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I. INTRODUCTION

In 2011, the United States had a total of 1,598,780 prisoners under the jurisdiction of state or federal correctional facilities.[1] California alone had 149,569 prisoners under the jurisdiction of its thirty-three federal and state prisons.[2] Nineteen of these prisons in California are located in the Eastern District of California of the Ninth Circuit.[3] While these numbers alone are overwhelming, these statistics are not just numbers; they are actual people who are sentenced to confinement and subject to the conditions of overcrowded prisons.[4] The Supreme Court's 5-4 decision in *Brown v. Plata* forced California to reduce its prison population and highlighted the tension between the constitutional rights of prisoners within the prison system and conditions of confinement in California prisons.[5] The relationship between the prisoners and the prisons within which they are confined directly relates to the constitutional violations alleged by prisoners in grievances against those institutions. The litigation claims that prisoners file under 18 U.S.C. § 1983 in federal courts claim a violation of constitutional rights that accounts for a large portion of the caseload in the Eastern District of California in the Ninth Circuit.[6]

This article will explore how different courts have used alternative dispute resolution methods, specifically mediation and mediation-like

1. E. Ann Carson & William J. Sabol, *Prisoners in 2011*, BUREAU OF JUSTICE STATISTICS (Dec. 17, 2012), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=4559.

2. *Id.*; *see also Eastern District of California Swamped by Prisoner Lawsuits*, THE THIRD BRANCH NEWS (July 2010), http://www.uscourts.gov/news/TheThirdBranch/10-07-01/Eastern_District_of_California_Swamped_by_Prisoner_Lawsuits.aspx

3. *Id*.

4. *See* Adam Liptak, *Justices, 5-4, Tell California to Cut Prisoner Population*, N.Y. TIMES, May 23, 2011 http://www.nytimes.com/2011/05/24/us/24scotus.html?_r=0&ref=prisonsandprisoners&pagewanted=print.

5. *See generally* Brown v. Plata, 131 S. Ct. 1910 (2011).

6. THE THIRD BRANCH NEWS, *supra* note 2.

programs, to settle prisoner litigation claims that have overwhelmed the caseloads of federal district courts over the past few decades.[7] In the Ninth Circuit, generally, and the Eastern District of California, specifically, the number of *pro se* prisoner complaints filed per year has increased the burden of an already budget-tight judicial system.[8] Limitations in the amount of available judgeships and the location of California prisons have created a problem unique to the Eastern District of California. While other federal districts have developed programs to accommodate heavy caseloads through ADR programs, the Eastern District is now creating and implementing a variety of programs to deal with the influx.

Section II (a) of this article will review the statutes under which prisoners may file Section 1983 claims in the Federal District Courts. Section II (b) will address the overburdened Eastern District of California's struggles to handle the large amounts of prisoner grievance cases that fall under its jurisdiction. Section III of this article will highlight the programs now in place in the Eastern District of California as well as the District of Nevada and the District of Idaho as a point of comparison. Section IV of this article will explore the implications of these programs with the traditional mediation model and some of the difficulties in implementing these programs. Finally, Section V will conclude that ADR programs in prisoner litigation cases can work to alleviate caseloads and also have the potential to address the civil rights of prisoners and remedy the troublesome nature of prisons.

II. SECTION 1983 CLAIMS AND THE NINTH CIRCUIT

A. Background on Prisoner Grievances

Prisoners of the federal prison system file grievances under 42 U.S.C. § 1983,[9] which creates a private cause of action for the deprivation of constitutional rights.[10] Section 1983 provides a mechanism for all private actors to bring actions alleging a violation of their constitutional rights.[11] The text of the section reads:

> 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

7. *Id.*
8. *Id.*
9. 42 U.S.C. § 1983 (2012).
10. *See* Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Civil Rights Cases in a Federal District Court*, 21 JUST. SYS. J. 23, 25 (1999).
11. *Id.* at 25.

> citizen of the United States or other person within the jurisdiction thereof to the depravation 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 . . . .[12]

While the statute does not specifically extend this mechanism to prisoners, prisoners do retain many constitutional rights after their confinement.[13] Furthermore, case law has provided that a prisoner's right to access the courts extends to civil rights claims.[14] Therefore, prisoners may use this section to "challenge the conditions of their confinement."[15] For prisoners, the ability to file complaints alleging violations of their constitutional rights may be increasingly important as the nature of their confinement limits their ability to take action against violations of their constitutional rights.[16] Prisoners usually file grievances for violations of their constitutional rights under the First, Eighth, and Fourteenth Amendments.[17] First Amendment claims include violations of the exercise of religion, freedom of speech, freedom of association, access to libraries, and access to non-legal mail.[18] Eighth Amendment violations include excessive force, failure to protect, medical treatment, conditions of confinement, retaliation, and general allegations of cruel and unusual punishment.[19] Lastly, Fourteenth Amendment claims involve violations of due process and retaliation claims.[20]

Due in large part to the perception that many claims filed by prisoners under section 1983 are frivolous and place a burden on district courts,

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12. 42 U.S.C. § 1983 (2012).

13. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

14. JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS, 167-68 (Elisabeth Roszmann Ebben & Michael C. Braswell eds., 9th ed. 2010).

15. Fradella, *supra* note 10, at 25.

16. *See* PALMER, *supra* note 14, at 169.

17. Fradella, *supra* note 10, at 33.

18. *Id.* at 33. Freedom of religion claims often arise when an item or act that the prisoner claims is included in his practice of religion is on a restricted list inside the prison.

19. *Id.* Claims of retaliation usually include a prisoner claiming that the correctional officers or prison officials acted out against the prisoner because the prisoner filed a grievance in the prison. *Section 1983 Prisoner Litigation Fundamentals Seminar* UC DAVIS SCHOOL OF LAW (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d (on file with author)

20. *Early Inmate Mediation Program,* U.S. DIST. COURT OF NEV., 18 (2010), *available at* http://www.nvd.uscourts.gov/Files/DC_Report2010.pdf; Fradella, *supra* note 10, at 33.

Congress passed the Prison Litigation Act of 1995 ("PLRA") in 1996.[21] The purpose in passing this legislation was to discourage prisoners from filing frivolous claims and thereby flooding the federal courts with prisoner grievances.[22] It was "estimated that more than seventy percent of prisoner filings under section 1983 were frivolous."[23]

PLRA included the following provisions in order to limit the number of prisoner grievance filings:[24] (1) the prisoner is required to pay at least a partial amount of the filing fee, and if the prisoner cannot afford it, the prison will deduct the money from the prison account regularly;[25] (2) if a claimant has had three previous complaints dismissed for being frivolous, malicious, or failing to state a claim upon which relief may be granted, the prisoner will not be allowed to file another complaint;[26] (3) no monetary damages may be awarded unless there was physical harm;[27] (4) the federal district courts must screen the complaints to assure that they are not frivolous, malicious, fail to state a claim upon which relief may be granted, or seek damages from a defendant with immunity;[28] (5) the court has the

21. *See* PALMER, *supra* note 14, at 413; *see also* Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 470-71 (2012).

22. *See* PALMER, *supra* note 14, at 415. Furthermore, PLRA reduced judges' ability to order certain types of remedies, such as making broad policy changes or orders for release. Christopher E. Smith & Christopher E. Nelson, *Perceptions of the Consequences of the Prison Litigation Reform Act: A Comparison of State Attorneys General and Federal District Judges*, 23 JUST. SYS. J. 295, 295 (2002). Incidentally PLRA, while an attempt to lessen caseloads, may have created a more time-consuming process for handling prisoner litigation in the federal courts. *Id.*

23. *See* PALMER, *supra* note 14, at 413. Those same estimates indicate that in the Ninth Circuit, ninety-nine percent of prisoner civil rights filings were frivolous. *Id.*

24. *See id.*, *supra* note 14, at 416–17, for a summary on the provisions of PLRA.

25. 28 U.S.C. § 1915(b) (2012). In instances where the prisoner is allowed to proceed in *forma pauperis*, the court may still require the prisoner to pay a partial filing fee. PALMER, *supra* note 14, at 418. This may be done over time by withdrawals from the prisoner's account until the amount is paid in full. *Id.* at 419. In addition, the prisoner must still pay the filing fee if the complaint is dismissed. *Id.*

26. 28 U.S.C. § 1915(g) (2012). This provision is meant not only to stop the flow of frivolous lawsuits into the federal courts, but also to act as a deterrent for prisoners to file a multitude of claims without real merit. PALMER, *supra* note 14, at 419. Individually, a prisoner is required to determine which claims are worth pursuing so as not to lose the opportunity to file another complaint. However, the statute does state that in the event that the prisoner is in "imminent danger of serious physical injury," they should be allowed to file despite the "three strikes" rule. *Id.*

27. 42 U.S.C. § 1997e(e) (2012). The statute reads, "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody, without a prior showing of physical injury." *Id.* This provision places a limit on the relief the court may grant to the prisoners, making it less likely for prisoners to receive monetary rewards for these claims.

28. 42 U.S.C. § 1997e(c) (2012); 28 U.S.C. § 1915(A)(b) (2012). The court is required to screen all complaints and may dismiss any complaint for failure to state a claim upon which relief may be granted, even in cases where the prisoner is not filing in *forma pauperis*. PALMER, *supra*

power to revoke "goodtime" credits from a prisoner if the court finds the prisoner is filing to harass prison staff;[29] (6) limits are placed on available attorneys fees;[30] and (7) prisoners are required to exhaust all administrative remedies available at the institutions before filing in federal court.[31]

However, the exhaustion of administrative remedies requirement at the institutions is not regulated.[32] Prisons create and administer these grievance procedures and compliance is not necessary to get into court. While this is a possible way to solve conflicts before courts become involved, the lack of regulation may just be serving to make the process more difficult for prisoners to get violations against their civil rights at the hands of those violating their rights.[33]

PLRA's exhaustion and screening requirements have not necessarily eased the burden of prisoner grievance complaints on the courts. As the majority of litigants are *pro se*, the screening requirement takes both time and man power in the courts to review complaints for cognizable claims.

B. Caseloads in Ninth Circuit

The District Courts of the Ninth Circuit are currently overburdened with case filings for limited judgeships. This has created a significant problem in districts that have a large number of prisoner grievances filed under section

note 14, at 419. The standard of review for screening these complaints is abuse of discretion, giving wide latitude to the district courts to determine where a prisoner has stated a cognizable claim. *Id.*

29. 28 U.S.C. § 1932 (2012). In the event that the court determines that a prisoner's complaint or series of complaints are being filed for the purpose of harassment of a prison official, the court may revoke any "good behavior" credits. PALMER, *supra* note 14, at 419. These credits sometimes provide prisoners with certain privileges and possibly an earlier release. *Id.* The court may take this action on its own upon a finding of harassment. *Id.*

30. 42 U.S.C. § 1997e(d) (2012). While the attorneys' fees provision does not relate to the purpose of this article specifically, the general idea that there are limits on what will be awarded to attorneys may serve to temper prisoner litigation filings.

31. 42 U.S.C. § 1997e(a) (2012). The statute reads, "No action shall be brought with respect to prison conditions under section 1983 of this title or under any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *Id.* The exhaustion of administrative remedies as a prerequisite to filing in federal court serves varying purposes. Not only is it an attempt to ensure that claims that reach the court system have some merit, it also gives institutions the opportunity to solve or correct problems before they are taken to court.

32. Borchardt, *supra* note 21, at 490.

33. *See id.* at 490.

1983.[34] In particular, the Eastern District of California has the largest caseload of the United States Federal Courts.[35] Prisoner litigation makes up about fifty-four percent of the civil caseload in the Eastern District.[36] The geographic location that the Eastern District of California encompasses covers around seventy percent of the prisons in California.[37] This number reflects "roughly 100,000 prisoners" filing their grievances in the Eastern District.[38] In contrast, upon average, prisoner litigation usually takes up about ten percent of a district's caseload.[39]

This heavy caseload mixed with shortages in judgeships have increased the workload of the current judges in the Eastern District.[40] Visiting judges from other districts and the Court of Appeals of the Ninth Circuit volunteered to help with prisoner civil right mediation programs in order to deal with the flood of prisoner litigation in the district.[41] Districts in the Ninth Circuit adopted ADR programs in prisoner litigation cases in order to reach a settlement before trial.[42] These programs include the use of third-party neutral mediators, federal district court judges, and, more commonly, federal court magistrate judges.[43] Generally, magistrate judges can be assigned many of these types of cases in order to alleviate some of the strain on the district court judges.[44] These settlements take place at varying times

34. THE THIRD BRANCH NEWS, *supra* note 2.

35. *Eastern District Uses Innovative Practices But Still Needs More Judges*, U.S. DIST. COURT, E. DIST. OF CAL., http://www.caed.uscourts.gov/caednew/index.cfm/news-updates/eastern-district-of-california-needs-new-judgeships-to-stem-docket-overload2/.

36. THE THIRD BRANCH NEWS, *supra* note 2.

37. *Id.*

38. *Id*.

39. *Id.* "Prisoner lawsuits last year [2009] gave the district the highest weighted civil caseload per judgeship in the nation." *Id.* The district still ranks at the top of the nation for total filings in a year and pending cases. *Id.*

40. *See United States District Court-Caseloads and Statistics, California Eastern*, U. S. COURTS FOR THE NINTH CIRCUIT (Nov. 4, 2012, 7:46 PM), http://www.ca9.uscourts.gov/statistics/ca_eastern.pdf. In 2011, the Eastern District had a total of 6,734 filings and civil filings were distributed at 933 per judgeship. *Id.* Overall, judges had 1,319 cases pending per judgeship. *Id.* Note that these numbers contain all civil filings and are not limited to prisoner litigation cases, but such filings are included in the numbers for civil filings.

41. THE THIRD BRANCH NEWS, *supra* note 2.

42. *Id.* An overview of some of the implemented programs will be discussed in detail below. As an initial measure to alleviate some of the stress of the caseload, judges from around the circuit volunteered to mediate prisoner civil right cases. *Id.*

43. *Eastern District Uses Innovative Practices But Still Needs More Judges*, *supra* note 35.

44. THE THIRD BRANCH NEWS, *supra* note 2. Despite the success of the efforts of the district thus far in settling prisoner litigation, new filings continue to outpace case terminations. *Eastern District Uses Innovative Practices But Still Needs More Judges*, *supra* note 35.

in the litigation process, depending on the program the courts adopt.[45] The nature of these complaints generally lends itself well to the mediation process, considering the on-going relationship between the parties and the court's interest in judicial economy. Additionally, the use of mediation to settle these complaints may also serve as a conduit for prisoner rehabilitation and social justice.

III. PRISONER ADR PROGRAMS IN THE EASTERN DISTRICT OF CALIFORNIA, THE DISTRICT OF NEVADA, AND THE DISTRICT OF IDAHO

Courts have adopted various programs throughout the Ninth Circuit to handle the high level of prisoner civil rights litigation.[46] The Eastern District of California's program will be the main focus of this article.[47] As points for contrast in the shape prisoner ADR programs may take, the District of Nevada's and the District of Idaho's programs will also be addressed.[48]

A. Nevada[49]

The program in the District of Nevada uses a two-track system, which includes a mediation track and a litigation track.[50] This program uses both an early mediation model as well as a post-summary judgment settlement conference model similar to that used in the Eastern District of California.[51] Early mediation initially diverts all prisoner grievances to the mediation

45. THE THIRD BRANCH NEWS, *supra* note 2.

46. Interview with Denise M. Asper, Prison Litigation Project Director, Judicial Council of the Ninth Circuit Office of the Circuit Executive, in L.A., Cal. (Nov. 29, 2012).

47. *See* Denise M. Asper, *Mediating Behind Bars: ADR Options in Prisoner Civil Rights Cases*, PACE LAW LIBRARY, http://www.ce9.uscourts.gov/committees/adr/publications/ADR_Options_in_Prisoner_Cases2.pdf (last visited November 4, 2012); *Early Inmate Mediation Program*, *supra* note 20; John F. Murtha & Brett Bitzer, *A New Pro Bono Opportunity With The District Court of Nevada: Mediation of Prisoners' § 1983 Civil Rights Actions*, NEV. LAW., July 2008, at 26.

48. It should be noted that the program explored in the Eastern District is younger than the programs established in both the District of Nevada and the District of Idaho. The circumstances surrounding the number of prisoner civil litigation cases filed in the Eastern District of California has influenced the method of implementation of the ADR in this district. Furthermore, the programs in the District of Nevada and the District of Idaho are meant only to illustrate the different types of ADR methods that may be utilized to handle prisoner civil litigation claims.

49. *See generally* Murtha & Bitzer, *supra* note 47.

50. Interview with Denise M. Asper, *supra* note 46.

51. *Id.*

track.[52] Private attorneys work as mediators and must be trained in mediation.[53] Prisoners are not usually represented in these mediations.[54] The early mediation model uses the private attorneys acting as mediators while the post summary judgment settlement conference model uses magistrate judges.[55] The early mediation model requires backing and support from the Department of Corrections in order to get the parties to settle without the claims having survived summary judgment.[56]

B. Idaho

The District of Idaho uses ADR in prisoner litigation cases at three possible points in litigation—pre-answer mediation, mediation at the close of discovery, and judicially supervised settlement conferences prior to trial.[57] The judicially supervised settlement conference addresses cases at the point in litigation when the claim has survived summary judgment.[58] The program uses both magistrate judges and private mediators in its settlement.[59] The magistrate judges have been trained in ADR and may use mediation techniques in the settlement conferences.[60]

In screening the cases for mediation or settlement, the district looks at the type of claim.[61] The program looks for trends in the claims from prisoners so that some claims can be grouped together by type or even by institution in order to address any institution wide claims.[62] Once these are identified, the cases are consolidated and appointed attorneys from the pro bono program in the district.[63] These appointments are limited-scope appointments in which one attorney is appointed for the entire group, mimicking a class action civil procedure structure.[64] The appointment removes the mediator or magistrate judge from being in the position of

52. Murtha & Bitzer, *supra* note 47, at 28.
53. Interview with Denise M. Asper, *supra* note 46.
54. *Id.*
55. *Id.*
56. *Id.*
57. Asper, *supra* note 47.
58. Interview with Denise M. Asper, *supra* note 46.
59. *Id.* When a magistrate judge is acting as a facilitator for agreement, the program is called a "judicially supervised settlement conference." *Id.* In the alternative, when a private mediator is acting in the program, the process is termed "mediation." *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

having to give legal advice to the prisoner as they are often uninformed about the law and the types of remedies that are allowed and feasible.[65]

This type of screening has had some success in creating institution wide remedies.[66] By addressing a certain issue that many prisoners had, the court was able to clear the docket of a large number of groups rather than individually going to trial and possibly requiring the defendants to pay monetary damages to each individual prisoner.[67] However, in these types of consolidated cases, it is essential for all the stakeholders, including the prisoners, the Attorney General, and the prison to "buy in.",[68] Additionally, the smaller size of the district allows for this type of large scale screening process.

C. Eastern District of California

The large geographical region that the Eastern District of California encompasses includes a large number of prisons.[69] Cases are assigned to different district court judges, who often assign them to magistrate judges.[70] Both district judges and magistrate judges have staff attorneys in their chambers who have subject matter expertise in the area of prisoner litigation.[71] Complaints are screened under the requirements provided in PLRA.[72] Once the court finds that a prisoner has stated a claim upon which relief may be granted, the complaints are screened for mediation on an individual basis.[73] Staff attorneys look for complications in the case or lack of a need for large policy changes as a remedy.[74] This program does not use the consolidation approach in screening complaints but looks for individual claims to settle.[75] Through this process, the cases are screened on an

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. THE THIRD BRANCH NEWS, *supra* note 2.
70. Telephone Interview with Sujean Park, ADR and Pro Bono Program Director, U.S. District Court – Eastern District of California (Dec. 10, 2012).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* Telephone Interview with Honorable Craig Kellison, Federal Magistrate Judge, U.S. District Court – Eastern District of California (Dec. 13, 2012).

individual basis as to whether or not the case would be a good candidate for mediation.[76] Sometimes the court will send an order setting the case to mediation and requiring the State (the Attorney General, representing the particular prison or institution and parties named thereunder) to explain why the case should not go to mediation or to a settlement conference.[77]

In the Eastern District of California, settlement conferences or mediations usually occur after dispositive motions, meaning the case must survive summary judgment before it goes to mediation.[78] Waiting until after the claim has survived summary judgment creates a greater incentive for the State to want to settle.[79]

In the Eastern District of California, magistrate judges perform settlement conferences either inside the prisons, by video, or by court-call depending on what is feasible.[80] The ADR program in place in the Eastern District works closely with the pro bono panel of the district in order to get some appointments of counsel for the prisoners, but usually prisoners are not represented in mediations or settlement conferences.[81]

The ADR program in the Eastern District also utilizes McGeorge Law School at the University of the Pacific and its Prisoner Civil Rights Mediation Clinic.[82] The clinic works with Magistrate Judge Craig Kellison as co-mediators in the settlement of prisoner civil rights litigation.[83] The students interview the prisoner before the mediation is set to take place.[84] Students provide prisoners with information about the mediation or settlement conference process and allow the prisoner an opportunity to tell his or her story.[85] Students then provide Judge Kellison with a confidential memo with information about the prisoner in order to facilitate the process

76. *Id.* In my conversation with Judge Kellison, he asserted that, in his experience, the State hardly ever settles before it survives summary judgment. Telephone Interview with Honorable Craig Kellison, *supra* note 75. This is presumably because the state does not really deem the suit a risk or a threat before this point.

77. *Id.*; Interview with Denise M. Asper, *supra* note 46.

78. Telephone Interview with Sujean Park, *supra* note 70.

79. Telephone Interview with Honorable Craig Kellison, *supra* note 75.

80. THE THIRD BRANCH NEWS, *supra* note 2.

81. Telephone Interview with Sujean Park, *supra* note 70. In a similar format to that of the District of Idaho, magistrate judges perform settlement conferences rather than mediations. This distinction is important as it may suggest differences in the way a case is settled.

82. *Id.* When working with the students in the clinic, the process is called a "co-mediation" rather than a supervised settlement conference. *Id.*

83. Here, certain aspects of mediation, which are lost in settlement conferences by magistrate judges, are restored by the involvement of the students. This program tends to look more like a mediation than the settlement conferences involving only a magistrate judge do.

84. Telephone Interview with Honorable Craig Kellison, *supra* note 75.

85. *Id.*

of settlement.[86] After speaking with the students, the prisoners are more informed about the process of the settlement conference or mediation.[87] This way the judge does not have to explain to the prisoner certain aspects of the settlement agreement, like confidentiality, which can take some time. This system also works to better facilitate settlement.[88] Judge Kellison explained that although he does not alter his methods in gaining settlement when he is practicing with the students or without, he has found that overall the process has run more smoothly when the students interview the prisoners before the settlement conference.[89]

In the Eastern District of California in 2012, magistrate judges held thirty-four settlement conferences in prisoner civil rights cases and settled twenty-one of those cases.[90] In 2012, no volunteer attorney mediators were used to settle cases.[91] The McGeorge Clinic, along with Judge Kellison, settled nine of seventeen settlement conferences.[92] In 2008, thirty cases went to settlement and fifty percent were settled; in 2009, forty-nine cases went to settlement and forty-five percent were settled; in 2010, seventy-one cases went to settlement and thirty-seven percent were settled; in 2011, forty-two cases went to settlement and thirty-one percent were settled; and in 2012, fifty-eight cases went to settlement and forty-five percent were settled.[93]

The use of ADR programs to settle prisoner civil rights cases has not yet been studied with an emphasis on providing data that would indicate the actual rates of success of these programs in providing a solution to the overwhelming caseloads, including prisoner civil rights claims. Despite the lack of empirical data to support a movement toward ADR as a solution to prisoner civil rights claims, an exploration of settlement of these claims through mediation or mediation techniques in settlement conferences will illuminate the numerous positive effects these programs can have in this context. The nature of these settlements has the ability to provide benefits for the prisons, the prisoners, and the courts. The regular use of mediations

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. CAED Settlement Statistics, Prisoner Civil Rights Cases – provided by S. Park.
91. *Id.*
92. *Id.*
93. *Id.*

to settle prisoner grievance claims may also influence the in-house grievance procedures such that the institutions adopt more effective tools that limit the number of cases that come to court.[94]

IV. THE MEDIATION PROCESS IN THE PRISONER GRIEVANCE CONTEXT

A. Mediation Process Considerations

The use of mediation or settlement conferences to settle prisoner grievance claims as applied in the various ADR programs established in the Ninth Circuit brings forth some important implications in comparison to the traditional mediation model. The nature of the types of claims to be settled between the parties as well as the different types of mediation-like methods the courts have applied in their ADR programs both contribute to the unique nuances in the mediation process.[95] These differences have possible negative and positive effects as to whether mediation is the appropriate method for settlement of prisoner grievances and its overall success. Overall, however, mediation or mediation-like settlement conferences can accommodate certain aspects of prisoner litigation that the courts cannot. This is in addition to the potential for judicial economy through these ADR programs.[96]

First, there are multiple levels of power issues at work in some of these types of mediations or settlement conferences.[97] There is a distinct power imbalance between the parties in prisoner grievance litigation. A party, the prisoner, is usually at a substantially disadvantaged bargaining position compared to the other party, the State,[98] which can cause a serious issue in the mediation process.[99] Power imbalances in mediations can undermine the process of mediation as a forum in which both parties come to a mutually

94. Interview with Denise M. Asper, *supra* note 46.

95. *See* Louise Otis & Eric H. Reiter, *Mediation By Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 374 (2006). "The nature of the conflict, coupled with the ways in which the participants understand and characterize that conflict, largely determines the intensity of the conflict, the scope of its issues, and ultimately the options for its resolution." *Id*.

96. *See* Jordi Agustí-Panareda, *Power Imbalances in Mediation: Questioning Some Common Assumptions*, 59 DISP. RESOL. J. 24, 29 (2004).

97. *See* Benjamin F. Overton, *From the Chair: Training is Essential for Judges as Mediators!*, 7 DISP. RESOL. MAG. 2 (2001).

98. The "State" includes the prisons or institution and their employees, who are the usual named defendants in prisoner grievances, as well as the Attorney General who represents them.

99. Interview with Denise M. Asper, *supra* note 46. This is of particular concern when the party with the disadvantaged bargaining position is not represented by counsel or there is a limited purpose appointment. *Id*.

agreeable solution to their conflict.[100] Whether the program established by the district court includes a third-party neutral mediator or a magistrate judge to facilitate the settlement process, the way this power imbalance is handled directly influences the relative success of getting to an agreement or the type of agreement reached.[101] What the individual mediator does to account for a power imbalance is not within the scope of this discussion. Nonetheless, the presence of a third party, whether a mediator or a magistrate judge, influences the power dynamic between the parties.[102] Third-party neutrals and magistrate judges alike may have influence over the parties as a result of legal expertise or experience in this area, which can aid in coming to a successful agreement despite the parties' unequal bargaining positions.[103]

The use of magistrate judges to perform settlement conferences in prisoner grievance cases brings forward another dynamic of power into the settlement conference.[104] The way the magistrate judge performs the settlement conference and the techniques he utilizes influences the power balance of the mediation—but so does the perception of the judge by the parties.[105] Judges are a part of the court system so the prisoners may perceive the judge as impartial, independent of the influence of the prison and a legitimate source of power within the negotiation of a settlement.[106] On the other hand, there is a possibility that judges are more likely to control

100. Power imbalance issues in mediation stem from the assumption that the party in the stronger position will bully the weaker party into settlements. However, there are arguments that weaker parties are protected against this threat in the mediation setting because they may simply refuse to settle if they feel forced into an agreement. *See* Agustí-Panareda, *supra* note 96, at 28-29.

101. *Id.* at 29.

102. *Id.* at 30.

103. *See* George F. Cole & Jonathan E. Silbert, *Alternative Dispute-Resolution Mechanisms for Prisoner Grievances*, 9 JUST. SYS. J. 306, 318 (1984).

104. The term settlement conference is used to identify when a magistrate judge is acting as the facilitator of conversation between the parties. Telephone Interview with Sujean Park, *supra* note 70. To a large extent, the magistrate judges use mediation techniques to help facilitate settlement between the parties. Telephone Interview with Honorable Craig Kellison, *supra* note 75. In settlement conferences, both parties are free to not settle and proceed onto litigation. However, when a magistrate judge is holding the settlement conference, he may be more likely to inform the parties of the negative consequences of not settling a particular case.

105. *See* Otis & Reiter, *supra* note 95, at 362; Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, 24 OHIO ST. J. ON DISP. RESOL. 535, 549-50 (2009).

106. *See* Otis & Reiter, *supra* note 95, at 365.

the process and the solution more so than other civil mediations.[107] As a part of the court system, the magistrate judge may influence the parties to come to settlement; this is particularly true of the prisoner.[108] In the context of prisoner litigation, this may aid in a successful mediation or settlement process. The inherent tension between the parties could inhibit their ability to communicate well enough to come to some sort of an agreement—with a magistrate judge working as a facilitator for agreement, both parties are forced to communicate with the other and are pushed toward reaching a settlement rather than continuing into litigation, if possible.[109] The extent to which this is done may help or hinder the settlement depending on the particular relationship between the prison and the prisoner.[110] However, the nature of the relationship between the parties and the law in prisoner grievance settlements can benefit from mediation in the shadow of the law.[111]

Other factors also may contribute to a power imbalance, especially if the prisoner is not aware of the legal issues and does not have representation. When the parties are not aware of their legal rights or the process in general, the magistrate judge or the mediator may be in a position where they have to decide between informing the prisoners of their legal rights and allowing the defendants to take advantage of the prisoners' unawareness of these rights.[112] This puts the mediator in a difficult position, especially when the prisoner begins to ask for legal advice, because the mediator needs to be neutral.[113] In the alternative, if prisoners are not represented, they may enter the mediation or settlement conference with unrealistic expectations about the

107. *Cf. id.*, at 367 (explaining that the use of judicial mediation intensifies the mediator's difficulty in allowing the parties to control the process).

108. Shapira, *supra* note 105, at 549-50.

109. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 342 (3d ed. 2004) (explaining that mediations and settlements in the court context push parties to settle).

110. Additionally, this power imbalance is not necessarily something that can be remedied in prisoner grievance litigation in either mediation or in the court system. *See* Agustí-Panareda, *supra* note 96, at 29.

111. *See* Otis & Reiter, *supra* note 95, at 378.

112. Interview with Denise M. Asper, *supra* note 46. The use of magistrate judges instead of mediators moves the process away from what is usually called mediation. However, in some cases, the use of a judge in ADR to settle prisoner civil rights complaints may be more useful as the prisoner may view and respect the authority of a judge more so than they would a private mediator. Honorable Candy Wagahoff Dale, *Judicially Supervised Alternative Dispute Resolution: Perspectives From A Magistrate Judge*, 56 FED. LAW. 47, 58 (2009).

113. Webcasts, UC Davis School of Law, Section 1983 Prisoner Litigation Fundamentals Seminar (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d.

type or amount of remedies they should receive.[114] For example, if a prisoner requests to be released as the remedy for a claim with respect to prisoner conditions, they must be aware that this type of remedy is only available in very limited circumstances and not available in settlements.[115] As a result, the prison may feel like it would be a waste of time to continue the settlement. This also happens in contexts where the prisoners request large monetary sums.[116] This slows down the settlement process and could cause the prison to be less willing to settle or communicate with the prisoner. However, mediators may be able to "talk the prisoner down" from the first high offers in settlements, maybe even more so than in other non-prisoner litigation cases.[117] If the mediator or judge is viewed by the prisoner as trustworthy and having expertise in the area of the conflict, the prisoner is likely to allow the facilitator to guide the negotiation offers to a more realistic level.

Similarly, if the prison is unwilling to offer any sort of acceptable relief for the prisoner, this might shut down communication efforts in the settlement conferences. There is often a problem with sufficient "buy-in" from the defendants—in most cases the prison or the State as represented by the Attorney General.[118] To be successful, "[m]ediation requires agreement by all parties that the issues are open for discussion and possible resolution."[119] If the prisons and their representatives are not open to negotiating a settlement with prisoners, the entire process is useless.[120] Some possible reasons for the prisons to avoid settling with prisoners may include the public's negative perception of such settlements and the need of the prison and correctional officers to "save face" in front of prisoners. There is little incentive for the State to agree to mediation or settlement over

114. Telephone Interview with Honorable Jennifer L. Thurston, U.S. Magistrate Judge, U.S. District Court – Eastern District of California (Dec.10, 2012).

115. 18 U.S.C. § 3626(a)(3) (2012).

116. Webcasts, UC Davis School of Law, Section 1983 Prisoner Litigation Fundamentals Seminar (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d.

117. *Id.*

118. Interview with Denise M. Asper, *supra* note 46.

119. George F. Cole, et. al, *Mediation: is it an effective alternative to adjudication in resolving prisoner complaints?*, 65 JUDICATURE 481, 486 (May 1982).

120. Webcasts, UC Davis School of Law, Section 1983 Prisoner Litigation Fundamentals Seminar (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d (noting the difficulty of getting some of the defendants to even present any type of benefits in settlement).

goingto trial if the State does not believe the claim has merit or if the cost of going to litigation does not directly implicate the prisons themselves.[121] In this respect, it is essential that the participating defendants are ready and willing to come up with solutions that are agreeable to the prisoner-plaintiffs.

The use of the mediation process over litigation may also address some important needs of prisoners.[122] An important aspect of the mediation process that may be beneficial in prisoner civil rights cases is the need for the prisoner to be heard.[123] As prisoners, the plaintiffs in these cases live in a highly dehumanizing environment.[124] Their need for control or validation may perpetuate their desire to file these grievances in the first place.[125] When the prisoners get the opportunity to be heard, as is allowed in mediation settlements and to some extent settlement conferences held by magistrate judges, this satisfies that need.[126] When a third-party neutral mediator is the facilitator of settlement, the mediator may have more time and experience in allowing the prisoner a chance to be heard. Judge Kellison noted that in his settlement conferences, the help of the law students of the McGeorge clinic often made the mediations run more smoothly, at least in respect to allowing the prisoner to be heard before moving to a negotiation with the prison.[127] Judge Thurston explained that even without the presence of a mediator or law student to listen to the prisoner's story, the prisoner often felt validated in being heard by a federal judge, whether or not it was in a settlement conference rather than a courtroom.[128] The mediation process lends itself to resolving the underlying issues in a conflict rather than just the dispute in the claim filed with the court.[129]

Lastly, the relationship between the parties is on going, as after the settlement of this conflict whether through mediation or litigation, the

121. Webcasts, UC Davis School of Law, Section 1983 Prisoner Litigation Fundamentals Seminar (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d.

122. Interview with Denise M. Asper, *supra* note 46.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Telephone Interview with Honorable Craig Kellison, *supra* note 75.

128. Telephone Interview with Honorable Jennifer L. Thurston, *supra* note 114.

129. *See* Otis & Reiter, *supra* note 95, at 372. "One of the strengths of mediation, as opposed to adjudication, is that it is possible to explore a problem more holistically in an effort to resolve the entire conflict and not simply its particular instantiation (the symptom, as it were) at a given point in time." *Id.*

prisoner will still be under the control of the prison and those who work there. The continued interaction between the parties illustrates an important reason that mediation is beneficial in these types of conflicts. The way the settlement of these cases take place influences how the relationship goes forward, affecting both the life of the prisoner and the success of the prison and its employees in maintaining control and creating a safe environment—both for themselves and for the prisoners. Mediation allows for a mutual agreement while addressing a broader conflict.

B. Issues with Implementation and General Concerns

There are some major concerns with the implementation of these types of programs as well as specific aspects of some of the programs. The point at which the mediation or settlement conference occurs and the screening of which cases go to mediation are two important factors in the success of mediations as a potential aid to judicial economy, especially in the Eastern District of California. For example, the earlier in the process a mediation or settlement occurs, the faster these cases are removed from the docket and the less time court has to put in working on each individual case. Waiting until the case survives summary judgment does involve distinct advantages in terms of buy-in from the State in order to settle. After summary judgment the State may see the case as having some real merit and then might prefer to settle or be more inclined to participate in settlement than before the cases goes through dispositive motions. If the program can somehow get the State to "buy-in" with the process in order to allow for mediation or settlement conferences earlier in the process, the program is more likely to ease the district courts' case loads and lighten the burden on the judges handling these cases.

Possible ways to incentivize an early mediation process starts from the courts themselves requiring such efforts.[130] This may be that the courts use a specific and uniform screening process in order to flag certain types of cases which will customarily be successful in mediation. In the Eastern District, it

130. *But see* Webcasts, UC Davis School of Law, Section 1983 Prisoner Litigation Fundamentals Seminar (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d (highlighting that there is a need for the courts to encourage such a process, but that there is a fine line between coercion and encouragement—the more coerced parties feel to enter into mediation, the less likely that the parties will reach a successful settlement).

might not be feasible or efficient at this point to make the screening requirement include looking for trends in order to settle large groups of cases at once, but it may instead be helpful to look for trends in order to help identify which cases should be immediately—and early on—diverted to mediation or settlement. In order for a program to be successful, it must have a screening component by which complaints that are frivolous or not appropriate for mediation for some other reason are identified.[131] Additionally, with time and set screening criteria, the State may become comfortable with the process of settlement and therefore, be more likely to take an active role in settling these claims early.

Other than the State's "buy-in" issues in the Eastern District, there are also "buy-in" issues with the courts as a whole. In order for ADR programs in prison litigation claims to effectuate change, the programs need to become more uniform and involve more district court judges and federal judges than it currently does. If all of the judges and staff attorneys assigned to these cases are working under the same set of screening requirements and processes for getting these cases to mediation, the efficiency of such programs will greatly improve.

The need for ADR settlement programs in the Eastern District in dealing with prisoner litigation cases stems from a large number of these cases filed in the district with a lack of resources in order to resolve them within the traditional court system.[132] In order to allow these programs to become effective in alleviating the stress on the district and ensuring, the district needs funds to support the implementation and study of these programs. Without widespread support for the program and implementation of district standards for the program, the efforts of the Eastern District may prove to be as frustrating as bailing out a flooding boat with a teaspoon.

Additionally, support for these types of programs involves public perception of prisoners and how they understand the process. These settlements may be perceived by the public as the State giving money to criminals for their frivolous claims about prison life.[133] On the one hand, this can promote settlement because prisoners may not want to take a chance at convincing a jury that they have been wronged because the jury will not be very sympathetic to past crimes.[134] This issue as to a certain stigma attached to settling with convicted criminals may include using alternative

131. *See* Cole & Silbert, *supra* note 103, at 324.

132. THE THIRD BRANCH NEWS, *supra* note 2.

133. *See* Borchardt, *supra* note 21, at 479-84.

134. Webcasts, UC Davis School of Law, Section 1983 Prisoner Litigation Fundamentals Seminar (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d.

forms of remedies within the settlement rather than focusing on monetary damages. These remedies may include: waiver of filing fees, apologies, policy changes, injunctive relief, items from the canteen, access to specialists, specialized diet, transfer of cell, and religious worship concessions.[135] By using alternative means for settlement, the mediation process can become more successful at actually reaching settlement as well as serve as an example for future prisoner grievances for relief.

V. BENEFITS OF MEDIATION TO JUDICIAL ECONOMY AND SOCIAL JUSTICE

While the ADR prisoner litigation program in the Eastern District of California has great potential to improve judicial economy, its benefits to social justice have not yet been fully discovered by the courts. Along with aiding in physically taking cases off the docket, implementing such programs has the power to influence the way disputes are handled inside the prisons themselves, thereby reducing prisoner grievance filings in the federal courts overall.

While prisoners' needs are often overlooked, the state of prisons is not only harmful to prisoners but also to the safety of the prison staff. Furthermore, the costs of the prison systems and the issues with overcrowding place a strain on the already weak fiscal position of the nation. In addition, issues with rehabilitation and release may also be influenced by the widespread use of mediation programs in prisons.[136] Finally, if the court can model a dispute resolution process that the institutions can use to settle these types of disputes themselves as part of the grievance process, these complaints do not have to go to court.[137]

Through ADR programs in the Ninth Circuit, there has been some surprisingly positive feedback on the part of correctional officers at certain institutions as it relates to the safety of the prisons.[138] Some correctional officers concluded that once judges entered the prison to hold a settlement agreement, the prison became a safer place.[139] This may be in part to the

135. Interview with Denise M. Asper, *supra* note 46; Telephone Interview with Sujean Park, *supra* note 70; Webcasts, UC Davis School of Law, Section 1983 Prisoner Litigation Fundamentals Seminar (Dec. 2, 2011), http://mediasite.ucdavis.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=b5e1be3dc4f844dd94ca4a51d781bc0c1d.

136. Interview with Denise M. Asper, *supra* note 46.

137. *Id.*

138. *Id.*

139. *Id.*

prisoners feeling like they had some actual form of redress, as an alternative to the court system, symbolized by the judges actually entering the premises.[140] In addition, the legitimate opportunity to be heard may act as a deterrent to other means of perceived justice on the part of prisoners.

The prospect of using federal court ADR programs in prisoner civil rights cases as an example for in-house prisoner grievance systems could serve to greatly lessen the need for prisoners to file these grievances in the first place. Currently, there are some downfalls with the institutional prison in-house administrative remedies.[141] While PLRA requires that prisoners exhaust all of these possible remedies before filing in court,[142] the grievance systems are somewhat lacking.[143] Prisoners have found it necessary to keep track of the paperwork they receive through the in-house administration process in order to be able to prove that they have exhausted these remedies.[144]

The employees of the prisons whose job it is to determine whether the prisoners' claims have merit and provide the proper avenues for redress often lose or take no action with the grievances filed by the prisoners.[145] If, through training and by example in the mediation process of the federal ADR programs, the institutions can utilize mediation skills in handling these grievances, they will be able to handle the problems of the prison within the prison.[146] This way, the court will not have to interfere on sensitive issues regarding the day-to-day happenings in the prison while providing prisoners with a productive system to settle their disputes.[147]

Taking the possibilities a step further, if the mediation model and skills can be implemented as part of the administrative exhaustion of remedies, it may also be implemented as a life-training tool for the prisoners.[148] These skills may provide the prisoners with alternative means to resolve disputes both in prison and when they are released.[149]

140. *Id.*
141. *See* Borchardt, *supra* note 21, at 490.
142. 42 U.S.C. § 1997e(a) (2012).
143. Interview with Denise M. Asper, *supra* note 46.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

VI. CONCLUSION

The overburdened Eastern District of California has struggled to find a solution to the magnitude of prisoner litigation overwhelming its dockets. The large geographical area and large number of prisons within the district has created a unique problem that is getting little aid by way of the government. The ADR programs already in place in the Eastern District of California have great potential as a tool for protection of prisoner civil rights, judicial economy, and as a long-term strategy to move the grievance process back into the prisons.

If the program in the Eastern District of California can establish a more clear and uniform procedure for screening which complaints are ripe for mediation and when such complaints will go to mediation or settlement conferences, more cases will be able to settle out of further litigation within the courts. If the program can be established as the main way these prisoner grievance cases are resolved, the potential to use mediation methods to resolve disputes within the prisons themselves may prove to be the best way to remove these cases from the court.

The conditions of prisons and prisoners' civil rights while incarcerated are not always at the forefront of public discourse. However, the use of mediation to settle cases of constitutional rights violations is mutually agreeable to both prisoner and the State and it simultaneously addresses the continuing relationship between the two. These programs have the potential to not just settle the conflict in front of the parties presently, but to influence future interactions between the parties. The ability to influence long-term relationship dynamics may prove to solve issues with case overloads in the Eastern District of California, but it may also address some major issues within the prisons and institutions themselves.