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### GRIEVANCE PROCEDURES IN FEDERAL PRISONS: PRACTICES AND PROPOSALS\*

HOWARD LESNICK†

Proposals to establish or improve methods by which prisoners may bring requests or complaints to prison officials or others for fair consideration of their merits are much in the air today. Some see in such notions the hope of fending off increased inmate resort to the courts, others have primarily in mind the prevention of violent disruptions, and there are some who support the idea "simply" on the grounds of its justice. This Article examines existing procedures in federal prisons (and a few state prison experiences which are particularly concerned with relevant current issues, but which lacked counterparts in federal institutions as of late 1973), and tries to evaluate current practices and proposed reforms. The procedure employed was to visit a number of institutions, principally those for long term inmates, and to speak with people, both inmates and staff, having a variety of inputs—senior corrections officers; persons involved with classification and assignment; correctional counselors; staff con-

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\* This Article is based on a report prepared for the Committee on Informal Action of the Administrative Conference of the United States. The views expressed are my own only. I profited from the assistance of Steven G. Scott, Esq., of the Oregon Bar. I appreciate the cooperation of many inmates and staff members at a number of prisons, and especially that of Eugene Barkin, Esq., General Counsel of the Federal Bureau of Prisons.

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cerned with custodial and disciplinary matters; persons involved in supplying legal resources and law books, including librarians and jailhouse lawyers; members of inmate representation committees; and persons associated with the office of the General Counsel of the Bureau of Prisons—and to review such file data as is available (principally that dealing with the forfeiture of “good time”).

Two conditioning factors should be borne in mind. First, we are dealing with the administrative process at its most informal. Even the word “procedure” tends to conjure up in lawyers’ minds an unrealistically formal affair. A “grievance” is often “processed” by means of a corridor conversation between an inmate and a staff member, with no written account made or preserved. Necessarily, data can only be gathered through interviews and observation, and is impressionistic and relatively unquantifiable in many areas.<sup>1</sup> Second, the routine caveat against easy solutions nowhere needs constant recollection more than in dealing with prisons. The extraordinary isolation of prisons and prison life from the thoughts of most Americans, and the national unwillingness to spend money (except for “security”); the polarization of feelings, experiences and values between inmates and the correctional bureaucracy; the characteristic of prisons as “total institutions,” in which every moment of the inmate’s life and virtually every act or statement is subject to some part of the regulatory pattern—these and other factors make one sharply aware of the intractability of the problems.

The first and second sections of this Article describe the various institutions within the federal prison system which regulate an inmate’s life, and the several mechanisms by which a request or complaint—a “grievance”—may be presented and considered. The third section attempts to evaluate the existing structure and several currently mooted modes of improved grievance mechanisms: arbitrators, ombudspeople, citizens’ panels, inmate councils and inmate paralegal training. I shall offer some skeptical conclusions about the first three ideas, and some affirmative ones about the latter two.

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<sup>1</sup> For this reason, and because conditions are so fluid at most prisons, I have not identified particular institutions by name in discussing practices. They are not confidential, however, and I would be glad to supply more precise information to anyone requesting it. The descriptions and perceptions set forth in this Article are presented not clothed with the scholarly “proofs” some are accustomed to. Needless to say, I think that they are accurate; needless also to say, my belief may be ill-founded; I hope that the reader who thinks so will base his or her belief on something other than the absence per se of such proof.

## I. THE REGULATION OF INMATE LIFE

### A. *The Classification and Parole Unit*

In most institutions, the Classification and Parole Unit has authority over the bulk of the decisions most crucial to the life of an inmate. The level of custody deemed appropriate will determine whether an inmate can spend none, some, or all of his time outside the walls working or living at the "camp" or "farm" which adjoins many prisons. Closely related is the housing assignment: whether or not the inmate will be assigned to housing with a window (and a view of the outside) or with greater freedom to come and go. An inmate's job assignment is critical in a number of respects. First, working conditions are obviously less appealing (to most) in the laundry or the kitchen than in the library or the machine shop. In addition, some but not all jobs may earn the inmate "meritorious pay" and "meritorious good time"—the latter term referring to an extra, discretionary reduction in sentence, beyond the statutory allowance to which an inmate is entitled, unless it is forfeited or withheld in disciplinary proceedings.<sup>2</sup> Inmate requests for interinstitution transfer likewise are within the jurisdiction—although here only the initial jurisdiction—of this unit. Finally, it is from Classification and Parole that the institution's recommendation regarding parole effectively emanates—a recommendation which apparently presages the Parole Board's decision in about three-quarters of the cases.

The procedure by which this pervasive authority is exercised varies somewhat from one institution to another. A committee—variously called a "classification committee," "treatment team," or some similar term—typically makes the decision. In some facilities, a single committee acts in all cases; it may be comprised of an associate warden, the chief correctional supervisor (captain of the guard force), the chief of Classification and Parole and one or two "department" heads, such as the supervisor of education or industries. In others, a decentralized approach is employed: the individual case manager and correctional counselor to whom the inmate in question is assigned, plus a case management or correctional supervisor, might comprise the committee. In all cases however, individual case managers sit

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<sup>2</sup> 18 U.S.C. §§ 4126, 4161, 4162, & 4165 (1970); see U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, POLICY STATEMENT 7600.50A, MERITORIOUS GOOD TIME (1971).

in with the committee and have the responsibility to "work up" each agendum in advance, presenting the case to the meeting with a recommendation. In fact, I had the sense that a case manager has discretion to deny an inmate's request for a change in job, housing or custody without even bringing it to the committee. The inmates' perception that case manager support is a *sine qua non* of committee approval may be exaggerated—he is the person with whom they deal—but it seems clear that his function as presenter of the case does make him the single most critical input.

An inmate typically is given an opportunity to appear before the committee in certain types of cases—initial classification and (in some institutions) parole recommendations, but not usually in reclassification cases or transfers—but he is called in after the case has been discussed and a committee response formulated; the appearance serves more to give the inmate some chance to hear the reasons for the action and to voice his reactions, than to provide a genuine input into the decision itself.

## B. *Disciplinary Proceedings*

### 1. The Adjustment Committee

The primary disciplinary body in federal prisons is the Adjustment Committee.<sup>3</sup> It has initial jurisdiction over all matters regarded by the institution as disciplinary which are not disposed of informally by the custodial staff. Its composition varies somewhat from institution to institution; the captain, the chief of Classification and Parole, and either another senior custodial official or a department head (education, hospital, industry) would comprise a typical Adjustment Committee. Including department heads serves the purposes of exposing inmates to personnel other than custodial and case management staff, and of exposing the department heads to the disciplinary process and its problems. The associate warden, although never a member of the Adjustment Committee, in many cases participates in its deliberations, either as an advisor or simply as an observer. The regulations permit a wide range of sanctions, including reprimand, restrictions of various privileges related to the offense

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<sup>3</sup> See U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, POLICY STATEMENT 7400.5B, INMATE DISCIPLINE (1972). Sections 4A and 4B contain the substantive rules of conduct enforced by disciplinary proceedings; sections 4C and 5 deal with the Adjustment Committee.

(such as visiting rights), segregation, loss of favorable custody, housing or job classifications, and the recommendation of loss of good time credits.<sup>4</sup> The committee has final authority, subject to the warden's power of review, in all cases but the last.

Inmates charged with an offense to be brought before the Adjustment Committee must be given a written specification of charges, signed by the custodial official who investigated the complaint. This official is usually a lieutenant (correctional supervisor) to whom the officer making the complaint is required to refer the matter prior to the filing of written charges and the convening of an Adjustment Committee. When the inmate has been placed in segregation pending a hearing, the rules require that he be given a written statement of charges within twenty-four hours.<sup>5</sup> The lieutenant includes as part of his report the inmate's response to the charge, if any.

The hearing is moderately informal. The committee chairman reads the investigative report to the members before the inmate is brought into the room. (In my observation, the case was not discussed by the members at that time.) When the inmate appears, the investigative report is read to him in full and he is asked if he has anything to say. It is not the Adjustment Committee's practice to summon witnesses in support of the complaint; in effect the hearsay statement of the report is regarded as evidence. If the inmate denies the factual allegations, the committee will discuss them with him, but it is not customary to summon witnesses to challenge his version of the case. In the rare event that the hearing discloses a genuine doubt as to what happened, the committee may decide to adjourn the hearing. Even then the response is not to obtain live witnesses, but rather to return the matter to the lieutenant who made the investigation with instructions to investigate and report further in writing. It is not inconceivable that the committee would decide to call a custodial official or other administration witness before it, but I believe that this is rarely done.

The inmate is not afforded any right of representation be-

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<sup>4</sup> One should also add that the Adjustment Committee can recommend transfer. While transfer for "adjustment" reasons is not regarded as a disciplinary matter, and is processed through Classification and Parole, the Warden's office and the central office, with little or no inmate notice and participation, the process is often set in motion by an incident which is brought before the Adjustment Committee. See text following note 3 *supra*.

<sup>5</sup> See POLICY STATEMENT 7400.5B, *supra* note 3, at § 5(c)(1).

fore the Adjustment Committee. Nor do the rules specifically provide a right to summon witnesses in his behalf. However, as a discretionary matter such a request is sometimes granted.

After the interview with the inmate is completed, he leaves the room and the case is discussed. Since the committee does not view itself as in any way a court, discussion is not necessarily limited to material before it as "evidence." For example, in one case I observed, an inmate charged with violating the regulation permitting one to kiss his wife at the beginning and end of a visit, "within the bounds of good taste,"<sup>6</sup> claimed that the duty officer in the visiting room had been harassing him, and had been looking for an excuse to report him. During the posthearing discussion all agreed that the particular officer in question, far from being vindictive, was an unusually patient man, and that if he thought it necessary to file an incident report the matter must have been serious indeed. In many cases, the committee draws upon its knowledge of the inmate, other inmates and staff members, and would be quite shocked to hear that it should do otherwise.

It is clear that the members of Adjustment Committees do not place as great a store on a finding of guilt as do courts and lawyers. They view their primary function as dispositional and managerial. Accordingly, the main issue is one of sanctions. The committee is required to meet three times each week; where an inmate has been placed in segregation his case must be reviewed at least weekly. In some cases, the committee uses segregation in a way which is a mixture of sanction and investigation. For example, an inmate involved in a fight who refused to disclose his assailant, having been placed in segregation pending the hearing, was ordered continued in segregation until the next review. Technically, there was no decision, although obviously as a practical matter he was being punished in this manner for the nondisclosure. Even this characterization could be questioned, however, since a contributing motivation may well have been the desire to keep the disputants apart for a time. Segregation is often used in this way, without necessarily suggesting blame. Even when segregation is used as a sanction, it is not in theory imposed for an extended period, because of the requirement of periodic review. In practice, however, inmates are sometimes

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<sup>6</sup> U.S. BUREAU OF PRISONS, DEPT OF JUSTICE, POLICY STATEMENT 7300.4A, VISITING REGULATIONS, § 5(h)(4) (1972).

held involuntarily in segregation for long periods of time. The stated rationale is that, based on the most current review, release to the general population would not be in the best interests of all; however, I was not able to get any precise idea of actual motivations.

I attempted to gain some sense of the standards used to select particular sanctions. However, this is not an easy matter to grasp. The answers I was given were true enough, but not very helpful: a consideration of all of the factors, the best interests of the inmate and the institution as a whole. In general, I think it true that segregation is used as an interim and short term sanction for aggressive (although often only marginally aggressive) behavior, but that it is more often imposed administratively through the prehearing process than as an avowed sanction. Loss of favorable housing and custody is typically imposed for a violation which suggests a security problem in any way, including forbidden transactions with the outside world. The standard sanction thought appropriate for cases deemed serious is the loss of good time; in a sense the Adjustment Committee's "gravest" sanction is to decide that the matter is appropriate for referral to a Good Time Forfeiture Board.

The procedure employed tends to impart some regularity of sanction. As noted, at least three, and sometimes five, staff members sit on the Adjustment Committee, and the associate warden typically is involved to a substantial degree as an observer-advisor. Cases are discussed at the meeting, and the matter, as I indicated above, is treated as one of management. Accordingly, there is a fairly significant built-in regularizer within a given institution, at least on the conscious level; each official, I believe, feels the need to be consistent in his reactions, and to explain them to his peers. It should be clear, however, that such pressures as operate are only those which are self-generated within the committee itself.

## 2. The Good Time Forfeiture Board

The Good Time Forfeiture Board is typically composed of senior staff people, the associate wardens and the captain being a likely complement.<sup>7</sup> Any member of the board who sat on the Adjustment Committee hearing of a particular case will be re-

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<sup>7</sup> See U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, POLICY STATEMENT 7400.6A, WITH-HOLDING, FORFEITURE, AND RESTORATION OF GOOD TIME (1971).



placed for the Forfeiture Board hearing of that case. The board's decision whether to take away "good time" and, if so, how much, are in the form of recommendations to the warden.

In general, the procedures followed by the Good Time Forfeiture Board are similar to those used by the Adjustment Committee. The primary difference is that, before the board, an inmate is entitled to the assistance of a staff representative. Apparently this option is exercised in about one-half of the cases, the inmate typically selecting a correctional counselor or work supervisor as his representative. The representative seems to serve primarily as a character witness and not as counsel.

It should be apparent that in a number of senses, the Good Time Forfeiture Board is reviewing decisions already made. It has the incident report and the report of the Adjustment Committee before it. The Adjustment Committee has of course already made a finding of culpability. Even as to the sanction, the very convening of the board represents a determination by the Adjustment Committee that forfeiture of good time is probably appropriate. This is not to say that the board never decides not to forfeit time, but I believe that such an outcome is rare. The primary question usually is how much time should be taken. Here too it was difficult to find any clear guidelines. At least one institution's board seems to regard the amount of time taken as largely determined by the amount of time an inmate has to his credit; that is to say, given a sufficiently serious offense, the board will take away all of the time an inmate has accumulated, unless there are two related cases before it at the same time with widely disparate accumulated times involved. Most boards, however, seem to give less weight to the amount of time an inmate has accrued.

The issue is less significant than would appear, however, for the reason that the forfeiture of good time is used as a control mechanism, and the expectation is that it will be restored. Indeed, it must be restored for the inmate to have any hope of a favorable response from the Board of Parole, whose practice apparently is not to consider seriously a case where there is any good time forfeited which has not been restored. Therefore, the loss of a year, rather than ninety days, is of significance only on the assumption that parole is going to be denied and an inmate will be continued in custody until mandatory release. Where an inmate is hoping for favorable parole action, he must get the time restored, whatever it may be.

Recommending the restoration of good time is within the jurisdiction of a classification committee or treatment team, and not the Good Time Forfeiture Board. In general, an inmate must have a year of clear conduct in order to expect to have his forfeited time restored. Where substantial time was forfeited, some institutions will typically restore only part of it, using the balance as a means of inducing further months of clear conduct. Accordingly, there is some significance in the amount of time forfeited, since it may take substantially more than a year in order for an inmate to clear his record in serious cases.

When the board has recommended forfeiture and the warden has acted on that recommendation, the inmate may appeal to the office of the General Counsel in Washington. There were between fifty and seventy-five such appeals during the first year of the program's operation, and I was given the opportunity to review the files. General Counsel review is for the purpose of determining whether regulations were complied with, as disclosed on the face of the report of the board and the letter provided by the inmate. Of course where the crucial question is factual, affirmance is a foregone conclusion. Nor do I believe that the General Counsel would reverse on the ground that the penalty was excessive. He might, however, while affirming, advise the warden that he should consider restoration. In fact, this device of affirmance-with-remonstrance was used in one case where the inmate had not been advised of his right to representation, as required; the General Counsel affirmed on the ground that there was no prejudice since the inmate had pleaded guilty (to having been drunk and in a fight), but a blind carbon to the warden recommended that the time be restored. The distinction between reversal of the forfeiture and later restoration of the time forfeited, so important to the legal tradition, is obviously not given substantial weight among prison authorities. One case which did end in actual reversal (although by the time of the appeal the inmate had already been transferred to another institution) involved an admission on the face of the report that the inmate's request to call exculpatory witnesses, which the regulations specifically grant, was rejected.

### 3. The Role of the Correctional Supervisor

In many ways the most important fact to bear in mind about the allocation of authority in disciplinary proceedings is that much actual authority is exercised one step below the level at

which it formally appears to be placed. An absolutely critical official is the correctional supervisor, the lieutenant. First, it is he who makes the initial decision whether the matter in question is sufficiently serious to treat as an Adjustment Committee issue, or whether a "minor" incident report should be prepared and an informal sanction applied by him. In effect, he has final authority to treat the case in this informal manner. If a report is filed, it must go to the Adjustment Committee for review, but it is not ordinarily discussed; and I have the feeling that review of decisions in this area is thought of more as a managerial than an adjudicatory process: that is, if a particular lieutenant is too lenient in this regard, the captain will see to it that his future actions are brought into line with institutional policy.

The inmates far prefer informal modes of sanctions, in part of course since they cannot be terribly serious—reprimand and extra duty are the ones I heard mentioned—but primarily because of the feeling that one's parole chances are hurt by even relatively minor Adjustment Committee actions, and that this is not so where there has been no referral to the committee.<sup>8</sup>

Should Adjustment Committee action be warranted, the lieutenant is the person who makes the next critical decision: whether or not the inmate is to be placed in segregation pending a hearing. There are general guidelines, such as the seriousness of the offense or its potential for violence, but obviously there is a fair amount of discretion here. So far as I can tell, the single most important factor influencing this decision is whether there is any pattern of "acting out" in the inmate's actions. I use a phrase such as this rather than violence because it should be realized that the slightest show of aggressiveness or even assertiveness is viewed very seriously by prison authorities. In one case I observed, two inmates were accused of similar offenses—the one referred to earlier, involving unauthorized kissing of one's wife during a visit. One, who simply accepted the incident report without comment, was permitted to remain in general population pending the Adjustment Committee hearing. The other crumpled the paper in his hand, threw it on the floor and said that he was innocent and a victim of the visiting-room

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<sup>8</sup> I do not know whether this perception is accurate, since the report goes into the inmate's file and is available to the Parole Board in any event, but it is the fact, at the one institution having an inmate representation committee, that one of the accomplishments of which it was most pleased was the growing acceptance by staff of the feasibility of using this mode of dealing with relatively minor violations.

officer's hostility. He was placed in segregation pending the hearing; the official attitude toward this conduct was reflected in the captain's offhand reference, during the hearing, to his having "raised Cain."<sup>9</sup>

Finally, one should bear in mind the obvious importance of the fact that it is the lieutenant who has the responsibility for the complainant's report. Since there are typically no witnesses in support of the complaint produced at the hearings, the report is of great significance to the outcome.<sup>10</sup>

## II. AN INMATE WITH A GRIEVANCE

### A. *Case Managers and Correctional Counselors*

An inmate who has a request or a complaint has a variety of means for raising it. The primary avenue is the inmate's case manager. The case manager, as the representative of Classification and Parole, has initial jurisdiction over most substantial questions affecting the inmate's life, and is generally thought to be the proper person to speak with first about almost any matter. He has "open house" for an hour each day, but this is obviously too short a time to permit everyone with a problem to raise it there. Appointments are possible at other times, but there is a fairly general inmate feeling that case managers are relatively inaccessible. Their caseload varies from one institution to another but a caseload well in excess of one hundred inmates is not unusual.

For about two years many institutions have employed "correctional counselors." These are typically former officers, who are relieved from custodial duties and assigned full-time to keep in regular touch with inmate life. They have no office or administrative responsibilities, and are freely available to inmates. They move around where the people are, and in at least some

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<sup>9</sup> Compare the captain's language with the seemingly narrower language of § 3(c) of *Policy Statement 7400.5B*, *supra* note 3, which speaks of segregation as an immediate control device "when it is determined that [inmates] constitute a threat to themselves, to others, or the safety and security of the institution," or as a response to a "willful refusal to obey an order or demonstrated defiance . . ."

<sup>10</sup> One might note a similar downward shifting of authority in connection with the forfeiture of "good time." Technically, the Adjustment Committee does not decide this, but it seems obvious that its recommendation will be given substantial weight. At the least it has the job of deciding whether the matter is to be regarded as *not* appropriate for a good time forfeiture. In theory, the Warden can convene a Forfeiture Board even though the Adjustment Committee has not recommended it, but that is obviously not going to happen in any but the most unusual case.

cases work a shift from eleven in the morning to seven in the evening. (The rest of the staff usually ends its work day at four or four-thirty in the afternoon.) Counselors have very little authority to act, except in such "minor" matters as authorizing outside telephone calls, but they serve an extremely important function in advising inmates about the way to process a request or, in some cases, personally taking up a matter on the inmate's behalf with the case manager or other staff members.

The effect of this new position has apparently been very substantial, far more so than its rather prosaic name would suggest. Inmates and staff alike laud the concept. Nor has the fact that the position is generally staffed from among custodial personnel proved a drawback to inmate acceptance. Few staff members know prison life as well as a former "hack," and taking away his uniform and custodial responsibility has in many cases seemed to work a startling change in his perceptions. While it is certainly an exaggeration to say that counselors regard themselves as advocates for the inmate, I believe there is some incipient feeling akin to this—certainly far more so than with respect to any other position in the bureaucracy of a correctional institution.

#### B. *Older Written Procedures*

There have been two avenues for presenting a request or complaint in writing, and a third has recently been initiated. The "cop out," an informal written statement which may be addressed to any staff member, is the traditional prison method of registering a complaint or making a request. Large numbers of these are used routinely. What happens after a "cop out" is received varies widely from staff member to staff member and institution to institution. Official policy is to encourage staff to respond, whether orally or in writing, but the pressure of time and case load makes this an episodic reality at best. Here again, the correctional counselor has often served a useful role by following up a "cop out" and obtaining an answer, perhaps even a reason, more easily than the inmate could.

In addition, there is the Prisoner's Mail Box. Each institution maintains a locked box into which an inmate may drop a letter to designated officials; such letters are mailed without passing through prison surveillance or censorship.<sup>11</sup> These offi-

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<sup>11</sup> See U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, POLICY STATEMENT 7300.2C, PRISONER'S MAIL BOX (1974).

cial include judges, congressmen, and the Central Office of the Bureau of Prisons in Washington. Mail addressed to the Bureau is referred to the office of the General Counsel, and many judges and other government officials follow the practice of forwarding to that office mail addressed to them. An attempt is made to answer each letter, typically by describing the regulation or practice which justifies what was done. In some cases, the General Counsel may request information from the institution involved, and in a few cases—for example, credible allegations of sexual abuse—an independent investigation is undertaken.

I read a representative sample of letters which came in to the central office through the Prisoner's Mail Box during a particular week (they are not retained once answered). They involved such matters as transfer questions, complaints about theft of property, denial of funeral leave, and requests for legal assistance regarding "outside" civil problems. I think it is fair to say that the institution is seen as serving primarily a therapeutic, "safety valve" function, rather than prompting any review of the merits of the actions complained of. The director of the Bureau of Prisons has said, in a statement to a House committee, that "routine requests which do not involve the deprivation of legal rights such as a request to be transferred to an institution closer to home or to a work release program are sent to the appropriate Bureau Division for disposition."<sup>12</sup>

Of course, to the extent that inquiry is made of institution personnel regarding the complaint, the confidentiality of the communication may be compromised. I received no intimation, however, that inmates were intimidated by this possibility, and, so far as I could tell, the staff did not regard inmate use of the Prisoner's Mail Box as per se a hostile act.

### C. *The New Complaint Procedure*

The Bureau of Prisons recently adopted a program which will require written answers to all grievances. A policy statement to this effect was prepared and discussed extensively with staff, and was scheduled for system wide inauguration on July 1, 1973. It was held in abeyance, however, and then ordered implemented as of September first on a four-month experimental basis in three designated institutions. It became effective on a

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<sup>12</sup> *Hearings on Corrections Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 15, pt. III, at 118 (1971) (statement of Norman Carlson).

system wide basis as of April 1, 1974.<sup>13</sup> A principal purpose appears to be to provide a readily ascertainable way to tell whether administrative remedies have been exhausted, where legal proceedings are in process or contemplated. There will now be a written record of inmate attempts to obtain internal redress and of the institution's response.

The procedure is quite simple. An inmate obtains a form from a correctional counselor, writes out his complaint and submits it. Within three weeks in the case of intrainstitution matters, and six weeks in the case of complaints addressed to the central office, a written reply on the same form is to be provided. In ten weeks or more, therefore, the inmate will have exhausted his administrative remedies, and will have put the institution on record as to the reason for the action about which he complained. The draft policy statement originally said that the warden or his designee should "clearly indicate" the facts underlying a denial, but the final version does not contain even this general aim; it states only that the response "should be based upon facts, and should deal only with the issue raised, and not include extraneous material."<sup>14</sup>

#### D. *Inmate Councils*

Only one institution for longer term offenders had a functioning inmate representation committee during the period of this study. There, an elected group met regularly with designated staff members to discuss items placed on the agenda by the inmate committee. Matters were sometimes disposed of at one meeting, but often inmate initiation of a request prompted consideration of a matter within the staff and resulted in a series of discussions. It was the only instance which came to my attention in which there seemed to be a genuine input into decision-making from the inmate side, and there were a number of instances of policy changes made, gradually, as a result of these meetings. The subjects covered such disparate matters as liberalization of the rules regarding outside telephone calls; improvements in the law library; guidelines for attorney visits; institution and liberalization of a furlough policy for inmates

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<sup>13</sup> U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, POLICY STATEMENT 2001.6, ADMINISTRATIVE REMEDY OF COMPLAINTS INITIATED BY OFFENDERS IN BUREAU OF PRISONS FACILITIES (1974).

<sup>14</sup> *Id.* § 5.

approaching release date; unescorted trips on Easter Sunday; improvement in the quality and manner of service of food distributed through vending machines; greater use of informal methods of discipline; continued commitment to work-release programs; and assignment of more Black and Spanish-speaking case workers.

The staff seemed to have adjusted to the notion of bargaining with inmates, and to have accepted the often spirited interchange which necessarily accompanies this process. However, shortly after a change in top level administrators at the facility, the committee members resigned following a dispute over a decision to move the visiting room to smaller quarters. The inmates' view was that the resignations were caused by administration unresponsiveness, while the staff maintained that the failure of an attempted work stoppage occasioned the resignations. An attempt to reactivate the committee several months later failed. This time there was actually a brief work stoppage, and the committee resigned after it was terminated by a general "lockup"—a critical meeting between the committee and the associate warden scheduled to convene just before the strike having failed to materialize. In every other institution I visited, the administration is implacably opposed to even the concept of inmate representation committees. In most, an inmate council apparently existed at one time but was disbanded, typically as part of the administration's response to a work stoppage or other demonstration led by people who had positions of leadership in the inmate organization.

#### E. *Legal Assistance*

In one sense the unavailability of legal assistance may be viewed as itself a grievance, rather than a "procedure" for dealing with grievances. One may also assert, however, that the grievance is the issue about which legal help is sought—the existence of a detainer,<sup>15</sup> the denial of a transfer, or whatever—and the availability of law-trained help is a crucial part of the method by which an inmate may resolve the grievance. Conceptually both perspectives are accurate, but for present purposes the second is clearly the more responsive to the issue; I there-

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<sup>15</sup> That is, a writ issued by a court, authorizing the keeper of a prison to keep (detain) a person in custody beyond the normal time for his release, usually because other charges are pending.



fore want to consider practices and proposals in the area of legal assistance.<sup>16</sup>

A Bureau policy statement on the subject of access to legal counsel and books makes clear that inmates are not to be disciplined by reason of their resort to court, and are not to be prevented from helping one another with their legal problems.<sup>17</sup> In addition, the statement sets out a list of law books which each institution is required to provide, and says a little about maintenance of the collection. Beyond this, the Bureau is interested in working with law schools which might provide student or other assistance to inmates on the scene. Through the work of the General Counsel's office, programs like this have been active, at one time or another, at most of the larger institutions.

Moving from Bureau policy to actual local practices, I think it is generally true that inmates are not interfered with in their attempts to file court papers, use such materials as are available, and have the help of whatever jailhouse lawyers the particular institution has at the time. My general sense was that most officials recognize that prisoners are entitled to access to courts, that jailhouse lawyers are viewed as no worse than a necessary evil and perhaps in some cases even of some therapeutic value, and that there is not a serious problem of restraint.

The real problem, however, only becomes exposed when official discouragement of access to law ceases. The fact is that most prisoners simply do not have minimally adequate resources within their reach. There are wide variations in the usability of the law libraries, although they may in fact have the books required by the Bureau policy statement. Maintaining a collection of legal materials current and functionally organized obviously takes continuing attention, and prison staff librarians are not, to my knowledge, trained in law librarianship. Inmates are sometimes assigned to this task, but although some inmates can do the job quite creatively and effectively, many cannot.

So far as legal assistance goes, the law student programs have foundered seriously because of difficulties not of the institutions' making. Most prisons are simply not close enough to

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<sup>16</sup> See Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363 (1974) (ABA Comm'n on Correctional Facilities and Services).

<sup>17</sup> See U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, POLICY STATEMENT 2001.2B, ACCESS TO LEGAL REFERENCE MATERIALS AND LEGAL COUNSEL AND PREPARATION OF LEGAL DOCUMENTS (1972).

an adequate source of law student resources, and where a connection is made, distance may insure its speedy demise. Beyond that, law school programs themselves are typically not reliable over the long run. Student availability is at the mercy of the calendar, and student interest waxes and wanes, often dependent on the presence and commitment of a particular professor or staff attorney. Inmates have expressed resentment at being represented by "unqualified" students. Whether this is a product of actual lack of ability on the students' part, whether it is resentment at being represented by someone whom the Bar regards as qualified only to represent prisoners, or whether it simply reflects the natural reaction of one who loses a case, the fact remains that the morale problem is a serious one. Inmate responses were not uniformly unfavorable, however; where students were available on the scene regularly, and seemed willing and able to represent and advise the inmates in ways that could be helpful to them, a positive reaction could be found. For example, the problem of clearing up detainees<sup>18</sup> is one of enormous significance to the inmate's life, requiring only rudimentary legal knowledge and the willingness to put in some time; students have done this, done it effectively, and earned the confidence of inmates as a result. This success generates its own problems, in the form of a rising demand for help which soon outruns the supply.

A few OEO-funded legal services offices seem to be attempting to develop prisoner assistance programs. In many cases, even here, the problem of distance is again very serious. Those offices are already burdened with a local caseload, and simply cannot handle any kind of large-scale prisoner assistance efforts. The local private bar is of course out of the question as a realistic resource.

One Bureau of Prisons facility has a unique program, set up under the auspices of the local district court. A magistrate, acting in effect as a special master, sits full time at the institution and both the U.S. Attorney and the public defender have full-time attorneys assigned to prisoner litigation. Whatever the overall effect of this program, it has two very unfortunate by-products: the caseload is enormous and, because the jurisdictional bases of federal court action so specify, the claims are necessarily cast in terms of deprivation of constitutional rights. One illustration is a

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<sup>18</sup> See note 15 *supra*.

suit challenging the institution's decision to strike the mother of a former inmate from another inmate's visiting list on the ground that it was improper for her, being a married woman, to visit the prisoner unaccompanied by her husband, and challenging as well the filing of a groundless charge against the inmate, which was later dismissed, but which cost him his single cell and favored job while he was in prehearing segregation. It seems clear that a program which takes real grievances and channels them into dubious constitutional cases has serious drawbacks. I would like to come back to this question below.

Finally, the institution of the jailhouse lawyer is one for which it is very difficult for an outsider to get an accurate sense. Prison authorities appear to tolerate them, and in some cases go beyond this. At one large institution I visited, two jailhouse lawyers maintain the law library collection in a corner of the regular library and operate an active bibliographic and legal assistance service, with the full cooperation of the staff librarian. In others, jailhouse lawyers hardly seem to be operating at all, or they are people with the most minimal skills attempting as best they can to piece together authority and procedure sufficient to put some paper before a court. I obviously do not know whether in the latter institutions there are inmates who could operate more effectively were the official climate more hospitable. A prisoner at one institution recently prepared a proposal to the administration for an inmate-run legal assistance committee. It involved very little money, but needed official encouragement. I do not know what response he got, but in general prison authorities regard inmates' need for lawyers as relatively minimal, and are most reluctant to give official status to such an inmates' group.

### III. EVALUATION

One can fairly characterize the complaint mechanisms in the federal prison system as designed largely to provide several avenues of communication from the inmate to the institution. The case manager and correctional counselor, the "cop out" and Prisoner's Mail Box, all provide means by which an inmate may attempt to make his request or complaint known to the administration. They have the advantage of being multifaceted; and this is an advantage of substance, because it is impossible to predict in advance the best channel by which a particular complaint or request may be voiced. To stop at this point, however, is to stop

far short of anything which one may call a real grievance procedure.

At present, the Bureau is struggling with the questions whether, in what circumstances, and by what means, the inmate is to receive an answer to his request or complaint. First, some institutions have recently adopted the policy, which others still find objectionable, of informing the inmate whether or not he is being recommended for parole to the Board of Parole. Second, the institution of the correctional counselor has served, most effectively, to overcome the difficulty a prisoner has in obtaining a case manager's attention. In many cases he can now learn through the counselor what the institution's answer or position is, where he stands on a particular matter, and other relevant information. Finally, the new complaint procedure, tentatively tried in three institutions in 1973 and recently promulgated on a system wide basis, is a substantial further step in this direction. It requires, as a general practice, the provision of a written response on behalf of the institution to any complaint.

All of these are generally significant and important steps. One cannot help remarking, however, on the extreme tentativeness and caution with which these steps are being taken; they are obviously regarded as momentous decisions. Where the provision of a simple answer is the present frontier of development, and its provision regarded as not so simple a matter, one would not expect that further requisites of a meaningful grievance procedure would be readily observable.

What might such further requisites be?<sup>19</sup> There are endless variables, but I think that in general they fall into two major categories: (a) an independent or quasi-independent third-party input, whether binding or advisory; (b) an input, going beyond the mere statement of a request or complaint, by or on behalf of the inmate. The first implicates such matters as arbitration, ombudsmen and citizens' councils; the second, inmate representation committees and legal or paralegal assistance. My present opinion is that proposals in both areas find formidable obstacles to their acceptability in the attitudes and values of prison offi-

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<sup>19</sup> No suggestion has been made that there is any constitutional requirement that a grievance procedure exist, nor that it have any particular characteristics where it does exist. Several courts have urged its utilization, *e.g.*, *Landman v. Peyton*, 370 F.2d 135, 140-41 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967); *Dreyer v. Jalet*, 349 F. Supp. 452, 488-91 (S.D. Tex. 1972), *aff'd mem.*, 479 F.2d 1044 (5th Cir. 1973), but only by way of exhortation.

cial, but that those of the first kind suffer as well from a misconception of the notion of a "grievance" in the prison world. I will attempt to support these conclusions below, and then outline some recommendations for implementing them. First, however, I would like to speak briefly to the disciplinary area.<sup>20</sup>

### A. Procedure in Disciplinary Cases

The Supreme Court has recently addressed the much-mooted issue of the extent to which the Due Process Clauses require that particular procedural protections be afforded respondents in prison disciplinary proceedings. *Wolff v. McDonnell*<sup>21</sup> lays down the following minimum standards in cases involving loss of good time, disciplinary confinement ("solitary") or other "major change in the conditions of confinement[,] . . . normally imposed only when it is claimed and proved that there has been a major act of misconduct":<sup>22</sup> (a) written notice of the

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<sup>20</sup> The relation of grievance procedures to disciplinary proceedings may be viewed from two perspectives. The first is easy to see: If there are "grievances" about disciplinary cases, reforms have to do with the substance of those cases, and not a procedure by which they may be heard. There is substantial force to this view, but I think there is a certain artificiality to it as well. Many disciplinary cases arise because of an inmate's response to the manner in which a grievance is handled, and the decision to discipline an inmate for his response is itself a mode of dealing with that grievance. Not all rules are always enforced in any area of life, particularly in one so all-enveloping as a prison. If particular rules are deemed unduly onerous by prisoners, one effective way—and often, the only way—to register a grievance may be simply not to obey them. Where the institution imposes no discipline, or punishes only after hearing a challenge to the reasonableness of the rule which was not obeyed, it has in effect responded affirmatively to the grievance. If an inmate, for example, is disciplined for refusing to obey an order of an officer, or for "insolence" toward him, and he contends that the order was arbitrary or the product of hostility, the procedure by which that hearing is conducted will have a substantial impact on the outcome. The disciplinary proceeding is in reality a means of responding to his grievance regarding the officer's manner of dealing with him. Thus, the nature of the disciplinary process has a significant effect in the area of prisoner grievances.

At the same time, there are reasons for keeping the subjects of grievance mechanisms and disciplinary proceedings separate. First, failure to discipline is, at best, an indirect, passive response to a grievance; and the most open, fair disciplinary hearing could be only partially responsive to inmate grievances. Those not articulated by breaches of the rules remain unanswered, and it is obviously unsatisfactory to foster a regime in which violations of discipline are the only means to gain attention to a complaint. Beyond that, disciplinary proceedings, just because they are "proceedings," are more congenial for lawyers to think about than the more formless grievance "procedures"; one can be beguiled into giving major attention to an area just because one feels more at home with it. This is not to say that procedure in disciplinary cases is not entitled to serious critical thought; it is to say that there is much more to the issue of grievance mechanisms than can be dealt with through such thought.

<sup>21</sup> 94 S. Ct. 2963 (1974).

<sup>22</sup> *Id.* at 2982 n.19. The imposition of "lesser penalties such as the loss of privileges" was held not subject to similar procedural restraint. Whether such penalties as changes in

claimed violation must be provided, at least twenty-four hours in advance of a hearing; (b) there must be a hearing at which the respondent may appear in his defense, and at which he "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals,"<sup>23</sup> but this protection is stated more as an exhortation to prison officials than as a judicially enforceable requirement;<sup>24</sup> (c) an inmate unable, because of illiteracy or the complexity of the issue, "to collect and present the evidence necessary for an adequate comprehension of the case" should be free to seek the aid of a staff member or a fellow inmate, perhaps one designated for such purposes by the staff, but there is no constitutional right to counsel; (d) an inmate found guilty must be given a written statement as to the evidence relied on and the reasons for the action taken, but there is no constitutional right to have adverse evidence presented in person, nor a right of confrontation or cross-examination;<sup>25</sup> (e) the composition and governing standards of the Adjustment Committee must be such as not to raise extreme issues of partiality or arbitrary decisionmaking.

These requirements should call forth some reconsideration of Adjustment Committee procedures within the Bureau of Prisons, but will probably fall short of mandating any real change through judicial proceedings. The requirements of written notice of the charges and decision are already embodied in policy and practice.<sup>26</sup> The Adjustment Committee is now required not to include staff members personally involved in the case, and is subject to general standards meant to guide its discretion.<sup>27</sup> The right to call witnesses is granted by regulations only before the Good Time Forfeiture Board;<sup>28</sup> fidelity to the spirit of *Wolff v. McDonnell* suggests that the Bureau consider seriously whether it would indeed be "unduly hazardous" to ex-

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housing, custody or job assignment would be deemed "major" or "lesser" is left by the Court for another day.

<sup>23</sup> *Id.* at 2979.

<sup>24</sup> *Id.* at 2979-80. For a similar reading of the Court's opinion by Justices Marshall and Douglas, see *id.* at 2987-89 & 2993-94.

<sup>25</sup> *Id.* at 2979-82.

<sup>26</sup> POLICY STATEMENT 7400.5B, *supra* note 3, §§ 5(c)(1), 5(c)(5).

<sup>27</sup> *Id.* §§ 5(b), 5(c)(1).

<sup>28</sup> See POLICY STATEMENT 7400.6A, *supra* note 7, § 4). No comparable statement appears in the Bureau statement on disciplinary hearings. See POLICY STATEMENT 7400.5B, *supra* note 3.

tend this limited<sup>29</sup> right to serious Adjustment Committee cases. Similarly, the right of staff-member representation is accorded only before the Forfeiture Board;<sup>30</sup> here, the Court's language is less plainly precatory only, and the regulations should be changed to accord representation in Adjustment Committee hearings, at least in the rather limited circumstances described by the Court. For the most part, however, the reform of disciplinary procedures is now one for debate and resolution on the policy level.

In my view, the most important single "reform" is one that has already been instituted (and on which the Court was least equivocal), and that apparently is being followed fairly faithfully: the requirement that all discipline be initiated by a written charge, investigated by a correctional supervisor. It is impossible to overestimate the importance of such a protection. If officers are required to make charges in writing, their discretion is enormously checked, even without regard to what follows. At least as important, the feeling of the inmates that they are subject to the absolute rule of each guard is very substantially affected. Of less importance, but very far from being trivial, are the other aspects of Adjustment Committee procedure described above, seeking to insure that the inmate knows of the charge, that he is not kept in segregation for long periods without being brought before the committee, and that he has an opportunity to appear before a decision is made. A right to call witnesses in Adjustment Committee hearings should be afforded to the same extent, at least in serious cases, as it is before the Good Time Forfeiture Board; the power given the chairman to reject requests to call witnesses meets any legitimate ground for concern.

I believe that, although there is much in Adjustment Committee practice that is rather startling to a lawyer, it would not be terribly productive to accord the right of confrontation (by prohibiting the use of the incident report as evidence) or, still less, to require that legal representation be made available. Given the realities of prison life, so long as the Adjustment Committee hears the case the right of confrontation would not markedly change results, and the presence of a lawyer would probably only hurt the inmate.<sup>31</sup>

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<sup>29</sup> The chairman may decline to call "unnecessary" or repetitive witnesses, but must note in writing his reasons for doing so.

<sup>30</sup> POLICY STATEMENT 7400.6A, *supra* note 5, §§ 4(d) & (e).

<sup>31</sup> I may well be wrong here, especially as to confrontation, but staff opposition

There is one "reform" which, if added to these, would make a substantial change indeed—to require that impartial hearing examiners, such as those provided for in Section Seven of the Administrative Procedure Act,<sup>32</sup> hear and decide the cases. That would be nearly the equivalent of abolishing disciplinary proceedings as we now know them. I say this because, as I tried to show above, Adjustment Committee proceedings are a central part of a managerial-control process. One can well argue that they should not be that, but it would be disingenuous to support a hearing-examiner proposal simply as a means of improving grievance machinery.

To be skeptical, as I am, about the likely utility of lawyers in many disciplinary cases is not to say that some kind of informed input from the inmate's perspective would not often be crucial. An expansion of the right of staff-member representation to Adjustment Committee proceedings would often make a real difference.<sup>33</sup> Beyond that, were prisons to develop paralegal inmate assistance,<sup>34</sup> an inmate could be afforded the assistance of inmate representation should he desire it. Someone who knows prison life, and who has had some experience with other cases, can perform an invaluable mediatory function on behalf of an inmate. For example, one case I observed involved an inmate who refused to report for work. The hearing made evident that he had an outstanding request for a transfer out of the kitchen, to which the case manager simply had not responded, and was resorting to nullification of his assignment as a remedy. The case called not so much for a strictly legal defense, even less for any pyrotechnical displays of advocacy, but for a friendly, informed attempt to work out the problem. Often Adjustment Committee members will do this, but it is obvious that they can be only episodically reliable as a genuine help to the inmate. Correctional counselors might be given such a role, but there are obvious tensions between their staff role and their capacity for providing genuine inmate oriented input. The prison authorities

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to these changes is so great that *Wolff v. McDonnell* assures that they will not soon be seriously considered in any event.

<sup>32</sup> 5 U.S.C. § 556 (1970).

<sup>33</sup> It is at this point that I most share the view expressed by Justice Marshall that a more balanced sensitivity to the conflicting interests involved would have produced a somewhat stricter constitutional requirement than that laid down by the Court. *Wolff v. McDonnell*, 94 S. Ct. 2963, 2992 (1974) (Marshall, J., dissenting in part).

<sup>34</sup> For a discussion of inmate paralegal training, see text accompanying notes 48 & 49, *infra*.



presently do not regard Adjustment Committee proceedings as appropriate for even staff-member representation, and would certainly have more difficulty accepting the idea of another inmate as a representative. There are of course clear dangers in permitting inmates to play the advocate's role, which would be a potent source of power within the institution. The question is whether those fears warrant total refusal to experiment seriously with the idea. I think not; the concept might work, and where it did, it would make a significant difference.

Finally, there is one important mode of discipline which has to date not been brought fully within the regime of Adjustment Committee proceedings. Inmates presently are not given the same procedural protections in connection with contemplated transfers for "adjustment" reasons as they are in the case of avowedly disciplinary matters, even though in any real sense such a transfer is a form of discipline and has far-reaching effects on an inmate's life.<sup>35</sup> The Adjustment Committee is not wholly uninvolved, since transfers almost always come up as a result of some incident which has been brought to it. The committee does not, however, focus on transfer as a sanction, nor is the inmate given any real opportunity to explore this at the hearing. The committee simply initiates consideration of transfer within the administration hierarchy; it is then pursued—by the classification team or committee, the associate warden and the warden, the central office and other institutions—without the inmate's participation. In at least one institution, inmates expressed some fears that transfers were used punitively in cases where discipline could not be justified. It is difficult to perceive compelling objections to a proposal requiring that transfers for adjustment reasons be treated in the same manner as other sanctions.

## B. *Third-Party Input*

### 1. *Arbitrators, Masters, et al.*

There is one area in which an adjudicatory mode of third-party input clearly makes sense to me, but the reasons it does serve to suggest its limits. I have in mind the resort to federal

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<sup>35</sup>It is unclear to what extent the procedures required by *Wolff v. McDonnell* will apply to transfers. See *Gomes v. Trivisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated and remanded in light of Wolff v. McDonnell*, 94 S. Ct. 3200 (1974).

court for claims based on the Bill of Rights. Here, a standard is being invoked which is external to the values of the prison system yet generally recognized by society, and it is applied by an institution of sufficient stature to gain the attention of prison authorities. Indeed, judicial rulings establishing rights of association and religious observance, access to courts, freedom from censorship and the like, have had an extensive impact on prison life.<sup>36</sup> I believe it would be a tragic error to devise "reforms" that would transfer such cases from federal judges—whether the transfer be to a judicial subaltern, such as a master, or to an administrative body. If constitutional imperatives are to be forced on prison bureaucracies, the force must come from an institution with the stature to apply it.

It is unfortunate that much litigation is forced into a constitutional mold simply because of the unavailability of any other avenue of redress. To say that a claim about the quality of food, for example, is a frivolous constitutional claim is not to say that it is a frivolous claim. And the fact that it is misdirected is hardly a failing of the inmate, in a regime affording no other choice. Nor is it an answer simply to provide for arbitral or quasi-arbitral review, whether by an administrative agency or by ad hoc arbitrators chosen by the parties. To the extent that the basis of a claim is a nonfrivolous constitutional interest, it *belongs* in court; to the extent it is not, one must provide, not merely an alternative forum (to dismiss an ill-founded constitutional claim), but a nonconstitutional standard as well.

While a number of prisoner grievances could reasonably be cast as claims of noncompliance with applicable regulations, the fact is that far more could not. So much of what is done in prisons is a matter of management, of judgment, that it is inconceivable that one could devise a set of comprehensive written standards which would make the matter simply one of invoking them (or of proposing their amendment). Congressman Rangel introduced a bill in 1971<sup>37</sup> which contained an unusually complete set of standards—fifty numbered paragraphs covering some fourteen pages of statute—to be applied by a quasi-judicial

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<sup>36</sup> There has been an enormous amount of writing in this area. See, e.g., H. KERPER & J. KERPER, *LEGAL RIGHTS OF THE CONVICTED* 277-489 (1974); SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *THE EMERGING RIGHTS OF THE CONFINED* (1972). See also RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, *PRISONERS' LEGAL RIGHTS: A BIBLIOGRAPHY OF CASES AND ARTICLES* (2d ed. 1973).

<sup>37</sup> H.R. 11605, 92d Cong., 1st Sess. (1971) (proposed Prisoner Treatment Act).

agency. Even this impressive set of rules would fall far short of providing a standard by which many typical cases could be judged: for example, the refusal to consider furloughing inmates approaching their release date, the question of inmate participation in food selection, a decision to make an adverse recommendation to the Board of Parole—these are ready illustrations of significant cases not covered by the bill. This is not to say that they were oversights of the draftsmen; we are dealing with decisions of a scope which simply cannot be reduced to rules. Of course one could attempt to come up with extremely broad and vague language to cover every kind of decision. Prison authorities would be quite correct in saying that such an approach simply delegates to the arbitrator authority to make decisions which are managerial in nature.

Nor would prisoners be aided by a quasi-judicial model. It is all too easy to dismiss a grievance as petty or frivolous, ill-founded or malicious, simply because one concludes, albeit rightly, that no violation of an existing standard has been made out. Just as claims made in federal court must be made as constitutional claims, so claims made to an arbitrator must be made as claims of breach of regulations. The fact is that many serious grievances are not of this order. First, many involve a challenge to the rule itself, although they may not be cast in this form because the inmate may not know the rule or may think or assume that he cannot cast it in such a form. A major failing of the new policy statement on complaint procedures is that it does not cover complaints which are answerable simply by reference to an existing rule. I am sure that this is not inadvertent. But it should be recognized that the federal prison service is an increasingly professional, competent, and self-analyzing bureaucracy. It is an illusion to think that a major percentage of grievances represent a failure to carry out existing regulations or standards.

In addition, one must take account of the fact that prison is a "total institution," in many ways one of the most total. It is a mistake, all too easy for lawyers to make, to look at a grievance from the wrong end, that is, as it is presented for adjudication. If there is available an adjudicatory mode of redress, complainants will cast their complaints in a way suitable for that mode (just as is now the case with federal court suits). Yet each grievance arises out of a twenty-four-hour-per-day, seven-day-per-week contact between prisoner and staff on nearly every level of the prisoner's life. The case referred to above, concerning the unau-

thorized kissing of one's wife, is simply an illustration of the pervasiveness of regulation. It is explicitly prohibited by the policy statement on discipline for an inmate to possess "any thing not authorized for retention or receipt by the inmate, and not issued to him through regular institutional channels"; to refuse "to obey an order of any staff member"; to engage in "[c]onduct which disrupts or interferes with the security or orderly running of the institution."<sup>38</sup> The point is not that these regulations are oppressive, though they may be so, but that in such an environment what is needed is not an institution which can only respond passively, whether favorably or otherwise, to a complainant's claim.

For example, one case now pending in federal court seems to raise the question of the right of an inmate to be present at a classification hearing regarding a job change. What actually happened, however, is instructive. The inmate was, in the view of his work supervisor, an unsatisfactory employee, and the supervisor asked Classification and Parole to remove him. Policy is always to accede to such a request, leaving open only the question where he should be reassigned. The inmate was notified of a scheduled meeting to determine this, and in fact appeared outside the chairman's door. He was told that it would be some time until his case was reached and that he could go elsewhere until called. Through a misunderstanding, he was called, but he was not in a place where he could hear the call. The committee then proceeded in his absence, and assigned him to the kitchen. When he heard of their action, he protested, and was told that he could have the matter reconsidered, but in the meantime he was assigned to the kitchen. He refused to work there, and now claims that the decision was invalid by reason of his absence.

Whether he wins or loses his case as a matter of procedural due process, or whether indeed he would win or lose a similar case brought before a nonjudicial arbitrator or board, it seems obvious that such a decision would be unable to come to grips with the real issue. Obviously, in one sense the case should never have arisen; obviously, now that it has, it should be dealt with in some nonadjudicatory manner. At least it seems obvious to me, and the example is not an isolated one.<sup>39</sup>

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<sup>38</sup> POLICY STATEMENT 7400.5B, *supra* note 3, § 4(B) (prohibited acts numbers 208, 256, 306).

<sup>39</sup> One might reasonably assert that an arbitrator could function in a nonadjudica-

## 2. Ombudsmen and Others<sup>40</sup>

It may be that what I have written suggests simply that the third-party input should not be analogous to that of a judge or arbitrator. The ombudsman concept in many ways seems responsive to this insight. It provides an outside "force" that is neither judicial in mode nor binding in its decisions. It is obviously an idea enjoying wide currency today, and much has been written about its utility in the prison area.<sup>41</sup> My own sense is that it is not a workable concept, for reasons I will try to develop here.

One warden with whom I spoke said that he was the ombudsman for his prison. The present director of the Bureau of Prisons has said that the General Counsel exercises an ombudsman-like function through the institution of the Prisoner's Mail Box.<sup>42</sup> There is a sense in which both of these observations are true: one can easily see that there are many cases where each official exercises a review function which, by reason of different perspective and higher rank, is similar to that which we associate with an ombudsman. It does not denigrate the importance of encouraging such attitudes and functions to observe that if the notion of an ombudsman is to have any meaning, the position cannot be fulfilled by an official, even a high official, of the Bureau of Prisons.

First, an ombudsman must be, and must appear to be, independent of the prison bureaucracy. This twin goal seems impossible to achieve. The ombudsman must be responsible to someone. It might be possible to set up an office directly answerable to the Office of Legal Counsel in the Department of Justice, bypassing the Bureau of Prisons, or even perhaps in the Office of the Comptroller General, bypassing the entire executive estab-

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tory manner. The Center for Correctional Justice, Washington, D.C., assists institutions interested in developing arbitral modes of grievance handling and has reported at least one "successful" hearing at a state institution in Massachusetts. *See also* Coulson, *Justice Behind Bars: Time to Arbitrate*, 59 A.B.A.J. 612 (1973). One should not lightly dismiss the potentialities of such a procedure, but I remain skeptical about its longer range workability, for reasons set forth in the discussion of citizens' panels, Section III(B)(3), *Citizens' Panels infra*.

<sup>40</sup> The term is Walter Gellhorn's, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1966), who not only made the word common coin in this country, but in a few pages, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* 145-51 (1966), provided the point of departure for its consideration in the prison setting.

<sup>41</sup> *See, e.g.*, T. FITZHARRIS, *THE DESIRABILITY OF A CORRECTIONAL OMBUDSMAN* (1973); Tibbles, *Ombudsmen for American Prisons*, 48 N.D.L. REV. 383 (1972).

<sup>42</sup> *See Hearings on Corrections, supra* note 12 (statement of Norman Carlson).

lishment and answerable to the Legislature. Even if such structures were administratively feasible, I question whether they would accomplish their purpose. The problem, it seems to me, lies in the tension between the need for independence and the need to have an official who would be regarded by prison officials as knowledgeable, as not simply an outside force to be related to only as an adversary. Even as an ombudsman came to play such a knowledgeable, nonadversarial role (assuming he could), his success would spell failure from the other direction: living, working, eating on a daily basis with the staff, he would become but one more person working at the prison but not a prisoner, perhaps overcoming the hostility of staff but surely earning that of the inmates. The suspicion and mistrust is so great on both sides that it seems far preferable to me to see whether methods can be devised whereby an incipient institution such as the correctional counselor—which has the extraordinary virtue of having been created from within and having genuine knowledge of prison life—might develop in some way which provides genuine prisoner oriented input.

A second requirement is that the ombudsman be physically present on a daily basis in the prison itself. This is essential because the “caseload” is potentially enormous, and the prison world is such that it is hopeless to expect someone not physically on the scene regularly to get and remain in touch with the realities from which grievances arise.<sup>43</sup> Proposals to establish systemwide ombudsmen, setting up an august personage at a desk in Washington, are simply an attempt to achieve a paper solution at little cost, and should be recognized as no more than public relations work.

A third requirement is that the office be conceived not as arbitral but as exercising influence through a reporting-advising-publicizing function. I think it naïve to hope that such a person could operate effectively in the prison environment, even if an individual of nationally recognized stature would take a position working at a local penitentiary day-in and day-out (and he would not). Priorities and attitudes regarding prison administration are sufficiently polarized that an outsider cannot influence events simply through the force of his or her office.

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<sup>43</sup> Lawyers' words, like “caseload,” can too easily reinforce our tendency to lose sight of the pervasive informality of the grievance process. A grievance is not to be analogized to a lawsuit; it is simply a request or complaint about something, and in the “total institution” of prison there are literally thousands of “somethings” each year.

We are not talking, at least not now in the federal system, about systematic acts of physical brutality, subhuman standards of incarceration, or other practices the mere exposure of which would generate a consensus of condemnation. To a limited but significant degree, federal judges have the stature (a stature enhanced by the power of injunction) to inculcate, among prison authorities, respect for constitutional values. When one seeks to go, as one must, substantially beyond that, the inadequacy of the concept seems patent.

It has been suggested that an ombudsman-like function be performed by masters or other officials designated by the court. To the extent that such officials would operate as surrogate judges deciding constitutionally based causes of action, the idea seems to me self-defeating, both because the constitution is too narrow a base and because the stature of the judge has been needlessly lost. One proposal, however, suggests that the *sentencing* judge be given authority and responsibility, going beyond constitutional rights, to oversee the conditions under which persons sentenced by him are incarcerated—that (in effect) the sentencing judge in one sense having created the problem, prisoners be regarded as wards of the sentencing court.<sup>44</sup> There is much in this notion that is worth serious thought; two substantial problems with it are the physical distance between the sentencing judge and the prisoner and the incompatibility between the tradition of the judge as a passive adjudicator and the necessity (as it appears to me) for the official in question to play a more active, nonadjudicatory role.

The foregoing illustrates that one cannot speak meaningfully of the general idea that the Bureau of Prisons establish “an ombudsman.” The varieties of mechanisms by which this might be done are so manifold, and the suspicion and conflicts which underlie varying hopes and concerns regarding the idea are so great, that either such a proposal would die aborning or, if something was later implemented called an ombudsman project, it might have as little responsiveness to the actualities and complexities of the problem as the notion of the warden as ombudsman.

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<sup>44</sup> Singer, *Prisoners as Wards of the Court—A Nonconstitutional Path to Assure Correctional Reform by the Courts*, 41 U. CINN. L. REV. 769 (1972).

### 3. Citizens' Panels

Input from interested private citizens can take a number of forms, some of which are essentially variants of the arbitral and "ombudsman" notions discussed above and some of which are closer to simple observers or mediators. It can be of great value in the relatively closed and isolated world of corrections to have an "outside" perspective. I do not know of an institution, however, where such input has been structured in such a way that it operates as an ongoing force.

At one state penitentiary, visited because of its inmate representation committees, a Citizens Advisory Committee (CAC) was constituted. Inmates were given an equal voice with the administration in the selection of the members of the CAC. It was agreed that the group would have full access to information and a wide-ranging responsibility to offer solutions to problems within the institution and to advise the public as to the needs of the prison and of the inmates. The instrument creating it asserted that "staff and residents [inmates] are obliged in all cases to pay particular heed to their counsel."

The idea failed. The original CAC members resigned out of frustration over their ineffectiveness, and the group has not been reconstituted (although efforts to do that were recently in process). It dealt with some basic issues—inadequacy of treatment and training facilities, lack of opportunities to demonstrate readiness for lesser security or for release, lack of training and guidance available to guards, antagonism toward the Parole Board and its processes—but, like so many promising efforts, it produced only "one more report." One should not over-generalize from a single experience, but the failure of the CAC was consistent with the difficulties such a conception would inevitably face. An outside group cannot be given real power, nor can its recommendations be expected to trigger the sustained institutional or public reaction necessary to bring about their implementation.

#### C. *Inmate and Inmate-Representative Input*

##### 1. The Inhibiting Effect of Present Correctional Attitudes

What is missing from everything which exists to date in the grievance processes, and in most of the proposals that have been floated abroad recently, is genuine input from the inmate. The



federal prison service is quite up-to-date and professional in its recognition of the importance of keeping lines of communication open, of attempting, within the inevitable confines of the work it has to carry out, to make available people to whom inmates may bring their complaints and requests and who can give them answers, and even reasons. But the prevailing correctional philosophy makes it inevitable that prison authorities feel no need to view inmate complaints or requests as occasions for serious rethinking of rules, assumptions, or attitudes. The inmate is a malefactor, a "sociopath," a person already demonstrated to be unable to handle his own affairs in a socially acceptable and personally rewarding way. In one way after another, prison authorities equate rehabilitation with the passive and unquestioning acceptance of the norms of the prison.

One warden illustrated this in speaking of a proposal to permit inmates to choose what should be done with "excess" funds. Were the prisoners to be told that so much money was newly available this year and asked what they thought it should be spent on, he said, they would probably choose strawberries and ice cream for dessert and color TV sets rather than another psychiatrist. He viewed the unwisdom, indeed the childishness, of such a priority as self-evident. My point is not that the prisoners are right and he wrong—although I should confess to harboring leanings in that direction—but that they might be right and that the difference would reflect varying priorities and perspectives, which should call for a variety of inputs into the decisionmaking process.

It seems reasonably clear that the new complaint procedure will not provide, indeed is not set up to provide, any such variety of inputs. The procedure may prove quite effective in enabling inmates to learn why certain action has been taken and, where line officials have breached established regulations, to obtain some indication that the breach will not be repeated. However, all of that falls far short of a reexamination of the rationale for the action complained of. The Bureau reported that, during the four-month period in which the new procedure was being employed experimentally, nearly one-third of the requests were "granted." However, an examination of the actual completed forms at one institution made clear that such a result was obtainable only because many of the inmate requests were cast in the form of an inquiry into the reason for a certain action, rather than a request to have the action reconsidered. The an-

swer in one sense granted the request (that is, for information), while it did not grant relief on the underlying objection.

## 2. Inmate Councils

In large measure, my preference for inmate-oriented modes of input reflects a belief that they can more easily take on a nonadjudicatory character. The characteristic of prisons as "total institutions" counsels an approach which interacts in an ongoing way between inmate and administration, is not limited to the assertion of claims of legal entitlement, and is flexible and capable of adaption to changing attitudes and problems.

The most flexible, adaptive mode of obtaining inmate input is through an inmate council or representation committee. It is enormously difficult for a representation model to be applied to prison life. Much about the psychological imperatives of prison makes it difficult, perhaps impossible, for prisoners to act in a representative or concerted way; and there is a danger of misuse of the process by those who come to a position of leadership. Beyond that, the entire submissiveness which the correctional philosophy encourages is defied by the concept of "negotiations"; even without a credible threat of work stoppages, prison authorities will find enormous difficulties in dealing with inmates who are assertive and argumentative in seeking their objectives, who not only question practices but persist in pursuing the matter beyond the initial explanation for a negative reply, who ask why long-followed priorities must indeed be regarded as dispositive.

Nearly all wardens and prison staff in the federal service are opposed to any concept of inmate councils, and regard their opposition as reflective of recent concrete experience. They assert that, whoever is chosen initially, leadership soon passes into the hands of "antiadministration" prisoners who take an insatiably combative view of things and seek an ongoing power struggle with the administration. As a result, dealings with inmate councils never placate and satisfy inmates as much as they stir them up and generate belligerency, and work stoppages have commonly followed a period of active inmate organization. At the same time, the Bureau has encouraged continued experimentation with "inmate communication committees," that is, with modes of structuring inmate expression of views that lack the "bargaining" connotation so distasteful to prison officialdom. For their part, the inmates' perception is that work stoppages are

the result, rather than the cause, of administrative defensiveness and unresponsiveness.

The problem is not wholly one of attitudes; formidable difficulties would attend a serious attempt to structure an inmate-council mode of grievance handling. I have referred to the problems in expecting incarcerated men to act in a representative way. An additional major sticking-point would be the mode of selection of any inmate committee; most prison officials are strongly opposed to letting free inmate choice control (although that seems to have been done at one institution) and there are obvious difficulties with the credibility of an inmate group selected by the staff. There are wide varieties of selection methods, however, and the evolution of a council at a specific facility would be responsive to the particular imperatives of that place and time. An attempt to construct a systemwide model is unnecessary, indeed would be foolish.

The prison with the most well-known representation committee is the Washington State Penitentiary at Walla Walla, and an attempt was made to get some first-hand impressions of that experience. In 1971 a "Constitution for Self-Government" was adopted, under which the Resident Government Council (RGC) was created. Inmates and administration agreed that the development was not a result of inmate initiatives. Rather, the decision to institute "resident government" seems to have come from a state official. In fact, it appears that initially not only the guards but the inmates as well resented the imposition of this general concept on the prison by officials in Olympia.

The Council is made up of eleven members representing the general population and seven members representing the minimum security building, both groups being elected from their respective populations on nominations signed by at least twenty residents and certified by the superintendent.

Enumerated responsibilities and duties of the RGC include: 1) to seek implementation of rehabilitation programs; 2) to represent the population to the superintendent and the public; 3) to plan and organize, with the approval of the superintendent, social and business occasions involving the entire population; 4) to keep the residents informed and politically active and to call assemblies whenever desirable, with the approval of the superintendent and the public; 5) to improve the institution environment, improve communications between residents and the public, aid in short and long range planning, review and confirm

resident-organized programs, and provide input into any rehabilitation program proposed by the administration, staff, or population; 6) to review all major grievances from each resident and act upon those grievances; 7) to be responsible for public relations; and 8) to seek redress in courts when appropriate.

In pursuing these responsibilities the Council offers input into the decisionmaking process. In less significant areas the RGC may make the initial "decision," subject to administration approval. As significance increases, the RGC offers input and proposals, but the decision rests entirely with the administration. It would be naïve to expect things to be otherwise.

Within the RGC itself are contained a number of committees, chaired by an RGC member and staffed by appointed inmates. They are responsible directly to the RGC and report at regular RGC business meetings and offer proposals at agenda meetings. An agenda meeting takes place each month. At these meetings agenda proposals are presented and explained by various committee chairmen (who are also RGC members). If an agenda proposal is approved by the Council, that proposal is then presented to the administration. In addition, the superintendent or his designees meet with nine Council members weekly for a "rap session" and the Council itself holds regular business meetings in order to handle minor problems, individual grievances and suggestions, and general business.

Arguments in support of proposals made or grievances submitted are offered in the written instruments themselves, and are expanded upon orally at the weekly "rap sessions." The administration will usually take the matter into consideration and announce a decision at the next weekly staff meeting, which RGC representatives are allowed to attend as observers. Occasionally, when the superintendent believes that a certain proposal or grievance requires greater attention, the issue involved might be discussed at the staff meeting and a decision postponed. All decisions are to be accompanied by reasons.

A subsidiary inmate group, called the People's Action Committee (PAC), has been given the responsibility of handling individual grievances. While inmates traditionally take their requests to a staff counselor initially, the RGC encourages them to go to PAC first. The PAC, which is specifically constituted so as to include all ethnic or racial groups, has several advantages as a grievance committee. First, when a resident contacts the PAC and it presents the request to a counselor, the likelihood of a

favorable disposition in cases involving discretion (for example, visitor or phone privileges) is thought to be increased. Second, if the request cannot be granted under existing regulations, the inmate is more likely to accept such an explanation from the PAC. Third, in a dispute involving only inmates, the PAC, again because of its peer status, seems more able to resolve it than the counselor.

The general opinion seems to be that the PAC is becoming an effective individual grievance handler. A staff official estimates that sixty percent of all grievances are dealt with satisfactorily at the PAC level. If, however, the inmate is dissatisfied, he can take the grievance to the RGC itself. Although the grievance is technically individual, at this point the issue is usually framed as a challenge to some institutional policy or as a proposal for change, and the RGC would follow the general procedure outlined earlier.

From one perspective, the establishment of the RGC and PAC manifests an extraordinary degree of recognition of inmate organization, and certainly no counterparts exist in the federal service. Members of the Council and the PAC have "official" duties, identification cards, and offices. A PAC representative is entitled to be present at "shakedowns," and shares responsibility for policing the visiting room. When RGC proposals are accepted by the administration, they are not promulgated unilaterally, but as jointly authorized announcements, or as RGC proposals approved by the administration, and bear signatures of inmates as well as staff. RGC leadership has the authority to call meetings of groups of inmates, an act that would be regarded as an extreme threat in most other prisons. Experimental proposals have been approved for such reforms as limited RGC representation at Adjustment Committee hearings and in the screening process for eligibility for minimum security custody. In all of these ways, there is a genuine collective inmate "presence" at Walla Walla—enough so that the informal feeling of federal officials at the nearby MacNeil Island facility is that the inmates have "taken over" the institution.

In fact, however, most of the issues with which RGC has dealt are less central to staff control over inmate life than are discipline and classification. Typical RGC proposals have been for the institution of evening visiting hours, greater choice of style of shoes which inmates may select, introduction of a change machine in the visiting room, increase in the tobacco ration,

establishment of a radio station, revision of the criteria for eligibility for minimum custody, and introduction of daytime "outside" visiting rights. Yet, so long as the prison administration is willing to tolerate—and insists that the staff tolerate—the inmate assertiveness which the RGC system involves, it will appear to those preferring the classic style of inmate demeanor that discipline and order have become unstuck. So long as the prison administrators have the actual discretion to reject any proposal—as, short of binding arbitration or a legitimization of work stoppages, they do—it will appear to many inmates that the process is a form of tokenism, a sham or charade.

If the administrative opposition to inmate councils could properly be called *wholly* paranoid, one would be saying that the forms and modes of participation of a system like the Walla Walla RGC make no substantive difference at all—one should not fear to adopt the idea, for it means nothing. To the extent that one believes that inmate councils can provide genuine input, one must acknowledge that he or she is asking prison officials to share power, if only to a relatively minor degree. It remains true, however, that the substantive change, if any, will be very slight, that no grievance procedure worth talking about can be *only* talk, and that the dichotomy between substantive matters of correctional philosophy and a concern for a viable and meaningful grievance procedure therefore cannot be absolutely leakproof. A grievance procedure with at least the hope of justifying its existence must have some genuine inmate input, going beyond the fact of the complaint or request. In my judgment, an inmate-council mode of supplying that input has the potential to succeed in doing so in a way that responds to the realities of prison life. Experience, even at Walla Walla, suggests that the danger is far greater that the idea will die for doing too little than for doing too much. A recent publication of the South Carolina Department of Corrections makes the point ably:

This term [participation] means little more than the notion that those who are allowed a voice in the rule-making process are more likely to obey such rules. It does not mean that the prisons would be run by a town meeting of the cell blocks or even that there would be any real power given to inmates to control the prisons. All that is implied by the notion is that at some point along the line, the inmate, either individually or through a representative, is allowed to make a meaning-

ful input into the decision-making process that surrounds him with rules. One means of accomplishing this goal would be the establishment of an inmate council with elected representatives. Such a council should be able to present questions to the administration concerning various rules and practices of the institution and receive a straightforward answer. If such an answer cannot be given, then there should be serious doubt concerning the utility of the rule. The inmate council would then be able to accept the explanation or suggest alternatives for the consideration of the administrators. Through a series of long range dialogues between inmates and administrators, many of the problems which plague our prisons could be worked out. While such a system is clearly not a panacea, perhaps through good faith and responsible efforts much of the mistrust and paranoia that pervade our prisons can be alleviated, and a much healthier and rehabilitative atmosphere would prevail. [Inmate] participation does not contemplate the removal of authority from the prison administrators; it only provides a means by which the inmates can feel that, and it would actually be that, they are to some degree still responsible for their futures.<sup>45</sup>

### 3. Paralegal Training

Even if a method were devised whereby inmate committees met with staff over grievances, there would be many grievances not susceptible to such treatment; individual inmates often lack the resources and skills needed to carry out the task of presenting their requests effectively. Legal assistance seems to me to be central to the existence of a viable grievance procedure. Indeed, in many circumstances the availability of legal assistance is itself the means by which a grievance can be resolved, as for example with respect to the widespread problem of detainees<sup>46</sup> which inmates are unable to clear up on their own.

However, it would be illusory to expect that a method could be devised to make lawyers or law students genuinely available in most prisons. In part this is a problem of remoteness of the institutions. If the day comes when we stop building large facilities in out of the way places, we can perhaps begin to take the next step in thinking about making lawyers available, but

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<sup>45</sup> THE EMERGING RIGHTS OF THE CONFINED, *supra* note 27, at 94.

<sup>46</sup> See note 15 *supra*.

obviously that day is not in sight. My own feeling is that prison-based programs<sup>47</sup> are bound to be ill-fated, for reasons to which I have already alluded: excessive litigation bias and developing staff orientation. However, I have no great confidence in the correctness of this judgment. The state of Kansas recently began an interesting program, whereby inmates may mail complaints to a corrections official outside the prison or to the warden, who is required to conduct an investigation. If this does not produce a solution satisfactory to the inmate, the matter is referred to an independent LEAA-funded corporation which has the services of one-and-a-half staff attorneys as well as law professors and law students.<sup>48</sup> It attempts to mediate the dispute at the lowest possible level, and contemplates legal action only where this is unsuccessful. The question remains how such a program operates in practice, given the demands of nearly limitless case loads, the institutionalization of the office, attorney identification with prison staff, and other problems of this sort.

It would be a mistake, however, to assume that legal assistance stops with the provision of a lawyer or law student. The notion which I think has the greatest promise is that of training inmates themselves to provide paralegal assistance. The potential is there for inmates to assist one another in a wide range of areas such as detainers, information about recurring civil legal problems, and postconviction matters, in which there is an enormous need for legal services—grievances, if you will, which are presently going unresolved for lack of help in pursuing them. If lawyers would put their minds to devising appropriate training mechanisms, a group of inmates could be equipped to serve a number of people far greater than the lawyers themselves could possibly serve. Here, the specialized, repetitive level of much of the work, which makes it difficult to structure a successful lawyers' assistance program, is exactly the characteristic that makes it possible to think about a paralegal program. Such training could also be useful to inmates who serve on inmate councils or in other ways raise grievances internal to the prison. I do not have in mind training inmates to make legal claims against prison authorities. What is needed, as I have indicated, is a more flexible approach that can go beyond the assertion of legal

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<sup>47</sup> See text accompanying note 17 *supra*.

<sup>48</sup> The program is described in NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, PRISON GRIEVANCE PROCEDURES 7-8 (1973).



rights, that is simply training in advocacy, although of course inmates so trained will at the same time be able to invoke any applicable prison regulations in support of a request or complaint.

Two state prison programs involving inmate paralegal training were visited. The first, at a state correctional institution in Pennsylvania, was initiated and is operated almost entirely by inmates; the second, at a New York state facility, was established by lawyers and law students affiliated with a nearby law school.

There are now thirty-one full-time employees working in the Paraprofessional Law Clinic in Pennsylvania. There is an office on every cell block. These offices are staffed by one regular employee, considered to be fully trained and competent, and one trainee. In addition, there is a central office for administration and maintenance of a library. Finally, there is a governing board, consisting of five members from the internal staff and four external members, who are often lawyers.

The Clinic is substantially self-governing, with the board establishing policy and operational guidelines. In addition to the policymaking functions exercised by the board, the chairman (who is an inmate) has broad powers, including making all hiring and firing decisions and the administration of training programs and of the Clinic itself.

From the beginning, the program of the Clinic has contained some significant limitations. First, it was to handle no civil or anti-institution cases and no cases where an inmate was already represented by counsel. Second, as a *Law Clinic*, it was not to become involved in any internal prison disputes. This meant that, generally speaking, they were free to do "conviction-related" things. By August, 1972, the Clinic was providing the following services: preparing state appeals, obtaining notes of testimony and other court records for inmates, obtaining time credit for time spent awaiting trial, having untried detainees dismissed or listed for trial, preparing post-conviction and habeas petitions, and occasionally preparing federal appeals.

Of these, the Clinic feels it has been very successful in obtaining court records or time credit and in dealing with detainees. It seems to have had some success with habeas and post-conviction petitions but so far has only rarely been successful with appeals.

Recently the Clinic has begun to step outside the original restrictions mentioned earlier. It now handles domestic relations

and civil actions of all kinds. Officially, it still does not handle anti-institution suits; however, in practice these suits are undertaken when an individual resident has been wronged (for example, where a resident has been discharged from the hospital earlier than he should have been). In these individual suits against the institution the Clinic will advise the resident and draw up the complaint and other necessary papers. The only difference here is that the complaint is not "sealed" by the Law Clinic (signifying that the resident is represented by the Clinic), but rather the suit is filed *pro se*. According to Clinic members, the administration's reaction to this has been reasonable—it has asked only that the superintendent be contacted first to see if a solution can be reached without resort to legal action.

In fact, then, the only "anti-institution" limit still observed is that the Clinic will not file an anti-institution class action. Where a guard was killed and the entire population was punished, the Clinic, after unsuccessful attempts at dealing with the administration, decided that it was not possible to pursue legal remedies.

The limitation on involvement in internal disputes has also begun to diminish. By administrative directive, an inmate has the right to choose any staff member or inmate in the general population to assist him in presenting his case at a disciplinary hearing. Although the administration interprets this as *not* allowing an inmate to choose the Clinic itself, it does recognize that an inmate may choose one who happens to be Chairman of the Clinic. In fact, the present chairman and vice-chairman estimate that they have appeared before the hearing committee nearly thirty times each as representative for other residents.

However, there seems to be agreement that representation by the Clinic actually hurts the "accused" rather than helps him. A senior staff officer went so far as to say that such representation assures one of a maximum penalty, primarily because the Clinic representatives tend to provoke the hearing committee members. Clinic officers explain the same tendency toward harsher penalties largely in terms of the hostile attitudes of individual members of the hearing committee.

The only procedure existing for airing an individual grievance is a request slip to the superintendent; here, the policy against Clinic involvement in internal disputes seems largely observed. The one function the Clinic does serve in this regard is to write up the request slip for an inmate who feels unable to do so himself. The Clinic in no way negotiates or deals with the

administration over nonlegal, minor grievances. This is so even though Clinic members are in complete agreement as to the inadequacy of the request slip procedure.

Clinic members are almost completely self-trained. Most of this training is accomplished simply by having the trainee work in a block office with a regular Clinic employee. However, there are also classes taught by the most experienced of the Clinic members. In addition to this, in most major cases lawyers who are external members of the board are contacted and consulted for advice.

The New York example is rather different. Operated by a law school's Women's Prison Project, its basic goal is to train jailhouse lawyers and assist the inmates (who are women) in identifying areas of legal need and in receiving legal representation. In practice, the project consists of two fairly independent components, the teaching of weekly classes and the provision of legal services.

Classes are taught primarily in "conviction-related" areas such as search and seizure, right to counsel, appeals, post-conviction and habeas corpus relief, although they cover other areas of interest, such as divorce and custody, and prisoners' rights. Interest has apparently been highest in "conviction-related" areas and lowest in the area of prisoners' rights. The project director believes that this represents less a feeling that there are no complaints than a pervasively passive attitude toward the possibilities for change. Even in classes where attendance is highest there have been problems maintaining continuity because of high turnover. Because of these factors, the Project has so far failed to develop any organization within the institution itself which might evolve into a clinic of the type existing in Pennsylvania.

The Project is allowed to represent persons at parole revocation hearings, but not at release hearings or at internal disciplinary proceedings. It does as much as it can in regard to disciplinary proceedings. This includes making sure that an inmate has a copy of the rules and regulations and a summary of the reasons for the hearing. Often, however, a person is placed in segregation and given a hearing before the Project has been notified.

Finally, the Project is not authorized to become involved in individual grievances. There is no established grievance procedure except to contact one's counsellor. In practice, the Project seems to have become involved in individual grievances as sort of

a combination advocate-ombudsman. It believes that it has been quite successful in this capacity, especially in regard to furloughs. Inmates with grievances are allowed to write letters to appropriate administrative personnel, but no response is guaranteed. The Project, therefore, advises an inmate to send a letter first. Then, when no reply is received, a student lawyer will go to the administration with the grievance. This approach has greatly reduced the likelihood that the Project lawyer will be informed that she is involved where she has no authority to be. Rather, once the inmate has exhausted what little there is in the way of procedures, the tendency has been to accept the Project lawyer as an advocate ombudswoman.

It seems clear that the greater availability of legal or paralegal assistance would do much to aid in the resolution of inmate grievances. In considering what steps might aid in bringing about such a result, several conditioning factors need to be borne in mind: (1) Lawyers cannot be made available in any quantity approaching need, even on an episodic basis. (2) Law students probably cannot be made sufficiently available in an ongoing way. (3) Efforts which train inmates have an investment potential, which mere "legal assistance" lacks. (4) The likelihood that law trained inmates can be of real assistance in internal grievances (including disciplinary proceedings) depends on local dynamics, including the personnel involved, both inmates and staff, but the inmates themselves, if trained, can respond flexibly to the utility or disutility of handling internal as well as external matters.<sup>49</sup>

The Bureau of Prisons, which has consistently tried to work with law student programs where they can be generated, is not unsympathetic to the concept of inmate paralegal training. It is concerned over the implicit recognition given selectees for such a program, and (as always) fears self-selection of the "wrong kind" of inmate for such training. These concerns can fairly readily be given weight in the shaping of a program, and do not warrant wholesale rejection of the idea. The Bureau should attempt to institute a program of paralegal training in one or two institutions on an experimental basis, and thereafter more broadly.

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<sup>49</sup> For a discussion, see RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL STUDIES, INMATE INVOLVEMENT IN PRISON LEGAL SERVICES: RULES AND TRAINING OPTIONS FOR THE INMATE AS PARALEGAL (1974) (ABA Comm'n on Correctional Facilities and Services); Resource Center on Correctional Law and Legal Services, *supra* note 16.

The most feasible way of doing this would be to contract with an outside organization to develop such a program. Groups which have an expertise and interest in the area include the Center for Correctional Justice, the Resource Center on Correctional Law and Legal Services of the ABA Commission on Correctional Facilities and Services, the National Center for Disputes Settlement of the American Arbitration Association, the Committee on Library Service to Prisoners of the American Association of Law Libraries, and any of a number of law schools and legal services programs.