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The Impact of Section 1983 Litigation on Policymaking in Corrections

A Malpractice Lawsuit by Any Name Would Smell as Sweet*

BY CANDACE MCCOY

Assistant Professor, Criminal Justice and Urban Administration, University of Cincinnati

THE WISDOM of judicial intervention into the administration of state agencies has been a hotly debated topic in American jurisprudence for at least a century. Indeed, the right of the Federal Government to override state actions in the name of Federal constitutional standards was the legal reason for fighting the Civil War.

Today, it is a Civil War-era statute which is the major vehicle for invoking Federal jurisdiction in order to challenge unconstitutional actions of various state agencies. Mental institutions, welfare departments, police agencies, and state prisons have all been the targets of challenges by plaintiffs seeking Federal intervention to protect their civil rights. Section 1983 of title 42 of the United States Code, originally passed in 1871 to prevent the Ku Klux Klan from holding lynching parties "under color of state law," is now used by prisoners to challenge the administration of the state institutions in which they are housed.

Though section 1983 cases have switched in emphasis from ending vigilantism to overseeing the operation of state agencies, the common theme of Federal intervention remains. Federal supremacy is necessary if there truly is a commitment to protection of Federal constitutional rights: "the very essence of the scheme of ordered liberty," as Frankfurter deemed the Bill of Rights in *Adamson* v. *California*, 332 U.S. 46 (1947).

Upholding constitutional rights in such a way means that the professional judgment of state administrators must always be subject to review. If civil rights are violated by state action, the victim may seek redress for the "constitutional tort." Though the harm has been loss of political rights, much constitutional litigation has begun to mirror the process of remedying tortious conduct—that is, the plaintiff claims that the defendant's actions fell below the standard of care legally prescribed for performance of duties. Whether the violation was against common law standards or constitutional ones, it seems that the impact on the behavior of the professional would be similar. Doctors defending malpractice lawsuits may find that correctional administrators well understand their plight.

Malpractice lawsuits against private professionals, it is assumed, represent the policing of the profession when self-control fails. It is assumed that a lawyer will not file a lawsuit after the statute of limitations has run, or that a doctor will not remove the incorrect internal organ, because there is a professional duty not to do so. If the sense of professional duty fails, the requirements of legal duty will keep the professional functioning above the minimum standards of required work. Fear of lawsuits may not be a daily preoccupation of a doctor or a lawyer, but we assume that the underlying reality of malpractice litigation has the effect of enforcing professional standards.

Does section 1983 litigation by prisoners have a similar impact upon the actions of correctional administrators? This article will examine trends in prisoners' rights litigation, and will attempt to ascertain whether the administrative response has actually resulted in changes in prison conditions and administration.

The Caselaw: From Hands-Off to Hands-On

Indepth review of state correctional practices by Federal courts is a comparatively recent legal development, although intervention in voting rights, congressional district formation, or racial desegregation cases has a longer history. Prior to the Warren Court era, courts usually refused to review the actions of correctional personnel because of "considerations of federalism and com-

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ity"[1] and deference to professional expertise.[2] In the late 1960's, however, many Federal district courts began to inquire into correctional policies and actions of administrators, and to declare them unconstitutional under various provisions of the Bill of Rights—most frequently the first, eighth, and fourteenth amendments. The older approach is often dubbed "the hands-off doctrine," on the theory that courts would keep out of prison affairs unless gross misconduct was alleged.[3] The newer approach, which closely monitors correctional administration, is often called "activist" or "interventionist." In the interests of symbolic consistency, this author calls it "the hands-on doctrine."

Caselaw from the 1960's and 1970's, then, aimed for systematic reform of correctional facilities. It achieved this through the use of sweeping equitable remedies: court monitoring under continuing jurisdiction. If the trial court found prison practices to be unconstitutional, the remedy often was to place the institution under court supervision until it complied with Federal constitutional standards. In one famous case, *Holt* v. *Sarver*, 309 F. Supp. 362 (E. D. Ark. 1970) the entire system of the State of Arkansas was declared unconstitutional, and the court spent years monitoring it until it passed constitutional muster. The supervision process in such cases usually included formulation of plans and deadlines for improvements, appointment of neutral monitors, and periodic review by the trial judge.[4] Today, 32 states are under some type of court order to remedy unconstitutional correctional practices.[5]

Have these cases had a substantial impact in reforming draconian prisons? Yes and no, according to a 1977 study by Harris and Spiller.[6] They found that the worst abuses had been ended, and that this was probably directly attributable to the judicial intervention and monitoring.[7] However,

> there were serious limitations on the impact of the judicial intervention. Relief was intended to eliminate illegality and achieve minimum constitutional acceptability. It was not directed toward creation of ideal or even progressive programs. . .. The scope of the relief was confined to the issues presented directly in the litigation.[8]

Thus, the "conditions case" which was so willingly embraced by district courts in the 1960's may be said to have put correctional administration on the road to reform. But insofar as the reform was limited to achieving minimum constitutional acceptability, the impact of litigation may not have been as deep as many prison reformers would have hoped. Further, several proponents of continued judicial intervention are fearful that recent Supreme Court decisions are aiming for a return to the hands-off doctrine.[9]

Whether Burger Court caselaw will return to a hands-off approach is a matter of speculation, in any event. Furthermore, interpretation by lower courts of *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the case hailed as the Burger Court cutback in prisoners' rights, does not indicate a backslide.[10]

Indeed, in one area of section 1983 litigation, the Burger Court has expanded access to court by prisoners. Prior to *Monell* v. *Department of Social Services*, 436 U.S. 56 (1979) and *Owen* v. *City of Independence*, 445 U.S. 662 (1980), local municipalities were immune from suit for money damages. Now, the city which operates the local jail may be named as a defendant in a section 1983 lawsuit. Often, conditions in local jails are considerably worse than those found in state institutions, and therefore it is possible that a powerful tool for local correctional reform has been fashioned.[11]

Monell and *Ownn* may foreshadow an important shift in section 1983 litigation. Municipalities were always subject to suit, of course, if injunctive and/or declaratory relief was the goal. Thus, the continuing jurisdiction lawsuit model evaluated by Harris and Spiller has been applied to municipalities. But *Monell* and *Owen* have held that jail inmates may also now sue under section 1983 to recover monetary damages from a deep pocket—the city's. Lawsuits for money, filed against cities, may be powerful reform tools, indeed. They are the equivalent of malpractice actions against municipalities, charging the cities with operating jails under unconstitutional policies. Surely, allowing inmates to sue for money damages against jailers, guards, wardens, or even cities will have profound impact on correctional reform. Or will it?

[1] McAlpine, Fraser A. *Prisoners, 1983 and the Federal Judge as Warden*, 9 TOLEDO LAW REVIEW 873 (1978).
[2] *Note: Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts.* 72 YALE LAW JOURNAL 506 (1963).
[3] Krantz, Sheldon. CORRECTIONS AND PRISONERS' RIGHTS 98 (West, 1976).
[4] *Note: Implementation Problems in Institutional Reform Litigation.* 91 HARVARD LAW REVIEW 428 (1977).
[5] National Association of Attorneys General. IMPLEMENTATION OF REMEDIES IN PRISON CONDITIONS SUITS 49 (1980).
[6] Harris, M. Kay and Dudley P. Spiller. AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS. U.S. Department of Justice: LEAA National Institute of Law Enforcement and Criminal Justice, 1977.
[7] *Ibid.* at 27.
[8] *Ibid.* at 28.
[9] Robbins, Ira P. *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration.* 71 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 211 (1980).
[10] For an excellent synopsis of post-*Wolfish* cases, in which district courts have continued a hands-on policy despite *Bell* v. *Wolfish*, see *Lareau* v. *Manson*, Civil Action No. H. 78-145 and H. 78-199 (U.S. District Court, District of Connecticut, 1981). The case is as yet unpublished.
[11] See, in general, Birdwhistell, William Barry. *County Jail Reform in Kentucky—A Second Look.* 68 KENTUCKY LAW JOURNAL 378 (1980).

Two Remedial Models for Unconstitutional Correctional Facilities

As noted, studies assessing the impact of section 1983 cases on correctional reform have concentrated on the "big case": the lawsuit which challenges a number of practices in a prison or jail, and seeks direct intervention into administration. Because district courts have usually set up fairly elaborate compliance schemes under which the courts oversee institutional operation until the prison is given a clean bill of health, this can be termed a "monitoring model" for correctional reform. The growth of this far-reaching judicial remedy, an interesting legal development, is one direct result of prison litigation of the 1970's.[12] In general, according to Singer, the impact of such a remedial scheme has been that: (1) prison reform has become the concern of several different professional groups, (2) grievance mechanisms have been instituted in most prisons, (3) prison concerns are now more visible to the public, (4) strip cells are now rare, and (5) prison policies and administration have become bureaucratized and standardized.[13]

Another remedy for unconstitutional treatment is, of course, compensatory damages. If someone wrongs you, and you sue him, the traditional legal remedy is to treat the wound with money. Thus, prisoners often sue correctional personnel individually, claiming specific unconstitutional actions and demanding money in recompense. Under *Monell* and *Owen*, they may now sue the city as the individual money-bearing defendant, too. (Note, however, that states are still immune from suits for direct money damages, under the 11th amendment.) This money model, it would seem, could have as much impact on correctional administration as does the monitoring model. Money model lawsuits are brought against individual administrators and guards in their personal capacities, and they are intended to hit the defendants where it hurts—in the pocket or purse. However, though studies such as that of Harris and Spiller have evaluated correctional reform under the monitoring model, little attention has been paid to the great number of lawsuits filed under the money model.

Indeed, lawsuits filed by prisoners which fall under the money model are much more numerous than are those which fit the monitoring model. Defendants call money model cases "frivolous nuisances," because they charge defendants with specific unconstitutional acts which are difficult to prove and difficult to assess to money terms. Generally, the suits are dismissed after the defendants are simply made slightly uncomfortable. Some cases, however, result in large money judgments.

Of course, the money model is not new. In fact, it fits legal tradition much more closely than does the meddling monitoring model. It uses the traditional legal remedy, not the equitable one. But the monitoring model, with its distinguished cast of characters—Federal judges, special masters, state legislatures, prison wardens, correctional planners—is bound to get more headlines.

The traditional suit for money does not request institutional reform, either. It simply demands monetary recompense. This is true of any malpractice action. But institutional reform may occur more swiftly if administrators are held personally responsible for failing to run constitutional prisons.

Analysis of Court Records: Which Cases Result in Reform?

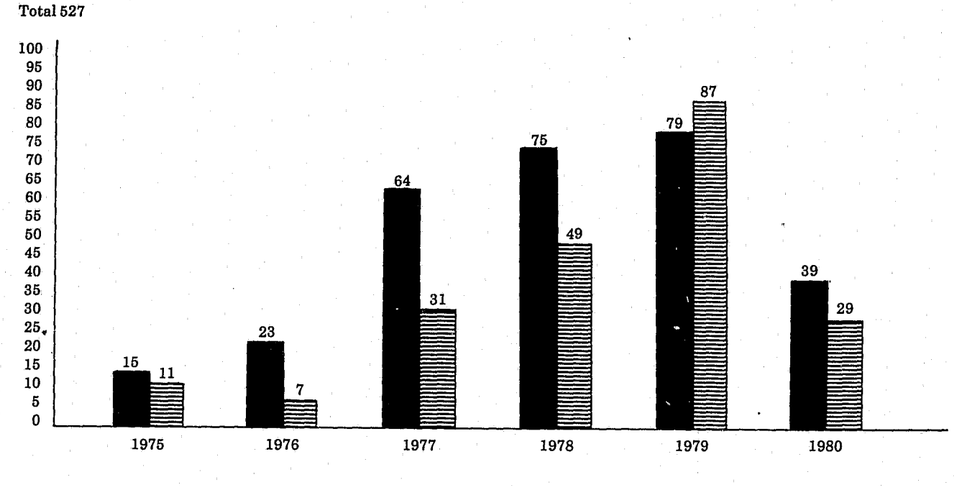
Do money model cases have the effect of encouraging institutional reform? Testing such a premise is difficult, because changes in correctional facilities are, of course, prompted by several factors. Results of the monitoring model cases are measurable in the short run—either the change ordered by the court is made, or it is not. Backsliding and evasion are possible, but reviews by court-appointed monitors and outside accreditors such as the American Correctional Association or the American Medical Association can help maintain standards.

Results of money model cases are harder to assess. If they resemble malpractice actions, their measurable impact is negative, that is, the better they enforce professional standards, the fewer are filed, because the standards are met. The fewer that are filed, the fewer we have as available case studies. It is often said that measuring the effectiveness of police patrol in preventing crime is difficult, because it is impossible to count crimes that do not happen.

However, if cases that do get filed are counted and their dispositions analyzed, a comparison of caseloads over several years could show whether correctional conditions have improved. Furthermore, those cases which result in monetary awards to prisoners would have a precedential value in future cases, and should be closely examined.

[12] Singer, Richard G. *Prisoners' Rights Litigation: A Look at the Past Decade, and a Look at the Coming Decade.* FEDERAL PROBATION 3 at 5 (1980).
[13] *Ibid.* at 3-4.

FIGURE 1.—*Federal suits filed by inmates of correctional facilities in Southern Ohio 1975-1980.*



Other type of prisoner lawsuits: 2 in 1975; 0 in 1976; 4 in 1977; 8 in 1978; 0 in 1979; 4 in 1980.

To begin such an examination, this author delved into court records of one Federal district court: the Southern District of Ohio, which has branches in Dayton and Cincinnati. All cases filed by prisoners during the years 1975-1980 which named correctional personnel as defendants were examined.

This is the only manner in which correctional cases can be isolated from others, because cases are cataloged by number and litigant names, not causes of action. Thus, by obtaining the names of all chief administrators of the four state prisons in Southern Ohio for the years 1975-1980, we found 527 cases filed. Some cases not found may have named correctional officials lower in the job hierarchy, but the number of these was probably small, because superintendents (wardens) are usually named as co-defendants in any lawsuit against guards, paramedics, and the like.

In addition, the 527 cases include a few lawsuits against local correctional officials. We obtained the names of all people who have served in the position of county sheriff for all the counties within the jurisdiction of the Southern District of Ohio over the course of two terms of office spanning the years 1975-1980. County sheriffs are responsible under Ohio law for the administration of county jails.

The statistics are interesting, and indicate that the "hands-on" doctrine probably did indeed produce a flurry of inmate lawsuits. From 11 section 1983 suits filed in 1975, there is a rise to 87 in 1979. The interesting point, however, is that there was a marked drop in lawsuits filed between 1979 and 1980. The drop does not seem to be a fluke, because *habeas corpus* petitions filed also dropped from 79 to 39. The implications of this drop could be that indeed the lawsuits were having an impact in reforming prisons, though more information is required. Figure I shows the number of cases filed from 1975-1980.

As figure 1 shows, the volume of prisoner litigation rose steadily until 1980, and then it dropped sharply. Especially is this true for the section 1983 cases, which climbed from 7 filings in 1976 to 87 in 1979, but then fell to 29 in 1980.

Although this article is primarily concerned with section 1983 cases, the number of *habeas corpus* petitions filed seems to follow the same trend as did the civil rights actions; that is, numbers filed rose steadily until 1979, and dropped sharply in 1980.

Habeas actions often challenge the same types of allegedly unconstitutional actions as do section 1983 cases, but the difference is in the remedy sought. Technically, as an extraordinary writ, *habeas corpus* may be used only to secure the release of the petitioner from incarceration. Considering that release almost never is granted, one wonders why so many prisoners file such petitions. (In one 4-year period, of 3,702 Federal *habeas corpus* petitons filed, only five resulted in the discharge of the prisoner.[14]) The petitions may be filed as a last-hope attempt to secure collateral review of a conviction, but they also often challenge prison conditions.[15] Conditions of confinement may be attacked and remedied through use of *habeas corpus* petitions, *Wilwording* v. *Swenson*, 404 U.S. 249 (1972), but they may not be used to sue for money damages, as may section 1983 cases.

In this study, the *habeas* cases were not categorized by those challenging prison conditions as opposed to those challenging legality of conviction. But, since *habeas corpus* is indeed one way to challenge correctional conditions, it is probable that several of the 295 *habeas* cases filed involved such challenges.

Thus, insofar as both *habeas corpus* and section 1983 cases may challenge correctional conditions, it is probable that a majority of the 527 cases filed (i.e., the 214 section 1983 cases, plus an unknown number of *habeas corpus* cases) were challenges to allegedly unconstitutional confinement or specific actions by correctional personnel. That the caseload dropped from a total of 166 in 1979 to 68 in 1980 is especially interesting.

Of course, none of the *habeas* cases would fit the money model described earlier, because compensatory damages are not available in *habeas* relief. Of the total of 527 cases filed, however, 214 were filed under section 1983. Of these, the clear majority were money model cases. Of the 214, only five demanded injunctive relief in the form of complete overhaul of various institutional policies or practices. Figure 2 describes the section 1983 cases.

[14]Kerper, Hazel B. and Jeneen Kerper. THE LEGAL RIGHTS OF THE CONVICTED 218 (West, 1974).
[15]Krantz, *loc. cit.*
[16]The case should not be read as a retreat to the "hands-off doctrine." Concurring Justices Brennan, Blackmun, and Stevens took pains to emphasize that, on the facts of the case, this particular prison was not inhumane, but that courts should continue close scrutiny of prison practices under eighth amendment standards. The five-justice majority opinion is rife with disapproval of activist monitoring model approaches, though, as discussed elsewhere in this article. Given this continued attack on the monitoring model, the money model becomes increasingly important.

FIGURE 2.—*Prisoner section 1983 cases filed in Southern District of Ohio, 1975-1980, and disposition of the cases.*

	Lawsuits demanding and receiving injunctive relief (monitoring model)	Lawsuits for money damages and/or injunctive relief (money model)
1975	1	10 (1)
1976	1	6 (0)
1977	2	29 (1)
1978	0	49 (3)
1979	0	87 (in litigation
1980	1 (but reversed on appeal)	28 (in litigation)

Numbers in parenthesis indicate those numbers of money model cases which resulted in compensatory damages being paid by correctional administrators or institutions.

It seems that, where sheer weight of litigation is concerned, money model cases use as much court time, and thus presumably cause as much concern to correctional administrators, as do monitoring model cases. The monitoring model cases, however, are very much more complex, difficult to litigate, and are brought by attorneys for the plaintiffs. Most money model cases were filed *pro se*, and they challenged one specific allegedly unconstitutional act.

Though the monitoring model cases are statistically insignificant, they could have substantial impact of the type described by Harris and Spiller. Two sought overhaul of county jails, and resulted in funds being appropriated for improvement of the facilities. Two of the cases sought permanent injunctions against specific medical care practices. These injunctions were easily granted.

The fifth successful monitoring model lawsuit seen in figure 2 is the major case of *Chapman* v. *Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977); affirmed 624 F. 2d 1099 (6th Cir. 1980); reversed 101 S.Ct. 2392 (1981). Plaintiff inmates prevailed in the district court, and injunctive relief against doublecelling at Ohio's maximum security prison was ordered. In 1980, the Sixth Circuit affirmed. But on appeal to the U.S. Supreme Court, the decision was reversed in what will surely be considered a national trendsetter.[16]

Because the injunctive orders of the district court had been stayed while the case was appealed, technically administrators were not legally required to end doublebunking or the strains on institutional services which plaintiffs claimed were caused by the overcrowding. The focal point of the legal challenge was doublecelling, a practice which continued throughout the litigation and the time period under study here. This specific practice was challenged in *Chapman*, and the Court declared it acceptable, though inmates claimed that it created more problems relating to medical care, rehabilitative services, and violence within the prison walls. If the ongoing litigation had had any impact, it perhaps would have been in these secondary results of overcrowding. Because there was no effort to end the primary practice which supposedly caused these evils, and because there was no binding legal order immediately to do so, it is fair to speculate that the *Chapman* case probably had little direct impact on the correctional practices during this period.

Unlike these monitoring model cases, the majority of the money model cases did not challenge conditions such as double-bunking. They sought damages for specific wrongs: denial of medical care when it was needed, assaults by correctional personnel, denial of access to law books or mail, confiscation of personal property, and the like. Would this type of lawsuit spur correctional policy changes?

If numbers of cases in which plaintiffs actually prevailed indicate how serious a threat to correctional administration these cases pose, the impact seems minimal. As figure 2 shows, only 3 of the 49 cases filed in 1978, for example, resulted in money damages being paid. The great majority of money model cases are filed by the aggrieved prisoner but successfully defeated at the earliest stage of litigation by a summary judgment or some other type of pretrial dismissal. Figure 3 shows the dispositions of the section 1983 money model cases. Outcomes of 1979 and 1980 cases are not listed, since several are still in litigation.

If plaintiff prisoners won only four cases at trial, and prevailed through only six settlements, it

FIGURE 3.—*Disposition of section 1983 correctional cases seeking compensatory damages, filed in Southern District of Ohio 1975-1978.*

	1975	1976	1977	1978
Summary judgment against plaintiff, or other pretrial dismissal	9	4	24	39
Pretrial settlement	1	0	1	4
Trial-plaintiff prevails	1	1	2	0
Trial-defendant prevails	0	1	1	2
Other	0	1	3	5*

*Five medical cases are still in litigation. Of these, three look promising for the plaintiffs.

seems that correctional administrators have little to fear from such lawsuits. These 10 lawsuits forced about $60,000 in judgments from the pockets of administrators or municipalities, and no doubt this was paid mostly by insurance money or municipal appropriations.

As one commentator who examined section 1983 cases in the district court for the Northern District of Illinois in 1971 and 1973 has noted:

> Judicial disposition of section 1983 claims filed by prisoners during 1971 was characterized by wholesale dismissals. . . . Judicial relief and a favorable decision on the merits for the inmate emerged in only four cases out of 218, leading to the conclusion that. . . the remedy of federal intervention has proved largely illusory.[17]

But statistics on final dispositions do not necessarily reveal the full impact of these cases. Even though prisoners lost virtually all of them, the fact of the litigation itself is important. The cases may be exactly what administrators call them—nuisances—but, given a choice, most people would rather work without nuisances than with them. No doubt defending the cases is a bit bothersome, even if the defendant ultimately prevails.

In other words, the frequency of filing is perhaps more significant than the eventual judgments. This is supported by the fact that the Federal courts themselves have found it necessary to initiate streamlined procedures for handling the volume of prisoner section 1983 money model cases.[18] Nationwide, the number of section 1983 cases filed by state prisoners (both money and monitoring models) increased from 218 in 1966 to 9,730 in 1978.[19] Simply dealing with the glut has been a problem for the courts,[20] presumably the process is also vexatious to correctional administrators.

Institutional Response

This presumption is supported by the data in figure 1. The precipitous drop in cases filed in 1980

[17]Bailey, William S. *The Realities of Prisoners' Cases Under 42 U.S.C. §1983: A Statistical Survey in the Northern District of Illinois.* 6 LOYOLA UNIVERSITY LAW JOURNAL 531 (1975).

[18]Unpublished manuscript report of Federal Judicial Center's Prisoner Civil Rights Committee, summarized in *Prison Reform: The Judicial Process, Special Report.* 23 CRIMINAL LAW REPORTER 1065 (1978); see also *CA 5 Sets Procedures for Handling Prisoners' 1983 Petitions.* 18 CRIMINAL LAW REPORTER 2395 (1976).

[19]Reynolds, William L. and Michael H. Tonry. *Professional Mediation Services for Prisoners' Complaints.* 67 A.B.A. JOURNAL 295 (1981).

[20]*Ibid.* at 297.

compared to those filed in 1979 is unexplained. The total number of *habeas corpus* cases and section 1983 cases filed in 1979 (166) dropped to 68 in 1980, a decrease of well over one-half. Since the number of cases filed in the years 1977 and 1978 was also high, the drop was probably not a return to a more placid normalcy. The norm had been a high volume of litigation.

If substantial improvements had been made in Ohio's prisons and jails during the years 1978 and 1979, cases filed in 1980 would probably be fewer. If such improvements had indeed been made, one explanation for this development could be that they were made in response to prisoners' litigation.

One change made does indeed seem to fit this hypothesis. In February 1978 the state department of corrections promulgated revised departmental guides for an "inspector" system. Each prison now has on staff an "inspector of institutional services" who is administratively responsible to the state department of corrections, not to the prison warden. The primary function of the inspector is to investigate and process inmate grievances, and thus the position has some characteristics of an ombudsman.

In 1976, prior to institution of the inspector system, only 166 grievances had been filed. The duties and functions of the inspectors were reviewed in 1977, as was the inmate grievance system. Following institutional reform of these systems, 1,139 grievances were filed in the first 6 months of 1977. In 1978, grievances by prisoners against corrections personnel numbered 2,159.[21] The most frequent complaints involved two subjects very often encountered in section 1983 lawsuits: medical care and property loss.[22]

By 1980, the grievance level had evened out at 2,830—still large, but not a huge increase over the 1978 figure.[23]

[21]Unpublished reports available from the Office of Chief Inspector, Department of Rehabilitation and Correction, 1050 Freeway Drive, North, Suite 403, Columbus, Ohio 43229.

[22]*Ibid.*

[23]*Ibid.*

[24]*Prison Grievance Procedures: A National Survey.* 1975 CORRECTIONS MAGAZINE 30 (Jan/Feb. 1975).

[25]For discussions of grievance systems, see *Comment, The Federal Bureau of Prisons Administrative Grievance Procedure: An Effective Alternative to Prisoner Litigation?* 13 AMERICAN CRIMINAL LAW REVIEW 779 (1976); McArthur, Virginia. Inmate Grievance Mechanisms: *A Survey of 209 American Prisons.* 38 FEDERAL PROBATION 41 (1974); Singer, Linda R. and J. Michael Keating. *Prisoner Grievance Mechanisms.* 19 CRIME AND DELINQUENCY 367 (1973); Hepburn, John R. and James H. Laue. *The Reduction of Inmate Grievances as an Alternative to the Courts.* 35 ARBITRATION JOURNAL 11 (1980). A set of training materials on "Grievance Mechanism in Correctional Institutions" is available from U.S. Dept. of Justice, L.E.A.A., National Institute of Law Enforcement and Criminal Justice (1975). On ombudsmen systems, see Anderson, Stanley. *The Corrections Ombudsman.* JUSTICE AS FAIRNESS (Anderson Publisher, 1981); and Williams, Theartrice. *Between the Keepers and the Kept,* 12 TRIAL 33 (1976). Generally: Dreyfuss, Elisabeth T. and Jane C. Knapp. *Due Process as a Management Tool in Schools and Prisons.* 28 CLEVELAND STATE LAW REVIEW 373 (1979).

[26]On exhaustion generally, see White, Steve. *42 U.S.C. §1983 Prisoner Petitions—Exhaustion of State Administrative Remedies.* 28 ARKANSAS LAW REVIEW 479 (1975); Russo, Salvatore. *State Prisoners and the Exhaustion of Administrtative Remedies.* 7 SETON HALL LAW REVIEW 366 (1976).

The inspector system and grievance mechanisms were set into operation at the time that money model litigation against prison adminsitration was heaviest. Probably, corrections officials realized that "(t)here are three options for corrections policy: coercion countered by resistance; endless prisoner litigation; or a(n). . . acceptable dispute resolution system."[24]

Institution of the latter alternative shows that prisoner litigation indeed can have impact on institutional policy. Grievance mechanisms, mediation services, and ombudsmen have been recommended as alternatives to prisoner litigation,[25] but little has been done to compare prison grievance reports and court records, to ascertain whether the institutional devices indeed have the internal impact expected. This study in the Southern District of Ohio indicates that prisoner frustrations indeed may be answered in the prison, not in the court. At least, insofar as the grievance mechanisms are set up as a response to prisoner complaints, prisoners' rights litigation brought by individual inmates seeking money damages has had impact on formulation of correctional policies.

A bothersome policy question for the future will be whether to require exhaustion of these administrative remedies before a case may be filed in Federal court. Early cases indicated that exhaustion was not necessary, *Houghton* v. *Shafer*, 392 U.S. 639 (1968). However, as grievance mechanisms became more sophisticated, courts began to require exhaustion[26] as long as the prison procedures are capable of providing remedies within the time in which the prisoner would be required to file the complaint in Federal court under the prevailing statute of limitations. *Secret* v. *Brierton*, 534 F. 2d 823 (7th Cir. 1978).

In May 1980 the U.S. Congress passed 42 United States Code Section 1997e, requiring exhaustion of remedies in state prisons before filing of section 1983 claims. But cases may be delayed only a maximum of 90 days, in order for the institutional hearings and decisions to be completed during that time. 42 U. SC. 1997e (a) (1) and (2). After 90 days, litigation may begin.

The statute appropriately preserves an inmate's access to Federal court, while requiring use of the internal mechanisms which were probably developed partly as a result of prisoner litigation. The impact of the litigation was that grievance and ombudsmen systems were instituted; the courts must keep their doors open to allow such reform responses to occur in the future.

END