

THE PRISONER'S OMBUDSMAN: PROTECTING CONSTITUTIONAL RIGHTS AND FOSTERING JUSTICE IN AMERICAN CORRECTIONS

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The Spirit of Christ, the Redeemer of the world, must breathe even where people are chained in prisons according to the logic of a still necessary human justice. Punishment cannot be reduced to mere retribution, much less take the form of social retaliation or a sort of institutional vengeance. Punishment and imprisonment have meaning if, while maintaining the demands of justice and discouraging crime, *they serve the rehabilitation of the individual* by offering those who have made a mistake an opportunity to reflect and to change their lives in order to be fully reintegrated into society.¹

~Pope John Paul II

[N]ot to promote the interests of prisoners would be to make imprisonment a mere act of vengeance on the part of society, provoking only hatred in the prisoners themselves.²

~Pope John Paul II

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1. Pope John Paul II, Homily at "Regina Coeli" Prison in Rome during the Celebration of the Great Jubilee ¶ 6 (July 9, 2000), in *Holy Father Visits "Regina Coeli" Prison: "I Was in Prison and You Came to Me,"* L'OSSERVATORE ROMANO (English ed.), July 12, 2000, at 1.

2. Message of Pope John Paul II for the Jubilee in Prisons (July 9, 2000), http://www.vatican.va/holy_father/john_paul_ii/messages/documents/hf_jp-ii_mes_20000630_jubilprisoners_en.html.

INTRODUCTION

Twenty-one year old Timothy Joe Souders was serving a one-to-four-year term in a Michigan prison for resisting arrest, assault, and destruction of police property when events turned fatal.³ Souders, medicated for manic depression and psychosis, exhibited some “unruly behavior” on August 2, 2006.⁴ He was then placed and restrained in an all steel isolation cell the size of a walk-in closet.⁵ Henry Franklin, a blind inmate who was locked up in a nearby cell, heard a dehydrated Souders choking and asking for water and attempted to get Souders help by kicking his own cell door and yelling to the guards.⁶ He was told to “shut up and mind his own business.”⁷ Despite Franklin’s efforts, Souders spent the last four days of his life in this steel cell: naked, bound to a steel bed by his hands and feet, lying in his own urine, with a heat index of 106 degrees Fahrenheit in the cell, and with neither physician nor psychiatric care.⁸ Dr. Robert Cohen, the court-appointed prison monitor who uncovered Souders’s death, wrote that the death was “a terrible, unnecessary tragedy.”⁹

Interestingly, this fiasco spurred an effort by state lawmakers to bring back the Michigan Department of Corrections Ombudsman,¹⁰ which was shut down in 2003 due to financial constraints.¹¹ This closing has resulted in an increased difficulty in remedying the various problems that exist within the Department of Corrections and the prisons it operates.¹² As Michigan Senate Judiciary Committee Chairman Alan Crompton stated, “The process worked when we had

3. Jeff Gerritt, *Mentally Ill Inmate Dies in Isolation*, DETROIT FREE PRESS, Aug. 20, 2006, at 1A.

4. *Id.*

5. *Id.*

6. Jeff Gerritt, *System Could Hide the Truth on Prison Health Care*, DETROIT FREE PRESS, Oct. 26, 2006, at 12A.

7. *Id.*

8. *Id.*

9. *Id.*

10. Tracy Samilton, *Bring Corrections Ombudsman Back, Say State Lawmakers*, MICHIGAN RADIO NEWS, Nov. 15, 2006, http://www.publicbroadcasting.net/michigan/news.newsmain?action=article&ARTICLE_ID=996936§ionID=1.

11. See Norman Sinclair et al., *Prisoner Complaints Unheeded*, DETROIT NEWS, May 24, 2005, at 1A.

12. See *id.*

the ombudsman and I've seen how hampered the legislature has been since we don't have [it]."¹³

Given the somewhat arcane nature of the ombudsman, it is useful to explain the concept at this point:

[H]e is an individual, generally elected or nominated by the legislature, who, upon receiving a complaint from a citizen alleging government abuse, investigates and intervenes on behalf of the citizen with the governmental authority concerned. He does not act in an adversary fashion as counsel for the complainant, but remains independent of both citizen and government as a mediator or intermediary. He endeavors to comprehend both sides of the dispute and bring about a satisfactory resolution of the citizen's complaint. If he finds that the complaint is well-founded but that the branch of government concerned refuses to remedy the situation, the Ombudsman is authorized to report the abuse directly and publicly to the legislative body that created his office. With the glare of publicity upon them, the legislators may then force a just and fair settlement of the complaint.¹⁴

The application of the ombudsman concept to the several American penal systems is not a new idea. As early as 1972, American legal commentators advocated for the application of this concept to American corrections in order to protect the rights of federal and state prisoners.¹⁵ Since that time, only a small number of states have adopted these recommendations by establishing an ombudsman office for prisoner and prisoner families' complaints to increase the accountability of American corrections systems and provide a much-needed outlet for these grievances.¹⁶ Many states have not even attempted to utilize the institution, and others have attempted unsuccessfully to pass legislation creating such an office.¹⁷ This Note

13. Samilton, *supra* note 10.

14. Lance Tibbles, *The Ombudsman: Who Needs Him?*, 47 J. URB. L. 1, 2 (1969).

15. See Lance Tibbles, *Ombudsman for American Prisons*, 48 N.D. L. REV. 383 (1972).

16. For example, the State of California Department of Corrections has an established Ombudsman who "reviews, investigates and responds to complaints from inmates, families and friends of inmates, and advocacy groups" and "acts as an advisor to the CDC." Prison Law Office, <http://www.prisonlaw.com/eventsa.htm> (last visited Jan. 24, 2008). Other states with corrections Ombudsmen include Georgia and Minnesota. See *infra* notes 33-35, 51-60 and accompanying text.

17. In Missouri, a bill was introduced to the legislature by Representative Charles Troupe in 1999, 2001, and 2002 to create a board of corrections Ombudsman and office of corrections

demonstrates that the ombudsman office has a substantial role to play in ensuring the adequate protection of prisoners' constitutional rights and in remedying the systemic problems¹⁸ underlying individual violations.

One familiar with the history of prison reform might be tempted to dismiss this Note at the outset because "conventional wisdom" holds that the sweeping court orders leading to prison reform in the 1970s and early 1980s have adequately shored up the constitutional rights of prisoners and remedied the abuses existing within prison systems.¹⁹ Although the scope of prison reform litigation has narrowed, tending to address only individual violations, it has done so not because systemic problems have ceased to exist; rather, it has narrowed because of the Prison Litigation Reform Act,²⁰ more stringent judicially imposed causation standards,²¹ and decreased public funding for such litigation.²² In fact, the relatively high volume of litigation revolving around individual prisoner rights violations and the grave injustices that sporadically occur prove that systemic problems remain in American penal systems.²³ Prisoner rights litigation has also become decreasingly effective at remedying the problems within prisons due to the aforementioned factors.²⁴

Ombudsman. H.B. 1305, 91st Gen. Assem., 2nd Reg. Sess. (Mo. 2002); H.B. 231, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2001); H.B. 200, 90th Gen. Assem., 1st Reg. Sess. (Mo. 1999). None of these bills were ever enacted into law. See Mo. House of Representatives, Bill Tracking, <http://www.house.mo.gov/billcentral.aspx?pid=26> (search for the bill in question by picking the correct year and entering the bill number or bill sponsor's name; follow the "Search" hyperlink; follow the hyperlink for the correct bill number, then follow the "ACTIONS" hyperlink in order to obtain the legislative history) (last visited Jan. 24, 2008).

18. "Systemic problems" is used, for lack of a better phrase, to refer to the cumulative actions and inactions of numerous individuals within the corrections system that lead to the emergence of certain system-wide cultural or social norms, creating an environment in which individual violations are possible and resulting in defective policy and procedure. See BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 771 (2003) ("*Systemic* = affecting an entire system; systemwide.").

19. See Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 550 (2006).

20. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321-66 to 1321-77 (1996) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.); Schlanger, *supra* note 19, at 602.

21. Schlanger, *supra* note 19, at 550.

22. *Id.* at 600.

23. See *id.* at 602; *infra* Part III.

24. See Schlanger, *supra* note 19, at 550, 602.

Consequently, additional safeguards such as the establishment of a corrections-specific ombudsman are now more necessary than ever.

Part I of this Note elucidates the nature of an ombudsman and presents an overview of the use of and failure to use the concept on the part of the states, concluding that ombudsmen are an affordable but underused possibility in American penal systems. Part II briefly addresses the various injustices currently occurring in American prisons, including overcrowding and "double-celling," prisoner-prisoner rape, sexual abuse, guard brutality, inadequate health care, and the prevalence of HIV/AIDS. Part III examines how the law fails to adequately protect prisoners. It argues that the judicial standards under the Eighth and Fourteenth Amendments make it difficult for prisoners to succeed in court and prevent courts from addressing the systemic problems underlying violations that are found, and also describes how the recent Prison Litigation Reform Act and the Prison Rape Elimination Act of 2003²⁵ affect prisoners. Part IV argues that the ombudsman has a substantial role to play in American corrections and is capable of fostering meaningful change by mitigating the injustices that plague prisoners within the American penal system.

I. THE NATURE AND SCOPE OF OMBUDSMAN USE IN AMERICAN CORRECTIONAL SYSTEMS

The nature and scope of ombudsman use vary from state to state and within the Federal Bureau of Prisons. Among the several states, the use of the ombudsman concept can be discussed categorically. Some states have successfully established a corrections-specific ombudsman office; some states have established a general ombudsman office for all complaints against the State, including complaints against the Department of Corrections; other states have established and later closed their corrections-specific ombudsman offices; and finally, many states have not attempted to use the concept at all. The Federal Bureau of Prisons has an ombudsman program established for staff to resolve work-related concerns, but no such program exists for the prisoners themselves.²⁶

25. 42 U.S.C. §§ 15601–15609 (Supp. III 2003).

26. Fed. Bureau of Prisons, U.S. Dep't of Justice, *FY 1999: The Year in Review*, 1999 STATE OF THE BUREAU 7, 9, available at <http://www.bop.gov/news/PDFs/sob99.pdf>.

Approximately half of the states have attempted to establish an ombudsman office to no avail.²⁷ These states include Missouri and New Hampshire. The Missouri legislature has considered bills that would create a corrections-specific ombudsman on several occasions, but the office has never been established.²⁸ In 2002, for example, Representative Charles Troupe introduced House Bill 1305 in order to establish a Department of Corrections Ombudsman, but the Bill never made it out of committee.²⁹ New Hampshire has also recently introduced legislation to establish an Office of Corrections Ombudsman,³⁰ but the bill was placed in “interim study” by the close of the 2006 legislative session.³¹ If the bill were finally to pass, the office would be responsible for “[r]eceiving, investigating, and referring complaints or problems received from inmates of the department of corrections, employees of the department of corrections, members of the general court, and the general public” at an estimated cost of \$111,189 for fiscal year 2007.³²

Other states have established a corrections-specific ombudsman office, with mixed success. Georgia, for example, has effectively established such an office.³³ The ombudsman was established to uncover and reduce problems within the prison system and protect the rights of prisoners by gathering information regarding the various problems reported in the corrections system and acting as a bridge between citizens and the Department of Corrections.³⁴ The Georgia Office of the Ombudsman has fostered relief for prisoners and change within the prison system, set goals for enhancing public trust, increased the accountability of the Department of Corrections, and provided an objective view of challenges faced by the Department.³⁵ California, on the other hand, has an Ombudsman who works for the Director of the California Department of Corrections and Rehabilitation

27. Tibbles, *supra* note 15, at 438.

28. *See supra* note 17.

29. *Id.*

30. H.B. 1415-FN-A, 2006 Leg., 2006 Sess. (N.H. 2006).

31. Docket for H.B. 1415-FN-A, 2006 Leg., 2006 Sess. (N.H. 2006), <http://www.gencourt.state.nh.us/ie/billstatus/quickbill.html> (insert bill number (HB1415) and session year (2006); follow “Submit” hyperlink; then follow “docket” hyperlink) (last visited Nov. 10, 2007).

32. H.B. 1415-FN-A, 2006 Leg., 2006 Sess. (N.H. 2006).

33. GA. DEP’T OF CORR., OFFICE OF THE OMBUDSMAN AND FAMILY ADVOCACY BROCHURE, available at <http://www.dcor.state.ga.us/pdf/ombudsmanBrochure.pdf>.

34. *Id.*

35. *Id.*

as an independent "special advisor," providing management advice, making policy and procedural recommendations, and serving as a "public relations expert."³⁶ Unfortunately, the California Office of the Ombudsman is not as effective as it should be due to the manner in which it is structured. The office is not fully independent since it works "for and reports to" the Director of Corrections rather than *with* him as an independent agency, potentially hampering its discretion to fully investigate complaints from prisoners and their families.³⁷ Furthermore, according to Lead Ombudsman Ken Hurdle, the office's efficacy is hindered by a lack of adequate funding and by the fact that "major investigations are referred to a separate state agency, the Office of the Inspector General."³⁸

Some states, such as Alaska and Nebraska, have successfully utilized a statewide ombudsman office that receives complaints from citizens against any state agency, including the Department of Corrections. The Alaska Office of the Ombudsman, for example, was established in 1975 and accepts complaints against nearly all state agencies and personnel, including state prisons and corrections employees.³⁹ The Ombudsman's primary responsibility is to investigate complaints formally or informally, to determine whether an agency action was "unlawful, unreasonable, unfair, arbitrary, erroneous, or inefficient," and to suggest an appropriate remedy.⁴⁰ The office may also issue investigative reports to the legislature and make recommendations for changes to existing state law.⁴¹ The Office of the Ombudsman's "O-Team" is currently comprised of nine persons, including one ombudsman, six assistant ombudsmen, an intake officer, and an intake secretary.⁴² The office maintains a website that keeps a matrix history of the "O-files"—complaints investi-

36. Cal. Dep't of Corr. and Rehab., Office of the Ombudsman, http://www.cdcr.ca.gov/News/Ombudsman_Office.html (last visited Jan. 25, 2008).

37. Andrea Jacobs, Comment, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277, 300 (2004).

38. *Id.* at 300 & nn.93-96.

39. Press Release, Alaska Office of the Ombudsman, News and Resources, <http://www.state.ak.us/local/akpages/LEGISLATURE/ombud/about.htm> (last visited Jan. 24, 2008).

40. *Id.*

41. *Id.*

42. Alaska Office of the Ombudsman, Meet the Staff, <http://www.state.ak.us/local/akpages/LEGISLATURE/ombud/bios.htm> (last visited Jan. 24, 2008).

gated by the office and the results of each investigation.⁴³ Recent complaints against the Department of Corrections have ranged from minor incidents such as an allegation by one inmate that Department officials lost his dentures, to allegations of excessive force, to an allegation that the Department had failed to take “reasonable steps to ensure the safety of incapacitated and suicidal inmates.”⁴⁴

Many complaints are successfully resolved, with the investigation summarized on the Office of the Ombudsman website; in some cases, a public report is also issued.⁴⁵ For example, in one complaint claiming that the Department failed to take reasonable steps to ensure the safety of incapacitated and suicidal inmates, the Ombudsman’s investigation discovered that the Alaska prisons lacked a unified policy for dealing with such incidents and that the training of guards failed to meet national best practice standards.⁴⁶ As a consequence, the Ombudsman recommended that the Department develop a set of comprehensive policies to detect prisoners at risk of suicide and revise its policy on special incident reporting, to which the Department agreed.⁴⁷

Nebraska has enjoyed similar success. Because the Nebraska Office of Public Counsel has a staff of eleven, including a Deputy Public Counsel for Corrections, and a high level of support from the public and legislature, it has effectively handled complaints from various state agencies including the Department of Correctional Services.⁴⁸ Complaints against the Department of Corrections were by far the largest group, comprising 1161 of the 2512 complaints,⁴⁹ indicating the ongoing usefulness of a corrections-specific ombudsman position.

Other states have established and subsequently closed an ombudsman office for the department of corrections, citing budgetary

43. Alaska Office of the Ombudsman, The O Files, <http://www.state.ak.us/local/akpages/LEGISLATURE/ombud/o-files.htm> (last visited Jan. 24, 2008).

44. Alaska Office of the Ombudsman, Fully Investigated Complaints Listed by Department, <http://www.state.ak.us/local/akpages/LEGISLATURE/ombud/table.htm> (last visited Jan. 24, 2008) (summarizing Case Nos. A2004-0036, A2002-0294, and C090-0049).

45. *Id.*

46. *Id.* (summarizing the results of the investigation in Case No. C090-0049).

47. *Id.* (summarizing the recommendations made in Case No. C090-0049).

48. 35 NEB. PUB. COUNS./OMBUDSMAN ANN. REP. 14, 27 (2005), available at <http://www.unicam.state.ne.us/web/public/reports/publiccounsel>.

49. *Id.* at 39–40.

limits.⁵⁰ Minnesota's office is illustrative. The Ombudsman for Corrections was established in the 1970s to investigate complaints against the Minnesota Department of Corrections⁵¹ and report these complaints to the executive branch.⁵² Additionally, the Ombudsman monitored program and policy changes within the Department of Corrections and made "recommendations that promote good correctional practice as mentioned by accrediting organizations such as the ACA [American Correctional Association]."⁵³ At its peak, the office employed nine full-time employees and had an operating budget of nearly \$700,000.⁵⁴ But in 2002, the Minnesota legislature slashed the office's budget to under \$300,000 and reduced its staff accordingly,⁵⁵ despite the fact that it received over three thousand letters and phone calls each year.⁵⁶ In 2003, the Governor recommended closing down the office entirely because "[t]he magnitude of the projected budget shortfall and the desire to protect core government functions necessitate[d] reducing or eliminating some functions."⁵⁷ Strangely, the budget report stated that the Ombudsman office was unnecessary because the cut in funding made it "difficult to maintain ongoing operations."⁵⁸ Bluntly put, because the office had too much work for it to handle, it was closed. The report also argued that "other avenues of redress exist for inmates that were not available when this office was created," but did not explicitly list or even hint at precisely what those avenues are or even could be.⁵⁹ Because the office received too many complaints to "maintain ongoing investigations," it seems more likely that the controlling

50. Amnesty Int'l, *Minnesota: Women in Prison*, at 4, Aug. 29, 2005 (noting the closure of Minnesota's Ombudsman Office); Sinclair et al., *supra* note 11 (discussing the closure of Michigan's Ombudsman Office).

51. MINN. DEP'T OF CORR., CORRECTIONS RETROSPECTIVE 1959-1999, at 19 (1999).

52. Minn. Dep't of Fin., Agency Profile: Ombudsman for Corrections (Nov. 26, 2002), <http://www.budget.state.mn.us/budget/operating/200405/prelim/192362.pdf>.

53. *Id.*

54. *See id.*

55. *Id.*

56. Ruben Rosario, *Inmates May Lose Advocate: Office House's Anti-Terrorism Bill Would Cut Funding for Ombudsman*, ST. PAUL PIONEER PRESS, Apr. 1, 2002, at 1B.

57. Letter from Dan McElroy, Comm'r of the State of Minn. Dep't of Fin., to Minn. Legislators, Feb. 18, 2003, http://www.budget.state.mn.us/budget/operating/200405/final/corrections_ombudsman.pdf.

58. Minn. Dep't of Fin., Change Item: Eliminate Ombudsman for Corrections (Feb. 18, 2003), http://www.budget.state.mn.us/budget/operating/200405/final/corrections_ombudsman.pdf.

59. *Id.*

reason behind the cuts and subsequent closing was the office's political vulnerability, resulting from "its obscurity and traditionally unpopular constituency."⁶⁰

Budgetary concerns are at the forefront of the debate in states considering the establishment (or re-establishment) of an ombudsman office. But these concerns are probably overestimated. Ombudsman offices are affordable even for smaller states, such as New Hampshire, where an office could be established and maintained for little over \$100,000 per year.⁶¹ To put this amount in perspective, New Hampshire spent over \$4,500,000,000 in 2006, with over \$90,000,000 allocated to the Department of Corrections alone.⁶² Furthermore, the Ombudsman has the ability to intervene on behalf of prisoners, solve problems, and collaborate with prison officials to alter defective prison policy before litigation arises.⁶³ As a result, the Ombudsman may potentially save New Hampshire a substantial amount of money by preventing the expenditure of legal and judicial resources on litigation brought by prisoners against the State.

The foregoing analysis illustrates the fact that the office of the ombudsman is a potentially successful and affordable institution for remedying the problems that exist in American penal systems as indicated by the accomplishments of the Ombudsmen in Alaska, Nebraska, and Georgia. Unfortunately, the ombudsman concept is an underused one in American penal systems. Most states simply have no ombudsman office at all, let alone one specifically intended to investigate complaints solely within its department of corrections.

II. GENERAL CONDITIONS WITHIN AMERICAN PENAL SYSTEMS

Conditions in American penal systems are far from satisfactory or desirable, and an examination of them will lay the foundation for demonstrating that the ombudsman has a substantial role to assume in American penal systems today. A host of problems have been pointed out by recent critics and observers of the several penal

60. Rosario, *supra* note 56.

61. H.B. 1415-FN-A, 2006 Leg., 2006 Sess. (N.H. 2006). Such office would include four hundred square feet of office space, one lead ombudsman, and an executive secretary. *Id.*

62. STATE OF N.H. DEP'T OF ADMIN. SERVS, OFFICE OF THE GOVERNOR, GOVERNOR'S OPERATING BUDGET, FISCAL YEARS 2008-2009, EXHIBIT C 10-11, 28 (2007).

63. See Alfred Bexelius, *The Ombudsman for Civil Affairs*, in THE OMBUDSMAN: CITIZEN'S DEFENDER 22, 24-25 (Donald C. Rowat ed., 1965).

systems, including the prevalence and spread of HIV/AIDS in prisons, rape among male inmates, sexual abuse of female inmates by prison guards, a failure to provide inmates with adequate health care, overcrowding, and "double-celling." It is important to recognize that these problems are not merely isolated incidents, but are systemic in the sense that they stem from an overall failure by the various corrections systems to recognize that these problems exist and to take adequate measures to prevent them.⁶⁴

Prison rape, particularly among male prisoners, has occurred with such frequency as to spark federal legislation in 2003: the Prison Rape Elimination Act.⁶⁵ The findings of the Act state that, while data on the frequency of prison rape is insufficient, conservative estimates indicate that 13% of inmates in the United States have been sexually assaulted—amounting to over one million victims over the past twenty years.⁶⁶ Two hundred thousand inmates now incarcerated have been or will be raped, many of them repeatedly.⁶⁷ This problem is compounded by the facts that prison rape is often not reported, prison guards are not adequately trained to deal with the problem, and, in the year 2000, over twenty-five thousand inmates were known to be infected by HIV/AIDS (not to mention other sexually transmitted diseases), causing over 6% of the deaths in American prisons.⁶⁸ While the Prison Rape Elimination Act is a step toward mitigating this problem, it has been undermined by the degree of discretion given to federal and state prison officials in establishing and implementing preventative programs, the continued denial of the extent of prison rape by prison officials, and by the high "deliberate indifference" standard that prisoners must meet in order to successfully bring a claim under the Act against prison officials.⁶⁹ Furthermore, most rape victims will not report the crime because of

64. See Danielle M. McGill, Note, *To Exhaust or Not to Exhaust? The Prisoner Litigation Reform Act Requires Prisoners to Exhaust All Administrative Remedies Before Filing Excessive Force Claims in Federal Court*, 50 CLEV. ST. L. REV. 129, 153 (2003) (also assessing the court's findings in *Smith v. Zachary*, 255 F.3d 446, 449 (7th Cir. 2001)).

65. 42 U.S.C. §§ 15601–15609 (Supp. III 2003).

66. *Id.* § 15601(2).

67. *Id.*

68. *Id.* §§ 15601(5)–(7).

69. David K. Ries, Note, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL'Y 915, 919–20 (2005).

“shame, intimidation, fear of being identified as a ‘rat,’” and fear of being identified as an “easy target” for future rape.⁷⁰

Sexual assault of female prisoners is also a serious problem in American penal systems. One study of women’s prisons in Michigan revealed the startling fact that nearly 100% of those interviewed reported being subjected to some form of sexually aggressive act by prison guards.⁷¹ The U.S. Department of Justice and Human Rights Watch have investigated such allegations in Michigan and found that sexually aggressive acts occurred frequently, ranging from inappropriate pat-downs involving groping of women’s breasts, buttocks, and genitals to rape occasionally resulting in pregnancy and, subsequently, forced abortion.⁷²

Modern observers of the American penal systems have also pointed out a systemic failure of many prison systems to provide inmates with adequate health care.⁷³ This problem particularly burdens female inmates, who often bring special problems and complications through the prison doors.⁷⁴ For example, although it is estimated that nearly 10% of women in prison are pregnant at some point during their incarceration, it is the rule, rather than the exception, that no obstetrician or gynecologist is on staff during weekends or evening hours, even at most major women’s penal institutions.⁷⁵ A study of California’s penal health care system revealed other injustices, including a lack of access to doctors due in part to a co-payment requirement even for entirely preventative care; above

70. James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 443–44 (2003).

71. HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 342 (1996) (citing letter from Deval Patrick, Assistant Att’y Gen., U.S. Dep’t of Justice, to John Engler, Governor, Mich., Mar. 27, 1995).

72. *Id.*

73. See, e.g., Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex’s Impact on Women’s Health*, 18 BERKELEY WOMEN’S L.J. 40 (2003); Amy Petré Hill, Note, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California’s Substandard Prison Health Care System*, 13 HASTINGS WOMEN’S L.J. 223 (2002); Kendra Weatherhead, Note, *Cruel but Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429 (2003); Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women’s Prisons*, CRIM. JUST., Spring 2001, at 39.

74. Weatherhead, *supra* note 73, at 440–51 (discussing strong correlations between physical and sexual abuse to drug addiction in women, a greater success rate of drug treatment programs for women, rampant sexual abuse by correctional officers against female prisoners, a high incidence of HIV/AIDS in female prison populations, and pregnancy).

75. Barry, *supra* note 73, at 40.

market prices for basic hygienic products such as soap, shampoo, and sanitary pads; and the use of "Medical Technical Assistants" (guards with some vocational nursing training) to provide a large degree of medical care, including life-or-death decisions regarding health care and access to health care.⁷⁶ The co-payment requirement may not seem like a serious obstacle to the attainment of adequate health care. But even a five dollar co-pay, which is standard in California prisons, can look like a small fortune to inmates who earn fifteen cents per hour working within the prison and who have to pay up to three times the market price for basic sanitary products.⁷⁷ The problem is further complicated by the fact that many inmates lack a "pay number" and thus cannot work at all.⁷⁸ Not only must inmates find the money for co-pays while working for pennies, but women in particular must face potential sexual abuse when seeking medical care, which acts as a further disincentive to the obtainment of treatment.⁷⁹ One recent study of twelve hundred female inmates found that at least 19% of the women suffered abuse while seeking medical care.⁸⁰ This problem is especially pointed given that approximately 80% of women suffer some form of abuse before even entering prison.⁸¹ Finally, the examination of California's prison health care system found a lack of adequate preventative health care provided to women to check for gender-specific diseases such as breast cancer or cervical cancer, and that even when such testing was performed, the results were occasionally falsified.⁸²

General prison overcrowding and "double-celling," a practice involving the placement of two or more inmates in a cell designed for one,⁸³ continue to be a serious problem in American penal systems.⁸⁴ When the prison capacity is exceeded by a factor of two or three, as occurs with some frequency in American prisons, "it necessarily follows that conditions such as sewage disposal, meal service, recrea-

76. Hill, *supra* note 73, at 228–29.

77. *Id.* at 229.

78. *Id.*

79. *Id.* at 232.

80. *Id.*

81. *Id.* at 233.

82. *Id.*

83. Bobby Scheihing, Comment, *An Overview of Prisoners' Rights: Part II, Conditions of Confinement Under the First and Eighth Amendments*, 14 ST. MARY'S L.J. 991, 995 (1983).

84. Susanna Y. Chung, Note, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2351–52 (2000).

tion, availability of medical treatment, and other services are adversely affected.”⁸⁵ Additionally, such overcrowding infringes upon privacy rights⁸⁶ and leads to an increase in stress and anxiety between inmates, which sometimes erupts into violence.⁸⁷

These conditions have prompted voluminous litigation, which further exposed the deplorable living conditions found in many American prisons.⁸⁸ For example, in *Pugh v. Locke*⁸⁹ the court found that four prisons in Alabama were designed to hold 2307 inmates, but actually held 3550 inmates.⁹⁰ This overcrowding, combined with other factors such as inadequate plumbing, led to various unsanitary conditions including inmates sleeping on hallway floors and next to urinals, spreading body lice, and sharing only one functional toilet among the two hundred inmates in their section of the prison.⁹¹ Unfortunately, Alabama is not the only state found by the courts to have deplorable living conditions caused by overcrowding.⁹²

In sum, the lamentable conditions within many American prisons raise serious questions about the integrity of corrections in the U.S. and leave one wondering why the situation has not improved to an acceptable degree over time. But these problems are more than mere inconveniences that prisoners need to deal with as part of their confinement or seek a remedy in tort. In some instances, they rise to the level of a violation of prisoners’ constitutional rights, further demonstrating the necessity of utilizing the ombudsman concept in American prisons.

85. Scheihing, *supra* note 83, at 997–98.

86. Chung, *supra* note 84, at 2352.

87. *Id.* at 2355.

88. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 340 (1981); Bell v. Wolfish, 441 U.S. 520, 541–42 (1979); Small v. Hunt, 98 F.3d 789, 792 (4th Cir. 1996); Nami v. Fauver, 82 F.3d 63, 65–66 (3d Cir. 1996); Tillery v. Owens, 907 F.2d 418, 427–28 (3d Cir. 1990); Chavis v. Rowe, 643 F.2d 1281, 1291 (7th Cir. 1981).

89. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff’d in part and remanded sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev’d in part and remanded on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam).

90. *Id.* at 322.

91. *Id.* at 323.

92. *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974) (describing the housing units of a prison in Mississippi as “unfit for human habitation under any modern concepts of decency”).

III. THE FAILURE OF THE LAW TO ADEQUATELY PROTECT PRISONERS

The Supreme Court has stated that “the Constitution does not mandate comfortable prisons.”⁹³ But it has found Eighth and Fourteenth Amendment violations when prison conditions pass remarkably high constitutional thresholds. The purpose of examining these violations and standards in relation to the ombudsman concept is not to illustrate that they would not have arisen had all penal systems utilized an ombudsman. Rather, it is to show that the ombudsman retains a substantial and important position in American corrections given the nearly insurmountable judicial standards imposed on prisoners seeking constitutional relief, the failure of the court system to address the systemic problems underlying these violations, and recent federal legislation like the Prison Litigation Reform Act and the Prison Rape Elimination Act.

Before moving on to address these legal standards and their effect on prisoners, the question of whether prisoners retain substantive rights, and to what degree, requires an answer. While it is clear that lawful imprisonment legitimately deprives citizens of freedom and other constitutional rights, prisoners do retain certain rights compatible with the objectives of incarceration.⁹⁴ These include the Eighth Amendment right to be free from cruel and unusual punishment⁹⁵ and certain Fifth and Fourteenth Amendment due process rights.⁹⁶ Other rights retained by prisoners include the right to marry, subject to restrictions;⁹⁷ the right of access to courts;⁹⁸ certain First Amendment rights regarding freedom of speech, association, and religion;⁹⁹ and certain privacy rights relating to family life and reproduction, although these are severely limited.¹⁰⁰

93. *Rhodes*, 452 U.S. at 349.

94. *Hudson v. Palmer*, 468 U.S. 517, 523–24 (1984).

95. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

96. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

97. *Turner v. Safley*, 482 U.S. 78, 95–97 (1987).

98. *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343, 354 (1996).

99. Generally speaking, prison officials may not infringe on prisoners' First Amendment rights unless the restriction is reasonably related to a legitimate penological objective. *Thornbush v. Abbott*, 490 U.S. 401, 414–15 (1989). Although a relatively easy standard to meet by prison officials, such rational basis review has occasionally found First Amendment violations. *See, e.g., Shaker v. Selsky*, 391 F.3d 106, 114–15 (2d Cir. 2004); *Love v. Reed*, 216 F.3d

A. *Judicial Standards Under the Eighth and Fourteenth Amendments*

Prisoners face a substantial obstacle when seeking to obtain relief for a violation of the aforementioned substantive rights. That is, judicial standards created in order to govern precisely when a violation exceeds constitutional thresholds are remarkably difficult for prisoners to meet. The various court-mandated standards set a high bar in three major areas: substantive due process, procedural due process, and, most notably, for violations of the Eighth Amendment restriction on cruel and unusual punishment. The result of the imposition of these judicial standards is twofold: first, courts find violations of individual rights only in particularly egregious situations and second, they are effectively precluded from addressing the systemic problems that underlie individual violations.

Prison conditions do not constitute a substantive due process violation until they rise to the level of an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”¹⁰¹ If a substantive due process violation is determined by virtue of its being excessive relative to “ordinary incidents of prison life,” where the sometimes abhorrent conditions described above are what constitutes “ordinary” prison life, one wonders whether such a subjective standard has any utility whatsoever. For example, in *Sealey v. Glitner*, the petitioner was nominally involved in an attack that occurred within the prison and was found not guilty at a subsequent hearing on charges of fighting, possession of weapons, and assault.¹⁰² Nonetheless, he was placed in a special housing unit (“SHU”) for a total of 101 days because the Deputy Superintendent for Security, based upon “confidential information, . . . felt that [petitioner’s] continued presence in general population could seriously jeopardize the safety and security of [the] facility.”¹⁰³ Conditions of confinement within the SHU included twenty-three hours per day of confinement to the cell, no more than three showers per week, no

682, 689–90 (8th Cir. 2000); *Eason v. Thaler*, 14 F.3d 8, 10 (5th Cir. 1994); *Murphy v. Mo. Dep’t of Corr.*, 814 F.2d 1252, 1257 (8th Cir. 1987).

100. *See, e.g., Victoria W. v. Larpenter*, 369 F.3d 475, 485–89 (5th Cir. 2004); *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 344–49 (3d Cir. 1987).

101. *Sandin v. Conner*, 515 U.S. 472, 472, 484 (1995) (returning to the due process principles elaborated upon in *Wolff*, 418 U.S. 539).

102. *Sealey v. Glitner*, 197 F.3d 578, 580 (2d Cir. 1999).

103. *Id.*

telephone privileges, continuous noise, and sporadic feces-flinging by inmates.¹⁰⁴ In spite of these conditions and the Superintendent's vague rationale for the confinement, the court found no due process violation.¹⁰⁵ Thus, even though "conditions of the Auburn SHU [were] doubtless unpleasant and somewhat more severe than those of general population," the court held that "the degree of incremental harshness, endured for 101 days, [was] not an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹⁰⁶

Procedural due process is another area of constitutional rights where prisoners must meet a high judicial standard in order to prevail on a claim against corrections institutions or officials. Prisoners who suffer personal injury or a loss of property must prove that a prison official acted "oppressively or abusively" in order to prevail.¹⁰⁷ That is, negligent conduct by prison officials will not suffice to establish a procedural due process claim, even if there is no other remedy under state law.¹⁰⁸

The most substantial judicial obstacle is the one imposed on inmates who are seeking relief for a violation of the Eighth Amendment's ban on cruel and unusual punishment. In order to allege a violation of the Eighth Amendment under 42 U.S.C. § 1983, prisoners must meet the "deliberate indifference" standard.¹⁰⁹ The Supreme Court first articulated the deliberate indifference standard in *Estelle v. Gamble*.¹¹⁰ The Court held that, in order for a prisoner to successfully bring an Eighth Amendment claim against prison officials for failure to provide medical care, he would have to show that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."¹¹¹ The parameters of deliberate indif-

104. *Id.* at 581.

105. *Id.* at 586.

106. *Id.* at 589–90 (internal quotation marks omitted).

107. Kendra Berner & Susan Bartholomew, *Substantive Rights Retained by Prisoners*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 929, 960 (2006).

108. *Id.* at 960–61.

109. Olga Giller, Note, *Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape*, 10 CARDOZO WOMEN'S L.J. 659, 666 (2004).

110. *Estelle v. Gamble*, 429 U.S. 97 (1976); Giller, *supra* note 109, at 666.

111. *Estelle*, 429 U.S. at 104 (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

ference were later refined in *Wilson v. Seiter*.¹¹² In that case, Wilson alleged that overcrowding, excessive noise, inadequate heating and cooling, and certain unsanitary conditions constituted cruel and unusual punishment.¹¹³ In discussing this claim, the Court established a new principle: in order for a prisoner to successfully meet the deliberate indifference standard, he must prove not only that the deprivation resulted from wanton conduct, but also that prison officials possessed culpable intent.¹¹⁴

The Court finally synthesized the modern standard in *Farmer v. Brennan*.¹¹⁵ Justice Souter, writing for the majority, elucidated the current two-prong test for deliberate indifference. The first prong requires that “the deprivation alleged must be, objectively, ‘sufficiently serious.’”¹¹⁶ The second prong requires that prison officials have a “sufficiently culpable state of mind,” which flows from the principle that “only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.”¹¹⁷ Exactly what constitutes a “sufficiently culpable state of mind” depends on the nature of the alleged violation. For claims involving excessive force, the claimant must prove that the officer *subjectively* applied force “maliciously and sadistically for the very purpose of causing harm.”¹¹⁸ For claims involving prison conditions, the claimant must prove that the prison official knew of and disregarded “an excessive risk to inmate health or safety.”¹¹⁹ That is, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹²⁰ In adopting this subjective standard, the Court explicitly rejected an objective test consistent with tort law, whereby the official could be held liable if the conditions were so obvious that a reasonable official would have known of their existence.¹²¹

112. *Wilson v. Seiter*, 501 U.S. 294 (1991).

113. *Id.* at 296.

114. *Id.* at 305.

115. *Farmer v. Brennan*, 511 U.S. 825 (1994).

116. *Id.* at 827, 834 (quoting *Wilson*, 501 U.S. at 298).

117. *Id.* at 827 (quoting *Wilson*, 501 U.S. at 297).

118. *Id.* at 835 (internal quotation marks omitted) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

119. *Id.* at 837.

120. *Id.*

121. *Id.* at 836–37.

The case *Adames v. Perez* presents an example of the difficulty imposed on prisoners by this subjective standard.¹²² In that case, a handcuffed and powerless Adames was stabbed thirteen times by an escaped inmate because Adames had provided information to the prison captain regarding drug smuggling in the cellblock.¹²³ In attempting to establish an Eighth Amendment claim, Adames offered evidence that inmates had previously escaped from their cells and attacked other inmates, the warden had been notified of these escapes by email, prison guards failed to follow standard safety procedures such as checking cell doors every half-hour and conducting cell searches on a regular basis, and Adames had been labeled as a “potential victim” by prison officials.¹²⁴ Despite the emails to the warden regarding the previous escapes, from which a reasonable official may have drawn an inference that Adames was in danger, the court held that the warden was not deliberately indifferent to Adames’s situation because he could not prove that the warden actually did draw that inference from the emails.¹²⁵

Notwithstanding these high and difficult standards, courts have, from time to time, found violations of prisoners’ constitutional rights, though only the most egregious situations result in successful claims. The case of *Nei v. Dooley* is illustrative—and sadly typical—of claims that actually succeed under the deliberate indifference standard.¹²⁶ In *Nei*, inmate Soyars admitted to prison officials that he was infected with AIDS, frequently told other inmates that he was going to infect them, urinated and smeared fecal matter on the floor while “cleaning” the bathroom, and spit on sinks and water fountains.¹²⁷ Further, Soyars frequently found occasion to fight with other inmates, spitting on their faces and occasionally bringing his blood into contact with them.¹²⁸ A group of inmates, fearful of this behavior, reported the fighting and other behavior to prison officials, filed a grievance to get

122. *Adames v. Perez*, 331 F.3d 508 (5th Cir. 2003).

123. *Id.* at 510–11.

124. *Id.* at 512–14.

125. *Id.* at 514.

126. *Nei v. Dooley*, 372 F.3d 1003, 1007 (8th Cir. 2004) (per curiam). For some other recent cases finding Eighth Amendment violations, see *Pierson v. Hartley*, 391 F.3d 898, 904 (7th Cir. 2004), *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004), *Odom v. South Carolina Department of Corrections*, 349 F.3d 765, 773–74 (4th Cir. 2003), and *Cantu v. Jones*, 293 F.3d 839, 844–45 (5th Cir. 2002).

127. *Nei*, 372 F.3d at 1005.

128. *Id.* at 1006.

Soyars removed from the prison, and also attempted to file a class action lawsuit.¹²⁹ All of this did not result in a meaningful response; rather, the warden accused the prisoners of an illegal petition drive and placed some of them “in the hole.”¹³⁰ On two occasions, the inmates were also denied access to the law library to draft a complaint and later an answer.¹³¹ The court held that the prisoners stated a deliberate indifference claim because “a jury could find the warden knew Soyars had AIDS, knew Soyars had threatened to infect other inmates through assault, and failed to respond reasonably to the risk in violation of the prison’s own policy.”¹³²

Hearns v. Terhune provides another example of just how conspicuously bad official conduct must be to meet the Eighth Amendment judicial standard.¹³³ Hearns brought an Eighth Amendment claim pro se, alleging that prison officials violated his “right to be free from cruel and unusual punishment” by failing to protect him from violence by other Muslim inmates.¹³⁴ A group of “ruling” Muslims stabbed Hearns numerous times in the chapel after learning that he violated Islamic beliefs by failing to abide by the Sunnah and was planning to secretly deliver prayer oil to another inmate, from whom the gang would regularly steal it.¹³⁵ Not only did the ruling Muslims learn these facts from prison officials whom Hearns specifically had asked not to reveal them, but the officials, contrary to prison policy, allowed the attacking inmates into the chapel unsupervised.¹³⁶ Furthermore, the officials knew that there were numerous acts of violence committed between the various Muslim factions within the prison over religious beliefs and services.¹³⁷ Amazingly, the district court dismissed the claim, holding that Hearns had failed to show that the prison officials had a sufficiently culpable state of mind.¹³⁸ The court of appeals reversed, holding that not only did the prison officials know of the violence

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1007.

133. *Hearns v. Terhune*, 413 F.3d 1036 (9th Cir. 2005).

134. *Id.* at 1037.

135. *Id.* at 1038–39.

136. *Id.*

137. *Id.*

138. *Id.* at 1040.

perpetrated by the ruling Muslim group, they “*created* the risk and then *facilitated* the attacks.”¹³⁹

While cases like *Nei* and *Hearns* are examples of prisoner success in obtaining some form of relief for Eighth Amendment violations, they are a rarity due primarily to the flagrant situations in which the prisoners found themselves. Furthermore, the systemic problems in prison policy and organizational culture that gave rise to these violations appear to be unchanged by sporadic individual successes because judicially created standards—particularly “deliberate indifference”—preclude courts from addressing the underlying problems. The problem with requiring the prisoner to prove that the prison official possessed a sufficiently culpable state of mind amounting to at least criminal recklessness¹⁴⁰ is that prison systems simply cannot be held accountable for the underlying conditions giving rise to the violation. Rather, they are only accountable for the individual violations themselves, and then only if specific officials acted with an intent greater than criminal negligence. As the concurring opinion in *Wilson* noted:

Inhumane prison conditions often are the result of *cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time*. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, *intent simply is not very meaningful when considering a challenge to an institution, such as a prison system*.¹⁴¹

If the previously mentioned harms were not sufficiently serious in themselves to warrant the incorporation of the ombudsman concept into the various American correction systems, they are compounded by the fact that prisoners do not have a constitutionally protected right to an attorney in many situations. These include disciplinary actions;¹⁴² cases of administrative segregation, unless the prisoner has been charged with a crime;¹⁴³ § 1983 claims, even if the prisoner has

139. *Id.* at 1040–41.

140. *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994).

141. *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring) (emphasis added).

142. *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976).

143. *United States v. Gouveia*, 467 U.S. 180, 182, 192–93 (1984).

established a prima facie case of a civil rights violation,¹⁴⁴ and capital habeas corpus proceedings.¹⁴⁵ As a result of these limitations on consulting an attorney, most cases involve prisoners filing pro se with limited education and no legal research skills, making it very difficult for them to navigate the procedural and substantive legal challenges that they will inevitably face in the federal or state court system.¹⁴⁶

B. *Federal Legislation: The PLRA & PREA*

Federal legislation has not helped prisoners to overcome the high judicial standards described above or allowed courts to address systemic problems within American prisons. The Prison Litigation Reform Act¹⁴⁷ (“PLRA”) and the Prison Rape Elimination Act¹⁴⁸ (“PREA”) are the two major statutes passed by Congress that bear on the application of the ombudsman concept in American corrections. The PLRA actually makes it *more* difficult for prisoners to bring suit in federal court, while PREA, although a necessary step toward addressing rape in prison, is not sufficient to fully address the problem.

The PLRA was passed in 1995 to curb the allegedly frivolous, excessive, and ever-increasing number of cases filed by prisoners.¹⁴⁹ To this end, the PLRA requires inmates to “exhaust administrative remedies” before bringing suit in federal court.¹⁵⁰ The PLRA also imposes certain procedural hurdles, such as the prepayment of any partial filing fees required when the prisoner brings a civil action or files an appeal *in forma pauperis*.¹⁵¹ Additional barriers include a “three strikes” provision, whereby the prisoner may not bring a civil action or appeal if he has on three previous occasions filed a

144. See, e.g., *Lee v. Crouse*, 284 F. Supp. 541, 543–44 (D. Kan. 1967), *aff’d*, 396 F.2d 952 (10th Cir. 1968) (stating that there is no “absolute [constitutional] right” to assistance of counsel in civil rights actions).

145. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

146. Giller, *supra* note 109, at 676.

147. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321-66 to 1321-77 (1996) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

148. Prison Rape Elimination Act, 42 U.S.C. §§ 15601–15609 (Supp. III 2003).

149. Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN’S L. REV. 203, 203, 210 (2004).

150. 42 U.S.C. § 1997e(a) (2000).

151. 28 U.S.C. § 1915(b) (2000). *In forma pauperis* is Latin for “in the manner of a pauper” and in law refers to an indigent person who is entitled to a waiver of filing fees and court costs. BLACK’S LAW DICTIONARY 794 (8th ed. 2004).

complaint that was dismissed on grounds that it was “frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”¹⁵² Additionally, the PLRA limits the time allowed for prospective relief in civil cases involving prison conditions to two years¹⁵³ and prevents damages for psychological injury from being recovered without a prior showing of physical injury.¹⁵⁴

The most problematic obstacle is the “administrative exhaustion” requirement, which not only applies to cases involving prison conditions, but has been extended to claims involving excessive force.¹⁵⁵ Obviously, requiring prisoners to exhaust administrative remedies before filing an excessive force or prison condition suit can be troublesome when the very individuals who cause the problem (like prison guards in the case of excessive force) are the same individuals receiving the complaints.¹⁵⁶ The administrative exhaustion requirement also works substantial injustice when mental illness causes prisoners to file untimely grievances and become subsequently barred from seeking relief in court under the Act.¹⁵⁷ Furthermore, the purpose of the administrative exhaustion requirement has not been achieved. Not only has it failed to reduce litigation by prisoners, but it has actually generated a significant amount of additional litigation surrounding its interpretation.¹⁵⁸

Several commentators have criticized the purported rationale for the PLRA’s existence, claiming that the litigation sparking its passage was (and is) neither frivolous nor excessive.¹⁵⁹ Congressional proponents of the Act failed to take into account the drastic increase in prison population when looking at litigation statistics¹⁶⁰ and the fact that deteriorating prison conditions were a further cause behind the increasing litigation.¹⁶¹ Furthermore, they trivialized or mischar-

152. 28 U.S.C. § 1915(g) (2000).

153. 18 U.S.C. § 3626(b)(1) (2000).

154. 42 U.S.C. § 1997e(e) (2000).

155. *Porter v. Nussle*, 534 U.S. 516, 520 (2002).

156. *Tibbles*, *supra* note 15, at 426.

157. Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 406-07 (2006).

158. *Chen*, *supra* note 149, at 218, 222-24.

159. *See, e.g., id.* at 210-16; Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519-22 (1996).

160. *Chen*, *supra* note 149, at 210.

161. *Id.* at 213.

acterized the lawsuits igniting the fury over prisoner litigation, such as the now-infamous “peanut butter case.”¹⁶² In short, while a substantial percentage of prisoner lawsuits are dismissed as frivolous,¹⁶³ the exaggeration of these claims has overshadowed legitimate claims resulting from serious problems within prison systems,¹⁶⁴ and the PLRA has the effect of preventing otherwise meritorious claims from ever being brought.¹⁶⁵

The PREA was passed as a result of a growing awareness in Congress that rape had become a serious problem in American prisons.¹⁶⁶ The PREA is a positive step toward addressing rape in prison, with the stated purpose of providing an “analysis of the incidence and effects of prison rape in Federal, State and local institutions, and for information, resources, recommendations and funding to protect individuals from prison rape.”¹⁶⁷ In furtherance of this goal, the Act provides funds for training and educating prison officials¹⁶⁸ and for grants to state prisons to prevent rape among inmates.¹⁶⁹ The PREA also focuses on data collection, with the ultimate goal of issuing recommendations for eliminating prison rape.¹⁷⁰ But commentators have criticized this focus because “unreliable observations” and underreporting are characteristics of sexual assault in prison, and thus the statutory goal will be very difficult to achieve.¹⁷¹ Furthermore, the Act does nothing to address the underlying and inherently unsafe conditions, such as overcrowding, that make rape possible.¹⁷²

162. *Id.* at 213–14; Newman, *supra* note 159, at 520–22. While the peanut butter case was characterized by congressmen as a completely frivolous claim about getting the “wrong” kind of peanut butter, it was actually about prison officials charging a prisoner for jars of peanut butter he never received. *Id.* at 521.

163. Newman, *supra* note 162, at 519.

164. *Id.*

165. Chen, *supra* note 149 at 224–28.

166. 42 U.S.C. § 15601 (Supp. III 2003).

167. Press Release, U.S. President George W. Bush, Statement on Signing the Prison Rape Elimination Act of 2003 (Sept. 4, 2003), <http://www.whitehouse.gov/news/releases/2003/09/20030904-9.html>.

168. 42 U.S.C. § 15604 (Supp. III 2003).

169. *Id.* § 15605.

170. *Id.* § 15606.

171. Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE, Oct. 1, 2003, <http://slate.msn.com/id/2089095>.

172. Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 427

In conclusion, the judicial standards imposed on prisoners under the Eighth and Fourteenth Amendments have set the bar so high that the previously discussed prison conditions only occasionally rise to the level of impermissible violations of prisoners' rights. That is, only in the most egregious situations, such as in *Nei* and *Hearns*, have the courts been willing to hold that prisoners' constitutional rights were violated. These judicial standards have also precluded courts from addressing the systemic problems that underlie these violations by forcing courts to focus on the intent of the prison official rather than on the conditions themselves. Furthermore, the Prison Litigation Reform Act has actually made it *more* difficult for prisoners to succeed in court, and the Prison Rape Elimination Act, while an important step forward, is not sufficient to satisfactorily address that particular problem.

IV. THE ROLE OF THE OMBUDSMAN

The analysis up to this point shows that courts have a difficult time finding violations of individual rights, let alone addressing the *systemic* problems that exist in modern penal systems. This is due to the high judicial standards that must be satisfied before a prisoner can receive constitutional relief. The problem is compounded by the PLRA, which makes it difficult for prisoners to bring suit in federal court because of its administrative exhaustion requirement. The question now arises: What role can the ombudsman play in an American penal system that retains substantial problems and injustices despite the reform efforts of the 1970s, and where egregious individual violations still occur with some frequency?

What the ombudsman brings to this situation is the service of an independent mediator who is capable of investigating complaints at any time (before or after administrative exhaustion) and reporting the results of its investigation to the legislature, which is capable of addressing systemic conditions underlying the individual complaints. The ombudsman is also able to recommend changes policy and in procedure directly to prison officials, taking a more direct role in reform. Furthermore, his independence, impartiality, and accessibility make the ombudsman an ideal mechanism for helping to

(2005); see Jerita L. DeBaux, *Prison Rape: Have We Done Enough? A Deep Look into the Adequacy of the Prison Rape Elimination Act*, 50 HOW. L.J. 203, 204 (2006).

provide meaningful change in American prison systems. A Swedish institution originating in 1809,¹⁷³ the ombudsman office has since been utilized in various nations¹⁷⁴ as a result of its ability to serve as a mediator between citizens and government,¹⁷⁵ recommend appropriate changes in the law,¹⁷⁶ “stand above the strife and winds of politics,”¹⁷⁷ and even prevent public officials from prosecution due to its ability to intervene and solve various problems before a lawsuit is filed.¹⁷⁸

The ombudsman’s role in American prisons cannot be analyzed apart from an understanding of the powers the office should possess. The statutory powers granted to him typically include the “power to investigate, upon receiving a complaint or upon his own motion, any act, omission, decision, recommendation, practice, or other procedure of the prison system.”¹⁷⁹ In order to carry out such investigations, “he should have immediate access to all parts of the prison institution.”¹⁸⁰ After conducting the investigation, the ombudsman should be able to make recommendations to the legislature and its various committees, issue special and annual reports, and alert the press to any pertinent information.¹⁸¹ Notably, an ombudsman does *not* have the power of enforcement, which would destroy the effectiveness of the institution as an independent mediator and transform it from an advocate to an adversary. The powers granted to the ombudsman’s office by the legislature place the institution in an ideal setting to address and attempt to change the problems that give rise to its investigations.

The ombudsman has a special role to play in prisons for two reasons. First, a high degree of judicial deference to the administrative agency operating the prisons on matters of policy or its organic statutory interpretation makes it difficult for courts to challenge institutional policy and procedure.¹⁸² Second, the ombudsman’s role is more important in prisons than elsewhere because of the prisoner’s

173. See Bexelius, *supra* note 63, at 23–24.

174. See Tibbles, *supra* note 15, at 400.

175. See Bexelius, *supra* note 63, at 24 & n.2.

176. *Id.* at 33–34.

177. Henry J. Abraham, *The Need for Ombudsmen in the United States*, in *THE OMBUDSMAN: CITIZEN’S DEFENDER* 234, 236 (Donald C. Rowat ed., 2d ed. 1968).

178. See Bexelius, *supra* note 63, at 31.

179. Tibbles, *supra* note 15, at 433.

180. *Id.*

181. *Id.*

182. *Id.* at 387–88.

relative isolation from society that occurs by nature of his incarceration.¹⁸³ Examples from Europe, where ombudsman offices have served successfully as “external grievance-response mechanisms,”¹⁸⁴ show that an ombudsman can build a bridge between society, government, and the prisoner by inspecting prisons and speaking to prisoners.¹⁸⁵ The interaction has a positive effect on both prisoners and prison administrators.¹⁸⁶ In Denmark, for example, where the Ombudsman privately confers with inmates about their complaints, inmates value the mere act of discussing the issues with him, presumably because they feel more connected to society as a result.¹⁸⁷ Additionally, prison officials in Denmark have frankly acknowledged that the ombudsman office has decreased laziness and increased receptivity to change among prison staff and administration.¹⁸⁸

The ombudsman's most important characteristics are his independence and impartiality, which allow him to serve as an effective mediator between prisoners and corrections officials. These characteristics allow the ombudsman to fully apprehend both sides of an issue, and also prevent him from acting in an adversarial manner.¹⁸⁹ Thus, he is in an ideal position to successfully foster change within the prison system because he is not perceived as a threat by prison administrators—he has no enforcement power, only the power to recommend and ultimately to bring the matter to the attention of the legislature.¹⁹⁰ This ability to serve as an effective mediator for both sides of a dispute is illustrated by the Alaska Ombudsman's investigation of an inmate's complaint that she was denied furlough to a halfway house.¹⁹¹ The inmate alleged that the reason behind the denial was retribution for informing officials that a correctional officer was having a sexual relationship with one of the

183. See Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 172 (2003).

184. Tibbles, *supra* note 15, at 400.

185. *See id.*

186. *Id.* at 402.

187. *Id.*

188. *Id.*

189. Tibbles, *supra* note 14, at 2.

190. *See id.*

191. OFFICE OF THE OMBUDSMAN, STATE OF ALASKA, INVESTIGATIVE REPORT A2004-1138, at 1 (2005), available at http://www.state.ak.us/local/akpages/LEGISLATURE/ombud/furlough_04-1138.pdf.

inmates.¹⁹² She complained to the Alaska Ombudsman office, which investigated the complaint and found it to be meritless because the decision to deny furlough was defensible under prison policy.¹⁹³ But during the course of the investigation the ombudsman became “uneasy” about the Department of Corrections’ appeal procedure, because the same official who denied the initial request also denied the inmate’s appeal.¹⁹⁴ Rather than simply stopping the investigation at a point that would have been beneficial to the Department, the Ombudsman continued to investigate the matter and eventually recommended that the Department of Corrections modify its appeal procedure by requiring that the appeal be reviewed by someone not previously involved in the matter.¹⁹⁵ The Department accepted the recommendation, and the complaint was successfully closed.¹⁹⁶

The ombudsman is potentially far more capable of addressing and recommending changes to prison policy than courts and prison administrators, who are limited by judicial standards and are defensive of their own policy and procedure, respectively. Given the PLRA’s requirement that prisoners exhaust administrative remedies before bringing suit in court,¹⁹⁷ the ombudsman’s ability to recommend the establishment or modification of internal prison grievance procedures is crucial to the maintenance of justice.

One successful revision of prison policies occurred in the Hawaiian prison system shortly after the institution of an ombudsman office.¹⁹⁸ Immediately after its establishment, the Ombudsman began receiving complaints about the food service and the ingoing and outgoing mail policy.¹⁹⁹ The Ombudsman investigated both issues, finding that there were no regular inspections of the food service and that prisoners’ mail, including privileged mail to and from government officials, was being opened and inspected.²⁰⁰ As a result of the food service investigation, the Ombudsman recommended that the Health Department inspect the various prison

192. *Id.*

193. *Id.* at 2.

194. *Id.* at 2–3.

195. *Id.* at 3.

196. *Id.*

197. *Jones v. Bock*, 127 S. Ct. 910, 918–19 (2007).

198. Tibbles, *supra* note 15, at 408–09.

199. *Id.* at 409.

200. *Id.*

food services, which it did and subsequently issued a report detailing various unsanitary conditions in kitchens and storerooms, among other places.²⁰¹ Consequently, a new inspection policy was adopted whereby the Health Department would investigate every State Correctional Facility's food service at least once every three months.²⁰² The result of the investigation into the mail policy was equally successful, resulting in the State Department of Corrections amending its mail policy to help ensure the confidentiality of privileged mail.²⁰³ Thus, the Ombudsman effectively resolved the systemic problems underlying the complaints in this instance.

Unlike prison administrators, who handle complaints through rigid and formalistic internal grievance procedures, the ombudsman is able to "bring a fresh outlook to the problem" and thus recommend novel ideas and solutions to problems implicating prison policy and culture.²⁰⁴ For example, two inmates of the Alaska Department of Corrections recently complained to the Ombudsman that the money they brought with them into a local jail was lost when they were transferred to the Anchorage Correctional Center.²⁰⁵ The Ombudsman investigated the matter, wondering: "Why, in the 21st century, are local and state agencies transferring cash across Alaska in brown paper bags?"²⁰⁶ An examination of the Alaska Department's booking policy and its application revealed that it was not only outdated, but unworkable and generally ignored.²⁰⁷ The investigator then contacted the Department's liaison, who emailed several officials within the prison system in order to get suggestions for changing the policy.²⁰⁸ The Ombudsman then reviewed the suggestions, finding that feasible and superior alternatives existed.²⁰⁹ The end result of this collaborative effort was the adoption of a new policy whereby money would be transferred in a less liquid form such as a check or money

201. *Id.*

202. *Id.*

203. *Id.* at 410.

204. *Id.* at 427.

205. OFFICE OF THE OMBUDSMAN, STATE OF ALASKA, INVESTIGATIVE REPORT A2004-0077, A2004-1270, at 1 (2005), available at http://www.state.ak.us/local/akpages/LEGISLATURE/ombud/lost_cash_A2004-0077-1270.pdf.

206. *Id.* at 5.

207. *Id.* at 4.

208. *Id.* at 5.

209. *See id.*

order to reduce any incentive to steal a prisoner's money, and the complaint was successfully closed.²¹⁰

As for the specific form which a model ombudsman office should take, it has been recommended that a corrections-specific office should be established rather than a general office (which would receive complaints against all state or federal agencies).²¹¹ This is particularly important at the federal level, where establishing a nationwide ombudsman for all federal agencies is simply "not a viable alternative" due to the sheer size of the ombudsman office that would be necessary to maintain efficient operations.²¹² Of the states that have adopted an ombudsman office, it seems that only those with relatively small populations, such as Hawaii and Nebraska, are able to maintain a statewide office that handles complaints from citizens regarding all state agencies.²¹³ The federal government and more populous states, with their larger and more complex penal systems, would be better served by a corrections-specific ombudsman office—preferably one that is physically located within each major prison and could inspect facilities on short notice.²¹⁴

But what is more important than an ombudsman's level of generality is that it possesses the necessary characteristics that make the office successful: "independence, impartiality, expertise, and accessibility by the potential complainants."²¹⁵ These characteristics must be carefully structured into the statute creating the ombudsman, by locating the ombudsman outside of the department of corrections, among other measures.²¹⁶ Otherwise, the ombudsman risks being transformed into a mere policy advisor to the department of corrections. For example, the Ombudsman offices in California work under the Director of Corrections and report directly to him, so the

210. *Id.* at 5–6.

211. Tibbles, *supra* note 15, at 422–23.

212. *Id.* at 428.

213. *Id.* at 422.

214. *Id.* at 422–23.

215. *Id.* at 423.

216. *See generally* AM. BAR ASS'N, STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), *available at* <http://www.abanet.org/child/ombudsmen-1.pdf> (describing the standards that should guide the creation of ombudsman offices); U.S. OMBUDSMAN ASS'N, GOVERNMENTAL OMBUDSMAN STANDARDS (2003), *available at* http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf (publishing a set of standards to be used as a guide in the establishment of an ombudsman office).

Ombudsman is not independent and cannot be impartial.²¹⁷ Indeed, some have said that an office like this should not even be characterized as "ombudsman" because it is neither external nor independent of the prison system.²¹⁸

States wishing to utilize the ombudsman are not without guidance. Both the American Bar Association ("ABA") and the United States Ombudsman Association ("USOA") provide model standards.²¹⁹ The USOA standards provide guidance for the establishment of an ombudsman office, focusing primarily on ensuring that the ombudsman remains independent, impartial, and confidential.²²⁰ The USOA recommends that governments ensure the ombudsman's independence by providing for specific modes of appointment and removal, sufficient compensation, a sufficient amount of discretion and procedures to protect that discretion, and qualified immunity in tort.²²¹ In order to protect the impartiality of an ombudsman, which lies "at the heart of the ombudsman concept," the USOA recommends not only that the ombudsman eschew political office, but that he refrain from partisan or political activities altogether.²²² Finally, to protect confidentiality, the USOA recommends that the ombudsman refrain from revealing information where confidentiality has been promised and that he receive statutory protection from being compelled to testify in legal or administrative hearings.²²³ The ABA standards similarly provide guidance on the establishment and operation of ombudsman offices; the qualifications that the ombudsman should possess; guidance on ensuring the effective operation of the ombudsman through independence, impartiality and confidentiality; and on the necessary limitations to the ombudsman's powers, among other areas.²²⁴

217. Jacobs, *supra* note 37, at 300.

218. Tibbles, *supra* note 15, at 425.

219. *See supra* note 216.

220. U.S. OMBUDSMAN ASS'N, *supra* note 216, at 1-2.

221. *Id.* at 2-5.

222. *Id.* at 5-6.

223. *Id.* at 7.

224. AM. BAR ASS'N, *supra* note 216, at 1-4.

CONCLUSION

The ombudsman concept is necessary, but underused, in American corrections. Serious injustices currently plague American corrections systems, including rape and the spread of HIV/AIDS, sexual assault and guard brutality, a systemic failure to provide adequate health care, and overcrowding. Courts are incapable of resolving individual prisoner rights violations and the underlying conditions that give rise to them due to legislative hurdles like the Prison Litigation Reform Act and high judicial standards such as the deliberate indifference test. As a result, all states and the Federal Bureau of Prisons should establish and implement a corrections-specific, independent, and impartial ombudsman office. In so doing, states will afford a much-needed avenue for prisoners to air grievances and allow for meaningful change within correctional systems. It is hoped that a wider utilization of the ombudsman concept will allow the correctional system to restore its integrity, protect prisoners' rights, promote justice, and to defend, protect, and maintain the dignity of its inmates.