North Dakota Law Review

Volume 48 | Number 3 Article 2

1971

Ombudsmen for American Prisons

Lance Tibbles

OMBUDSMEN FOR AMERICAN PRISONS

LANCE TIBBLES * **

> These demands are being presented to you. There is no strike of any kind to protest these demands. We are trying to do this in a democratic fashion. We feel there is no need to dramatize our demands.[1]
>
> We are men. We are not beasts and we do not intend to be beaten or driven as such.[2]
>
> 9 HOSTAGES AND 28 PRISONERS DIE AS 1,000 STORM PRISON IN ATTICA; 28 RESCUED, SCORES ARE INJURED — 'LIKE A WAR ZONE' — Air and Ground Attack Follows Refusal of Convicts to Yield.[3]

The agony of Attica has turned the nation's spotlight on prisons, prison inmates, and prison inmate grievances. Before the spotlight fades, perhaps it is appropriate to analyze prison grievance machinery—both present and proposed—by which prison inmates can present their complaints about conduct of prison officials and physical conditions within prison walls.

What is it that inmates are complaining about? Are they valid complaints? Attica may furnish us with a starting point. At the height of the inmate revolt, the New York Commissioner of Corrections reportedly agreed to 28 inmate demands.[4] Upon reading

---

* Assistant Professor of Law, University of North Dakota; B.S. with Honors, 1960, LL.B., 1963, University of Oregon, Director, Ombudsman Demonstration Project, Buffalo, New York (1967-1969).

** Mr. Orell Schmitz, second year law student, wrote the section of this article relating to judicial review of prison administration and the descriptions of prison practices. During the summer of 1971, Mr. Schmitz was a Correctional Intern at the Sandstone, Minnesota Federal Correctional Institution.

1. N.Y. Times, Sept. 19, 1971, at 60, col. 3. Attica inmates presentation of list of grievances to New York State Commission of Correction.

2. N.Y. Times, Sept. 10, 1971, at 71, col. 4. Attica inmates negotiation committee statement on the first day of the Attica prisoner revolt, Sept. 9, 1971.

3. N.Y. Times, Sept. 14, 1971, at 1, cols. 4-8.

Unfortunately even this stark headline did not convey the full loss of life. Later and more complete body counts, which include subsequent deaths of those injured in the attack, placed the final toll at 43,—11 guards and 32 prisoners. N.Y. Times, Oct. 10, 1971, at 73, col. 1.

4. 1. Provide adequate food, water and shelter for all inmates.

2. Inmates shall be permitted to return to their cells or to other suitable accommodations or shelter under their power. The observer committee shall monitor the implementation of this operation.

3. Grant complete administrative amnesty to all persons associated with this matter. By administrative amnesty the state agrees:

A. Not to take any adverse parole actions, administrative pro-

these 28 points, one is immediately struck by the fact that almost one-half represent things that a decent, humane, and responsible penal system should have been providing. The call for religious freedom; access to newspapers and magazines; communication at inmates' expense with outsiders; institution of rehabilitation programs; establishment of a Spanish library; provision for an effective narcotics treatment program; provision for adequate legal assistance; provision for adequate medical treatment, including either a Spanish speaking doctor or interpreters to accompany Spanish speaking inmates to medical interviews, hardly seems more than minimally acceptable standards to accompany human confinement. Most of the rest are broad general goals or recommendations to be made to the state legislature or other agencies. Items 1-3 and 28 are concerned merely with the settlement of the revolt. Only three points appear to call for real "reform"—item fives asks for the establishment of an Ombudsman type of grievance handling mechanism; item six asks that inmates be allowed to be politically active without intimidation; and item 18 asks establishment of an inmate grievance commission and the development of other procedures for inmate participation in the prison decision-making process.

---

ceedings, physical punishment or other type of harassment such as holding inmates incommunicado, segregating inmates, or keep them in isolation or in 24-hour lockup.

B. The state will grant legal amnesty in regard to all civil actions that could arise from this matter.

C. It is agreed that the State of New York and all its departments, divisions and subdivisions, including the State Department of Corrections and the Attica Correctional Facility and its employees and agents, shall not file or initiate any criminal complaint or act as complainant in any criminal action of any kind or nature relating to property, property damage or property-relating crimes arising out of the incidents at the Attica Correctional Facility during September 9, 10 and 11, 1971.

4. Recommend the application of the New York State Minimum Wage Law standards to all work done by inmates. Every effort will be made to make the records of payments available to the inmates.

5. Establish by Oct. 1 a permanent ombudsman service for the facility, staffed by appropriate persons from the neighboring communities.

6. Allow all New York State prisoners to be politically active without intimidation or reprisal.

7. Allow true religious freedom.

8. End all censorship of newspapers, magazines and other publications from publishers, unless it is determined by qualified authority, which includes the ombudsman, that the literature in question presents a clear and present danger to the safety of the institution. Institution spot-censoring only of letters.

9. Allow all inmates at their own expense to communicate with anyone they please.

10. Institute realistic effective rehabilitation programs for all inmates according to their offense and personal needs.

11. Modernize the inmate education system including the establishment of a (Spanish-language) library.

12. Provide an effective narcotics treatment program for all prisoners requesting such treatment.

13. Provide or allow adequate legal assistance to all inmates requesting it,

Another area of prison inmate complaints which has received little attention is the computation of the sentence by prison officials. The Center for Correctional Justice in Washington, D. C., is an experimental program to provide comprehensive legal services and procedures for resolution of grievances to offenders in the District of Columbia. The Center found an unexpected area of inmates' requests that the sentence be computed and the inmate be informed of his time remaining. These complaints did not challenge the legality of the conviction and are not appropriate for legal action.[5]

---

or permit them to use inmate legal assistance of their choice in any proceedings whatsoever. In all such proceedings inmates shall be entitled to appropriate due process of law.

14. Reduce cell time, increase recreation time and provide better recreation facilities and equipment, hopefully by Nov. 1, 1971.

15. Provide a healthy diet, reduce the number of pork dishes, increase fresh fruit daily.

16. Provide adequate medical treatment for every inmate. Engage either a Spanish-speaking doctor or interpreters who will accompany Spanish-speaking inmates to medical interviews.

17. Institute a program for the recruitment and employment of a significant number of black and Spanish-speaking officers.

18. Establish an inmate grievance commission, comprised of one elected inmate from each company, which is authorized to speak to the administration concerning grievances and develop other procedures for inmate participation in the operation and decision-making processes of the institution.

19. Investigate the alleged expropriation of inmate funds and the use of profits from the metal and other shops.

20. The State Commissioner of Correctional Services will recommend that the penal law be changed to cease administrative resentencing of inmates returned for parole violation.

21. Recommend that *Menechino* hearings be held promptly and fairly. (This concerns the right of prisoners to be represented legally on parole-violation charges).

22. Recommend necessary legislation and more adequate funds to expand work relief programs.

23. End approved lists for correspondents and visitors.

24. Remove visitation screen as soon as possible.

25. Institute a 30-day maximum for segregation arising out of any one offense. Every effort should be geared toward restoring the individual to regular housing as soon as possible, consistent with safety regulations.

26. Paroled inmates shall not be charged with parole violations for moving traffic violations or driving without a license unconnected with any other crimes.

27. Permit access to outside dentists and doctors at the inmates' own expense within the institution where possible and consistent with scheduling problems medical diagnosis and health needs.

28. It is expressly understood that members of the observer committee will be permitted into the institution on a reasonable basis to determine whether all of the above provisions are being effectively carried out. If questions of adequacy are raised, the matter will be brought to the attention of the Commission of Correctional Services for clearance.

This was signed by Commissioner Oswald.
N.Y. Times, Sept. 13, 1971, at 71, col. 1-3. Reprinted Corrections Hearings 3-4.

5. There is a whole area of complaints that we did not expect, that we consider to fall in the Public Defender Service area. They involve sentence computation and clerical error in cases where we sometimes have discovered that men were serving time that was illegal time.

Generally, we think of postconviction challenges as challenges to the legality of convictions. The vast majority of them have gone to court and have been unsuccessful. But the whole area of sentence computation and finding out how much a man has to serve, and telling him, so at least he knows what it is he owes and when he can

But the time remaining to be served is crucial to the inmate. His nearly total isolation from the rest of society gives requests of this type an added importance.

If a large share of prison inmates' discontent is caused by griveances other than those requiring an entire new correctional system, how can these grievances be handled so that the valid complaints can be separated from the invalid ones and proper attention given to resolving them at an early stage? Are additional grievance-response mechanisms necessary? Or is judicial review an adequate vehicle to handle the cases where the inmate is alleging that the prison system treats him unfairly?

This article will contend that judicial review of prison inmates' complaints of improper action or inaction by prison officials is inadequate. In addition, despite increasing judicial interest in the area, judicial review will not be adequate unless supplemented by external review of inmate complaints to assure that prison rules meet due process requirements and that the prison officials follow these rules at all times. This article will further contend that the Ombudsman has served a useful function in other countries in accepting complaints from prison inmates. In addition, newly created Ombudsmen in the United States have aided prison administration. New and proposed procedures for additional review of inmates' complaints will be analyzed. Finally, specific problem areas in the adaptation of the Ombudsman to the American prison system will be discussed.

This article will not burden the reader with a lengthy description of what an Ombudsman is and how he operates.[6] For present purposes, an Ombudsman is an independent, external, impartial, and expert handler of citizens' complaints against governmental agencies who is easily accessible by the citizenry. He is an individual, generally appointed by the legislature, who, upon receiving a complaint from a citizen alleging government abuse or occasionally upon his own motion, investigates and intervenes on behalf of the citizen with the governmental authority concerned. He does not act in an adversary fashion as counsel for the complainant, but remains independent of both citizen and government as a mediator

---

expect to get out, is something that has not been done before, and that we did not anticipate.
Testimony of Linda R. Singer, Executive Director, Center for Correctional Justice, Corrections Hearings 81, 87.

6. For readers interested in such background material, there are numerous books and articles available which explore every aspect of the Ombudsman concept. The following sources provide a solid nucleus: GELLHORN, WHEN AMERICANS COMPLAIN/GOVERNMENTAL GRIEVANCE PROCEDURES (1966); GELLHORN, OMBUDSMAN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1967); THE OMBUDSMAN: CITIZENS' DEFENDERS (Rowat ed. 1965); OMBUDSMEN FOR AMERICAN GOVERNMENT? (Anderson ed. 1968); 377 ANNALS 1-138 (May 1968); Tibbles, *The Ombudsman: Who Needs Him?*, 47 J. URBAN L. 1 (1969); and TIBBLES & HOLLANDS, BUFFALO CITIZENS ADMINISTRATIVE SERVICE: AN OMBUDSMAN DEMONSTRATIVE PROJECT (1970).

or intermediary. He attempts to see all sides of the dispute and bring about a satisfactory resolution of the citizen's complaint. If he finds that the complaint is well-founded but that the branch of government concerned refuses to remedy the situation, the Ombudsman is authorized to report the abuse directly and publicly to the legislative body that created his office. With the glare of publicity upon them, the legislators may then force a just and fair settlement of the complaint. The Ombudsman has no authority to change any decision of any official.

It is not suggested that the establishment of a general Ombudsman whose jurisdiction includes acceptance of complaints from prison inmates or the establishment of a prison Ombudsman will solve all, or even most, of the problems currently confronting America's penal systems. But the Ombudsman concept can play a part in allowing the penal system to attain whatever goals we set out. However, no one should make the mistake of assuming that, if a prison Ombudsman is established, our prisons can be returned to the anonymousness and isolation where we have kept them for so long.

We turn now to a review of the role of the judicial system in the handling of allegations by prison inmates of improper conduct by prison officials.

JUDICIAL REVIEW OF PRISON ADMINISTRATIVE DECISION MAKING

Until recently courts have been reluctant to interfere with intra-prison administrative matters. This so called "hands off" policy was initially developed to avoid needless constitutional litigation,[7] and was subsequently applied to judicial review of prison administrative decisions.[8] By adopting this abstention policy, the courts in effect gave prison officials relatively unrestrained powers in prison administration. As early as 1953 the courts recognized the problems that existed in adhering to this approach.

> It is hard to believe that persons . . . convicted of crime are at the mercy of the executive department and yet it is unthinkable that the judiciary should take over the operation of the . . . prisons. There must be some middle ground between these extremes.[9]

Despite this recognition, the courts have maintained a cool attitude toward extensive judicial review of administrative decisions.

---

7. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).
8. *See* Herschhop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 812 (1969).
9. U.S. *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953).

A major reason for this judicial restraint is a federal statute giving the Bureau of Prisons, under the direction of the Attorney General of the United States, custody of inmates in federal prisons.[10] Pursuant to this statute, maintenance of discipline in federal prisons has been recognized as an executive function in which the judiciary will seldom intrude.[11] This "deference" is accorded to state institutions as well. "[A]dministration of a state detention facility is a state function with which federal courts will not interfere except where paramount federal constitutional or statutory rights are involved."[12] Federal courts often speak of their role in reviewing matters of both state and federal prison administration as appropriate only in exceptional circumstances.[13] In addition, federal courts have held that all state remedies must be exhausted before a state prisoner can petition a federal court.[14]

This judicial attitude exists, not only in areas of discipline, but in many other areas of prison administration. The internal administration of prison affairs has been held beyond the bounds of judicial review.[15] Prison officials may make rules restricting the preparation of legal documents,[16] limiting the number of books or magazines an inmate may accumulate,[17] and limiting the length of hair,[18] to name but a few. The only requirement seems to be that the policy must be a reasonable one. By applying a standard of reasonableness, the possibility of successfully challenging an administrative decision is remote. However, in recent years courts have made significant strides away from their previous adherence to the abstention doctrine.[19] The recognition that the delegation of prison authority to administrators does not preclude judicial review of the manner in which such authority is exercised,[20] constituted a major deviation from the prior judicial restraint exhibited. Areas concerning vital questions of civil rights, such as claims alleging cruel and unusual punishment were recognized as the least

10. 18 U.S.C. 4042 (1970).
This section provides that the Bureau of Prisons under the direction of the Attorney General is charged with the management of Federal institutions and the care of inmates.
11. Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970).
12. Krist v. Smith, 309 F. Supp. 497, 499 (S.D. Ga. 1970).
13. Blake v. Pryse, 444 F.2d 219 (8th Cir. 1971); Bowman v. Hale, 302 F. Supp. 1306 (S.D. Ala. 1969).
14. Still v. Nichols, 412 F.2d 778 (1st Cir. 1969); Brown v. Pennsylvania Bd. of Parole, 309 F. Supp. 886 (E.D. Pa. 1970); Bailey v. Beto, 313 F. Supp. 918 (S.D. Tex. 1970).
15. Konigsberg v. Ciccone, 285 F. Supp. 585, 590 (W.D. Mo. 1968).
16. Hatfield v. Beilleauz, 290 F.2d 632 (9th Cir. 1961).
17. Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968).
18. Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971).
19. Johnson v. Avery, 252 F. Supp. 783 (D. Tenn. 1966), *rev'd*, 382 F.2d 353, *rev'd*, 393 U.S. 483 (1969); *See generally* Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669 (1966).
20. *See* Muniz v. United States, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963).

likely for abstention.[21] In these areas, state prisoners need not exhaust all state remedies prior to federal court intervention.[22]

In *Covington v. Harris*,[23] the court stated the purpose served by limited judicial review of administrative decisions "is to insure that the decision makers have (1) reached a reasoned and not an unreasonable decision, (2) by employing the proper criteria, and (3) without overlooking anything of substantial relevance."[24] The judiciary does not purport to do more than this, and in all probability is not competent to do more.[25] However, the court indicated that the judiciary, at a minimum, must follow these guidelines when reviewing an administrative decision. Not to do so, would give the administrative officials absolute power.[26]

By investing prison administrators with such broad, unchecked, discretionary power, miniature legal systems have been fostered, largely independent of outside control.[27] This fact, coupled with the relatively few areas in which courts do review prison decisions,[28] makes it much easier to understand why inmates are frustrated when attempting to air their grievances.

This newly fostered judicial interest in prison administration has not gone unchallenged.[29] The judiciary is criticized for making the prison administrator's complex problems even more complicated by reviewing his decisions.[30] Such a result may not be undesirable. With increased judicial pressure on the prison administrators, it is likely that new and better procedures will be established.[31] If such judicial pressure leads to new intra-prison procedures to handle the review of administrative policies, decisions, and prisoner complaints, the quantity of judicial review will undoubtedly be reduced and the intensity of the supervision which remains will be lessened.[32]

Another commonly voiced criticism is that the recognition of new inmate rights will open a floodgate of litigation and further clog an already over-burdened court system.[33] As recently as 1971, in *Chubbs v. N.Y.*,[34] the court reasserted this fear. Chubbs filed

21. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).
22. *Id.* at 522.
23. Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969).
24. *Id.* at 621.
25. *Id.*
26. *Id.*
27. Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 227 (1970).
28. *See* Blake v. Pryse, 444 F.2d 219 (8th Cir. 1971); Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970); Bowman v. Hale, 302 F. Supp. 1306 (S.D. Ala. 1969).
29. Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967).
30. *Id.* at 189.
31. *Id.* at 191.
32. *Id.*
33. *Id.* at 189.
34. Chubbs v. N.Y., 324 F. Supp. 1183 (E.D.N.Y. 1971).

a section 1983 civil rights action after his conviction, alleging that he was unlawfully arrested and falsely imprisoned.[35] The court dismissed his complaint, observing that "[E]ven though this civil rights action states a valid claim for relief, the probability of obtaining a significant remedy is miniscule and the burden on the court, defendants, the bar and the penal system of allowing the litigation to proceed are great."[36]

It seems obvious that if legal recognition of prisoner complaints will result in judicial pandemonium,[37] other avenues must be found. There have been various proposals to handle these prison administrative problems.[38]

A suggestion proposing the establishment by statute of a quasi-judicial or administrative review, for airing initial grievances, may solve the prevalent problems of judicial intervention.[39] In such a proposal, the courts would merely serve as an appellate review when one of the parties is dissatisfied with the agency's decision.[40] This would keep judicial pressure on administrators at a minimum and prevent further overburdening of the courts. This approach seems to indicate that by having "outsiders" initially handle complaints, the resolution would be more readily accepted by both parties without turning to the courts.

The recent report of the Presidential Commission on Corrections cited the benefits of the use of "outsiders" in prison grievance procedures.

> The mere presence of outsiders would serve to discourage illegal and unfair or inhumane practices. The potential dangers of leaving the correctional system entirely isolated from the outside world are illustrated by . . . recent investigation[s] . . . which [found] widespread corruption and physical abuse. . . .[41]

A brief examination of the areas most frequently litigated, gives an indication of the breadth of the problems posed by judicial review of intra-prison administrative decisions.

Discipline

The dispensing and enforcing of discipline by prison officials

35. *Id.*
36. *Id.* at 1185.
37. Note, *supra* note 29.
38. *See* Kraft, *Prison Disciplinary Practice and Procedures: Is Due Process Provided*, 47 N.D. L. REV. 9, 72-73 (1970); ANDERSON, OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS 21 (1969); Singer & Godlfarb, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 304 (1970).
39. Vogelman, *Prison Restrictions-Prisoners Rights*, 59 J. CRIM. L.C. & P.S. 386, 395 (1968).
40. *Id.*
41. Pres. Comm. on Law Enforcement & Admin. of Justice, Task Force Report: Corrections 85 (1967).

is an area in which inmates often feel they receive less than "fair play." When a correctional officer writes a misconduct report on an inmate the man charged appears before an adjustment committee.[42] If the adjustment committee finds him "guilty" some form of punishment will be prescribed. The inmate may appeal the decision to another intra-prison board.[43] However, only in "exceptional circumstances" will the adjustment committee fail to uphold the officer making the charge.[44] If the inmate denies the allegations, it is the inmate's word against the officer's misconduct report. In such a situation the committee accepts the allegations in the misconduct report as true and prescribes corresponding disciplinary action. If the adjustment committee consistently declined to "punish" inmates who deny having committed the infractions listed in the misconduct report, the results could well have dramatic effects on the internal functioning of the prison—morale of the officers would decline and the distinct possibility exists, that the correctional officers might quit issuing misconduct reports, and take it upon themselves to mete out punishment. Such a result can only compound the problem.[45] Some form of external grievance channel is necessary to assure the inmate that the judicially recognized concepts of due process and the prison's own written rules and regulations are complied with in each disciplinary case. It should be noted that although the Ombudsman form of independent intermediary can assure the inmate that the prison rules meet the standards set by the courts, and that the rules are followed, he cannot make his own independent judgment as to what the facts are when there is a factual dispute. This subject is covered in more detail in a later section.

In the federal prison system, when an inmate's misconduct is considered serious enough a "good time" forfeiture hearing is held.[46] Created by statute,[47] "good time" entitles the deduction from the inmate's sentence of a fixed number of days per month. In order to receive good time he must obey the prison rules and not have been subjected to disciplinary action.[48] The Good Time Forfeiture Board may forfeit any good time earned in months prior

42. For a detailed discussion of disciplinary procedures *see* Kraft, *Prison Disciplinary Practices and Procedures: Is Due Process Provided?*, 47 N.D. L. REV. 9 (1970).
43. *Id.* at 31.
44. From the writer's exposure to the adjustment committee this fact became more than obvious.
45. *See* Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966).
> Where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment [by custodial staff], due process and Eighth Amendment questions inevitably arise.

46. *See* Kraft, *supra* note 42, at 31.
47. 18 U.S.C. § 4161 (1964).
48. *Id.*

to the infraction so the loss of good time credits effectively prolongs the sentence.

The procedures for good time forfeiture followed in the various federal institutions seem to vary.[49] However, generally allegations of serious infractions are taken before a Good Time Forfeiture Board. There the inmate enters a plea, may have counsel-substitute representation, and may call and cross-examine witnesses. The Board recommends action and the Warden affirms or rejects the Board's recommendation. The inmate may challenge the decision by writing to the Director of the United States Bureau of Prisons through the Prisoners Mail Box.[50] The authority to restore forfeited good time is delegated to the warden.[51]

The procedures followed by the Federal Penal System appear to afford adequate safeguards to the inmate. There are indications, though, that such safeguards are not present in state institutions.[52] Once the procedures are established, two questions must be posed at both the state and federal level. Do the procedures established comply with judicial guidelines. Are the procedures complied with in each case?

Judicial examination of prison disciplinary boards' procedures has developed only recently. An examination of the area reveals a new judicial interest in insuring that inmates receive procedural due process in intra-prison disciplinary actions.[53] Although the courts seldom agree on what is required to satisfy due process, two elements appear to be generally accepted. An accused inmate must have sufficient notice of the charge against him, and he must be given some form of a hearing.[54] These seem to be the only constant requirements, with the decisions differing as to other requisites. Additional procedural guidelines set forth by the courts have evidenced little consistency. While some courts have required a written record of the hearing and an internal administrative review,[55] others have required the presence of counsel or counsel substitute.[56] Recent

49. *See* Kraft, *supra* note 42, at 37 n.108.
This article indicates that the Adjustment Committee and the Good Time Forfeiture Board are one and the same. At Sandstone Federal Correctional Institution, Minnesota these were distinct bodies, composed of different members.

50. These procedures were observed at Sandstone, Minnesota. *See also* Kraft, *supra* note 42, at 31.

51. Bureau of Prison Policy Statement 7400.6 (12-1-66) at 4, as cited in Kraft, *supra* note 42, at 41 n.125.

52. Testimony of Philip Hirshkop, *Hearings on Corrections Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 91st Cong., 1st Sess., ser. 15, pt. III, at 40-45 (1971).

53. Kraft, *supra* note 42, and cases cited therein including: Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970); Sostre v. Rockerfeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1970); Rodrigues v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969); Nolan v. Scafati, 306 F. Supp. 1 (D. Mass. 1969).

54. Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1970); Landman v. Royster, Civil Action No. 170-69-R (E.D. Va., Oct. 30, 1971).

55. Morris v. Travisono, 310 F. Supp. 857, 871 (D.R.I. 1970).

56. Sostre v. Rockerfeller, 312 F. Supp. 863, 872 (S.D.N.Y. 1970), *rev'd,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1970).

decisions have indicated both procedural guidelines, and instances in which they must be applied. In *Landman v. Royster,*[57] the court indicated six requirements in prison disciplinary proceedings which must be afforded the inmate to satisfy due process:

> (1) The decision to punish must be made by an impartial tribunal;
> (2) A hearing must be afforded where the inmate may present evidence in his defense and produce voluntary witnesses in his behalf;
> (3) Written notice informing the inmate of the charges must be given in advance of the hearing;
> (4) The inmate charged must be allowed to cross-examine adverse witnesses;
> (5) The decision must be based on evidence presented at the hearing; and
> (6) The inmate must be allowed to have a lay advisor represent him.[58]

These standards must be applied when the charge lodged may result in solitary confinement, transfer to a maximum security confinement, loss of good time, or padlock confinement for more than 10 days.[59] In *Clutchette v. Procunier,*[60] the court specified the cases requiring due process: "Instances where due process must be provided in disciplinary procedures are, when the punishment may be an indefinite confinement in the adjustment center or segregation, an increase in sentence, a fine or forfeiture, isolation for more than 10 days, or when the case may be referred to the district attorney for criminal prosecution."[61] Clutchette was charged with a prison rule violation which could have resulted in criminal prosecution by state authorities[62] and in his appearance before the adjustment committee he was given a Miranda warning. He was faced with the decision to remain silent and accept the discipline prescribed by the disciplinary committee, or to make a statement in an attempt to vindicate himself, with the possibility that his statement could be used against him in a subsequent criminal proceeding. In such cases, the court said that the inmate must be afforded counsel and given the right to cross-examine witnesses.[63]

Another recent judicial requirement is that the decision of the

57. Landman v. Royster, Civil Action No. 170-69-R (E.D. Va., Oct. 30, 1971).
58. *Id.*
59. *Id.*
60. Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).
61. *Id.* at 781.
62. *Id.* at 778.
63. *Id.*

hearing officers must be based on substantial evidence.[64] This requirement reveals a willingness on the part of the judiciary to go beyond the scope of the review previously accorded to prison administrative decisions. These cases imply that ritualistic conformance to these procedures is insufficient.

The notice requirement, given by most courts when laying the ground rules for minimal due process standards, demands adequate prior notice to prepare for the hearing.[65] Some courts have gone so far as to indicate that in charges which could result in substantial discipline, written notice is a basic constitutional right.[66]

Although the courts disagree as to what constitutes due process, once the procedures are established an external review mechanism can insure that they are actually followed. An example of this function is where the official issuing the misconduct report has an active role in the decision of the adjustment committee. At least one court has indicated that this is not permissible.[67] An external mechanism, which is readily available, could reveal such irregularities through minimal investigation. The fact that a court might not consider this practice a violation of due process does not preclude the external intermediary from criticizing this arrangement as poor administrative procedure.[68]

---

64. *See* Nolan v. Schafati, 306 F. Supp. 1 (D. Mass. 1969); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1970); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970); Landman v. Royster, Civil Action No. 170-69-R (E.D. Va., Oct. 30, 1970).

65. Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); Landman v. Royster, Civil Action No. 170-69-R (E.D. Va., Oct. 30, 1971).

66. *See* Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970).

67. Bundy v. Cannon, 328 F. Supp. 165, 172 (D. Md. 1971).

68. I think some complaints would have to go to the courts. There are points of conflict which perhaps cannot be resolved except in courts; and I think there are prison rules and regulations which are illegal and only the courts can say so. But what I'm concerned about, what I think an Ombudsman would be concerned about, is the area in which the prison rules are not unlawful, are not illegal and are not unreasonable; but where they are not being obeyed or they're being misinterpreted. For example, we had a complaint from a young prisoner down in Soledad prison who was in the segregation wing being held pending investigation, on very serious charges. Because he was upset about it, he had requested a tranquilizer from the prison doctor and received one. When we visited him, he said he was quite concerned because the tranquilizer was too strong and he found that he was dopey and that he couldn't think with the alertness that he needed about the seriousness of the charges against him and how to prepare his defense. So, he had declined to take the pills on a number of occasions and the guard told him that he had to take them. So, he asked us whether we could arrange to get a milder pill, or if he couldn't get anything milder, to have nothing at all. I spoke to the prison doctor and he said that there was no requirement that you had to take medication given. This was a rule that had been misunderstood by the guard. Prisoners could not retain the pills without swallowing them within the guard's presence. This is a reasonable rule to avoid having prisoners save medication in their cells. But he could have returned it to the guard and he could have given it to the doctor. The prison guard simply didn't understand the rule and the prisoner was being forced, physically forced, to take medication when he didn't want to and which was not required by the prison rules. That's one kind of

Medical Treatment

Courts have hesitated to become involved in allegations of inadequate medical care. Both state and federal inmates face tremendous obstacles in getting their claims adjudicated on the merits. Most contemporary challenges to medical treatment are based on the Civil Rights Act of 1870[69] or the eighth amendment ban on cruel and unusual punishment.[70] Both state and federal prisoners must plead and prove the same essential elements in order to have a successful petition.

Even though the inmate may have suffered actual injuries from insufficient medical care, for a cause of action under the Civil Rights Act he must show that these injuries resulted from the deprivation by the prison authorities of some constitutionally protected right.[71] Injury alone will not suffice. Furthermore, under section 1983 the complaint must allege: (1) an acute physical condition, (2) the urgent need for medical care, (3) the failure or refusal to provide it, and (4) tangible residual injury.[72]

A successful claim based on alleged cruel and unusual punishment is even more difficult. The complaint must plead and prove intentional deprivation of essential medical care with a specific intent to cause harm to the prisoner, or the presence of severe and obvious injuries.[73] If an inmate does not have severe injuries, the requirement of specific intent will make it very unlikely that the petition will succeed.

A typical judicial handling of these problems is found in *Bowman v. Hale*.[74] A state prisoner alleged, *inter alia*, a denial of medical treatment in violation of the Civil Rights Act of 1870. In refusing relief the court said that the allegation of a denial of medical treatment does not allege a deprivation of such rights as are cognizable under the act.[75] Federal courts will not inquire into the adequacy or sufficiency of medical care of state prisoners unless it appears that there has been an abuse of the broad discretion granted to the administrative officials.[76]

In the absence of factual allegations of obvious neglect or in-

---

example of something where prisoners should have been able to go to someone besides a lawyer and say, "Hey, I don't want to take these pills." Testimony of Miss Alice Daniel, N.A.A.C.P. Legal Defense Fund, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Omudsman 40, 147-149 (1970).

69. 42 U.S.C. § 1983 (1970).
70. U.S. CONST. amend. VIII.
71. Comment, *Prisoners' Rights: Personal Security*, 42 U. COLO. L. REV. 275, 357 (1970).
72. *Id.* at 361 n.306.
73. *Id.* at 361.
74. Bowman v. Hale, 302 F. Supp. 1306 (S.D. Ala. 1969).
75. *Id.* at 1307.
76. Haskew v. Wainwright, 427 F.2d 525 (5th Cir. 1970).

tentional mistreatment, the courts rely on the reports of prison physicians that reasonable medical care is being rendered.[77] A typical judicial response to claims that improper medical treatment constitutes cruel and unusual punishment is that it is an intentional denial of needed medical attention, or a denial with reckless disregard of petitioner's health, which constitutes cruel and unusual punishment; insufficient, improper, or negligent care will not support such a claim.[78]

From this brief discussion it is obvious that many problems relating to medical treatment are never treated by the courts. The limited areas of relief available from a petition based upon section 1983, or the eighth amendment leaves a broad area of untouched discretion in prison administrators. Some external review procedure seems highly advisable to insure the administration of adequate medical care for all inmates.

Mail Censorship

Inmates are instituting an increasing number of court actions challenging censorship of their mail.[79] Prison administrators give two basic reasons for the necessity of mail censorship: (1) to confiscate contraband;[80] and (2) to prevent the inmate from carrying on outside business dealings.[81] Although both reasons arguably further a permissible penal interest, neither seems to justify the blanket censorship usually imposed on both incoming and outgoing mail.

The United States Bureau of Prisons, which censors both incoming and outgoing mail,[82] has an additional alternative procedure which allows inmates to address mail to certain public officials and place it in the Prisoners Mail Box, from which it is posted without being opened.[83] Although the theory of the Prisoners Mail Box is good, the results are often less than satisfactory. If an inmate writes a letter to the Director of the Bureau in Washington,

77. Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970).
78. Lopez Tijerina v. Ciccone, 324 F. Supp. 1265, 1268 (W.D. Mo. 1971).
79. *See* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Nolan v. Fitzpatrick, 326 F. Supp. 209 (D. Mass. 1971); Sostre v. Rockerfeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1970); Hymes v. Dickson, 232 F. Supp. 796 (N.D. Cal. 1964); Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965).
80. Brown v. Wainwright, 419 F.2d 1308 (5th Cir. 1969) (By implication).
81. Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S.2d 693, 699 (Sup. Ct. 1965).
82. *See* Policy Statement 2001.2A, June 29, 1971, as set out in *Hearings on Corrections, supra* note 52, at 119.
83. *See* Policy Statement 7300.2A, Dec. 28, 1967, as set out in *Hearings on Corrections, supra* note 52, at 129.
This provides for the establishment of a Prisoners Mail Box. Inmates may seal and mail letters to public officials without having the letters censored. These officials are Pres. and V. Pres.; Attorney General; Dir. of B. of P.; Members of the B. of P.; The Pardon Attorney; the Surgeon General; U.S. Public Health Service; the Secretary of the Army, Navy, Air Force; United States Courts; Members of the U.S. Senate and House of Representatives.

D. C., complaining about prison officials or conditions, and deposits it in the Prisoners Mail Box, it leaves the institution unopened. In many instances these letters are returned to the institution[84] because the Director's staff believes that institution personnel are in the best position to respond to the complaints. From the viewpoint of ease of administration this may be true, but it affords little comfort to the inmate, who may be later faced with his "uncensored" letter in the hands of the same prison officials about whom he is complaining. Often the complaint is answered by the very person against whom the complaint is lodged.

The situations placed before the courts are as varied as the results reached.[85] There is virtually no agreement among the courts as to when censorship is, or is not, permitted.[86] The important aspect is that the courts are subjecting prison mail regulations to closer scrutiny. A recent example is *Nolan v. Fitzpatrick*,[87] where the court allowed prisoners to send mail to the news media even though the letters concerned prison matters.[88] This is a marked departure from prior judicial thinking.

Inmates' mail to attorneys and to courts has received much judicial attention. Access to the courts is one right an inmate retains.[89] While the United States Bureau of Prisons inspects mail to attorneys for improper content,[90] recent decisions indicate that actual censorship of such mail is not allowed.[91] These courts reason that censorship of attorney mail hinders the inmates' access to the courts, his right to petition the government for redress of grievances, and his first amendment right of free speech. Even with this apparent trend, some courts have allowed censorship of mail to attorneys.[92] These courts conclude that if the inmate includes matters within his correspondence, which violate a prison

84. Remarks of Norman Carlson, Dir. of Bureau of Prisons, *Hearings on Corrections, supra* note 52, at 29-30. *See also* FITZHARRIS, THE DESIRABILITY OF A CORRECTIONAL OMBUDSMAN, A REPORT TO THE CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE 31 (1971).

85. *See* Diehl v. Wainwright, 419 F.2d 1309 (5th Cir. 1970); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968); Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

86. For cases allowing censorship *see* O'Brien v. Blackwall, 421 F.2d 844 (5th Cir. 1970); Diehl v. Wainwright, 419 F.2d 1309 (5th Cir. 1970); McCloskey v. Md., 337 F.2d 72 (4th Cir. 1964); *contra*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968); Labat v. McKeithen, 243 F. Supp. 662 (E.D. La. 1965).

87. Nolan v. Fitzpatrick, 326 F. Supp. 209 (D. Mass. 1971).

88. *Id.* at 217.

89. Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1970).

90. Bureau of Prisons Policy Statement 2001.2A(9), June 29, 1971, *Hearings on Corrections, supra* note 52, at 119.

91. *See* McDonough v. Director, 429 F.2d 1189, 1193 (4th Cir. 1970); Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Palmigiano v. Travisono, 317 F. Supp. 776, 788-789 (D.R.I. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

92. Rhinehart v. Rhay, 314 F. Supp. 81 (W.D. Wash. 1970); Garcia v. State, 454 S.W.2d 400 (Tex. Crim. App. 1970).

regulation, the mail need not be sent out by the prison officials. These results seem to ignore the emphasis, placed by other courts, on the rights the inmate retains. In addition, the inmate usually is not told what language violates what regulation, or given a chance to omit the offensive material.

The role of the judiciary in the area of mail censorship, seems to be at best, a limited one. The courts can set out general guidelines concerning mail regulations. From these guidelines, the institutions can establish their policies. The inmate may know what the court guideline is, but he has no way of knowing whether the prison officials are complying with the guidelines. When this is effectuated, some external review of prison mail policies and the method in which they are administered would insure fair application of the court guidelines and make unnecessary repeated law suits by inmates attempting to make sure that there is compliance with court guidelines.[93]

Religious Freedom

The right to one's freedom of religion,[94] stimulated within prison walls by the Black Muslim movement, is another area in which the courts have moved away from the "hands off" doctrine.[95] Muslim allegations of discrimination have been admitted by prison officials who justify their conduct on two basic grounds:

> (1) The inflammatory doctrines of Muslims are an incitement to violence; and
>
> (2) The Muslim movement is in reality social and political, rather than religious.[96]

Courts have held that a prisoner retains the right to reasonably practice his religion without punishment,[97] and have now recognized the Muslim movement as a religion.[98] Although the courts

---

93. As I say, we're concerned with those instances in which the regulations themselves do seem to give ample room to the prisoner's rights, the regulations are not being enforced. Even once there has been a court ruling, there's still a need to enforce it on the daily level within the prison. An example of that would be the ruling last summer by Federal court that inmates had the right to confidential correspondence with attorneys. Three and four months later we still were receiving censored mail from inmates. Not because the prison officials involved were breaking the law either, it was because they have never posted regulations advising prisoners about how they could go about confidential correspondence with attorneys.
Testimony of Miss Alice Daniel, N.A.A.C.P. Legal Defense Fund, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 140, 149 (1970).

94. U.S. CONST. amend. I.

95. *See* Kraft, *supra* note 42, at 15.

96. King, *Religious Freedom in the Correctional Institution*, 60 J. CRIM. L.C. & P.S. 299, 301 (1969).

97. Howard v. Smyth, 365 F.2d 428, 431 (4th Cir. 1966), *cert. denied*, 385 U.S. 988 (1967).

98. Knuckles v. Praase, 302 F. Supp. 1036 (E.D. Pa. 1969).

are far from agreement on solutions to such problems,[99] the important aspect seems to be the abandonment of the "hands off" approach.[100] Because of the number of religions and the different policies of each, general guidelines formulated by the courts have achieved only limited success in alleviating problems of religious freedom. Basic fairness in administrative policies seems the only practical solution.[101] It is not expected that the courts alone can do much more. To insure such basic fairness, some external grievance procedure seems the logical answer.

Other Inmate Complaints

There are many other areas in which prisoners have legitimate complaints which do not seem to be judicially cognizable. Many of these grievances are attached to petitions alleging matters of a more serious nature. A brief look at some of these allegations indicates the scope of the problem. Claims that inmates are not allowed to use typewriters, that food is served in plastic ice cream containers, that there is no evening mail pick up, that there is a lack of adequate bedding, and that there is not adequate television and newspapers have all appeared in complaints.[102] Decisions relating to classification,[103] job change, transfer, and custody change are areas in which the inmate has little hope of effectively having prison administrative decisions reviewed in court.

Aside from the complaints previously mentioned, there remains a "Pandora's box" of prisoner grievances. Obviously, the great majority of these complaints never reach the courts. Neither are these minor complaints judicially recognized nor are the courts equipped to handle the large number of petitions which would ensue if they were. The expense and the amount of time involved in the judicial process add to the problems posed by court action. Some external method of reviewing administrative decisions and

---

99. *See* Kraft, *supra* note 42, at 15.

100. *See* Kraft, *supra* note 42, at 15.

101. I do go forward on humanitarian grounds on many, many cases. It works very effectively, too. I am often met with, "Now look, there's the law and we didn't break the law," and they didn't. I find that by saying, "All right now, if you and I walk outside and we stop the first fifteen people that come along and we tell them what happened to this man, what do you think they're going to say about whether he's had a fair shake or not?" And, interesting enough, they'd pause, and then finally smile and say, "Okay, what is it you want?" On the basis of "has the man had a fair shake," and more frequently than not, that is it. The jail regulations have just been amended.

Testimony of George B. McClellan, Ombudsman, Province of Alberta, Canada, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 54, 69 (1970).

102. *See* Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970); Bowman v. Hale, 302 F. Supp. 1306 (S.D. Ala. 1969).

103. *See* Hagen & Campbell, *Team Classification in Federal Institutions*, 32 FED. PROB. 30 (1968).

inmate grievances in the prisons is needed.[104] If inmate complaints are investigated in a quick, unbiased manner by an external grievance procedure independent of the prison administration, it would go far in alleviating much inmate dissatisfaction with American prisons.[105]

EXTERNAL REVIEW OF PRISON COMPLAINTS IN OTHER COUNTRIES

Independent, external grievance officers in other countries accept complaints from prison inmates as a part of their general complaint handling duties. Sweden has had an Ombudsman for civil administration since 1809, Finland since 1919, Denmark since 1954, New Zealand since 1962, Norway since 1963, and the Canadian Provinces of Alberta and New Brunswick since 1967. We can begin our analysis of the role external grievance-response mechanisms might play in American prisons by looking at prison grievance handling by Ombudsmen in these countries.

Scandinavian Countries

In each of the Scandinavian countries, the Ombudsman receives and investigates complaints received from prisoners. In Sweden, control over imprisonments has been one of the Ombudsman's most important tasks. In addition, the Ombudsman inspects prison institutions and speaks to prisoners.[106] Complaints to the Swedish

---

104. [I]t seems to me that we're now on the threshhold of some radical changes in the legal status of prisoners. Others may dispute that; but this is a very extensive and inefficient way to handle prisoner complaints. You have a judge; you have the problems of illiciting testimony with all of the restraints of our rules of evidence, confrontation, cross examination, and so on. Just as we have found that courts are inefficient to supervise all of our administrative agencies, so I'm afraid we will have to concede that courts are an inefficient means of trying to supervise the little nitty kinds of things that go on that now have to attain the status of cruel and unusual punishment; but this standard may become so that a great number or more things may come under this scrutiny of the courts—particularly the rights of expression, bail, religious expression and this sort of thing. These are fantastic developments which are now terminating. So, to put this in the ombudsman context, one way of using the ombudsman is as legal aid in the administrative sphere—in a most efficient form by actually having one man solve the problem. You can view all of these complaints mechanisms as if it were an electrical circuit in parallel: you have the courts which can carry some current of complaints, but which have a very high resistance, very low accessibility, high expense to the community; whereas, the ombudsman has a very low resistance, his accessibility is automatic, immediate and universal, and so you would be considering that a lot of complaints would be able to flow through that channel, and in so doing you're obviously going to protect the courts from being over burdened with a lot of trivial things.
Testimony of Professor Stanley V. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 19-20 (1970).

105. The writer spent from June through August 1971 at the Federal Correctional Institution, Sandstone, Minnesota. It became obvious that many inmates were satisfied when they merely had the opportunity to air their complaint to someone outside the prison chain of command.

106. Bexelius, *Ombudsman for Civil Affairs*, THE OMBUDSMAN: CITIZEN'S DEFENDER 22, 37-38 (Rowat ed. 1965).

Ombudsman concerning prison administration increased slowly during the early 1960's. One hundred eleven complaints were received in 1960,[107] and this had increased to 166 by 1965.[108] Sweden does not have a device similar to our writ of habeas corpus and release from improper detention is not easily obtained.[109] The Ombudsman has successfully sought pardons or a shortened term of imprisonment when he was persuaded that the conviction was wrongly obtained or the sentence excessive and lapse of time had closed direct judicial remedies. He has also investigated when prisoners suffering from alcoholism or psychiatric problems have sought help.[110]

In Finland, in the early 1960's more than 60 per cent of the Ombudsman's cases came from persons in detention.[111] Finland, like Sweden has another protector, the Chancellor of Justice. The Chancellor played a large role in gaining Finnish independence and now many people turn to him for assistance. With the establishment of the Ombudsman, the Chancellor refers all complaints from the military and prisons to the Ombudsman.[112] Prisoners' complaints in Finland, usually concern the carrying out of the sentences or the beginning of the parole period rather than prison conditions. Prisoners frequently seek sentence reduction because of new evidence or alleged errors in judgment.[113] The Finland Ombudsman also inspects prisons and prisoners present many complaints during these inspections.[114]

Professor Gelhorn questions the efficiency and the effectiveness of the prison inspections, suggesting that the Ombudsman may do a better job behind his desk than behind bars.[115] The Finnish public generally is not aware of the Ombudsman. Consequently, few complaints are forthcoming from a prison housing only first offenders. But in prisons composed of repeat offenders the volume of complaints is much higher, suggesting the effectiveness of word-of-mouth communication in a prison.[116]

---

107. GELLHORN, OMBUDSMEN AND OTHERS: CITIZEN'S PROTECTORS IN NINE COUNTRIES 209 (1967). [Hereinafter cited as GELLHORN, OMBUDSMEN AND OTHERS].
108. Testimony of Professor Stanley V. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 8 (1970). The 166 complaints received concerning prison administration was almost 12 percent of the 1,399 complaints received by the Swedish Ombudsman in 1965.
109. GELLHORN, OMBUDSMEN AND OTHERS at 215.
110. *Id.*
111. *Id.* at 65-66.
112. Testimony of Professor Stanley V. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 8-10 (1970).
113. Kastari, *Finland's Guardians of the Law,* THE OMBUDSMAN 64 (Rowat ed. 1965).
114. *Id.* at 68.
115. GELLHORN, OMBUDSMEN AND OTHERS at 79-80.
116. *Id.* at 66 .
The writer's experience with the Buffalo, New York Ombudman Demonstration Project was that word-of-mouth communication is the best method of informing the public of the Ombudsman's existence in a big city ghetto.

In Denmark, the Ombudsman's investigations of prisoner's complaints apparently has a positive effect on both the prisoners and the prison administrators. As is the case in Sweden and Finland, Denmark's Ombudsman inspects places of detention and confers privately with inmates. Although most prisoner complaints are found to be invalid, Professor Stephan Hurwitz, the Danish Ombudsman, believes that "these talks may well be considered important, since apart from the value they may have for the person confined, they may afford grounds for examining questions of more general interest."[117] Professor Gelhorn states that the Danish Ombudsman has also had a positive effect on prison administrators.[118] In conversations with Professor Gelhorn, Danish prison officials acknowledge that staff laziness, entrenched procedures, and receptivity to change have decreased since the Ombudsman has been in a position to criticize officials and procedures.[119]

In Norway, as in the other Scandinavian countries, complaints from prisoners have increased as word of the Ombudsman's existence has spread.[120] Prison administrators' workload has increased as prisoners take advantage of the opportunity to voice grievances, but the tensions of prison life have lessened. Prison officials apparently have made an increased effort to give "objective, rational decisions."[121] Comments of prison administrators on this point are instructive.

> A prison is an authoritarian society, not a democracy, and we who have the authority must guard against exercising it too freely just because we can do so without challenge. If one of the inmates sends us a request or a complaint, we

117. Quoted in GELLHORN, OMBUDSMEN AND OTHERS at 19.
118. *Id.* at 36-37.
119. The staff's formerly resistant attitude first brought it into conflict with the Omudsman in an extremely petty matter. A prison rule forade smoking in workshops. To facilitate the rule's enforcement each prisoner was allowed to possess only one pipe, which had to be left in plain sight in the prisoner's cell when he was at work elsewhere. A prisoner complained to the Ombudsman. Himself an avid pipe-smoker who knew that a pipe loses it savor if too constantly in use, the Ombudsman counseled against restricting pipe ownership, saying that smoking in workshops could be prevented by other means.

Soon afterward prisoners complained that the prison commissary had rejected their request that powdered coffee be made available for sale; they desired to prepare coffee in their own cells at other than meal hours. The staff had voted against granting the request because hot water could not be made constantly available to the inmates. The Ombudsman deemed this unreasonable; he suggested, instead, that hot water be supplied at specified times when it was not needed for other institutional purposes and when most prisoners were in any event allowed to circulate outside their cells.

In a third episode a prisoner wrote the Ombudsman that bathing facilities were inadequately maintained, an objection that had apparently not seemed tenable to the staff members to whom it had first been voiced. When the prison director himself inspected the facilities after the Ombudsman had made an inquiry, he concluded that the complaint was indeed well founded. Suitable corrective steps were then promptly taken.

This succession of incidents, insignificant in themselves, apparently affected staff attitudes profoundly. GELLHORN AND OTHERS at 37 n.54.

120. *Id.* at 174-175.
121. *Id.* at 180-181.

> have always been able to say 'No' and that was that. But now, with the Ombudsman in the picture, it's not enough. If he asks us why we said 'No', we have to give him a detailed explanation and we can't simply rest on our authority as we can with a prisoner. So now we try to think the matter through more carefully, to avoid being embarrassed by inability to explain ourselves if questioned later.[122]

Professor Gelhorn presents four examples of change in prison administrative practice which were achieved by the Ombudsman's investigation of prisoners' complaints.[123]

New Zealand

The New Zealand Ombudsman received virtually no complaints from persons in prisons or other places of detention from its inception in 1962 through 1966. Prison administrators were not swift to appraise prisoners of the existence of the new grievance machinery and, unlike the Scandinavian countries, New Zealand charges a fee for each complaint filed.[124] The 1968 Annual Report of the New Zealand Ombudsman lists four complaints lodged by prisoners.[125]

However, by the end of 1970, the New Zealand Ombudsman had investigated a total of 36 prison complaints from its inception—

---

122. Comments of two Norwegian prison officials to Professor Gellhorn, quoted in GELLHORN, OMBUDSMEN AND OTHERS at 181.

123. Illustrations: (1) An unruly prisoner can be disciplined locally by the prison director and, additionally, by a later decision of the Ministry of Justice to prolong a sentence, within limits. By order of the prison director, prisoner A had been placed in solitary confinement for thirty days for an infraction of rules. Two months later he was notified by the Ministry of Justice that he would be detained for fourteen days beyond the completion of his original sentence. He complained to the Ombudsman against what he regarded as 'double punishment' for the same misconduct. The Ombudsman found no ground for criticizing the Ministry, but he persuaded it that prisoners should be given a fuller explanation of the range of disciplinary measures that might be utilized by the authorities and, moreover, he encouraged the Ministry to coordinate its punitive measures more closely with those decided upon by the prison administrators. (2) Penitentiary inmates earn a small daily wage, part of which is withheld until their release or until the prison director considers it is needed by the prisoner's family or for other worthy purposes. While in detention Prisoner B received a tax refund of about $20. The director refused to turn it over to him to be spent as he might choose. Upon B's complaint, the Ombudsman suggested that the director had no power to control prisoner's funds other than those earned by prison work. As a consequence, prison administrators no longer interfere with an inmate's receiving windfalls and private funds, which may then be spent outside the prison as the recipient may choose. (3) Prisoner C's application for release on probation, for which he was eligible, had been denied without the giving of any reason. The Ombudsman suggested, and the authorities agreed, that in the future a person denied the privilege of early release should be told the reason for the adverse decision. (4) Prisoner D complained that the coffee was too diluted; he was found to be an accurate analyst, and the strength of the coffee served the prisoners was increased. GELLHORN, OMBUDSMEN AND OTHERS at 181-182 n.45.

124. *Id.* at 122.

125. A complaint about computation of sentance and one involving visitation rights were classified not justified. A complaint about treatment of a prisoner was discontinued because he had an adequate remedy or right of appeal, and a complaint about transfer of an inmate was listed as being investigated. REPORT OF THE NEW ZEALAND OMBUDSMAN 80-81 (1968).

and 11 of these were filed in 1969 and 11 more filed in 1970.[126] One of the reasons given for the low caseload is that New Zealand has an effective internal grievance handling system within the prison system.[127] This not only reduces the Ombudsman's caseload of prison complaints, but it also makes the Ombudsman more effective. The Ombudsman's forte is analyzing administrative procedures in general, and internal grievance-response mechanisms in particular.

Canadian Ombudsmen

The Canadian Provinces of Alberta[128] and New Brunswick[129] each created an Ombudsman in 1967. Since then, Quebec[130] created an Ombudsman in 1968, and Manitoba[131] did likewise in 1970. The Ombudsman reports from both Alberta and New Brunswick mention prisoners' complaints. The New Brunswick Ombudsman's Second Report lists a complaint of condition of employment at jail as not justified,[132] and the Third Report lists four complaints received: unpaid work in jail—not justified; length of prison sentence—information given; prisoner privileges—no jurisdiction; and length of parole—no jurisdiction.[133] Other complaints from prisoners may have been listed under topics not disclosing the status of the complainant.

The Alberta Ombudsman apparently has been much more active in the prison area than his New Brunswick counterpart. His 1967 Report lists three and his 1968 Report lists 18 complaints from persons detained in prisons and jails.[134]

From the abbreviated description given these 21 complaints, they can be roughly classified as follows: 3 physical mistreatment

126. Testimony of Professor Stanley V. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 11 (1970).

127. No ombudsman office can function without a pre-existing complaint mechanism within the institutions of government in question. He cannot assume the total load of handling complaints. Basically, the ombudsman is a fail-safe device. It's when the other mechanisms of complaint fail, as inevitably, given human conditions, they must from time to time, given the inevitable inefficiencies of bureaucracy, they must fail; the ombudsman is there to point to the failures of these primary complain mechanisms. One reason that the New Zealand office has had a low caseload is because they have a very efficient system of internal grievance handling within the prison system. Even to the point that any punishment greater than a day in one cell is subject to review upon request by the prisoner by a Circuit Judge, that is, a judge within the prison system who goes from jail to jail and hears the prisoners grievances about any one particular punishment that was given out to them.

Testimony of Professor Stanley V. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 13-14 (1970).

128. ALTA. STAT. c. 59 (1967).

129. N.B. STAT. c. 18 (1966).

130. QUE. STAT. c. 11 (1968).

131. MAN. REV. STAT. c. 045 (1970).

132. SECOND REPORT OF THE OMBUDSMAN 21 (1968).

133. THIRD REPORT OF THE OMBUDSMAN 19, 24 (1969).

134. ALBERTA REPORT OF THE OMBUDSMAN 10, 11, 12, 26, and 34 (1967). [Hereinafter cited as ALBERTA OMBUDSMAN 1967 REPORT]. ALBERTA REPORT OF THE OMBUDSMAN 11, 12, 21, 22, 36, 68, 69, 70, 100, and 102 (1968). [Hereinafter cited as ALBERTA OMBUDSMAN 1968 REPORT].

or injury by prison officials; 3 prisoner transferred to mental institution; 2 inadequate medical attention; 2 transfer to another institution; 2 prison disciplinary procedures; and 1 each mail censorship, request for bail, refusal to pay prisoner travel expenses home upon release, public statement by prison official, prisoner requests trial exhibits returned, alien in jail, prisoner did not receive legal aid, prisoner's physical abnormality, and prisoner loss of money while in custody. It is impossible to get a "feeling" for the nature of the complaint and the Ombudsman's investigation from the very brief listing given most of the complaints. In addition, it is possible that some prisoner complaints are described in these lists without identifying the complainant as a prison inmate. However, the Alberta Ombudsman's reports do give a brief summary of some of the more important and interesting investigations. A few prisoner complaints are described in these summaries.

Both the 1967 and 1968 Reports summarize cases where a person has been transferred from prison to a mental institution, as well as cases where a person is charged with a crime, found not guilty or unfit to stand trial for reasons of insanity and sent to a mental institution.[135] Apparently both types of persons are detained in the mental institution at the pleasure of the lieutenant governor. In one circumstance the Ombudsman found that prisoners sent from provincial jails to a mental institution had a right to appeal for a review of their certification to the mental institution, while prisoners admitted from a federal penitentiary had no right to appeal their certification.[136] The Alberta Ombudsman's 1967 Report states the result of one such complaint, which incidentally was the first complaint received by the Ombudsman upon taking office.

> Full co-operation and assistance was afforded me in making my investigation by the Deputy Attorney General and the Director of Mental Health. When all the facts outlined in this summary were reviewed, the Deputy Attorney General recommended (1) that Penitentiary prisoners previously transferred to a Provincial Mental Institute should be certified under the Mental Health Act so that they might be given the right to have their cases reviewed by a Review Panel; (2) that until such time as a formal agreement under Section 19 of the Penitentiary Act had been finalized with the Federal Government, it was the intention to follow the procedure of transferring a prisoner to a Provincial Gaol [jail] and then having him transferred to a Mental Hospital under Section 9a (1) of the Mental Health Act; (3) that everything be done as soon as possible to give the complain-

135. *See* ALBERTA OMBUDSMAN 1967 REPORT at 10-12; ALBERTA OMBUDSMAN 1968 REPORT at 11-14, 71-100.
136. ALBERTA OMBUDSMAN 1967 REPORT at 10-12.

> ant the right of Review; (4) and that the procedure of certification be followed in the case of all prisoners transferred from a Penitentiary directly to a Mental Institute prior to, and after, the recommendation.
>
> Instructions were forthwith issued to the Superintendent of the Hospital by the Director of Mental Health, that the complainant be certified and advised of right to a Review. This was done. The complainant entered an appeal. His case was considered by the Review Panel and he was advised in writing of the decision of the Review Panel.
>
> I have been advised that proposed amendments to the Mental Health Act have been drafted and forwarded to the Legislative Council for consideration. Such amendments, it is hoped, will regulate the whole procedure of accepting Penitentiary prisoners in Provincial Hospitals, and ensure that situations such as the one complained about, cannot again occur.[137]

The Alberta Ombudsman found that there were about 30 persons in Alberta mental hospitals whose commitment had not been reviewed by an independent tribunal and whose cases had not been brought to the attention of the lieutenant governor since their original detention. A few had been detained in the mental hospitals for more than 25 years.[138] The Ombudsman, while recognizing that many such mental patients ought never to be released, agonized over the problem of someone held in a mental hospital for more than 25 years without any legal requirement that changes in his mental health be reviewed.

> I must, of course, pay due regard to the law in arriving at an opinion. I am also obligated by the Act under which I work, to give full regard to its provisions, such as the Section I have quoted. [Section 20 of the Alberta Ombudsman Act states the circumstances under which the Ombudsman should report his opinion and reasons to the appropriate minister, department, or agency.]
>
> I could come to no other conclusion, but that the situation which I have described, was wrong.[139]

Two additional complaints from prisoners which are commented upon in the Alberta Ombudsman's Report are worth noting. In a somewhat amusing case, the complainant and his accomplice, after considerable imbibing of spirits, robbed an acquaintance who immediately furnished the police with their identity, and they were swiftly arrested with the money from the robbery still on their person. All of the cash in the complainant's possession was turned

137. *Id.* at 12.
138. ALBERTA OMBUDSMAN 1968 REPORT at 11-13.
139. *Id.* at 13.

into the court as evidence, but not all of this money was taken from the robbery victim. The complainant was not sure how much of this money was his, but he knew that some of it was. While incarcerated, the complainant made numerous efforts to obtain the return of his personal funds and not unexpectedly ran afoul of bureaucratic red tape and in one case wrong information. An accounting of the funds was difficult because the victim had cashed checks for two personal friends immediately before the robbery and because some of the money belonged to an accomplice who had served his time and whose whereabouts was unknown. The Ombudsman assembled the facts and made his calculation of the amount of money in court belonging to the complainant, and the amount belonging to the accomplice. A court officer had paid the victim $180.83 more than he was entitled to, this was the total amount of the complainant's and his accomplice's personal funds. The Ombudsman found an administrative error in a court clerk's restitution to the victim. The Ombudsman's recommendation to the deputy attorney general, that the complainant and his accomplice, if found, be paid the amount of their missing personal funds was followed.[140]

A complainant was arrested in Montreal, which was his home, and returned to Alberta where he was tried, convicted, and sentenced. When he was about to be released, he applied to the warden and then the Royal Canadian Mounted Police for transportation fare back to his home. Both the warden and the Mounted Police responded that they did not have authority to provide the transportation money. The Ombudsman, upon receiving the complaint, found statutory authority giving the attorney-general discretion to supply transportation to prisoners upon their release. The Ombudsman found it unnecessary to make a recommendation because, when informed of the situation, the attorney general's office immediately provided the transportation funds.[141]

In 1970, responding to an inquiry from a California legislative interim committee, the Alberta Ombudsman said that he has brought a number of matters to the attention of prison administrators and they have been corrected. He mentions a warden's erroneous assessment of disciplinary punishment which exceeded his jurisdiction and careless handling of prisoner's mail.[142] He also said that his

140. *Id.* at 68-70.
141. *Id.* at 102.
142. Letter from George B. McClellan, Alberta Ombudsman to Timothy L. Fitzharris, Assistant Committee Consultant, California Assembly Interim Committee on Criminal Procedure, Oct. 16, 1970, quoted in *Hearings Before a Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., *on Corrections*, pt. III, *Prisoners' Representation* 446 (1972). [Hereinafter cited as *Correction Hearings*].

activities had not caused any hostility by the prison administrators.[143] He believes that the Ombudsman has had a beneficial effect on the prison system, and, most interestingly, that although complaints of physical abuse of prisoners by guards have been unsubstantiated, the number of complaints had decreased. He interpreted this decrease to the fact that the prison officials are now aware that the Ombudsman can investigate these types of complaints.[144] Unfortunately, it might also be interpreted that the prisoners had found the Ombudsman ineffective, and worse, that they might have received additional abuse because of the Ombudsman's investigation.

EXTERNAL REVIEW OF PRISON COMPLAINTS IN THE UNITED STATES

Our discussion of the experience of Ombudsmen in handling complaints from prison inmates as a part of their caseload does not have to be limited to Ombudsmen in other countries. In the past few years, Ombudsmen appointed by state legislatures and governors, as well as experimental ombudsman projects have appeared on the American scene. Some of them have accepted complaints from prison inmates. The experiences of Hawaii, Oregon, Iowa, and Buffalo, New York will be reviewed here.

Hawaii Ombudsman

In 1967, Hawaii became the first state to enact legislation establishing an Ombudsman.[145] The Hawaii Ombudsman has been

---

143. We have not found any real hostility by the prison administrators. At the administrative level, that is the senior officers in the Attorney General's Department; who have overall administration of Provincial jails. We have in fact received every cooperation and a readiness to remedy complaints on a voluntary basis without requiring any pressure from the Ombudsman's office.

We have detected some evasiveness on the part of officials who are actually working in the jails, but I have ample powers to deal with such matters if I feel that I am being misled. Such experiences have been infrequent.

Letter from George B. McClellan, Alberta Ombudsman to Timothy L. Fitzharris, Assistant Committee Consultant, California Assembly Interim Committee on Criminal Procedure, Oct. 16, 1970, quoted in *Corrections Hearing* at 446.

144. I do consider overall that the Ombudsman has had a beneficial effect on the prison system within this Province. He has the authority to inspect any prison at any time. He has the authority to demand to see any Departmental file and he cannot be refused. Prisoners may communicate with me in writing and must be supplied with envelopes, which they seal, and their letters are forwarded unopened. The whole general effect has been a gradual tightening up of prison procedures from the top down, to ensure that incidents do not happen which might bring the attention of the Ombudsman to any particular prison. There were a few complaints of rough handling of prisoners by guards earlier in my term of office, and although almost all of these were unsubstantiated, it is interesting to note that the number of such complaints has decreased to almost none. I think this is an indication that the authorities are aware that the Ombudsman is available and has effective powers to investigate.

Letter from George B. McClellan, Alberta Ombudsman, to Timothy L. Fitzharris, Assistant Committee Consultant, quoted in *Corrections Hearings* at 444.

145. HAWAII REV. STAT. ch. 96 (1968); In 1969 Nebraska became the second state to enact legislation for a state Ombudsman. The Nebraska official is called the Public Counsel. NEB. REV. STAT. §§ 81-8240 - 81-8254 (Supp. 1969).

accepting citizens' complaints against state agencies and state administrators since July 1, 1969. The Hawaii Ombudsman reports that he has received numerous complaints from prisoners dealing with a variety of problems, including remodeling of certain areas within the prison store, inaccuracies in handling of inmates' trust funds, segregation of prisoners for disciplinary reasons, sanitation of the dining room and food preparation area, racial discrimination in the granting of parole, return of property taken when an inmate was recaptured after escape, mail censorship, and education and recreational facilities for prisoners.[146]

The handling of the complaint concerning unsanitary conditions in connection with the prison food service is of interest because inmates' complaints about food are perhaps more numerous than any other. The Hawaii Ombudsman learned that there were no regular inspections of the prison food service areas and asked the Health Department to inspect the areas. The Health Department's report revealed various unsanitary conditions in the dining room, kitchen, bakery, storeroom, and garbage storage area and made detailed recommendations for correcting these conditions. A new inspection policy was initiated which requires every state correctional facility to have its food service unit inspected by the Health Department at least once every three months.[147]

Prison policy in Hawaii is to censor both incoming and outgoing mail. But inmates are entitled to send sealed letters to designated state officials, including the Ombudsman, which are posted unopened. An inmate complained to the Ombudsman that incoming mail from these state officials was being opened and inspected. Positive results came from the Ombudsman's investigation and discussions with prison officials.

> During our discussions and review with the Corrections Division administrator and State Prison staff, two major points, among others, were emphasized:
>
> (1) If the principle of confidential correspondence between a resident and certain designated government officials to be maintained, not only must the prison resident be allowed, as he is presently allowed, to send sealed letters to the designated government officials, but he must also be allowed to receive sealed letters from them. It was emphasized that any censorship of incoming correspondence from

146. HAWAII OMBUDSMAN REPORT No. 2, FISCAL YEAR 1970-71, at 130, 132-134, 134, 141-142, 143 (1971); letter from Herman S. Doi, Hawaii Ombudsman to Representative Robert W. Kastenmeier, Nov. 23, 1971, quoted in *Corrections Hearings* at 290, 292; letter from Herman S. Doi, Hawaii Ombudsman to Timothy L. Fitzharris, Assistant Committee Consultant, California Assembly Interim Committee on Criminal Procedure, Oct. 8, 1970, quoted in *Corrections Hearings* at 371, 372.

147. HAWAII OMBUDSMAN REPORT NO. 2, FISCAL YEAR 1970-71, at 141-142 (1971).

the designated officials would be incompatible with this principle.

(2) In the light of the responsibility and necessity for the Corrections to maintain security in its institutions, procedures or precautions should be established to prevent unauthorized persons outside of the prison from sending sealed correspondence to an inmate using envelopes or stationery bearing the names or offices of the designated officials.

Our office also made certain specific suggestions to improve the State Prison's existing resident mail policy or procedures. Subsequently, after further review, the State Prison amended certain sections of its resident mail policy in order to help insure the secrecy of confidential or privileged mail being sent to as well as sent from prison residents, while at the same time providing for adequate controls to prevent abuses.[148]

Two points of interest appear in the Hawaii Ombudsman's comments on the handling of prisoner's complaints.[149] First, he can do little with complaints concerning prison educational and recreational opportunities because these facilities and programs are limited by the appropriations made by the legislature. There is little doubt that, if additional funds were made available, prison officials in Hawaii, as elsewhere, would improve these facilities and programs. It is the legislative branch's function to appropriate public funds as part of the political process. The Ombudsman is not a part of political decision making. He is in no position to tell the legislature how to spend the public purse—that it should appropriate more money for correctional institutions and less for highways and campgrounds. Even though the Ombudsman may be able to inform the legislature and the public of the lack of prison facilities and programs, he cannot compel a reallocation of resources.

Second, the Hawaii Ombudsman helped to create new internal grievance machinery within the prison. As an external grievance mechanism, the Ombudsman may not only be overburdened with many minor grievances that should be handled internally, but long range improvements in prison grievance handling cannot be made without the operation of an internal grievance-response mechanism. The Ombudsman is most effective when he is reviewing the opera-

148. *Id.* at 143.

149. [C]ases involving educational and recreational opportunities for prisoners in which there was very little we could do, since the number of programs that are instituted by the prison authorities is governed to a great extent by the amount of appropriations received from the legislature. Because of the number of complaints that were being received by the office, the corrections officials asked to meet with us. As a result of such meeting, a grievance procedure, he may still bring his complaint to our office for review.

Letter from Herman S. Doi, Hawaii Ombudsman to Representative Robert W. Kastenmeier, quoted in *Corrections Hearings* at 292.

tion of internal grievance mcahinery rather than responding to every minor grievance himself. Although it is usually preferable to improve internal grievance response mechanisms before turning to an external critic, it may be that even in those prisons which do not have adequate internal grievance handling mechanisms, the creation of an Ombudsman will lead to the establishment of adequate internal complaint handling devices.

Oregon Ombudsman

The governor of Oregon appointed an "Executive Ombudsman" in 1969 after unsuccessful efforts to have the Ombudsman position created by statute. The executive ombudsman is a member of the governor's staff and operates out of the governor's office. The Oregon Ombudsman's first Annual Report issued in 1969 gave a brief statement about each of nine complaints concerning the Oregon State Corrections Division. Three of the nine complaints were from Division employees concerning employer-employee relations. Two complaints involved visitation of friends and relatives at the prison, and the other four involved the prisoner's visit to his father's death bed, medical treatment, a parole revocation, and admission to a release education program.[150] Although these complaints appear to be relatively minor matters, several involve disputes where the inmate might not believe the explanation given by prison officials, but will believe the same explanation if given by an independent Ombudsman after his own investigation.

IOWA CITIZENS' AIDE

In 1969, the Governor of Iowa appointed an executive Ombudsman called the "Citizens' Aide." The Iowa Citizens' Aide Report

150. A possible framing of a prison inmate regarding his responsibility to administer medical drug dosage (which was referred to legal advisor);

A denial to a mother who requested prison officials to let her visit her son. She had travelled all day from Spokane, [Washington] but was disappointed on arrival because that day was not visitor's day. We interceded on her behalf, and prison officials were persuaded to bend the rules in this instance;

A related visitation mix-up which we helped to resolve;

A complicated set of requirements to allow an inmate to visit his dying father. The father's last request was to see his son. We saw that the the various paper-work was expedited, and the death-bed reunion was made possible;

. . .

A complaint from a parolee regarding the revoking of his parole was discussed with the relevant personnel and we were assured that they would give consideration to the information we provided in their final hearing;

. . .

A prison inmate felt discriminated against when he was denied acceptance into a release education program. We pursued the matter to the extent of understanding the problem, and were assured the agency decision is still pending;

OFFICE OF THE OREGON OMBUDSMAN, FIRST ANNUAL REPORT (1970).

of his first year of operation,[151] does not identify the number of complaints received from prisoners or concerning prisons, but the section of case summaries contains seven cases which fall into this category. Three of the cases involved rather simple matters of obtaining and providing information. Upon a request for help in obtaining the release of her husband, a prisoner's wife was referred to the Parole Board which explained to her its proceedings and policies and advised her when her husband would be eligible for parole.[152] A prisoner in a county jail awaiting trial told the Citizens' Aide that he was addicted to drugs and asked for help. The Citizens' Aide referred his case to the governor's Drug Abuse Authority.[153] An inmate's mother complained that her son was not receiving adequate medical attention. The Citizens' Aide's investigation disclosed that he was receiving medical attention and was scheduled for further treatment in a hospital.[154]

Of the remaining four complaints involving prison inmates, two involve inmate trips outside the prison and return of an inmate's property taken at the time of arrest. An inmate's request to attend his mother's funeral after he had visited her on her death bed gave the Citizens' Aide an opportunity to analyze a prison rule.

> A prisoner in a state prison asked for help in being allowed to attend his mother's funeral. Prison authorities advised that prisoners are given the choice of going to the death bed of close relatives or to the funeral. This prisoner had chosen the former. C.A. [Citizens' Aide] feels this is a reasonable rule, and that it would be wrong to make exceptions.[155]

The Iowa Citizens' Aide comments on a prisoner's request for the return of his property taken at the time of arrest not only shows the Ombudsman's ability to achieve results for the complainant, but also the Ombudsman's ability to chastise a public official merely by reciting the date of the Ombudsman's inquiry and the much later date of the official's response and affirmative action.

> A citizen, while residing in Iowa, was arrested and returned to another state to face felony charges. He was convicted and served a prison term. He was told that the police had possession of his worldly belongings, which he had left in a motel room in Iowa. When released from prison, he

151. Report To The Honorable Robert D. Ray, Governor of Iowa. THE IOWA CITIZENS' AIDE (1971). [Hereinafter cited as IOWA CITIZENS' AIDE REPORT].
152. IOWA CITIZENS' AIDE REPORT at 105.
153. *Id.* at 118.
154. *Id.* at 106.
155. *Id.* at 105.

> called the police department and was told they still had his property. After making a long trip to Iowa, he was told the police did not have his property. He sought the assistance of an attorney, who referred him to C.A. [Citizens' Aide]. On October 30, 1970, C.A. wrote police chief asking him the location of man's property. On December 29, 1970, C.A. received a letter from the Chief of Police stating his department did have possession of the property and the citizen could obtain it.[156]

It is recognized that this case did not involve a complaint about prison officials, but it does indicate the type of complaints that inmates and ex-inmates have against other governmental officials as a result of their incarceration.

The Iowa Citizens' Aide was called upon to investigate a parolee's complaint against his parole officer.

> A citizen complained that he had lost his job because his parole officer had revealed his criminal record to his employer. The citizen had not informed his employer of his record. C.A. [Citizens' Aide] was informed that it is parole policy that parolees inform prospective employers of their record. Ideally the parole officer helps the parolee bridge the problems of gaining employment under these circumstances. In this instance the parole officer had not checked with the man concerning the situation. C.A. believes that counseling between the parole officer and the parolee should have taken place before the parole officer contacted the employer. This set of facts should be viewed in the context of the heavy case load which individual parole officers are required to handle.[157]

Here the Citizens' Aide, although not able to give direct assistance to the complainant, was able to criticize the administrative procedures used and recommend to the chief parole administrator (whom the complainant likely could never have reached on his own) a re-thinking of the procedures used in this type of situation.[158] Although the parolee is not technically a prisoner, obstacles faced by parolees and probationers have an extremely important bearing on their readjustment to civilian life.

The Iowa Citizens' Aide also investigated an interesting case involving the possibility of an Iowa inmate being extradited to California at the end of his Iowa confinement and the effect that the possible extradition had on his chances for an Iowa parole.

---

156. *Id.* at 110.
157. *Id.* at 106.
158. It should be noted here that the American custom frowns upon giving money to soften a complainant's loss caused by a governmental officials' lack of judgment. That case might well be an example of the type of case that compensation for lost wages should be made. *See* Gellhorn, *The Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A.J. 134, 136 (1968).

> A citizen complained about communication problems between the California and Iowa penal systems regarding his son. His son had escaped from a jail in California prior to his being sentenced to prison in Iowa. A California warrant had been forwarded to Iowa authorities. The existence of this warrant clouded the man's chances for parole in Iowa. The problem is that it is often hard to tell whether or not a state actually intends to come and get a man after they have sent the warrant. C. A. [Citizens' Aide] contacted California authorities. C.A. did not call to urge that the warrant be dropped, but only to find out whether or not they intended to proceed with extradition. C.A. was informed that California did not intend to perfect extradition. The detainer in Iowa was dropped.[159]

Buffalo Ombudsman Demonstration Project

The Buffalo Citizens Administrative Service was an experimental project to test the feasibility of the Scandinavian Ombudsman concept on the local government level in the United States.[160] Without any attempt to make its presence known to those detained in county correctional institutions, the Service did receive a few complaints from prisoners, prisoners' families, and those on probation. One case is worth mentioning. The complainant's son had been arrested and taken to the county jail. At the arraignment, the judge had asked for a psychiatric examination of the prisoner. Shortly thereafter the prisoner's father secured his release on bail. The son was taking medication at the time of his arrest. He told his father that he was not given this medication while he was in jail. The son later pleaded guilty and was sentenced to a short term in the county jail. The father came to the Service because he could not obtain any information about the psychiatric examination and was worried that his son would not be given his medication while incarcerated. The Buffalo Ombudsman was immediately successful in having the jail officials give the son his prescribed medication and in obtaining an immediate psychiatric examination for him. On the basis of this examination, he was prescribed new medication and was to be examined again the day before his scheduled release. All of this met with the father's approval. The records at the county jail showed that, contrary to the son's statement, he was given his medication prior to his release on bail.

Unfortunately, the result of the investigation of the judge-ordered psychiatric examination was not so successful. The son's file in the jail contained a copy of a two-physician statement stating

159. IOWA CITIZENS' AIDE REPORT at 106.
160. *See* TIBBLES & HOLLANDS, BUFFALO CITIZENS ADMINISTRATIVE SERVICE: AN OMBUDSMAN DEMONSTRATION PROJECT (1970), [Hereinafter cited as TIBBLES & HOLLANDS, BUFFALO OMBUDSMAN PROJECT].

the prisoner was mentally ill. Under New York law, this statement should have been sufficient to have the prisoner committed to the appropriate mental hospital. The jail officials said that a clerk had taken the two-physician certificate to the district attorney's office, but that the district attorney had refused to dismiss the charges because of their severity. The district attorney's office, however, reported to the Ombudsman that it was never notified of the existence of the two-physician certificate. The jail officials and the district attorney's office gave different versions of the procedures that are followed when a two-physician certificate is filed for a prisoner in the county jail. The Ombudsman, judging that he was at an impasse in talking further with the two officials involved, addressed an identical letter to both jail officials and the district attorney's office, setting out the facts and conflicting stories in some detail and suggesting that efforts be made to update administrative procedures to assure that court-ordered two-physician statements are correctly handled by the two agencies.[161]

NEW OR PROPOSED PRISON GRIEVANCE METHODS

In addition to the general Ombudsmen in the United States who accept prison inmates' complaints as a part of their jurisdiction, there are several recently established or proposed prison grievance offices. The Oregon State Penitentiary has a Penitentiary Ombudsman appointed by the Superintendent, the Philadelphia Prisons have an experimental Ombudsman project, and the Maryland Legislature recently established an Inmate Grievance Commission. In addition, a Model Act for the Protection of Rights of Prisoners, prepared by the National Council on Crime and Delinquency, provides for establishing an inmate grievance procedure, and there is presently pending in the California Legislature a bill to establish a Correctional Ombudsman. This section will review these five types grievance-response mechanisms.

Oregon Penitentiary Ombudsman

In March 1971 the Superintendent of the Oregon State Penitentiary established the position of Penitentiary Ombudsman on an experimental basis and appointed the Ombudsman. The Ombudsman had been a correctional officer at the Penitentiary for many years. The idea for the Ombudsman originally came from the inmates who selected the candidates for the position by popular vote. All but one of their candidates were correctional officers.[162] The position

161. TIBBLES & HOLLANDS, BUFFALO OMBUDSMAN PROJECT at 87-88.
162. Letter from H. C. Cupp to Lance Tibbles, Jan. 26, 1972.

is a staff position and is directly responsible to the Superintendent. Inmates are asked to continue to pursue the established channels, seeking the Ombudsman's assistance if a reply is not given within a reasonable length of time. The Superintendent is satisfied with the results, and prefers it to any form of inmate committee or council.[163]

The position is obviously a type of executive Ombudsman, appointed by and responsible to the Superintendent. It more nearly resembles an internal grievance mechanism than an external one. In fact, since there is a state-wide Ombudsman in Oregon, an inmate can complain to the State Ombudsman if he is dissatisfied with the results of the Penitentiary Ombudsman. The fact that the prison grievance officer will not have all of the attributes of an Ombudsman—independent, impartial, external to the system—should not prevent creation of an additional complaint handling office. However, the use of the name Ombudsman should not be taken literally. The Oregon Penitentiary Ombudsman (and the general Oregon Ombudsman as well) clearly do not possess that combination of attributes which make the Scandinavian Ombudsman unique. Although it is not essential that all grievance officers be Ombudsmen, it may be worthwhile to restrict the name "Ombudsman" to grievance officers who possess the attributes of the Scandinavian Ombudsman.

Philadelphia Prison Ombudsman Project

The Pennsylvania Prison Society, at the invitation of the superintendent of the Philadelphia Prisons, has established a one year project for an Ombudsman in the Philadelphia prisons.[164] The Ombudsman project began operations on November 3, 1971. The Ombudsman's employer is the Pennsylvania Prison Society, a private community organization. The Ombudsman is an ex-inmate. He is not, of course, a governmental official, and he obviously has no power to change administrative decisions. He is, however, an external grievance channel and he is independent of the Philadelphia Prison system. He will receive and investigate complaints, investigate matters on his own motion, recommend suitable action, and make periodic reports. If publicity is required to support a requested change, it will be initiated by the Pennsylvania Prison Society. The Philadelphia Prisons became this country's first prison to have external review by a prison Ombudsman whose function and method

163. *Id.*
164. Testimony of G. Richard Bacon, Executive Director, The Pennsylvania Prison Society and James R. Reed, Ombudsman, The Pennsylvania Prison Society, *Correction Hearings* at 31-37.

of operation are closely patterned upon the Scandinavian Ombudsman. The results of this project will tell us much about the viability of a Scandinavian-type Ombudsman for prisons.

Maryland Inmate Grievance Commission

The 1971 Maryland Legislature established an Inmate Grievance Commission in the Department of Public Safety and Correctional Services which became effective on July 1, 1971.[165] The five commission members are appointed by the governor for staggered four year terms with the advice of the Secretary of Public Safety and Correctional Services. Two members must be attorneys and two must be familiar with matters handled by the Department.[166] The executive director receives a salary and serves at the pleasure of the Secretary.[167] Subject to the approval of the Secretary, the Commission can adopt rules and regulations, and it has done so.[168]

An inmate who has a complaint against an official or employee of the institution may submit it to the Commission. If the institution has an applicable grievance procedure which the Commission deems is reasonable and fair, the Commission may require the inmate to exhaust that procedure before pursuing his complaint with the Commission.[169] The executive director or any commissioner or commissioners can dismiss a complaint without a hearing and without specific findings of facts if they determine it to be wholly lacking in merit.[170] When a complaint is not dismissed upon preliminary review the Commission will hold a hearing if requested by the complainant. Three members of the Commission constitute a quorum. The Commission's decision is an "order" which includes its findings of fact, its conclusions, and its disposition of the complaint. If the complaint is wholly lacking in merit the Commission's decision is an order of dismissal. If the complaint is meritorious in whole or in part, the Secretary has 15 days to affirm, modify, or reverse the Commission's order. The Secretary can order prison officials to accept the Commission's "recommendation" in whole, or in part or he can take any action he deems appropriate.[171]

With the approval of the Secretary, the Commission can have

165. MD. ANN. CODE art. 41, § 204F (Supp. 1971).
166. *Id.* at § 204F(a).
167. *Id.* at § 204F(b).
168. *Id.* at § 204F(k); Department of Public Safety and Correctional Services, Inmate Grievance Commission Regulation, reproduced in House Judiciary Hearings Corrections, pt. III, Prisoners' Representation 255-257.
169. MD. ANN. CODE art. 41, § 204F(d) (Supp. 1971); Department of Public Safety and Correctional Services, Inmate Grievance Commissoon Regulations, reproduced in House Judiciary Hearings Corrections, pt. III, Prisoners' Representation 255-257.
170. MD. ANN. CODE art. 41, § 204F(3) (Supp. 1971); Department of Public Safety and Correctional Services, Inmate Grievance Commission Regulations reproduced in House Judiciary Hearings Corrections, pt. III, Prisoners' Representation 255-257.
171. MD. ANN. CODE art. 41, § 204F(f)(2)(Supp. 1971).

access to documentary evidence. Although the statute is somewhat ambiguous, the approval of the Secretary appears to be necessary before the Commission can subpoena witnesses and documentary evidence.[172] The inmate can appear before the Commission, call and question witnesses, and retain an attorney at his own expense.[173] Assuming the availability of Public Defender programs, the requirement of retaining his own attorney probably will not foreclose an inmate who cannot afford to hire his own.

The statute provides that state courts are not required to entertain an inmate's complaint, if it is within the Commission's jurisdiction, until the inmate has exhausted his statutory remedies. The statute purports to limit the court's review to the record of the Commission's proceedings and the Secretary's order, if any, to determine whether there was a violation of any state or federally protected right.[174]

Although Maryland became the first state to provide for a quasi-judicial proceeding for hearing inmate grievances, the procedure does not appear to have the advantages of an independent, external critic and it is probably more formal and time consuming than the simple and speedy methods of an Ombudsman. Outsiders are brought into the process, and this feature alone may justify the procedure. But the outsiders are not independent of the executive or even Department of Public Safety and Correctional Services. The governor appoints the commissioners with the advice of the Secretary. The executive director is appointed by and serves at the pleasure of the Secretary. The commissioners receive only *per diem* compensation for time engaged in official duties. Thus, they probably will continue their regular occupations. Therefore, the executive director is the key to the procedure. Under the regulations, he receives the complaint and makes the initial investigation. He can dismiss the complaint without a hearing or without specific findings of fact. The Commission's "order" which is later and more properly referred to as a "recommendation" is not binding on the Department. Thus the Commission has no more power than an Ombudsman, and is without the Ombudsman's two chief attributes —independence and impartiality. The Ombudsman's approach is usually inexpensive, informal, and speedy. Such is not likely to be the case with the Commission's hearings. The requirement of exhaustion of administrative remedies, seems unnecessary when the Secretary is completely free to ignore the Commission's recommendations. An inmate must file a complaint with the Commission

172. *Id.* at § 204F(g).
173. *Id.* at § 204F(h).
174. *Id.* at § 204F(l).

even though it may be apparent that the Secretary will not agree with the complainant even if the Commission does. If the statute is read as limiting the court to a determination of an abuse of discretion by the Commission, rather than the substantive merits of the grievance, the inmate may be in a worse position by an adverse decision by the Commission than he was prior to the statute when he could file a legal acation for determination of his complaint on the merits.

Model Act for the Protection of Rights of Prisoners

The National Council on Crime and Delinquency has prepared a Model Act for the Protection of Rights of Prisoners.[175] The Model Act sets out rights of citizens that are not removed by imprisonment, defines and prohibits inhumane treatment, establishes procedures for isolation in solitary confinement, requires prison officials to establish a disciplinary procedure, requires the department head to establish a grievance procedure, provides for judicial relief, and requires prison officials to establish rules and regulations for outsiders to visit prisoners and institutions. The provision of most concern here is Section 5 requiring the establishment of a grievance procedure.

> The director of the State Department of Correction (or the equivalent official) shall establish a grievance procedure to which all prisoners confined within the system shall have access. Prisoners shall be entitled to report any grievance, whether or not it charges a violation of this Act, and to mail such communication to the head of the department. The grievance procedure established shall provide for an investigation (aside from any investigation made by the institution or department) of all alleged grievances by a person or agency outside of the department, and for a written report of findings to be submitted to the department and the prisoner.[176]

The Council reasons that this "autonomous Ombudsman agency" provides inmates with a simpler procedure, than currently available by legal action, to review allegation of inhumane treatment.[177]

The head of the state correction agency is required to establish

175. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS (1972).

176. *Id.* § 5, at 17-18.

177. In most instances it is the prisoner's petition to a court that uncovers inhumane treatment. Filing such a petition and presenting sufficient proof face many obstacles. A simpler procedure for prisoner complaints—one that would be more accessible to prisoners and closer to the prison administrator —is established in Section 5, which provides for an autonomous "ombudsman" agency empowered to receive and act on prisoner grievances.
Id. at 12.

a grievance procedure composed of a person or agency outside of the department. The procedure is thus external to the correction agency, but, because of the executive appointment, not necessarily independent of the agency. The provision is broad enough to allow the establishment of a wide variety of grievance mechanisms tailored to the needs of the particular system. For small systems, an external grievance handler could be appointed on a part-time basis, when the volume of complaints does not justify a full-time position.

California's Proposed Correctional Ombudsman

California may become the first state to enact legislation establishing an Ombudsman for Corrections. In the 1971 session, both houses of the California Legislature passed a bill creating a Correctional Ombudsman.[178] However, the bill was vetoed by the Governor. The bill had developed from hearings held by the Assembly Interim Committee on Criminal Procedure in December 1970 and a report prepared for the Committee in February 1971.[179] The bill was amended six times before passage. A bill identical to the one vetoed has been introduced in the 1972 California Legislature.[180]

The Correctional Ombudsman bill currently before the California Legislature would create a Joint Legislative Committee on Corrections Administration consisting of four Senators and four Assemblymen, which would nominate an Ombudsman for Corrections and would oversee the functioning of his office.[181] The Legislature would appoint the Ombudsman by concurrent resolution.[182] The Joint Legislative Committee on Corrections Administration would appoint the Ombudsman's assistants and staff.[183] Among the Ombudsman and his staff there must be at least one person schooled and experienced in each of the following areas: law, investigative technique, and criminology and corrections.[184] The minimum qualification for the investigative staff is five years experience in "corrections" or its equivalent.[185] The Ombudsman would have jurisdiction to investigate,

178. California Assembly Bill No. 614, 1971 Regular Session.
179. *See* California Assembly Interim Committee on Criminal Procedure, Hearing on the Desirability of a Correctional Ombudsman (1970); Timothy L. Fitzharris, The Desirability of a Correctional Ombudsman: A Report to the California Assembly Interim Committee on Criminal Procedure (1971); and California Assembly Interim Committee On Criminal Procedure, The Penal Ombudsman (1971).

The Fitzharris report to the Interim Committee is a lengthy review of the Ombudsman concept, the degree of judicial review of the correctional system, present grievance procedures available to prison inmates, and previous experience with correctional Ombudsmen. His proposals for a correctional Ombudsman for California are the basis of the two bills discussed in this section.
180. California Assembly Bill No. 5, 1972 Regular Session.
181. *Id.* at §§ 10702(a) and (b).
182. *Id.* at § 10702(a).
183. *Id.* at § 10704(a).
184. *Id.* at § 10704(c).
185. *Id.* at § 10700(d).

upon receiving a complaint or upon his own motion, the administrative acts of seven specific correctional agencies.[186]

In conducting investigations, the Ombudsman would have power to subpoena testimony and records, enter without notice to inspect the premises of an agency, and hold hearings.[187] The Ombudsman is to be a supplemental grievance channel, and would not limit any present remedy, right of appeal, or objection.[188] The bill also provides that California's right to information act does not apply to the office of Ombudsman for Corrections.[189]

One of the amendments to the 1971 bill eliminated funding for the office. The 1972 bill does not contain an appropriation. Unless federal funds can be found, enactment of the bill into law will not make its procedures operative. The bill does not state who has access to the Ombudsman for Corrections. Unless the bill is amended, the Ombudsman could accept from anyone complaints concerning the administrative act of the correctional agencies.

The California bill for an Ombudsman for Corrections appears to provide an approach superior to the other grievance mechanisms discussed in this section. The California proposal, providing for appointment by the State Legislature, would create an independent external official to investigate prison grievances. All of the present avenues of handling prison grievances are continued. A new external critic would supplement existing methods both internal complaint channels and judicial review.

It is submitted that the California supplemental approach is superior to the Maryland approach of making judicial review dependent upon prior usage of the Grievance Commission. It is to be expected that most complaints will be submitted to the Ombudsman before initiation of court action. But the Ombudsman should be an additional avenue and an inmate should not be required to use him prior to beginning legal action. The Ombudsman's method of investigating complaints is left to his discretion. His investigation can be much more informal and speedy than can the Maryland Inmate Grievance Commission, which must hold a hearing if the complaint is not dismissed upon preliminary review.

The bill has two limitations concerning the Ombudsman's assistants that might prove troublesome. The Legislative Joint Committee rather than the Ombudsman appoints the assistants. This limitation is a potential infringement on the Ombudsman's independence. The requirement that an investigative staff member must have five years in corrections "or its equivalent" is also too restric-

186. *Id.* at §§ 10709, 10710, and 10700.
187. *Id.* at §§ 10714(a) and 10715.
188. *Id.* at § 10723.
189. *Id.* at § 10724.

tive. Hopefully the equivalency alternative would be used when necessary to hire an assistant whose background is in other areas. The bill would be improved by the removal of both of these limitations.

AN OMBUDSMAN'S REVIEW OF PRISON ADMINISTRATION—SOME SPECIFIC PROBLEMS

Those who are convinced that present means of responding to prison inmates' complaints, are insufficient and inadequate are faced with the problem of suggesting a new grievance mechanism which will meet the objections to present procedures. An analysis of the handling of prison inmates' complaints by both foreign Ombudsmen and presently existing American Ombudsmen convinces this writer that a prison grievance handling device based upon the Scandinavian Ombudsman model is a viable means of prison complaint handling. This section will examine some of the practical problems that will arise in establishing Ombudsmen for American prisons.

A General Ombudsman vs. a Specific Ombudsman

The Scandinavian Ombudsmen for the most part are general Ombudsmen. They have country-wide jurisdiction over agencies of the national government. The exceptions are the Swedish Military Ombudsman which was recently merged with the Civil Ombudsman, and the Norwegian Military Ombudsman which predates the Civil Ombudsman by a decade.

The general Ombudsman has the advantage of reviewing administrative procedures in all executive departments. No one agency can feel singled out for special scrutiny. Lessons learned in investigations involving one agency can be applied to other agencies.

In the United States, however, creation of a statutory general statewide Ombudsman has been rejected in all states except Hawaii and Nebraska. In terms of both population and land area, several states exceed an entire Scandinavian country in population or land area, or both. It is difficult to devise a workable Ombudsman office to handle complaints against all state administrative agencies in such populous states as California, New York, Pennsylvania, Illinois, or Texas. The office may well be inundated with so many complaints that it will be unable to operate in a manner similar to the simple and direct style of the Scandinavian Ombudsmen. However, an Ombudsman for a specific agency or a limited number of state agencies, may be workable, even in the most populous

states.[190] In fact, if the Ombudsman concept works well when applied to a specific agency, there may be an incentive for other states to initiate some form of independent intermediary for either particular agencies or, in smaller states, for all state agencies.[191]

A state may establish a state-wide general Ombudsman office which will accept complaints against prison officials as part of his general complaint handling duties. If that is thought to be too large of an undertaking, the state can establish an Ombudsman to accept and investigate complaints only against prison officials, or Corrections Department officials if it is desired to include other correctional agencies in addition to prisons. A prison Ombudsman located within the prison walls has the advantage of being able to immediately investigate a complaint, including the ability to inspect without notice any physical facility at any location in the prison. The prison Ombudsman should have access to every corner of the prison at any time. He should be able to talk to any inmate at any time he desires. In this manner, the prison Ombudsman can check on any physical condition in the prison and the physical condition of any inmate. The prison Ombudsman can personally attend prison disciplinary hearings in addition to reviewing the written record.

What is important about the creation of either a general or a prison Ombudsman is that the office have the combination of attributes that make the Scandinavian Ombudsmen unique—independence, impartiality, expertise, and accessibility by the potential complainants. In the Scandinavian countries, the Ombudsmen are appointed by the legislature. However, in the United States, the tradition is for the chief executive to fill appointments to high-level governmental positions, subject sometimes to legislative confirmation. Therefore, Professor Gelhorn proposes appointment by

190. And, one of the primary objections, and, I think the one which was the most compelling against having an ombudsman in California was the size of our state. When twenty million people—the largest ombudsman country today is Sweden with eight million and Sweden has, in the past year or two, had to treble the size of its office, that is they merged the ombudsman and the ombudsman for the military into a 3-man office. So, one asks, "How, in a state like California, can you have the ombudsman and still be effective, with our great number of twenty million." There are a great number of answers that come to mind: more ombudsman, or you could do what this committee is considering doing and that is setting up ombudsman for specific areas of government. So, twenty million is too large for the classical Scandinavian ombudsman probably, but the prison population of a state of this size might be just about right for such a position.
Testimony of Professor Stanley v. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 18-19 (1970).

191. Bills to establish state Ombudsman have been introduced in several state legislatures during their 1972 legislative sessions. A Constitution Convention in North Dakota has adopted a proposed State Constitution to be voted upon by the people in April 1972. The proposed State Constitution contains a provision that the legislature shall provide by statute for the establishment of an independent governmental agency to receive complaints against agencies, officials, and officers. Proposed Constitution of the State of North Dakota, art. XI, § 6.

the chief executive, with confirmation by two-thirds of each house of the legislative body.[192] In the Harvard Journal on Legislation, model state statute, appointment is by the governor with the advice and consent of the senate.[193] However, the two states which have created an Ombudsman by statute have both used some form of legislative appointment. In Hawaii, the appointment is by a majority vote of each house of the legislature in joint session.[194] In Nebraska, the appointment is by a two-thirds vote of the legislature from nominations submitted by the Executive Board of the Legislative Council.[195]

If states wish to experiment with an Ombudsman limited to a specific agency or agencies, two of the most appropriate agencies are the prison system and the public welfare system.[196] In addition to the points covered elsewhere in this paper, the nearly total isolation of prison inmates from traditional means of communication is sufficient reason for providing a special grievance mechanism specially tailored to inmates' needs.

Internal Prison Grievance Machinery Needed

The establishment within the prison of an adequate internal grievance-response mechanism is of first importance. Thought should be given to establishing or improving internal grievance channels before the creation of a prison Ombudsman or any other type of external review mechanism. Internal grievance mechanisms must be relied upon to resolve the vast majority of inmates' complaints. Routine questions concerning job assignments, availability of certain magazines, when an inmate becomes eligible for parole, transfer to another institution, in addition to disciplinary machinery, should be handled in the first instance by regular prison channels.

External review should supplement the internal complaint receiving mechanisms. The Ombudsman is a critic of administrative procedures, and he should not be spending all of his time retrieving

192. Gellhorn, *Annotated Model Ombudsman Statute,* OMBUDSMEN FOR AMERICAN GOVERMENT? §4, at 159, 161 (Anderson ed. 1968).
193. *A State Statute to Create The Office of Ombudsman,* 2 HARV. J. LEGIS. 213, 222, § 202 (1965).
194. HAWAII REV. STAT. § 96-2 (1968).
195. NEB. REV. STAT. § 81-8241 (Supp. 1969).
196. *See e.g.,* TIBBLES & HOLLANDS, BUFFALO OMBUDSMAN PROJECT at 46, where the Directors of the experimental ombudsman program in Buffalo concluded that "[I]t may well be that the Social Services Department [County Welfare] is the agency at the local government level that could derive most benefit from an independent intermediary, who would be available to welfare recipients and applicants to check on the handling of welfare and Medicaid assistance."
See IOWA CITIZENS' AIDE REPORT at 2 of the transmittal letter to the Governor, where commenting on a bill currently in the Iowa Legislature which would establish a legislative Ombudsman, the Citizens' Aide says "If it is determined that Iowa will also exclude local government from Ombudsman jurisdiction, I suggest that exception be made to the exclusion regarding County Departments of Social Services."

information and responding to matters of daily routine.[197] If there are no internal complaint channels, the external critic will be overwhelmed with day-to-day adjustments that should be handled within the prison system.

Several recently established "prison Ombudsmen" are in reality additional avenues of internal prison grievance handling. They often lack independence and impartiality. The danger here is not their establishment—they are obviously needed—but the possibility that a true prison Ombudsman's potential will be judged by the performance of these officers. If the grievance officer is not external to the prison system and relatively independent of, not only the corrections department, but also the chief executive, he ought not to be classified as an Ombudsman. The establishment of additional internal prison grievance mechanisms is long overdue, but they should not be confused with external critics who act as independent intermediaries.

It may be the case, however, that the establishment of a general or prison Ombudsman prior to the improvement of internal complaint handling devices, will speed the improvement of internal complaint procedures. The Ombudsman, in part for reasons of self-defense, may recommend that the existing complaint handling devices be improved. The Ombudsman's experience may show the administrators where the internal complaint mechanisms are inadequate. The experience of the Hawaii Ombudsman in working with the complaint handling is an example of the Ombudsman helping to improve prison grievance response mechanisms.[198]

---

197. [T]he ombudsman office is a fail-safe device. That is, it's not a primary complaint handling mechanism. Every executive agency should have it's own internal grievance mechanism. This obviously goes for prisons, as well. To make an analogy to the military, for example, I think that some office like an inspector general is obviously what is called for. This office exists in the prisons in countries like New Zealand or something comparable to it. There should be an efficient, effective and accessible way for handling grievances by the agency itself. This is no substitute for an ombudsman. These internal grievance mechanisms often have many more people working on them than you would expect for an ombudsman's office. Ombudsmen's offices are traditionally very small. The largest is now in Sweden where there are three ombudsman and a small supporting staff. As I mentioned, Denmark may go to two. In Each of the other cases, there's only one and the staff ranges from a handful of three or four up to perhaps a dozen or somewhat more. This small group of ombudsman and staff cannot handle all the complaints; and so let me say that if you do not have an internal grievance, mechanism, you would have to create one even before you considered setting up an ombudsman. It seems to me that one of the things that consideration of an ombudsman for any area of government does is to force you to take an inventory. To force you to ask what kinds of mechanisms already exist. How can they be improved. This is one of the great contributions of an ombudsman. . . .

Testimony of Professor Stanley V. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 16-17 (1970).

198. *See* note 149 *Infra* and accompanying text.

Advantages of an Ombudsman Over Internal Prison Grievance Procedures

As important as the prison internal grievance machinery is, it has its limits. It is part of the prison system. Those who are called upon to respond to the inmates' complaints work for the prison and for higher prison officials. Their first duty is to their superiors. They are the eyes and ears which provide information to the officials concerning what is happening in the cell blocks. This is true for the correction officers and caseworkers who handle inmate complaints in addition to their regular duties, and it is true for those whose primary duty is to respond to prisoner complaints. Even if a complaint is fully investigated and an honest answer given to the inmate, the answer is suspect. Suspect because the answer is given by the people who are charged with running the institution—the people whose omissions or commissions are the subject of the complaint. This is true even though the internal grievance mechanism is labeled an "Ombudsman." A grievance mechanism responsible to the chief executive will always have these limitations and a lack of inmate confidence.

Even when methods are instituted to allow an inmate to file his complaint at or near the top of the corrections department, the chances are that the investigation of the allegations, the judgment as to their validity, and the recommended action will come from the same prison officials who would have responded if the inmate had gone to his caseworker with his complaint. In June 1971, the United States Bureau of Prisons established what it calls an "ombudsman monitoring function" in the Office of Legal Counsel, which is directly responsible to the director of the Bureau. A mechanism is supplied whereby the inmate can send his unopened complaint directly to the Legal Counsel's office, bypassing the local prison administration. But it appears that in responding to the complaint, it is often passed back down the line to the warden of the prison, and down to the person who is most likely to be aware of the factual situation involved in the complaint. Often the complaint will be given to the inmate's caseworker, the person to whom the inmate would have gone with his complaint before the inception of the new program. It is also likely that once the answer is formulated, it will be sent back up the administrative ladder, reinforced at every administrative level until it reaches

199. In order to provide a thorough review of inmate complaints and to insure that policies are being followed, the Bureau of Prisons established in June 1971 an "Ombudsman monitoring function" with the Office of Legal Counsel. This office is directly responsible to me [the Director] and is composed of attorneys who have no responsibility for institutional operations.

Under this newly established system, all complaints concerning inmates

the Legal Counsel's office.[199] The Director frankly admits that the new function does not have the attributes of an Ombudsman.[200] The above comments are not meant to suggest that the new mechanism does not serve some useful function. But its operative effect appears to be not much different than other types of internal review. It should also be noted that the Director has publicly stated his support for an Ombudsman-type of grievance mechanism if it is properly established.[201]

Another limitation of internal grievance mechanisms is their inability to bring a fresh outlook to the problem. A prison official is likely to see the problem through the eyes of a prison official rather than an impartial administrative critic. A Report by the Center for Correctional Justice states that the executive Ombudsman in the Oregon State Penitentiary has been unable to obtain needed changes in the rules although he has been able to correct individual cases of injustice, inefficiency, and oversight.[202]

An administrative agency head has difficulty investigating and criticizing his officers and employees while continuing to keep their loyalty and confidence. This is apparent when the officials and

---

are sent to the legal office where they are screened according to three categories and disposition is based upon the nature of the complaints. 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 work release program are sent to the appropriate Bureau Division for disposition.

Other requests or complaints which, if substantiated, appear to indicate that Bureau policy is not being followed, are referred to the appropriate Division to ascertain the facts, take remedial action of necessary, and to notify the Office of Legal Counsel and Review within thirty days of the action taken.

The third category relates to serious charges made by inmates or employees which would indicate wide-spread or serious violations of Bureau policy or legal rights. In those cases, the legal office retains control and by direct, immediate contact, ascertains the facts. If the facts indicate that corrective action is needed, the Director and other top management staff are notified and appropriate action taken. There have been several cases where an attorney in that office visited the institution on the day following receipt of the correspondence, conducted an investigation, and after consultation, made a disposition.

Statement of Norman Carlson, Director, United States Bureau of Prisons, *Correction Hearings* at 118.

200. *Id.* at 20.

201. *Id.* at 21-23.

202. The Ombudsman have been successful in cutting though bureaucratic red tape in assuring that prescribed regulations are followed in specific cases. Officals at the Oregon Pententiary are convinced that the Ombudsman has contributed to a more stable "atmosphere." On the other hand, the Ombudsman seems to have made little progress in changing the general policies and procedures under which government agencies operate. (For example, Oregon prisoners now have some assurance that the written rules concerning disciplinary procedures will be followed; the rules, however, remain unchanged.) This is not surprising in Oregon, where the prison Ombudsman, after sixteen years' experience as a guard, continues to be responsible to the Superintendent and to share most of the basic assumption of correctional personnel. Recently, the Ombudsman has become frustrated by the necessity of acting as a middleman between inmates and staff and by his lack of independent power to change practices that seem unfair. The inmates express faith in the Ombudsman's sincerity but doubt in his ability to do anything more than "play politics."

FIRST QUARTERLY PROGRESS REPORT, CENTER FOR CORRECTIONAL JUSTICE (1971). Quoted in NATIONAL COUNCIL ON CRIME AND DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS 12-13 n.11 (1972).

employees are generally subject to public criticism as are police officers and prison officials. It is extremely rare to have the head of a police agency or of a prison or corrections department acknowledge publically that one of his staff has acted improperly. A corrections commissioner may find it necessary to support his correctional officers from outside attacks to prevent a break-down in morale and confidence. Even a reform-minded commissioner may be prevented from making the type of changes necessary because of the prison staff's opposition.[203]

A Prison Ombudsman at the National Level

The establishment of a prison Ombudsman at the national level to handle complaints about the United States Bureau of Prisons is more difficult than is the establishment of an Ombudsman for state prisons. No one has yet seriously suggested a national Ombudsman based on the Scandinavian model for all federal governmental agencies.[204] Thus the technique of having a national general Ombudsman include the prison system in his jurisdiction of governmental agencies is not a viable alternative. Even if it were, there could be no personal investigation of complaints by the Ombudsman. The central national ombudsman would have to rely on the staff of the Bureau of Prisons to investigate most of the complaints for him.

A possible alternative is to have a national Ombudsman limited to one, or at most a few agencies. A potential vehicle for this arrangement is presently before Congress. A bill to amend the Economic Opportunity Act of 1964 provides a means for experimenting with the Ombudsman concept.[205]

The bill would establish an Office of Administrative Ombudsman in the legislative branch to conduct demonstration Ombudsman programs on a regional basis to deal with individual complaints against federal administrative actions, particularly affecting the poor. Under the bill, the Ombudsman would be appointed by the Speaker of the House of Representatives and the President pro tempore of the Senate after consultation with the majority and minority leaders of each house. The bill would also establish an "American Ombudsman Foundation" in the executive branch to initiate and support demonstration projects designed to test the effectiveness of the adoption of the Ombudsman concept at the state and local level.

203. *See* testimony of Representative Herman Badillo, *Correction Hearing* at 2, 16.
204. Professor Bernard Schwartz has urged that the British Ombudsman prototype, the Parliamentary Commissioner for Administration, be tried at the national government level. The Commissioner may act only upon cases referred to him by a member of parliament. Professor Schwartz argues that this feature can make the Ombudsman concept workable on the national government level. Schwartz, *The Parliamentary Commissioner and His Office: The British Ombudsman in Operation,* 45 N.Y.U.L. REV. 963 (1970).
205. S. 2200, 92nd Cong., 1st Sess. (1971).

Under the bill, the demonstration projects would be designed to test the effectiveness of the adoption of the Ombudsman concept at the state and local level. The demonstration projects would be limited to acts of the Department of Labor; the Department of Health, Education, and Welfare; the Department of Housing and Urban Development; and the Office of Economic Opportunity.

This bill could easily be amended to add the United States Bureau of Prisons to the agencies covered. One of the projects authorized by the bill might be the creation of an independent intermediary for three or four of the largest Bureau prisons. The administrative Ombudsman could appoint a deputy for each institution. Either the Ombudsman Foundation to be established under the bill, or the administrative Ombudsman's central staff, could coordinate investigations, findings, and recommendations of the Ombudsman at each institution so that each could have the benefit of the experience and work products of his counterpart in other institutions.

One other agency should not be overlooked in the serach for new methods of improving grievance procedure in federal prisons. The Administrative Conference of the United States was established:

> . . . to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.[206]

The Conference is given wide-ranging powers to (1) study the efficiency, adequacy, and fairness of administrative procedures used by federal administrative agencies, (2) arrange for the exchange of information between agencies, and (3) collect information and statistics, to improve the administrative procedures of federal administrative agencies.[207]

In addition, the Chairman, as chief executive of the Conference, has broad powers to inquire into matters which he considers important for Conference consideration.[208]

In 1968, the Chairman of the Administrative Conference stated that he did not regard the Conference as a super-administrator or an Ombudsman that would handle individual complaints.[209] He

206. 5 U.S.C. § 571 (1970).
207. 5 U.S.C. § 574 (1970).
208. 5 U.S.C. § 575 (1970).
209. Williams, *Problems Confronting the Administrative Conference,* 21 AD. L. REV. 11, 16 (1968).

did not rule out the use of citizens' complaints as a means to identify troublesome areas which the Conference might investigate for the purpose of making procedural recommendations.[210] The Conference has a potential role to play in improving administrative grievance-response procedures in federal prisons.

The Administrative Conference has one potential advantage over the Ombudsman concept. The Conference is composed primarily of high-ranking federal government administrators and respected non-governmental figures. If Presidential directives or remedial legislation is needed, recommendations formulated by people of this stature should carry considerable weight with other administrators, as well as with the executive and legislative branches. The Conference's view may receive more attention and respect than the recommendations of a lonely "impractical" Ombudsman isolated from the realities of running an agency on a day-to-day basis.[211]

Selection of the Ombudsman

The selection of the proper person to be the Ombudsman is always a point of concern. The Ombudsman must be a person of high integrity and he should have a relatively wide reputation as a person who can be independent of the partisan political process and as one who will be an impartial intermediary in all matters within his jurisdiction. He must have a general knowledge of governmental agencies and an awareness of how the bureaucracy works. If he is to be a specific Ombudsman handling complaints involving only one agency, he must have a working knowledge of that particular agency.

But the Ombudsman is not a super-human exercising mystical powers not possessed by mortals. The essence of the Ombudsman is his role as an independent, impartial expert who is accessible to all citizens who feel aggrieved by governmental action. He is not an agent, advocate, or attorney for either party, but remains independent of both. No other governmental official has this combination of attributes. The Ombudsman's review of numerous complaints can detect defects in administration which will not be revealed by isolated administrative or judicial appeals of individual cases. He is not burdened with responsibility for running a department. He has no power to change administrative decisions; he can only recommend and bring public attention to the matter. It is these qualifications and focus that give the Ombudsman the ability to be an effective mediator of disputes between the citizen and his

210. *Id.* at 16-17.
211. *See* GELLHORN, WHEN AMERICANS COMPLAIN/GOVERNMENTAL GRIEVANCE PROCEDURES 98-100 (1966).

government. The qualifications of the particular individual obviously are important. Yet it is the nature of the Ombudsman's combination of attributes, not the superiority of the individual that gives the Ombudsman concept viability in modern society.

Nevertheless it may be asserted that the appointment of a prison Ombudsman involves considerations not present in the selection of a general Ombudsman. Although prison administration is a part of public administration, it can be argued that a prison Ombudsman cannot be effective unless he has a knowledge of the unique and difficult problems facing prison administrators. Managing a Motor Vehicles Department, it can be said, is vastly different than managing an institution housing convicted felons.

Although the argument has some merit, this is not the first instance where a public administrator is heard to say that an Ombudsman just would not understand the peculiar problems involved in the administration of his particular agency. Every governmental agency has some areas requiring special training, knowledge, and skills which are different from those required in other agencies. But the unifying theme is that they all involve public administration: the goal of administrative procedures in all agencies is to provide fair and efficient service to the public. To the extent that the procedures do not accomplish this goal, they are subject to the Ombudsman's criticism. The question of whether the internal administrative decision making process and grievance-response mechanisms are adequate, given the type of agency and the nature of its operation, probably is no more difficult to answer for prisons than it is for a welfare department or a public housing authority.

What type of background should a prison Ombudsman have in order to be able to be an impartial mediator of questions involving the adequacy of prison procedures? If he has been a prison official for a number of years, will he be able to set aside those assumptions and values which are part of the makeup of a correction officer? Will he be able to impartially judge the merits of a challenged procedure without assuming that its existence is its justification? Will an ex-inmate be able to understand government bureaucracies and necessary prison administrative procedures and regulations? Will he be able to argue persuasively to prison officials that certain procedures no longer accomplish their original purpose, now that the number of inmates has doubled? Will an outsider understand either the problems facing the prison administrator of maintaining order in a prison or the feeling of isolation, despair, and hopelessness facing the inmates?

Although it appears to beg the question, the answer to these questions probably is that it depends upon the qualifications of the

individual—whether an ex-prison official, an ex-inmate, or an outsider. Looking at the person, his prior activities, and his experience with bureaucratic procedures, does it appear that he has a general understanding of how the prison system works, what problems are facing the prison administrators, and a general understanding of how the system affects prisoners? Most importantly can he put on the "white hat" and be an impartial intermediary whose judgment will be respected by both inmates and prison officials?

Perhaps an additional comment on race is needed. In many prisons, the inmates are predominately non-white. In all prisons, the prison staff from the wardens to the guards are nearly all white. Thus we have a prison system where the dominant positions of authority are white and the subservient positions of powerlessness are non-white. The argument is made that a white Ombudsman will not be trusted by non-white inmates and a non-white Ombudsman will not be trusted by white prison officials. The conclusion of some who have thought seriously about the problem is that the Ombudsman must be multi-racial, or at least bi-racial. Accordingly, some proposals call for the Ombudsman function to be handled by a committee or panel.[212]

The solution is a difficult one; as in fact are most remedies for the pernicious problems caused by our country's long history of racial intolerance. It is submitted, however, that the multi-racial prison Ombudsman is not an adequate answer. Ultimately, the Ombudsman must decide whether or not the complaint has merit. If it is judged to have merit, it will favor non-whites; if it is judged without merit, it will favor whites. The fact that the decision was by a majority of vote of a multi-colored committee will not hide this fact. The better approach is to select the Ombudsman on the qualifications listed above. The Ombudsman should be a single individual. His credibility with both the inmates and the prison officials should be based upon

212. Representative Herman Badillo, United States Congressman from New York and a member of the Observer Committee which attempted to negotiate a settlement to the Attica prisoner revolt in Sept. 1971 proposes that the Prison Ombudsman be a bi-racial three-man committee.

> [T]o be very realistic about it, I think that if the ombudsman at each facility is going to have credibilty that it would have to be at least a committee of three. I say this because we have to face reality.
>
> The fact is, most of the prisoners who are in prison today are black. It certainly was true in Attica. It is certainly true in New York City. Practically 100 percent of the guards are white.
>
> Of course, one of the recommendations here is that job training programs for black and Puerto Rican guards be started, but it is going to take a long time before this is done. If you have one ombudsman for each prison and the Governor appoints a fellow who is black, he won't get the support of the white guards.
>
> If you appoint someone who is white, he is not going to have credibility with the black prisoners. So one ombudsman just can't do it. If you have three then you have flexibility. You can look at the prison and maybe appoint one white, one black and somebody who will have the responsibility of mediating.

Testimony of congressman Herman Badillo, *Correction Hearings* at 2, 8.

his prestige, his background, and the record of impartiality he builds as he handles individual complaints. If the prison system is large enough to support assistants for the prison Ombudsman, his individual staff members can have special qualifications. Such qualifications might include: legal skills, investigative skills, a knowledge of public administration, expertice in penology and corrections. There is no reason for the staff not to be multi-racial. Each staff member should be utilized in those areas where he is most valuable.

Powers of a Prison Ombudsman

The prison Ombudsman should have power to investigate, upon receiving a complaint or upon his own motion, any act, omission, decision, recommendation, practice, or other procedure of the prison system. He should have immediate access to all parts of the institution. He should have the power to recommend appropriate action by the prison administration. But he should not have the power to make or change any administrative decision. The prison Ombudsman should also have the power to make annual and special reports of his investigations and recommendations to the state legislature, any of its committees, to the press, and to others who may be concerned.

The philosophy behind the Ombudsman concept is that administrative procedures can be improved and individual grievances rectified by the use of an independent, impartial expert acting outside the administrative chain of command. The external critic has a different focus than the administrator charged with the operation of the agency. The Ombudsman is not burdened with making or carrying out administrative decisions. He is a critic of administrative procedures. His approach is to be informal, speedy, and cheap. He can do this only if he does not have power to overrule the decision of the administrator. If he is given the power to change an administrative decision, some mechanism would have to be added to provide for appeals from his decision. The Ombudsman's reports should identify defects in administrative procedures that have not been changed at his suggestions. He also should propose legislative amendments if his investigations show that this is needed.

Scope of Prison Ombudsman's Jurisdiction—Type of Complainant, Type of Complaint

The question of defining those complaints a prison Ombudsman can accept is not a simple one. Obviously the Ombudsman should be able to accept complaints from inmates physically within the prison. But what about those who have been released on parole and who have a complaint against the corrections department or corrections officials? Although those on parole are not subject to all of the con-

straints and limitations of those within prison walls, nevertheless they are directly and intimately affected by the department's acts or failures to act. The incident reported by the Iowa Citizens Aide, referred to earlier,[213] where the parolee lost his job when the parole officer told the employer that his employee was a parolee is an example, not only of a loss suffered by an individual as a result of action by a corrections department officer, but also of a breakdown in department procedures whereby the parole officer and the parolee are to work together to ease the problems of the parolee's re-entry into society.

There is an additional problem of whether the Ombudsman should accept complaints from persons not under the jurisdiction of either the prison or the corrections department, but which relate to a particular inmate or class of inmates, or relate to a condition within the prison. It is obvious that the Ombudsman should not be burdened with complaints from citizens who have no direct interest or involvement in the subject matter of the complaint. But what of a complaint from an inmate's attorney concerning some matter directly affecting his client, which is otherwise within the Ombudsman's jurisdiction? What of a complaint from a relative or friend of the inmate concerning prison actions directly affecting the inmate?

It is submitted that the prison Ombudsman ought to have the ability to accept complaints from parolees who are within the jurisdiction of the corrections department. In addition, the Ombudsman ought to be able to accept complaints from "outsiders" if the complaint prima facie involves, prison conditions or prison officials' action otherwise within the Ombudsman's jurisdiction. There may be some matters which would not come to the Ombudsman's attention without such outsider's complaint. He ought to have the discretion to investigate these complaints.

The Ombudsman ought to have a wide range of discretion not to accept complaints, even from inmates, if there is another remedy available which should be used, if the complainant's interest is insufficiently related to the subject matter of the complaint, if the complaint is trival or frivolous, or if the complaint is too stale to justify an investigation. In addition, the prison Ombudsman ought to have the power to investigate on his own motion, even without a complaint. The protection afforded by the Ombudsman's powers to investigate on his own motion and his discretion to refuse to investigate when it is not worthwhile, provides the prison Ombudsman with ample protection from being overwhelmed by his discretionary acceptance of complaints from those outside prison walls.

213. *See* note 151 *Supra* and accompanying text.

Complaints of Physical Mistreatment

One of the first and probably one of the most difficult cases that the prison Ombudsman will be called upon to handle will involve an inmate's allegation that he was physically beaten or mistreated by prison officials. Usually there will be no witnesses to the incident other than the accused guard and the inmate. The Ombudsman is not a trier of fact—he can inspect records, he can inspect physical facilities, he can criticize administrative procedures, but he cannot reconstruct the facts surrounding the incident between the guard and the inmate. If they give different versions of what happened, the prison Ombudsman will be unable to ascertain who is telling the truth.

The Ombudsman, upon receiving the complaint, can see that the inmate is immediately examined by a doctor. Thus a medical report made as soon after the incident as possible will be available for the Ombudsman's use. But the guard's story will, in all likelihood, contradict most of the essential elements of the inmate's story. The Ombudsman has no authority to decide who is telling the truth. The Ombudsman can, however, review the methods by which the prison administration internally handles inmates' complaints of misconduct by prison officials. If there is no procedure, he will need to make recommendations concerning establishment of a procedure. He can determine whether the procedure is known to the inmates, whether it gives equal opportunity to both sides to present their case, and whether it is otherwise reasonable. It is prison supervisors who review the conduct of prison officials. The Ombudsman will not be able to criticize their conclusion in any particular case, but he is in a position to criticize, positively or negatively, the procedures used in reaching those conclusions. By his record keeping, the Ombudsman will be able to tell when, over a period of time an unusually large number of misconduct complaints have been lodged against a particular officer. The Ombudsman will also be able to see whether an officer who has been found to have mistreated an inmate is actually disciplined or punished in an appropriate manner.[214]

Inmates' Fear That Their Complaints Will Be Used for Reprisal

One of the restraints preventing inmates from using internal complaint mechanisms is the fear that the complaint will be included in their file and may be used by prison officials to suspend their "good time" credits, or as evidence against them at their parole hearings,

214. This procedure was recommended by this writer and another for the handling of complaints of misconduct by police officers. *See* TIBBLES & HOLLANDS, BUFFALO OMBUDSMAN PROJECT at 50-52. This writer perfers this type of review of internal police grievance procedures by an independent, impartial, and external critic, to the establishment of police review boards.

or in other forms of reprisal. Inmates in the federal prison system often think that their letters deposited in the "Prisoners Mail Box" and their complaints sent to the "ombudsman monitoring function" in the Legal Counsel's office ultimately will find their way back to their files for potential use against them. Although letters in the "Prisoners Mail Box" and those sent to the Legal Counsel's office are posted without being opened or inspected by prison officials, the identity of the writer is known. When an attorney, Congressman, or the Legal Counsel's office asks the prison officials for their response to an inmate's complaint, there is nothing to prevent the officials from placing the inmate's complaint in his file.

The prison Ombudsman can protect the inmate from the placing of his complaint in his record and using it against him in two ways. First, the Ombudsman can inspect the prison records to see if, in fact, the incident is reported in the inmate's record. If it is, he can ask that it be removed. The Ombudsman should also have access to the files upon which the Parole Board uses in making its determination whether to grant parole. He can see if, in fact, the incident was relied upon by the Parole Board. The Ombudsman can review the decision to suspend an inmate's good time to determine if the inmate's complaint was the reason for the "good time" suspension. If the inmate's complaint has not been noted in his file and if it has not been used against him, he is more likely to believe the Ombudsman's statement that this is so, than he is to believe the statement of the prison officials themselves.

Second, the prison Ombudsman can assure that an inmate's complaint to the Ombudsman is not recorded in his file or otherwise used against him. In fact, the Ombudsman can keep the complainant's identity anonymous where it is not necessary for the resolution of the complaint. In addition, the prison Ombudsman can investigate on his own motion without the necessity of receiving a complaint. In this manner, the Ombudsman can minimize the reluctance of inmates to raise complaints.[215]

Even though the practice of using an inmate's complaint as a basis for reprisal against him at some later time probably is much less frequent than inmates believe it to be, the inmate has no way of knowing whether or not this is so. The assurance of

---

215. It seems to me that a prison ombudsman is going to have to take up matters on his own motion for this particular reason: that there is a lurking fear of reprisal of whatever subtle form, or perhaps severe form, on the part of prisoners who make complaints. It is important for the ombudsman to have ways to minimize this inevitable reluctance on the part of some prisoners in certain situations who raise complaints. This he can do by raising complaints on matters on his own inititative and partly through perhaps the prison grapevine.
Testimony of Professor Stanley V. Anderson, California Interim Committee on Criminal Procedure, Hearing on Desirability of a Correctional Ombudsman 4, 15 (1970).

the prison administration that it has not been done may not be very convincing. The ability of an independent, impartial intermediary to check the records and report to the inmate should provide an increased degree of comfort.

Additional Services of a Prison Ombudsman

The prison Ombudsman can perform other services in addition to his main function of reviewing prison administrative decision making. The Ombudsman should never allow a complaint or inquiry to go unnoticed even though he may not be able to handle it himself. The Ombudsman also should be an expert at knowing where to go, and he should be able to channel an inmate's inquiry to the person or agency that can handle it.

If the complaint is not within the Ombudsman's jurisdiction, he should send it to the appropriate agency, see that the agency receives it, notify the inmate that the referral has been made, and follow-up to see that the matter is handled and that the inmate is informed of the results. Inmates have many problems which they may bring to the Ombudsman involving drug addiction, mental illness, domestic problems, and legal problems to mention only a few. The Ombudsman should not hesitate to refer these matters to the appropriate agency. He should be especially alert to problems where the inmate should be directed to an attorney—be it a Legal Aid agency, a Public Defender, or a private attorney retained at the inmate's expense. If it appears that the inmate needs an advocate, an attorney, or merely someone defending his interests against the rest of the world, the Ombudsman should recommend that the inmate obtain the best available source of legal counsel. This is true even though the Ombudsman continues to pursue certain aspects of the complaint.

In addition, the existence of a prison Ombudsman will probably reduce the number of writs that inmates file in court. Many writs prepared by inmates have no chance of being favorably received by the courts. The filing of these useless writs is a waste of the inmate's time as well as a waste of the court's time. If the inmate takes his complaint to the prison Ombudsman before filing the writ, the Ombudsman may be able to rectify the complaint without the necessity of going to court. If the inmate's complaint is invalid, the Ombudsman's explanation may convince the inmate of the futility of writing the writ. Many inmates have no way of knowing whether their writs have any chance of being acted upon by the court. The Ombudsman's advice could be useful in limiting the flow of writs with no chance of acceptance. If there is any possibility of favorable action by the courts, the Ombudsman

can tell the inmate, and perhaps suggest that the inmate obtain legal help through a Public Defender office, a Legal Aid office, or by retaining his own attorney. The result of the prison Ombudsman's presence will be a reduction in the total number of writs filed, and a greater likelihood that the courts will give more attention to the writs that they do receive.

Opposition to the Creation of Ombudsmen

Despite the fact that the Ombudsman traditionally has been created by the legislature as a check on the executive, in the United States it is legislators that are the most frequent opponents of establishing an Ombudsman.[216] Legislation to establish an Ombudsman office has been introduced in more than one half of the states, but has been enacted only in Hawaii and Nebraska. In addition, Ombudsman-like offices which have been established at various levels of state and local government have been created by, or with the approval of, the chief executive.[217]

One of the chief reasons for legislative opposition to the establishment of an independent grievance mechanism is that individual legislators see themselves as Ombudsmen when they respond to citizens' complaints. Some candidly admit that handling citizens' complaints is a method to be re-elected.[218] The handling of complaints is a relatively easy and inexpensive way of getting votes.

Legislative opposition to the establishment of a prison Ombudsman should be much reduced. Inmates have lost the right to vote and investigating complaints of convicted felons does not have much vote getting appeal.

Communication Between Prison Ombudsmen

One of the primary advantages of an Ombudsman is that he is an expert in administrative procedures. His investigation of individual complaints will disclose patterns of administrative practice that are underlying causes of what may at first appear to be isolated complaints. But if we assume that we will have many prison Ombudsmen across the nation, each dealing with his own institution, how will the Ombudsman at another institution be able to take advantage of the experiences of other Ombudsmen? It

216. *See e.g.*, the hostile reaction of the Buffalo, New York Common Council to the establishment of an experimental Ombudsman project approved by the mayor, TIBBLES & HOLLANDS, BUFFALO OMBUDSMAN PROJECT at 10-14.

217. For example an Ombudsman office was created in Nassau County, New York by the County Executive; the Buffalo, New York Ombudsman Project, sponsored by the Buffalo Law School and funded by a grant from the United States Office of Economic Opportunity was approved by the Mayor and the County Executive; and the Oregon and Iowa Ombudsman positions were created by the Governor.

218. *See* TIBBLES & HOLLANDS, BUFFALO OMBUDSMAN PROJECT at 11.

should not be necessary that each individual Ombudsman at each individual institution "rediscover the wheel." If a number of prison Ombudsmen are established, they will receive complaints concerning the same types of official conduct and physical conditions. It seems necessary to provide for some method for each to reap the benefits from his colleagues' experiences.

The American Bar Association Commission on Correctional Facilities and Services may be an appropriate vehicle to provide this clearinghouse function. The Commission has begun work in planning for the delivery of comprehensive offender legal services and in experimenting with the use of paraprofessionals and Ombudsmen and other grievance mechanisms.[219] The Commission's proposed projects include the establishment of a national staff and clearinghouse to analyze and encourage experiments with a variety of Ombudsman-type grievance mechanism.[220] It appears that this aspect of the Commission's program can be expanded to include serving as a clearinghouse for dissemination of reports and other information between prison grievance mechanisms. Thus, Ombudsmen handling complaints from prison inmates, whether a general Ombudsman, a state prison Ombudsman, or an Ombudsman at the national level would have immediate access to the results of each others' experience.

LIMITATIONS OF A PRISON OMBUDSMAN

The four prominent limitations of Ombudsmen generally, apply to a prison Ombudsman. The Ombudsman is not a reformer, he does not shape legislative policy, he is not a super-administrator, and he does not function as a trial court. Where the Ombudsman has worked effectively, it has been within a system where people generally trust the government. If governmental authorities, including prison administrators have no intention of improving governmental administration, or if they are thoroughly corrupt, the Ombudsman will not be able to lead a sweeping reform movement.[221]

---

219. Statement of Richard J. Hughes, Chairman, American Bar Association Commission on Correctional Facilities and Services, *Correction Hearings* at 213, 214-215.

220. ABA Commission on Correctional Facilities and Services, Descriptions of Proposed Projects in Comprehensive Action Program Design, *Correction Hearings* at 217, 222-223.

221. First of all such an office can work sucessfully only in a democracy.

> On the whole the work of an ombudsman needs resonance in an open mind of the people as to common problems and a living interest in the worth of democracy. If the rule of law is not acknowledged and accepted by all—the rulers as well as the ruled—there is no foothold for an ombudsman.
>
> An ombudsman cannot work sucessfully for the protection of the rights of the citizens without support of the general public. No one in the administration will listen to the ombudsman, if the officials don't feel that the ombudsman is supported by the general public. Such support can an ombudsman get only in a democracy where there is freedom of press for pub-

It should be pointed out that now after the courts have said that due process applies within prison walls, the Ombudsman will be able to function more effectively than he could have before the recent change in judicial attitude.

The Ombudsman does not second guess the legislature and basic legislative policy decisions are beyond the reach of an Ombudsman. This includes the basic policy decisions as to how funds are to be dispensed from the public purse. The Hawaii Ombudsman's experience, referred to above,[222] that educational and recreational facilities and programs were limited primarily by a lack of funds, is likely to be repeated frequently.[223] The Ombudsman does not attempt to perform someone else's job better than he is currently performing it. The Ombudsman cannot settle factual disputes. He operates best where the facts are agreed upon by both parties or where the facts are readily accessible in agency files.

There are countless aspects of prison life—indeed of the whole correctional process from sentencing to return to society—that will not be affected in any respect by the Prison Ombudsman. Problems of racial bias in prosecution and sentencing,[224] disparate sentencing by different judges for the offense, lack of adequate mental health facilities, lack of rehabilitation programs, lack of job training programs, lack of remedial education programs, and society hostility to "ex-cons" are beyond the reach of a prison Ombudsman.

But because the prison Ombudsman cannot do it all, is no reason not to let him do what he can. Surely society is past the stage of thinking that a major problem area must be solved

---

lishing the decisions and the observations of the ombudsman in order to bring them up for discussion.

Speech by Alfred Bexelius, Swedish Ombudsman before the New Jersey Conference on the Ombudsman in Newark, New Jersey, May 25, 1970.

222. *See* note 149 *supra* and accompanying text.

223. We found that the diet of the [Attica] prisoners—and this was one of the items that was agreed upon, the question of providing an adequate diet—we found that the diet of the prisoners was limited to 72 cents a day. The Commissioner said that the reason for that was not that he felt 72 cents a day provided an adequate diet, but that the budget of the corrections department had been cut by the State legislature so that dividing the budget by the number of prisoners and the number of days they had to be fed, it worked out that the most he could spend per prisoner was 72 cents a day.

That is what was done although it was conceded by everyone this was an inadequate diet. The commissioner said he was trying to get the budget changed when the riot took place.

Another problem the Commissioner said he had involved the question of showers. The Commissioner said he had requested additional moneys in the State capitol budget for additional shower facilities in Attica and had been turned down by the Governor and State legislature.

So it worked out that because there were a limited number of showers, if you started giving showers to the prisoners from the time the sun came out till it went down, you could only get done one shower a week and that is the way it worked out. The prisoners were allowed only one shower a week.

Testimony of Congressman Herman Badillo, *Corrections Hearings* 4, 7.

224. For an interesting study on racial discrimination in bail, release, preliminary hearings, jury verdicts, and sentences, *see* Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 WASH. L.Q. 415.

by one magic cure-all solution or not at all. It is submitted that a prison Ombudsman can respond to individual complaints in the short run, and bring improvements in prison administrative procedures in the long run. He cannot "reform" prisons; we should not ask him to do so. Whether or not a prison Ombudsman is tried, work should continue to improve the other aspects of our correctional system. The fact that a particular jurisdiction rejects the notion of a prison Ombudsman should not be used as an excuse for failing to work for other improvements. Neither should the adoption of a prison Ombudsman be used as an excuse to stop efforts to improve the entire American penal system.

As this article went to press, the writer received a copy of a proposal by the Commissioner of the Minnesota Corrections Department for the establishment of an experimental office of Ombudsman. Under the proposal, the Governor will appoint a Department of Corrections Ombudsman from six nominees submitted by an Ombudsman Commission.

The proposal follows quite closely the Gellhorn Model Ombudsman Statute, *supra* note 192, in providing for the Ombudsman's qualifications, term of office, and salary; organization of office; powers; matters appropriate for investigation; action on complaints; consultation with agency; recommendations; publication of recommendations; and reports.