178 (1980), the Court rejected the idea that losing the case proves it was meritless.

116. Haines v. Kerner, 404 U.S. 519, 521 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

117. Turner urged an explicit legal standard. "Neither judicial efficiency nor the cause of individual justice is served by leaving those who read complaints without clear guidance." Turner, *supra* note 3, at 649.

118. Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C.A. § 1997 (West Supp. 1974-80)).

able."[119] The continuance is proper only if the United States Attorney General certifies, or the court determines, that the grievance resolution mechanism meets stringent minimum standards:[120] an advisory role for inmates and employees, specific time limits for written replies to grievances, priority handling of emergency grievances, safeguards to avoid reprisals, and independent review.[121] Judges concerned about their section 1983 caseload, therefore, can determine whether the correctional facilities in their district have acceptable grievance mechanisms. The prisoner's interest is protected because the federal court would retain jurisdiction; if the complaint were not addressed and resolved during the ninety day continuance, the court action would commence.[122] Further, if the complaint alleges imminent danger to life, or raises issues which the grievance resolution system probably could not resolve, the court would forego the procedure in the interests of justice.[123] Judicial interest in deferring to an institutional remedy could go far to encourage creation of effective resolution systems in the prisons.[124]

Compensating Counsel

To many commentators, the appointment and compensation of counsel is the most crucial element in meeting judicial needs for efficient case management, and litigants' needs to press meritorious complaints to a successful conclusion. When

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119. 42 U.S.C.A. § 1997e(a)(1) (West Supp. 1974-80). "The almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. Many of these complaints are pro se and often poorly drafted in terms of presenting the problem in a legal context. Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issues in the remaining cases so as to make them ready for expeditious court consideration." S. REP. No. 416, 96th Cong., 2d Sess. 34 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 787, 816 [hereinafter cited as S. REP. No. 96-416].

120. 45 Fed. Reg. 79,095 (1980) (to be codified in 28 C.F.R. part 40).

121. 42 U.S.C.A. § 1997e(b)(2)(A)-(E) (West Supp. 1974-80). The court may request information from the United States Attorney General on the grievance process certification status of a prison. 45 Fed. Reg. 79,098 (1980) (to be codified in 28 C.F.R. § 40.22).

122. The standards set a maximum time limit of 90 days from initiation to disposition. 45 Fed. Reg. 79,097 (1980) (to be codified in 28 C.F.R. § 40.7(e)).

123. 42 U.S.C.A. § 1997e(a)(1) (West Supp. 1974-80). *See* S. REP. No. 96-416, *supra* note 119, at 34, [1980] U.S. CODE CONG. & AD. NEWS at 817.

124. The Standards for Inmate Grievance Procedures describe many forms of relief: "monetary remedies, restitution of property, reclassification, correction of records, personnel actions, agreement by institutional officials to remedy an objectionable condition within a reasonable, specified time, and a change in an institution policy or practice." 45 Fed. Reg. 79,096 (1980) (to be codified in 28 C.F.R. § 40.6).

the prisoner is on his own, relying on his intuitive sense of injury, his prison law library for substantive legal principles, his own skill, or an inmate "writ writer" for procedural guidance,[125] the court loses the benefit of counsel's screening the nonjusticiable controversy or mediating an out-of-court settlement. Absence of counsel also deprives the court of the professionally crafted working papers to which it is accustomed. For judicial efficiency, no section 1983 case should be prosecuted *pro se*.[126] In terms of fairness, analysis of the cases demonstrates that *pro se* prisoner litigants in federal courts do not make full use of pretrial discovery, move their cases to trial, or receive the relief they request.[127]

The *in forma pauperis* statute, so crucial to prisoner litigants, gives courts discretion to "request" that an attorney represent an indigent petitioner,[128] but it does not provide for award of fees.[129] The Civil Rights Attorney's Fee Award Act of 1976,[130] however, does authorize reasonable fees to the prevailing

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125. The state may not bar mutual help between prisoners if no alternative legal aid is available to assist poorly educated inmates in writing petitions for post-conviction relief. Johnson v. Avery, 393 U.S. 483 (1969). "It is indisputable that prison 'writ writers' like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them." *Id.* at 488. For varying perspectives on writ-writing, see Krause, *A Lawyer Looks at Writ-Writing*, 56 CALIF. L. REV. 371 (1968); Larsen, *A Prisoner Looks at Writ-Writing*, *id.* at 343; Spector, *A Prison Librarian Looks at Writ-Writing*, *id.* at 365.

126. Duniway, *supra* note 102 *passim*. For an historical review, see Note, *Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1326-27, 1329 & n.51 (1966). The writer urges screening by an impartial panel of the bar, followed by appointment of counsel for meritorious claims. *Id.* at 1337-38, 1337 n.94.

127. In Turner's 644-case sample, only 4 *pro se* plaintiffs successfully used the discovery procedures available under the Federal Rules, and fewer still got any results. The court awarded 12 temporary restraining orders and preliminary injunctions on 286 applications. Three injunctions and two damage awards issued in 664 cases. One *pro se* plaintiff obtained an award, for $6. Turner, *supra* note 3, at 624-25. No *pro se* plaintiff had a hearing or trial. *Id.* at 663 app. B.

128. 28 U.S.C. § 1915(d) (1976).

129. On the other hand, the Criminal Justice Act authorizes appointment and compensation of counsel in habeas corpus actions. 18 U.S.C. § 3006A (1976). That section should be amended to extend it to civil rights actions. Turner, *supra* note 3, at 651.

For discussion of appointment and compensation of counsel, see I. SENSENICH, *supra* note 2, at 22-37, Supp. at 5-8; ALDISERT REPORT, *supra* note 19, at 12-16, 14 n.26.

130. 42 U.S.C. § 1988 (1976). The Act states: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, 1986 of this title . . . the court, in its discretion, may award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Fees are an integral part of the section 1983 remedy whether the plaintiff brings the action in federal or state court. Maine v. Thiboutot, 448 U.S. 1, 11 (1980).

Congress passed the Civil Rights Attorney's Fees Award Act of 1976 with the inten-

party in an action to enforce section 1983. Congress intended to increase the availability of counsel, and federal judges could publicize their interest in utilizing the statute to promote participation by counsel in these cases.

Utilizing Magistrates

Some of the complexities of prisoner litigation identified by the Aldisert Committee derive from the fact of incarceration. How does a prisoner-petitioner, or his witness, get to court? Who pays, and who is responsible for security?[131] Congress created a lower tier of judicial officers, magistrates, to provide the flexible and economical support for district court judges[132] faced with just such dilemmas. Magistrates, for example, can travel to a correctional institution to conduct a hearing, supervise discovery, or hold a pretrial conference[133] and since 1979, they may also conduct trials upon the consent of the parties.[134]

Congress expanded magistrates' jurisdiction in part to "expedite prisoner litigation in the district courts and give prisoners prompt access to a competent judicial officer."[135] Judges can utilize their magistrates as the statute explicitly provides: to

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tion of increasing the availability of counsel. Availability of counsel will not be a panacea. When civil legal services have been available, as in Washington State, the negative attitude of prisoners toward the legal system has been the most important variable in their decision to use or avoid the resource. For an empirical study, see Alpert, *The Determinants of Prisoner Decisions to Seek Legal Aid*, 4 NEW ENG. J. PRISON L. 309 (1978).

131. In Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977), the court ordered shared state and federal responsibility. For discussion of the complexities of the judicial process when litigants and witnesses are incarcerated, see ALDISERT REPORT, *supra* note 19, at 16-17, 19 n.34.

132. Congressional expansion of the role and jurisdiction of magistrates is one of the major developments in the judiciary in the last decade. *See* McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. LEGIS. 343 (1979). Magistrates replaced the part-time, nonprofessional, service-for-fees Commissioners in 1968 as a lower tier of judicial officers. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968). Congress expanded magistrates' jurisdiction in 1976 and 1979. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729; Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643. The magistrate provisions are codified at 28 U.S.C. §§ 631-39 (1976 & Supp. III 1979).

133. 28 U.S.C. § 636(b)(1)(A) (1976). Judges can also appoint magistrates to serve as Special Masters. *Id.* § 636(b)(2).

134. *Id.* § 636(c)(1)-(7) (Supp. III 1979). Magistrates may conduct jury or nonjury civil trials upon the consent of the parties made voluntarily at the time the action is filed. Judgment is appealable directly to the appropriate circuit court. *Id.* § 636(c)(2)-(3).

135. *1975 Hearings*, *supra* note 100, at 36. *See also* S. REP. No. 74, 96th Cong., 1st Sess. 3-4, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 1469, 1472 [hereinafter cited as S. REP. No. 96-74].

conduct evidentiary hearings in prisoner conditions of confinement cases, and to present findings of fact and recommendations for disposition to the district court judge.[136] An extremely heavy prisoner caseload would justify a judicial request for appointment of additional magistrates.[137] Increased use of magistrates serves both the interest of judicial efficiency and individual fairness. The magistrate's recommendations, and the judge's dispositive ruling, would be based on evidence presented at a hearing, possibly at the prison, rather than, as is now predominantly the case, based on the magistrate's *ex parte* judgment of the pleading.

Expanding Concurrent State Court Jurisdiction

The federal courts' contemporary response to prisoner cases should be read against the historical background of federal judicial deference to a state executive's authority to set penal objectives and provide for penal security within the limits of the resources allocated by state legislatures. The traditional "hands off" policy gave way in the 1960's and 1970's as courts recognized prisoners' substantive constitutional rights, but the underlying concerns for federalism and separation of powers remain.[138]

Expanded participation by state courts in hearing section 1983 complaints would not only alleviate the district court

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136. 28 U.S.C. § 636(b)(1)(B) (1976). The 1976 amendments authorized magistrates to conduct evidentiary hearings in prisoners' conditions of confinement cases, and to present findings of fact and recommendations for disposition to the district court judge, who, constitutionally, retains jurisdiction although delegating duties to the magistrate.

137. *Id.* §§ 631, 633. The Judicial Conference surveys districts to determine numbers and locations of magistrates. District court judges appoint magistrates for an eight year term. *See* S. REP. No. 96-74, *supra* note 135, at 4, [1979] U.S. CODE CONG. & AD. NEWS at 1472.

138. Professor Christina Whitman concludes that federal court section 1983 actions inevitably displace state authority.

> The displacement occurs simply because when an interest is granted constitutional protection, the existence or nonexistence of state law becomes, in large measure, irrelevant. Whatever choice a state has previously adopted — whether it be to provide or to withhold protection — is preempted simply because a plaintiff will usually pursue the federal remedy. The displacement is particularly insidious because there is no explicit decision that state performance is inadequate, and, thus, no clear signal to the states that their power is being eroded.

Whitman, *supra* note 11, at 30. *See also Symposium on "State Courts and Federalism in the 1980's"*, 22 WM. & MARY L. REV. 599 (1981); Aldisert, *id.* at 821; Aldisert, *supra* note 9, at 557.

caseload, but would also diminish the tensions inherent in federal judicial oversight of state institutions. When Congress passed the Civil Rights Act of 1871, it placed exclusive jurisdiction in federal courts.[139] In codifying the act several years later, Congress dropped that language.[140] The Supreme Court has reserved the question whether state courts *must* accept section 1983 actions, but has held that Congress has not barred them from doing so.[141] There is no statutory or implied preclusion of concurrent state and federal court jurisdiction, as appellate courts in nearly half the states recognize.[142]

CONCLUSION

The volume and characteristics of prisoner civil rights cases exacerbate the strain on finite judicial resources. Judicial self-help in the form of local court rules is an inappropriate response. Singling out prisoners' suits under the Civil Rights Act for treatment different from other civil plaintiffs undermines the uniformity and purposes of the Federal Rules of Civil Procedure: the just, speedy, and inexpensive determination of every action. The special procedures analyzed in this Comment, such as a complaint form in conflict with both rule and statute, fact pleading under penalty of perjury, and service of process at the discretion of the court, are not just. They impede the speedy determination of the prisoner's civil action by delaying, and most likely denying, a hearing on the merits. Furthermore, the procedures by local rule probably do not promote the inexpensive determination of the action, measured either by dollars or by the use of judicial resources: the court's stance as shield to the defendant not only delays the case, but also creates a new district court burden, and increases the likelihood of appellate review of the *ex parte* dismissal.

Judicial willingness to inquire into penal practices and conditions in the last two decades has redressed individual injuries, initiated widespread reform, and heightened the efforts of administrators to implement objectively rational practices

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139. The Civil Rights Act of 1871, ch. 22, 17 Stat. 13, provided for "such proceeding to be prosecuted in the several district or circuit courts of the United States . . . ."

140. U.S. REV. STAT. §§ 563(12), 629(16) (1873-74).

141. Martinez v. California, 444 U.S. 277, 283 n.7 (1980).

142. As of January, 1980, twenty-three state appellate courts recognized state court jurisdiction over section 1983 actions. ALDISERT REPORT, *supra* note 19, at 107-14 app.

within the authoritarian society of the prison.[143] The decisions of the past decades, however, are not assurances of constitutional rights if local rules of procedure bar the prisoner-petitioner from federal court.

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143. Court decisions redressing constitutional injuries are discussed at notes 3-8 *supra*. Even losing cases lead to positive change. Turner, *supra* note 3, at 639 & nn.146-48. Some cases have had broad impact. Widespread reform is clearly the aim of a case like Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), addressing systemic failures of the Rhode Island prisons. New Hampshire decided to act before the courts intervened. Mesmer, Bourdan & Foley, *Constitutional Guidelines for New Hampshire County Jails and Houses of Correction*, 4 NEW ENG. J. PRISON L. 83 (1977). The Texas legislature established its Commission on Jail Standards "due to increasing pressure from Federal Courts acting on law suits that have so far targeted facilities and treatment of prisoners in 20 Texas jails. Only 6 of 254 counties have jails meeting State health department standards on sanitation, health, and population." U.S. GENERAL ACCOUNTING OFFICE, CONDITIONS IN LOCAL JAILS 17 (1976).