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Essay

***591 A PRESCRIPTION FOR CALIFORNIA'S AILING INMATE TREATMENT SYSTEM: AN
INDEPENDENT CORRECTIONS OMBUDSMAN**

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[T]he ombudsman symbolizes the use of reason and moral persuasion rather than force. This is very civilized--and civilizing! [FN1][FN1]

Introduction

California's prison system is "totally broken" [FN2][FN2] and in urgent need of reform on many fronts. Most urgent are those reforms taking place in the areas of prison culture and conditions. United States District Judge Thelton Henderson recently summarized the situation in *Plata v. Schwarzenegger*, when he ordered that the delivery of all medical care in California prisons be put under federal receivership. [FN3][FN3] The plaintiffs in the *592 *Plata* class action, filed in 2001, alleged that the California Department of Corrections and Rehabilitation (CDCR or the Department) violated 42 U.S.C. § 1983 by depriving them of adequate medical care at all California state prisons and by being deliberately indifferent to serious medical problems. [FN4][FN4] In 2002, the defendants agreed to the entry of a consent decree and to implement comprehensive new medical care policies and procedures at all institutions. [FN5][FN5] The defendants also agreed to have court-appointed medical and nursing experts assist with the remedial process. [FN6][FN6] By early 2005, however, the defendants publicly acknowledged that they were unable to correct the unconstitutional conditions on their own. [FN7][FN7] In May 2005, Judge Henderson issued an order to show cause regarding civil contempt and the appointment of an interim receiver. [FN8][FN8] After an evidentiary hearing, Judge Henderson found that, over the past twenty-five years, California's inmate population has grown over 500%, the number of institutions has nearly tripled, and the "rapid growth of the correctional system was not accompanied by organizational restructuring to meet increasing system demands." [FN9][FN9] "The problem of [this] highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system . . . is too far gone to be corrected by conventional methods." [FN10][FN10]

By one estimate, California taxpayers will spend in excess of \$44 million defending the *Plata* matter--with \$23.8 million budgeted just for copying medical files of 157,603 prisoners which must be gathered, coded, and scanned into a database. [FN11][FN11] Already, over \$600,000 has been paid to court-appointed experts. [FN12][FN12]

Judge Henderson's assessment of California's prisons was echoed by the Corrections Independent Review Panel (Panel) convened by Governor Arnold Schwarzenegger to investigate the prison system. In its 200-page report, "Reforming Corrections," the Panel made more than 200 recommendations aimed at remedying the system's more serious *593 problems. [FN13][FN13] The report described a need for "cultural reform" of a system in which a "code of silence" and failures in internal investigations protect correctional officers from being held accountable for wrongdoing, undermine the objectives of the corrections system, and erode the public trust. [FN14][FN14] The

report also detailed the need for ongoing reform regarding use-of-force policies. [FN15][FN15] It described prisons as grossly overcrowded, which increases the likelihood of violent confrontations and undermines programs aimed at preparing inmates for re-entry into society. [FN16][FN16]

While some of the Panel's recommended changes already have been implemented, and many are still being considered, sweeping new reforms are still needed if the entire system is to be overhauled effectively and brought into compliance with constitutional requirements. The Panel's report recommends creating an Office of the Inspector General and a Civilian Corrections Commission that would function in an oversight capacity to ensure Department compliance with law and policies. [FN17][FN17] It also advocates the development and implementation of an ombudsman program within the newly created Office of the Regional Director of the Department of Correctional Services to act as a liaison to inmates and family members. [FN18][FN18]

This Article proposes creating an independent corrections ombudsman whose key objective is to foster good public administration within the CDCR. The current Office of the Ombudsman in the California Department of Corrections and Rehabilitation (CDCR Ombudsman Office) [FN19][FN19] should be severed from the CDCR. While the current head of the CDCR Ombudsman Office appears committed to the task of resolving inmate complaints, he is not independent. He must report to the Director of Corrections, whose employees are the targets of prisoner complaints of abuse or neglect of medical needs. [FN20][FN20] An *594 independent ombudsman, as is recommended by the American Bar Association (ABA) [FN21][FN21] and United States Ombudsman Association (USOA), [FN22][FN22] will complement the Panel's objectives of bringing credibility and transparency to the administration and its ongoing reform efforts, while helping restore the public's trust in the system. Creating an autonomous corrections ombudsman outside the CDCR, with a legislative mandate to receive, investigate and, where possible, resolve inmate complaints, would promote and significantly advance the prison reforms already underway, while reducing the enormous costs of litigation. Appended to this Article is proposed legislation establishing such an independent corrections ombudsman.

By emphasizing practical solutions to prisoner grievances, rather than assessing fault, an autonomous ombudsman is well-positioned to resolve inmate complaints informally, quickly, knowledgeably, and cost effectively. Over the long term, an independent ombudsman can also document alleged misconduct or mistreatment. The resulting systemic and administrative changes would increase prison security and reduce inmate litigation.

I. An Independent Ombudsman Will Bring Credibility and Transparency to the Current Reform Efforts

A. Problems with the Status Quo

The current CDCR Ombudsman Office receives complaints from inmates through letters, visits to institutions, collections from "boxes" that are set up on some prison yards, and from family and legislative inquiries. [FN23][FN23] The office

provides management advice and consultation to the Director and *595 makes recommendations to resolve critical issues that impact departmental policies, procedures and programs applicable to specific institutions. The Ombudsman serves as a key policy and public relations expert, with a focus on ethical decision-making, and has extensive contact with staff, inmates and their families, legislative bodies and community-based groups. [FN24][FN24]

The CDCR Ombudsman's office does not serve as an independent investigator of inmate grievances. Instead, it was created specifically to assist the Director of the California Department of Corrections [FN25][FN25] and to provide public relations expertise to the CDCR. [FN26][FN26] Because the CDCR Ombudsman is not independent, the office does not comply with recognized ombudsman standards.

The recent case of *Rhodes v. Robinson* [FN27][FN27] illustrates the shortcomings of the CDCR Ombudsman's

office as it is currently structured. Kevin Rhodes, a California inmate, owned a broken typewriter. [FN28][FN28] Every time he sent his typewriter off for repairs, it would be returned with some additional damage. [FN29][FN29] The corrections officers allegedly were unhelpful in providing Rhodes with timely service of his typewriter. [FN30][FN30] Rhodes filed a grievance in accordance with the procedures outlined in the California Code of Regulations. [FN31][FN31] He requested very simple relief: that in the future, "his typewriter be returned to him in its original shipping containers so that[,] 'in the event the typewriter failed to function, [he] could assign blame to the appropriate parties.'" [FN32][FN32] His grievance was summarily denied. [FN33][FN33]

Following the denial of his first grievance, Rhodes contended that the correctional officers retaliated by forcing him to relinquish either his CD player or his television in exchange for his typewriter, which had recently returned from another round of repairs. [FN34][FN34] When Rhodes refused to relinquish either device, a correctional officer confiscated the CD *596 player and withheld the typewriter. [FN35][FN35] Subsequently, Rhodes filed another grievance, complaining of retaliation. [FN36][FN36] His grievance, however, was not filed with the prison after it was placed in the possession of the CDCR Ombudsman. [FN37][FN37] The appeal instead was forwarded to the Men's Advisory Council, an association of inmates with no authority to remedy the alleged misconduct by correctional officers. [FN38][FN38]

Rhodes first used informal means to attempt to recover his typewriter, discussing the matter with the correctional officers' supervisors. [FN39][FN39] One of the supervisors discussed the grievance with Rhodes's correctional officer, but nothing was resolved. [FN40][FN40] Another supervisor requested that Rhodes put his complaint in writing, which he did. [FN41][FN41] That supervisor allegedly never responded to the complaint. [FN42][FN42]

According to Rhodes, prison officials took further retaliatory actions. [FN43][FN43] This alleged conduct eventually led to the filing of a civil rights action pursuant to 42 U.S.C. § 1983 in federal district court. [FN44][FN44] He alleged that his First Amendment rights were violated in retaliation for his complaints about his treatment. [FN45][FN45] Importantly, one of the CDCR ombudsmen was named as a defendant and charged by Rhodes as having "conspired" with the correctional officer defendants to prevent his grievance from being properly filed. [FN46][FN46] The district court dismissed the action for failure to state a claim. [FN47][FN47] The Ninth Circuit Court of Appeals reversed the judgment and remanded for further proceedings. [FN48][FN48]

Rhodes's lawsuit has yet to be resolved. [FN49][FN49] However, the procedural background of his suit highlights some of the deficiencies in the prison system's grievance procedure. At substantial cost, a relatively simple complaint was not resolved at its early stages and snowballed into a federal lawsuit.

In addition to the problems brought on by the ombudsman's lack of *597 independence, the office also appears to be underfunded and understaffed considering California's burgeoning prison inmate population. With a budget of only \$1 million, there are six ombudsman positions in the CDCR to handle complaints of the 166,844 inmates housed in the CDCR's thirty-two prison facilities--just one ombudsman for every 27,807 prisoners. [FN50][FN50]

In contrast, consider the examples of the independent ombudsmen in Iowa and Hawaii. Iowa houses 8577 inmates in its prisons, and its ombudsman office has a staff of eleven (although several consider complaints regarding other state agencies in addition to prisoner grievances). [FN51][FN51] Hawaii has eight analysts who handle complaints regarding multiple state and county agencies with approximately half of the grievances coming from inmates. [FN52][FN52] Hawaii's prison population is 5960. [FN53][FN53]

B. An Independent Ombudsman: The Classic Model

The notion of an independent governmental institution designed to protect the rights and interests of citizens from abuses arising from a powerful and impersonal bureaucracy is well-rooted in history. In ancient Rome, for

example, the tribuni plebes (tribunes of the plebes) was established as part of the Roman Republic's constitution to protect the common people from abuses by the governmental bureaucracy. [FN54][FN54] The Swedish later emulated the tribuni plebes in the 1809 Swedish constitution when they included in it the position of justitieombudsman, an official charged with monitoring the actions of Swedish officials to make certain that the laws were administered properly. [FN55][FN55] In each case, the ombudsman was independent of the officials whose actions he was charged with reviewing. As one commentator explained, "an *598 ombudsman, because he or she is expected to frustrate the will of powerful people, must be protected by the system from interference by those who would wish the ombudsman ill." [FN56][FN56]

An independent ombudsman protects against abuse through investigating complaints. The guiding principle in an Ombudsman investigation is whether the administrative action under investigation is unlawful, unreasonable, unjust, oppressive, improperly discriminatory, factually deficient, or otherwise wrong. At the conclusion of the investigation, the Ombudsman can recommend that corrective action be taken by an agency. This occurs either specifically in an individual case or generally by a change to relevant legislation, administrative policies or procedures. [FN57][FN57]

Organizations such as the ABA and USOA endorse the concept of an ombudsman who is completely independent from the agency he or she is investigating. Under the standards approved by the ABA, no one should be able to "(a) control or limit the ombuds's performance of assigned duties, or (b) for retaliatory purposes (1) eliminate the office, (2) remove the ombuds, or (3) reduce the office's budget or resources." [FN58][FN58] An ombudsman should be "creat[ed] by legislation through statute or ordinance." [FN59][FN59] "Creation by administrative fiat such as executive order, administrative rule, or formal policy contains potential temporal limitations subject to changes in the mandating authority's term or whim." [FN60][FN60]

In order for an ombudsman truly to be impartial, he or she must be free from conflict of interest, bias, or the appearance of bias. As the ABA has explained:

The ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombuds from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. [FN61][FN61]

Impartiality "instills confidence in the public and agencies that complaints will receive a fair review, and encourages all parties to accept the Ombudsman's findings and recommendations." [FN62][FN62]

*599 C. Independent Ombudsmen in Other Jurisdictions

Several jurisdictions, including Hawaii, Iowa, and Nebraska, as well as Canada, England, and Wales, follow the classic independent ombudsman model. Canada's program is particularly instructive because its population of thirty-two million is comparable to California's. [FN63][FN63] Canada's experience "suggests that prison ombudsmen could function effectively in American states of comparable population, such as California or New York." [FN64][FN64]

One of the most important functions of an independent ombudsman should be the preparation of an Annual Report, describing the office's cases, findings, and conclusions, for submission to the legislature and the Governor. [FN65][FN65] As the Annual Reports from other jurisdictions with independent ombudsmen demonstrate, numerous and varied grievances are resolved informally, and sometimes lead to administrative policy changes. [FN66][FN66] In fact, "the best way to allay misgivings of those who fear that an ombudsman in prison may be disruptive is to present the experience of these new offices. The experience is reassuring." [FN67][FN67]

In other states, "[o]mbudsman programs have also been successful at improving conditions in adult correctional institutions by monitoring the relationship between inmates and prison officials. Programs are designed to protect

the rights of inmates and staff and to ensure safe and humane conditions.” [FN68][FN68] As noted by the United States Office of Juvenile Justice and Delinquency Prevention:

The presence of an ombudsman has benefitted management as much *600 as the inmates. The ombudsman has been a useful control device for upper echelons, while employees down the line have been able to use the ombudsman as a means of focusing attention on their pressing problems. [FN69][FN69]

An excerpt from the 2002 Annual Report of the Iowa Citizen’s Aide, Corrections Ombudsman, illustrates the effectiveness of the independent ombudsman in resolving an issue that was affecting numerous Spanish-speaking inmates:

It’s hard to follow the rules if they’re written in another language. That was one of the concerns brought to our office by a group of Latino inmates at Anamosa State Penitentiary (ASP). They wrote a letter that we arranged to be translated into English. In addition to not having rule books in Spanish, they said Latinos were not allowed to:

- Cell together.
- Speak Spanish in the yard.
- Gather as a group in the yard.
- Have Bibles written in Spanish.

We contacted ASP’s security director and an official with the Department of Corrections’ central office. They agreed that Latino offenders should be allowed to speak Spanish or any other language in the yard, though they added that offenders should try to reply to an officer’s questions in English, if possible.

Staff also assured us that Latino offenders would be allowed to cell together, and Bibles in Spanish are allowed. Rule books and important policies are in Spanish and available in the orientation area or from their counselor. The security director also posted a memorandum to security staff reinforcing this information. [FN70][FN70]

By serving as a liaison between inmates and prison officials, the ombudsman was able to clarify existing policies for both parties, extinguishing the issue before it escalated into a court-filed complaint. Similarly, an excerpt from the Hawaii Office of Ombudsman Annual Report for 2003-2004 demonstrates the effectiveness of that state’s program:

Visitor identification. A mother complained that she was not allowed to visit her adopted son, who was an inmate, because she did not have a Hawaii driver’s license or a Hawaii State identification card (ID). Although she had a current Florida driver’s license, her social security card, a store’s membership card, a copy of her birth certificate issued by the hospital where she was born, and a Hawaii Department of Education teacher’s ID, she was told a Hawaii driver’s license or Hawaii State ID was absolutely required. Since her Florida driver’s *601 license was valid in Hawaii, she saw no need to obtain a Hawaii license, and she was unable to obtain a State ID as she did not have an official certified birth certificate, which was one of two basic documents required by the State ID office.

We reviewed the Department of Public Safety rules on this matter [and] . . . noted that the rule did not require that a visitor present a Hawaii driver’s license or State ID to gain entry into a facility. Instead, the rule provided for the use of various documents and it appeared that all the documents that a visitor presented were to be considered to determine the visitor’s identity. . . .

[A]fter reviewing the PSD rule, the warden issued a new directive to the facility staff that [did not require inmates’ visitors] . . . to present a Hawaii driver’s license or State ID. . . . Subsequently, the complainant called to inform us that she was allowed to visit her son. [FN71][FN71]

The 2004-2005 annual report of the Prisons and Probations Ombudsman for England and Wales reported the following:

Prisons mirror communities. The everyday problems, disappointments and annoyances that each of us faces are all encountered behind a prison wall. But prisons also generate problems of their own, deriving from

the raw fact of incarceration.

Mr. A complained that he had been refused contact lenses. He explained that he had worn contact lenses for many years and found it difficult to take part in sport wearing glasses.

My Investigator visited Mr. A. She explained that the prison reflected the NHS’s approach to the provision of contact lenses. It provided free eyesight tests, free NHS glasses, or non-NHS glasses at the prisoner’s expense. However, should an optician consider that contact lenses were necessary for clinical reasons, then the prison would arrange to provide both the contact lenses and cleaning solution. Following this discussion, Mr. A. accepted that the provision of contact lenses, except for clinical reasons, fell outside the NHS guidelines. [FN72][FN72]

Through the independent resolution of complaints, the prison ombudsman identifies areas where a policy change may be in order and reports such findings to the legislature, the executive, and the public at large. [FN73][FN73] Publication of an annual report contributes to transparency in the system by enabling interested parties, as well as the public, to see what complaints are being made, how they are being resolved, and how policies have been changed or reversed. [FN74][FN74] In *Plata v. Schwarzenegger*, had *602 there been an independent ombudsman with statutory reporting requirements, the failure of California’s prisons to provide adequate medical care would have gained public scrutiny. This may have avoided the filing of this class action four years ago.

D. Implementing the Classic Model in California

California’s existing grievance procedure is contained within the walls of the CDCR, which has a long tradition of officers respecting an unwritten “code of silence.” In *Madrid v. Woodford*, [FN75][FN75] another case before Judge Henderson, the special master charged with investigating alleged misconduct of prison officials concluded that “[b]ad investigations and the failure to discipline staff who abuse prisoners jeopardizes prison security. Likewise, an active code of silence threatens inmates, honest officers, security and public safety.” [FN76][FN76]

Creating an independent corrections ombudsman would give inmates a method, other than filing an internal CDCR grievance or an action in federal court, for an impartial individual to address their grievances regarding alleged abuse or neglect of necessary medical treatment. It would enhance confidence in the integrity of the system, thereby contributing to a positive transformation of prison culture. “A crucial step in the process of translating rights into reality is to open lines of communication outside the prison walls.” [FN77][FN77]

Under current CDCR Ombudsman practices, no report of the nature of the prisoner’s complaints is submitted to the Governor or the legislature. No method exists to measure the rate of success in resolving inmate complaints or to show what the office has accomplished. [FN78][FN78]

Recognizing the need for greater accountability, credibility, and transparency in the system, the Governor’s Panel recommended creating a Civilian Corrections Commission and an Office of the Inspector General. [FN79][FN79] Both of these bodies would report directly to the Governor. The aim of the Civilian Corrections Commission would be to bring “public scrutiny and a public voice to correctional policies by approving policy, bringing correctional activities into the open, and making the *603 correctional system transparent to the public.” [FN80][FN80] The Office of the Inspector General would serve as “the independent investigative and auditing arm of the Civilian Corrections Commission and will also be responsible for independent oversight of the correctional system.” [FN81][FN81] The Governor’s Panel recommended that the Office of the Inspector General be in an authoritative position to conduct audits and stressed that it must remain independent. [FN82][FN82]

Similarly, the Governor’s Panel recognized the need for an ombudsman to handle inmate complaints because the Panel recommended that the office of ombudsman be placed within the Regional Director of Correction Services. [FN83][FN83] By following this recommendation, however, reformers would miss an important and valuable opportunity to reap the benefits of an independent ombudsman. Consistent with the recommended reforms, an independent ombudsman would identify prisoner grievances on a case-by-case basis, in contrast to the mission of the Civilian Corrections Commission and Inspector General, which focus on larger institutional and policy issues

and allegations of correctional officer misconduct. [FN84][FN84] Moreover, the independent ombudsman would be an excellent source of data regarding areas where grievances arise. This may assist the Inspector General and Civilian Corrections Commission in identifying areas in need of policy reform.

As Professor Stanley Anderson explained:

The ombudsman institution is congenial to any humane philosophy of imprisonment. While an atmosphere of prison reform is not essential to the operation of an ombudsman office, it is conducive. In a climate of prison reform, each new program or service provides a new possible subject of controversy. Because the correctional ombudsman idea itself is a reform measure, with a primary focus on the grievances of prisoners, it is part of the ferment that currently surrounds prisoners' rights and remedies. [FN85][FN85]

II. An Independent Prison Ombudsman Would Promote Resolution of Grievances Prior to Costly Litigation

Fundamentally changing the prison culture will save California money because improved conditions will reduce the number of inmate *604 lawsuits. [FN86][FN86] Poor conditions, like those identified in *Plata v. Schwarzenegger*, and inadequate grievance procedures help to explain why California spends millions of dollars every year defending lawsuits brought by prison inmates asserting civil rights violations. In 1999, for example, the Department paid out so much in settlements and judgments that it exhausted its \$15.5 million appropriation three months before the fiscal year ended. [FN87][FN87]

A. Prison Inmate Litigation

Defending against inmate lawsuits is no small undertaking. The correctional law section of the California Attorney General's office, which focuses in large part on the defense of inmate civil suits, currently has an annual budget of \$14.5 million. [FN88][FN88] There are twenty-one attorneys in the Attorney General's Sacramento office alone who work exclusively on inmate civil suits. [FN89][FN89] The CDCR has an additional budget of \$3 million to employ outside counsel to defend against inmate civil suits. [FN90][FN90] Currently, thousands of actions filed by prisoners are pending in state and federal courts in California. [FN91][FN91] In 2004-2005, the state paid \$2,767,000 in settlements and judgments to individual inmates and \$7,744,000 to class action litigants. [FN92][FN92]

Both state and federal legislators recognize the expense of defending against inmate suits. In 1996, Congress passed the Prisoner Litigation Reform Act ("PLRA") in an attempt to address the ever-increasing number of inmate lawsuits filed. [FN93][FN93] The PLRA creates additional procedural requirements with which inmates must comply before filing suits. [FN94][FN94] In some cases, the PLRA forecloses suits entirely if the procedures are not followed or administrative remedies are not exhausted. [FN95][FN95] While the PLRA appears to have led to a decrease in the number of lawsuits filed, [FN96][FN96] its overall success is questionable. Processing *605 and defending against inmate suits continues to impose significant costs on the system, averaging approximately \$30 million annually at the federal level. [FN97][FN97]

The PLRA has not been successful in its objectives of preventing the filing of non-meritorious suits while allowing meritorious suits to go forward. [FN98][FN98] Although there are many different provisions of the PLRA that were intended to filter out non-meritorious suits, such as filing fee provisions and limitations on frequent filers, one provision aimed at separating meritorious from meritless suits was the requirement that an inmate exhaust administrative remedies within the prison system before filing suit. [FN99][FN99] As Professor Schlanger writes:

With respect to conflict resolution, the exhaustion requirement should decrease filings because at least some inmates will actually get some part of what they want in an administrative process and decide they no longer want to file a lawsuit. As a secondary consequence, the success rate of the cases that do get filed

should go down, as a disproportionate number of the meritorious cases get filtered out because they succeed in the grievance process. These results, however, are both apt to be extremely small. People with experience in inmate grievance systems emphasize that only a well-designed system can satisfy its users well enough to substitute for litigation, and there is little reason to think that the PLRA is encouraging jail and prison administrators to implement effective grievance systems. [FN100][FN100]

The CDCR grievance procedures currently in place are typical of the procedures Professor Schlanger described as ineffective in addressing inmates' complaints. [FN101][FN101] Additionally, the conventional prison grievance *606 procedures typically are difficult to navigate and pose traps for the unwary. [FN102][FN102]

Finally, in some respects the PLRA has simply created another basis for litigation: whether the inmate plaintiff in fact has complied with its requirements. Since the PLRA's passage, courts have issued thousands of decisions interpreting its provisions. [FN103][FN103] The Supreme Court has rendered decisions in three cases, one last year. [FN104][FN104] Litigation over whether the inmate exhausted his remedies is unrelated entirely to the merits of the complaint [FN105][FN105] and, in instances where the inmate has complied with the requirements of the PLRA, it adds cost and prolongs the duration of the action.

B. An Independent Ombudsman Would Complement the CDCR's Strategic Plan to Reduce Inmate Litigation

Recognizing that "[w]hen poorly managed or ignored, [prison] risks translate into injured employees, inmates, or wards and sometimes result in costly lawsuits or court settlements," the Governor's Panel recommended the creation of an Office of Risk Management as part of the CDCR. [FN106][FN106] Its goal would be "to coordinate and implement a department-wide risk management strategy" aimed at identifying areas that expose the prison system to liability. [FN107][FN107] The Panel suggested that, over time, the Office of Risk Management could save money for the state and reduce lawsuits, but recognized that it would not eliminate the problem completely. [FN108][FN108]

In January 2005, the CDCR developed a strategic plan in response to the recommendations made by the Panel's report. [FN109][FN109] Part of the plan, predictably, sought to develop preventive strategies to "preclude class *607 action suits and remedy identified violations." [FN110][FN110] The CDCR recognized the need to "proactively identify areas where we are vulnerable to litigation." [FN111][FN111] Although the strategies for identifying problem areas are not concrete, the CDCR intends to "identify and review existing standards and identify areas in need of standards"; "[r]eview existing policies to determine their evidentiary and legal sufficiency"; "[d]evelop and implement a process for auditing standards for compliance"; "[d]evelop a process for ongoing review of policies to ensure compliance with evolving legal requirements"; and "[d]etermine and implement strategies for communicating new and revised directives and/or policies." [FN112][FN112]

While the reforms suggested by the Governor's Panel and the CDCR are steps in the right direction, they fail to address the ways in which grievances of individual inmates will be investigated and resolved. As a result, even with changes in policy, individual inmates will continue to file grievances within the CDCR, find the grievance procedure inadequate, and initiate lawsuits. The creation of an independent ombudsman's office would implement the reforms called for by the Governor's Panel by promptly focusing on effectively resolving individual inmate grievances.

By simply fixing a snafu that adversely affects an inmate early in the grievance process, small complaints that could otherwise turn into lawsuits, such as in the Rhodes case, can be resolved. [FN113][FN113] For example, an inmate at Corcoran State Prison requested that prison staff provide him with a specific type of sesame seed that he needed for a monthly religious ritual. [FN114][FN114] After the inmate tried to resolve the problem within the prison to no avail, he filed a lawsuit in federal district court. [FN115][FN115] It is not clear why the inmate did not seek the assistance of the Ombudsman. [FN116][FN116] It may be that he lacked confidence in the Ombudsman's ability to act independently. [FN117][FN117] The district court contacted the CDCR Ombudsman and informed him that it appeared that the inmate had a valid claim. [FN118][FN118] The court stated that it was contemplating an award of punitive damages *608 of \$500,000 if the inmate prevailed. [FN119][FN119] The case settled after the

Ombudsman investigated and found that the inmate belonged to a religious sect that in fact used sesame seeds in a monthly ritual. [FN120][FN120] The Ombudsman located a source of the seeds and notified prison officials they must provide the seeds when the inmate needs them. [FN121][FN121] The seeds are kept at the Corcoran prison ombudsman office and distributed when required by the inmate. [FN122][FN122] This case provides a vivid example of how an ombudsman can resolve grievances. Ideally, however, such grievances should come to the attention of an independent ombudsman for resolution without litigation.

In Walker v. Gomez, prison personnel did not allow African-American inmates to return to work during a lockdown following prison riots without an individualized screening for gang membership. [FN123][FN123] Following one riot, the plaintiff was screened, and it was determined that he was not a member of a gang. [FN124][FN124] He was permitted to return to his job at the prison law library. [FN125][FN125] However, following a second and third riot, the plaintiff was again excluded from his job until he was screened. [FN126][FN126] Prison personnel failed to show why the additional screenings were necessary. [FN127][FN127] Without justification for the additional screenings, the court concluded that the plaintiff had a right to be free from race-based exclusion from his job. [FN128][FN128]

In Hearn v. Terhune, the plaintiff complained of poor living conditions in the prison's disciplinary segregation yard. [FN129][FN129] He complained that the disciplinary segregation yard had "no working toilets, rusted and insect filled sinks, [and] stagnant pools of water infested with dead insects." [FN130][FN130] He also contended that "cold water, which was supplied to the prison's general population yards, was not available in the disciplinary segregation yard, despite the fact that the segregation yard's temperature regularly exceeded one hundred degrees." [FN131][FN131] The Ninth Circuit concluded that the plaintiff stated a claim under the Eighth Amendment: "In one hundred degree plus weather, lack of drinkable *609 water can be dangerous, thus precluding use of the yard." [FN132][FN132]

In an action filed in Nevada, inmate Kenneth Parker wanted to buy two jars of chunky peanut butter from the prison canteen at a cost of \$5. [FN133][FN133] The canteen sent him one jar of chunky, but had to substitute a jar of creamy after running out of the chunky style. [FN134][FN134] The guard took back the jar of creamy peanut butter and assured the prisoner that he would be reimbursed for the \$2.50 that had been debited from his account. [FN135][FN135] Parker was transferred to another prison and not reimbursed for the item he had ordered but never received. [FN136][FN136] Parker filed a civil rights action, demanding a jail term for a prison official and \$5500 for "mental and emotional pain." [FN137][FN137] After two years of legal wrangling, the case was dismissed in 1991 after thousands of dollars were spent by the Nevada Attorney General's office defending the matter. [FN138][FN138] This episode surely could--and should--have been resolved without litigation.

Grievances such as these are not unique or infrequent. In many of the cases in which the Ninth Circuit Court of Appeals has ruled in favor of an inmate who brought a civil rights complaint pursuant to 42 U.S.C. § 1983, an ombudsman likely could have resolved the dispute.

Additionally, an ombudsman may be helpful even when an inmate's grievance ultimately is without merit. In Jeng v. Fleck, [FN139][FN139] the plaintiff inmate had entered prison with corneal grafts in both eyes. [FN140][FN140] He requested, and was denied, safety glasses for use during sports. [FN141][FN141] While playing basketball without safety glasses, he became blinded in one eye. [FN142][FN142] He filed a civil rights claim under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Washington. [FN143][FN143] He alleged that the doctor who treated him prior to his injury violated the Eighth Amendment by failing to authorize the issuance of safety glasses for him to wear while playing contact sports, and by failing to warn him that he should refrain from playing basketball. [FN144][FN144] The Ninth Circuit held *610 that the plaintiff failed to show that the doctor acted with deliberate indifference to his serious medical needs and affirmed the district court's judgment in favor of the doctor. [FN145][FN145] The plaintiff's medical need for safety glasses was only "serious" if he chose to play contact sports. [FN146][FN146] The court reasoned that the doctor "had no duty to provide [the plaintiff] with safety glasses for the sole purpose of facilitating [the plaintiff's] voluntary participation

in contact sports." [FN147][FN147] Even though the doctor's failure to issue safety glasses did not violate the Eighth Amendment, providing the inmate with safety glasses would have avoided four years of litigation. [FN148][FN148] An independent ombudsman may have been able to assess the risk and persuade prison authorities to take the more cost-effective tack of providing Jeng with safety glasses, which would have prevented him from becoming injured. Instead, denying Jeng's simple request led to his injury and caused the state to spend thousands of dollars defending Jeng's federal lawsuit.

In each case, one cannot help but think that, with some independent oversight, the easily remediable problems presented could have been resolved-- even if not ultimately in the inmate's favor--without the expense of litigating in the district court and before the Ninth Circuit. [FN149][FN149]

Conclusion

Appended is proposed legislation establishing an independent corrections ombudsman in California. The bill is patterned largely after model legislation drafted by the ABA. It contains commentary explaining its various provisions.

*611 Appendix: Proposed Bill

An act to repeal [Section 5066 of the Penal Code](#) and to add Sections 5066.1 through 5066.16, relating to the establishment of an Office of the Corrections Ombudsman.

Existing law calls for the expansion of the existing prison Ombudsman program to ensure comprehensive deployment of ombudsmen throughout the state prison system with specific focus on maximum security institutions. The existing prison Ombudsman program consists of six individuals, all of whom work for the Department of Corrections.

This bill would create an independent office of the Ombudsman to receive, investigate, and make recommendations regarding the resolution of inmate complaints.

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

[Section 5066 of the Penal Code](#) is repealed.

Section 1. Legislative Purpose. Section 5066.1 of the Penal Code is added to read:

It is the intent of the legislature to establish, in addition to other remedies or rights of appeal of any person within custody of the California Department of Corrections and Rehabilitation under state law, an independent, impartial state office, readily available to the public and persons in custody, responsible to the legislature and the Governor, empowered to investigate the acts of the Department and to recommend appropriate changes toward the goals of safeguarding the rights of persons in custody, of promoting higher standards of competency, efficiency and justice in the administration of state laws.

Section 2. Short Title. Section 5066.2 of the Penal Code is added to read:

This Act may be cited as "The California Corrections Ombudsman Act."

Comment. The title "Ombudsman" is distinctive from the more usual official titles such as "director" and "commissioner" and has gained recognition in the United States and other countries. While existing statutes in other jurisdictions do not all use the title "Ombudsman" (Nebraska--"Public Counsel"; Iowa--"Citizens' Aide"; Arizona--"Ombudsman-Citizens' Aide"), it should be noted that the term "Ombudsman" is used in these states by the public, the media, and even by the incumbents, who found other titles could be confused with other offices and concepts.

The term "Ombudsman" should be used only when the legislation provides for an independent official who receives complaints against *612 government agencies and who, after investigation, may, if the complaints are justified, make recommendations to remedy the complaints.

Section 3. Definitions. Section 5066.3 of the Penal Code is added to read:

In this act, unless the context requires otherwise:

"Corrections Ombudsman" or "Ombudsman" means a man or woman, appointed by the legislature as the corrections Ombudsman, or a deputy Ombudsman, as selected by the appointed Ombudsman.

"Department" means the California Department of Corrections and Rehabilitation and its subdivisions.

Section 4. Office of the Corrections Ombudsman Established, Appointment, Tenure, Removal, Vacancy, Qualifications. Section 5066.4 of the Penal Code is added to read:

(a) The Office of the Corrections Ombudsman is established. The legislature, by a majority vote of each house in joint session, shall appoint a corrections Ombudsman who shall serve for a period of six years and thereafter until a successor shall have been appointed. The Ombudsman may be reappointed but may not serve for more than three terms. The legislature, by two-thirds vote of the members in joint session, may remove or suspend the Ombudsman from office, but only for neglect of duty, misconduct, or disability. The Office of the Corrections Ombudsman shall be independent from the Department and the primary office shall not be physically located at any Department site.

(b) If the corrections Ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the first deputy to the Ombudsman becomes the acting Ombudsman until a new Ombudsman is appointed for a full term.

(c) No person may serve as corrections Ombudsman within two years of the last day on which the person served as a member of the legislature, or while the person is a candidate for or holds any other state office, or while the person is engaged in any other occupation for reward or profit.

(d) The corrections Ombudsman shall be a person of recognized knowledge, judgment, objectivity, and integrity, and shall be qualified to hold the position by reason of education and experience. This may include advanced education in criminal justice, law, mediation, or other relevant areas, or experience in security and investigations in corrections or law enforcement.

(e) It is essential that the nonpartisan nature, integrity, and impartiality of the corrections Ombudsman's functions and services be maintained. The corrections Ombudsman and members of the staff of *613 the Ombudsman may not join, support, or otherwise participate in a partisan political organization, faction, or activity, including but not limited to the making of political contributions. This subsection does not restrict the corrections Ombudsman or members of the staff of the Ombudsman from expressing private opinion, registering as to party, or

voting.

Comment. (a) The Ombudsman is an appointed officer of the legislative branch of government. This arrangement helps to guarantee the independence of the Ombudsman, who might be reluctant to criticize the actions of agencies that are responsible to the executive, if he or she were an executive appointee. As part of the legislative branch of government, the Ombudsman is not only providing a direct service to citizens, but is also performing a role in legislative oversight of the agencies under the Ombudsman's jurisdiction. Since the Ombudsman may only make recommendations, and may not compel the executive and judicial agencies to take substantive actions, the Ombudsman's role is consistent with the concept of separation of powers.

Section 5. Compensation. Section 5066.5 is added to the Penal Code to read:

The Ombudsman shall receive the same salary and benefits as a legislative agency head. The salary of the Ombudsman shall not be diminished during the Ombudsman's term of office, unless by general law applying to all salaried officers of the state.

Comment. The Ombudsman is a high-level official who should receive a salary that reflects the importance, responsibility and prestige of the office. Also, a high salary is warranted if the Ombudsman is prohibited by law from engaging in any other occupation, business, or profession.

Section 6. Organization of Office. Section 5066.6 is added to the Penal Code to read:

(a) The Ombudsman shall select, appoint, and fix the compensation of a person as Deputy Ombudsman and may select, appoint, and fix the compensation of such other officers and employees as the Ombudsman may deem necessary to discharge the Ombudsman's responsibilities under this Act. Deputy Ombudsman shall be qualified as described in Section 5066.4(d) and (e) of this chapter. Compensation shall be fixed within the amount available by appropriation. All officers and employees shall serve at the Ombudsman's pleasure.

*614 (b) The Ombudsman may delegate to staff members any authority, power, or duty except this power of delegation and the Ombudsman's duty to make any report under this Act. However, the Ombudsman may authorize the Deputy Ombudsman to act in the Ombudsman's stead in the event of illness, absence, leave, or disability, or when, in the Ombudsman's sole discretion, an appearance of impropriety, partiality, or a conflict of interest prevents the Ombudsman from discharging his or her duty in a particular matter.

(c) The Ombudsman and his or her staff shall be entitled to participate in any employee benefit or retirement plan available to state employees.

(d) The Ombudsman shall prepare and administer a budget for the office of the Ombudsman.

Comment. (a) The sensitive nature of the work and the high degree of delegation to and confidence in staff that will be required dictate that the Ombudsman be free of civil service and political constraints in staff selection and retention. The Ombudsman, however, should refer to civil service salary schedules in setting comparable salaries for staff, and would naturally use state accounting facilities for payment of such. The appointment of a Deputy Ombudsman is compulsory while selection of other officials, including an Assistant Ombudsman or Ombudsmen, is optional.

(b) This same desire for flexibility should permit a broad delegation of powers. The Ombudsman, however, remains responsible for the organization of the office and for whatever reports leave the office unless the Deputy Ombudsman has assumed the Ombudsman's duties under this sub-section or when the office is vacant. The Ombudsman has complete discretion with respect to recusal for "cause" in order to avoid procedural smoke screens and because the Ombudsman can be expected to diligently maintain his or her limited authority through appropriate recusal. The Ombudsman has discretion to require that a delegation be in writing or that staff members take an oath of office.

Section 7. Duties of the Corrections Ombudsman. Section 5066.7 is added to the Penal Code to read:

(a) The corrections Ombudsman shall be responsible for receiving, investigating, and making recommendations regarding the resolution of complaints received from individuals, including inmates of the Department, family members of inmates, members of the state legislature, and the general public. The corrections Ombudsman may also investigate issues related to inmate health or safety on his or her own initiative.

*615 (b) In selecting matters for attention, the corrections Ombudsman shall address him or herself particularly to acts of the Department that may be: (1) contrary to law or regulation; (2) unreasonable, unfair, oppressive, or inconsistent with the general course of the Department's judgments; (3) mistaken in law or arbitrary in ascertainment of fact; (4) improper in motivation or based on irrelevant considerations; or (5) unclear or inadequately explained when reasons should have been revealed.

(c) The Ombudsman in the Ombudsman's discretion may decide not to investigate because: (1) the complainant could reasonably be expected to use another remedy or channel; (2) the complaint is trivial, frivolous, vexatious, or not made in good faith; (3) the complaint has been too long delayed to justify present examination; (4) the complainant is not personally aggrieved by the subject matter of the complaint; (5) resources are insufficient for adequate investigation; or (6) other complaints are more worthy of attention.

(d) The Ombudsman's declining to investigate a complaint shall not bar the Ombudsman from proceeding on his or her own initiative to investigate an administrative act whether or not included in the complaint.

(e) The corrections Ombudsman shall not investigate a complaint from an employee of the Department that relates to the his or her employment relationship with the department.

(f) The approach to each complaint is tailored to its particular facts, but the corrections Ombudsman shall address complaints impartially, and shall not approach cases from an initial perspective as acting as an advocate for the complainant.

Comment. (b) The Ombudsman has a duty to investigate the complaints described in subsection (b), although he or she may decline to investigate for the reasons given in subsection (c). The enumerated complaints indicate the

kinds of administrative acts that generate complaints to the Ombudsman's office. As shown by paragraph (c)(6), which is a catchall, the statute is intended as a guide to and not a limitation on the complaints which the Ombudsman can investigate.

(c) The Ombudsman may choose to investigate a complaint even though the statute permits him or her to refuse. For instance, under paragraph (c)(1), if the Ombudsman believes that recourse to an administrative or legal remedy would be futile or overly burdensome to the complainant, the Ombudsman may investigate the complaint. Similarly, the Ombudsman may decide to investigate a complaint of public concern even though the complainant was not personally aggrieved.

*616 (d) Complaints which are inappropriate for investigation may nevertheless reveal administrative acts which the Ombudsman may decide to investigate on his or her own initiative.

Section 8. Investigations, Procedures, Communications with Complainants. Section 5066.8 is added to the Penal Code to read:

(a) The Ombudsman may adopt, promulgate, amend, and rescind rules and regulations required for the discharge of the Ombudsman's duties, including procedures for receiving and processing complaints, conducting investigations, and reporting findings, conclusions, and recommendations.

(b) The Ombudsman shall adopt methods by which to make his presence and services known to inmates within the custody of the Department.

(c) The Ombudsman shall advise a complainant to pursue his complaint with the Department prior to the Ombudsman beginning an investigation, although the complainant is not required to exhaust his administrative remedies. An Ombudsman may commence an investigation prior to the completion of the administrative remedy process.

(d) If the Ombudsman declines to investigate, the Ombudsman shall notify the complainant in writing of the reasons for the decision.

(e) The Ombudsman shall, if requested by the complainant, suitably report the status of his or her investigation to the complainant.

(f) After investigation of a complaint, the Ombudsman shall suitably inform the complainant of his or her conclusion or recommendation and, if appropriate, any action taken or to be taken by the Department.

(g) Upon request, the corrections Ombudsman shall have access to all testimony, information, records, and documents in the possession of the Department that the Ombudsman deems necessary to conduct the investigation. The Department shall assist the Ombudsman in obtaining the necessary releases of those documents which are restricted or privileged under law. The Ombudsman shall be granted entrance to inspect at any time any premises under the control of the Department.

(h) The Ombudsman shall have the power to issue subpoenas if necessary to compel the attendance and testimony of witnesses and the production of information, records, documents, and other evidence that the Ombudsman deems necessary to conduct the investigation. The Ombudsman may only issue a subpoena if he or she has previously requested the testimony, information, records, and documents in accordance with subsection (g) of

this section and the Department failed to comply with the request in a reasonable amount of time.

*617 (i) The Ombudsman may utilize any resources deemed appropriate during the course of the investigation of a complaint.

(j) The Ombudsman may not levy fees for the submission or investigation of complaints.

(k) The Ombudsman may bring suit in California courts to enforce the provisions of this Act.

Section 9. Confidentiality. Penal Code Section 5066.9 is added to read:

(a) The Ombudsman shall maintain confidentiality with respect to all matters under investigation including the identity of the complainant and relevant Department personnel, and any persons from whom information related to the investigation is acquired, except as necessary in performing the duties of the office.

(b) Before conducting the first investigation, the corrections Ombudsman shall adopt rules to ensure that confidential information that is gathered will not be disclosed.

(c) Any written correspondence from the complainant to the corrections Ombudsman, and any written correspondence from the Ombudsman to the complainant shall be delivered immediately and unopened. Telephone and personal contacts between the Ombudsman and a person in custody shall not be prohibited or monitored.

(d) Documents and records produced in connection with an investigation of the corrections Ombudsman shall not be disclosed pursuant to the Public Records Act as codified in [Government Code section 6250](#), et seq.

(e) The Ombudsman shall not disclose confidential records and shall be subject to the same penalties as the legal custodian of records for any unlawful or unauthorized disclosure.

Section 10. Procedure After Investigation. Penal Code Section 5066.10 is added to read:

(a) If, after investigation, the Ombudsman is of the opinion that the Department should: (1) consider the matter further; (2) modify or cancel an act; (3) alter a regulation, practice or ruling; (4) explain more fully the act in question; (5) rectify an omission; or (6) take any other action, including compensating the complainant, the Ombudsman shall state any conclusions, recommendations and reasons therefor to the Department. If the Ombudsman so requests, the Department shall, within the time specified, inform the Ombudsman about the action taken on recommendations or the reasons for not complying with them.

(b) After a reasonable period of time has elapsed, the Ombudsman may issue his or her conclusions or recommendations to the Legislature, the Governor, a grand jury, the public, or any other appropriate *618 authority. The Ombudsman shall include any brief statement the Department may provide if an opportunity to reply is required by Section 5066.11.

(c) If the Ombudsman believes that an action has been dictated by laws whose results are unfair or otherwise objectionable, and could be revised by legislative action, the Ombudsman shall notify the legislature and the Department of desirable statutory change.

(d) If the Ombudsman believes that any Department official or employee has acted in a manner warranting criminal or disciplinary proceedings, the Ombudsman shall refer the matter to the appropriate authorities without notice to that person.

Comment. (a) Though the Ombudsman will rarely have reason to make a recommendation if there is no error in what the Department has done or neglected to do, the Ombudsman should remain free to suggest improvements in method or policy even when the existing practice may be legally permissible. This subsection contemplates no entry of judgment, as it were, but simply the expression of opinion by the Ombudsman. The Ombudsman is not a superior official, in a position of command, and cannot compel a change in an administrative act. The Ombudsman's recommendation may, however, induce the Department to exercise whatever power it may possess to right what the Ombudsman points out as a past mistake.

(b) If the Ombudsman is required to provide an opportunity to reply under and a reply is forthcoming, the Ombudsman must include it when issuing findings.

(c) There may be instances where the Department acted in accordance with existing law, but the law itself produces unjust results. The Ombudsman has the duty to bring these situations to the attention of the legislature and appropriate Department officials; if appropriate, the Ombudsman may comment on or recommend changes in legislation.

(d) The Ombudsman's duty to report wrongdoing pertains to miscreant officials. This subsection makes it clear that the Ombudsman may report allegations of wrongdoing without having to first notify the person involved (who may otherwise flee the state or destroy pertinent evidence if tipped off prematurely).

Section 11. Rights of Department. Penal Code Section 5066.11 is added to read:

Before formally issuing a conclusion or recommendation that is significantly critical or adverse to the Department, the Ombudsman shall have consulted with the Department and permitted the Department reasonable opportunity to reply. If the Ombudsman makes a conclusion *619 or recommendation available to the Department to facilitate a reply, the conclusion or recommendation is confidential and may not be disclosed to the public by the Department unless the Ombudsman releases it.

Comment. This section protects the Department, its officers, and employees by requiring consultation and giving them reasonable time to reply to significant criticism before the Ombudsman issues critical findings. The Ombudsman has the discretion to make all or part of his or her findings available to facilitate a reply. Because the Ombudsman may modify findings, which may include removal of confidential information and incorporation of the Department's response, after reviewing the Department's reply, disclosure of findings not released by the Ombudsman is a violation of law, which may be dealt with under existing records confidentiality provisions.

Notice of the Ombudsman's decision to investigate is not required because such formalities are inconsistent with the role of the Ombudsman as an alternative to procedure-bound remedies and the limited resources of the office; are largely ceremonial in that the Ombudsman will inevitably contact the Department during an investigation; and are not required by due process given the absence of Ombudsman power to enforce recommendations and the fact that an opportunity to be heard is required before publication.

If an advance notice provision is nonetheless desired, it should provide for: informal or preliminary inquiries

without notice, since experience shows that the vast majority of complaints are handled expeditiously and informally; withholding notice when notice would hinder investigation; and flexibility of form to avoid legalistic procedural wrangling, e.g., "If after making preliminary inquiries the Ombudsman decides to investigate, the Ombudsman shall suitably inform Department unless the Ombudsman reasonably believes that advance notice will unduly hinder the investigation or make it ineffectual. The Ombudsman may inform the Department verbally or in writing."

Section 12. Reports. Penal Code Section 5066.12 is added to read:

The Ombudsman may from time to time and shall annually report on his or her activities to the Governor, to the Legislature, and any of its committees, to the public and, in the Ombudsman's discretion, to the Department.

Section 13. Ombudsman's Immunities. Penal Code Section 5066.13 is added to read:

(a) The substantive content of any finding, conclusion, recommendation, or report of the Ombudsman or member of the *620 Ombudsman's staff shall not be reviewable in any court.

(b) The Ombudsman and the Ombudsman's staff have the same immunities from civil and criminal liabilities as a judge of this state.

(c) The Ombudsman and the Ombudsman's staff shall not be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except as may be necessary to enforce this Act.

Comment. (a)-(b) As a public watchdog, the Ombudsman should be able to state his or her position freely and candidly without fear of pressure or reprisal. The judicial immunities afforded the Ombudsman are intended to protect against harassment when the Ombudsman deals with controversial issues or makes an unpopular decision. While the Ombudsman's findings are presented only after due consideration, no claim of infallibility is made and the Ombudsman's findings, conclusions, and recommendations are always subject to criticism by government officials as well as members of the public. Since the Ombudsman has no enforcement power and any findings and recommendations are only advisory in nature, the courts should have no authority to order that an expression of opinion be changed.

(c) Certain dealings that the Ombudsman has with complainants and witnesses may be confidential in nature. This subsection is meant to protect these confidential relationships so as to encourage complainants to avail themselves of the Ombudsman's services and witnesses to cooperate with the Ombudsman, where they may be otherwise reluctant to do so.

Section 14. Witnesses' Privileges. Penal Code Section 5066.14 is added to read:

Any person who provides information under this Act may be accompanied and advised by counsel of his or her choice and shall be paid the same fees and travel allowances and accorded the same privileges and immunities as witnesses whose attendance has been required in the courts of California. However, a representative of the

Department providing information under this Act during business hours shall not be entitled to receive such fees and allowances.

Comment. Although investigations conducted by the Ombudsman are not contested cases or adjudications of rights or interests, and although nearly all testimony will be private and confidential, witnesses who testify (whether or not by subpoena) are given judicial privileges and immunities. Witness fees and travel allowances are also required for persons who provide information to the Ombudsman under the Act. A *621 provision that a representative of the Department during business hours shall not be entitled to such fees and allowances is included to avoid possible double payment of public servants during working hours.

Section 15. Obstruction. Penal Code Section 5066.15 is added to read:

Any person who willfully obstructs or hinders the proper and lawful exercise of the Ombudsman's power, or willfully misleads or attempts to mislead the Ombudsman in the Ombudsman's inquiries, shall be guilty of a [specify the level of offense].

Comment. It must be determined in each state whether necessity exists for indicating the court in which proceedings are to be brought and upon whose initiative. Since fines for offenses vary from state to state and may be subject to periodic changes, it is preferable to specify the offense rather than a set amount of fine for a violation.

[FN1]. Senior Judge, United States Court of Appeals for the Ninth Circuit. Over the course of my career, I have had experience in various roles related to California's prison system. As the Legal Advisor to Governor Edmund G. "Pat" Brown, I was responsible for conducting investigations to assist the Governor in deciding whether to commute the sentence of a death row inmate to life imprisonment. I also advised Governor Brown on all prisoner complaints about the denial of medical services, intolerable prison conditions such as extremely low temperatures in their cells, and physical mistreatment by correctional officers. As Chairman of the Adult Authority (California Parole Board for Adult Men), I reviewed applications for release on parole from prisoners who claimed that they had received punishment for infraction of prison rules without notice or a hearing. As a member of the United States Court of Appeals for the Ninth Circuit, I have reviewed federal district court decisions relating to prisoners' claims under 42 U.S.C. § 1983 of civil rights violations by correctional officers. I am indebted to my former law clerks, Paula M. Mitchell, a graduate of Loyola Law School, and Virginia F. Milstead, a graduate of Pepperdine School of Law, for their outstanding contributions to the research and preparation of this article. Any flaws in the recommendations set forth in this Article are my own.

[FN1]. Stanley V. Anderson, *The Corrections Ombudsman in the United States*, in *Int'l Handbook of the Ombudsman* 137, 143 (Gerald E. Caiden ed., 1983).

[FN2]. Experts assigned to investigate California prisons and report findings to the court described it as "a totally broken system." *Plata v. Schwarzenegger*, No. 01-1351, 2005 WL 2932243, at *2 (N.D. Cal. May 10, 2005).

[FN3]. No. 01-1351, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005).

[FN4]. See *Plata v. Davis*, 329 F.3d 1101, 1105 & n.3 (9th Cir. 2003).

[FN5]. *Plata*, 2005 WL 2932253, at *4.

[FN6] *Id.*

[FN7] *Id.* at *3-4.

[FN8] *Id.* at *2.

[FN9] *Id.* at *3.

[FN10] *Id.* The prisons need “fundamental reform in a variety of areas, including management structure, information technology and health care services in order to function effectively and in compliance with basic constitutional standards.” *Id.* at *3.

[FN11] Robert Salladay & Greg Lucas, *State to Fight Suit Over Inmates' Care: Prisoners' Attorneys Want Funds Spent on Doctors, Not Lawyers*, S.F. Chron., May 19, 2001, at A2 (quoting figures provided by Donald Speeter, director of the Prison Law Office, and the California Department of Justice).

[FN12] See Docket, Entry Nos. 96, 101, 107, 118-19, 153-54, 160, 162, 177, 181, 193, 195-97, 207, 214, 216-17, 219, 225-28, 243, 252-53, 270, 276-78, 284, 290, 297, 302, 315, 317-20, 340, 346, 356, 358, 368, 381, 399, 410, 416, 421, 424, 439-40, *Plata v. Schwarzenegger*, No. 01-1351 (N.D. Cal. Oct. 3, 2005).

[FN13] Corr. Indep. Review Panel, *State of California, Reforming Corrections ii* (2004), available at <http://www.cpr.ca.gov/report/indrpt/corr/> [hereinafter *Governor's Panel Report* or *Panel Report*].

[FN14] *Id.* at 19.

[FN15] *Id.* at 41.

[FN16] *Id.* at 123-25.

[FN17] *Id.* at 8.

[FN18] *Id.* at 13-14.

[FN19] California's ombudsman program was created through departmental initiative in 1997 as an agency within the California Department of Corrections (CDC) to work for and report to the Director of the CDC. In 1998, the California Legislature enacted [Penal Code § 5066](#). 1998 Cal. Legis. Serv. 5659 (West). It reads as follows: “The Director of Corrections shall expand the existing prison ombudsman program to ensure comprehensive deployment of ombudsmen throughout the state prison system with specific focus in the maximum security institutions.” [Cal. Penal Code § 5066](#) (West 2005). Prior to the enactment of [§ 5066](#), ombudsmen were assigned to the California State Prison, Corcoran, and Pelican Bay State Prison in response to allegations of prison guard misconduct. After [§ 5066](#) became effective, four more ombudsman positions were created.

[FN20] In fact, the lack of independence makes the term “ombudsman” in the context of the California prison system something of a misnomer. By any standard, including those adopted by the American Bar Association and the United States Ombudsman Association, an “ombudsman” must be functionally autonomous. See Larry B. Hill, Professor of Political Science, University of Oklahoma, Address at the 1997 Spring Meeting of the American Bar Association Section of Administrative Law and Regulatory Practice: American Ombudsmen and Others; or, American Ombudsmen and “Wannabe” Ombudsmen (Apr. 18, 1997), available at

<http://www.abanet.org/adminlaw/ombuds/wannabe.html>. The United States Ombudsman Association (USOA) is the national organization for public sector ombudsman professionals. USOA, About Us, http://usoa.non-profitsites.biz/en/About_Us/ (last visited Jan. 4, 2007). It provides training conferences and reference information and publishes a newsletter. USOA, Activities, http://usoa.non-profitsites.biz/en/activities_and_services/ (last visited Jan. 4, 2007).

[FN21] See Am. Bar Ass'n, *Standards for Establishment and Operation of Ombuds Offices 3* (2004), available at <http://meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf> [hereinafter *ABA Standards*].

[FN22] See U.S. Ombudsman Ass'n, *Governmental Ombudsman Standards 2* (2003), available at http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf [hereinafter *USOA Standards*].

[FN23] E-mail from Ken Hurdle, Lead Ombudsman, CDCR Ombudsman Office, to Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit (Nov. 11, 2005) (on file with author).

[FN24] Office of the Ombudsman, California Department of Corrections and Rehabilitation, <http://www.cya.ca.gov/communications/oo.html> (last visited Jan. 4, 2007).

[FN25] See Ombudsman's Office, *Memorandum to Director of CDC* (on file with author). The CDC is now called Adult Operations and Adult Programs and is part of the larger CDCR, which was formerly the Youth and Adult Correctional Agency. See Gov. Arnold Schwarzenegger, *Reorganization Plan 2: Reforming California's Youth and Adult Correctional System 5-9*, available at <http://cpr.ca.gov/pdf/GRP2.pdf> (last visited Jan. 4, 2007). These organizational changes were made pursuant to recommendations by the Governor's Panel. *Id.*

[FN26] See Ombudsman's Office, *supra* note 25.

[FN27] [408 F.3d 559 \(9th Cir. 2005\)](#).

[FN28] *Id.* at 563.

[FN29] *Id.*

[FN30] *Id.*

[FN31] *Id.*

[FN32] *Id.*

[FN33] *Id.*

[FN34] *Id.*

[FN35] *Id.*

[FN36] *Id.*

[FN37]. *Id.* at 564.

[FN38]. *Id.* at 565 n.6.

[FN39]. *Id.* at 564.

[FN40]. *Id.*

[FN41]. *Id.*

[FN42]. *Id.*

[FN43]. *Id.*

[FN44]. *Id.* at 565.

[FN45]. *Id.*

[FN46]. *Id.* at 566.

[FN47]. *Id.*

[FN48]. *Id.* at 569.

[FN49]. See Docket, Entry Nos. 86-87, *Rhodes*, 408 F.3d 559 (No. 1:02-cv-05018-AWI-DLB) (demonstrating that as of June 2006, briefing of the defendants' summary judgment motion had yet to be completed, and Mr. Rhodes had filed a notice of appeal from the denial of his motion to amend his complaint).

[FN50]. See E-mail from Ken Hurdle, *supra* note 23 (providing budget information); Office of the Ombudsman: Contact the Ombudsman's Office, <http://www.cya.ca.gov/communications/oocontact.html> (last visited Jan. 4, 2007) (providing biographical information for each ombudsman); Data Analysis Unit, California Department of Corrections and Rehabilitation, Monthly Report of Population as of Midnight October 31, 2005 (2005), available at <http://www.cya.ca.gov/ReportsResearch/OffenderInfoServices/Monthly/TPOPIA/TPOPIAd0510.pdf> (providing information regarding inmate population).

[FN51]. See Iowa Department of Human Rights, Iowa Prison Population Forecast FY2005-2015 at 2 (2005), available at http://www.state.ia.us/dhr/cjpp/images/pdf/Forecast_2005-2015.pdf (Iowa prison population mid-2005); Office of Citizens' Aide/Ombudsman Contact Information, <http://www.legis.state.ia.us/Ombudsman/staff/> (last visited Jan. 4, 2007) (listing the Ombudsmen on staff at the State of Iowa Office of Citizens' Aide/Ombudsman).

[FN52]. E-mail from Robin K. Matsunaga, Ombudsman, State of Hawaii, to Arthur Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit (Dec. 2, 2005) (on file with author).

[FN53]. U.S. Drug Enforcement Admin., DEA Briefs and Background, Drug and Drug Abuse, State Factsheets, Hawaii, <http://www.dea.gov/pubs/states/hawaiip.html> (last visited Jan. 4, 2007).

[FN54]. See Marshall Lux, Neb. Pub. Couns., Thirty-Third Annual Report of the Nebraska Public Counsel: the Ombudsman 19 (2003), available at http://www.unicam.state.ne.us/reports/ombudsman/03ombudsman_0503.pdf

[hereinafter Nebraska Annual Report].

[FN55]. *Id.* at 17.

[FN56]. *Id.* at 19.

[FN57]. Austl. Commonwealth Ombudsman, Annual Report 2004-2005, at 8 (2005), available at http://www.comb.gov.au/publications_information/Annual_Reports/ar2004-05/download/PDF/commanrep.pdf [hereinafter Australia Annual Report].

[FN58]. See ABA Standards, *supra* note 21, at 12-13.

[FN59]. See USOA Standards, *supra* note 22.

[FN60]. *Id.* For example, the CDCR Ombudsman was created through departmental initiative, and the Ombudsman has found that "[in] the past, some Directors [of the CDC] have used the office extensively, and others have not." See Ombudsman's Office, *supra* note 25.

[FN61]. See ABA Standards, *supra* note 21, at 3.

[FN62]. See USOA Standards, *supra* note 22, at 1.

[FN63]. Statistics Canada, Canada's Population Clock, <http://www.statcan.ca/english/edu/clock/population.htm> (last visited Jan. 4, 2007); United States Census Bureau, State and County Quick Facts, California, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Jan. 4, 2007) (estimating California's population at 36.1 million).

[FN64]. Anderson, *supra* note 1, at 142.

[FN65]. See, e.g., *Haw. Rev. Stat. § 96-16* (2005). For another example, California's Foster Care Ombudsman (FCO) was created by the legislature as "an autonomous entity within the [D]epartment [of Social Services (DSS)] for the purpose of providing children who are placed in foster care... with a means to resolve issues related to their care, placement, or services." *Cal. Wel. & Inst. Code § 16161* (West 2005). Though the FCO operates within the DSS, it follows the classic ombudsman model in that it annually compiles data on complaints received and provides the data to the legislature, along with an annual report that includes a summary of the types of complaints filed, referred, investigated, and resolved. See Cal. Foster Care Ombudsman Off., Annual Report 2002-2003, available at <http://www.fosteryouthhelp.ca.gov/PDFs/FCOAnnualReport2002-2003.pdf>.

[FN66]. See, e.g., Office of Citizens' Aide/Ombudsman, State of Iowa, Annual Reports, http://www.legis.state.ia.us/scripts/docmgr/doc_mgr_www.dll/CAO?type=ca (last visited Jan. 4, 2007); Office of the Ombudsman, State of Hawaii, Annual Reports, <http://www.ombudsman.state.hi.us/Annual%20Reports.htm> (last visited Jan. 4, 2007); Prisons and Probation Ombudsman for England and Wales, Annual Reports, <http://www.ppo.gov.uk/annureps.htm> (last visited Jan. 4, 2007).

[FN67]. Anderson, *supra* note 1, at 137.

[FN68]. Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Use of Ombudsman Programs in Juvenile Corrections, <http://www.ojjdp.ncjrs.org/pubs/walls/sect-02.html> (last visited Jan. 4, 2007) [hereinafter Ombudsman Programs in Juvenile Corrections].

[FN69]. *Id.*

[FN70]. See Office of Citizens' Aide/Ombudsman, State of Iowa, Ombudsman's Report 2002, at 13 (2003), available at http://www.legis.state.ia.us/caodocs/Annual_Reports/CAWP000.pdf.

[FN71]. Office of Ombudsman, State of Hawaii, Report of the Ombudsman (2004), available at <http://www.ombudsman.state.hi.us/2003-2004.htm>.

[FN72]. Prisons and Probation Ombudsman for England and Wales Annual Report 2004-2005, at 10 (2005), available at <http://www.ppo.gov.uk/download/annualreps/annrep200405.pdf>.

[FN73]. Minnesota's independent correctional ombudsman, for example, has worked effectively with both the Department of Corrections and inmates and, accordingly, has "produced a more secure and humane prison environment while reducing costly lawsuits." Ombudsman Programs in Juvenile Corrections, *supra* note 68, at 12.

[FN74]. The federal government has established several ombudsman programs which are statutorily required to submit annual reports to Congress, such as the Citizen and Immigration Services Ombudsman, [6 U.S.C. § 272\(c\) \(2000\)](#), the Medicare Beneficiary Ombudsman, [42 U.S.C. § 1395b-9\(c\)\(2\)\(C\) \(2000\)](#), the Student Loan Ombudsman, [20 U.S.C. § 1018f\(4\) \(2000\)](#), and the Aircraft Noise Ombudsman, [49 U.S.C. § 106\(q\) \(2000\)](#).

[FN75]. Special Master's Final Report Re Department of Corrections, *Madrid v. Woodford*, No. C90-3094-T.E.H. (N.D. Cal. June 24, 2004), available at <http://www.prisonlaw.com/pdfs/HagarReport.pdf>.

[FN76]. *Id.* at 105.

[FN77]. Anderson, *supra* note 1, at 138.

[FN78]. E-mail from Ken Hurdle, *supra* note 23.

[FN79]. Governor's Panel Report, *supra* note 13, at 3-4.

[FN80]. *Id.* at 8.

[FN81]. *Id.*

[FN82]. See *id.*

[FN83]. *Id.* at 13-14.

[FN84]. Cf. Judith Jones & Alvin W. Cohn, State Ombudsman Programs, *Juv. Just. Bull.*, Feb. 2005, at 1, 6 (stating that Inspector General offices "are concerned primarily with issues such as systemic waste and fraud and not particularly with individual grievances").

[FN85]. Anderson, *supra* note 1, at 138.

[FN86]. See, e.g., Governor's Panel Report, *supra* note 13, at 41, 49, 52, 88.

[FN87]. Pamela J. Podger, *Spiraling Legal Costs Have Busted Budget of Corrections Dept.*, *S.F. Chron.*, May 27, 1999, at A24.

[FN88]. E-mail from Edgar Cabral, Fiscal and Policy Analyst, Legislative Analyst's Office, to Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit (Oct. 26, 2005) (on file with author).

[FN89]. Telephone Interview by Virginia Milstead with Constance Picciano, Attorney, California Attorney General's Office (Oct. 26, 2005) [hereinafter Picciano Interview].

[FN90]. Telephone Interview by Virginia Milstead with Kathryn Bernstein, Attorney, California Department of Corrections and Rehabilitation (Nov. 14, 2005).

[FN91]. Picciano Interview, *supra* note 89.

[FN92]. Telephone Interview by Virginia Milstead with Kathryn Bernstein, Attorney, California Department of Corrections and Rehabilitation (Nov. 1, 2005).

[FN93]. [Pub. L. No. 104-134, 801-810, 110 Stat. 1321, 1321-66 to -77 \(1996\)](#) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

[FN94]. [42 U.S.C. § 1997e \(2000\)](#).

[FN95]. *Id.*

[FN96]. See Margo Schlanger, *Inmate Litigation*, 116 *Harv. L. Rev.* 1555, 1639 (2003).

[FN97]. In 2000, for instance, federal and state prison inmates filed 25,633 civil lawsuits, or eighteen complaints for each 1000 persons incarcerated. Bureau of Justice Statistics, United States Department of Justice, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf> [hereinafter DOJ Report]. It is estimated that those filings cost the United States District Courts \$31,166,178. Schlanger, *supra* note 96, at 1640. California inmates filed 2836 of those suits, costing federal courts in California approximately \$3.4 million. See DOJ Report, *supra*, at 3. In 2003, there were 24,073 civil suits filed by state and federal prisoners in United States District Courts. See Administrative Office of the United States Courts, Judicial Facts and Figures tbl.4.6 (2005), available at <http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf> [hereinafter Judicial Facts and Figures]. By the end of the twelve-month period ending in September 2003, 2574 of these suits were pending in federal district courts in California. E-mail from Robin Donoghue (June 25, 2004) (on file with author). Extrapolating from the figures from 2000 and assuming costs remained constant from year to year, the costs to the United States courts would be approximately \$29 million, with \$3.2 million borne by district courts in California. In 2004, 23,449 suits were filed nationally, or sixteen suits filed for each 1000 inmates. Judicial Facts and Figures, *supra*, at tbl.4.6. Extrapolating from the 2000 figures, the cost to United States District Courts in 2004 would be approximately \$28.5 million. These costs are in addition to those incurred by state and federal governments defending the suits.

[FN98]. Schlanger, *supra* note 96, at 1644.

[FN99]. See *id.* at 1645-47.

[FN100]. *Id.* at 1653.

[FN101] Cf. [Cal. Code Regs. tit. 15, §§ 3084-3084.7 \(2006\)](#); [Ngo v. Woodford](#), 403 F.3d 620, 623-24 (9th Cir. 2005) (discussing California's appeals process and explaining that, pursuant to the PLRA, inmates must comply with it prior to bringing suit), rev'd, 126 S. Ct. 2378 (2006).

[FN102] [Schlanger](#), supra note 96, at 1650. Professor [Schlanger](#) explains:

Inmates who filed only the first level of grievance, or who failed to comply with a stringent time limit (sometimes even because they were hospitalized for the injury motivating the lawsuit), or who simply wrote a letter to prison authorities rather than filling out the requisite form, are seeing the constitutional cases dismissed for failure to exhaust.

Id. at 1653-54.; accord [Woodford v. Ngo](#), 126 S. Ct. 2378, 2382 (2006) (holding that prisoners must exhaust all available remedies).

[FN103] A LexisNexis search of the Combined Federal & State Cases Database on January 4, 2007 for "Prisoner Litigation Reform Act" brings up 794 state and federal published and unpublished cases mentioning the Act.

[FN104] See [Ngo](#), 126 S. Ct. at 2378; [Porter v. Nussle](#), 534 U.S. 516 (2002); [Booth v. Churner](#), 532 U.S. 731 (2002).

[FN105] See [Schlanger](#), supra note 96, at 1653.

[FN106] Governor's Panel Report, supra note 13, at 87.

[FN107] Id. at 88.

[FN108] Id.

[FN109] The Plan was developed by what was then the Youth and Adult Correctional Agency. See Youth and Adult Correctional Agency, State of California, Strategic Plan (2005), available at <http://www.cya.ca.gov/communications/docs/StrategicPlanJan2005s.pdf>.

[FN110] Id. at 21.

[FN111] Id.

[FN112] Id. at 21-22.

[FN113] This can be done quite efficiently. The Australian Ombudsman reports having finalized 81% of all complaints within one month and finalized investigations into 65% of complaints within one month. Australia Annual Report, supra note 57, at 14.

[FN114] Telephone Interview by Judicial Extern with Ken Hurdle, Lead Ombudsman, CDCR Ombudsman Office (June 10, 2004).

[FN115] Id.

[FN116] Id.

[FN117] Id.

[FN118] Id.

[FN119] Id.

[FN120] Id.

[FN121] Id.

[FN122] Id.

[FN123] [370 F.3d 969, 973 \(9th Cir. 2003\)](#).

[FN124] Id. at 976.

[FN125] Id.

[FN126] See id.

[FN127] Id.

[FN128] See id. at 977.

[FN129] [413 F.3d 1036, 1039 \(9th Cir. 2005\)](#).

[FN130] Id. (alteration in original).

[FN131] Id.

[FN132] Id. at 1043.

[FN133] See Ashley Dunn, Flood of Prisoner Rights Suits Brings Effort to Limit Filings, N.Y. Times, Mar. 21, 1994, at A1, B4.

[FN134] Id.

[FN135] This example was frequently cited in the limited legislative history of the PLRA as an example of a frivolous suit. See Jon O. Newman, [Pro Se Prisoner Litigation: Looking for Needles in Haystacks](#), 62 Brook. L. Rev. 519, 521-22 (1996) (summarizing facts of the suit).

[FN136] Id.

[FN137] Dunn, supra note 133, at B4.

[FN138] Id.

[FN139] Nos. 98-36228, 99-35094, 2000 WL 1593397 (9th Cir. Oct. 25, 2000).

[FN140]. See Combined Answering/Reply Brief of Appellant/Cross-Appellee at 2, [Ieng v. Fleck](#), 1999 WL 33621827 (9th Cir. 1999) (No. 99-35094).

[FN141]. Id. at 2, 6.

[FN142]. Id. at 3.

[FN143]. [Ieng](#), 2000 WL 1593397, at *1.

[FN144]. Id. at *1-2.

[FN145]. Id. at *1.

[FN146]. Id. at *2.

[FN147]. Id.

[FN148]. The plaintiff initiated his suit in 1996, and the Ninth Circuit affirmed the judgment of the district court in 2000. See id. at *1.

[FN149]. Walker and Hearn are not isolated examples. See also [Bruce v. Ylst](#), 351 F.3d 1283, 1288 (9th Cir. 2003) (plaintiff was classified as a gang member and placed in segregation in retaliation for his filing grievances); [Ashker v. Cal. Dep't of Corr.](#), 350 F.3d 917, 924 (9th Cir. 2003) (department policy of requiring books and magazines mailed to the prison to have an approved vendor label affixed to the package prevented many prisoners from receiving books and lacked an adequate justification); [Johnson v. Martinez](#), No. 02-17101, 68 Fed. Appx. 66, 67 (9th Cir. 2003) (prison officials failed to alleviate slippery conditions on shower floor for mobility-impaired prisoner); [Hagen v. Jabar](#), No. 01-56437, 56 Fed. Appx. 302, 304 (9th Cir. 2002) (plaintiff denied right to attend Jewish services because he had also attended Muslim services "for academic purposes"); [Keller v. Faecher](#), No. 01-57179, 44 Fed. Appx. 828, 831 (9th Cir. 2002) (prison doctor recommended that plaintiff purchase over-the-counter medicine while knowing that the prisoner could not afford it); [Wakefield v. Thompson](#), 177 F.3d 1160, 1162 (9th Cir. 1999) (prison failed to fill plaintiff's prescription medicine prior to his release). In each of these cases, it is not clear that the inmate ultimately prevailed. However, the complaints were ripe for investigation and resolution by an ombudsman, even if the result was not ultimately in favor of the inmate.

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