

# The Desirability of a Correctional Ombudsman

By TIMOTHY L. FITZHARRIS

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## INSTITUTE OF GOVERNMENTAL STUDIES

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## The Desirability of a Correctional Ombudsman

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INSTITUTE OF GOVERNMENTAL STUDIES  
University of California, Berkeley

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By

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To my father,  
a dedicated penologist

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## Foreword

Burgeoning interest in Ombudsmen and Ombudsmen-like institutions is manifested in many nations. These developments--and other collateral evidence--emphasize the fact that citizen-government relationships can produce unhappiness, discontent, allegations of unjust treatment, and other assorted woes caused by actual or imagined governmental indifference to citizens.

A well-functioning government should be able to identify and resolve such problems equitably and quickly. But there is growing recognition that many developed countries, with seemingly well-organized and sophisticated governmental systems, still leave a good deal to be desired in the way they respond to their citizens. Accordingly, the Ombudsman concept is receiving widespread attention, adaptation and experimentation. The Ombudsman apparently is proving a successful and effective means to humanize government, and to smooth the rough edges of relationships between citizens and bureaucracies.

Such reforms are being instituted on behalf of "well-adjusted" citizens, who are able to move about freely and who have comparatively few daily contacts

with officialdom. But if free citizens can feel "put upon" by government, and if their relations with the bureaucracy can become strained, then the predicaments of both prison inmates and the personnel in charge of correctional institutions must indeed be difficult.

Many prisoners have been victimized and brutalized by society, and embittered by their own experiences, long before they reach correctional institutions. Many enter prison filled with resentment and hatred. The great risk is that the closed-in, "hot-house" environment of prisons--Fitzharris refers to them as "total institutions"--will further intensify the problems of both prisoners and correctional staff. What is more, the tension-laden atmosphere of prisons, and the constant threat of violence that all too often explodes into tragedy, may predispose the most fair-minded personnel to restrictive and heavy-handed measures. Some may react with callousness, abuse, and even brutality.

This being true, knowledgeable people concerned with penology are beginning to examine Ombudsman-like offices, seeking help in improving the human environment of prisons. California, which is said to have one of the most progressive penal philosophies in the world--although the system is still beset with huge problems--is logically one of the first states to explore the idea of a correctional Ombudsman.

Furthermore, it seems peculiarly fitting that much of the groundwork should be done by Timothy Fitzharris. While serving as a full-time consultant with the California Assembly Committee on Criminal Procedure, Fitzharris introduced the penal Ombudsman concept to the committee, prepared the committee report on the subject, and drafted the proposed legislation. His report, submitted to the committee in February 1971, formed the basis for the present monograph.

Timothy Fitzharris had personal experience with the work of a correctional Ombudsman--i.e., the activities of the U.S. Army's inspector general--while he was

acting as the confinement officer of an army stockade. The author's father is the deputy director of the California Department of Corrections, and a 30-year veteran penologist. Consequently, much of the author's first 18 years were spent on the grounds of Chino, San Quentin and Soledad prisons. Fitzharris holds a doctorate in criminology from the University of California, Berkeley.

\* On the recommendation of Stanley V. Anderson, Principal Investigator of the Institute's Ombudsman Activities Project, we invited Fitzharris to revise his material for presentation in this monograph. The cut-off date for his research effort was Spring 1972.

Publication was funded in part by the Ombudsman Activities Project, which, in turn, is supported by a grant from the Office of Economic Opportunity. Appreciation is expressed for the services of Institute editorial consultant Mark Peters. Chérie Von May also reviewed the manuscript and helped with the footnotes. Mary Wilson and Katherine Castro did the typing.

Stanley Scott  
Assistant Director

## Preface

Timothy Fitzharris's book is essentially a plea for the establishment of an American correctional Ombudsman. It is grounded in an inventory of existing prisoner grievance procedures and a careful appraisal of their characteristics in comparison with those of an Ombudsman.

Two points deserve emphasis in connection with this proposal. First, the airing of prisoner complaints has been successfully accomplished elsewhere under general-purpose Ombudsmen and other agents. Second, implementation of the proposal will probably more than pay for itself.

In Chapter VI, Fitzharris sketches the correctional side of the activities of Ombudsman offices in Scandinavia, New Zealand, Canada and the United States. What was new about the California proposal was its focus on an *exclusively penal jurisdiction*.

It is now too late for California to be the first state to try such an experiment. On July 10, 1972, the Minnesota correctional Ombudsman went to work. Creation of the office had been urged by David Fogel, State Corrections Commissioner, but the Ombudsman is accountable

directly to the governor, and is thereby administratively independent of the corrections department. The first American correctional Ombudsman, Theartrice Williams, was appointed by Governor Wendell Anderson after nomination by a broadly representative 10-member commission.

Hopefully, successful operation in Minnesota will lead to legislative enactment of a prison Ombudsman statute. (The California prison Ombudsman proposal provides for appointment by the Legislature.)

While the contributions of national, state and provincial Ombudsmen in redressing individual prisoner grievances and improving prison management have been worthwhile, they have also been modest. In an issue of the *Annals of the American Academy of Political and Social Science* devoted to the topic, "The Future of Corrections" (January 1969), penologist Richard McGee asserted that "the correctional field is on the threshold of revolutionary changes." The impact of an Ombudsman could be much greater within such a context. Work-release programs, inmate liaison committees, conjugal visits, training furloughs, half-way houses, and so on, may provide new occasions for prisoner complaints and thereby expand the number and kind of grievances described in Chapter II. This, in turn, will increase the need for "institutions capable of monitoring the discretionary acts of government officials and of compelling accountability," to borrow a phrase from Charles Silberman's fine book, *Crisis in the Classroom*. The Ombudsman office is one such institution.

How can a correctional Ombudsman save money? Merely helping to forestall a single prison riot, of course, would not only offset the cost of an Ombudsman office, but also probably save human life. The Ombudsman's contribution here is necessarily speculative: The results of prevented riots, like the casualties of unfought wars, cannot be documented. Other possible savings are more easily measurable. Convicts are emerging from "a no man's land which is off-limits to the courts and beyond the concern of the legislature," in another of

Silberman's phrases. If inexpensive and informal forums are not available, then complaints will gravitate to more expensive and cumbersome mechanisms, particularly to the courts. The Ombudsman office is not only itself an inexpensive and informal avenue of appeal, but it also stimulates the creation and operation of effective internal complaint-handling procedures.

When Governor Ronald Reagan vetoed the California prison Ombudsman bill in 1971, as described in Chapter I, he based his action upon the grounds that such an office would be "divisive." Such an assertion may be a self-fulfilling prophecy. In order to be effective, a prison Ombudsman (like any other Ombudsman) must have the cooperation of the agencies within his jurisdiction. Without the support at the top, an Ombudsman would serve only to highlight the gulf that already exists between convicts and custodians.

With encouragement from political and administrative leaders, on the other hand, an Ombudsman should be able to help establish communication up and down the line. His voice of reasoned persuasion and his neutral position should help to professionalize jailors and to socialize inmates. In short, a prison Ombudsman would provide the very antithesis of divisiveness: He would contribute to the creation of a spirit of community within correctional facilities.

In that sense, then, the Ombudsman fits in better with the ideals of prison reform than with the prevailing actualities of prison administration. Thus, it is eminently appropriate that a prison Ombudsman office be implemented in a state like California, which, as Fitzharris notes in Chapter I, "has one of the most enlightened correctional programs in the nation."

In some distant day, there may be no prisons. Meanwhile, prison systems are becoming civilized. Ombudsman offices are badges of civilization. Timothy Fitzharris has articulated the humanizing function of the correctional Ombudsman. His proposal is not only

humane, but also realistic, if only because it is more efficient to be humane than to be brutal. With or without California, American experiments with correctional Ombudsmen will be undertaken, in Minnesota and elsewhere. Experience will provide a sounder basis for judgment. But present experience already justifies the experiment.

Stanley V. Anderson  
Principal Investigator,  
Ombudsman Activities  
Project

## Introduction

Recent events have focused attention on America's penal institutions and correctional programs. It is, nonetheless, unfortunate that the subject of prisons and prisoners arouses the interest of the media and the public only when a riot or other form of prison violence occurs.

While efforts to improve the methods of dealing with society's outcasts have been pursued since the late nineteenth century, and perhaps earlier, there is now a new and increasing public concern about what goes on behind prison walls. Concomitantly, there is a renewed effort on the part of correctional officials to enhance the public's awareness of prison problems and the new programs--implemented or proposed--for increasing correctional effectiveness.

The notoriety and public outcry stemming from recent prison tragedies tend to overshadow the many trends toward improvement. One of these is the application of the well-established Ombudsman concept to the correctional setting.

Despite the fact that the penitentiary as we know it is an American invention, the concept of an outside reviewer for penal institutions has been slow in coming of age here. Until recently, this country's system of checks and balances for prisons was generally limited to spotty--almost rare--investigations by legislative committees, special crime commissions, or grand juries. On the federal level, the U.S. Army had extended the duties of its in-house investigator--inspector general--to cover penal settings shortly after it began to build confinement facilities. In the main, however, procedures for the ongoing review of grievances of prisoners and correctional staffs have been neglected.

The Ombudsman concept made its American debut in the 1960s under the leadership of Walter Gellhorn, Stanley Anderson, John Moore, and others. Today, the states of Hawaii, Iowa, Nebraska and South Carolina have Ombudsmen hearing the grievances of their citizenry.

Perhaps the first American to recognize the utility of using the Ombudsman in the penal setting was Gellhorn. Writing in 1966, in his book *When Americans Complain*, he said: "Nowhere is the need for external examination of grievances greater than in America's prisons, jails, and other places of detention." Gellhorn emphasized that, while he must lose a degree of freedom, a prisoner nevertheless continues to be a person with certain rights. Gellhorn discussed the question of protecting a prisoner's residual rights without destroying a penal institution's discipline. The answer he proposed was the Ombudsman.

On March 7, 1967, Senator Edward V. Long (D., Missouri) introduced legislation to establish a federal "Office of Administrative Ombudsman." Besides covering the Internal Revenue Service, the Selective Service System, the Social Security Administration and the Veterans Administration, the proposed Ombudsman was to have jurisdiction over the Federal Bureau of Prisons. The bill died.

On February 6, 1970, in a speech to the National Association of Attorneys General in Washington, D.C., Chief Justice Warren E. Burger urged renewed efforts to review prisoner grievances. In order to "reduce the flood of federal-state cases to a small stream," he recommended adoption of state procedures "by which every person in confinement who has or who thinks he has a grievance or a complaint can be heard promptly, fairly and fully." Pointing to prison complaint-resolving teams operating in Scandinavian countries, the chief justice said that "the mere existence of such an avenue of communication exercises a very beneficial influence which is in many respects far superior to our habeas corpus process."

The creation of the first American Ombudsman in Hawaii also brought the first application of this instrumentality to a penal matter in this country; the first prisoner grievance was heard in the fall of 1969. To date, however, prisoner inquiries constitute only about 2 percent of the total received by the Hawaiian Ombudsman.

The first research into the possible use of an Ombudsman exclusively for prisons was conducted by the California Legislature. As early as 1965, legislation was introduced which would have created a *generalized* Ombudsman for California. The proposal met defeat because the legislators generally felt that they themselves acted in part as elected Ombudsmen for the state's citizenry. In March of 1970, in a separate effort, the Assembly Criminal Procedure Committee began to study the concept and to consider the possibility of creating an Ombudsman for exclusive application to the state's correctional system.

After extensive communication with existing Ombudsmen, and review of current methods of grievance resolution for California prisoners, the committee held a fact-finding hearing on December 14-15, 1970. The hearing was devoted to the desirability of establishing a correctional Ombudsman, and received testimony by a

number of experts including: George B. McClellan, the Ombudsman for the Province of Alberta; Major General Lloyd B. Ramsey and Major General William Enemark, the U.S. Army's Provost Marshal General and Inspector General, respectively; Professor Stanley V. Anderson, a University of California Ombudsman expert; Dr. David Fogel, a criminologist; and Raymond Procnier, Director, California Department of Corrections. Also taking part in the hearing were representatives of the California Youth Authority, the California Probation, Parole and Correctional Association, the bar, and the community.<sup>1</sup>

As a result of the hearings and staff work, the committee issued a report that recommended the creation of a correctional Ombudsman who would be directly responsible to the legislature.<sup>2</sup> Following the committee's recommendation, Assemblyman Frank Murphy, Jr. (R., Santa Cruz), its chairman, on March 25, 1971, introduced legislation (AB 1181) to set up the first correctional Ombudsman. Although the bill passed the Assembly by a 43 to 26 vote, and the Senate by a 21 to 14 margin, the governor vetoed the bill on December 22, 1971. Assemblyman Murphy immediately reintroduced the measure (AB 5) in the 1972 legislative session and, at this writing, it has once again passed the lower house and the key committee of the Senate.

An unrelated effort was stimulated by a violent outburst at Pennsylvania's Honesburg State Prison on July 4, 1970, when 29 guards and 73 prisoners were injured. Thereupon the Pennsylvania Prison Society began studying the possibility of creating a penal Ombudsman for the prison. On March 1, 1971, the Pennsylvania commissioner of welfare and the executive director of the society jointly announced plans to develop such a program in order to "improve communications between inmates and administrators."

The society's plans met fruition with the appointment of the nation's first active penal Ombudsman in early November 1971. Unfortunately, he was discharged after only three weeks in office, apparently due to a

difference of opinion between the Board of Trustees of Philadelphia Prisons and the Prison Society. To date, the position remains unfilled.

Despite these reversals, the prison Ombudsman concept has caught fire. The Oregon State Penitentiary has experimented with an "Ombudsman" in the form of a specially trained correctional officer who hears the complaints of the prison's 1160 inmates. In Minnesota, an Ombudsman for the state Department of Corrections-- who was selected by and is accountable to the governor-- has been funded by the federal Law Enforcement Assistance Administration (LEAA). Several months ago, the New York City Board of Corrections recommended the establishment of an Ombudsman for each of the city's prisons while at the state level, the Correctional Association of New York suggested, as its primary recommendation to that state's 1972 legislature, "that an independent objective, impartial nongovernmental inspection/monitor/Ombudsman program be established for the correctional institutions of the State."

Although a penal Ombudsman in the traditional mold-- one who is an employee of the legislative branch with full investigative powers provided by statute--has not yet been established in the United States, the effort in California may now be close to success. Furthermore, legislation based on the California model is pending in the Arizona State Legislature, and inquiries on the subject have been received by the California legislative committee from many state legislatures. In Washington, D.C., Representative William F. Ryan (D., New York) introduced the Correctional Ombudsman Act of 1972, which would require that every state receiving federal funds for corrections have a correctional Ombudsman who must be politically independent and have a staff and powers similar to those outlined in the California legislation.

This monograph presents material supporting the concept of a correctional Ombudsman. While the focus is on the California penal system, parallels applying

to other states should be obvious. In fact, since California is generally conceded to have one of the most enlightened correctional programs in the nation, the internal grievance procedure described here probably constitutes a high-water mark, with those in the majority of prisons and jails in this country falling well below the California standards.

It should be noted, also, that although the discussion deals principally with a state prison system, the application of a penal Ombudsman to county jails and other local detention facilities could be of equal or perhaps greater value.

The report states the need for a correctional Ombudsman primarily from the standpoint of the prison system and its effect on the prisoner. In California, the situation involves a question of emphasis, however, rather than one of neglect. The past year has also brought out an increased concern about the needs and problems of correctional officers and other staff members. And many have long recognized the plight of families whose breadwinner is confined. These and other such matters should be placed within the scope of Ombudsman activity so that society may have the benefit of an *additional avenue for problem resolution.*

## Chapter

### The Ombudsman Concept<sup>1</sup>

This discussion can appropriately begin with the following statement:

The maintenance of a free society depends upon the confidence of the people in their government. This, in turn, requires the recognition of each individual's problems by the agencies of government. The complex nature of American government has created a frustration among its citizens which weakens their confidence in that government. To many, the guaranteed right to petition government for redress of grievances is not a reality but rather a right in name only.<sup>2</sup>

It is now generally recognized that government bureaucracy has grown to such an extent that, as the Ombudsman from New Brunswick, Canada, put it, "the opportunities for individual grievances against the government have *multiplied.*"<sup>3</sup> Moreover, the proliferation in number and increase in sheer mass of bureaucratic

organizations--usually created with the intent of solving human problems--may now mean that they have themselves become part of the overall problem.

These developments help illustrate the impact of bureaucracies and complex government structures on individuals who must try to deal with them. The sociologist Robert K. Merton has described the process whereby the essential characteristics of the bureaucracy--formalism, rigidity, strict reliance on rules, and depersonalization of relationships--become dysfunctional:

- (1) An effective bureaucracy demands reliability of response and strict devotion to the regulations.
- (2) Such devotion to the rules leads to their transformation into absolutes; they are no longer conceived as relative to a set of purposes.
- (3) This interferes with ready adaptation under special conditions not clearly envisaged by those who drew up the general rules.
- (4) Thus, the very elements which conduce toward efficiency in general produce inefficiency in specific instances. Full realization of the inadequacy is seldom attained by members of the group who have not divorced themselves from the meanings which the rules have for them. These rules in time become symbolic in cast, rather than strictly utilitarian.<sup>4</sup>

For Merton, the extreme product of this process of displacement of goals is the bureaucratic virtuoso "who never forgets a single rule binding his action and hence is unable to assist many of his clients."<sup>5</sup>

In recognition of citizen frustration due to an increase in bureaucratization, and in an attempt to assure redress of grievances in an ever more complicated

society, many have turned to the concept of the Ombudsman, which may be described as follows:

[The Ombudsman is a] person with a reputation for integrity, objectivity, and courage to act as conciliator for the people in handling complaints about their treatment by governmental agencies. Many devices, public and private, presently serve to express the needs of the individual to public officials. Nevertheless, there is a need for a mechanism whose function is to handle the citizen's need for expeditious redress of grievances. This is the role of the Ombudsman.<sup>6</sup>

#### ORIGIN AND CHARACTERISTICS OF THE OMBUDSMAN

The Ombudsman concept is of Swedish origin and dates back to 1809. In that year, the Swedes established a Riksdagens Justitieombudsman or "Parliament's Agent of Justice" as a counterweight in the balance of power, whereby both the king and parliament controlled the administration of justice--primarily through judges and police. Finland followed this lead when it gained independence in 1919.

The modern Ombudsman institution, however, is more accurately reflected in the Danish version (1953), wherein he is a "constitutional officer appointed by Parliament to receive, investigate, and report on citizens' complaints of bureaucratic abuse."<sup>7</sup> The ideal form of the Ombudsman exhibits the essential characteristics of (1) independence, (2) impartiality, (3) expertise in government, (4) universal accessibility, and (5) power only to recommend and to publicize.

### Impartial and Independent

In order to be impartial, the Ombudsman must be independent; that is, his tenure in office, his promotions and salary, must not be dependent on the administrative organization that he investigates. His attitude is judicial and develops in the following manner:

He begins with...neither...a presumption of the correctness nor the incorrectness of a complaint made to him by a consumer of the agency in question. In that sense, he's a judge, but he differs from a judge at the point where he reaches a decision that there has been something wrong done by administration. At that point, he becomes an advocate for his own position. His advocacy...comes only after he has reached that decision, and not before.<sup>8</sup>

### No Direct Power

Perhaps the single most significant feature of the Ombudsman is that he has no direct power to alter administrative decisions. Sometimes administrative decisions are altered on the basis of his action, but it is clear that "he doesn't alter them, somebody else does....If a chief administrator wants to follow an Ombudsman's recommendation, he may do so; but he is not legally bound to do so. If the Legislature wishes to listen to an Ombudsman's recommendation, it may do so; but, obviously, it is not bound to do so."<sup>9</sup> Stanley V. Anderson emphasizes that there is nothing unique about any one of the five essential characteristics of the Ombudsman; rather, "it's their combination which makes the Ombudsman often something special."<sup>10</sup>

The two primary functions of the Ombudsman are (1) to receive and investigate citizen grievances, and (2)

to improve, albeit indirectly, the quality of public administration. Although he is traditionally able to correct an injustice by direct means in only a small percentage of cases, the indirect benefits he provides may be quite important. The people who complain may "get a more generalized satisfaction; that is, that someone has listened to their complaint. They may gain the satisfaction of having received an explanation as to why the particular decision was taken. And, in general, the public...may have some satisfaction, even if they don't use the mechanism themselves...in knowing that it is there."<sup>11</sup>

### Informal Redress

Because of the nature of the Ombudsman--that is, his accessibility and his power to act relatively quickly--his principal accomplishments lie in the area of *informal* administrative change or redress. The Ombudsman from the Canadian province of Alberta explained this phase of his work in the following manner:

Probably ninety-eight percent of [the complaints] are settled at [the deputy administrator] level by dealing directly with the civil service head himself. I do it as unofficially as I can. I try not to put formal reports in; we can talk it over and if he's convinced that something should be done, why then we do it there. If, on the other hand, the deputy administrator is unable to agree with me...it then goes to his minister. I will go to the minister personally or I may submit a formal report. Usually, I go see him. If he and I can't agree, and this is very infrequent, then I have the authority to send my full report and my recommendations to what we call the Lieutenant Governor Council.<sup>12</sup>

While functioning as a receiver of complaints, the Ombudsman also acts as an information source, assisting confused consumers to find the proper avenue of redress. According to the Alberta Ombudsman, for example, inherent in the Ombudsman's charge is the responsibility to refer people with real problems to persons who have the capability of resolving those problems, if the Ombudsman cannot do so. "We do a lot of this sort of work," he said.<sup>13</sup>

#### Improving Communication

The second level of Ombudsman service relates to improving the quality and efficiency of administration through better communication. In fact, communication is the Ombudsman's forte. Thus, the Ombudsman

provides for the needs of people at the consuming end of government to communicate to those at the top positions of administration, [for] there does often exist a gap between the people at the teller window and the man at a big desk in an office building with a view. The man sitting at his office just can't be looking at that window all the time to see how the people who actually face the public are behaving.<sup>14</sup>

With the improvement of communication upward, information flowing downward finds better interpretation as well. New regulations and the reasons for policy decisions are transmitted downward to lower levels with greater facility, clarity and force.

Finally, in a manner similar to that of a judicial appellate review, the Ombudsman apparently engenders a "halo effect" for the prevention of abuse. The existence of an avenue for effective redress means that public officials will be encouraged to observe both the letter

and spirit of the law, thus helping produce fairer and more understanding administration.

#### THE NEED FOR AN OMBUDSMAN

Basically the Ombudsman is a device for making good administration better. Professor Walter Gellhorn puts it aptly:

Among public officials in all nations that count themselves well developed, professionalism and probity are normal though not invariable. Were administrators thought to possess too narrow capabilities and too broad consciences, their authority should, as a matter of logic, be confined to utterly routine matters. Then they would have little room to err. But since this would leave correspondingly little room for achievement, no country has concluded that straightjackets looped with chains should be prescribed as uniforms for public servants.

Instead, the responsibilities committed to administrators have everywhere been enlarged. At the same time, efforts to suppress blunders (regardless of motives) have intensified. Insensitivity, often reflected in slowness, is no doubt the largest generator of dissatisfaction with officials; it may afflict the upright as well as the corrupt. Imprecision may appear in the work of usually careful craftsmen....Persons not in the least "power hungry" may misconceive the scope of their responsibility or its relationship to

competing public interests. Scrupulously unbiased minds can faultily analyze issues of fact or law, as witness the frequency with which appellate courts reverse the decisions of respected judges. Taking note of all these possibilities, sophisticated societies constantly seek governmental equivalents of what industrialists call quality controls. That is to say, they are trying to maintain output at a desired level of quality without adding inordinately to costs.<sup>15</sup>

Few would question the desirability of quality controls for governmental administration. In fact, the concept of checks and balances is basic to the structure of American government. The Ombudsman can be such a check and balance. Thus, the Ombudsman has been described as a "device [which] when the other mechanisms of complaint fail...is there to point to the failure of these primary complaint mechanisms."<sup>16</sup>

#### EXISTING OMBUDSMEN

Ombudsmen are found in Canada, Denmark, England, Finland, Guyana, Mauritius, New Zealand, Northern Ireland, Norway, Sweden, Tanzania, and the United States. Legislation on the subject is under consideration in a score of other countries.

In the United States, Ombudsmen with statewide jurisdiction have been established in Hawaii, Iowa and Nebraska, while a modified (executive branch) Ombudsman assists the people of Oregon and South Carolina. Bills that would create Ombudsmen have been introduced in many other states, including California. A local-regional Ombudsman is in operation in Seattle/King County, Washington, and a local Ombudsman ordinance has been enacted in Newark, New Jersey.

Several federal Ombudsman proposals have been submitted to Congress, but none as yet has been adopted. Nevertheless, several federal executive branch "Ombudsmen" have been created. Last year, Secretary of Commerce Maurice H. Stans established the post of special assistant to the secretary of commerce bearing the unique title of "Ombudsman for Business." In the first 10 months of operation, this official handled more than 2000 inquiries from people in 49 of the 50 states. The U.S. Postal Service has followed suit recently by setting up its own grievance-handling position with the title of Ombudsman.

Nongovernment Ombudsman-like positions continue to proliferate. Today, quasi-Ombudsmen are employed on many college campuses to hear complaints from students, school employees and others. Moreover, the new emphasis on consumerism has stimulated the creation of various special complaint-handling posts in the business sector.

Although they cannot be said to possess all of the requisite impartiality, consumer advocates of the Ralph Nader variety abound and serve in an Ombudsman-like role.

Further, an increasing number of clergymen, private social workers, service clubs and police officers are specially trained to do Ombudsman-like work. As a final note, station KABC in Los Angeles has for the past six years claimed to be the "world's first Ombudsman radio station," reportedly handling over 30,000 complaints from Californians a year.

## The Correctional System and Judicial Review

The proposal under review endeavors to narrow the traditional Ombudsman model and to apply it to specific problems in the correctional field. The question here is whether the Ombudsman, as an agent concerned with administrative justice, could indeed function effectively in the area of penology.

A major attribute of the Ombudsman is his ability to facilitate communication, and it is probably in this regard that his impact on correctional practice would be most felt. In a penal setting, there are chiefly two levels of communication: that between staff and inmates, and that between the inside and outside worlds.

The following comments, based mainly on the characteristics of maximum security prisons, should provide a good illustration of the kind of communication situation into which the Ombudsman could be thrust. In this extreme case, use of the Ombudsman would be an application of a democratic device to an autocratic situation with a view toward improving communication. The Ombudsman's impact could, of course, be expected to vary with the degree of correctional control and the freedom of or restraint on communication.

## THE PRISON AS A "TOTAL INSTITUTION"

Along with such institutional social groupings as mental hospitals, military academies, and monasteries, prisons have been classified by sociologists as "total institutions." Such groupings appear to be characterized by dissolution of privacy and suppression of individuality. The following description is illustrative of prison situations:

First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled, with one activity leading at a prearranged time into the next, the whole sequence of activities being imposed from above by a system of explicit formal rulings and a body of officials. Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.<sup>1</sup>

The key fact of life in "total" institutions is the responsibility of a bureaucratic organization for the many human needs of entire groups of people. The inevitable result is a basic split between a large managed group (inmates) and a small supervisory staff. This, in turn, tends to produce hostile stereotyping of individuals on both sides.

In a total institution, social mobility between the managers and the managed is grossly inhibited.

Although some communication between the two groups is necessary, one of the managers' functions is the control of communication between inmates and individuals at higher staff levels.<sup>2</sup> Moreover, in a total institution, the passage of information--especially about the staff's plans for inmates--is characteristically restricted. Normally, the inmate is even denied knowledge of the decisions regarding his fate. As a result, social distance is typically great and often formally prescribed.

Richard McCleery, a criminologist, described one prison outside of California as a totalitarian system "in that all the basic processes necessary to sustain life within the walls were subject to detailed official regulation." The prison he investigated was organized so that "a monopoly of discretion and control was retained by the executive. All issues were resolved in the interests of an abstract 'state,' which was separate from the will and welfare of the subjects."<sup>3</sup>

"In a total institution," says Goffman, "the inmate's life is penetrated by constant sanctioning interaction from above, especially during the initial period of stay before the inmate accepts the regulations unthinkingly. Each specification robs the individual of an opportunity to balance his needs and objectives in a personally efficient way and opens up his line of action to sanctions. The autonomy of the act itself is violated."<sup>4</sup>

By confining power to a select few, the total institution can produce deleterious effects in terms of abuse of those who are managed. In addition, it can be seen as restricting behavior modification, which has significance for the time when the inmate is released from prison. Consequently, the claim can be made that such a total institution limits rehabilitation because viable learning--i.e., perceiving alternative choices in action situations, or building self-restraint--is often restricted. As Goffman puts it:

Total institutions disrupt or defile precisely those actions that in civil society have the role of attesting to the actor and those in his presence that he has some command over his world--that he is a person with "adult" self-determination, autonomy, and freedom of action.<sup>5</sup>

Inmates in authoritarian, maximum security prisons occasionally face the same kinds of obstacles as any other citizen trying to deal with a modern bureaucracy--red tape, a morass of rules, and indifference by public officials (see Chapter I). Moreover, they are also subject to additional constraints. In the extreme situation, prisoners can be seen as voiceless, powerless subjects of bureaucratic control, as well as objects of "benign" neglect by the society they have offended. These characteristics of total institutions seem to plead urgently for greater efforts at quality controls, because the effects on people (inmates) are so pervasive and profound.

#### PRISONERS' PROBLEMS

In California, some 19,000 adult prisoners and 4500 juvenile wards are currently under supervision in the facilities of the Department of Corrections and the Department of Youth Authority, respectively. The needs of those incarcerated are dealt with by large correctional bureaucracies having the dual mission of protecting the interests of society and of the prisoners.

Any agency responsible for large numbers of people will inevitably receive complaints arising out of human error, misinterpretation of the law or administrative rule, systemic inequity, callousness, psychological abuse, or mutual distrust. This will be particularly true of a total and bureaucratically organized institution such as a prison. Further, many of the complaints

will be justified. Even the most carefully administered organization of any magnitude is subject to lapses.

In the correctional case, however, an additional factor comes into play: the involuntary confinement of those for whom the agency is responsible. Thus, correctional personnel must grapple with the usual grievances associated with bureaucracies and total institutions, as well as those created by the withdrawal of personal freedom for extended periods. The coercive nature of the custody model thrust upon correctional administrators and prisoners is undoubtedly responsible for a significant portion of all complaints received from prisoners.

One can expect, then, that prisoner grievances will range from the "I am a person--listen to me" variety (the typical request made to a bureaucracy), to those in effect saying "Let me out!" (the typical request by an involuntary subject of a total institution). Grievances or prisoner complaints falling between these extremes are highly varied. A prisoner grievance may deal with any of the following: (1) the facts of his case (apprehension or trial, including legal technicalities or representation); (2) the conditions of his confinement or of his outside affairs; (3) matters relating to release, parole, parole revocation, or the discharge process.

From a legal viewpoint, complaints fall into three categories: (1) problems related to constitutional protections, (2) civil problems, and (3) problems involving administrative discretion or judgment.<sup>6</sup>

Among the constitutional complaints, judicial intercession is most often based on the Fourteenth Amendment due process clause (protecting persons from arbitrary denial of their rights to life, liberty, property, etc.) and the First Amendment guarantees (of freedom of speech, of the press, of religion, and of assembly, and the right to petition for redress of

grievances). Courts have considered prisoners' complaints about mail censorship; restricted access to the courts; limitations on the right to prepare legal materials, or to receive help in their preparation; unreasonable visiting prohibitions; restriction of religious practices; racial discrimination; inadequate medical care; and other violations of constitutional provisions.

The civil problems of prisoners may involve domestic relations (divorce, child custody, adoption), financial matters (indebtedness, insurance, home mortgages, business interests), dealings with government agencies (licensing, legal paperwork), complaints against correctional institutions (physical injury while confined, arbitrary restrictions), or various other civil litigation matters. In many cases, the resolution of a civil problem may be more important to a prisoner's correctional "treatment" than any other single action.<sup>7</sup>

Finally, complaints relating to administrative discretion are receiving increasing legal attention. Of particular concern are the decisions relating to prisoner punishment or restrictions on freedom, as in classification and disciplinary procedures, and in parole decisionmaking. While the power of correctional officials to impose sanctions is limited by constitutional provisions, state statutes, and department rules, it is nonetheless discretionary.<sup>8</sup> Some legislators, attorneys, and other individuals are presently attempting to create new procedural safeguards for prisoners, as well as guidelines for staff people in the discretionary areas mentioned. Examples of these requirements are: the right to counsel; the right of cross-examination; the inadmissibility of hearsay evidence and other evidentiary rules; the requirement of notice; the right to public hearings; prisoners' access to their own files; written reasons for punishment, parole denial, or parole revocation; timely disposition of pending matters; and judicial review of the appropriateness of sanctions.

## JUDICIAL INTERVENTION

It is not difficult to visualize how an unprotected correctional "consumer" could be victimized by the abuse of administrative discretion, because

the law permits corrections extraordinary discretion which in turn leads to great disparities in the application of sanctions for alleged misconduct or rule infraction. The benevolent purpose of the mandate is of little consequence. It may only spur the self-righteous administrator to even greater disparities in application since his personal and moral whims may now have a legitimate cover.<sup>9</sup>

### The Traditional Hands-Off Role

Wide latitude in the application of a statute is not unusual. Normally judicial review is expected to provide adequate interpretation of the law and guidance for performance. In the correctional field, however, the courts have unfortunately maintained a traditional distance or aloofness from penal settings, assuming a hands-off role and displaying great reluctance to interfere in prison management. In explanation, it may be said that

courts usually justify this non-interference on the basis of separation of powers--the administration of prisons viewed as an executive function; allocation of state-federal power--among the powers reserved to the states is the power to proscribe an act as criminal and to set the punishment; cost-improved penal procedures are expensive and courts

cannot appropriate funds; or fear that judicial lack of expertise in penology will create disciplinary problems.<sup>10</sup>

A consequence of this doctrine has been described as placing the prison official in a position of absolute power and virtual invulnerability.<sup>11</sup>

### Recent Intervention on Constitutional Protections

Notwithstanding the disinclination of the courts to intervene, the last few years have seen increased judicial penetration of prison walls. To date, however, these recent developments have been limited primarily to federal court action relating to constitutional protections and, on occasion, an exceptional kind of civil suit (e.g., a class action).<sup>12</sup>

On the constitutional front, the courts have increasingly responded to and sustained charges of violations of First Amendment rights concerning the practice of religion in prison, of Eighth Amendment prohibitions against cruel and unusual punishment, and of Fourteenth Amendment due process. Other court decisions have challenged some traditional discretionary powers of correctional officials affecting: confidentiality of pre-sentence reports or parole board "write-ups"; granting and revocation of paroles; the development and application of administrative practices and rules governing prisoner conduct; mail censorship; medical care; and classification methods.

The judicial awakening in the area of corrections clearly indicates a redesignation or reaffirmation of the prisoner as a person with rights.<sup>13</sup> Perhaps this is best illustrated by a recent Rhode Island case wherein the federal district court issued a preliminary injunction against further mail censorship by prison authorities in that state. The court stated:

Our enlightened concern for individual human rights as it has penetrated prison compounds has taken us a long way from the judicial attitudes of the past as illustrated by the following language from *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796:

"He [the convicted felon] has as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."

Today's growing recognition of prisoners' rights perhaps finds its genesis in *Coffin v. Relchard*, 143 F. 2d 443, 445, (6th Cir. 1944), in which case the court repudiated the idea that prisoner privileges were exceptional by stating, "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."

Implicit in this retention of rights concept is the need to define them in relation to the restrictions demanded for prison security and orderly administration. Though maintenance of institutional discipline is not the function of the court, it must, nevertheless, interfere by articulating the permissible applicable standards when there has been a deprivation of prisoners' constitutional rights.<sup>14</sup>

### Limitations of Courts as Grievance Mechanisms

Despite the recent court activity, however, the courts of today are generally still maintaining the traditional hands-off attitude with respect to administrative decisions about prisoners.<sup>15</sup> What is more, in most cases reaching the courts, the petitioner--whether because of judicial reluctance, case content, or nature of pleading--is unsuccessful and the correctional agency position is upheld.<sup>16</sup> Often, even when the court rules in his favor, the petitioner may win no more than a hearing.<sup>17</sup>

Nationally, release or some other substantial benefit for the prisoner has been granted in only about 8 percent of the reported cases. In another 4 percent the prisoner obtained a formal hearing or rehearing on his parole revocation, "but it may well have been revoked nonetheless."<sup>18</sup> California court actions seem to follow these national averages.<sup>19</sup>

Furthermore, the present situation is not likely to change substantially in the foreseeable future. On the contrary, it can be argued that the burden of frivolous prisoner petitions will cause courts to pull back, narrowing the criteria for matters that will be considered. Indeed, such a step is the substance of a recommendation to the Judicial Council of California by the consultant whom it commissioned to study post-conviction remedies.<sup>20</sup>

Finally, one knowledgeable California attorney has concluded--on the basis of his experience representing prisoners in habeas corpus petitions--that the courts are not and will not become effective grievance mechanisms. He stated:

My considered conclusion, based upon almost two years of litigating prison issues in both [federal and state] courts, is that lawsuits have never had, and--more importantly--can never

have, any significant effect in resolving such problems. And that, for the average, run of the mill, day-to-day prison grievance which does *not* deserve elaborate treatment--but which *does* deserve *some* attention--a lawsuit in either state or federal court is not only useless to the prisoner but represents an enormous waste of time and money on the part of both the bench and bar.<sup>21</sup>

Chapter



## Existing Prisoner Grievance Channels

Their total-institution environment notwithstanding, inmates in California state prisons have a number of grievance procedures available to them. Some of these are more effective than others, depending on the type of grievance, the power of the person appealed to, and other considerations. For a better understanding of the role an Ombudsman might play in corrections, the various avenues for redress presently available to the prisoner must be reviewed.

### STANDARD IN-HOUSE PROCEDURES<sup>1</sup>

The primary grievance-handling mechanism for California prisoners and wards is found at the housing-unit level. Instances of problem resolution or enlightenment--e.g., clarifying questionable situations and interpreting rules--can occur every hour in a cell block, vocational shop, duty station, or counselor's office.

By far the greatest percentage of individual problems--corrections officials estimate 85-90 percent--are

resolved at this level, whether the difficulty is interpersonal (between prisoners or between staff and prisoners), familial, or related to institution programs.<sup>2</sup>

Together, the custodial and casework (or treatment) staffs of a prison handle most complaints. The custodial staff resolve more of the day-to-day problems of prison life (i.e., matters of clothing, bedding, recreation, movement, privileges, discipline, and so on). And, while there is overlapping concern and responsibility, the casework staff is involved more with social problems, such as those relating to treatment goals, pre-release training, family needs, and employment development.<sup>3</sup>

Some observers may question the effectiveness of this first-stage grievance process, pointing out that the direct-contact level is the one where most of the grievances develop. This is the level where staff-prisoner relations are most strained. Because the lower level correctional officer or counselor has the day-to-day contact, and makes most of the decisions about the prisoner's daily life, he is usually the primary object of prisoner resentment toward the criminal justice system and toward prison conditions. When charges of brutality or racial abuse are made, it is the correctional "beat cop" who is most often the target, since he is more tangible than "the system."

If the problem cannot be resolved at the first level, the normal and approved procedure is an appeal up the chain of command.<sup>4</sup> Usually the prisoner goes to the staff supervisor in the area covering the subject of concern. If the problem is one, for instance, that has been compounded by a personality clash at the first level, this becomes the first interjection of a more or less disinterested third party. In many cases, of course, the supervisor will support or agree with his subordinate. Nonetheless, many prisoner grievances are disposed of on this level.

According to officials of the California correctional departments, prisoners and wards may at any time appeal directly to an institution's superintendent or any member of his top staff (e.g., chaplain, psychiatrist, or chief medical officer). The purpose of this procedure is to help resolve a given problem within the institution, if at all possible. It also has the effect of elevating the problem to a level of administrative power where there is wider latitude for rule interpretation. Again, a good many grievances are resolved through this particular filter.<sup>5</sup>

#### THE DIRECTOR-WARD RELATIONSHIP

In both the Department of Corrections and the Department of Youth Authority, a prisoner or ward may at any time circumvent the institution staff and correspond directly with the director of the department in Sacramento. Officials say that an inmate is informed of this right in his orientation session.<sup>6</sup>

#### Department of Youth Authority

According to testimony at the committee's Ombudsman hearing, people in the Department of Youth Authority feel strongly about protecting the relationship between the department director and the ward: "It is absolutely necessary, in order to maintain an effective treatment program, that the Youth Authority ward have confidence in this procedure. It is essential in establishing this confidence that the ward feels that he is being treated fairly."<sup>7</sup>

Department officials explain that letters from wards addressed to the director--numbering about 50 per week--are read by the director's immediate staff, and then most often are referred to the casework staff of the department's Division of Rehabilitation. The normal procedure then calls for a review of the ward's

master file and/or a contact with the institution in which he is located.

Most of the letters appear to be primarily routine inquiries to which appropriate answers are provided. In reviewing staff-prepared responses to wards, the director emphasizes two things: (1) Every question raised must be answered; and (2) the response must be as "human" and understanding as possible, and give the recipient some grounds for encouragement.

If the subject of a ward's letter constitutes a casework problem--e.g., the ward believes he is in the wrong program or finds himself in constant difficulty--a departmental investigator visits the complainant.<sup>8</sup> If the grievance is especially sensitive in nature--for example, if it concerns a staff or race problem--the letter and the investigation are turned over to the department's human relations staff.<sup>9</sup>

Letters detailing problems relating to the Youth Authority Board (the parole board)--most often release requests--are reviewed by the director, who is also the chairman of the board. Following the review, the ward in question is given an answer and both his letter and the response are placed in the ward's file "so that the board can discuss the matter when it next meets with him."<sup>10</sup> The department almost never second-guesses board decisions, although the correctional staff may recommend a rehearing when new information is developed.

Thus, in every case, according to officials, the ward gets a response, even though it may not be the one he would like, and all letters and responses become part of the ward's master file.

#### Department of Corrections

Prisoners send the director of the Department of Corrections something more than 300 letters per month.

Table I analyzes such correspondence for December 1970 and January 1971 by main subject category. According to a department estimate, approximately one-third of the prisoner correspondence received by the director concerns matters over which he has no jurisdiction (e.g., the legal circumstances of a case, or consideration for parole).

A newly created full-time grievance coordinator now reviews letters to the director. After going over a prisoner's letter and case file in detail, the coordinator refers his letter to the appropriate section within the department. Under a new procedure, all letters are logged and assigned a date by which a response must be made. Responses drafted by the director's staff are then channeled back through the coordinator to the prisoner.

Department officials indicate that they wish to encourage the use of proper institutional channels. Most often, the grievance is, as one of them phrased it, "put back in the channel where it ought to be." As a means of follow-through, both the prisoner and the institution staff receive copies of the department's response.

The author's experience with prisoner mail, acquired while he was acting as a legislative consultant, suggests that an important prisoner complaint concerns this practice of referring the prisoner's letter back down the chain of command. Often this means that the investigation is conducted, the response prepared, or, at the very least, the answer interpreted, *by the very person against whom the complaint is lodged.*<sup>11</sup> Reportedly, the director has recently tried to counter this consequence by asking each of his wardens to designate a complaint-handler to review and supervise such letters coming down from headquarters.

In the case of a complaint about his legal status, the prisoner is usually informed that the department cannot change judicial decisions and advised to seek

TABLE I

ANALYSIS OF COMPLAINT LETTERS  
FROM INMATES RECEIVED BY CENTRAL OFFICE,  
CALIFORNIA DEPARTMENT OF CORRECTIONS,  
IN DECEMBER 1970 AND JANUARY 1971<sup>a</sup>

| Principal subject<br>of complaint | Number of letters<br>received |
|-----------------------------------|-------------------------------|
| Parole                            | 175                           |
| Transfer                          | 165                           |
| Legal                             | 113                           |
| Program treatment                 | 57                            |
| Medical                           | 51                            |
| Not explicit                      | 36                            |
| Personal property                 | 33                            |
| Religious or racial matter        | 33                            |
| Mail and visits                   | 28                            |
| Complaints against staff          | 14                            |
| Need for protection               | 3                             |
| TOTAL                             | 708 <sup>b</sup>              |

<sup>a</sup>Includes correspondence involving the following state institutions: San Quentin Prison, Folsom Prison, California Medical Facility (Vacaville), Deuel Vocational Institution (Tracy), Sierra Conservation Center (Jamestown), California Training Facility at Soledad, California Men's Colony (Los Padres), California Rehabilitation Center (Corona), California Institution for Men (Chino), California Institution for Women (Frontera), Southern Conservation Center (now part of the California Institution for Men, Chino), California Conservation Center (Susanville), California Correctional Institution (Tehachapi).

<sup>b</sup>Includes 640 letters received by the state institutions. In addition, 68 more involved prisoners who were paroled or discharged, or who were inmates of facilities other than state institutions.

legal counsel. If a prisoner complains about a parole revocation or a denial of parole, the letter is most commonly referred to the Adult Authority (state parole board for adult male felons) for response. According to the department, if the situation warrants, a letter will be referred either to a full-time minority consultant, a special-services investigator, or a member of a special classification committee. In many cases, these staff members go to the institution to talk with the prisoner and the staff. They may even visit the prisoner's family or a potential employer. In any case, the Department of Corrections staff maintains that all prisoners who write to the director get answers, though not necessarily the ones they desire.

Despite the new grievance-handling procedures in the Department of Corrections, many prisoners still contend that their voices are suppressed. They allege that the department simply rubber-stamps the institutional staff position, or that a "silent beef"--a staff member's negative report--may be put in a prisoner's file and considered by the parole board. This possibility, they argue, inhibits a prisoner's diligent pursuit of a grievance.<sup>12</sup> In addition, many prisoners contend that the department cannot be expected to investigate itself dispassionately. Others claim that the department only tries to "cover itself" to make itself look good at any cost.

Of particular concern, however, is the inarticulate, confused, or meek prisoner who either does not know how, or does not have the wherewithal, to voice a legitimate complaint. Such prisoners, says the department grievance coordinator, are most often overlooked by the department.

#### GRIEVANCE CHANNELS UNDER RECENT LEGISLATION

In 1968, prisoners were given the right by California law (Penal Code Section 2600) to correspond confidentially with any member of the State Bar, or with

any holder of public office, and thereby gained an added opportunity for reaching beyond the correctional agencies.<sup>13</sup> This legislation means that grievances, in lieu of undergoing the time-consuming judicial process, can be presented directly to a number of outside agencies for review. Some of the grievance channels thus provided and their efficacy in handling prisoners' complaints, are examined in the following discussion.

#### Members of the State Bar

It is true that a number of attorneys--particularly those working with socially oriented legal aid groups--have acted as a result of the above statute. Nevertheless the legal assistance thus made available in connection with prisoners' grievances must be characterized as inadequate. This may be due both to a lack of financial incentive in most such cases and to a lack of interest among lawyers for this type of work. The situation has been described as follows:

The interest of the bar has been far less than the interest of judges either in sentencing or in penal reform generally. It is surprising and disappointing to realize the general acquiescence of the bar to the existing order of things in penology. Public disclosure of inhumane treatment of persons in jails and prisons seldom triggers corrective action by the bar in behalf of their brutalized clients.<sup>14</sup>

When outside legal support is available, it comes chiefly from legal assistance groups (e.g., ACLU, NAACP Legal Defense Fund, California Rural Legal Assistance, Legal Aid, Defenders, Inc.) or from the public defender. The former are usually understaffed, involved with many

other issues than corrections, and necessarily selective about the cases they will pursue.

The public defender's office is often swamped by prisoner litigation, most of which concerns administrative rather than legal problems. A representative of the public defender in Solano County, California--whose jurisdiction includes the Department of Corrections' Medical Facility and Northern Reception Guidance Center--explained to the hearing committee that his office handles nearly 400 writs a year. He also commented that 90 percent of the writs he receives are frivolous, and that 75 percent could be eliminated "if there were someone, an Ombudsman [perhaps] between the prisoner and the facility." He indicated that in those cases the public defender serves merely "as a buffer with no ability really to do anything..."<sup>15</sup>

In California there is also some very limited use of law students to assist prisoners with appeals and complaints. But the device is not formalized. Moreover the few students available serve at the pleasure of the administration. Consequently most legal assistance utilized in penal settings still comes from self-taught "jailhouse lawyers."<sup>16</sup>

#### The Courts

As Chapter II indicated, the courts are apparently not an effective conduit for prisoner grievances because (1) they are generally reluctant to act in this area, and (2) the likelihood of a prisoner receiving a hearing, let alone a finding in his favor, is extremely low. Further, the court process is lengthy and time consuming.

The courts are also at a disadvantage in not being able to investigate a situation first hand, when the information is readily available or fresh. Finally, a court will usually not consider information beyond the legal issue raised in a brief.

### The Executive Branch

Inmates often attempt to go beyond the heads of the directors of the correctional agencies, appealing either to the secretary of the Human Relations Agency or to the governor of California. Most frequently, in these cases, the request is referred to the department that has the expertise and/or the information on the case. In doing so, the governor or the agency secretary may ask the department (or the parole board) to (1) resolve the issue, (2) provide information with which his staff can prepare an answer, or (3) recommend an appropriate response. Prisoners complain that, regardless of the alternative taken, the governor or the secretary is relying solely upon information and views emanating from the correctional department or parole board. A few also contend that the agencies will provide only the kind of information that will make the departments, or the actions taken by them, look good, even to the great detriment of the complainant's interest. And here, too, there is concern among prisoners that this process will lead to the inclusion of a prisoner's letter with its reply as a permanent part of his official file.

Members of the governor's staff indicate that he receives 30 to 40 letters per week from prisoners, not all of which are complaints. Although an attempt is made to answer each letter, individuals on the governor's (or the agency secretary's) staff rarely, if ever, go to an institution to interview a prisoner or follow through on a complaint. This follows partly from a general belief that the correctional departments can adequately respond to prisoners' complaints and partly from a lack of available staff.

An interesting observation on the subject was made by a university professor testifying before a legislative committee about the complaint-handling procedures of a previous gubernatorial administration. During his testimony he indicated that the governor's extradition secretary, who handles prisoner affairs for the chief

executive, "delays answering [prisoner] mail because he does not want to set up a 'pen pal' sort of correspondence and as long as there is a reply pending from the governor, prisoners are thought to be 'model inmates.'"<sup>17</sup> This does not, of course, express the attitude of the present state administration.

### The Legislative Branch

Some California legislators who have considered Ombudsman proposals in past years have contended that the 120 senators and assemblymen already act in the role of Ombudsmen, thus obviating the need for such an office in California. Because of this attitude, the role of legislators in relation to handling prisoner complaints is examined here at some length.

In 1966, a limited investigation attempted to determine the extent to which California legislators were functioning as complaint-handlers for the general public.<sup>18</sup> This admittedly nonrigorous research effort attempted to discover what type of person complained and what action was typically taken by the elected official.

For the most part, persons requesting the assistance of legislators were found to be relatively effective in coping with problems. "They were fairly adept socially, and typically came to the legislator neither out of desperation, nor because they were totally incapable of dealing directly with those against whom the complaints were lodged." In some instances the complainants had approached the appropriate agencies but had not received satisfaction; in others, they went to the legislator first because they felt he was the logical one to implement a change in the pertinent law or administrative policy.<sup>19</sup> The report continues:

The frequency with which individual citizens appealed for assistance from the legislators' offices suggests that citizens looked to

the legislator as a potential intervenor or mediator with state or local agencies. Moreover, the citizens appeared to feel that the local legislator was responsive to an expression of concern for public policy.<sup>20</sup>

On the question of value or benefit of the legislators' actions to the complainants, the study findings are mixed:

In no instance did a complainant induce a material change in the disposition of his case. The actions of the legislators' offices may have expedited matters somewhat, although the evidence is not clear on this point. The complainants did receive new information regarding state policy, administrative procedures and work loads, and perhaps thereby gained insight into what is practicable in dealing with state agencies. They may remain cynical about state policy or administrative expertise and capacity, but may become more realistic about expectations.<sup>21</sup>

The report concludes that despite the legislators' modest success in this area,

it is clear to students of government that even veteran legislators are not sufficiently acquainted with the details of state policy and programs to function with maximum effectiveness. Perhaps because of the scope and complexity of the program, there is a limit

to the legislator's ability to fill the role of mediator and to pursue research on citizen complaints. The legislator's larger role and the setting within which he works inhibit his performance as an Ombudsman.<sup>22</sup> \* \* \*

Presumably, the legislator's office personnel are most effective where they are most familiar with the substantive problems and where the legislator or his staff have personal contact with agency officers and staff. Obviously, the limited number of staff assistants and the legislator's own contacts cannot encompass the full administrative structure of state and local governments in California.

It would appear, therefore, that only in case of gross and obvious error would the legislator or his staff be able to challenge the expertise of administrative officials regarding their explanations of the cases. The legislator is in a position to plead the case of the complainant on humanitarian grounds, and is able to encourage among administrators a recognition of his own political influence. However, he seldom can urge a different course of action within the framework of settled state policy.<sup>23</sup>

To gain some insight into legislative disposition of complaints received from prisoners, the author recently reviewed the correspondence files of two California Assembly committees--the Committee on Criminal

Procedure and the Select Committee on the Administration of Justice--as well as those of two of the most active assemblymen in the area of penal reform. In terms of response to individuals, the four files studied probably reflect the largest proportion of the California Legislature's activity on behalf of prisoners.

In sharp contrast to the findings of the earlier study,<sup>24</sup>--which dealt with the general public--prisoner correspondents represented in the files appear to be desperate. They are appealing to the legislature as a last-resort measure. In further contrast, the prisoner correspondents seem generally to be lacking in social adeptness, and in the ability to deal with their situations effectively. Perhaps the most nearly universal theme expressed is *the prisoners' need for information*. Tables II and III illustrate the nature of the correspondence and actions taken.

The evidence indicates that the responses offered prisoners by the legislature in the area of complaint resolution are similar to those available from the executive branch. Legislators often appear either not to feel qualified to prepare responses, or consider the resolution of prisoners' problems to be more properly the responsibility of the correctional agencies. Furthermore, since most legislative members lack sufficient staff help to follow through on complaints, those without any knowledge in the subject area apparently tend to refer such letters either to one of the two committees cited above, or to the correctional agencies.

Although the committee members and the legislators occasionally followed through by personally calling the correctional staff, reviewing the case files or, rarely, talking to a prisoner, such action was clearly exceptional.<sup>25</sup>

TABLE II

ANALYSIS OF 1970 PRISONER CORRESPONDENCE FILE--  
ASSEMBLY CRIMINAL PROCEDURE COMMITTEE

| Subject of correspondence                                     | Number of letters | Action taken by legislators   |   |                                 |                |
|---|-------------------|---|---|---------------------------------|----------------|
|   |                   | Replies, expressing inability to help and suggesting contact with prison counselor or legal aid | Called agency involved and/or reviewed prisoner's case file | Provided own information        | Other reply    |
| Request for assistance by prisoner:                           |                   |   |   |                                 |                |
| in obtaining release  | 7                 | 7   | -   | -                               | -              |
| asking that case be looked into                               | 12                | 8   | 2   | 1                               | 1              |
| with specific grievance                                       | 8                 | 2   | 3   | 3                               | -              |
| with regard to legal or other matters                         | 6                 | 3   | -   | 2                               | 1              |
| Request for assistance by others on behalf of prisoner:       |                   |   |   |                                 |                |
| in obtaining release  | 1                 | -   | 1   | -                               | -              |
| asking that case be looked into                               | 4                 | 1   | 3   | -                               | -              |
| Request for information:                                      |                   |   |   |                                 |                |
| on legislation, legislative reports, or legislative process   | 39                | 1   | -   | 31 <sup>a</sup>                 | 7 <sup>b</sup> |
| on criminal justice procedure                                 | 8                 | -   | -   | 8                               | -              |
| on prisoner's case and other matters                          | 4                 | -   | -   | 4                               | -              |
| Information for legislator                                    | 15                |   |   | Acknowledged with thanks        | (15)           |
| Received information copy of letter addressed to someone else | 4                 |   |   | No action required <sup>c</sup> | (4)            |
| TOTALS  | 108 <sup>d</sup>  | 22  | 9   | 49                              | 9              |

<sup>a</sup>In most cases, sent copy of a bill or a committee report.

<sup>b</sup>Referred prisoner to prison library for copy of report.

<sup>c</sup>It is surmised that carbon copies were sent both to inform committee and to apply pressure on addressee.

<sup>d</sup>In 12 instances, more than one letter was received from the same prisoner, but these are recorded in the table as one contact.

TABLE III  
ANALYSIS OF 1970 PRISONER CORRESPONDENCE FILE--  
ASSEMBLY SELECT COMMITTEE ON ADMINISTRATION OF JUSTICE

| Subject of correspondence                                   | Number of letters | Action taken by legislators   |  |                                 |                                     |                 | No reply found in file |
|---|-------------------|---|--|---------------------------------|-------------------------------------|-----------------|------------------------|
|   |                   | Replied, expressing inability to help and suggesting contact with prison counselor or legal aid | Requested and received suggested reply from agency | Provided own information        | Letter forwarded to agency involved | Other reply     |                        |
| Request for assistance by prisoner:                         |                   |   |  |                                 |                                     |                 |                        |
| in obtaining release  | 37                | 16  | 16   | -                               | 5                                   | -               | -                      |
| asking that case be looked into                             | 42                | 27  | 5  | 2                               | 5                                   | 1               | 2                      |
| with specific grievance                                     | 22                | 8   | 2  | -                               | 9                                   | -               | 3                      |
| with regard to legal or other matters                       | 6                 | 2   | -  | 1                               | -                                   | -               | 3                      |
| Request for assistance by others on behalf of prisoner:     |                   |   |  |                                 |                                     |                 |                        |
| in obtaining release  | 24                | 7   | 10   | 3                               | 3                                   | 1               | -                      |
| asking that case be looked into                             | 8                 | 2   | 3  | -                               | 2                                   | 1               | -                      |
| Request for information:                                    |                   |   |  |                                 |                                     |                 |                        |
| on legislation, legislative reports, or legislative process | 60                | 1   | 1  | 40 <sup>a</sup>                 | -                                   | 18 <sup>b</sup> | -                      |
| on criminal justice procedure                               | 7                 | 4   | 2  | -                               | 1                                   | -               | -                      |
| on prisoner's case and other matters                        | 6                 | 2   | -  | 2                               | 1                                   | -               | 1                      |
| Information for legislator                                  | 31                |   |  | Acknowledged with thanks        |                                     | (31)            |                        |
| Information copy of letter to someone else                  | 26                |   |  | No action required <sup>c</sup> |                                     | (26)            |                        |
| TOTALS  | 269 <sup>d</sup>  | 69  | 39   | 48                              | 26                                  | 21              | 9                      |

<sup>a</sup>In most cases, sent copy of a bill or a committee report.

<sup>b</sup>Referred prisoner to prison library for copy of report.

<sup>c</sup>It is surmised that carbon copies were sent both to inform committee and to apply pressure on addressee.

<sup>d</sup>In 38 instances, more than one letter was received from the same prisoner, but these are recorded in the table as one contact.

## Chapter IV

### The Correctional Ombudsman Proposal

It can be argued that effective operation requires the post of correctional Ombudsman to conform to the ideal Ombudsman model, as closely as possible. Accordingly, the correctional Ombudsman proposal places major emphasis on insuring *independence* and *impartiality*. A hearing witness stressed the point:

His impartiality requires that he be independent--that is, that his tenure in office, his promotions, not depend upon the chain of command in the administrative organization which he is keeping an eye on.<sup>1</sup>

The Ombudsman should be an employee of the legislative branch, following the traditional model.<sup>2</sup> While such placement does not guarantee impartiality, the structural independence thus provided is critical both to the concept and to potential complainants.

The principal provisions of the proposal are outlined below, in relation to the more important characteristics and aspects of the office. All of the

proposal's elements are contained in the pending California legislation, which is reproduced in its entirety in Appendix I.<sup>3</sup>

#### INDEPENDENCE

Part of the Ombudsman's "brave independence" relates to his freedom both from political pressures and from personal insecurities. Such freedom obviously includes a lack of concern about personal remuneration, a point on which Gellhorn has commented as follows:

Control of salary might be a means of bringing a critic to heel or of showing displeasure with his work. This is avoided in some countries by putting his compensation permanently on a parity with that of a member of the Supreme Court.

For posts like these, limited terms are probably preferable to lifetime appointments. The theoretical enhancement of independence that flows from security in office must be weighed against the possibility that a critic may lose verve and flexibility if too long involved in the same work.<sup>4</sup>

*The proposal would:*

1. Create a special Ombudsman office within the legislative branch.
2. Provide for the nomination of Ombudsman candidates by a nonpolitical committee with final approval by the legislative body as a whole.
3. Give the Ombudsman a tenure of four years, with a possibility of reappointment.

4. Specify that the Ombudsman cannot engage in conflict-of-interest activities while in office.
5. Provide compensation equivalent to that of an associate justice of the California Supreme Court.

#### JURISDICTION

Jurisdictional responsibility is the second major area of concern. Under the proposal, the correctional Ombudsman should have the authority to review and examine complaints from persons in the charge of any of the state correctional agencies.<sup>5</sup> Whenever necessary, the correctional Ombudsman would be able to conduct investigations entirely on his own initiative. It should be pointed out here that a special definition of jurisdiction is important, inasmuch as the role of an Ombudsman restricted to the field of corrections is still virtually unique.

*The proposal would:*

1. Authorize the Ombudsman to deal with the following agencies: Adult Authority, Board of Corrections, Department of Corrections, Department of Youth Authority, Narcotics Addict Evaluation Authority, Women's Board of Terms and Paroles, and Youth Authority Board.
2. Give the Ombudsman authority to investigate any act, omission, decision, recommendation, practice, or other procedure of these agencies.
3. Give the Ombudsman authority to investigate (inspect) on his own initiative.

#### POWERS

Another critical consideration is the degree of power granted the Ombudsman. Most of the literature

on the subject is emphatic in holding that the Ombudsman should have clear powers to investigate and inspect thoroughly in areas concerning administrative justice, but also that he should *not* have the power to order or reverse administrative decisions. On the first point, a recent study declares:

[In the pure model] the Ombudsman's investigatory powers are absolute. He has power to gather any information he desires....He has the subpoena power and the power to require the testimony of witnesses. All officials are required as a matter of duty to assist the Ombudsman in gathering information. There are no restraints on the scope of the Ombudsman's inquiry.<sup>6</sup>

Concerning the limitation of power, one expert on Ombudsmen told the hearing committee:

[One must never forget] that the Ombudsman can have no power himself to directly alter administrative decisions...if a chief administrator wants to follow an Ombudsman's recommendation, he may do so; but he is not legally bound to do so.<sup>7</sup>

In the same context, another witness before the committee suggested that the Ombudsman could say to the warden, "This is, it seems to me, an obvious injustice." He continued:

Fair-minded wardens will often make changes in that connection. [The Ombudsman] should have the power and the responsibility of making clear to the Legislature every year, on the basis of what he has found, what he thinks the fundamental

defects of the system are that could be improved step-by-step by legislation.<sup>8</sup>

It is important to remember--with regard to the Ombudsman's role in an inquiry--that determining what happened is not the end, but rather the beginning of the Ombudsman's job as an independent critic. He is more concerned with advising about what should be done next than with allocating praise or blame for what has already occurred.<sup>9</sup>

*The proposal would:*

1. Give the Ombudsman complete investigative powers (powers to subpoena testimony and records).
2. Give the Ombudsman power to hold meetings privately, and to protect witnesses.
3. Restrict the Ombudsman's power of action to making recommendations to the agency involved. If not satisfied with the response, he may carry the matter to higher administrative levels, or to the legislature.
4. Permit the Ombudsman, at his discretion, to use the public media as a forum.
5. Require the Ombudsman to report annually to the legislature.

#### EXPERTISE

One aspect of the proposal on which there is a considerable difference of opinion concerns the matter of expertise. Inasmuch as the proposal focuses the concern of the Ombudsman on the specialized field of corrections, there is some debate on whether the person for this job should have expertise in penology and prior experience with prisoners.

A number of hearing witnesses testified that a career orientation in the correctional field would hinder a person's effectiveness as an Ombudsman in the following ways:

1. He would tend to be slow to criticize his colleagues, who may be members of the same professional organizations or have other associations in common.
2. Being steeped in time-honored and established administrative practices, the Ombudsman might be predisposed to accept without question many such practices, even though they deserve criticism.
3. His effectiveness in countering unfounded criticism and accusations against the administration depends on the degree to which he is regarded by outsiders as objective and unbiased. If the Ombudsman is a member, by profession, of the correctional establishment, his acceptance as an impartial investigator will suffer.

On the other hand, it can also be argued that a person without experience in penology might easily be manipulated by prisoners, and consequently make decisions detrimental to the entire system. Furthermore, according to testimony by the Ombudsman of the Province of Alberta, Canada, such an officer should have--or his staff should have--experience with bureaucracies and bureaucrats, be able to conduct an investigation, and know in detail the law in the area of his jurisdiction. All of this seems to support the case for some correctional experience on the part of the proposed Ombudsman.

*The proposal calls for the Ombudsman and his staff to include:*

1. A person schooled and experienced in the law.
2. A person schooled and experienced in investigative technique.

3. A person schooled and experienced in criminology and corrections.

#### CONFIDENTIALITY AND RELATIONS WITH JUDICIARY

Finally, it seems desirable to specify two conditions which are critical to a penal Ombudsman's activity. The first covers the confidentiality of correspondence between the Ombudsman and inmates; the second has to do with the use of the Ombudsman by the courts.

In order to guarantee confidentiality and protect prisoners who are either complainants or witnesses, all correspondence between prisoners and the Ombudsman must be privileged. In California, this means merely an extension of present law allowing uncensored contact between prisoners and public officials or members of the State Bar.

To guard against any temptation on the part of the overburdened courts to use the Ombudsman as a *mandatory* prior remedy which *must be exhausted* before an individual could seek redress from the bench, it should be specified that the presence of the new office shall in no way limit or exclude any person from access to the courts or other existing avenues of redress. One objective in creating the Ombudsman is, of course, to reduce the volume of writs and petitions handled by the courts. But this can be accomplished by providing an *additional* remedy that is both informal and quick; it would be self-defeating to block other avenues in creating the new one.

*The proposal would:*

1. Provide that correspondence between the Ombudsman and any prisoner is confidential and shall immediately be forwarded unopened.

2. Provide that nothing in the Ombudsman statute shall be construed as limiting or affecting any remedy or right of appeal, or deemed part of an exclusionary process.

## Chapter

**V****The Advantages of an Ombudsman in Penology**

On first glance, some critics may assume that, at best, the correctional Ombudsman would duplicate efforts now made on behalf of prisoners. At worst, they may view it as an all-out attack on the state correctional agencies. From the discussion in previous chapters, however, it should be clear that neither is the case.

The expression of a grievance is a significant action in a penal institution; the response to it may be both telling and critical. Milton G. Rector, Executive Director of the National Council on Crime and Delinquency, has made the point as follows:

Resistance [to the correctional Ombudsman proposal would be] unfortunate, not only because prisoner grievances are a legitimate way of examining the operation of a correctional system, but also because it seems much more desirable for a correctional unit, or any other governmental unit, to

attempt to deal with such problems administratively and positively, rather than waiting for the time when they are compelled to do so by a court.<sup>1</sup>

Most correctional administrators readily admit that they (1) do not have the capacity to resolve all prisoner complaints, and (2) can always use assistance in their efforts at problem resolution. One witness at the Ombudsman hearing emphasized the value of numerous channels for solving problems, saying:

It is good to have many parallel channels of complaint in a democracy. It is not that efficiency isn't an important consideration but it is not the only one and there should be competition among these channels of complaint almost like an electrical circuit in parallel in which the more juice goes through that line which has the least resistance. So let the [various grievance mechanisms] compete with the Ombudsman to see who is the best servicer in terms of promptness and efficiency, not necessarily in terms of the final result.<sup>2</sup>

The attraction of the correctional Ombudsman idea lies in the fact that this mechanism has strengths *precisely* in those areas where existing grievance procedures are weak. Thus, the proposal under consideration should complement the present grievance apparatus, rather than either duplicating or hindering it. See Appendix II for a comparison of the proposal with the characteristics of the existing machinery.<sup>3</sup>

In fact, a convincing case can be made that an Ombudsman could eliminate some duplication of effort.

For example, when one prisoner writes several individuals or agencies on the same issue, or when several prisoners' complaints focus on one subject area, an Ombudsman could amalgamate the individual appeals into a single investigation. A recent editorial comment in support of the California Ombudsman legislation referred to this advantage:

People outside the prisons: attorneys, legislators, and various state offices find that they must conduct independent investigations of complaints if they want objective data. The Ombudsman would save that duplication of effort and provide more reliable information for those who need it.<sup>4</sup>

The criticism that the Ombudsman idea is an attack on the correctional system perhaps could be considered just the opposite--instead it may be a compliment to the modernity and sophistication of present practice in California. Thus it has been urged that the ideal Ombudsman model can function only where a reasonably effective primary complaint-handling mechanism (i.e., internal grievance procedure) already exists.<sup>5</sup> A proposal like the one under discussion would be unlikely to be pioneered in an unprogressive correctional state. A similar point was made with regard to judicial intervention in corrections as follows:

Challenges do not arise very frequently in those few states where penology remains crude and sometimes brutal, but are more common in those correctional systems that pride themselves on their benevolence and have sincerely adopted rehabilitative rather than punitive methods. [Such confrontation] complicates the matter, for it builds resentment precisely among those correctional administrators

who are truly professional and striving to act in the best interest of the men in their charge. It takes unusual insight to recognize that the very fact of being challenged marks the system as maturing, responsible and capable of tolerating demands that it act fairly.<sup>6</sup>

#### BENEFITS WITHIN THE INSTITUTIONS

The benefits of a correctional Ombudsman to prisoners, to the correctional staff, and to society have been implied throughout this report. These benefits would derive from the Ombudsman's independence, impartiality, and ability to investigate and resolve problems in an informal manner.

#### Improved Communication

Perhaps the Ombudsman's chief function would be to stimulate communication and the flow of information, the lack of which is one of the principal debilitating characteristics of the total institution. On the basis of experience with 400 prisoner writs per year, the chief deputy of the public defender of Solano County, California, views the present prison problem as essentially one of communication. He commented:

These grievances can [heat] up to the boiling point as we are all well aware and build up to an explosion. [There should be] someone who could discuss the question of rules and regulations, why they were disciplined, what the situation is, why they're not entitled to be released immediately--which are all contained in the present

rules and regulations. [Prisoners] get resentful and it has been our experience that [they] will not speak with the prison officials.

As was pointed out earlier, many, many of these [prisoners] are extremely poor in learning almost to the point of illiteracy--they just don't understand.<sup>7</sup>

This commentator went on to explain that much prison crime or acting out of hostility relates to misunderstanding on the part of the prisoner. "It's just an outlet," he said, "the only way he can get at us."<sup>8</sup> The presiding judge of the same county has remarked that a correctional Ombudsman could provide "a much needed safety valve whereby prisoners could find some relief without fear of recrimination."<sup>9</sup>

The problem of communication, moreover, is not limited to the prisoners. As the following points out, staff and families are also affected.

Our nation's prisons are suffering from a breakdown in communications. Inmates, guards, administrators and even families feel that nobody is listening when they describe their problems or register complaints. The result is a growing distrust, fear and hostility surrounding the prison system.

The need for improved communications shows up in prisoner unrest, in the frustration felt by administrators when the outside world doesn't seem to believe their side of the story, by guards who find themselves caught in a very dangerous middle ground, and by families trying to

know what is really happening to their relatives behind the walls.<sup>10</sup>

#### Improved Quality of Prison Life and Administration

It is hoped that the Ombudsman, as an influential third party whose mission is finding the truth and improving communication, would begin to have a measurable impact on the total institution soon after he enters the picture.<sup>11</sup> Perhaps the inmate culture, which serves as a self-protective device in total institutions, might be modified and become less crime-generating, as well as less antagonistic to rehabilitative efforts. Perhaps the relationship between staff and inmates might even change from an often strained toleration to cooperation.

For these reasons alone, the proposal should, if successfully implemented, improve the quality of life in prison. For the prisoner, the Ombudsman would (1) provide protection from official error, abuse, or neglect, and (2) forestall some problems by facilitating early recognition of complaints, and providing an avenue for quick redress. For the benefit of the correctional administration, the Ombudsman could (1) detect developing problems at an early stage, (2) complement rehabilitative efforts, (3) evaluate impartially allegations of maladministration, and (4) assist in uncovering problems requiring action beyond the jurisdiction of the correctional agency.<sup>12</sup>

As another benefit, an Ombudsman may also serve as a gauge for administrators in program and personnel evaluation, although this would clearly not be one of his duties. On this point, a member of the judiciary made the following observation:

[A correctional Ombudsman] could assist the prison officials by giving them an independent source

of information concerning the performance of responsible employees. He could uncover actual instances of misconduct which occasionally occur to the embarrassment of conscientious members of the staff who are reluctant to tattle on their associates.<sup>13</sup>

#### BENEFITS OUTSIDE THE INSTITUTIONS

The advantage to the courts of strengthening the processes of administrative justice is obvious. Clearly, the large majority of petitions to the courts represent problems of such a nature that they could be resolved through a nonjudicial process. The new grievance filter provided by the Ombudsman should thus effectively eliminate many groundless, time-consuming prisoner petitions that otherwise go to the courts.<sup>14</sup>

Finally, the proposal has two other important features. First, it is not only a reform device in its own right, but also a permanent mechanism for ensuring that future reform measures will be instituted and evaluated, as part of a continuing process. Thus the Ombudsman would have direct contact with the members of the legislature, facilitating feedback and apprising them of needed improvements. Second, the correctional Ombudsman would provide a model for the nation, both as a new professional role in the field of corrections and as a new use of the Ombudsman concept. Perhaps such innovations are the only realistic way to apply the Ombudsman concept in a large state, such as California, by breaking the constituency down into specialty areas, such as corrections, mental health, and welfare.

## Chapter VI

### Previous Experience with Correctional Ombudsmen

Whenever a new proposal is made, the first question usually arising is: Has there been any experience with this before? The answer in our case is that, while no Ombudsman of just the kind proposed is as yet functioning anywhere, a good deal of relevant experience has been amassed in various quarters.

#### RELEVANT OMBUDSMAN EXPERIENCE OUTSIDE THE UNITED STATES: SCANDINAVIA, NEW ZEALAND AND CANADA

The function of the correctional Ombudsman herein proposed is encompassed within the responsibilities of most Ombudsmen in foreign countries. For example, 5 to 10 percent of the activities of the Swedish, Danish, and Norwegian Ombudsmen have to do with prisoners.<sup>1</sup> During the period from 1964 to 1970, the New Zealand Ombudsman received 36 requests for investigation from prisoners, while the Canadian Ombudsman from Alberta received 30 prison-related complaints during his first two years in office.<sup>2</sup>

Of all the governmental Ombudsmen, however, the one in Finland is perhaps the most relevant to this

proposal. Because of the role played by the chancellor of justice in Finland, the Finnish Ombudsman's jurisdiction has been narrowed to the military forces and the prisons. In 1968, 25 percent of the Finnish Ombudsman's total workload concerned detention facilities.

In that same year, the Ombudsman made 10 inspection visits to prisons throughout Finland. On such trips, he wanders around in the prisons and the inmates can confer with him without the presence of guards or officials. And a good deal of what he accomplishes is done by simply giving prisoners an opportunity to air their feelings and grievances.<sup>3</sup>

With regard to the Finnish Ombudsman, the hearing committee was told that:

In 1968, [he] took up 104 cases on his own initiative. This is much higher than the average number of cases taken up by Ombudsmen on their own initiative. Most Ombudsmen wait for complaints to come in to them.

It seems to me, precisely because the Finnish Ombudsman has directed his attention to the military and to penitentiaries, that he has had to take more matters on his own initiative; and so, as a result of his inspection visits, he may see something, hear something, which isn't exactly a complaint from a specific prisoner, but, nonetheless, may lead to an investigation and to an opinion or case note printed by the Ombudsman in his annual report, or to a correction of something which the Ombudsman thinks is wrong.<sup>4</sup>

As an aside, the committee was informed that there is a strong movement in the Danish Parliament to divide the country's present Ombudsman office into two offices and limit one of the new positions solely to police and prisons. The informant also commented on the fact by saying, "So, there is even some interest in Denmark in doing precisely what this committee is now considering to do."<sup>5</sup>

The Ombudsman in the Province of Alberta, Canada--George B. McClellan--was appointed in 1967, after having completed 35 years of service in the Royal Canadian Mounted Police. A law enforcement background is unusual in Ombudsmen. Consequently the unique combination in Alberta, and McClellan's law enforcement expertise, are especially relevant to the California correctional Ombudsman proposal.

Appearing before the committee, McClellan explained the function of his office in detail and provided the committee with his estimate of what effect an Ombudsman in the correctional field can have. He said: "Of all the opinions and recommendations for correction which I have submitted since I took office, in no case have I been turned down. Every case has been corrected in the manner...I have recommended."<sup>6</sup> McClellan also agreed with other committee witnesses that a large majority of the problems--he estimated 98 percent--are settled by dealing directly with the head of the institution or department involved.

"In this technological age," McClellan further stated, "the loneliest people that I know of are those who do not have the tools with which to be able to get their message across." He said he felt that this is particularly true of prisoners, who have often been out of step, and out of luck, virtually all their lives.

McClellan went on to explain that frequently a given problem is resolved by prison officials before the Ombudsman has time to conduct an investigation.

He said: "I do know departments in which the senior civil servant or official has issued orders that if a complaint comes from the Ombudsman, he wants that file on his desk immediately. This, of course, is what you need."<sup>7</sup>

#### AMERICAN OMBUDSMAN: THE U.S. ARMY AND HAWAII

The U.S. Army provides the most significant American experience with an "outside" investigator in the correctional field. The office of the army's inspector general has been in existence since 1777. The inspector general has the power to investigate soldiers' grievances and to inspect military units. He can make no changes, only recommendations.

The army's Provost Marshal General--the chief law enforcement and correctional officer, Major General Lloyd B. Ramsey--explained that, among various duties, the inspector general inspects military correctional programs to insure that each "is conducted in accordance with existing Department of Army regulations, that none of the prisoners' judicial rights are violated, and that all prisoners receive adequate care."<sup>8</sup> According to army regulations supplied to the committee, the inspector general investigates prisoner grievances on a regular basis. In addition, inspectors general routinely visit all stockades approximately once a week.<sup>9</sup>

General Ramsey reported that a review of the records of six army confinement facilities, including the large military prison at Fort Leavenworth, Kansas, showed that over 2500 complaints were made in these facilities during fiscal year 1970. "Many complaints were resolved by inspectors general without formal action, merely by talking with prisoners," said the general.<sup>10</sup>

Army confinement officers are required by regulation to forward immediately prisoner requests for interviews with the inspector general. A confined soldier may also appeal for assistance to his commanding officer,

as well as to the chaplain, the judge advocate, the army psychiatrist, the confinement officer, and many others.

To learn more about the army's experience, the committee invited and received personal testimony from Provost Marshal General Ramsey and Major General William A. Enemark, the Inspector General of the army. The officers indicated that the relationship between the inspector general and the provost marshal general was one of cooperation, primarily because they shared the same objective: the return of the soldier to duty with his unit. The witnesses went on to describe the types of complaints received. Half of the complaints by army prisoners relate to events in the stockade, according to General Enemark, while the other half pertain to such matters as the arrest, the charges, receipt of records and transcript of hearing, safeguard of belongings, discharge, and the like.<sup>11</sup>

General Ramsey indicated that inspectors general have a reputation for solving problems quickly, and are therefore often preferred as an avenue of redress. He stated, "Some people don't trust [the] chain of command... and... would prefer to go to the IG... because they know that this will bring fast action very rapidly."<sup>12</sup> Said General Enemark, "We consider that the [inspector general] complaint system is an in-house safety valve."<sup>13</sup>

Finally, General Ramsey outlined a unique role played by the inspector general, that of rule interpreter. "Many times we use the IG before we do certain things... [we ask:] is this the right interpretation of a regulation, is this the right application of that regulation?... I'm all for the IG," said the army's chief correctional officer.<sup>14</sup>

The only significant American experience with a state-government Ombudsman is in Hawaii. Herman S. Doi, the Hawaiian Ombudsman, has been in office since July 1, 1969. By the latter part of April 1972, he had received 93 inquiries from individual prisoners. Nineteen of these were informational requests and the remainder were

TABLE IV

## INQUIRIES TO HAWAIIAN OMBUDSMAN

| Period                              | Total inquiries | Number of prisoner or prison-related inquiries |               |            |
|-------------------------------------|-----------------|--|---------------|------------|
|                                     |                 | Total  | Informational | Complaints |
| Fiscal year 1969-70                 | 983             | 16   | 4             | 12         |
| Fiscal year 1970-71                 | 1758            | 32   | 8             | 24         |
| 7/1/71 - 4/21/72                    | 1358            | 45   | 7             | 38         |
| <u>Totals:</u>                      | 4099            | 93   | 19            | 74         |
| Percent of total inquiries          | 100%            | 2.3%   | 0.5%          | 1.8%       |
| Percent of total prisoner inquiries | -               | 100%   | 20%           | 80%        |

  

| Period                               | Total complaints | Disposition of complaints |             |         |
|--------------------------------------|------------------|---------------------------|-------------|---------|
|                                      |                  | Justified                 | Unjustified | Pending |
| Fiscal year 1969-70                  | 12               | 4                         | 8           | -       |
| Fiscal year 1970-71                  | 24               | 9                         | 12          | 3       |
| 7/1/71 - 4/21/72                     | 38               | 8                         | 21          | 6       |
| <u>Totals:</u>                       | 74               | 21                        | 41          | 9       |
| Percent of total prisoner complaints | 100%             | 28%                       | 56%         | 12%     |
|                                      |                  |                           |             | 4%      |

Source: Herman S. Doi, Ombudsman, State of Hawaii, April 25, 1972.

complaints.<sup>15</sup> Of the latter group, 21 (28 percent) were deemed to be "justified" (i.e., investigation indicated that the complaint had some merit). A breakdown of the inquiries is shown in Table IV.

A preliminary review of the cases resolved by the Hawaiian Ombudsman showed the following as typical:

- (1) A prisoner's request to see the doctor with regard to recurring pain resulted in a scheduled appointment with the doctor.
- (2) A prisoner who was to be transferred to the honor camp had his transfer expedited.
- (3) A prisoner who was transferred to the adjustment center did not receive a hearing within 48 hours as required by the rules. This matter was brought to the attention of the administration and a hearing was held immediately thereafter.
- (4) A better working relationship between the Resident Council of Prisoners and the administration was encouraged.
- (5) Prisoners who were fearful for their own safety in prison were reassured by a shakedown of the jail.
- (6) Censorship of privileged mail was reviewed and corrected.
- (7) Sanitary conditions in the prison cafeteria were checked by the health department and necessary corrections were made.
- (8) Property seized from a prisoner after his arrest was returned to him.
- (9) A review of a long confinement in the adjustment center resulted in the prisoner's release.

(10) A review of the prisoner accounts and the activity fund disclosed a need for corrective procedures, which were instituted.

(11) Delays in processing prisoner communications were acknowledged and communications were expedited.<sup>16</sup>

"As a result of the many prisoner complaints that we have received," said Mr. Doi in a recent communication, "we were able to secure, with the assistance of the prison administration, a grievance procedure for prisoners. We have also reviewed the medical treatment procedures for prisoners and feel that the prisoners now are accorded faster and perhaps better treatment."<sup>17</sup>

In an earlier letter, the Ombudsman expressed the belief that the lines of communication between top-level administrators and line personnel have been improved since his office was established. He wrote:

We say this from the point of view that when a complaint arises, we notify the top administrator about the complaint. Thus, if there is an obvious lack of communication of policy from the top to the line, this is immediately noted by the top administrator. He can then take appropriate steps to correct this individual situation and possibly future problems of the same type.<sup>18</sup>

(For additional relevant observations by Ombudsman experts, see Appendix III.)

## Chapter VII

### Summary and Conclusions

Two points have been emphasized throughout this report. First, by its very nature, the prison system generates numerous complaints. Second, many prison inmates and staff members feel they have grievances that are not being properly considered. Recent events have more than amply demonstrated these facts for both modern and antiquated penal institutions in the United States.

To neglect active efforts at dealing with such complaints will invite further prison violence, sanction the exploitation or victimization of both prisoners and properly acting public officials, encourage "criminogenic" factors in prison life, and shut out the public from the supervision of one of society's important operations. With this background of need in mind, the proposal for the creation of a penal Ombudsman is presented.

#### THE COURTS

The courts have traditionally been viewed as the best avenue for redress, the instrumentality for mitigating the unnecessary harshness of prison life, and

the protector from arbitrary abuse. A review of actual practice, however, has shown that the courts have not generally provided the most effective means of ameliorating such harsh penal conditions and abuses, where they occur. There are several reasons why this is so.

First, the courts have traditionally emphasized the doctrine of separation of powers. Accordingly, they have generally held that, except in cases of flagrant abuse, the administration of prisons is properly a function solely of the executive branch. In the same vein, the courts have also been reluctant to act because judges have felt that the courts lacked the necessary expertise. Moreover, they have been concerned with possibly far-reaching consequences of individual decisions concerning prison administration.

Second, the already overburdened judiciary normally restricts its opinions to the legal issues raised in a writ, and generally does not welcome expansion of the court's role into the area of administrative decision-making. Third, the formal, time-consuming nature of the judicial process makes the quick investigation and resolution of cases nearly impossible.

#### THE EXECUTIVE BRANCH

The real burden of redress, then, falls on the executive branch. While the largest portion of prisoner problems is probably resolved satisfactorily at the institution or agency level, these primary avenues of grievance resolution also have serious weaknesses. As is often the case, attention to these matters and the ability to resolve a multiplicity of problems varies from one institution to another, and from state to state.

A primary shortcoming lies in the many situations in which the correctional staff, or the system itself, is the object of the grievance. Due to the nature of prisons--i.e., they are "total" institutions, enclosed systems housing immobile populations--grievances are

against the staff or the institution in a substantial proportion of all cases. Not surprisingly, many prisoners object to in-house investigations--completely mistrusting any person who might have something to gain from controlling such a review. In addition, the means for resolution seem, too often, to lie beyond the power or scope of the correctional staff involved.

In California, prisoners can go over the heads of correctional officials and correspond directly with top executive branch administrators, or with members of the legislature. Studies have shown, however, that these extradepartmental remedies lack a high degree of effectiveness because the parties appealed to generally believe they lack the necessary expertise, jurisdiction, or information to act in this area. Furthermore, because top executive and legislative officials are, in general, extremely busy persons, they usually have little time to allocate to prison grievances. In addition, these officials--including the governor, the secretary of the Human Relations Agency, as well as the individual legislators--lack sufficient staff manpower to follow through with cases on an ongoing basis.

As a consequence, nearly all prisoner letters of inquiry or complaint are referred back to the correctional agency, or result in requests to the correctional departments to supply suggested replies or information. It is true enough that in nearly every case the prisoner can expect to receive an answer. The net effect, however, is little different from an appeal handled solely within the correctional apparatus. Indeed, some prisoners believe that extradepartmental appeals become part of their files, perhaps to be used against them at the time they are being considered for parole.

Appeals to other outside parties, such as relatives, private agencies, or private attorneys, are generally ineffectual because such parties lack the power to compel an official investigation, and the fact that without the necessary information they must rely solely on any

personal influence they may possess with the authorities in order to bring about any results.

#### ADVANTAGES OF A CORRECTIONAL OMBUDSMAN

With a unique combination of independence, impartiality, expertise, accessibility, and investigative power, the correctional Ombudsman would constitute a significant "fail-safe" device among available grievance channels. This device, moreover, would enhance the total grievance machinery because its strengths would complement the present channels' weaknesses.

An Ombudsman could act as a central source of information and provide the advantage of timely, informal investigations. Because his forte is communication, such an officer could supply valuable feedback for both prison staff and inmates--a critical need in penology today. With his capability for quick, on-the-spot investigations, the Ombudsman may be able to assist the prison staff in preventing the kinds of rumors that often erupt in violence. In addition, he could assist as a mediator in strike situations or riots.

Through the Ombudsman, prisoners would have a means of voicing their complaints without fear of reprisal and immeasurable benefits should accrue from giving prisoners the feeling that someone is really listening. One of these would be the reduction in prisoner frustration.

A crucial advantage in having an independent reviewer, such as the Ombudsman, lies in his ability to protect the prison staff against unfounded charges or allegations. This could help rebuild the public's confidence in our penal methods and institutions.

Several additional benefits would accrue from the operations of a correctional Ombudsman. First, there would be a reduction in the number of frivolous prisoner petitions to the courts. Second, the Ombudsman could promote better public awareness of how the correctional

system works. Third, the new office would provide an excellent source of advice and information to guide future statutory and administrative efforts to deal with unresolved problems in penology and prison government.

Moreover, it should be emphasized that what has been proposed here is not without precedent and demonstrated experience. Where Ombudsmen have investigated prisoner complaints the results have been beneficial to the prisoners, to the prison staffs, and in the long run, to society.

Cautionary note: The correctional Ombudsman should be considered neither a panacea nor a kind of structural penal reform. For example, the Ombudsman will *not* be overturning administrative decisions, such as parole denials or revocations, although he may occasionally cause a decision to be reconsidered on the basis on new information disclosed.

These caveats notwithstanding, an Ombudsman of the type proposed in this report should have significant impact on the correctional system. Implementation of the proposal, moreover, should be a giant step along the path of cooperation between the citizenry, penology professionals, and prisoners toward the desirable goals: prisoner rehabilitation, social reintegration, and achievement of positive citizenship.

The final point to be emphasized is that the institution here discussed will only be as good as the individuals staffing it. The success or failure of the correctional Ombudsman would depend on the character of the Ombudsman himself--his integrity, his aggressiveness, his ability--and on the availability of genuine support and good faith on the part of those who deal with him.

Throughout this discussion, the Ombudsman has been characterized as a complement to the existing grievance processes--particularly those of the judiciary and the legislature. The only judicial review of an Ombudsman

in the Western Hemisphere to date occurred early in 1970 in Alberta, Canada. The court's opinion described the function of the Ombudsman in a way that is particularly relevant to our area of concern:

As an ultimate objective, the Ombudsman can bring to the Legislature, his observations on the mis-working of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the Ombudsman is also a fallible human-being and not necessarily right. However, he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good.

--Chief Justice J.V.H. Milvain  
Judicial District of Edmonton  
Supreme Court of Alberta, Canada  
Case No. 63115, January 6, 1970

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<sup>1</sup>California, Assembly Interim Committee on Criminal Procedure, *Hearing on Desirability of a Correctional Ombudsman* (Sacramento: December 14-15, 1970).

<sup>2</sup>California, Assembly Interim Committee on Criminal Procedure, *The Penal Ombudsman* (Sacramento: March 25, 1971).

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pages 7-9

<sup>1</sup>For a more definite discussion of the Ombudsman concept, see: Stanley V. Anderson, ed., *Ombudsmen for American Government* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1968); Walter Gellhorn, *Ombudsmen and Others and When Americans Complain* (Cambridge, Mass.: Harvard University Press, 1966); T.E. Utley, *Occasion for Ombudsman* (London: Christopher Johnson, 1961).

<sup>2</sup>Policy statement of the University of Illinois Assembly on the Ombudsman, meeting at Zion, Illinois, March 13-14, 1969. In *University of Illinois Bulletin*, 66 (131): 5 (June 25, 1969).

<sup>3</sup>W.T. Ross Flemington, address quoted in *Illinois Bulletin*, *ibid.*, p. 11 (emphasis added).

<sup>4</sup>"Bureaucratic Structure and Personality," in Amitai Etzioni, ed., *Complex Organizations--A Sociological Reader* (New York: Holt, Rinehart and Winston, 1962), p. 54.

<sup>5</sup>*Ibid.*, p. 53.

<sup>6</sup>*Illinois Bulletin*, note 2 above, p. 5.

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<sup>7</sup> Stanley V. Anderson, *Ombudsman Papers: American Experience and Proposals* (Berkeley: Institute of Governmental Studies, University of California, 1969), p. 3.

<sup>8</sup> Testimony of Stanley V. Anderson before California Legislature, Assembly Interim Committee on Criminal Procedure, *Hearings on Desirability of a Correctional Ombudsman*, held in Sacramento, December 14-15, 1970 (subsequently referred to as Ombudsman Desirability Hearings), p. 4.

<sup>9</sup> *Ibid.*, p. 5 (emphasis added).

<sup>10</sup> *Loc. cit.*

<sup>11</sup> *Ibid.*, pp. 5-6.

<sup>12</sup> Testimony of George B. McClellan in Ombudsman Desirability Hearings, p. 61.

<sup>13</sup> *Ibid.*, p. 66.

<sup>14</sup> Anderson, note 8 above, p. 6.

<sup>15</sup> Gellhorn, *Ombudsmen and Others*, note 1 above, pp. 420-421.

<sup>16</sup> Anderson, note 8 above, p. 13.

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<sup>1</sup> Erving Goffman, *Asylums* (Garden City, N.Y.: Doubleday & Co., 1961), p. 6.

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Chapter II (cont.)  
pages 18-21

<sup>2</sup> *Ibid.*, p. 8.

<sup>3</sup> "Communication Patterns as Bases of Systems of Authority and Power," Richard A. Cloward and others, *Theoretical Studies in Social Organization of the Prison* (New York: Social Science Research Council, Pamphlet #15, 1960), p. 51.

<sup>4</sup> Goffman, *op. cit.*, p. 38.

<sup>5</sup> *Ibid.*, p. 43.

<sup>6</sup> For more detail on the legal rights and problems of prisoners, see:

- (1) Note, "The Problems of Modern Penology, Prison Life and Prisoner Rights," 53 *Iowa Law Review* 1: 671-707 (1967).
- (2) Note, "Constitutional Rights of Prisoners: The Developing Law," 110 *University of Pennsylvania Law Review* 985-1008 (1962).
- (3) Comment, Edward L. Kimball, "Introduction: Inmate Problems and Correctional Administration," James A. Jablonski, "Resolving Civil Problems of Correctional Inmates," Robert L. Martin, "Administrative Fairness in Corrections," in 1969 *Wisconsin Law Review* 571-601.
- (4) Richard P. Vogelmann, "Prison Restrictions--Prisoner Rights," 59 *Journal of Criminal Law, Criminology and Police Science* 386-396 (1968).
- (5) Ronald L. Goldfarb and Linda R. Singer, "Redressing Prisoners' Grievances," 39 *George Washington Law Review* 1: 176-317 (1970).

<sup>7</sup> See Comment, James A. Jablonski, "Resolving Civil Problems of Correctional Inmates," 1969 *Wisconsin Law Review* 574-586.

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Chapter II (cont.)  
pages 21-25

<sup>8</sup>For example, several attempts are being made to restrict the power of the California Adult Authority, the term-fixing and parole-granting administrative board. See California Legislature, Assembly Select Committee on the Administration of Justice, *Parole Board Reform in California: Order out of Chaos* (1970).

<sup>9</sup>Testimony of David Fogel in Ombudsman Desirability Hearings, p. 27.

<sup>10</sup>"Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts," 72 *Yale Law Review* 506.

<sup>11</sup>*Ibid.*, p. 813. See also: Ralph K. Schwilzgebel, *Development and Legal Regulation of Coercive Behavior Modification Techniques with Offenders*, National Institute of Mental Health (February 1971), p. 63.

<sup>12</sup>Edmund B. Spaeth, "The Court's Responsibility For Prison Reform," 16 *Villanova Law Review* 6: 1031-1046 (1971).

<sup>13</sup>Victor Rabinowitz, "The Expansion of Prisoners' Rights," 16 *Villanova Law Review* 6: 1047-1054 (1971).

<sup>14</sup>*Palmigiano v. Travisono*, U.S. District Court (R.I.) August 24, 1970 (Civil Action 4296 and 4348).

<sup>15</sup>Edward L. Kimball and Donald J. Newman, "Judicial Intervention in Correctional Decisions: Threat and Response," *Crime and Delinquency*, 14(1): 1-13 (1968), pp. 2-3. See also testimony of David Fogel in Ombudsman Desirability Hearings, pp. 25-26.

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<sup>16</sup>A California attorney has provided the author of the California Correctional Ombudsman Bill with extensive documentation to support the barrister's conclusion that "prisoners' habeas corpus petitions which attack the conditions of their confinement are now and always have been routinely denied by all Superior Courts throughout this state. These courts apparently have neither the time nor the desire to separate the frivolous petitions from those with merit, and to see that justice is done on a case-by-case basis."

In addition, he supplied the following reasons why the federal courts also do not furnish a "valuable and adequate forum for complaints":

- a. Whether a prisoner proceeds by way of federal habeas corpus, or under the Civil Rights Act (42 U.S.C. § 1983) he must allege and prove that his mistreatment at the hands of prison officials is so serious as to violate his federal constitutional rights; anything short of that simply will not support federal jurisdiction, no matter how malicious or harmful the mistreatment may have been. (*Smith v. Schneckloth*, 414 F. 2d 680 (9th Cir. 1969); *Williams v. Field*, 416 F. 2d 483 (9th Cir. 1968).)
- b. Even if an inmate has the type of claim which is cognizable under federal habeas corpus or Section 1983, he is in all likelihood without funds to retain an attorney to represent him. Without the assistance of an attorney, it is almost certain that he will be unable to (a) identify and articulate his constitutional claim, (b) properly research his case, (c) draft intelligible and legally sound pleadings,

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(d) file his suit in the correct court, and  
(e) intelligently respond to the motion to dismiss which the attorney general will inevitably file.

- c. Even in those relatively few cases in which attorneys are actually representing prison inmates in federal suits, proceedings in federal court are inordinately time-consuming; require several years from the filing of the complaint to a decision on the merits, especially if an appeal is involved; are always in danger of becoming moot, if the prisoner is transferred to another institution or released on parole; and may come to an untimely end for any number of reasons unrelated to the merits of the claim which the prisoner wished to litigate at the time his complaint was filed.
- d. The fact that there are no more than 3-5 reported federal court decisions rendered in California in the past six years which granted relief to prisoners is by itself eloquent testimony against any notion that so long as prisoners have a federal forum in which to litigate, they can routinely obtain redress for most of their grievances.

(Letter from B.E. Bergesen, III, to Assemblyman Frank Murphy, Jr., dated April 6, 1972. Quoted with permission.)

<sup>17</sup> See Kimball and Newman, note 15 above, p. 3; see also Fogel, note 9 above, pp. 25-26.

<sup>18</sup> Loc. cit., Kimball and Newman.

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<sup>19</sup> For example, of the superior court habeas corpus filings in 1968-69, the following percentages were disposed of without hearing (denied):

| <u>Place</u>  | <u>Percentage</u> |
|---|-------------------|
| Marin (includes San Quentin Prison)                         | 88                |
| Monterey (includes Correctional Training Facility, Soledad) | 94                |
| Sacramento (includes Folsom Prison)                         | 88                |
| Solano (includes California Medical Facility, Vacaville)    | 70                |

(Source: California Judicial Council, 1970 Annual Report, Table 24, p. 148.)

Of the habeas corpus petitions filed with the Third District Court of Appeals in 1969 (n=212), only 5 percent (n=11) were granted orders to show cause. Data were not available on the disposition after the hearing with counsel, but probably a large percentage of the 11 were disallowed after receipt of the attorney general's brief.

(Source: Clerk of the Court, Third District, interview with author on January 14, 1971.)

<sup>20</sup> Jack Leavitt, "A Study of Post-Conviction Procedures in California," in California Judicial Council, 1971 Annual Report, pp. 23-65.

The author states on page 30, "Only by creating subject matter barriers will the courts be able to lighten their calendars by discouraging prospective litigants from seeking help."

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<sup>21</sup> See Bergesen, letter, note 16 above.

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<sup>1</sup> The material in this section is based on several field interviews with staff members of the Department of Corrections and the Department of Youth Authority.

<sup>2</sup> Officials of the Department of Corrections indicate that "institution" complaints concern such things as the desire for transfer, for program change or special medical treatment, for mail or visiting privileges, and race problems.

<sup>3</sup> Such overlap is designed into the "team concept" prevailing in all Youth Authority facilities.

<sup>4</sup> For purposes of this discussion, extra-official methods prisoners often use to mitigate living conditions or solve problems (e.g., prison subculture, inmate code, grapevine, subterranean merchants) can be disregarded.

<sup>5</sup> Available evidence indicates that staff have great discretion in deciding whether to pursue an inmate grievance. For example, a deputy superintendent of one large California prison recently testified: "If I received a complaint from an inmate, and had it investigated, I probably wouldn't write anything to the Superintendent, if I were satisfied with the investigation." (Deposition of Robert M. Rees, dated November 15, 1971, *Charles v. Patterson*, No. C-71 1337 SAW.)

<sup>6</sup> The Rees testimony, however, indicates that in at least one institution, there is nothing in writing

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available to prisoners which advises them what the grievance channels are or suggests ways to initiate action or to petition for redress. *Ibid.*, p. 43, pp. 183-184.

<sup>7</sup> Testimony of William A. Daugherty in Ombudsman Desirability Hearings, p. 48.

<sup>8</sup> These investigators rank as Grade Three Parole Officers, or higher.

<sup>9</sup> Investigating grievances is only part of the job of the human relations staff, which is designed primarily to be the corrections equivalent of a police-community relations staff. Consequently, its members move about the institutions, talk to wards and try to head off trouble. These men work directly for the department head.

<sup>10</sup> Comment made by administrative assistant to the director in an interview with the author, January 1971.

<sup>11</sup> Another prisoner claim is that these letters, as part of a man's official file, may later prejudice his case when it is heard by the parole board. See Daugherty, note 7 above, p. 139.

<sup>12</sup> See Rees, deposition, note 5 above, p. 120, pp. 132-133.

<sup>13</sup> One common prisoner grievance concerns the violation of this right by prison staffs.

<sup>14</sup> Milton G. Rector, "Sentencing Reform and Litigation," 53 *Judicature* 2: 60 (August-September 1969). It should be noted that the American Bar Association has initiated a significant effort in prison reform.

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<sup>15</sup> Testimony of John R. Aye in Ombudsman Desirability Hearings, p. 98.

<sup>16</sup> See *Johnson v. Avery* (1969) 393 *United States Supreme Court Reports* (U.S.) 483; *Gilmore v. Avery* (Northern District, California, 1970) 319 *Federal Supplement* (F. Supp.) 105; *In re. Harrall* (1970) 2 *California State Reports, Third Series* (Cal. 30) 675.

<sup>17</sup> Gerald McDaniel, *Ombudsman Hearing*, Assembly Committee on Government Organization, Los Angeles, September 26, 1966 (staff draft, pp. 96-104).

<sup>18</sup> Dean Mann, *The Citizen and the Bureaucracy: Complaint-Handling Procedures of Three California Legislators* (Berkeley: Institute of Governmental Studies, University of California, 1968).

<sup>19</sup> *Ibid.*, pp. 8-9.

<sup>20</sup> *Ibid.*, p. 15.

<sup>21</sup> *Ibid.*, p. 19.

<sup>22</sup> *Ibid.*, p. 33.

<sup>23</sup> *Ibid.*, p. 40.

<sup>24</sup> Mann, *op. cit.*

<sup>25</sup> From time to time the legislature has established special investigative committees to review prison practice. Also, the legislature has the opportunity of reviewing correctional programs during the annual state budget hearings. Both reviews, however, relate solely to policy questions, not individual grievances. Moreover, they are usually superficial in nature.

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<sup>1</sup> Anderson, note 8, Ch. I above, p. 4.

<sup>2</sup> The California legislative counsel has issued an opinion that the correctional Ombudsman, as embodied in AB 1181 (1971), does not present a separation of powers problem. (Opinion #19370, September 28, 1971.)

<sup>3</sup> During the 1971 regular session of the California Legislature, AB 1181 passed both houses, but was vetoed by the governor. The bill was reintroduced in the 1972 legislative session as AB 5 and passed the Assembly by a 53-14 vote. The bill has passed a critical Senate committee, and passage by the upper house now appears virtually certain.

<sup>4</sup> Gellhorn, *Ombudsmen and Others*, note 1, Ch. I above, p. 425.

<sup>5</sup> The decision to narrow the proposal to state correctional agencies was political. The need for an Ombudsman certainly exists at the local level, perhaps even to a greater degree than at the state level. However, local resistance would spell certain death for statewide implementing legislation. See note 8, Ch. I above, pp. 159-160.

<sup>6</sup> Thomas B. Gruenig, *A Comparative Study of Ombudsmen* (San Jose, Calif.: Ombudsman Research Center, December 1970), pp. 2-3.

<sup>7</sup> Anderson, note 8, Ch. I above, p. 5.

<sup>8</sup> Testimony of John R. Ellingston in Ombudsman Desirability Hearings, p. 132.

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<sup>9</sup>Gellhorn, *Ombudsmen and Others*, note 1, Ch. I above, p. 433. (See Gellhorn for detailed discussion on negotiated settlements and the use of persuasion by an Ombudsman.)

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<sup>1</sup>Letter to committee chairman from Milton G. Rector, dated October 30, 1970 (quoted with permission).

<sup>2</sup>Testimony of Stanley V. Anderson before California Legislative Assembly Committee on Government Organization, *Hearings on the Ombudsman*, held in Los Angeles, September 26, 1966, p. 44.

<sup>3</sup>A practicing attorney and former correctional lieutenant has told the Criminal Procedure Committee that the correctional Ombudsman "would not overlap the present available means of investigating complaints and would in fact be complimentary thereto and enhance those limited procedures which currently exist. For many of the complaints and circumstances that are found within the prison environment, there just do not exist at the current time remedies nor an accessible office with any authority to undertake to look into them." (Letter to committee chairman from David P. Lucchesi, dated May 13, 1971. Quoted with permission.)

<sup>4</sup>William E. Osterhaus, "Prison Ombudsman," editorial telecast by KPIX Television, San Francisco, March 13, 1972.

<sup>5</sup>Anderson, note 8, Ch. I above, p. 16.

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<sup>6</sup>Kimball and Newman, note 15, Ch. II above, p. 44.

<sup>7</sup>Aye, note 15, Ch. III above, pp. 99-100.

<sup>8</sup>*Ibid.*, p. 101.

<sup>9</sup>Letter to committee chairman from Hon. Raymond J. Sherwin, Superior Court, County of Solano, dated May 7, 1971.

<sup>10</sup>Osterhaus, note 4 above.

<sup>11</sup>The point has been made that litigation "often brings the inmates and their counsels into communication with administration for the first time and procedures are worked out that enable dismissal of the complaint." (Rector, note 1 above.) The implication is that an Ombudsman--providing a less harsh, less formal method--would be equally successful, if not more so.

<sup>12</sup>See California Department of Corrections, *Correctional News Briefs*, 12(4) April 28, 1972; Board of Corrections, *Report To Governor Ronald Reagan On Violence In California Prisons*, October 7, 1971; California State Employees' Association, *California Prisons in Crisis*, September 24, 1971. The most violent year in California penal history for both staff and prisoners was 1971. The violence should be sufficient proof that external grievance procedures are needed. While the creation of an Ombudsman cannot guarantee a decrease in prison violence, such a safety valve may be helpful. In any event, existing machinery did not forestall the violence. See also Ombudsman Desirability Hearings, pp. 29, 99, 136, 145-146.

<sup>13</sup>Sherwin, note 9 above.

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<sup>14</sup>One expert has stated: "It goes without saying that courts do not have the flexibility that administration should have and exercise." (Rector, note 1 above.) It should be noted, however, that the Ombudsman is proposed as an additional remedy, and would in no way exclude a role for the courts.

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pages 58-61

<sup>1</sup>Anderson, note 8, Ch. I above, p. 8.

<sup>2</sup>Stanley V. Anderson, "Background Materials For Use In Prison Ombudsman Hearings," submitted to the Committee on Criminal Procedure, Assembly, California Legislature, December 14, 1970. These materials provide a detailed breakdown of each prisoner complaint cited.

<sup>3</sup>Anderson, note 8, Ch. I above, p. 9.

<sup>4</sup>Ibid., p. 10.

<sup>5</sup>Loc. cit.

<sup>6</sup>McClellan, note 12, Ch. I above, p. 60.

<sup>7</sup>Ibid., p. 80.

<sup>8</sup>Letter to the chairman, California Assembly Interim Committee on Criminal Procedure from Major General Lloyd B. Ramsey, Provost Marshal General of the Army, dated October 26, 1970 (quoted with permission).

<sup>9</sup>Testimony of Major General William A. Enemark in Ombudsman Desirability Hearings, p. 88.

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pages 61-65

<sup>10</sup>Ramsey, note 8 above.

<sup>11</sup>Enemark, note 9 above, pp. 86-87.

<sup>12</sup>Testimony of Major General Lloyd B. Ramsey in Ombudsman Desirability Hearings, p. 90.

<sup>13</sup>Enemark, note 9 above, p. 86.

<sup>14</sup>Ramsey, note 12 above, pp. 91-92.

<sup>15</sup>Letter to author from Herman S. Doi, dated April 25, 1972. This appears consistent with the experience in Alberta, Canada, and New Zealand. Comparison is difficult, however, because of the small number of complaints accumulated. See Anderson, note 2 above.

<sup>16</sup>Ibid., Doi.

<sup>17</sup>Ibid.

<sup>18</sup>Letter to author from Herman S. Doi, dated October 8, 1970.

APPENDIX I

THE 1971 CALIFORNIA CORRECTIONAL OMBUDSMAN BILL

All of the elements of the correctional Ombudsman proposal are contained in the pending California legislation. The amended version as of July 21, 1971 is reproduced on the following pages in its entirety (see note 3, Ch. IV). The legislation is not presented as a model, but rather as a baseline from which the concept can be further developed.

AMENDED IN ASSEMBLY JULY 21, 1971  
AMENDED IN ASSEMBLY MAY 14, 1971  
AMENDED IN ASSEMBLY APRIL 29, 1971

CALIFORNIA LEGISLATURE—1971 REGULAR SESSION

ASSEMBLY BILL

No. 1181

Introduced by Assemblyman Murphy

March 25, 1971

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE.

*An act to add Chapter 6 (commencing with Section 10700) to Part 2 of Division 2 of Title 2 of the Government Code, and to amend Section 2600 of the Penal Code, relating to the creation of the office of Ombudsman for Corrections, and making an appropriation therefor. CREATION OF THE OFFICE OF OMBUDSMAN FOR CORRECTIONS.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1181, as amended, Murphy (Crim.J.). Ombudsman for Corrections.

Adds Ch. 6 (commencing with Sec. 10700), Pt. 2, Div. 2, Title 2, Gov.C., amends Sec. 2600, Pen.C.

Creates Joint Committee on Corrections Administration and the office of Ombudsman for Corrections. Grants powers and duties to Ombudsman, relating to administrative actions of correctional agencies and advising Legislature on problems in administering corrections. Makes related changes.

Appropriates unspecified amount to the office of Ombudsman for Corrections.

Vote— $\frac{2}{3}$  Majority ; Appropriation—Yes No ; Fiscal Committee—Yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Chapter 6 (commencing with Section 10700)  
2 in added to Part 2, Division 2, Title 2 of the Government Code,  
3 to read:

4 CHAPTER 6. CORRECTIONAL OMBUDSMAN

5 Article 1. General  
6  
7

8 10700. (a) "Agency" as used in this chapter includes any  
9 of the following departments or boards, or any officer or em-

AB 1181

— 2 —

1 ployee thereof acting or purporting to act in the exercise of  
2 his official duties:

- 3 (1) The Adult Authority.  
4 (2) The Board of Corrections.  
5 (3) The Department of Corrections.  
6 (4) The Department of Youth Authority.  
7 (5) The Narcotic Addict Evaluation Authority.  
8 (6) The Women's Board of Terms and Paroles.  
9 (7) The Youth Authority Board.

10 (b) "Administrative act" includes any action, omission,  
11 decision, recommendation, practice, or other procedure of an  
12 agency.

13 10701. There is in the state government the office of the  
14 Ombudsman for Corrections. The office is in the charge of an  
15 officer who shall be known as the Ombudsman.

16 10702. (a) There is hereby created the Joint Legislative  
17 Committee on Corrections Administration consisting of two  
18 Members of the Senate, appointed by the Committee on Rules,  
19 each representing a different political party, and two Mem-  
20 bers of the Assembly, appointed by the Speaker, each repre-  
21 senting a different political party.

22 The joint committee shall select a chairman from one of its  
23 members.

24 The joint committee shall have continuing existence and it  
25 shall meet on call of its chairman, upon call of the chairman  
26 of the Senate Committee on Rules or the Speaker of the As-  
27 sembly, or upon the request of one-half or more of its members.

28 The joint committee shall have such powers, duties and re-  
29 sponsibilities as the Joint Rules of the Senate and Assembly  
30 shall from time to time prescribe and all the powers conferred  
31 upon committees by Section 11 of Article IV of the Consti-  
32 tution.

33 Funds for the support of the committee shall be provided  
34 from the Contingent Funds of the Assembly and Senate in the  
35 same manner that such funds are made available to other joint  
36 committees of the Legislature.

37 (b) The joint committee shall nominate a person for the  
38 office of Ombudsman for Corrections by the vote of a majority  
39 of its members. The person so nominated or another person  
40 shall be appointed to the office by concurrent resolution of the  
41 Legislature.

42 (c) The Board of Corrections may act in an advisory ca-  
43 pacity to the joint committee concerning the nomination of  
44 the Ombudsman, and provide any other assistance which may  
45 be requested by the committee.

46 (d) The Ombudsman shall consult with the joint committee  
47 from time to time as he deems necessary to the execution of his  
48 powers and duties. The committee shall otherwise supervise the  
49 activities of the Ombudsman when the Legislature cannot act  
50 as a body.

1 10703. (a) Unless his office sooner becomes vacant, the per-  
2 son appointed as Ombudsman shall hold office for a term of  
3 four years from the date of his appointment.

4 (b) The Ombudsman may at any time resign his office by  
5 writing to the Speaker of the Assembly and the Chairman of  
6 the Senate Committee on Rules.

7 (c) In the event that a vacancy occurs in the office of Om-  
8 budsman, his chief assistant shall serve in his stead until the  
9 vacancy is filled in the manner prescribed in Section 10702.

10 (d) The Ombudsman shall not hold office beyond the term  
11 for which he is appointed except that he may be reappointed  
12 by concurrent resolution of the Legislature.

13 (e) By concurrent resolution of the Legislature, the Om-  
14 budsman may be suspended or removed from office at any time  
15 for disability, neglect of duty, or misconduct.

16 10704. (a) The joint committee, in consultation with the  
17 Ombudsman, shall have authority to appoint such assistants  
18 and employees as it and the Ombudsman deem necessary for  
19 the effective conduct of the work of the Ombudsman.

20 (b) The Ombudsman shall designate one assistant to be his  
21 chief assistant, and he shall have the powers specified in Sec-  
22 tion 1194 of the Government Code.

23 (c) Among the Ombudsman and his staff shall be a mini-  
24 mum of one person schooled and experienced in law, one person  
25 schooled and experienced in investigative technique, and one  
26 person schooled and experienced in criminology and correc-  
27 tions.

28 10705. The Ombudsman shall not have been a Member of  
29 the Legislature during the two years preceding his appoint-  
30 ment as Ombudsman.

31 10706. Neither the Ombudsman nor any of his assistants  
32 or employees shall:

33 (a) Hold any other office of trust or profit under the laws  
34 of this state; or

35 (b) Engage in any other employment or occupation or ac-  
36 tivity for remuneration; or

37 (c) Hold membership in any association of state or govern-  
38 mental employees; or

39 (d) Engage in or maintain any unnecessary contacts with  
40 persons against whom complaints may be made under Article  
41 2 (commencing with Section 10708) of this chapter.

42 10707. The Ombudsman shall receive as minimum compen-  
43 sation the compensation prescribed for an Associate Justice of  
44 the Supreme Court.

45 Article 2. Powers and Duties

46  
47  
48 10708. The Ombudsman may establish procedures for re-  
49 ceiving and processing complaints, conducting investigations,  
50 and reporting his findings. Fees may not be levied for the  
51 submission or investigation of complaints.

1 10709. The Ombudsman has jurisdiction to investigate the  
2 administrative acts of agencies and he may exercise his powers  
3 without regard to the finality of any administrative act.

4 10710. (a) The Ombudsman shall investigate any com-  
5 plaint which he determines to be an appropriate subject for  
6 investigation under Section 10711.

7 (b) The Ombudsman may investigate on his own motion if  
8 he reasonably believes that an appropriate subject for investi-  
9 gation under Section 10711 exists.

10 10711. An appropriate subject for investigation is an ad-  
11 ministrative act of an agency, which may be:

12 (a) Contrary to law;

13 (b) Unreasonable, unfair, oppressive, or unnecessarily dis-  
14 criminatory, even though in accordance with law;

15 (c) Based on a mistake of fact;

16 (d) Based on improper or irrelevant grounds;

17 (e) Unaccompanied by an adequate statement of reasons;

18 (f) Performed in an inefficient manner; or

19 (g) Otherwise erroneous.

20 The Ombudsman may investigate to find an appropriate  
21 remedy.

22 10712. (a) The Ombudsman may decline to entertain a  
23 complaint or decline to undertake to investigate a complaint or  
24 continue an investigation whenever it appears in his opinion  
25 that:

26 (1) The complainant has an adequate remedy under exist-  
27 ing law or administrative practice;

28 (2) The complaint relates to a matter of policy as deter-  
29 mined by the law and not of execution of the law;

30 (3) Further investigation is unnecessary;

31 (4) The subject matter of the complaint is trivial or the  
32 complaint is frivolous, vexatious or was not made in good faith;

33 (5) The complainant had knowledge of the matter com-  
34 plained of for a period of more than one year and within the  
35 period of one year did not bring it to his attention.

36 (b) It is not necessary for the Ombudsman to hold any  
37 investigation and no person is entitled as a right to be heard  
38 by the Ombudsman.

39 10713. In any case in which the Ombudsman declines to  
40 entertain a complaint or to investigate a complaint or to con-  
41 tinue the investigation, he shall inform the complainant of  
42 that decision and shall state his reasons.

43 If the Ombudsman decides to investigate, he shall notify  
44 the complainant of his decision and he shall also notify the  
45 agency of his intention to investigate.

46 10714. (a) In an investigation, the Ombudsman may make  
47 inquiries and obtain information as he thinks fit, enter without  
48 notice to inspect the premises of an agency, and hold hearings.  
49 All of the foregoing may be accomplished in public or in  
50 private.

51 (b) The Ombudsman is required to maintain secrecy with  
52 respect to all matters and the identities of the complainants

1 or persons from whom information was acquired, except so far  
2 as disclosures may be necessary to enable him to carry out his  
3 duties and to support his recommendations.

4 10715. In furtherance of any investigation conducted pur-  
5 suant to Section 10710, the Ombudsman has all the powers of  
6 a head of a department under Article 2 (commencing with  
7 Section 11180) of Chapter 2 of Part 1 of Division 3 of this  
8 title.

9 The Ombudsman may bring suit in an appropriate state  
10 court to enforce these powers.

11 Witnesses in such hearings or investigations possess the  
12 privileges which witnesses possess in the courts of this state.

13 10716. Before giving any opinion or recommendation that  
14 is critical of an agency or person, the Ombudsman shall consult  
15 with that agency or person.

16 10717. If, after investigation, the Ombudsman finds that:

17 (a) A matter should be further considered by the agency;

18 (b) An administrative act should be modified or canceled;

19 (c) A statute or regulation on which an administrative act  
20 is based should be altered;

21 (d) Reasons should be given for an administrative act;

22 (e) Any other action should be taken by the agency; he  
23 shall report his opinion and recommendation to the agency.  
24 He may request the agency to notify him, within a specified  
25 time, of any action taken on his recommendations.

26 10718. After a reasonable time has elapsed, the Ombuds-  
27 man may present his opinion and recommendations to the  
28 Governor, the Legislature, the public, or any of these. The  
29 Ombudsman shall include with this opinion any reply made  
30 by the agency.

31 10719. After a reasonable time has elapsed, the Ombudsman  
32 shall notify the complainant of the actions taken by him and  
33 by the agency.

34 10720. If the Ombudsman finds or has reasonable cause to  
35 believe there is a breach of duty or misconduct by any officer  
36 or employee of an agency, he shall advise the authority having  
37 jurisdiction over that person.

38 10721. Notwithstanding any provision of law in this or  
39 any other code, correspondence between the Ombudsman and  
40 any person in the legal custody of an agency is confidential and  
41 shall be immediately forwarded to the addressee without being  
42 opened or inspected.

43 10722. The Ombudsman shall report annually to the Legis-  
44 lature and may report to the Legislature at any other time.  
45 The annual report shall be made available to the Governor  
46 and to the public.

47 10723. The provisions of this chapter are in addition to the  
48 provisions of any other act or any rule of law under which  
49 any remedy or right of appeal or objection is provided for  
50 any person, or any procedure provided for the inquiry into

1 or investigation of any matter. Nothing in this chapter shall be  
2 construed to limit or affect such remedy or right of appeal  
3 or objection and shall not be deemed part of an exclusionary  
4 process.

5 10724. The provisions of Chapter 3.5 (commencing with  
6 Section 6250) of Division 7 of Title 1 shall not apply to the  
7 office of Ombudsman for Corrections.

8 ~~SEC. 2. The sum of ----- is appropriated from the~~  
9 ~~General Fund for the support of the office of Ombudsman for~~  
10 ~~Corrections.~~

11 ~~SEC. 3~~

12 ~~SEC. 2.~~ Section 2600 of the Penal Code is amended to  
13 read:

14 2600. A sentence of imprisonment in a state prison for  
15 any term suspends all the civil rights of the person so sen-  
16 tenced, and forfeits all public offices and all private trusts,  
17 authority, or power during such imprisonment. But the  
18 Adult Authority may restore to said person during his impris-  
19 onment such civil rights as the authority may deem proper,  
20 except the right to act as a trustee, or hold public office or  
21 exercise the privilege of an elector or give a general power of  
22 attorney.

23 Between the time of the imposition of a sentence of impris-  
24 onment in a state prison for any term and the time the said  
25 person commences serving such sentence, the judge who im-  
26 posed such sentence may restore to said person for said period  
27 of time such civil rights as the judge may deem proper, ex-  
28 cept the right to act as a trustee, or hold public office or exer-  
29 cise the privilege of an elector or give a general power of  
30 attorney.

31 This section shall be construed so as not to deprive such  
32 person of the following civil rights, in accordance with the laws  
33 of this state:

34 (1) To inherit real or personal property.

35 (2) To correspond, confidentially, with any member of the  
36 State Bar, holder of public office, or the Ombudsman. Such  
37 correspondence shall not be opened or inspected by any prison  
38 authority.

39 (3) To own all written material produced by such person  
40 during the period of imprisonment.

41 (4) To purchase, receive, and read any and all newspapers,  
42 periodicals, and books accepted for distribution by the United  
43 States Post Office. Pursuant to the provisions of this section,  
44 prison authorities shall have the authority to exclude obscene  
45 publications or writings, and mail containing information  
46 concerning where, how, or from whom such matter may be  
47 obtained; and any matter of a character tending to incite  
48 murder, arson, riot, violent racism, or any other form of vio-  
49 lence; and any matter concerning gambling or a lottery. Noth-  
50 ing in this section shall be construed as limiting the right of

- 1 prison authorities (i) to open and inspect any and all pack-
- 2 ages received by an inmate and (ii) to establish reasonable
- 3 restrictions as to the number of newspapers, magazines, and
- 4 books that the inmate may have in his cell or elsewhere in the
- 5 prison at one time.

0

APPENDIX II

PROJECTED ADVANTAGES OF A CORRECTIONAL OMBUDSMAN,  
COMPARED WITH EXISTING PRISONER GRIEVANCE CHANNELS

A useful way to consider the advantages of the penal Ombudsman concept is to compare it, in its various aspects, with the present avenues of redress utilized by prisoners. Thus, it should be clear from the following presentation that the Ombudsman would complement the current processes, as well as add some needed strengths.

Appendix II compares the potential roles of the proposed correctional Ombudsman, expressed in idealized terms, with the respective roles of (1) the correctional agencies, (2) private attorneys, (3) the courts, (4) executive officers, and (5) legislators.

Correctional Agencies  
and the Correctional Ombudsman

The agencies:

The Ombudsman:

1. are often suspect in their role as "keeper".

1. could be viewed as non-correctional in nature; more judicial.

2. may be the target of the complaint: The agency must investigate itself. (A mediator, buffer, or expeditor is needed.)

2. could be viewed as an unbiased outside reviewer.

3. are often suspected of "covering up" (have a vested interest in upholding the department or supporting the staff).

3. could be viewed as an unbiased outside reviewer.

4. are sometimes accused of withholding information.

4. could be a supplementary information source.

- |   |  |
|---|--|
| <p>5. generally make a prisoner complaint part of the official file, possibly affecting later parole decisions.</p>   | <p>5. could resolve complaints without official paperwork; could meet privately and guarantee confidentiality.</p>   |
| <p>6. by their very nature as bureaucracies, might exhibit "operational slippage"--misinterpretation of rules, lack of communication, legal but unfair acts, and so on.</p> | <p>6. should have the effect of tightening operation (because of the possibility of outside review), and of improving internal communication (between staff members and between staff and prisoner).</p> |
| <p>7. in many cases, cannot prevent abuses or intercept and forestall developing problems.</p>  | <p>7. should have enough "halo effect" to prevent blatant offenses. Could be used to defuse bad situations (e.g., riots, strikes).</p>   |
| <p>8. are sometimes accused of abuse or maladministration, with no way to clear the air.</p>  | <p>8. should be able to resolve questions when the agencies are right; and to correct the situation when they are wrong.</p>   |
| <p>9. are rarely subject to outside inspections.</p>  | <p>9. could investigate (or inspect) on his own initiative.</p>  |
| <p>10. most often view correctional objectives and methods in a conventional way.</p>   | <p>10. could provide fresh perspectives.</p>   |
| <p>11. often miss grievances of nontroublemakers--the voiceless prisoners.</p>  | <p>11. may identify some of the voiceless prisoners, by dint of accessibility and privacy of interviews.</p>   |

- |   |  |
|---|--|
| <p>12. are presently subjected to expensive and time-consuming court litigation, or embarrassing publicity to test or resolve problem areas.</p>    | <p>12. in most cases, would act informally--without fanfare.</p>   |
| <p>13. are sometimes unable to "reach" a prisoner, particularly with regard to rehabilitation.</p>  | <p>13. might be able to assist rehabilitative efforts by providing outside, unbiased opinions or suggestions that may be more acceptable when coming from the Ombudsman.</p> |
| <p>14. are often unable to perceive specific problem areas, or to suggest reforms that may have to proceed through several bureaucratic levels.</p> | <p>14. after some experience, could focus on problem areas and suggest new directions to the legislature in annual reports.</p>  |

Private Attorneys and  
the Correctional Ombudsman

The attorneys:

1. generally lack interest in this area because of poor financial rewards and low chances of success.
2. usually have only infrequent contact with corrections.
3. because of infrequent contacts, often lack continuity in efforts to resolve issues or suggest change.

The Ombudsman:

1. would be employed specifically to deal with correctional problems.
2. would have corrections as a full-time interest.
3. would have continuous and close contact with the people involved.

4. are rarely successful--through the formal, time-consuming judicial process--in having a significant impact on problems of prisoners.

5. lack significant power to investigate or to affect situational change, other than through appeal to the courts.

6. generally lack an appreciation of correctional objectives, methods, and problems.

7. are usually client-oriented.

4. would probably be more effective--acting informally and swiftly.

5. would have authority to investigate--including subpoena of witnesses and records--and the power to publicize and to inform the legislature.

6. would probably begin with some expertise in the area, and would gain practical experience daily.

7. would not be an advocate of either adversary position. After investigation, he would be an advocate for his own position. He would act as investigator, mediator, expeditor and problem-solver.

#### Courts and the Correctional Ombudsman

##### The courts:

1. are generally reluctant to act on prisoner complaints because of a lack of expertise, and the "separation of powers" doctrine.

##### The Ombudsman:

1. would not be reluctant to act: complaint-handling is his mission.

2. are generally concerned with legal issues on a case by case basis (e.g., they cannot interfere where an action is unfair, but within the law).

3. usually provide a very slow, formal remedy.

4. tend to be relatively inaccessible.

5. are both formal and expensive (involving transcripts, attorneys, court time, appeals, etc.).

6. are generally not able to visit a prisoner or an institution to investigate firsthand. A court's information is usually based on a brief.

7. usually must deny a petition if the legal points cannot be sustained, or if the complaint seems frivolous.

8. usually cannot provide any information that is helpful to the prisoner.

9. feeling the administration of prisons is an executive branch function, are reluctant to step into

2. would be concerned with administrative justice, and would investigate beyond the case at hand (for cause and cure).

3. would provide a quick and informal remedy (through timely investigation).

4. would be easily accessible.

5. would be a relatively cheap remedy because of informality of procedure and centralized function.

6. would be able to investigate expeditiously and on a firsthand basis.

7. does not require a legal basis or any legal standard for action; can assist even if a grievance is found wanting; can refer a prisoner to the proper source for assistance.

8. should be a useful information source.

9. by the nature of his accessibility, might be able to circumvent serious problems, and could be used to

riot situations or strikes.

10. cause the fact of litigation to become a permanent part of the prisoner's record.

11. do not recommend to the legislature on changes needed in penal law and procedures.

mediate developing crises.

10. could resolve problems in an informal manner, without writing potentially awkward or damaging information into a prisoner's record.

11. would recommend to the legislature needed changes in penal law and procedure.

#### Executive Officers and the Correctional Ombudsman

The executive officers:\*

1. are concerned with many other issues, some more important than prisoner complaints.

2. have no expertise in the field; rely on the correctional departments for information.

3. are reluctant to step into an area of administrative discretion in one of their departments.

The Ombudsman:

1. would be a full-time grievance-handler.

2. would have expertise in the field; do his own investigating.

3. office is specifically designed to complement correctional operations; has no power to order changes or reverse decisions.

\*The governor and the secretary of the state Human Relations Agency. The latter supervises both the director of the Department of Corrections and the director of the Youth Authority.

4. lack staff or resources to follow through.

5. are situated in the state capital and rarely visit institutions.

6. usually send prisoner letters to the department involved.

4. would have staff and resources to follow through.

5. would be continually moving through institutions, meeting with staff and prisoners.

6. might decide not to let the department have a copy of a written complaint; might not disclose the identity of a complainant.

#### Legislators and the Correctional Ombudsman

Legislators:

1. are concerned with many other issues, some more important than prisoner complaints.

2. have no expertise in the field; rely on the correctional departments for information.

3. are reluctant to step into an area of administrative discretion (due to the "separation of powers" doctrine).

4. lack staff or resources to follow through.

5. are situated in the state capital and rarely visit institutions.

The Ombudsman:

1. would be a full-time grievance-handler.

2. would have expertise in the field; do his own investigating.

3. office is specifically designed to complement correctional operations; has no power to order changes or reverse decisions.

4. would have staff and resources to follow through.

5. would be continually moving through institutions, meeting with staff and prisoners.

6. usually send prisoners' letters to the department involved.
7. often lack guidance on how to resolve penal problems or set new standards.
8. when considering correctional legislation, often get the views only of correctional professionals.
6. might decide not to let the department have a copy of a written complaint; might not disclose the identity of a complainant.
7. would act as legislative expert with daily contact and substantial knowledge in the field of corrections.
8. as a resource for legislative committees, should be able to present and discuss the prisoners' viewpoints on issues.

## APPENDIX III

COMMENTS BY EXPERTS ON CORRECTIONAL  
OMBUDSMAN ACTIVITIES

During the initial stages of proposal exploration, the Assembly Interim Committee on Criminal Procedure posed questions concerning the possible impact the creation of a correctional Ombudsman might have. The answers were provided by a number of Ombudsman experts with experience in the jurisdictions and agencies indicated below:

1. What effect has the Ombudsman had on administrative agencies?

Ombudsman of Alberta, Canada:

We have been able to bring to the attention of the prison administrators a number of matters which have been corrected. For instance, a Warden in assessing punishment on a disciplinary matter exceeded, by error rather than intent, his jurisdiction. That situation was brought to our attention by a prisoner and corrected. There have been some cases of carelessness in the handling of prisoners' mail, and these have been quickly remedied by clarification of regulations and warnings to the offending officers.

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.<sup>1</sup>

#### Ombudsman of Hawaii:

Generally speaking, the operation of the Ombudsman's Office, from our view, has not weakened the authority or responsibility of those on the firing line. Rather, it has had some beneficial effect in that weaknesses have been revealed to the administrator in charge of the program. This has provided the administrator with an opportunity to improve his own operations, thereby strengthening his own organization. Insofar as this particular effect is felt in penal institutions, we have had some "feedback" from the prison authorities that many prisoners are using our office, or

attempting to use our office, as a means of threatening the penal institution's employees. However, we do not consider the problem as being serious and are taking appropriate steps to meet it. The steps which have been taken are as follows. We ask that the prisoners themselves attempt to resolve their own grievances internally and if they are then dissatisfied with what occurs that they then bring the complaint to us. Secondly, we are going through a process of educating the prison employees about the role of our office: namely, that we are not advocates of the prisoners but rather consider our role to be that of an objective intermediary between the prisoners and the administrators. We are positive these two steps will alleviate some of the fears, if there [are] any, on the part of the prison employees.<sup>2</sup>

#### Ombudsman of New Zealand:

In the first place, the existence of the office has a salutary effect on the overall conduct and attitude of prison officers generally. As I have said, the complaint-handling system within the prisons is quite adequate to deal with all ordinary matters of complaint arising which do not actually concern prison discipline as such. These deal with hardships thought to be suffered by individual prisoners and concern perhaps their family circumstances, the calculation of their sentence,

and matters in which Departments of Government may be involved as well as the Justice Department.<sup>3</sup>

U.S. Army Provost Marshal General:

The existence of the Army complaint system has allowed a quicker and less expensive resolution of prisoners' grievances than is possible through the courts. The inspector general inquiry, in most cases, results in immediate corrective action in those cases in which the allegation is substantiated. The system also allows for a rapid determination as to whether a specific complaint is justified. The court system, on the other hand, is slow and extremely expensive.<sup>4</sup>

2. Are correctional authorities hostile to Ombudsmen?

Ombudsman of Alberta, Canada:

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.<sup>5</sup>

Ombudsman of Hawaii:

We have not found the administrators to be hostile in any way to our inquiries nor to any suggestions that we have made thus far. We believe that this is due, in large part, to the understanding of our role by the administrators and our own understanding of our role. We believe there is mutual respect.<sup>6</sup>

U.S. Army Provost Marshal General:

The right of the soldier to make formal complaints or request assistance in solving problems has been recognized in the Army for many years, and several channels of communications were established for this purpose. As a result, commanders and staff officers have come to accept the system and rarely feel that their authority and responsibility are threatened. With the initial establishment of such a system, however, this well may be a fear that would have to be overcome. As long as the correctional officer and his staff members are performing their jobs according to regulations, they should not fear investigations or inspections by the inspectors general or other investigative agencies. In fact, they have found that their position is strengthened when a complaint is registered by a prisoner, and investigation is conducted by

an outside agency, and the prisoner is informed that his complaint is groundless. The prisoner has had the satisfaction of having his complaint heard and knowing that action was taken even though he may not be pleased with the results. On the other hand, when regulations are being violated, the staff members probably feel threatened because the inspector general system is designed to detect and correct these violations. The correctional staff is more apt to follow regulations in the operation of confinement facilities, and is less likely to deviate from Army directives and policies due to this system. The inspector general system offers an advantage to the correctional officer in the decision-making process in that when questionable areas develop, the correctional officer may turn to the inspector general for guidance prior to making a decision.<sup>7</sup>

3. With an Ombudsman functioning, do prisoners feel they are being heard?

Ombudsman of Alberta, Canada:

I do believe from the volume of mail I now receive from Provincial jails, that there is a real consciousness among prisoners that they can appeal to the Ombudsman and that they will be heard. We have instances where prisoners have made requests, either rightly or wrongly, and have threatened to write to the Ombudsman after a request was denied.<sup>8</sup>

Ombudsman of Denmark:

It is difficult to estimate the results of the Ombudsman in prison matters, but it is my personal opinion, that it is of importance to the prisoners that they have a possibility to complain to a person outside the prison system.<sup>9</sup>

Ombudsman of Finland:

My personal impression about the feelings and attitudes among prisoners is (a) that writing to the Ombudsman and being heard during his inspection tours often certainly serves a therapeutic purpose and thus reduces tensions, (b) that the prisoners in average feel it to be a good thing to have an Ombudsman and feel that he can really help them, (c) that this feeling or understanding gets more sophisticated and even skeptical among the older prisoners and that, (d) in general, the prisoners, if the office of Ombudsman were abolished, would feel that to be a real, and not only formal, worsening of the situation.<sup>10</sup>

Ombudsman of Sweden:

The great and increasing number of complaints made by prisoners to the Ombudsman gives the impression that the prisoners generally are well aware of their civil rights and have confidence in the Ombudsman as a guardian of these rights.<sup>11</sup>

U.S. Army Provost Marshal General:

Each time a prisoner requests an interview with personnel outside the confinement facility, the commanding officer is required by Army regulations to arrange for the interview. Every prisoner who desires to talk to an inspector general or other recognized personnel or agencies such as chaplains, attorneys, medical personnel, or the Red Cross, is allowed to do so within a reasonable time. If the complaint is valid, immediate corrective action is taken by the inspector general through appropriate channels; on the other hand, if the complaint is groundless, the prisoner is so informed and the matter is closed. In either case the prisoner has had the opportunity to talk to someone outside the confinement system concerning his problem. In most cases, individual tension is released and any tension inside the facility is reduced.<sup>12</sup>

4. Final comment by Ombudsman of Quebec:

Finally, with regard to the potential impact of Ombudsman activity in penal settings, the legislative committee was especially impressed by the comments of the Public Protector (Ombudsman) from the Canadian Province of Quebec in his first annual report. After noting that numerous complaints were received about the conditions under which prisoners were being held, he said:

I only wish to express the hope that changes in the internal regulations of our penal institutions, of which the minister informed me

when I intervened for the first time in October 1969, will be made as soon as possible and that they will permit the persons held under accusation to be detained under different conditions than those already convicted, as far as possible.

Other complaints made me aware of the urgent need for the reform which has already been undertaken on the administrative methods, particularly record keeping, followed in certain institutions. The present system unfortunately may give rise to certain regrettable incidents.<sup>13</sup>

## NOTES TO APPENDIX III

- <sup>1</sup>Letter to author from George B. McClellan, dated October 16, 1970.
- <sup>2</sup>Letter to author from Herman Doi, dated October 8, 1970.
- <sup>3</sup>Letter to Stanley V. Anderson from Sir Guy Powles, dated December 1, 1970 (quoted with permission).
- <sup>4</sup>Letter from Major General Lloyd B. Ramsey, Provost Marshal General of the Army, dated October 26, 1970.
- <sup>5</sup>McClellan, note 1 above.
- <sup>6</sup>Doi, note 2 above.
- <sup>7</sup>Ramsey, note 4 above.
- <sup>8</sup>McClellan, note 1 above.
- <sup>9</sup>Letter to author from Stephan Hurwitz, Office of Danish Ombudsman, dated September 11, 1970.
- <sup>10</sup>Letter to author from Mikael Hidén, Office of Finnish Ombudsman, dated September 29, 1970.
- <sup>11</sup>Letter to author from Brita Sungberg-Weitman, Office of Swedish Ombudsman, dated September 9, 1970.
- <sup>12</sup>Ramsey, note 4 above.
- <sup>13</sup>1969 *Quebec Public Protector Report* 86.

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**END**