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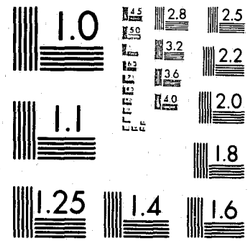

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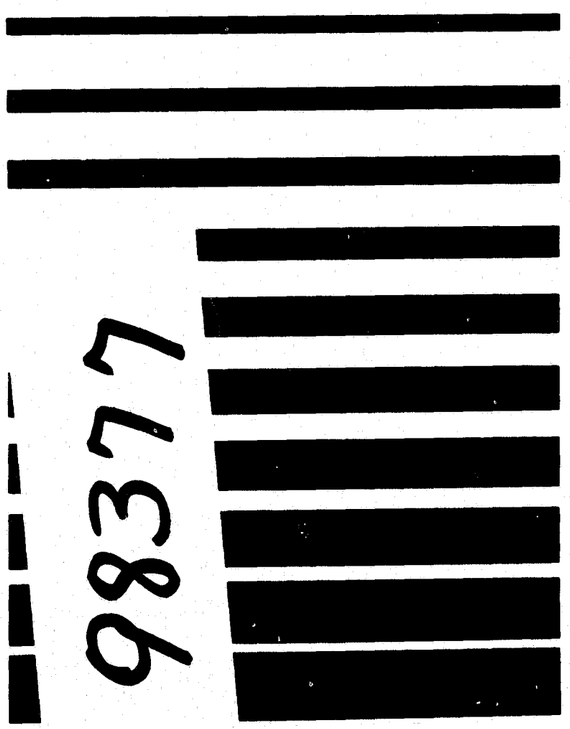

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ALTERNATIVE DISPUTE RESOLUTION MECHANISMS FOR PRISONER GRIEVANCES

A Reference Manual for Averting Litigation

Submitted to the
National Institute of Corrections
U.S. Department of Justice
by
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New Haven, Connecticut

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March 1984

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FOREWORD

The dramatic increase in conditions of confinement actions brought in the Federal courts by state and local prisoners under 42 U.S.C. 1983 has been and continues to be of great concern to practitioners, policymakers, and others. The number of these cases filed in United States District Courts increased from 218 in 1966 to 17,687 in 1983. With state prison populations rapidly expanding, the potential for significant increases in the number of filings per year is very real. It is not only reasonable, but necessary, to seek alternatives to litigation to address prisoner complaints.

This manual has been designed to serve as a reference tool for correctional administrators. It focuses on the advantages and disadvantages of six alternative dispute resolution mechanisms now in place in various correctional systems. These mechanisms include inmate grievance procedures, ombudsmen, mediation, inmate councils, legal assistance, and external review bodies.

The manual: (1) describes the benefits that can be expected upon implementation of one or more of the mechanisms, (2) clarifies the structure of the alternatives and the procedures needed to adapt the general framework to particular institutions or systems, and (3) explains legal standards that will enable correctional administrators to differentiate between potentially meritorious prisoner claims and frivolous ones.

We hope that correctional administrators will find the information contained in this manual helpful to their planning efforts.

Raymond C. Brown, Director
National Institute of Corrections

September 1984

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PREFACE

Selection of the forum in which state prisoner grievances are resolved has been a fundamental problem since the U.S. Supreme Court recognized the constitutional right of inmates to challenge the conditions of their confinement. The courts provide an arena in which prisoners can sue for damages and injunctive relief when policies, practices, and specific actions fall short of constitutional standards. Although the federal courts are an appropriate forum in which to address questions of great magnitude, most of the nearly 20,000 cases annually coming into the federal court system focus on administrative problems that affect only an individual or a small group of inmates. The results of this litigation are usually unsatisfying for all parties, and most of the suits are dismissed without even a hearing on the merits. Moreover, such litigation draws down heavily on the scarce resources of judges, state attorneys general, correctional administrators and their staffs. States may even have to pay attorneys' fees and damage awards in cases that might have been resolved informally at minimal cost.

The use of alternative dispute resolution mechanisms is a possible way of averting much of this prisoner litigation. In September of 1982, Silbert, Feeley, and Associates, Inc., began collecting information on six basic dispute resolution mechanisms--inmate grievance procedures, ombudsmen, mediation, legal assistance, inmate councils, and external review bodies. The authors interviewed correctional officials and experts in correctional law, made site visits in eleven states, and reviewed the literature to produce a reference manual that highlights key policy issues in the search for alternatives to litigation. The manual includes:

... A statement of purpose (Chapter I).

... A discussion of the need for alternatives to litigation (Chapter II).

... A review of correctional law suggesting ways to recognize potentially meritorious grievances and preventing them from becoming lawsuits (Chapter III).

... A description of the basic structure, process and impact of six major alternative mechanisms, based on information gathered during the course of the project (Chapter IV).

... A reminder of the contextual factors that help to ensure successful implementation and operation of the mechanisms (Chapter V).

... A list of officials in key states who are knowledgeable about particular mechanisms that work effectively (Appendix).

... A list of reference material for further examination of this problem area (Bibliography).

Although the authors are responsible for the material included in this manual, we are indebted to the many men and women who gave of their time and energy to discuss grievance mechanisms with us. Wardens, inmate grievance program staffs, correctional administrators, assistant attorneys general, and officials in the U.S. Bureau of Prisons all helped to keep the project on course. The individuals listed in the Appendix were especially helpful.

We were particularly fortunate to have an advisory board composed of individuals with different perspectives on this topic: Charles Bethel, Director, Accord Associates; Renee Chotiner, Yale Law School Danbury Prison Project; James Harris, Connecticut Department of Corrections; and Michael Millemann, Associate Professor of Law, Maryland University School of Law. They helped us clarify the major issues and reviewed drafts of the final product. Professor Millemann also contributed extensively to the section on "Preventive Law."

Support from the National Institute of Corrections came in the form of financial resources, advice and encouragement. Initially, Judith Friedman, now at the Executive Office of the U.S. Attorneys, was project monitor. When she left NIC, Mary Lou Commiso assumed that responsibility. We are most grateful to them for their assistance in guiding the project to its conclusion.

Finally, we appreciate the research assistance of Patricia Kilkenny as well as the skillful work of Kathy E. Williams and Betty Seaver in the preparation of this manual.

March 1984

George Cole

Roger Hanson,
Project Director

Jonathan E. Silbert

CHAPTER I

INTRODUCTION

The dramatic rise in conditions of confinement actions brought in the federal courts[1] by state and local prisoners under 42 U.S.C. 1983 has been of greatest concern to practitioners, scholars, and policymakers. Through such suits, prisoners request injunctive and compensatory relief against such claimed abuses as staff brutality, inadequate nutrition and medical care, theft of personal property, violence by other inmates, restrictions on religious freedom, interference with mail, and many others. The number of these cases filed in U.S. District Courts increased from 218 in 1966 to 17,687 in 1983. An additional 2,103 decisions were appealed in 1983 to the U.S. Circuit Courts of Appeals[2].

Recent Supreme Court decisions suggest some judicial limits on the extent to which courts will intervene in these cases[3]. With burgeoning prison populations, however, there is ample reason to consider the impact of such filings on the federal judiciary, state attorneys general, and correctional administrators.

The potential benefits of resolving prisoner grievances without resort to litigation are different for each group of participants--judges, government attorneys, prisoners, and correctional officials. The interests of administrators, however, often have been overlooked in the wealth of literature about alternative dispute resolution mechanisms. This manual focuses on the advantages and disadvantages of six alternative dispute resolution mechanisms now in place in various correctional systems. These mechanisms include: Inmate Grievance Procedures, Ombudsmen, Mediation, Inmate Councils, Legal Assistance, and External Review Bodies. Among the advantages associated with one or more of the alternatives are:

...Preventing complaints based on extremely questionable evidence from being pursued, by advising prisoners of the merits of grievances when initially expressed.

...Providing a prompt resolution through procedures less complex than litigation.

...Minimizing prisoner resentment when grievances are not acted upon in their favor, because the procedure is recognized as being fair, open, and legitimate.

...Alerting officials to problem areas so they may be remedied before both costly lawsuits are filed and the situation becomes any worse.

The purpose of this reference manual is to describe the structure, process, and impact of the six dispute resolution mechanisms found most frequently in American correctional systems. Site visits to several states, communications with program directors, and a review of the literature document experience with these alternatives. The information gathered from the various users and presented in this manual should assist correctional administrators in three ways:

...First, by describing the benefits that can be expected upon implementation of one or more of the mechanisms.

...Second, by clarifying the structure of the alternatives and the procedures needed to adapt the general framework to particular institutions or systems.

...Third, by explaining legal standards that will enable correctional administrators to differentiate between potentially meritorious claims and weak or frivolous ones .

The manual is designed to be used as a reference tool by those charged with maintaining humane, just, and secure correctional institutions at both the state and local levels. Well-managed institutions are probably the best way to avert litigation. When prisoners express complaints, however, correctional administrators must have the ability to distinguish the frivolous from the potentially meritorious. They must also have the ability to utilize dispute resolution techniques that can resolve problems quickly, fairly and efficiently.

Averting litigation does not mean denying prisoners access to the courts. That right, of course, is protected by the U.S. Constitution. Moreover, litigation is generally recognized as an important factor in the history of correctional reform. Some correctional administrators welcome responsible lawsuits that heighten public and legislative awareness of the need for change.[4] The vast majority of inmate complaints, however, are capable of resolution without judicial intervention. The dispute resolution mechanisms discussed should be viewed as alternatives that may be more effective for both prisoners and correctional staff than the more traditional action of filing a suit in federal court.

Notes

1. In most states, prisoners generally file complaints involving the conditions of their confinement in the federal courts. However, cases can be and are filed in state courts as well. For the purpose of simplifying this report, reference will be made only to the more common practice of federal court filings.

2. Administrative Office of the U.S. Courts, Annual Report (Washington, DC: Government Printing Office, 1982).

3. Bell v. Wolfish, 99 S. Ct. 1861 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981). For recent ideas on streamlining procedures for handling prisoner cases, see Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Washington, DC: Federal Judicial Center, 1980), pp. 31-43.

4. See, e.g., Rhodes v. Chapman, 452 U.S. at 360-361 (1981), Brennan, J. concurring.

CHAPTER II

THE NEED FOR ALTERNATIVES TO LITIGATION

Since the 1964 decision of the U.S. Supreme Court in Cooper v. Pate holding that prisoners in state and local institutions are entitled to the protections of the Civil Rights Act of 1871, the judiciary has become a major factor in overseeing correctional institutions and their administration.[1] In that case the Court ruled that prisoners could sue wardens under 42 U.S.C. §1983, which imposes civil liability on persons who deprive others of their constitutional rights--thus ending the court's traditional "hands-off" policy toward conditions in correctional facilities. Thereupon followed opinions that recognized increased constitutional protections for inmates with regard to a broad range of aspects of prison life.[2]

In an era that saw the rise of the prisoners' rights movement, demands by Black Muslim inmates for religious freedom, and the 1971 uprising at Attica, the federal judiciary became the focus of legal actions. As noted by Jacobs, that movement was a "broadscale effort to redefine the status (moral, political, as well as legal) of prisoners in a democratic society."[3] Assisting the movement were lawyers who became specialists in prisoners' rights litigation. Organizations such as the American Civil Liberties Union's National Prison Project, the National Association for the Advancement of Colored People's Legal Defense Fund, and the Southern Poverty Law Center represented prisoners in cases that would have a wide impact on correctional systems and on the expansion of the rights of inmates. There was also a general extension of legal assistance to inmates through legal services programs and similar organizations. The Supreme Court decisions upholding the activities of "jailhouse lawyers" and requiring that prisoners have access to law libraries and legal services further contributed to the rise in litigation. These forces both expanded the legal rights of inmates and created a climate that encouraged courts to implement these rights fully.

Because approximately 93 percent of American prisoners are in state and local, rather than federal, institutions, and because historically conditions in the former institutions have been harsher, the great bulk of litigation has focused on state correctional practices. Inmates in state institutions have used habeas corpus and the Civil Rights Act of 1871 as the two procedural vehicles to challenge the constitutionality of state prison practices in the federal courts.

Following Cooper v. Pate, the vast majority of inmate litigation has been brought pursuant to 42 U.S.C. §1983. Habeas corpus is technically an "extraordinary writ," apart from the appellate process, and is the route traditionally used to secure release from illegal incarceration. Release is almost never granted, however, and the procedure has proved ineffective as a

means of challenging conditions of confinement. For example, during one recent four-year period, 3,702 federal habeas petitions were filed by inmates, but only five resulted in discharges.[4] Under some circumstances, habeas also may be used to attack and to remedy conditions of confinement but not to sue for money damages.

This chapter has two purposes. The first is to point out the disadvantages and limitations of litigation as a method for resolving prisoner grievances. The second is to suggest that a variety of dispute resolution mechanisms may be more appropriate to the resolution of certain of these grievances and may thus serve to avert litigation.

Litigation and the Resolution of Prisoner Disputes

Of the thousands of prisoner conditions of confinement suits filed each year, a very high proportion are deemed "frivolous" by the judiciary and are dismissed for failure to state legitimate claims.[5] Among the remainder, only a very few are decided in ways that have an impact extending beyond the individual litigant. It is true that there have been landmark cases that have brought major reforms to correctional institutions, but the number pales when one considers the overall scope of prisoner-initiated litigation.

It is generally recognized that many prisoners have legitimate claims that must be heard. Yet, correctional specialists, judges, and even some lawyers who have represented prisoners are now raising questions about the suitability of litigation as the sole means of resolving these claims.[6] Litigation is cumbersome, costly, and often ineffective because, except for class-action and isolated individual grievances, many suits resemble matters settled in small claims courts. As noted by Chief Justice Warren E. Burger, the courtroom is an overly complex forum for the resolution of many of these claims: "Federal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges."[7]

Although most suits filed by prisoners under the provisions of Section 1983 are dismissed prior to trial, the rest must be litigated or settled. Correctional officials know that this may cause them to expend considerable time and resources in litigation, expose them to personal liability[8], and erode their leadership. Cases that survive summary judgment often require defendants and other staff members to put in long hours conferring with counsel, answering interrogatories, giving depositions, preparing for trial, "managing" the press and testifying at trial. Many non-frivolous suits concern small monetary sums, and the time devoted to them by administrators is disproportionate to the amounts involved. In more complicated suits, particularly those filed as class actions, the resources

expended by attorneys general may be great, and there is the risk that federal intervention will result in the appointment of a special master to supervise aspects of institutional administration. Even if correctional officials are able to "win" the suits against them, leadership may be hurt when wardens are placed on trial. In the adversarial process, plaintiff and defendant--prisoner and warden--are legally and symbolically equal, a fact that does not go unnoticed by those whom the warden must supervise.

From the perspective of the prisoner, litigation is rarely an effective route to a satisfying outcome. Of the 500 cases naming a correctional official as the defendant filed over a two-year period in the U.S. District Court in Baltimore, for example, 95 percent were filed without benefit of counsel. They averaged nine months to resolve, and 95 percent were disposed of by summary judgment or motions to dismiss on behalf of the defendants.[9] Thus, although some inmates may achieve some expressive value by forcing the legal system to respond to their complaints, few inmates realize any substantial benefits.

Prisoners Generally Lack Representation

Most prisoner actions are filed without the assistance of counsel. Although prisons now have law libraries, "jailhouse lawyers," and in some cases even professional legal assistance programs, the courts receive large numbers of complaints that are "crude, opaque, verbose, exasperating, frequently disrespectful, sometimes trivial, and often without factual or legal merit."[10] Where attorneys do enter cases on behalf of inmates, it is usually in class action lawsuits, such as those challenging double celling, overcrowding or a totality of deleterious conditions, rather than cases raising individual claims.

Because the cases of individual prisoners tend to be filed *pro se* and *in forma pauperis*, they are subject to screening in many jurisdictions to determine if they are frivolous or malicious. In some courts, clerks evaluate the complaints and often recommend dismissal before they are even docketed. In others, all *pro se* complaints are docketed, but most are quickly dismissed either after a perfunctory motion to dismiss or motion for summary judgment. Even if the defense motions are not successful, the cases may languish because the inmates lack the legal skills necessary to press their complaints. As a result of these processes, few actions filed by prisoners receive significant review.

In 1982, 91 percent of the cases terminated by the courts ended at screening or after issue was joined but before pretrial conference.[11] One reaction of some correctional officials to these data might be that there is nothing to worry about because few suits ever come to trial. It must be remembered, however, that significant judicial, legal, and correctional resources are expended during the pretrial period. Cases must be placed on the

court calendar and considered by the judge; attorneys general must prepare responses and briefs; and wardens, staff, or other officials may be required to collect evidence, give depositions and make court appearances to answer plaintiffs' motions. Inmates may well become disillusioned with the judicial system and become a problem to correctional administrators on learning that their complaints, in which they have invested considerable emotional and practical resources, have been dismissed as being without merit. Perhaps more important, meritorious claims and grievous wrongs may go unnoticed because they never receive an effective airing in court.

Constitutional Standards Are Difficult to Meet

By far the greatest number of cases filed by prisoners under §1983 are classified as "constitutional torts."[12] These cases charge that the individual prisoner has received unconstitutional treatment by a correctional official and that money damages should be awarded. The constitutional standards in such cases are elusive because the federal judiciary has been ambiguous in many areas as to the nature of the conduct that is illegal. Where the courts have set out criteria, requirements like "willful negligence" and "deliberate indifference" are difficult to prove. In medical care cases, for example, the state usually is able to present records that show a history of treatment for a given health problem. The plaintiff's case thereby fails to satisfy the Supreme Court's basic criteria, and thus there is no remedy under 42 U.S.C. §1983. Because of the plaintiff's difficulty in satisfying the burden of proof in medical and other tort cases, the great majority are disposed of by summary judgment motions and motions to dismiss.

The Impact of Successful Suits

Although the prisoners' rights movement has achieved court-ordered reforms in some state correctional systems, successful suits under §1983 often have little impact on the individual plaintiff. In some instances, inmates whose cases survive screening and motions to dismiss may have been transferred to other institutions or released on parole by the time their cases come to trial. Even when a case is successful, implementing decrees may have to run the bureaucratic gauntlet before compensation is rendered, or the services of a special master may be necessary to bring about court-ordered reforms. Masters often find that the "decree implementation process is impeded by the parties' disagreement over what specific changes the order requires and whether those changes can be accomplished by the defendants."[13]

Correctional administrators naturally are not happy that an outside master has been appointed to oversee their work, and this intervention may cause tensions with the staff. Because court decrees are not always models of clarity, there may be disagreement between administrators and the master as to the

court's requirements. Rather than give correctional officials discretion to implement changes to fit the special conditions of the institution, the master may go back to the court for further instructions. The implementation process thus can be time consuming and vexing.

Litigation: The Best Route?

Most observers agree that prisoners have grievances that must be addressed. As the Supreme Court has indicated, the nature of prison life creates situations that for a private citizen might be insignificant but that for an inmate are weighty.[14] Certainly, the conditions examined by the courts with regard to such correctional systems as those in Arkansas,[15] Louisiana, and Baltimore called for attention. But the ability of prisoners to sue under §1983 also has produced myriad cases that have taken up resources of the judiciary, state attorneys general, and correctional administrators without having notably served the practical needs of the plaintiffs by changing prison conditions, policies, and practices.[16]

The proliferation of inmate lawsuits also has become a concern of officials in light of the impact of the adversary system on the correctional environment. An institution whose prisoners have successfully sued administrators may find its staff fearful of becoming defendants in another lawsuit and thus reluctant to exercise discretion to solve festering and potentially serious problems.[17] The emotional costs of litigation for staff and inmates may increase tensions, with ensuing management and security problems. Finally, meritorious inmate claims may go unnoticed in the crush of litigation, resulting in further erosion of the inmates' faith in the law and social institutions.

It is apparent that there is a pronounced need for non-court mechanisms that can help to resolve prisoner grievances. Such mechanisms must be applicable to the large group of cases that may be called "administrative": the generally non-frivolous and potentially meritorious complaints of individual inmates. These include cases, for example, in which prisoners request prosthetics, changes in mail or visiting procedures, compensation for lost personal property, transfer of an officer, a special diet, or restoration of good time. To serve as an effective alternative to litigation, non-court mechanisms must:

...encourage the prompt and thorough investigation of complaints;

...provide the grievant with a reasoned response;

...allow for review of the decision;

...provide for implementation even if a finding favors the inmate; and

...deter non-meritorious cases from proceeding.

These criteria are demanding, particularly when the dispute resolution mechanisms must function within the constraints and organizational context of a correctional facility. Given the mission of such an institution, the mechanisms must have the support of prisoners, staff, and administrators. Even in the best-managed facilities, certain prisoners will believe that they are being denied their rights, and it is neither possible nor desirable to deny access to the courts to those who have bona fide legal issues to raise. Likewise, there are staff members who view implementation of a decision favorable to an inmate as "giving in to the cons." Wardens and other administrators caught in this dilemma need to be able to discourage frivolous cases from being filed, to resolve meritorious cases prior to their being filed, and to resolve the meritorious cases that come to their attention after filing with as little resort to the judicial process as possible.

Alternatives to Litigation

Six kinds of dispute resolution mechanisms have been incorporated into the correctional systems of various states. These include inmate grievance procedures, ombudsmen, mediation, inmate councils, legal assistance, and external review bodies. Some have been used for many years; some are more recent, often having been borrowed from other disciplines. Although all these alternatives have equitable resolution as their goal, their approaches may differ. All, for example, are designed to solve problems before the inmate feels compelled to file litigation; legal assistance and mediation may also be used after the judicial process has been invoked.

With passage in 1980 of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. §1997, Congress lent its support to "encouraging the development and implementation of administrative mechanisms for the resolution of prisoner grievances within institutions." The U.S. Attorney General was given the responsibility of establishing standards for such mechanisms in all non- federal correctional facilities and setting up procedures to certify that the grievance processes meet the standards. If the alternative mechanisms of a correctional system are certified, the federal judge may remand for 90 days cases that have not gone through the administrative remedy, and only after exhaustion of this process during that period may the case be returned to court. Thus far, mechanisms in the correctional system of Virginia and the maximum security prison of Wyoming have been certified. Other states have filed plans with the U.S. Department of Justice seeking certification of their mechanisms.

The minimum standards set by the Attorney General for certification under CRIPA require that the mechanism be available to all inmates in an institution. It must apply to a broad range

of complaints regarding policies and conditions within the jurisdiction of the facility or agency, and to incidents occurring within the institution that affect the inmates and employees personally. With regard to the operation of the procedure, six elements are mandatory:

...Initiation. The institution may require an inmate to attempt informal resolution before filing a grievance.

...Participation. Inmates and employees shall be provided a role in the operation of the mechanism so as to provide credibility. At a minimum, this includes an advisory role in the disposition of grievances concerning general policies and practices, and in the review of the effectiveness of the procedure.

...Investigation. No employee who appears to be involved in the matter at issue shall participate in resolution of the grievance.

...Reasoned, written response. At each level of decision and review, the inmate shall receive a written response stating the reason for the decision.

...Fixed time limits. Response shall be made within fixed time limits and the entire process completed within 90 days.

...Review. The grievant shall be entitled to review by a person or entity not under the institution's supervision or control.[18]

Conclusion

Dispute resolution mechanisms can serve to advance the goal of averting litigation by handling complaints promptly, fairly and effectively. In the past, grievance mechanisms were instituted in many correctional facilities primarily to prevent disturbances. It has now been recognized that in the era of prisoner litigation, these alternative mechanisms are valuable ways to solve problems without the massive expenditure of correctional and judicial resources. More important, the mechanisms serve the essential function of ensuring that bona fide complaints are recognized and addressed.

Notes

1. Cooper v. Pate, 278 U.S. 546 (1964).

2. The stage for Cooper v. Pate was set in Monroe v. Pape, 365 U.S. 167 (1961), in which the Court said that 42 U.S.C. 1983 applied to police officers who had acted illegally, and in Robinson v. California, 370 U.S. 660 (1962), in which the cruel and unusual punishment clause of the Eighth Amendment was made applicable to the states through the Fourteenth Amendment. See: Daryl R. Fair, "Judicial Strategies in Prison Litigation," in Criminal Corrections: Ideals and Realities, ed. Jameson W. Doig (Lexington, MA: Lexington Books, 1983), p. 155.

3. James B. Jacobs, New Perspectives on Prisons and Imprisonment (Ithaca: Cornell University Press, 1983), p. 35; Alvin J. Bronstein, "Prisoners' Rights: A History," in Legal Rights of Prisoners, ed. Geoffrey P. Alpert (Beverly Hills, CA: Sage Publishing Company, 1980), p. 19.

4. Candace McCoy, "The Impact of Section 1983 Litigation on Policymaking in Corrections," 45 Federal Probation 21 (December 1981).

5. William Bennett Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts," 92 Harvard Law Review 610 (1979), at p. 611; comments of U.S. District Judge Carl Rubin at Symposium on Mediation of Prisoner Grievances, American Bar Association, Washington, D.C., 7 November 1981.

6. See, for example: Michael J. Keating, Jr., Improved Grievance Procedures (Washington, DC: BASICS, American Bar Association, 1976).

7. Warren E. Burger, "Chief Justice Burger Issues Yearend Report," American Bar Association Journal 62 (1976):190.

8. During the course of this project, several correctional officials raised the issue of individual liability in prisoner civil rights cases. Frequently, wardens, administrators, and others indicated that this situation was one of great concern because of the potential devasting economic impact on their lives. Although §1983 says nothing about such liability, judicial decisions have suggested that prison officials have qualified immunity. See Procunier v. Navarette, 434 U.S. 555 (1978).

9. Roger A. Hanson, William L. Reynolds and Kathy Shuart, Evaluation of the Maryland Prisoner Mediation Project, First Year Report (New Haven, CT: Silbert, Feeley and Associates, Inc., 1983).

10. Memorandum, Judge James E. Doyle, W.D. Wis., to Chief Justice of the United States and the Judicial Conference of the United States, 4 March 1975, quoted in Turner, "When Prisoners Sue," p. 617, n. 46.

11. U.S. Administrative Office of the Courts, Annual Report.

12. Candace McCoy, "Actionability of Negligence Under Section 1983 and the Eighth Amendment," 127 University of Pennsylvania Law Review 533 (1978).

13. "'Mastering' Intervention in Prisons," 88 Yale Law Journal 1070 (1979); M. Kay Harris and Dudley P. Spiller, Jr., After Decision Implementation of Judicial Decrees in Correctional Settings (Washington, DC: Government Printing Office, 1977).

14. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

15. Harris and Spiller, Jr., After Decision Implementation of Judicial Decrees in Correctional Settings.

16. For example, it is estimated that in Virginia the cost to the state in time spent obtaining affidavits, taking depositions, and organizing witnesses is between $1,200 and $1,500 a case, even though over 90 percent of cases do not get past a motion for summary judgment. Interview with James Sisk, Manager, Ombudsman Services Unit, Richmond, VA, 18 January 1983.

17. Jerome Skolnick, Justice Without Trial (New York: John Wiley and Sons, 1966), p. 44.

18. "Minimum Standards for Inmate Grievance Procedures," 46 Federal Register 48186 (1 October 1981).

CHAPTER III

LEGAL ISSUES

The best way to avert potentially meritorious litigation, even class actions that challenge system-wide policies and practices, is to identify and resolve legitimate complaints before they turn into lawsuits. Once a case that states a colorable legal claim has actually been filed in court, the stakes may increase dramatically for all parties. Attorneys will enter the case, often at considerable governmental expense. Investigation, depositions and discovery may involve not only lawyers, but also correctional administrators and line staff. Moreover, court orders may establish precedents that go beyond the scope of the inmate's initial complaint. What may have begun as a relatively small individual grievance could conceivably result in a decision mandating extensive and expensive system-wide change.

The process of identifying and resolving legitimate complaints requires both a mechanism for responding to these complaints and knowledge of the law of inmates' rights. The purpose of this chapter is to provide a general overview of the fundamental legal issues most frequently raised by inmate grievances to aid correctional administrators in differentiating between meritorious claims and weak or frivolous ones. The cases cited should be viewed as illustrations, not comprehensive statements of the state of the law.[1] For a fuller treatment of these complex issues, the reader should refer to the following sources, some of which are updated by annual supplements:

Prisoners' Rights Source Book, Michele G. Hermann, Marilyn G. Haft and Ira P. Robbins, eds., Clark Boardman Company (New York, 1973, 1980) (two volumes).

Rights of Prisoners, James G. Gobert and Neil P. Cohen, Shepard's McGraw-Hill, Inc. (Colorado Springs, 1981)

Legal Rights of Prisoners, Geoffrey P. Alpert, ed., Sage Publications (Beverly Hills, CA, 1980).

Compendium Of The Law On Prisoners' Rights, Ila J. Sensenich, Federal Judicial Center, Superintendent of Documents, (Washington, DC, 1979).

The Legal Aspects of Prisons and Jails, P.D. Clute, Charles C. Thomas, Publisher (Springfield, IL, 1980).

Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts, Federal Judicial Center (Washington, DC, 1980).

Prisoner's Rights: Treatment of Prisoners and Post Conviction Remedies:Cases and Materials, Hillel

Hoffman, Matthew Bender (New York, 1976); Supplement (1981).

The Law of Criminal Correction, Sol Rubin, West Pub. Co. (St. Paul, 1973).

Law of Corrections and Prisoners' Rights in a Nutshell, (2nd ed.), Sheldon Krantz, West Pub. Co. (St. Paul, 1983).

Rights of the Imprisoned: Cases, Materials and Directions, Richard G. Singer and William P. Statsky, Bobbs-Merrill (Indianapolis, 1974).

Although these documents are instructive, for specific guidance on particular legal problems, the correctional administrator should seek the help of in-house legal counsel, the attorney general's office, or other legal official charged with representing the department's interests. The administrator should therefore develop a good working relationship with the department's attorney and establish channels of communication that will facilitate the rendering of legal opinions when needed. In South Carolina, for example, the Inmate Grievance Program is located within the office of the Legal Advisor to the Department of Corrections, and administrators faced with unusual grievances are frequently able to resolve them after conferring with departmental attorneys. At the Federal Correctional Institution at Danbury, Connecticut, a staff paralegal position was created to work with the warden on inmate grievances. Consultation with a lawyer on every grievance is not possible, however, and the administrator will have to evaluate the legal merits of a great many complaints without the assistance of counsel.

Administrators therefore should have a general understanding of the four potential sources of legal rights of persons confined in correctional institutions. These include the U.S. Constitution, the constitution of the state in which the institution is located, federal laws and regulations, and state laws and regulations. Most correctional litigation has involved rights claimed under the provisions of the U.S. Constitution. The protections of most state constitutions generally parallel those of the U.S. Constitution but sometimes confer other rights. Over and above these constitutional minima, legislatures are free to grant additional rights to inmates and to authorize corrections departments to promulgate regulations that give these rights substance. Federal statutory and regulatory law generally affects only federal correctional institutions, although certain statutes, such as the Civil Rights of Institutionalized Person Act (CRIPA) may give state inmates additional legal protections.

The Constitution of the United States

The vast majority of litigation brought by state prisoners is based on the Civil Rights Act of 1871 and involves allegations

of the deprivation of one or more rights guaranteed by the U.S. Constitution. With thousands of constitutional claims filed annually, spawning reams of legal opinions, one often loses sight of the fact that the constitutional rights applicable to inmates are essentially summarized in a handful of phrases contained within just four of the amendments to the United States Constitution:

> AMENDMENT I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> AMENDMENT IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....
>
> AMENDMENT VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> AMENDMENT XIV. ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The constitutional rights of persons living in the United States are not completely lost upon conviction of crime or sentence to a prison. Indeed, the Eighth Amendment's prohibitions against cruel and unusual punishment and excessive fines are applicable virtually exclusively to convicts. The courts have emphasized, however, that some of these rights may be abridged when they are outweighed by legitimate governmental interests and when the restriction imposed is no greater than necessary to accomplish these limited objectives. The three specific interests that the courts have recognized as justifying some abridgement of the constitutional rights of prisoners are the maintenance of institutional order, the maintenance of institutional security, and the rehabilitation of inmates.[2] Whether these interests are implicated in a given situation and whether the proposed restriction is greater than necessary to preserve them are questions of fact that must be determined on a case-by-case basis. Thus, the development of a body of correctional law essentially has been based on efforts to balance these legitimate interests against the specific rights enumerated by the Constitution.

The First Amendment. Generally speaking, the First Amendment guarantees that inmates retain their right to express themselves on issues that concern them and to practice their own religions,

although this right is limited by the reasonable exercise of precautions necessary for the maintenance of institutional order and security.[3] Most of the litigation to date has focused on claimed rights concerning correspondence, communication, assembly, visitation and religion, although there have been some cases relating to access to the press.

The burden is on the inmate to prove that exercise of the claimed right does not present a danger or that the institution's response to security concerns is exaggerated.[4] Courts routinely have deferred to corrections officials in their attempts to regulate communications within the institution, visitation, and receipt of mail and publications.[5] If a less restrictive alternative is available, however, a given practice may be struck down. Thus, for example, a rule prohibiting nude photographs of wives and girlfriends has been found unconstitutional. Because it was not the receipt of such photographs that would disrupt institutional order, but rather the fact that other inmates might be aroused by their display, the Court felt that a rule which prevented inmates from displaying their photographs in their cells would have been preferable.[6] Similarly, a court struck down the practice of punishing inmates for writing inflammatory political tracts because officials could have merely confiscated the material.[7] The administrator who cannot reasonably link a particular restriction to a legitimate institutional purpose should look for ways to resolve the grievance before it gets to court. Similarly, if there is a less restrictive way to accomplish a legitimate curtailment of the right of expression, it implementation may enable the administrator to avert a potentially meritorious lawsuit.

Petitions based on claimed denials of freedom of religion have formed a large portion of the First Amendment filings under §1983. Inmates have fared somewhat better with such claims than with alleged denials of freedom of speech or expression. In balancing an inmate's desire to practice a religious belief with the needs of the institution, the administrator first must ask whether the inmate is sincere in the belief and whether the purported "religion" is in fact a religion at all. These are often difficult determinations to make. Even if both questions are answered affirmatively, however, the religious practice still must be balanced against the recognized legitimate institutional interests in order, security and rehabilitation.

Moreover, policies that favor certain conventional religions over other, less traditional beliefs, may also run afoul of both the First Amendment's guarantee of religious freedom and the Fourteenth Amendment's prohibition against denial of equal protection of the laws. As examples, inmates have been held to have the right to be served meals consistent with the dietary laws of their religions,[8] the right to correspond with religious leaders and to receive and possess religious literature,[9] the right to wear beards, if part of a religious belief,[10] and the right to assemble for religious services.[11] Predicting what a

court will do in any given situation is difficult, of course, but the administrator can go a long way toward preventing costly litigation over these issues by making a common-sense analysis of the apparent sincerity of the inmate's belief, the authenticity of the religion and the extent to which the particular practice truly conflicts with the institution's interest in order, security and rehabilitation.

The Fourth Amendment. Inmates entering correctional institutions surrender most of their Fourth Amendment protections. Intrusions on privacy which, in the society of free men and women, clearly would violate the ban against "unreasonable searches and seizures," often can be justified in terms of the institution's interest in security and order, and courts generally have been loathe to confer a very extensive right to privacy on inmates[12]. Body searches have been harder for corrections officials to defend than cell searches, but even a cell search will be found unconstitutional if it is the pretext for damaging or destroying inmate property[13]. On the other hand, body cavity searches have been upheld when part of a clear-cut policy demonstrably related to an identifiable legitimate institutional need,[14] but not when intentionally humiliating or degrading.[15]

To illustrate the fine balance needed to justify an intrusion on the right to privacy, some courts have ruled that staff members of one sex may not supervise inmates of the opposite sex during bathing, use of the toilet, and strip searches.[16] In these cases, the inconvenience of requiring staff members of the same sex as the inmate was held not to constitute a legimate institutional reason justifying the intrusion. On the other hand, the practice of allowing female guards to "pat down" male prisoners, excluding the genital area, has been upheld.[17] In that case, the decree of the intrusion was outweighed by the institution's staffing interests. These cases illustrate the difficulty of balancing the degree of the intrusion against the institution's needs and the requirement that administrators must respond to each complaint individually.

The Eighth Amendment. The Eighth Amendment, as applied to the states through the Fourteenth, specifically limits the extent to which states can punish convicts, proscribing excessive fines and those punishments that are "cruel and unusual." There is no question that the Eighth Amendment is meant to apply, almost exclusively, to inmates serving sentences. It is the interpretation of this amendment, and the determination of whether specific conditions and practices meet its standards, that have provided the courts with some of their most intriguing issues.[18]

Judicial attempts to give substance to the words "cruel and unusual" have used such phrases as "depriv[ations] ... of the minimal civilized measure of life's necessities"[19] and "wanton and unnecessary infliction of pain...grossly disproportionate to the severity of the crime warranting imprisonment."[20] Since the Supreme Court's decision in Rhodes v. Chapman, several lower

courts have held that the Eighth Amendment requires the provision of "basic human needs," including "adequate food, clothing, shelter, sanitation, medical care and personal safety."[21] The Court has repeatedly recognized "evolving standards of decency," rather than the standards in vogue at the time of the passage of the Eighth Amendment, in determining constitutionality.[22]

Individual inmates have claimed a wide variety of institutional conditions and practices to be violative of the Eighth Amendment. Although most such petitions are summarily dismissed, courts have upheld Eighth Amendment challenges to such conditions and practices as:

> ...deliberate indifference to medical needs, as distinguished from mere negligence or malpractice;[23]
>
> ...assaults on inmates by prison personnel, including the use of more force than is necessary to subdue a prisoner;[24]
>
> ...deliberate failure to protect against foreseeable assaults by fellow inmates, including confinement of inmates where violence is commonplace;[25]
>
> ...specific instances of overcrowded conditions that shock the conscience;[26]
>
> ...denial or extreme limitation of opportunities for physical exercise;[27]
>
> ...diet which is nutritionally inadequate, as distinguished from merely monotonous;[28]
>
> ...infliction of corporal punishment;[29]
>
> ...unreasonably lengthy solitary confinement, such as 30 days or longer[30]

Yet, the majority of the challenged conditions that have been examined by the courts continue to pass constitutional muster. The courts repeatedly have made clear that the Constitution sets very minimal standards. Many conditions and practices that judges may find personally repugnant will not be found to violate the Constitution and will be permitted to continue, unless legislators and corrections departments themselves take steps to change them. "To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[31]

The Fourteenth Amendment. A sentence to a penal institution obviously deprives an individual of personal liberty.[32] The

statutes and regulations of many states, however, provide inmates with certain protections regarding parole release,[33] intra-prison transfers,[34] transfers to administrative or disciplinary segregation,[35] and disciplinary hearings.[36] The courts have held that such statutes confer "liberty interests" on inmates that are independent of the liberty lost upon incarceration. Because inmates are expressly given these rights, they cannot be taken from them without following procedures that afford them due process of law.[37] The requirements of due process in such cases may be minimal, however. For example, the Supreme Court has held that certain statutory provisions concerning administrative segregation created a "liberty interest," but that due process required only some notice of the reason for the transfer, an opportunity to present the inmate's views to the responsible official within a reasonable time, and "some sort of periodic review."[38]

The Fourteenth Amendment also prohibits states from denying inmates the equal protection of the laws. Thus, institutional conditions or practices that discriminate against inmates on impermissible bases such as race, religion, sex or age have been held unconstitutional. Since 1968, courts consistently have struck down policies of racial segregation in prisons, permitting temporary separation of the races only where violence is demonstrably imminent.[39] Equal protection claims also have been combined successfully with other substantive constitutional claims, especially those relating to denial of religious freedoms to members of minority religions.[40]

The Supreme Court has ruled that inmates have a "meaningful right of access" to the courts guaranteed by the Constitution of the United States. Based on this right, courts have held that institutions:

> ...may not tamper with inmate mail directed to the courts, even though under certain circumstances other kinds of mail may be inspected to prevent a potential breach of security;[41]
>
> ...may not interfere with the inmate's relationship with legal counsel, including "jailhouse lawyers" who are themselves prisoners;[42]
>
> ...may not deny reasonable access by prisoners to decent legal libraries.[43]

The Supreme Court has not made clear, however, precisely where in the Constitution this right of access to the courts is found. Majority opinions have spoken of the right as "fundamental" but have not pointed to a particular article or amendment. The right may have Fourteenth Amendment underpinnings, but dissenting opinions have stressed the lack of language in that or any other constitutional provision that deals directly with the issue.[44]

Nevertheless, the right seems firmly established, and administrators should be aware that conditions or practices that have the effect of interfering with an inmate's access to the courts, lawyers, law books and materials necessary to the proper preparation of court papers are likely to be challenged.

State Constitutions

The state courts are empowered to declare correctional conditions and practices unconstitutional on the bases of violations of either state or federal constitutions, but most inmates choose to file their claims in federal courts. Inmates perceive that their petitions will receive better attention from federal judges, and the procedural vehicles for filing such claims usually are more readily available and easier to follow. Although most state constitutions will not confer upon inmates any greater rights than those granted by the U.S. Constitution, others may, and the administrator should be aware of any state constitutional rights of inmates that have been recognized by the courts. California and Oregon, for example, are two states in which state constitutional provisions increasingly are cited as the bases for state court claims challenging conditions of confinement.[45]

State Statutes and Regulations

State legislatures are free to grant specific rights to inmates over and above those conferred by either the state or the federal constitution. As indicated above, some of these have been held to create "liberty interests" that cannot be denied without due process of law. Some states also have enacted "right-to-treatment" legislation[46] or other statutes that charge correctional officials with particular duties. Prisoners may bring state tort claims against officials who fail to fulfill their statutory duties and obligations. If successful, the inmate may be entitled to collect monetary damages or to receive injunctive relief against the responsible officials.[47] The correctional administrator therefore must be aware of all legislative enactments and regulations that prescribe official responsibilities or duties, which, upon any failure to perform, could form the basis of a cause of action by an inmate.

Federal Statutes

Just as state statutes and regulations may create a "liberty interest" for state prisoners, so federal laws and regulations may create similar interests for federal prisoners. In addition, recent federal legislation may prove to have a strong impact on state correctional systems. The Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997, permits the U.S. Attorney General to sue state institutions that subject inmates to

> egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm...pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities....

Preventive Law

Once a corrections administrator understands the sources and scope of correctional law and the costs of litigating both major, system-wide cases and individual lawsuits, the immediate question becomes: What reasonably can be done to prevent such lawsuits? What are the techniques of prevention in addition to the development of the specialized non-litigation dispute resolution mechanisms discussed elsewhere in this manual?

There are, we believe, several important techniques of prevention. They have one thing in common: carefully planned and implemented collaboration between corrections administrators and their lawyers, whether they be "house counsel" or assistant attorneys general. Put simply, the best immunization against major corrections litigation is establishment of a strong and ongoing attorney-client relationship before, not after, the major lawsuit is filed.

It is a rare corrections system that does not require its officers to participate in pre-employment or continuing education programs. State lawyers should help design and teach a legal curriculum that communicates effectively the complicated body of corrections law that defines the responsibilities, as well as the potential liability, of corrections officers and administrators.

A standard text and a most useful methodology for teaching corrections law to correctional officers has been developed by the National Street Law Institute, an outgrowth of a Georgetown Law Center program started in 1971. Some variation of this model program should be implemented in all corrections systems if corrections officers and administrators are to be protected from the increasing risk of personal liability and if existing law is to be effectively implemented.

The provision by corrections lawyers of an ongoing legal education program for corrections officials should have many beneficial consequences. First, corrections officials--from line staff through top administrators--will gain an understanding of the basic rights and responsibilities of inmates. Much system-wide litigation is generated, in part, because inmate rights that have been established by the courts simply were not communicated to line officers. A face-to-face legal educational program will allow corrections lawyers to assure that this essential communication occurs.

Second, there is an informal and valuable policy and practice "review" that occurs between corrections lawyers and corrections officials at legal training sessions. Such sessions may be the only opportunity for corrections officers--particularly line staff--to ask basic legal questions about outdated policies and practices that, if not modified, will generate litigation. These sessions may provide the only opportunity that corrections lawyers will have, before litigation is filed, to learn about and review ongoing problems that tend to breed litigation. Thus, these in-house sessions can serve as an "early warning" device to detect and resolve problems that lead to major lawsuits.

A comprehensive legal education program is also the first step in implementing correctional decisions that are binding on corrections officials in a specific jurisdiction. In a number of recent cases, inmates have received substantial awards of monetary damages against prison officials who acted in disregard of applicable law.[48] Although prison officials are protected by the "good faith" immunity doctrine in federal damage actions if they act without malice, the implicit principle of many of these damage actions is that prison officials will be held accountable for the enforcement of binding law whether or not they, in fact, were personally aware of all details of the binding decision.

Indeed, this implicit principle was made explicit in one case in which the judge said:

> It would obviously be desirable for [the correctional official held to be liable] to be advised regularly by counsel on the development in prison law. The record in this case does not reveal whether he had the benefit of briefings of this kind. It does, however, reveal circumstances which would cause a prudent man in Superintendent Anderson's position to seek counsel about plaintiff's right and to execute his responsibilities in a manner consistent with the advice he surely would have received. Accordingly, I hold that he has failed to establish an official immunity defense with respect to this portion of plaintiff's due process claim.[49]

Prison officials should not have to ask in order to be informed about decisions that are binding on them. It is the responsibility of corrections lawyers systematically to inform them of such decisions. But, in implementing binding corrections decisions, corrections officials should be as certain as possible that they have the best attention and advice of busy corrections lawyers. For example, the assistance of state corrections lawyers is usually essential to assure that legal principles get translated into correctional practice. Corrections officials and lawyers, working together, should actively monitor each final

court decision to assure that legal principles get translated, first, into correctional policy and, second, into correctional practice. Where binding decisions have fiscal implications, the lawyers and officials should review annual budgets to make certain that the necessary sums are appropriated to enforce these decisions. To avoid further "compliance" litigation, corrections officials and lawyers must be just as zealous within government in their advocacy for adequate funding for legally required programs as they are when they defend themselves in court.

In addition, where management or information deficiencies contribute to the non-enforcement of judicial decisions, corrections lawyers should be asked to help identify and resolve these problems. The management problems that frustrate the implementation of overcrowding decrees provide an example of the need for collaboration between corrections lawyers and officials. Such management issues may appear mundane: Is the corrections classification system functioning adequately? Is there a reliable mechanism that assures that all inmates are being credited with the correct amount of good time? Do parole practices contribute unnecessarily to overcrowding by "holding" eligible inmates for lengthy periods after parole hearings have been held while marginally useful information about them slowly makes its way to the parole board? These issues may not be as exciting as cross-examining plaintiffs' expert witnesses in overcrowding cases. If, however, careful attention is paid to them by lawyers and officials working together, implementation of an overcrowding decree may be made less difficult to accomplish.

The above list is by no means an exclusive catalog of the techniques of "preventive law." Reviewing regulations for legal sufficiency, drafting commercial documents, and proposing necessary legislation have been the "bread-and- butter" techniques of preventive law for years. More important than emphasizing any one technique is the acceptance by corrections officials and lawyers of the vital importance of the preventive law function. It is an indispensable means for both keeping corrections clients out of trouble and helping ensure that the law of corrections is enforced.

Conclusion

It is clearly in the interest of the institution and its staff to resolve legitimate complaints short of litigation. Moreover, an inmate whose complaint lacks merit may be encouraged not to pursue the case in court if corrections officials can provide a reasonable explanation of the law applicable to the particular grievance.

By asking a few basic question, properly trained corrections officers can make a rough but reasonable judgment as to whether a particular grievance may have constitutional legal merit. The administrator should encourage staff, especially those involved in the grievance process, to acquire a basic understanding of the

law of prisoners' rights, for these individuals often are in the best position to resolve a grievance before it festers into a lawsuit. When in doubt, the administrator should consult with legal counsel. In general, administrators and their attorneys should develop strong collaborative relationships.

When confronted with an inmate complaint, the corrections administrator should ask:

...Has the inmate made a claim that implicates a right guaranteed by either a constitution (state or federal) or a statute or regulation (state or federal)?

...Has such a right in fact been violated or abridged?

...Can the abridgement of the right be justified by a legitimate institutional interest in order, security or rehabilitation?

...Are there ways of protecting those legitimate interests adequately while minimizing the abridgement of the claimed right?

Notes

[1]The field of corrections law is not much more than a couple of decades old, and only a handful of lawyers are considered experts in it. Regional, political, and philosophical differences have all been strong influences on judicial decision-making, and similar complaints frequently have produced divergent results in different courts. Relatively little inmate litigation has reached the U.S. Supreme Court. In the few cases in which that Court has spoken, it often has been sharply divided in its interpretations of the rights of inmates. There are therefore many questions about the scope of prisoners' rights that are still unanswered.

[2]Procunier v. Martinez, 416 U.S. 396, 404 (1974).

[3]Pell v. Procunier, 417 U.S. 817, 822 (1974); Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119, 125 (1977).

[4]St. Claire v. Cuyler, 634 F.2d 109, 115 (3d Cir. 1980), citing Pell v. Procunier, 417 U.S. 817, 827 (1974).

[5]Nickens v. White, 622 F.2d 967 (8th Cir. 1980) (prison may prohibit circulation of protest petition on grounds of security concerns where prisoners have alternative means to communicate grievances), cert. denied 449 U.S. 1004 (1980); Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978) (right of officials to reject mail on grounds of security or obscenity upheld); Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982) (prison may restrict receipt of hardcover books by pretrial detainees on grounds of security); See Bell v. Wolfish, 441 U.S. 520, 548-52 (1979) (ban on "non-publisher" hardcover books upheld); Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980) (ban on receipt of newsletter permissible on grounds of institutional security); White v. Keller, 588 F.2d 913 (4th Cir. 1978) (prison may suspend visitation privileges for limited period after contraband discovered immediately following visit); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (reasonable restrictions on visitation upheld), cert. denied, 450 U.S. 1041 (1980).

[6]Pepperling v. Crist, 678 F.2d 787, 790-791 (9th Cir. 1982).

[7]Sostre v. McGinnis, 442 F.2d 178 202-203 (2d Cir. 1971), cert. denied, 404 U.S. 1049 (1972); but see Davidson v. Scully, 694 F.2d 50 (2d Cir. 1982) (prison mail regulations irrational as applied to outgoing mail to public officials and civil liberties group).

[8]Barnett v. Rodger, 410 F.2d 995, 1003 (D.C. Cir. 1969) (impediments to serving meals consistent with religious dietary laws must be compelling).

[9]Walker v. Blackwell, 411 F.2d 23, 29 (5th Cir. 1969).

[10]Monroe v. Bombard, 422 F.Supp. 211, 218 (S.D.N.Y. 1976).

[11]Walker v. Blackwell, 411 F.2d 23, 24 (5th Cir. 1969); Cooper v. Pate, 382 F.2d 518, 522 (7th 1967).

[12]Bell v. Wolfish, 441 U.S. 520, 557 (1979) (room searches and package inspections are permissible if "reasonable" and made for security reasons).

[13]Ferranti v. Moran, 618 F.2d 888 (1st Cir. 1980) (destruction of prisoner's property without legitimate reason states a claim under 42 U.S.C. §1983). See Taylor v. Leidig, 484 F. Supp. 1330 (D. Colo. 1980) (confiscation of prisoner's personal belongings may amount to violation of Fourth and Fifth Amendments); Thornton v. Redman, 435 F. Supp. 876 (D. Del. 1977) (prisoners afforded protection against unjustified appropriation of property by officials); Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975) (seizure of transcript during search states a claim under Fourth Amendment).

[14]Bell v. Wolfish, 441 U.S. 542, 558-59 (1979); Smith v. Fairman, 678 F.2d 52, 54 (7th Cir. 1982), cert. denied, 103 S.Ct. 1879 (1983).

[15]Smith v. Fairman, 678 F.2d 52, 53 (7th Cir. 1982), cert. denied, 103 S.Ct. 1879 (1983). See also Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) (when not reasonably necessary, exposure of genitals in presence of other sex may be demeaning and impermissible).

[16]Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981); Cumbey v. Meachum, 684 F.2d 712 (10th Cir. 1982).

[17]Smith v. Fairman, 678 F.2d 52, 53-54 (7th Cir. 1982), cert. denied, 103 S.Ct 1879 (1983).

[18]The definition of "cruel and unusual" is elusive and controversial. Moreover, deprivations that individually might not be found to be cruel and unusual could, in combination with others, be ruled unconstitutional. See, e.g., Rhodes v. Chapman, 452 U.S. 337, 347 (1982). It is such broad "totality of conditions" claims that have been at the heart of the major class action lawsuits brought by litigators such as the American Civil Liberties Union National Prison Project, NAACP Legal Defense Fund, and others. Some of these, if successful, would require massive institution or system-wide changes at enormous financial expense. Under these circumstances, the administrator may be personally unable to respond in a fashion that could successfully avert the litigation. The ultimate response must come from the legislature, which often will not act until a court has ordered that changes be made. In such cases, any negotiation that might prevent filing of the suit should be undertaken by the agency's counsel.

[19]Rhodes v. Chapman, 452 U.S. 337, 347 (1982).

[20]Id., citing Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[21]Hoptowit v. Ray, 682 F.2d 1237, 1258 (9th Cir. 1982), rehearing en banc denied (1982); Capps v. Atiyeh, 559 F. Supp. 894 (D. Oregon 1982).

[22]Rhodes v. Chapman, 452 U.S. 337, 346 (1982), citing Trop v. Dulles, 356 U.S. 86, 101 (1958).

[23]Estelle v. Gamble, 429 U.S. 97, 103 (1976). See also Harris v. Chanclor, 537 F.2d 203 (5th Cir 1976); Zaczek v. Hutto, 642 F.2d 74 (4th Cir. 1981); cf. Layne v. Vinzant, 657 F.2d 468 (1st Cir. 1981) (substandard treatment to the point of malpractice not the basis for liability); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (negligence or inadvertent failure to provide adequate medical care does not constitute a medical wrong under Eighth Amendment), cert. denied 450 U.S. 1041 (1980).

[24]George v. Evans, 633 F.2d 413, 416 (5th Cir. 1980).

[25]Gullatte v. Potts, 654 F.2d 1007, 1012-14 (5th Cir. 1981); Madyun v. Thompson, 657 F.2d 868, 875 (7th Cir. 1981).

[26]LaRean v. McDougall, 473 F.2d 974, 977-78 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973); Campbell v. Cauthron, 623 F.2d 503, 506 (8th Cir. 1980).

[27]Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854, 865-66 (4th Cir. 1975).

[28]Hutto v. Finney, 437 U.S. 678, 683 (1978); Cunningham v. Jones, 567 F.2d 653 (6th Cir. 1977); Campbell v. Cauthron, 623 F.2d 503, 508 (8th Cir. 1980).

[29]Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976).

[30]Hutto v. Finney, 437 U.S. 678 (1978).

[31]Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[32]Hewitt v. Helms, 103 S.Ct. 864, 869, 872 (1983), quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976).

[33]Greenholtz v. Inmates of Nebraska Penal and Correctional Institution, 442 U.S. 1 (1979).

[34]Meachum v. Fano, 427 U.S. 215 (1976).

[35]Hewitt v. Helms, 103 S.Ct. 864 (1983).

[36]Finney v. Arkansas Board of Corrections, 505 F.2d 194, 208 (8th Cir. 1974) (officers may not sit in judgment on their own complaints in disciplinary proceedings); Wolff v. McDonnell, 418 U.S. 539 (1974) (hearing required prior to discipline for major misbehavior); Hurney v. Carver, 602 F.2d 993 (1st Cir. 1979) (dismissal of complaint where prisoner not permitted to call witnesses).

[37]Montanye v. Haymes, 427 U.S. 236 (1976); Mitchell v. Hicks, 614 F.2d 1016, 1019 (5th Cir. 1980); Bullard v. Wainwright, 614 F.2d 1020 (5th Cir. 1980).

[38]Hewitt v. Helms, 103 S.Ct. 864, 874 (1983).

[39]Lee v. Washington, 390 U.S. 333, 334 (1968); cf. Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), mod. sub nom. Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974) (racial segregation impermissible if not undertaken for security purposes).

[40]Cruz v. Beto, 405 U.S. 319 (1972).

[41]Ex Parte Hull, 312 U.S. 546 (1941).

[42]Johnson v. Avery, 393 U.S. 483 (1969).

[43]Bounds v. Smith, 430 U.S. 817 (1977).

[44]Bounds v. Smith, 430 U.S. 817, 835 (1977).

[45]Sterling v. Cupp, 290 Ore. 611, 625 P.2d 123 (1981) (state constitutional guarantee against "unnecessary rigor" in correctional practices provides grounds to enjoin certain genital searches); DeLancie v. Superior Court of San Mateo County, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982) (electronic surveillance of prisoners actionable under privacy guarantees of state statute).

[46]Fear v. Rundle, 506 F.2d 331 (3d Cir. 1974), cert. denied sub nom. Anderson v. Fear, 421 U.S. 1012 (1975). See, also, Dancer v. Dept. of Corrections, 282 So.2d 730 (La. App. 1973); Shea v. City of Spokane, 17 Wash. App. 235, 562 F.2d 264 (1977), aff'd 9 Wash. 2d 43, 578 P.2d 42 (1978).

[47]Methola v. County of Eddy, 96 N.M. 274, 629 P.2d 350 (1980) (prisoner recovers tort damages when battered by other inmates without intervention by prison personnel); Wilson v. City of Kotzebue, 627 P.2d 623 (Alaska, 1980).

[48]See, e.g., Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979) ($99,000 awarded against jail officials for indifference to the medical needs of a jailed inmate); Johnson v. Anderson, 420 F. Supp. 845 (D. Del. 1976) ($1,500 awarded to five inmates who were not provided procedurally fair hearings before being transferred to maximum security quarters); Wright v. McMann, 460 F.2d 126 (2d Cir. 1972), cert. denied 409 U.S. 885 (1972) ($1,500 awarded to an inmate who was confined in a bare and unsanitary solitary confinement cell); Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), cert. denied 100 S. Ct. 710 (1980) (over $56,000 awarded to inmates who were assaulted, improperly placed in maximum security quarters, and denied correspondence rights); Bryant v. McGinnis, 463 F. Supp. 373 (W.D. N.Y. 1978) ($3,000 awarded to Muslim inmates who were denied their right to practice their religion); Taylor v. Clement, 433 F. Supp. 585 (D.D. N.Y. 19787) ($2,750 awarded to two inmates who were placed in protective custody cells without required hearings); Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973) (over $21,000 awarded to state prisoners for improper subjection to solitary confinement and the denial of other rights.

[49]Johnson v. Anderson, 420 F. Supp. 845 at 850-51.

CHAPTER IV

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

For some time, scholars and practitioners in a number of fields outside corrections have encouraged the use of techniques other than litigation as a means of resolving disputes. No-fault automobile insurance, mediation of marital disputes, arbitration in labor relations, landlord-tenant negotiations, and consumer-merchant settlement processes all have been developed as alternatives to the courts. Many of these processes now have become incorporated into the framework of American society. In the corrections field, however, the assertion of legal rights by prisoners in an adversarial setting is of recent vintage. As a result, the adaptation of alternative dispute resolution mechanisms to the special circumstances of corrections is still developing. Increasingly, however, state and local correctional administrators have been adding one or more of these alternatives to their institutions.

This chapter reviews six models of dispute resolution mechanisms now found in American correctional systems: inmate grievance procedures, ombudsmen, mediation, inmate councils, legal assistance, and external review bodies. Other approaches have been used on an experimental basis, but these mechanisms are now intregal parts of some correctional systems. There has been enough experience with them so that is it possible to evaluate their utility. The descriptions presented here rely on information gathered from the literature of corrections, law, and dispute resolution, as well as from site visits in eleven states,[1] during which interviews were conducted with attorneys general, judges, prisoners, wardens, correctional line staff, program administrators, and corrections commissioners. In addition, there was an exchange of information with persons in the same or similar positions in many other states, as well as with criminal justice scholars and planners throughout the country.

Rather than describe the specific characteristics of a mechanism as found in one state or designating one state's mechanism as exemplary, the general principles undergirding each technique are set out so as to present a composite picture. Where suitable, the description is organized to direct attention to the each mechanism's structure or organization, process and procedures, and impact.

Inmate Grievance Procedures

Although informal ways of hearing inmate complaints have existed for many years, it has been only since the mid-1970s that formal grievance mechanisms have been used widely. They vary considerable in the extent to which they emphasize such aspects as inmate participation, informal resolution at an early stage,

required time limits for decisions, and exclusion of some types of cases.

The question of inmate participation is controversial. Those programs certified under CRIPA (as well as some others) include prisoners either as decision makers who, along with staff, review grievances, or as advisers to the administration on policies concerning the overall operation of the procedure. In New York, for example, the Inmate Grievance Resolution Committee, the basic complaint decision-making body in each institution, consists of two inmate representatives elected for six-month terms and two staff members appointed for five-month terms. They receive cases, investigate them, and make recommendations to the institution head. In most correctional systems, however, administrators have been skeptical of inmate participation, arguing that the prisoners selected will use the position to enhance their own influence with staff and other inmates. As a result, most inmate grievance procedures operate with little or no inmate participation.

Most observers believe that prisoners should make an attempt to solve their problems informally before filing complaints. There are some grievance procedures that specify that a good-faith attempt must be made, and the CRIPA standards allow correctional systems to make this stipulation. Many complaints have their genesis in misunderstandings, and often can be cleared up if the prisoner goes to a case counselor, staff member, or fellow inmate for information that would resolve the matter without requiring implementation of formal processes. Without the requirement of an initial attempt to resolve a problem, form may become more important to an institution than the substance of informal communication. Decisions may go unmade and cases unresolved because it is easier for staff to pass the issues to a higher authority than to assume responsibility for a solution. In addition, there are many situations where the inmate is unable to confront the individual whom he or she believes is the cause of the grievance. In these situations, the question of the extent to which the formal mechanism should be used at this beginning stage is often a difficult one.

Most grievance procedures set time limits for the actions taken at each level of decision-making. Most observers believe that the period for investigation and decision should be as short as possible in the early stages. Many inmate grievances can be resolved easily through the communication of correct information. The prisoner should not be held in a state of agitation if the grievance can be resolved easily and quickly. At the same time, it also is recognized that prisoners have responsibilities to register appeals in a timely fashion.

If the problem is serious or complex, requiring actions by officials at higher levels, the time limits for decisions at later stages may be longer. This takes into account the fact that inmate grievances constitute only a small part of the

variety of issues upon which corrections officials must act every day. Realistic time limits must reflect both the need of the prisoner to have a decision made after a careful consideration of the facts and the multiple demands placed on the shoulders of correctional administrators.

Systems vary as to the nature of the complaints that may use the inmate grievance procedure. In some institutions, there are separate processes for complaints concerning discipline and property claims. In other systems, questions about an inmate's sentence or release on parole are excluded as being outside the jurisdiction of correctional administrators.

The description below is a composite of the structure, process and impact of inmate grievance procedures developed after field visits to California, Georgia, Massachusetts, Nevada, New York and Virginia.

Structure

A three-step process for the resolution of prisoner grievances is typical of most correctional systems. There is usually a staff person (often called the grievance coordinator) or committee in each institution that receives complaints, investigates them, and makes decisions. If prisoners are dissatisfied with the outcome, they may appeal to the warden and ultimately to the commissioner of corrections. In large correctional systems with institutions located in a number of places throughout the state, an appeals coordinator in the central office may be the staff person responsible to the commissioner for investigating and making recommendations in individuals cases. Alternatively, in some states the commissioner may delegate the decision-making function to an outside body, such as an arbitrator or a citizen review panel.

The staffing of inmate grievance procedures varies among states as well as among institutions within a state. In California, for example, there is a full-time staff member responsible for receiving and investigating grievances in each institution. In Massachusetts, these duties may constitute a portion of a staff member's assignment. The number of prisoner grievances fully occupies the time of the grievance coordinator in only one of the eighteen Massachusetts institutions. In South Carolina, the grievance coordinator is part of the Legal Advisor's Office in the Department of Corrections and uses the assistance of inmate clerks who earn sentence-reducing work credits. Correctional staff with responsibilities under the grievance procedure undertake these duties as part of their regular assignments.

Process

Most systems require or encourage inmates to bring problems to the attention of a staff member first in order to attempt an

informal resolution. Up to 70 percent of complaints may be resolved at this level. If the inmates still believe they grievances that should go forward, they fill out the proper form and take it to the first level. The grievance official or the grievance staff investigates the complaint, makes a decision and then communicates it to the inmate and other concerned parties with reasons stated for the action. Dissatisfied inmates may appeal to the second and, ultimately, the third level of review.

Processes vary among institutions as to whether grievance decisions are made "on the papers" or as the result of a hearing before a grievance officer or board with the inmate present. In addition, some correctional systems allow the grievant to present and examine witnesses. Other due process safeguards may be included to ensure fairness and maintain legitimacy.

Impact

The inmate grievance procedure is a model that can be used effectively with other alternative dispute resolution mechanisms, such as an ombudsman, inmate council, or external review board. It thus may be viewed as the keystone mechanism.

Inmate grievance procedures are more successful at resolving some kinds of complaints than others. Three categories of complaints are used to illustrate, in ascending order, the difficulty and problems associated with each.

Medical complaints are usually the easiest to solve, although prisoners generally do not understand what constitutes a legally meritorious grievance in this area. The complaints typically are not about the quality of treatment but, rather, access to treatment. Inmates who feel that they are not being given treatment for what they perceive as a medical problem make up most of these cases. Documentation about treatment given and the opinion of the medical staff can normally end these cases.

Property complaints are great in number and usually involve property missing either at the time of the prisoner's arrival at the reception or release centers or in connection with an emergency situation requiring the prisoner to move to another institution or another part of the institution. In both situations, the problems occur when there is not sufficient documentation or control by staff. The process by which inmates receive compensation for lost or damaged property as a result of staff negligence is often complicated. In California, the process requires the Department of Correction to gather the claims and submit them through a legislative bill to the Assembly, a process that takes about 18 months. By contrast, in Massachusetts there is greater discretionary power for property claims to be resolved and compensation granted within the department.

Complaints about staff brutality seldom produce independent corroborating evidence as to what happened in an incident involving a staff member and prisoner, thus pitting the staff member's word against the inmate's. It takes quick action to get other staff to come forward, and even then they will rarely give information against a fellow officer. It is often difficult to respond to a grievance by transferring staff members from one job or institution to another. Staff organizations and associations may be powerful enough to prevent the action desired by the administration.

Data from the California Department of Correction provide an indication of the percentage of complaints filed at each level of appeal that is granted for the three most frequently filed types of cases. During the third quarter of the 1983 fiscal year, the following were the rates of grievances granted:

Percentage of Grievances Granted

Complaint	First Level	Second Level	Third Level
Property/funds	47	34	6
Disciplinary	26	21	14
Staff	26	20	0

Source: Report prepared by the Office of California Inmate Appeals.

It also must be noted that an effective inmate grievance procedure requires the expenditure of staff resources. Depending upon the inmate population, it can be expected that at least one staff person per institution must be allocated to ensure that the process is run properly. In larger institutions and at the central office level, key staff people must have investigators and clerical assistance. Massachusetts has estimated that it costs approximately $166 for the processing of each grievance that goes through its three-stage mechanism. The cost varies with the extent to which inmate clerks are used, the number of staff who participate in decisions on each case, and the extent to which the flow of complaints occupies the time of staff in a cost-effective manner.

Reports in the literature and our own field investigations indicate that the inmate grievance procedure is a useful device for defusing tensions in correctional facilities. It also has been found useful as a management tool. By attentive monitoring of the complaint process, a warden or commissioner is able to discern patterns of inmate discontent that may warrant actions to prevent the development of more serious problems.

Ombudsmen

The concept of ombudsman, a Swedish public official with full authority to investigate citizen complaints against government officials, has been applied to the correctional setting in the United States. In 1980 the Center for Community Justice found ombudsmen operating in 17 prison systems.[2] It is thus the second most frequently used dispute resolution mechanism in corrections, with some programs having been in existence for over a decade. The discussion that follows is drawn primarily from information gathered through site visits in Connecticut, Michigan, and Minnesota, supplemented by communications with a number of other ombudsman programs.

Generally, the ombudsman is empowered to receive complaints, investigate them, report findings with recommendations to the proper authority and make findings public. Typically, an ombudsman may determine

> whether or not the institution's actions are: contrary to law or regulations; unreasonable, unfair or inconsistent; arbitrary in the ascertainment of facts; unclear or inadequately explained; or inefficiently performed. Minnesota Statutes, §241.45 Subd. 2.

It should be emphasized that the ombudsman can only recommend. He must, therefore, rely upon his reputation for impartiality and his ability to persuade as the means of resolving conflict and insuring compliance with the agreed-upon decision. Given full access to records and the authority to conduct investigations, the prison ombudsman may be effective in resolving disputes and averting litigation, especially in the pre-filing stage.

Structure

Independence, impartiality, and expertise traditionally have been cited as the requirements for a successful ombudsman. Because his authority is limited to investigation and recommendation, the ombudsman must be viewed as a person of stature whose judgment is respected. He thus must operate above the fray so that all sides will agree to abide by his judgment.

The independence of the ombudsman from either domination by correctional officials or partisanship for inmates has been the focus of much discussion. Appointment of the ombudsman and funding from sources outside the department of corrections have been used to enhance his independence, thus bolstering his legitimacy, especially in the eyes of the prisoners. To illustrate, in Michigan, the Correctional Ombudsman reports directly to a committee of the state legislature; in Minnesota, he is appointed by the Governor; and in Connecticut, his services are provided through a contract with an outside nonprofit organization. In other correctional systems, staff persons have been designated to perform the function, although such appointment seems to be at odds with the usual conception of the office. In fact, several ombudsman offices report directly to

the commissioner of corrections and oversee the department's administrative grievance process.

Given the nature of prisoner complaints in an increasingly litigious atmosphere, a number of correctional ombudsmen are attorneys or at least have some legal training. This is an important characteristic because the ombudsman with some legal background may be able to advise prisoners of the constitutional implications of their complaints and the extent to which grievances may be looked upon by the courts as frivolous. An ombudsman with legal training is likely to be perceived by inmates as having a full understanding of issues likely to be judged meritorious by the courts.

Access is a second major structural issue concerning both the ability of prisoners to address their complaints to the ombudsman and the ombudsman's access to officials, records, proceedings, and facilities. Although the traditional conception dictates that citizens should have ready access to the ombudsman, this seemingly worthwhile ideal may have its problems in the correctional setting. If inmates are able to bypass formal grievance procedures and go directly to the ombudsman, those procedures may lose their legitimacy. In addition, the openness may so overwhelm the ombudsman and his staff that it becomes impossible to keep up with the workload. In such a situation the ombudsman may be thrust into a position for which he is ill-prepared and unsuited, that of the institution's primary grievance mechanism.

To deal with the access-workload problem, many correctional systems require that inmate grievances first must go through the established administrative remedies before appeal to the ombudsman. Provisions are made, however, for "emergency" complaints to proceed directly to the ombudsman, who then can determine if the matter is so dire that the grievance mechanisms should be bypassed.

Ombudsmen often have found that they are unable to investigate some types of complaints because they cannot get the information necessary for them to make determinations. It is believed essential that the right of the ombudsman to have access to any individual, document, or part of the institution be stated clearly in the formal charter of the program. Without this access to information, the ombudsman is unable to carry out his investigative function.

Ombudsman programs have been organized formally in a variety of ways. Sometimes an ombudsman is appointed for each institution and shoulders the responsibility for operation of the inmate grievance program as well. This is not desirable, for the ombudsman's independence may be undermined. In contrast, in each of the three states investigated, a central office of ombudsman for the entire system is physically separate from the department of corrections. Staff work out of this office but are assigned

to field duties in one or more institutions. With this structure, independence is preserved. Yet, staff are in constant touch with their assigned facilities. They thus are able to know the prisoners and each prison's staff, to understand the subtle features of the prison, and to measure more accurately the pulse of the institution.

The ratio of staff to the size of the prison population is an important variable in the role definition of the ombudsman and the manner in which service needs may be met. In Minnesota, the ombudsman's staff of seven serves approximately 3,000 inmates; in Michigan, the ombudsman, three field investigators, and a group of student interns are responsible for complaints from the state's 15,000 prisoners; in Connecticut, there are four ombudsmen for about 3,000 inmates. One result of these ratios is that Michigan's ombudsmen are unable to keep as close contact with prisoners and the institutional environment as are the ombudsmen in the other two states. This service problem is illustrated by the fact that a toll-free telephone line in Michigan had to be discontinued in 1980 because the number of calls from prisoners inundated the central office to the point that all other work came to a standstill. Given this situation, it appears that the Michigan ombudsmen have been forced to define their role as one in which more time is given to major cases having a potentially wide impact than to matters relating only to a single prisoner or to a few prisoners. In Connecticut and Minnesota, with a closer staff-to-inmate ratio, the ombudsmen have greater freedom to deal with both individual cases and those with the potential of bringing changes having a wide impact.

Process

Prisoners generally contact the ombudsman by telephone, mail, or "complaint box," or personally at the institution. When organized on a system-wide basis with only a central office, the physical distance of the ombudsman from the inmates may reduce opportunities for contact within the institution. Some programs are so set up that the ombudsman, or an assistant, is a constant presence in the jail or prison, and approaching either is firsthand and easy. Under some circumstances the ombudsman may initiate an investigation on his own if he feels that departmental procedures are not being followed or that a potentially explosive situation exists. However, this is not a universal characteristic because many ombudsmen believe that there should be a "case or controversy" before they do anything. As one ombudsman noted, "It is not, nor should it be, the role of the ombudsman to second-guess the running of the prison system or attempt to foist ideas and programs upon the Department of Corrections."

Once an ombudsman receives a case, he normally has the following options: (1) return the complaint for exhaustion of administrative remedies (as required in some systems); (2) refer the case to an agency better suited; (3) dismiss the case as

either non-meritorious or outside the ombudsman's jurisdiction; or (4) open the case and attempt to resolve the grievance. In making these decisions, the ombudsman and his staff may be required to conduct an initial investigation, consult with the inmate, and interview others. Action is not taken solely on the basis of the information contained in the written complaint.

If the ombudsman feels that the complaint is frivolous, is outside his jurisdiction, or for some other reason does not warrant further investigation, the inmate must be told of the decision and given an explanation. If he agrees to open a case, a ombudsman will typically:

1. Meet the inmate to explain the function of the ombudsman and the procedures to be followed in the case.

2. Determine which correctional staff members, inmates, and others should be interviewed.

3. Determine which documents, reports, and other written materials need to be reviewed.

4. Notify selected officials of the department that the investigation is being undertaken.

5. Conduct additional interviews and collect other documents as necessary to insure all pertinent information has been gathered.

6. Formulate a conclusion based on the accumulated evidence.

As the investigation proceeds, the case may be referred to another agency or the complainant may withdraw the grievance. It is important to note that during this phase, resolution may be achieved to the satisfaction of all without the need for a formal recommendation. Should the ombudsman conclude that no recommendation for change should be made, he must communicate this finding to the prisoner and explain why no further action is being taken. Where there is staff in the field, this information may be communicated directly to the inmate. In some programs, however, this important function can be carried out only through the mail or by telephone.

When a case has been investigated and a decision made as to the action that should be taken, the ombudsman then must make a recommendation to the appropriate official. Depending upon the nature of the case, the ombudsman may urge that a matter be reopened, that a policy be created or altered, that an official action be cancelled, or that staff changes be undertaken. It should be emphasized that although the ombudsman is concerned about resolving the individual inmate's problem, he may take a broader view and consider the wider implications of a

recommendation that will reduce the likelihood of similar problems arising in the future.

It is during the resolution phase of the process that the ombudsman's influence is crucial. His recommendations are advisory. Thus, he must present a sound rationale. His stature and personal relationship with prison officials may be most important in resolving the problem. If his recommendation is accepted, the ombudsman must notify the complainant and monitor implementation of the solution.

The open-ended quality of the ombudsman concept means that the typical office receives the entire gamut of prisoner complaints. For example, the Minnesota Ombudsman for Corrections has listed the following categories of cases received and the percentage of caseload occupied by each:

Parole (10.8%)--any matter under the jurisdiction of the releasing authority, such as work release, temporary parole, special review, etc.

Medical (6.8%)--availability of treatment or accessibility of staff physician or medical professional.

Legal (7.7%)--legal assistance, or problems with getting a response from the public defender or other legal counsel.

Placement (8.1%)--assignment of an inmate to a facility, area, or physical unit.

Property (12.0%)--loss, destruction, or theft of personal property.

Program (14.4%)--training or treatment program, or to a work assignment.

Discrimination (.7%)--unequal treatment based upon race, color, creed, religion, national origin, or sex.

Records (6.9%)--concerning data in inmate or staff files.

Rules (14.4%)--administrative policies establishing regulations that an inmate, staff member, or other person affected by the operation of a facility or program is expected to follow, such as visits, disciplinary hearings, dress, etc.

Threats/Abuse (6.5%)--threats of bodily harm or actual physical abuse to an inmate or staff, including charges of harassment.

Other (11.4%)--issues not covered in previous categories, including food, mail, etc.

This listing is comparable generally to the grievances received in other ombudsman offices. Among the issues most frequently dealt with are those concerning: property, community programs, harassment, medical matters and work assignments.

Impact

Correctional ombudsmen have been in place in a number of states for over a decade. Most continue to function, although at a lower level of service because of reduced budgets. The potential workload for ombudsmen seems infinite but the office is not designed to supplant administrative remedies. In some programs there is an explicit requirement that these remedies be exhausted before the ombudsman opens the complaint.

Although the ombudsman must be ready to receive a great number and variety of complaints from prisoners, neither the resources of the office nor the role allows him to pursue all grievances. In some states, the ombudsman rejects up to 70 percent of the grievances filed. Because the power of the office is based upon influence and persuasion, some ombudsmen feel limited in the number of times that they can go to the warden or commissioner without concern for future effectiveness. Others, however, believe that their credibility has increased in direct proportion to their activity. There are ombudsmen who feel that it is their personal relationships with corrections officials that are crucial for success, a situation that may be tenuous in those states with a high turnover for these officials.

The ombudsman may be useful in averting §1983 litigation by his ability to deal with complaints before they are filed in the federal courts. This is particularly important if there is quick and easy access to the office. If the ombudsman is respected by the inmates, his advice as to the merits of grievances may help to reduce the number of frivolous claims that are filed. Likewise, if claims are viewed as meritorious, the ombudsman can try to convince authorities that attention must be paid and that it would be in their interest to attempt to resolve the matter out of court.

Mediation

Mediation, a mechanism established in many non-correctional settings, is distinguished from other approaches to resolution in that both parties must first agree to submit the complaint to the process and then both must agree to the terms of the solution, if any. It is a consensual and voluntary process in which a neutral third party assists the contestants to reconcile their differences. Mediation has been advanced as an appropriate forum to settle disputes because the informality of the process stands in contrast to the complex, cumbersome procedures of the courtroom. In addition, proponents argue that in the mediation setting, straightforward questions may be asked so that underlying issues may be explored. This is especially important

in dealing with prisoner cases, most of which are filed without the assistance of counsel.

Mediation is especially effective where the essence of the complaint is not a conflict of abstract principles but, rather, an administrative problem requiring an administrative solution. In contrast, the adversarial nature of litigation tends to transform nonfrivolous but not necessarily clearly constitutional questions about administrative policy into hardened positions. Finally, the ability of the mediator to uncover the real nature of the problem and to help search for meaningful solutions agreeable to both sides should require far fewer resources than are entailed in court proceedings.

Mediation has had only a limited application in the correctional setting, and its impact on averting §1983 litigation has been minor. It is important, however, for correctional administrators and planners to know about the concept, the ways that it has been implemented, and program evaluations, because future applications may use more successful operating procedures. Thus far, the technique has been attempted after a prisoner's complaint has been filed in the federal courts. There have been no programs that have been organized to mediate cases during the pre-filing phase.[3]

The mediation programs that have been fully implemented and evaluated have been in the state prisons of Maryland[4] and at the Federal Correctional Institution in Danbury, Connecticut.[5] The approach has also been used in Rhode Island and Arkansas. All four programs received cases for possible mediation from the federal court after a prisoner's complaint had been filed. The Maryland and Connecticut experiences are the basis for the description that follows.

Structure

There are two variable organizational components to mediation. First, the structure depends on who participates in the discussions with the mediator. The mediator may meet only with the prisoner bringing the complaint and with a representative or representatives of the institution. A post-filing program, however, is likely to involve the prisoner, a representative of the department of corrections, and the legal representative for the department. This structural difference reflects the fact that mediation on a post-filing basis is an attempt to resolve complaints in which the scope of the dispute has gone beyond the boundaries of the prisoner and line staff. If mediation is intended to resolve complaints before they are filed as §1983 suits, the institutional representatives may be limited to the line staff that the prisoner deems responsible for for problem or to the prison administrator with supervisory authority over the area of the complaint.

Structure also depends on whether the mediator meets separately or jointly with the prisoner and representatives of the prison. Both approaches have been tried, and even a hybrid model has developed. An illustration of the first approach occurred in an effort to mediate cases arising at the Federal Correctional Institution in Connecticut. There, a mediator first met with the prisoner to determine the nature of the complaint and then sought to resolve the matter in a subsequent discussion with the warden. Because this situation involved the U.S. Bureau of Prisons, any agreement reached by the prisoner and the warden then had to be ratified by supervisory authority at a higher level.

The second approach was used in Maryland. A joint session was held at the institution where the prisoner was incarcerated. In addition to the mediator, the participants included the prisoner, legal counsel for the prisoner, an assistant attorney general representing the department, and sometimes a representative of the department or of the specific institution. Over time, however, this structure was changed, and eventually a hybrid model emerged. A "screening session" was established to sort out cases suitable for mediation. At the screening session, conducted by the mediator, attorneys for both sides had to agree on which set of cases were to go to mediation sessions.

In theory, the mediator is not an advocate of a particular position, does not give advice or accumulate the facts, but seeks instead to bring the parties together by searching for a reasonable solution to the conflict. But in the correctional setting, the mediator may be required to deviate from this model, because there may be certain conditions that make the prescribed role difficult to fulfill. These conditions are (1) the "real" issue behind the complaint may not be recognizable as described in writing, (2) the prisoner may lack an understanding of viable legal options, and (3) the prisoner is unrepresented by counsel. Working under these conditions, the mediator may violate all of the restrictions stipulated in the theoretical definition of the position.

The realities of the correctional arena require that the mediator possess two attributes. First, the role of mediator is unavoidably more that of ombudsman or special master performing a fact-finding function than a dispassionate conciliator on conflicting positions. A second attribute is legal training. Frequently mediators are confronted with statements made and positions taken by officials claiming that rules and regulations make it impossible to mediate particular cases. Moreover, in dealing with inmates, the mediator frequently must deal with matters that require legal expertise.

Process

Mediation appears to be a simple process of bringing the disputing parties together, helping them clarify the issues, and

attempting to bring about an agreement that is acceptable to both sides. When a satisfactory solution is reached, the parties sign an agreement as to the terms, the plaintiff withdraws the complaint, and the settlement, in the form of a stipulated agreement, is filed with an appropriate authority. As described by the National Center for Correctional Mediation, "mediation offers an opportunity to develop a solution which the parties themselves feel is workable and, if it is successful, insures that a decision will not be imposed on the parties by a court or other agency."[6]

The process begins by inviting prisoners to mediate cases that they already have filed in court. This seemingly simple step is actually a critical point in the process because it requires agreement on which cases are potentially eligible candidates for mediation. Cases could be screened out according to a variety of criteria, such as no class-action suits, no suits alleging guard brutality, no suits requesting a million-dollar compensation, and no suits that fail to raise a colorable federal claim. Although there are justifications for such criteria, each one affects the size of the pool of cases eligible for mediation, which, in turn, affects the number of possible agreements. In addition, the suits would have to identify a correctional officer or official as a defendant. Otherwise, the corrections department would have no role to play in the mediation process.

The mediation sessions generally begin with the prisoner briefly stating the nature of the complaint, followed by questioning by the mediator of both the prisoner and the correctional representative or their counsel. To the extent possible, the mediator tries to get the participants to narrow the issues, and to come to a realization of what the complaint is and whether the department bears any responsibility. If the prisoner and the department representatives agree on the nature of the complaint and the department's responsibility, the mediator will propose drafting a mediation agreement for eventual signature by both sides. The signed agreement is sent to the court, and the case is settled with the mediation agreement as the basis for a consent decree.

Impact

The available documentation on mediation in the prison indicates that the initial programs have had limited impact in terms of prisoner participation, willingness by the officials or their legal representatives to mediate certain grievances, and the number of actually signed mediation agreements. Concerning prisoner participation, the evidence from Maryland indicates that 66 percent of the prisoners invited to mediate expressed an initial interest.[8] However, before the mediation sessions could be scheduled, 20 percent of these withdrew from the process. Thus, approximately only half of the prisoners who had been invited to mediate found the process sufficiently appealing to consider it an alternative to litigation.[9] Correspondingly, the

legal representatives for Maryland withdrew from over 20 percent of the cases that they initially agreed to mediate. This action was generally taken during the screening session, for the Assistant Attorney General claimed that he could not mediate a case that failed to raise a colorable federal claim.

In addition to the withdrawals from mediation by both sides, agreements proved difficult to achieve. An impasse was the most frequent outcome even after multiple sessions. As a result, the Danbury, Connecticut, project failed to produce a single agreement during a 12-month test period, and the Maryland project produced eight agreements over two years, with four agreements involving transfer issues and four involving questions of property or small (under $100) financial payments.

Because of the limited number of efforts that have been undertaken to date, the Danbury and Maryland projects may be unrepresentative of mediation's long-term potential impact. Other programs, learning from the experience of these pilot studies, may be much more effective. Yet, correctional administrators and others need to ask three questions about the structure and process of mediation before deciding to establish this alternative to litigation. They are:

... Are there enough cases? Mediation can be useful only if an individual is named in the complaint who then can participate in the process. In the correctional context, this means that an official within the department must be so named. In Maryland, only half of the complaints filed met this criterion. At the outset, mediation programs must clearly establish who will be able to participate as the defendant.

... Are there suitable cases? The objective of mediation is to resolve prisoner disputes, but if it is decided that only those with a colorable federal claim are appropriate, there is a further reduction in the number of cases. Cases that although meritorious do not meet the federal claim requirements may be difficult for defendants to mediate in a post-filing context.

... Are there incentives to mediate? Different incentives and disincentives operate for each of the participants in the process. Each participant interprets the use of mediation from his or her own perspective in specific cases. If, for example, correctional administrators believe (correctly) that most §1983 petitions will be dismissed by the court, they may feel no need to engage in the mediation process.

Inmate Councils

One of the oldest mechanisms for resolving inmate grievances is the inmate council. The program at the Massachusetts Correctional Institution at Norfolk, established in 1927, is the oldest in continuous existence. Councils are found in correctional institutions across the country, but their numbers and influence seem to rise and fall depending upon the extent to which they are used by particular administrators. Recently there has been a noticeable decline in the number of inmate councils in adult prisons. A 1980 study by the Center for Community Justice found that less than one jurisdiction in three now had councils.[10] It is believed that as inmate grievance procedures and ombudsman programs have been extended, they have replaced inmate councils. Still, the continued existence of this mechanisms in one-third of correctional institutions warrants attention.

The inmate council is designed to permit input from prisoners into the design and implementation of the procedures and programs of the institution. Membership on the council is representative of the inmates through elections held in each unit, and its decisions are advisory. The council thus serves primarily as a sounding board for issues that administrators want communicated to the inmate population and as a means by which the prisoners may register their concerns about institutional operations. It is through this communicative function that an inmate council may best serve to avert tensions between prisoners and staff. Tensions of this sort are the type that may develop into conflicts that can result in litigation.

One of the problems with inmate councils concerns expectations as to their purpose. Prison administrators expect the council to play an advisory role, but the inmates may believe that they have been asked to assume a more direct part in the running of the institution. If the council is unable to show the population that it represents inmate interests it will be viewed as a powerless body.

Councils appear to be less useful in solving the individual problems of prisoners than many of the other alternative dispute resolution mechanisms discussed in this manual. Indeed, in some institutions individual complaints are excluded specifically from consideration. To this extent, inmate councils are probably unlikely to serve as a major factor in averting §1983 litigation.

The Warden's Forum at the State Penitentiary of Southern Michigan, in Jackson, is an example of the structure and operation of inmate councils. Begun in 1979, the Warden's Forum serves as the representative body of the 5,300 inmates at the institution. As outlined in the policy directive establishing it, the Forum has as its objective the promotion of better communications between the residents and the administration through discussions of selected issues. These issues, according to the structure of its subcommittee system, involve policies concerning residents' welfare and recreation.

Structure

The Warden's Forum at Jackson is, in fact, a penitentiary-wide inmate body representing similarly elected bodies in each of the housing units. From each group of unit representatives, one member is selected to serve on the Warden's Forum, a total of ten. Membership is restricted such that prisoners who have received a misconduct during the previous 12 months cannot stand for election. There is one week for candidates to indicate that they want to run for election, one week for the campaign, and then the election is held. Seventy-five percent of the inmates normally participate in the election. The composition of the representative bodies in the living units and the Forum subcommittees must reflect the racial composition of the unit and the institution. The Forum members select from among themselves an individual to be their chairman for a one-year term.

Process

The elected representatives in each of the living units meet with the staff member (Unit Manager) at least once a week. The representatives are given special privileges to circulate among the residents of the unit to solicit comments on issues under discussion. Matters may be referred from the housing units to the Warden's Forum. The Warden's Forum meets with the warden on a quarterly basis in each of the three complexes that constitute the penitentiary.

The Warden's Forum has the responsibility of selecting residents to serve on subcommittees and perform special tasks relating to such issues as resident benefits, resident store, movie selection process, inspection of the dining room and infirmary, and television and radio program scheduling, as well as an ad hoc committee for special problems as requested by the warden or deputy warden.

Impact

Success of an inmate council depends to a great extent on its membership and the way it is perceived by both the administration and prisoners. Part of the folklore of corrections is that it is only the "politicians" within the inmate community who aspire to council seats. This may raise doubts about the representativeness of the council. If the council agenda deals mainly with the trivial or if its recommendations are not acted upon by the administration, it may enjoy little status among the inmates.

Unlike the other dispute resolution mechanisms described in this manual, the inmate council is not concerned with the grievances of individual prisoners. Rather, it deals with issues that tend to affect a number of inmates. For example, the type of items for sale in the prison store or the scheduling of television programs do affect the institutional environment, but

they are not the issues that tend to result in §1983 petitions--staff brutality, lost property, medical negligence and the like.

Legal Assistance

Beginning with its 1969 decision in Johnson v. Avery[11] the Supreme Court has emphasized that prisoners must have access to legal resources so that they may seek post-conviction relief. In the last decade, several legal assistance models have been implemented in state correctional institutions, including staff counsel, volunteer attorneys, "jailhouse lawyers," and law school clinical programs. At first glance, legal assistance might seem to be counterproductive if the goal of correctional administrators is to avoid §1983 cases. However, lawyers do more than simply help prisoners file suits. They also advise prisoners as to the legal merits of their complaints, and in so doing they may be in the best position to discourage frivolous litigation.

Legal Services Programs and Volunteer Counsel

In many states, legal services programs for the indigent have defined prisoners as being elibible for their assistance. One or more staff attorneys may be designated to deal primarily with prison cases, including §1983 petitions. Budget cuts have greatly restricted the operations of legal services programs, however, and inmate legal services have often been the first to feel the fiscal pressure. Several jurisdictions also have volunteer attorney teams that were given access to the institution and that have been helpful in resolving grievances, especially those relating to good time and parole eligibility.

The program in Georgia begun in 1972 exemplifies what a legal assistance program can accomplish. Under a grant from the Law Enforcement Assistance Administration, the Georgia Department of Offender Rehabilitation contracts with the University of Georgia Law School for the services of the Georgia Prisoner Legal Counseling Project and its staff, who are law school employees. Because this program has become institutionalized, it is the basis for the description of the staff attorney, although we recognize that more limited efforts have operated in other states, such as Texas, Florida, South Carolina, Vermont, Minnesota, Oregon, and Kansas.

Structure

Because the Georgia Department of Offender Rehabilitation provides funds that ultimately support the GPLCP, the staff lawyers are not attorneys of record in §1983 cases. Instead, they seek informal resolutions of grievances involving conditions issues but do not litigate such complaints. Their assistance in §1983 cases may extend to helping frame interrogatories and explaining matters such as subpoenas. The GPLCP does represent

prisoners in habeas corpus cases, however, and provides help in divorce, adoption, and other matters.

The representation of prisoners in §1983 cases is performed by Georgia Legal Services. This division of labor prevents the Department from being in the position of being sued by an organization that it has funded, an obvious conflict of interest.

The GPLCP is organized into two basic units. One unit, composed of two lawyers and two paralegals, has responsibility for the State Prison at Reidsville. Six other attorneys are responsible for the remaining state correctional facilities. Hence, the eight lawyers have the task of assisting the state's 15,000 prisoners.

Process

The GPLCP attorneys are available to meet with prisoners on specific days. Requests to meet with an attorney are placed on a list at the prison, and prisoners are seen on a first-come, first-served basis, usually in a case counselor's office. Generally, the attorneys are at the institutions for which they are responsible two to three days a week, and in the GPLCP main office the rest of the week.

The contacts with prisoners are more extensive at the Georgia State Prison than at the other correctional institutions, reflecting in part the close proximity of the attorneys. Based on quarterly reports compiled by the GPLCP, the staff attorneys at the Georgia State Prison had contact with over 20 percent of the approximately 1,200 inmates over a recent four month period, whereas staff attorneys at the other correctional institutions had contact with ten percent of the remaining 13,000 Georgia prisoners.

The GPLCP deals with problems ranging from habeas cases to personal matters such as divorce and child custody. Approximately 20 percent of the problems fall into the category of conditions of confinement.

Usually the attorney identifies the prisoner's problem at the first interview and subsequently meets the inmate again to discuss the problem and the progress made in resolving it. However, the GPLCP staff does not see itself as having to resolve grievances or complaints "on demand." That is, the attorneys do not automatically call every issue to the attention of a correctional official to determine how it could be settled. Those which they believe to be without merit are not investigated.

Impact

The GPLCP has been successful in resolving meritorious cases informally and in discouraging non-meritorious cases.

Nevertheless, as in the case of inmate grievance procedures, discussed on pages 33-34, different types of grievances pose different types of problems for the attorneys. For example:

Medical grievances. Although these are given high priority, the GPLCP is not in a position to second-guess the doctors who attend the prisoners. For example, if a prisoner claims to be a diabetic in need of medication, and the GPLCP attorney is informed that the prisoner is not a diabetic, the GPLCP does not pursue the matter. Medical grievances are among the easiest for the GPLCP to investigate because of the availability of medical records.

Property. If the loss of property occurred during a transfer or during transit from a local jail, the matter can be resolved expeditiously because the prisoner is likely to have a receipt. When property is destroyed, confiscated, or stolen at the prison, the problem is much more nettlesome, unless the item appears on an inventory of the prisoner's belongings.

Staff brutality. In such instances, by the time the GPLCP attorney comes in contact with the prisoner, the latter generally has been subject to a disciplinary citation by staff. In fact, the prisoner already may have had a disciplinary hearing. As a result, if the decision at the hearing has gone against the prisoner, the attorney usually tells the prisoner to come back later, after having gone through the appeal process. The attorney may advise him to file a §1983 suit if there is a strong case. In short, the GPLCP has limited impact here.

"Jailhouse Lawyers"

Although existing in prisons for decades, the "jailhouse lawyer"--an inmate who endeavors to assist other inmates with their legal problems--was legitimized by the Supreme Court in 1969.[12] A number of states have launched training programs to improve the legal knowledge of the inmate "lawyers." The most successful of these was undertaken by the Michigan Bar Association.

Most of the activities of "jailhouse lawyers" take the form of advice, legal research, and the writing of writs and briefs. With the rise of libraries in institutions, inmates with legal skills and interests have vied for positions as assistants to the librarian. In some states, such as Nebraska, Pennsylvania, and Nevada, the position of the "jailhouse lawyer" has been formalized. In Nebraska, good-time credits may be earned by inmates giving legal assistance. In Pennsylvania, a group of "jailhouse lawyers" formed a law office, with supplies and other support from the institution. In Nevada, inmate librarians have been assigned to serve the legal needs of specific housing units. Paralegal training for inmates has been provided in New York and

Pennsylvania to help them assist prisoners and because it might be an occupation to which they aspire upon release.

Acceptance of the "jailhouse lawyer" in the prison as a way to avert litigation depends on some basic stipulations. First, "jailhouse lawyers" cannot charge for their services, although they perhaps can be rewarded for their efforts through good-time credits or work assignments. Second, "jailhouse lawyers" must be acknowledged by the line staff and administration as performing a useful role. Third, they must receive proper training in legal procedures, so that their work does not need revision and correction by federal court clerks, and so that they do not misinform their fellow inmates as to the law and judicial procedures. Fourth, and perhaps most important, "jailhouse lawyers" must be trained so that they can advise inmates as to which of their complaints are likely to be viewed by the court as frivolous and which may be seen as having merit.

"Jailhouse lawyers" are an important part of the American corrections scene. They can be useful if they communicate accurate information to prisoners about their rights and their potential for success in federal court. Training programs for paralegals in correctional facilities should emphasize the distinction between a frivolous and a meritorious complaint. "Jailhouse lawyers" may also be helpful to the federal courts by assisting prisoners in writing their complaints in terms that are understandable by the clerk and judges.

Law School Clinical Programs

During the past decade the number of law schools providing legal assistance to prisoners has increased. Students are able to help prisoners prepare their cases and, where permitted by a local "student practice rule," present them in court, or assist a qualified faculty member with the litigation. Although such programs are essentially without financial costs to a department of correction, several drawbacks to this approach have been reported in the literature.

First, the student's educational needs may be inconsistent with the goal of averting litigation. Because law students seek experience, they may encourage a solution through the courts, thus neglecting existing alternative mechanisms. A second problem relates to the academic year and classroom demands on students that may prevent them from maintaining continuity with the cases that they undertake. Finally, prisoners often resent being represented by students.

On the other hand, a law school clinical program may be a useful supplement to other existing mechanisms for the resolution of grievances. With professional supervision by a faculty member who is cognizant of inmate needs, correctional law, and the special environment of a prison, students may be of assistance in

advising offenders on their legal problems and encouraging them to resolve their problems out of court where possible.

External Review Bodies

The perspective of an outside observer may assist institutional administrators in recognizing conditions that lead to litigation. Grand juries in many states have the responsibility of visiting local jails to observe conditions and to hear complaints that are then brought to the attention of the sheriff, commissioners, and judges. In some states, external review boards similar to the English Prison Visitor Committees are used in this fashion. Former federal judge Shirley Hufstedler has proposed the establishment of "Inmate Institutions Commissions" for the facilities operated by the Federal Bureau of Prisons.[13] Such groups also may serve in a capacity similar to that of an ombudsman, hearing complaints and pressing for reforms when warranted.

In several states, external review boards are linked to the inmate grievance procedure. That is, after exhausting the grievance procedure, the prisoner may appeal the complaint to an external review body for final review. It is assumed that an outsider will be independent of the corrections department, and that as a result the grievance mechanism will be perceived as legitimate by the inmates. There is variation, however, among the programs that have formalized "outside" participation. In Illinois, for example, the Administrative Review Board, a three-member panel that makes recommendations to the Director of Corrections, has only one member occupying the citizen role who is not employed by the department. In the California Youth Authority, the Ward Grievance Procedure includes provision for arbitration by volunteers from the community for those complaints appealed through the departmental levels and ultimately to an outside board. This board attempts to mediate resolution of the problem, and, if it fails, makes a decision based upon the facts presented. In South Carolina, a three-person panel made up of one member of the department, the deputy director of the Alston Wilkes Society (a private prisoner-support group), and an arbitrator named by the deputy director of the Alston Wilkes Society receives appeals and makes recommendations to the Commissioner of Corrections. At the other extreme on the scale of formal separation from the department of corrections is the Maryland Inmate Grievance Commission, which operates outside the the corrections system and whose members are appointed by the Governor. The Illinois Administrative Review Board and the Maryland Inmate Grievance Commission are more fully described below.

Structure

In Illinois, prison-level decisions by the Institutional Inquiry Board to deny a prisoner's claim may be appealed to the Administrative Review Board, a three-member committee that meets

at each of the state's smaller prisons about once a month and at the larger institutions, such as Stateville, as often as three times a month.[14] The members are two department officials and an outside "citizen" member from the community where the prison is located. The citizen member is appointed by the local warden. Attempts are made to appoint a respected member of the community with an interest in corrections. Decisions of the Administrative Review Board must be approved by the director of the Department of Corrections, who does not always concur with the recommendations.

Created by statute in 1971, the Maryland Inmate Grievance Commission is composed of seven citizens appointed by the Governor, and an executive director appointed by the Secretary of Public Safety and Correctional Services. At least two of the commissioners must be attorneys, and at least two must have prior correctional experience. These are non-salaried positions, although a per diem allowance is made.

Process

The grievance process in Illinois is open to any inmate seeking resolution of complaints that have not been solved through other avenues available at the institution. There are ten Institutional Inquiry Boards--one at each facility--and they sometimes are confronted with issues pertaining to department-wide policies. As a result, prisoners often attempt to bypass the local boards and appeal directly to the Administrative Review Board. Revocation of more than 30 days of good time during a 12-month period is the only recognized ground for direct appeal to the Administrative Review Board and bypass of the local board. Grievants have the right to appear before the boards, but witnesses may be summoned only at the discretion of the board members. There are no time limits placed on the appeals process.

Inmates at any of Maryland's prisons may contact the Inmate Grievance Commission (IGC) at its central office, usually by mail. Each complaint is reviewed initially by the executive director, who determines whether it is wholly lacking in merit and deserves to be dismissed or should be scheduled for a hearing before the Commission. This decision is not reviewable by the commissioners, but the prisoner may appeal to the Maryland Circuit Court. During the lifetime of the Commission, about 52 percent of the complaints have been resolved informally, withdrawn or dismissed.

The IGC, sitting as a panel of at least three, holds hearings at each of the state's institutions. The inmate is allowed to examine witnesses and elaborate on the charge and may use a "jailhouse lawyer" as counsel. The correctional official involved presents a response and is allowed to cross-examine witnesses. Decisions by the Commission that favor the inmate's position are forwarded to the Secretary of Public Safety and Correctional Services for review. The Secretary must affirm the

commissioners' recommendation before action is taken. If the commissioners reject a complaint, the prisoner may appeal to the Circuit Court. If a favorable commissioners' recommendation is turned down by the Secretary, the prisoner may appeal that decision.

The IGC, which has statewide jurisdiction, is assisted by four staff members, including an executive director, staff assistant, and two secretaries. The staff members handle complaints, conduct investigations, prepare materials for review by the commission members, and store all pertinent records. This seven-member commission and four-person administrative staff have the exclusive responsibility of responding to the complaints of the state's 11,000 prisoners because there is no other grievance mechanism available short of litigation.

The number of complaints filed annually with the IGC has grown appreciably over its short history, with a 68 percent increase in just over a decade. During 1982, approximately 1,490 complaints were filed. A major consequence of this increase is a six-to-eight month delay between filing and a scheduled hearing. A second consequence is an increase the pending or "open" caseload. This group now constitutes half of the total number of annual filings. Given the limited number of days each month on which hearings are held, the pending caseload will only continue to grow.

Impact

In Illinois, the role of the sole citizen member of the Administrative Review Board appears to have had little impact on averting prisoner litigation. If grievances are to be resolved effectively without filing a case in the federal court, one assumes that this would occur primarily as a result of the Institutional Inquiry Board at each facility. The prisoner "win" rate is actually very low, but only a small portion of the cases are referred to the Administrative Review Board.

Most of the complaints received by the Maryland Inmate Grievance Commission concern disciplinary hearings.[15] The prisoner may argue that the officials lacked sufficient evidence to impose a penalty, did not compute good-time correctly or violated a procedural rule. The executive director estimates that most of the cases fall into the disciplinary category.. Very few involved property until recently because the Maryland Attorney General's office had determined that the Commission did not have the authority to offer financial compensation. Significantly, disciplinary hearings are the least frequently filed prisoner complaints in the U.S. District Court in Baltimore, whereas medical and property cases are the most frequently filed.

Of the decisions made by the Commissioners in January-March 1982, the IGC found 25 percent of the prisoners' grievances to be

"meritorious." Of the 19 pro-prisoner recommendations sent to the Secretary, 16 were affirmed, two reversed, and one remanded.

In summary, the Maryland Inmate Grievance Commission is an outlet for prisoner complaints. Moreover, this mechanism offers prisoners the opportunity to present their cases at a hearing. Yet, the resources given to the Commission appear insufficient as evidenced by the time required to process grievances and the growing backlog of complaints.

Conclusion

All of the dispute resolution mechanisms discussed above have shown some capacity to serve as alternatives to litigation in the correctional context. Although the growing number of §1983 cases is a cause of concern, many more grievances are being resolved without resort to the federal courts. If these alternatives were not in place, it seems fair to assume that the volume of §1983 cases would be higher.

Of the six alternatives discussed, the inmate grievance procedure, ombudsman, and legal assistance programs appear relatively more fruitful than the others, not only in their capacity to avert litigation, but also in the prompt, fair, rational and comprehensive performance of their prescribed functions. Moreover, the jurisdictions in which these alternatives appear to be most effective are those in which two or more of them are used in combination.

Inmate grievance procedures encourage informal resolution of prisoner grievances. They endeavor to provide prompt and reasoned responses to inmate complaints. If staff involved in the grievance process are familiar with basic issues in correctional law, they can help not only to resolve complaints but also alert wardens and correctional officials to issues that could form the bases of successful lawsuits.

Although inmate grievance procedures provide for various levels of appeal, the independent nature of the review is difficult to maintain. For this reason, an inmate grievance procedure ought to be supplemented by an ombudsman or one of the various forms of legal assistance programs. The experiences of Connecticut and Minnesota suggest that a grievance procedure and an ombudsman program can work effectively together. The fruitful combination of an inmate grievance program and some form of legal assistance has been demonstrated in Georgia and Nevada.

In contrast to these three dispute resolution mechanisms, external review bodies, mediation and inmate councils are of questionable utility. An external review body may provide an independent assessment of inmate grievances, but its distance from the source of the grievance inhibits its fact- finding capability. Mediation has not yet shown itself to be an effective mechanism in the contexts in which it has been

attempted, although future testing may yet point to a possible role. The inmate council serves to air general grievances but has had difficulty in handling the complaints of individuals prisoners.

Future efforts to avert litigation by providing alternative methods of dispute resolution should focus on improving those inmate grievance procedures and ombudsman programs that appear to work best.[16] In addition, programs that provide legal assistance to inmates should be encouraged.

Finally, the fact that even these mechanisms are not successful in every instance is a reminder that they do not operate in a vacuum. Rather, contextual factors surrounding the dispute resolution mechanism play a key role in affecting their performance. For this reason, the nature and significance of these contextual factors is discussed briefly in the chapter that follows.

Notes

1. The states visited were: California, Nevada, Massachusetts, New York, Michigan, South Carolina, Connecticut, Maryland, Georgia, Minnesota and Virginia. The rationale for conducting site visits in these particular states is threefold: First, we were interested in examining dispute resolution mechanisms in states where the number of §1983 petitions was relatively low. Because the grievance mechanisms in these respective states may be contributing to a lower level of petitions, information on how they operate might tell how mechanisms, in general, are able to provide effective, efficient, and fair alternatives to litigation. Hence, we decided to consider mechanisms in those states where the ratio of the number of §1983 petitions to the number of prisoners incarcerated was appreciably lower than in most other states. This search led us to the states of California, Connecticut, Georgia, Massachusetts, Minnesota, Nevada, and South Carolina.

Second, we wanted to include states where inmate participation was a component of the dispute resolution mechanism. Because this component was incorporated as a standard for certification under the Civil Rights of Institutionalized Persons Act, information from states that had recent experience with this feature should prove helpful to states that are considering whether to adopt similar procedures in the future. For this reason, we decided to examine inmate grievance procedures in New York and Virginia.

Finally, we were interested in describing a wide range of mechanisms including those that might play a minor role (e.g., inmate council) compared to more comprehensive mechanisms, or that were not widespread (e.g., external review body), or that were still in the experimental state (e.g., mediation). This interest led us to look at mechanisms in Michigan and Maryland.

2. U.S., Department of Justice, National Institute of Corrections, David D. Dillingham and Linda R. Singer, Complaint Procedures in Prisons and Jails: An Examination of recent Experience (Washington, D.C.: National Institute of Corrections, 1980), p.22.

3. A prefiling program was beginning to operate in late 1983 at the San Quentin Prison in California. The mediating service was the Center for Community Justice, Washington, D.C.

4. Roger A. Hanson, William L. Reynolds, and Kathy Shuart, Evaluation of the Maryland Prisoner Mediation Project, Final Report, prepared for the National Institute of Corrections, November 1983.

5. The Danbury suits were filed under §1331 because the prisoners were inmates of federal rather than state institutions. See George Cole, Roger Hanson, and Jonathan E. Silbert,

"Mediation: Is It an Effective Alternative to Adjudication in Resolving Prisoner Complaints?" 65 Judicature, 341-489 (May 1982).

6. National Center for Correctional Mediation, Mediation in Prison Disputes (New York: Criminal Justice Institute, 1979), p.1.

7. The problem of implementation of the consent decree is the same for a mediated agreement as a litigated one. There is the question of who is to monitor the mediated agreement. In the Maryland instance, the mediator did not assume that role but instead counsel for the prisoner was designated this task.

8. In Maryland, there have been approximately 350 §1983 suits filed annually for the past several years; approximately half name a correctional official as the defendant, and the remainer name The President of the United States, the U.S. Attorney, court reporters, jailhouse lawyers, and wives. Hence, only about 175 were sent invitations to mediate and of those, 66 percent responded affirmatively.

9. Given that only half of the prisoners were invited to mediate (note 8, supra), the withdrawals by the prisoners and the Assistant Attorney General meant that ultimately only one quarter of the total number of §1983 cases actually entered mediation despite the intended purpose of mediating "all cases."

10. Dillingham and Singer, op. cit. p.21.

11. 393 U.S. 483.

12. Johnson v. Avery, 393 U.S. 483 (1969).

13. William L. Reynolds and Michael H. Tonry, "Professional Mediation Services for Prisoners' Complaints," 67 ABA Journal 294 (March 1981).

14. This description is based on the work of Samuel J. Brakel, "Administrative Justice in the Penitentiary: A Report on Inmate Grievance Procedures," American Bar Foundation Research Journal 111 (Winter 1982); and "Ruling on Prisoners' Grievances," Id., 393 (Spring 1983).

15. Based on a review of commission files for January, February, and March 1982, 64 percent of the grievances involved some aspect of a disciplinary hearing. In contrast, medical and property complaints constituted only 8 percent.

16. For the purpose of gaining more detailed information on particular mechanisms in these states, a list of appropriate persons to contact is found in the Appendix.

CHAPTER V

POSTSCRIPT: FACTORS AFFECTING THE SUCCESS OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Dispute resolution mechanisms operate within the broader setting of a state's correctional system and its social, economic, and political environment. Some kinds of mechanisms work better than others, in part because contextual factors shape the kinds of grievances that arise and the degree of effort made to resolve them. These factors are well known to officials in charge of managing these mechanisms. However, the point is worth stating as a reminder that a dispute resolution technique will not likely succeed if it is conceived, implemented and monitored in a vacuum. Accordingly, the purpose of this chapter is to identify those factors that contribute to the success of dispute resolution mechanisms and those that inhibit success.

Institutional Management

One of the factors that affects the number and kinds of complaints that arise is how well the institution is managed. If the institution is running well, there will be fewer complaints. For example, when prisoners enter the correctional system, the collection and maintenance of their property must be done carefully, with proper records kept. One of the primary reasons for the large number of property complaints by inmates is the loose inventory procedures that operate at some institutions. Complaints may be reduced by tight supervision over this process. In this and many other areas, sound management can avert both litigation and grievances.

The number of grievances also can be lessened if compensation for inmate claims is handled without a complicated and time-consuming bureaucratic process. In some correctional systems, inmate claims for amounts as little as $25 must be processed through other departments of state government, including the state legislature. In other states, the corrections department may itself authorize these payments. Consequently, complaints involving requests for small monetary damages may be resolved short of litigation by correctional administrators seeking and gaining the authority to make such compensation.

Credibility

Prisoners need to believe that the dispute resolution mechanism will lead to a thorough, expeditious, fair and independent investigation before they consider it as an alternative to litigation. Credibility is a product of many factors, but three seem especially important.

One factor is the proximity of the mechanism to the prisoner. If the person who is responsible for conducting investigations or making decisions is close to the prisoner, the inmate is more likely to use the mechanism, less likely to appeal any rejection made at lower levels, and less likely to sue. This suggests that all dispute resolution mechanisms should place emphasis upon having personnel in a position to hear complaints, investigate them and provide the prisoner with a prompt and reasoned response.

In the context of the inmate grievance procedure, for example, the initial review stage is the most critical. The efforts of the prisoner's case counselor and the inmate grievance coordinator should be emphasized over an elaborate process leading to subsequent appeal stages.

Second, the individuals operating the dispute resolution mechanism must believe that prisoners do have legitimate problems that need to be resolved. If the prisoners perceive the mechanism as operating in bad faith, they will not rely on it. Furthermore, if the decision-maker takes the attitude of "like it or sue," he or she will undermine confidence in the mechanism.

The establishment and maintenance of positive attitudes on the part of the personnel operating the dispute resolution mechanism require the commitment and interest of top correctional officials. If the head of the department of correction believes that a mechanism is essential to operating a facility according to constitutional standards and that institutions ought to provide prisoners with the opportunity to exercise their rights when they believe that conditions are substandard, then staff will be encouraged to respond to complaints appropriately.

Sufficient Resources

The goals of all alternative dispute resolution mechanisms--immediate investigation and timely response--require staff to be available to carry out the investigation and necessary resources to make the procedure work. Based on our observations, there are approximately two grievances filed per prisoner annually in most state correctional systems. Although many of these complaints can be resolved with limited review and investigation, the sheer volume requires at least one staff person for every 750-1,000 prisoners. Unless the grievance program provides this approximate ratio, the mechanism will soon

develop an extensive backlog and its effectiveness will be jeopardized.

Conclusions

The choice of a dispute resolution mechanism for a correctional institution depends upon the administrator's sense of the fit of the structure and process with the environment of the facility as well as the impact that the administrator hopes for. Regardless of the method chosen, however, sound institutional management, credibility, and commitment by correctional administrators to a realistic allocation staff and other resources can help to ensure that the mechanism achieves the desired ends.

APPENDIX

List of Officials Managing Dispute Resolution Mechanisms in Selected States and the U.S. Bureau of Prisons

California

Senon E. Palacioz
Chief, Inmate Appeals
Department of Corrections
603 K Street
P.O. Box 714
Sacramento, CA 95814
(916) 445-0496

Connecticut

James Bookwalter
Corrections Ombudsman
Hartford Institute of Justice
190 New Britain Avenue
Hartford, CT 06106
(203) 527-1866

Georgia

Charles J. Topetzes
Director of Court Services
Department of Offender Rehabilitation
Two Martin Luther King Drive Southeast
Floyd Building
Twin Towers East
8th Floor
Atlanta, Georgia 30334
(404)656-6002

Thomas J. Killeen
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