Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process

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Introduction

Prisons are not meant to be particularly hospitable places; punishment as a goal of imprisonment implies a certain level of discomfort. Since the establishment of punishment by incarceration, prison conditions have had notably harsh effects upon the human body and mind.[1] Although conditions have varied over time and between institutions, reformers have constantly voiced concerns over the treatment of prisoners.[2] Approximately four decades ago, federal courts began responding to complaints of inhumane treatment by applying the Constitutional Eighth Amendment prohibition against cruel and unusual punishment to demarcate a line between conditions of confinement that are uncomfortable and those that are unconstitutional.[3] Along with the expansions of civil rights for inmates, courts mandated the costly reorganization of prisons. The prisons, once characterized by local autonomy and self-rule, were transformed into modern bureaucratic institutions designed to protect prisoners' newly acquired rights.[4]

Today's bureaucratic prisons promulgate internal rules that govern the prison's resolution of an inmate's allegation that one or more of his rights have been violated: the right to medical care, to have personal property, to be free from physical abuse, or, perhaps, to adhere to a particular religious practice. By allowing the prison to resolve inmate complaints, internal grievance procedures tend to keep the dispute within the prison's walls and out of the public sphere. In turn, the resolution of inmate grievances by prisons themselves is likely to reduce exposure to liability from inmate lawsuits, as prisons can self-correct before being forced to do so by a court. Additionally, internal grievance procedures may shield prisons from liability in yet another way. By having in place elaborate internal procedures guaranteeing multiple levels of review, prisons may signal compliance with judicially-imposed standards when, in fact, their grievance procedures do not actually protect constitutionally defined rights. To the extent this is true, "cosmetic compliance" tends to benefit the prison, not the prisoner.[5] Where correctional officers and administrators engage in predominantly legal functions – the resolution of legal claims through multiple levels of review – inmates' constitutional rights may be jeopardized at the expense of the private interests of the prison and its staff.

This Comment explores the extent to which internal grievance procedures within prisons serve as a proper substitute for traditional courts in adjudicating inmate legal disputes, or alternatively, the extent to which these procedures serve as a form of cosmetic compliance. While this analysis yields no conclusive answer, it does suggest that prisons and correctional departments have a set of priorities that is so at odds with prisoners' interests that a more neutral body might more effectively resolve inmate grievances. In order to secure adequate and fair adjudication of inmates' legal rights, this Comment urges that such grievances should be heard and decided by an impartial third party.

Part I of the Comment begins by presenting a brief overview of the history of prisoner rights litigation and the resulting bureaucratization of prisons beginning in the 1960s. The history of internal grievance procedures is also discussed in this section, as

prisons adopted these procedures, at least in part, to place the resolution of inmate complaints behind prison walls rather than before a busy judiciary. Drawing on insights from the sociology of law field, Part II examines the attributes of sharing adjudicative power through negotiated governance, the effects of repeat player interactions in inmate disputes, and the possibility that correctional departments engage in practices that nominally signal compliance with the rule of law but fail to provide substantive protection. Part III presents the corrections system in California as a case study to illustrate the internal workings of prisoner grievance mechanisms. Part IV applies the sociological and legal insights from Part II to the California case study in order to evaluate whether grievance procedures resemble law in their ability to protect inmates' rights or whether they serve more cosmetic purposes. The Comment concludes with the recommendation that the resolution of inmate grievances, if administered outside the traditional legal setting, should be placed in the hands of a neutral third party rather than with the prisons themselves.

I . Inmate Litigation and Institutional Changes: The National Experience

A. Prisoner Rights Litigation and Court Intervention

During the vast majority of the United States' history, courts strictly adhered to a "hands-off" approach toward prison litigation. Judges summarily dismissed prisoner complaints, or, if they allowed complaints to proceed, declared them to be without remedy.[6] Rather than invoking the Eighth Amendment's prohibition against cruel and unusual punishment, decisions such as the Supreme Court's 1952 ruling in *Sweeney v. Woodall* relied upon other judicial doctrines to avoid addressing particularly disturbing instances of inmate abuse.[7]

> In *Sweeney* a fugitive from an Alabama prison made the following allegations:
> He offered to prove that the Alabama jailers have a nine-pound strap with five metal prongs that they use to beat prisoners, that they used this strap against him, that the beatings frequently caused him to lose consciousness and resulted in deep wounds and permanent scars.
> He offered to prove that he was stripped to his waist and forced to work in the broiling sun all day long without a rest period.
> He offered to prove that on entrance to the prison he was forced to serve as a 'gal-boy' or female for the homosexuals among the prisoners.[8]

Notwithstanding Justice Douglas' impassioned dissent, the Court failed to provide the petitioner with a federal remedy, in effect, thwarting Mr. Woodall's effort to avoid extradition and retaliation by Alabama authorities. Such decisions were not unique to fugitives. In 1956, for example, the United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of petitioner George Atterbury's pro se complaint alleging systematic violent beatings, placement "in solitary confinement in 'the hole' for two months without clothes or blankets, and that for a period of five days he was deprived of any food."[9]

The district court had dismissed the complaint on its own motion, meaning that, in the court's view, no remedy existed even if all of Mr. Atterbury's allegations were true.[10]

In affirming this decision, the Court of Appeals stated: "We think it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[11]

Indeed, as of 1964, no court in the United States had ever required a prison to change its practices or conditions as they related to inmate well-being.[12] Beginning in the mid-1960s, however, federal judges started to intervene in the previously ignored area of prisoners' rights, fashioning a new set of inmate rights based upon habeas corpus, the Eighth Amendment, and other constitutional provisions.[13] This effort was facilitated by the passage of the Civil Rights Act of 1964, which allowed judges to hold prison administrators responsible for unconstitutional actions taken under state law.[14] Despite resistance by prison officials,[15] the proliferation of prison litigation was widespread: within a decade of the first conditions-of-confinement case, prisons in twenty-five states had been placed under comprehensive court orders. Indeed, judicial recognition of prisoners' rights violations led to comprehensive prison reform in a handful of states by the early 1980s, and posed a threat to other state prison administrations throughout the country. [16]

The federal courts that spearheaded these reforms were concerned with the organizational structure of prisons. That is, courts focused on wholesale institutional change rather than applying piecemeal bandages. These judges understood that securing a set of fundamental rights for prisoners required an understanding of the means that were available to reach that end as well as understanding to what extent those means could be manipulated.[17] The means turned out to be the restructuring of the prison organization itself. Bureaucratization – the creation of a centralized system with a consistent set of internal procedures and regulations – would both dismantle the broken system and effectively secure prisoners' rights.[18] Bureaucratic standards replaced warden autonomy. Minimum standards of care required minimum standards of professionalism. In turn, the bureaucracy protected prisoners' rights by providing transparency, accountability, oversight, and standardization in the prison system.[19] In case after case, judges brought about organizational reform by chipping away at the autonomy of local wardens and placing additional authority in the bureaucracy of the correctional departments.[20]

Federal courts created institutional standards throughout prisons nationwide largely without guidance or opposition from Congress.[21] Instead, judges relied upon the expertise of corrections professionals and sociologists, their own moral compasses, and other judges' decisions and remedial schemes to reform broken institutions. While both the procedural and the substantive aspects of judicial intervention took a variety of forms,[22] the common denominator was the application of standards adopted by professional associations that suggested minimum requirements for adequate inmate care.[23]

Whereas the doctrinal advances are numerous and impressive, the prison system's implementation record is mixed. Deliberate resistance and incompetence are partially to blame, but it is also important to recognize that the complexity of such a large organization reflects different goals, views, and needs among the various institutional actors – prison wardens, correctional administrators, and special masters.[24] Keeping in mind the conflicts of interest, lack of cooperation, difficulty in coordination, budgetary pressures, as well as the stubbornness that has, at times, characterized prison administration, it is unsurprising that implementing prison reform measures has been difficult.[25] Nevertheless, conditions in prisons are substantially better than they were prior to court intervention.[26] It is now widely

accepted that inmates should be free from torture and sadistic treatment, receive basic services and nutritious meals, and have the ability to voice complaints.

Yet still, the precise legal status of incarcerated individuals and the rights they retain remains somewhat ambiguous. The guiding principle put forth by the Supreme Court leaves considerable room for interpretation: "It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'"[27] Despite the ambiguities, it is clear that over the past forty years, prison litigation and the resulting judicial doctrine – not legislation – has served as the driving force behind the reforms which established and broadened inmate rights.[28]

B. The Ascendancy of Internal Grievance Procedures

As prisoners' rights litigation gained traction in the 1960s, so too did the idea that prisons should have some internal procedure to deal with inmate complaints. Two benefits in particular provided initial justification for the adoption of internal grievance mechanisms: the ability to reduce inmate violence and to reduce litigation.[29]

With conditions-of-confinement litigation threatening wardens' autonomy and proving quite costly, prison administrators recognized a need for handling disputes within the prison system before they reached the courts.[30] Indeed, there is arguably a causal relationship between the success of prisoners' rights litigation and universal adoption of inmate grievance procedures by correctional departments nationwide: internalizing the resolution of inmate complaints may have been a direct measure taken to curb otherwise successful litigation. As explained by the National Association of Attorneys General in 1976,

> An administrative grievance procedure might reduce prisoner litigation in two ways: (1) the courts, on the basis of doctrines of exhaustion or abstention, might defer to administrative remedies; (2) inmates might choose the more expeditious and efficient administrative procedure over litigation through the courts. Either, of course, would reduce the burden on Attorneys General's offices.[31]

Undoubtedly, as inmate litigation began to succeed, the call for internal grievance procedures became louder and more frequent.[32] In what would become a widely cited report, the President's Commission on Law Enforcement and Administration of Justice in 1967 "urged correctional agencies to establish just and effective procedures for dealing with prisoner grievances."[33] While implicitly accepting the "modern conditions" of overcrowding and the lack of adequate staff in American prisons, Chief Justice Burger recommended the nationwide adoption of internal grievance procedures in a 1970 speech to the National Association of Attorneys General:

> What we need is to supplement [judicial actions] with flexible, sensible working mechanisms adapted to the modern conditions of overcrowded and understaffed prisons ... a simple and workable procedure by which every person in confinement who has, or thinks he has, a grievance or complaint can be heard promptly, fairly and fully.[34]

Chief Justice Burger's advocacy for such procedures appears to have arisen out of a concern over increasing pressure on the federal docket.[35]

By the mid-1970s multiple government agencies had issued reports specifically advocating the adoption of internal procedures to handle inmate complaints.[36] In 1973 the National Advisory Commission on Criminal Justice Standards and Goals called for nationwide implementation of grievance mechanisms in a report on correctional facilities, stating, "[A]ll correctional agencies have not only a responsibility but an *institutional interest* in maintaining procedures that are, and appear to offenders to be, designed to resolve complaints fairly."[37] Throughout the literature, there appears to be a genuine concern for the fair and effective treatment of inmate complaints with the explicit hope that these procedures would both adequately address the complaints and simultaneously reduce litigation and increase the legitimacy of such procedures in the eyes of the courts.

As litigation increased during the 1970s, so did the adoption of internal dispute-handling mechanisms among federal and state departments of corrections.[38] As these procedures gained acceptance, the reasons for adopting them became more publicly available. A 1977 report by the Comptroller General of the United States listed the following justifications for the adoption of internal grievance procedures: promoting justice and fairness; providing opportunities for all inmates to voice grievances and receive official responses; reducing the amount of litigation; aiding management in identifying institutional problems; and reducing violence.[39] Congress weighed in on the issue by passing the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA),[40] which not only provided for grievance procedures in all federal prisons, but provided powerful motivation for states to adopt similar procedures by providing judicial discretion to hear cases that had yet to be exhausted by administrative methods.[41] By 1983, each of the fifty states had adopted some form of grievance procedures in their adult penitentiary systems.

While stated rationales for internally handling inmate complaints appear to have both the prisoners' and the prisons' interests in mind, the resulting implementation of grievance procedures may not produce a win-win situation. Because courts do, in fact, defer to administrative decisions[42] – as predicted by the National Association of Attorneys General in 1976 – internal grievance procedures guarantee not only that prisons get the first opportunity to rule on the legitimacy of inmate complaints, but perhaps also allow prisons to shape the law by defining the contours of the procedures that are reviewed by courts.[43]

II . Negotiated Governance and Cosmetic Compliance

Professor Kimberly Krawiec describes how, in a variety of legal settings, United States law reduces or eliminates liability for organizations that exhibit internal compliance structures – organizational procedures that presumably enforce specific norms or reduce the incidence of prohibited acts.[44] These compliance structures are increasingly employed as a cooperative model of governance between the regulator and the regulated, in which the regulated party negotiates with the regulator to determine the procedures that will produce the desired results. Under Krawiec's theory of negotiated governance, in certain circumstances the government will effectively transfer its legal and regulatory powers to an interested party so long as that party demonstrates that it has procedural or substantive policies in place to guarantee compliance with a given rule.

Commentators have traditionally discussed these methods of sharing power in the context of the relationship between government regulators and private actors. However, this conceptualization also applies to the sharing of power between branches of government – in the case at hand, between the judiciary and state executive agencies. Corrections departments, seeking to avoid judicially imposed fines and negative publicity, are eager to adopt policies and procedures that effectively reduce liability from inmate lawsuits.[45] Given the history of antagonism in prisoner rights litigation, which sets policy-making courts against recalcitrant wardens, prison grievance procedures can be viewed as a negotiated governance model in which courts agree to transfer their legal power to prisons that have enacted internal complaint-handling procedures.[46]

Krawiec identifies the forms common to internal compliance structures. Effective structures will contain a written code that is communicated to employees, a monitoring or auditing system designed to detect prohibited conduct, a system that allows reporting of violations, and high-level personnel within the organization who have responsibility for oversight of compliance with the written code. These features are all, to varying degrees, incorporated in most prisons' complaint-handling procedures.[47]

Krawiec demonstrates that although internal compliance structures are increasingly used by organizations and accorded deference by the courts, there is little evidence that such structures actually reduce the incidence of the targeted conduct.[48] Rather, it appears that these structures fail to deter undesirable conduct within organizations and instead serve as "window-dressing" that legitimizes the organization's behavior, enabling it to avoid legal liability.[49] As a result, Krawiec argues, there may be both under-deterrence of prohibited conduct and an increase in costly, ineffective, internal compliance mechanisms.[50]

In addressing the failure of mechanisms designed according to the established negotiated governance model to produce outcomes associated with effective governance, Krawiec analyzes the roles played by repeat players in the process, and examines how each player fills the legal gaps created by this devolution of regulatory power. In her analysis, Krawiec finds that there is room for opportunistic behavior, as actors tend to seek out resolutions aligned with their own interests. Over time, the gap-filling process produces outcomes most favorable to the parties that have the most influence.

Applying Krawiec's framework to the internal compliance structures of prisons, the process of handling prisoners' grievances can be seen as a series of repeated interactions in which a variety of groups with a stake in the governance process – politicians, prison administrators, prison guards, and inmates themselves – negotiate for interpretations of ambiguous law. Throughout this process, each set of actors has its own agenda that it desires to advance. These interested parties can be separated into two groups: those who embrace order and autonomy, and those who advocate change but lack the status and power necessary to institutionalize reforms.[51]

A. Order and Autonomy: Prison Guards, Prison Administrators, and Politicians

The groups that favor the status quo are formidable adversaries to change. Prison guards, in general, are critical to the successful implementation of reformist policies. Reform threatens the guards' normative commitment to authority, autonomy, and the desire to preside over the predictable and self-controlled operation of the prison. Prison guards

typically receive little training and are focused on their primary task of maintaining order. Although guards are the authority group with the best access to firsthand knowledge of prisoners' problems, they tend to have little or no formal access to high-level administrators. Guards are also likely to underreport negative information, such as the use of force against an inmate or the failure to follow procedures when depriving an inmate of his personal property, when providing that information might adversely affect their jobs.[52] Indeed, a "code of silence" often exists among guards when it comes to transmitting self-incriminating information up the hierarchical ladder. As a result, prison guards are often aligned against the policies and reforms requested by the inmates they oversee.

In some respects, prison administrators share similar motives. Administrators have significant power over management decisions within prisons; they sit at the top of the formal corrections bureaucracy and are responsible for setting policy, overseeing its execution, and implementing changes.[53] However, administrators generally share the custodial perspectives of the prison guards they manage, and largely disfavor organizational reform. The norms associated with prison administrators include the pursuit of status, autonomy and power; the desire to preserve their positions; and the desire to maintain the current form of prison bureaucracy. In general then, prison administrators tend to favor status-quo policies over reformist programs that may threaten their position within the system.

Politicians are also governed by norms and incentives that disfavor reform. On one hand, the public is largely ignorant of the conditions of prison confinement and routinely re-elects politicians who favor "tough-on-crime" approaches.[54] On the other hand, it is a costly undertaking for prisons to comply with new regulatory standards.[55] As a result, legislators and governors generally respond to public ignorance of prison conditions by opposing all reform initiatives and increases in funding unless they are intended to build additional prisons.[56] Together, these three groups – prison guards, high-level administrators, and politicians – create a powerful resistance to the types of reforms that courts have mandated in recent years.

B. Promoters of Change: Inmates and Reform-Minded Staff

Prison inmates embrace the goals of enhancing individual dignity and rehabilitation, and therefore plead for constitutionally recognized rights and reforms within correctional institutions.[57] Many of the substantive reforms brought about by court intervention have limited the discretion and level of autonomy of prison guards and officials, thereby enhancing inmates' rights. However, the institutional position of prisoners and their lack of social and political rights limit prisoners' role in promoting the institutional reform they seek.

Reform-minded prison administrators face equally daunting obstacles in affecting change within their prisons. A minority among prison administrators, these individuals tend to have training in social work, counseling, or other areas requiring strong interpersonal skills. In an establishment faced with budgetary constraints, preoccupied with authority and order, and filled with supervisors who espouse different ideologies, reform-minded individuals confront substantial resistance.

C. The Effect of Institutionalizing Rights in Organizational Settings

Through examination of the views of both the opponents and proponents of reform, Susan Sturm demonstrates that the combination of norms and incentives aligned with each interest group in the correctional setting results in organizational stasis. This conclusion is evident throughout the history of prison reform, as judicial decree, not action by the executive branch, the legislative branch, or from within the institution itself, has created recognition of inmates' rights.[58]

When courts defer to or transfer regulatory governance of inmate grievances to the prisons themselves, we can expect each group of stakeholders to engage in a process of repeated interactions in which each attempts to maximize its own interests.[59] With each new inmate grievance, prison staff must determine the nature of the complaint and the appropriate remedy, if any. To be sure, many inmate grievances are simple, routine matters that are quickly addressed to the satisfaction of all interested parties. But to the extent that inmate grievances touch upon less tractable issues, prison guards and administrators are likely to interpret ambiguities or gaps in the rules in ways that enhance their own self-interested position over that of the prisoner. As complaint handlers repeatedly address similar situations, these gaps are likely to be filled in ways that solidify the preferred policies of those in power. Over time the decisions made by grievance handlers serve a function similar to case law: they become the precedent by which claims are evaluated. Yet, self-interested prison staff and not impartial courts have developed the rules. Given Sturm's insights on the potential (or lack thereof) for each group to promote change through the recognition of inmate rights,[60] as well as Krawiec's insight that the gap-filling process produces outcomes most favorable to the parties that have the most influence, it appears that the model of negotiated governance as institutionalized by the inmate grievance system may systematically produce outcomes that diverge considerably from the trend of judicial recognition of inmate rights.[61]

In fact, this is the type of outcome that observers have demonstrated in connection with the adoption of internal compliance structures in the employment discrimination arena.[62] Lauren Edelman and other authors have written extensively about the problems of institutionalizing rights in organizational settings.[63] Focusing on corporate responses to anti-discrimination laws, Edelman and her colleagues have found that although businesses may be responsive to employees' complaints, the internal grievance procedures businesses adopt often serve the "window-dressing" function that Krawiec described.[64] This is because human resource departments tend to reinterpret legally defined rights through vague, subjective notions of justice, arbitrating employee grievances in forums that allow discontented employees the opportunity to express their feelings rather than to vindicate their rights. While there may be benefits associated with these exercises, such as greater flexibility and the ability to confer remedies not available in court, they typically deemphasize legal rights and fail to address and rectify the underlying causes of employee dissatisfaction.[65] Perhaps most worrisome, Edelman and her colleagues find that when employees, dissatisfied with arbitration proceedings, turn to litigation, courts often defer to the outcomes reached by companies that appear to have "effective" policies and procedures in place, without questioning the adequacy of the internal grievance process.[66]

The following inquiry applies Krawiec's and Sturms' insights to the internal grievance procedures at the California Department of Corrections, and examines the extent

to which such practices resemble the cosmetic compliance identified by Krawiec and found by Edelman in the employee rights context.

III. California's Experience

In order to understand the relationship between the internalization of grievance adjudication functions and its effect on inmates' rights, it is necessary to look closely at the organizational structure of the prison system. Because each state, as well as the federal government, has its own unique set of internal grievance procedures,[67] the task of surveying all correctional departments is beyond the scope of this Comment. In order to make this analysis possible, this Comment focuses instead on the prison system of one state: the California Department of Corrections and Rehabilitation (CDCR).[68] California serves as a representative model because it maintains the largest inmate population of any state, has extensive experience with major prison litigation, has undergone a substantial amount of organizational reform, and has clearly defined internal grievance procedures.

A. Litigation and Reform in the Golden State

The internal grievance procedures used in California prisons are rooted in the relatively recent history of prison litigation and the bureaucratization that followed from court directives. California remained free of major challenges to its prison system until the early 1980s. Beginning in 1983, however, prison administrators faced multiple conditions-of-confinement suits that required the prison system to reform basic living conditions in order to meet constitutional standards.[69] Litigation, organizational reform, and infrastructure renovation resulted in substantial costs to state taxpayers and the elimination of over 3,000 prison beds.[70] Consequently, the CDCR recognized the need for a new litigation management strategy designed to reduce the threat of future lawsuits. Institutional staff developed a set of system-wide standards based on a variety of sources: regulatory law, internal and external audit reports, environmental health surveys, prior litigation, and inmate appeals. The strategy worked; plaintiff's attorneys settled disputes by negotiation rather than litigation because of the CDCR's promise to implement these standards.[71]

Nevertheless, the CDCR was back in court just a few years later. The prison population explosion that began in the 1980s,[72] combined with a recession in the early 1990s, resulted in significant constraints on the Department's ability to provide constitutionally-mandated facilities to its inmates.[73] Furthermore, in addition to general conditions-of-confinement issues such as overcrowding,[74] new types of rights were being recognized by the courts: the right to safety and a general prohibition against guards' use of excessive force;[75] the right to receive basic medical and mental health care; [76] the right of prisoners with HIV to receive appropriate treatment;[77] and the right to have ADA-approved facilities and rehabilitation programs.[78] Despite these court-initiated reforms, the CDCR still struggles to meet constitutional standards. For example, in 2005, United States District Judge Thelton Henderson removed the entire realm of health care delivery in California state prisons from CDCR control, placing it under federal receivership.[79]

B. Current Grievance Procedures in California: The 602 Form

Like many other states that instituted internal grievance procedures in the early to mid-1970s, California adopted its prison grievance procedures in 1973.[80] The procedures are statutorily defined[81] and implemented entirely within the department itself.[82] Inmates may appeal any departmental decision, action, condition, or policy that they can demonstrate has an adverse effect upon their welfare by filing a CDCR Form 602 (Inmate/Parole Appeal Form).[83] The 602 grievance process is an administrative procedure that provides prisoners with an opportunity to have their grievances addressed directly at various levels of the CDCR administration. Inmates must exhaust the administrative appeals process before filing suit in state or federal court.[84] The regulations governing the process present a system of four levels of review: one informal level and three formal levels.

The first step in the 602 grievance process is for the inmate to lodge a complaint by completing an official CDCR 602 form, attaching all relevant documentation, and sending it to the appeals coordinator within fifteen days of the triggering event. The coordinator initiates an informal review, during which the prisoner must make an effort to solve the problem with the staff member most involved with that particular issue. The prison staff member has five working days to address the grievance.

If the inmate and staff member are unable to agree upon a resolution at the informal level, the inmate has fifteen days to appeal the staff member's decision. The fifteen-day time constraint is the same for each level of review. This appeal triggers the first formal level of review in which the prison appeals coordinator reviews the complaint and assigns the case to the appropriate supervisor or administrator. The supervisor interviews the inmate and investigates the complaint. The division head then provides a response to the grievant. The appeals coordinator has the option to bypass this first level of review if she decides the appeal issue cannot be resolved at the division head's level. Regulations require that the first level of review must be completed within thirty working days.

Upon appeal (or bypass) of the first level of review, the coordinator sends the case to the prison warden where it enters the second level of review. The warden is responsible for evaluating institutional policies, regulations, and procedures, and has twenty working days to return a decision to the inmate. If dissatisfied with the warden's decision, the inmate can appeal to the Director of the Department of Corrections for a third level of formal review. If the second level appeal challenges a California regulation, or a prison policy or procedure, the warden provides the inmate with a written evaluation and recommendation, with instructions to the prisoner to refer the appeal to the Director of the CDCR for a final review (the third formal level of review). The Director has sixty working days to respond to appeals at the third level of review. The Director's decision is final and exhausts all administrative remedies.

IV. How California's Grievance Procedures Compare with Formal Law

The theories of negotiated governance and cosmetic compliance that come from the sociology of law literature can be applied to the CDCR's internal dispute resolution process. As demonstrated above, California's internal complaint-handling procedures have parallels with the formal legal system. Both have formal filing procedures, an opportunity for the complainant to be heard, an adjudicator, and multiple levels of appeals. The internal

grievance procedures serve both as a method by which inmates may have their complaints addressed and as a buffer against actual litigation.

Although the legal literature helps to clarify why and how internal grievance procedures developed within prisons, it has not adequately described the effect of these procedures upon inmates' outcomes. The sociology of law literature suggests that informal grievance procedures will produce outcomes similar to those produced by formal law as long as a certain amount of equality exists between the parties.[85] However, as Sturm has shown, grievance procedures within correctional institutions involve disputants who are fundamentally unequal.[86] As a result, it is necessary to examine how complaint handling within prisons differs from complaint handling in courts, and, ultimately, what it means in relation to the concept of prisoners' rights.

A. The Four Dimensions of Internal Grievance Procedures

In evaluating the internal complaint-handling process in California prisons, I draw heavily upon the ideas and structure of several articles by Edelman with various coauthors.[87] In looking at the construction of Equal Employment Opportunity and Affirmative Action law within organizations, Edelman identifies four dimensions of internal complaint-handling procedures that may generate outcomes that differ from those produced by courts: (1) access to the dispute-handling forum; (2) procedural protections; (3) the use of law in decision-making; and (4) the nature of remedies that result from the procedure.[88] These four dimensions frame my inquiry into the internal grievance procedures in California prisons and their bearing upon inmates' rights.

1. Access to the Dispute-Handling Forum

Access to the dispute-handling forum is the crucial first step in resolving complaints. Obtaining a 602 form is relatively simple, even if an inmate is unfamiliar with the process. Every California prison is required to provide inmates with a law library, staffed by a librarian, which contains the most recent copies of the California Code of Regulations, the CDCR Departmental Operations Manual, and 602 forms. All prisoners, including those in solitary confinement, have library privileges. However, access to the prison library is restricted not only to certain hours of each day, but each inmate is usually limited to a specific number of weekly or monthly visits determined by demand and accessibility.

Unlike the state and federal legal forums, the statute of limitations under the 602 grievance process is particularly short – just fifteen days. Prisoners new to the internal complaint-handling process may not be able to file a grievance within the appropriate time frame for a variety of reasons. Deciding to take legal action is often a difficult choice to make; it can require a considerable amount of time to decide whether such action is the best approach for resolving a dispute. Inmates who fail to file within the fifteen-day period risk having their claim barred, as acceptance of such claims is left to the discretion of the appeals coordinator.[89] Given this strict filing deadline, CDCR inmates have little time to evaluate whether the situation will resolve itself, to consider alternatives, or to weigh the consequences of filing a grievance. Moreover, inmates must also be able to adequately

understand the 602 process and comply with what may seem like complex filing requirements, which may be especially daunting for prisoners with limited literacy.

For certain grievances, psychological inhibitors, such as fear of retaliation, may create intangible barriers to the internal grievance procedure. Prisoners may decide that lodging a formal complaint against another inmate would result in violence or exclusion from a social group. Alternatively, prisoners who have complaints against correctional officers may refrain from taking action because they do not wish to provoke those who have considerable power over many facets of their lives, including the ability to remove the inmate from general population into the more restrictive segregated housing unit. Similarly, prisoners concerned about their reputation within the institution may not want to be seen as troublemakers.

Several departmental guidelines regarding the 602 grievance process create structural barriers to the system. A grievant must follow each step of the appeals process according to CDCR regulations in order to proceed to the next level of review. The CDCR Departmental Operations Manual contains a section on identifying abuses of the grievance process and listing acceptable reasons for rejecting appeals. Inmate grievances may be rejected for a number of reasons, including: submitting more than two appeals within a seven day period; incorporating obscene statements in the appeal; failing to clearly identify the nature of the problem by including voluminous descriptions of the problem; or failing to file (or appeal) within fifteen days.[90]

It does appear that because access to the 602 process is, at least somewhat, readily available and because access is free of charge, inmates would be encouraged to use the system. Additionally, resolution of inmate appeals tends to take less time than formal litigation. The maximum amount of time for resolution of any 602 grievance, if both the inmate and prison official operate within time limits, is 150 days from the initial filing of the grievance.[91]

2. Procedural Protections

Procedural protections shape legal negotiations by reducing the effects of an imbalance of power between parties. They create fairer forums and help overcome bias. Prison inmates arguably have a special need for procedural protections in legal forums, as they have already lost many of their basic civil liberties. The level and nature of procedural protections within prison internal grievance procedures may affect prisoners' rights by allowing prisoners to overcome the inherently unequal position they occupy in the grievance process.

The CDCR 602 grievance process was created under the California Code of Regulations and the guidelines for its operation are stated in the CDCR's Departmental Operations Manual. It is immediately obvious that the prison itself establishes the rules under which it will be the respondent to an inmate's claim. The prison system dictates all aspects of the grievance process, from what type of complaint is admissible to the nature of its resolution. Thus, from its very inception, the CDCR's internal grievance process maintains the type of power imbalance that procedural protections are designed to overcome. Moreover, there is no independent third-party adjudicator in any of the levels of review in the internal grievance process. Beginning with the line staff and moving up through the organizational ranks to the appropriate manager, then warden, then CDCR

Director, the person who acts as arbiter is a vested party in the dispute. In effect, the defendant is judge. This structure is fundamentally in conflict with basic concepts of procedural fairness.

In sum, the lack of procedural protections potentially puts CDCR inmates at a disadvantage in a process defined and governed by their adversary. The structure of the internal grievance process can thus be seen as one that is less concerned with the legal rights and due process afforded to inmates and more concerned with resolving complaints in a manner agreeable to the CDCR.

3. Use of Law in Decision Making

Relying on the law or legal criteria in the complaint-handling process may produce outcomes that are more attentive to claims of rights. Courts are bound by the constraints of law, and thus derive their understanding of prisoners' rights from the United States Constitution and its Amendments, case law, and prevailing norms. As opposed to the formal legal process, the 602 grievance process does not require the arbiter to provide a decision articulated through a set of legal rules. Instead, CDCR staff may employ a variety of subjective measures in their attempt to partially invoke law in order to respond to the merits of an inmate's complaint.[92]

In general, the law appears to play a rather indirect role in the internal grievance procedures of the CDCR. Prison workers are trained to maintain order, not to understand the constantly evolving legal concepts relating to prisoners' conditions of confinement. Thus, complaint handlers are often unfamiliar with the law that would apply in a formal legal setting. Additionally, complaint handlers in prison tend to become inured to the constitutional values they are responsible for upholding, showing a "finely honed derision for inmate complaints."[93] This feeling is deeply imbedded in the intensely oppositional world of prison administration.[94] It is also widespread, as documented by sociologist James Jacobs: "Almost any discussion with administrators or top guards elicits the same invectives against the courts, which are said to be 'for the criminal,' 'naïve,' 'unsympathetic,' and 'ignorant' of the unique problems of administration in a maximum security prison."[95]

Instead of relying upon legal doctrines, complaint handlers may turn to their own conceptions of what constitutes fair treatment. Edelman indicates that complaint handlers in the employment context base decisions on their own philosophies of what constitutes procedural fairness: consistent treatment, protection from retaliation, and an opportunity to be heard.[96] Given inadequate training and lack of clear applicable standards, the same may be true in the correctional setting: prison staff may use subjective criteria in formulating fair treatment. But because complaint handlers may not fashion their resolutions based upon law, their decisions are unlikely to resemble those that are grounded in the legal process.[97] Formal legal forums generally require specific forms of redress for specific violations. Rather than providing these forms of redress, inmate claims are resolved based on the factual conclusions of prison staff and their own construction of the law or fairness.[98] Moreover, the general ambiguity of the law as it pertains to inmate complaints makes it difficult for CDCR staff – at any level – to evaluate claims based on established law.

Thus, it appears that CDCR complaint handlers may be less likely to base their decisions on legal rules and are more likely to be concerned with resolving the situation within the prison. Rather than deciding matters of law, CDCR officers are primarily concerned with maintaining order and containing potentially violent situations. As previously noted, the evolving constitutional standards relating to prisoners' rights were largely judicially crafted.[99] Writing in their chambers, judges retained a perspective both rooted in the law and removed from the extreme emotions and political power plays inherent to disputes arising within prison walls. By shifting adjudicative power to those closer to the controversy, the internal grievance process may elevate the prison's goals at the expense of the inmate's constitutional rights.

4. The Nature of Remedies

The nature of remedies available to prisoners under the CDCR 602 process may affect the forms of redress available to individual claimants as well as the living environment for other inmates. Remedies in the formal legal system include monetary compensation for damages, attorneys' fees, injunction against certain practices or the mandate for provision of others, and a public declaration that certain actions undertaken by or within the prison violate prisoners' rights. In contrast, remedies granted to prisoners under the prisons' internal grievance procedures are quite different from those granted in formal legal disputes; internal remedies do not include monetary compensation or public declarations of wrongdoing. Nor, presumably, do they result in the wide-scale change of policies and practices that occur as a result of court orders.[100] Moreover, without a court order requiring the legislature to provide funds for the requested change in procedure – say, compliance with the Americans with Disabilities Act or the provision of more beds to alleviate overcrowded conditions – responses to individual claims may include attempts to accommodate the needs of a single inmate, but can do little to initiate changes that affect larger prisoner populations.

In formal courts of law, on the other hand, two parties engage in what can often be seen as a zero-sum game. If one party wins, there is a public declaration that that party has won and that the other party has lost. In a prisoners' rights case, for example, this could mean that a court enforced a specific civil right and declared that the prison engaged in unlawful behavior. Because courts rely upon precedent, over time cases become integrated into a set of rules that can be consistently applied. In internal complaint-handling procedures, however, there are no such declarations. Complaint handlers may very well value consistency, but consistency in the treatment of inmates' claims may not necessarily result in resolutions that are consistent with the law.[101]

On the other hand, complaint handlers may be able to provide remedies in situations where formal courts simply cannot act. In courts of law, remedies are available only where there has been a clear infraction of the law. Without doubt, one of the apparent strengths of the 602 process is its ability to deal with issues that are not cognizable as legal claims – the request to be moved away from a disliked bunkmate or a complaint regarding the television programming, for example. Resolution of these disputes by prison staff may include relocating an inmate or arranging more news programming. In such circumstances, inmates may be provided with a form of redress unavailable in the formal legal system. Even many serious complaints may not amount to a deprivation of legal rights under section 1983 of

the United States Code.[102] For example, an inmate "may complain of genuine discomfort when a prison doctor prescribes only aspirin for a painful skin rash, yet such incomplete medical treatment would not violate the limited constitutional right against correctional officials' deliberate indifference to medical needs."[103] Here, too, a prisoner might be able to find relief through the 602 process – perhaps in the form of another visit to the doctor who provides an antibiotic cream – where no comparable resolution could be offered in a traditional legal forum. Most importantly, the inmate grievance process offers the ability to provide rapid responses to minor issues that would otherwise take years to work their way through the court system. Prison officials know the capabilities and resources of the prison, and are often able to provide flexible and responsive remedies that may not be available by court order.

But while complaint handlers are eager to resolve disputes, they also want to avoid creating a system of rewards for inmates who bring complaints against the prison. Corrections officials believe that settling with inmate plaintiffs in traditional courts encourages more filings; it seems logical that this belief applies to the internal complaint-handling process as well.[104] Accordingly, it is not clear to what extent complaint handlers provide remedies in situations where formal courts would not. An empirical evaluation of inmate complaints could provide insight into this question.

Finally, remedies provided to individuals in formal legal forums may lead to institutional changes, either through the regulatory process or through heightened awareness of inmates' rights. But because internally handled complaints are likely to provide remedies that are private and discreet, it is unlikely that internal complaint-handling procedures will lead to global changes in institutional policies.

B. Prison Internal Grievance Procedures Are Ensconced in the Law

Although grievance procedures may be a poor substitute for the hard-edge of formal law, their use is not only ubiquitous, but also widely acknowledged and relied upon in formal legal arenas. With the passage of the Prison Litigation Reform Act of 1995 (PLRA), Congress signaled its deference to prison internal compliance structures by requiring inmates to exhaust all grievance procedures within their correctional facility before being permitted to file a cause of action in federal court.[105] The public sentiment behind the act was not to guarantee effective resolution of inmate claims, but rather to limit inmates' access to the courts.[106] In addition to the exhaustion requirements,[107] PLRA imposes filing fees on even indigent inmates,[108] rejects claims of mental or emotional injury without physical injury,[109] limits damages and attorney fees,[110] and contains a "three strikes" clause that severely limits a prisoner's ability to file a complaint if a court has dismissed three previous complaints because a claim was frivolous, malicious, or did not state a proper claim.[111] PLRA worked as intended: in just six years, inmate filings decreased by forty-three percent, notwithstanding a simultaneous twenty-three percent increase in the incarcerated population.[112]

PLRA's requirement that inmates use internal grievance procedures has been upheld by the Supreme Court.[113] Federal courts have found that California inmates, in accordance with PLRA, must exhaust CDCR grievance procedures before filing in federal court.[114] Courts are also likely to defer to the decisions rendered by prison administrators who review 602s.[115] Moreover, numerous federal court decisions have deferred to the

outcomes of the prison's grievance procedures despite an inmate's persistence in asserting that the grievance system failed to provide relief for his claim.[116]

PLRA requirements may also have the perverse effect of drawing out costly litigation. Take the example of California inmate Ralph G. Ellison, who filed a pro se complaint in February 2001 alleging that he fell out of his upper bunk during a seizure and fractured his shoulder after two correctional officers refused to honor his lower bunk request "because of a seizure disorder."[117] Despite finding that Mr. Ellison's allegations stated cognizable section 1983 claims against the officers for deliberate indifference to his safety, Mr. Ellison's complaint was dismissed by a federal court in May 2003 for failure to exhaust administrative remedies. The court found that Mr. Ellison exhausted his administrative grievances within the CDCR with respect to one officer, but not the other.[118] As a result, Mr. Ellison must begin anew the process of filing an internal grievance against both officers. Given that the grievance relates to an issue now much older than 15 days, the claim may be immediately dismissed on that technicality. If reviewed, Mr. Ellison must wait as his claim winds through departmental staff, and then, once exhausted, he may file another complaint in federal court, requiring the CDCR to expend yet more resources to contest the new complaint.

C. Why Grievance Procedures Are Inadequate Substitutes for Courts

Although internal grievance procedures in prisons have in many ways replaced courts in addressing inmate claims, prison grievance systems and courts do not appear to produce similar outcomes. While retaining some parallels to formal courts, the CDCR 602 grievance procedures dramatically alter the focus of the complaint process from one concerned primarily with the declaration of rights and wrongdoings to one focused on a prison's organizational goal of resolving disputes quickly and to its own advantage. As inmates have limited rights to begin with, the grievance procedure has the potential to further organizational dominance over many aspects of inmate life.

By entrusting prison staff to fill the gaps of unclear laws, the internalization of grievance procedures allows a prison, traditionally regulated by statute, to become the regulator itself. In this sense, the internal grievance procedures of the CDCR can be seen as an internal compliance structure – an institutional form of negotiated governance. The danger of cosmetic compliance Kimberly Krawiec revealed in other institutional settings may also be present in the prison's internal grievance system.[119] Furthermore, the system not only fails to deter particular forms of constitutionally unlawful conduct within the prison walls, but also provides a sense of legal legitimacy that may limit court-imposed liability.

To be sure, some aspects of the CDCR grievance process may be beneficial to inmates: access to the 602 process is fairly simple; it often provides for the quick resolution of disputes; it offers inmates a chance to be heard; and it has a potential for providing remedies not available in formal courts. Furthermore, it aids the goal of smooth prison operations.

Yet, in the areas in which the 602 grievance process differs from formal legal proceedings, it may be detrimental to inmates' rights. Although barriers to access, the absence of legal criteria in decision making, and lack of traditional remedies all contribute to the erosion of prisoners' rights in the internal dispute-handling process, special attention

should be given to the lack of procedural protections. A dispute resolution process in which the State defines the rules of the process and then becomes both a party in the dispute and the adjudicator violates basic notions of procedural fairness. Complaint handlers have a patent stake in resolving complaints with the interests of their employer in mind. Such inherent bias in the system is more than problematic, as stated by Lon Fuller: "Obviously, a strong emotional attachment by the arbiter to one of the interests involved in the dispute is destructive of that participation."[120]

Even discounting career ties to their employer, prison personnel are not disposed to act in the capacity of impartial complaint handlers. As Anne Chih Lin notes: "Prisoners are confined involuntarily, and the prison staff are the ones keeping them there. The resulting bitterness, resentment, wariness, and contempt would seem to preclude the trust and mutual respect necessary for effective ... counseling."[121] In each step of the 602 grievance process, it is common for both parties to look upon each other with skepticism and distrust.[122] In contrast to a traditional legal forum, where an unbiased arbiter applying the rule of law mediates between adversarial parties, the CDCR complaint-handling process lacks a neutral third-party adjudicator at every stage of review.

How, then, do we describe what happens to the common notion of rights in the CDCR grievance process? Under a harsh light, these rights can be viewed, as Edelman has described employment-opportunity rights, as "subsumed under managerial goals," or "transformed" or "reshaped" into managerial interests.[123] Alternatively, considering the lack of familiarity with traditional legal criteria, rights could be regarded as "neglected" through ignorance. Taking into account the adversarial nature of the complainant to the arbiter, rights are sometimes likely to be "suppressed." In all of these situations, however, Edelman's theory holds: complaint handlers may frame the dispute as something other than a claim of rights.

By failing to define conflicts as rights-based disputes, internal complaint handlers broaden the scope of possible resolutions. In a more benign light, providing remedies in this fashion may lead to successful problem resolution. Yet, this type of resolution, unlike that provided by a court, is unlikely to result in changes to the institutional practices that brought about the initial complaint.

Conclusion

This Comment has focused on how the hard edge of law becomes blunted when inmate grievances are heard and resolved by de facto adversaries. Looking at the origins and structure of the internal complaint process, there can be little doubt that these grievance procedures were designed at least in part to maximize the interests of correctional departments. At the same time, requiring traditional courts to provide initial review of all inmate claims would be prohibitively costly, time-consuming, and would deprive inmates and institutions the flexibility sometimes needed to address minor problems.

How then can prisons improve upon their grievance procedures? Critics have offered many proposals; examining the strengths and weaknesses of each is beyond the scope of this work.[124] Nonetheless, common to almost all the proposals is the need for a neutral arbiter in the grievance process. The recommendation for an impartial, disinterested adjudicator is not new. The use of a government institution such as an ombudsman to protect the interests and rights of citizens against the tyranny of a powerful bureaucracy has

existed since Roman times.[125] Architects of prison grievance systems nationwide must have been aware of the possibility for designing a system operated by a neutral party. Indeed, perhaps guided by Professor Louis L. Jaffe's influential series of articles on judicial review printed by the Harvard Law Review, in which he advised that "[t]he guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system,"[126] the majority of recommendations and guidelines issued in the late 1960s and throughout the 1970s highlighted the importance of neutrality.[127]

Nevertheless, only a handful of jurisdictions in the United States, including Hawaii, Iowa, and Nebraska, employ independent ombudsmen to handle inmate grievances.[128] Several states, such as California, maintain ombudsmen offices. However, these offices lack true independence because they are organizationally lodged within and responsible to the state correctional department.

Recently, calls for procedural impartiality in the handling of inmate complaints have resurfaced. None is more persuasive than the plea from Senior Judge Arthur L. Alarcon of the United States Court of Appeals for the Ninth Circuit. Judge Alarcon advocates the use of an ombudsman completely independent of the correctional department to investigate inmate claims and determine "whether the administrative action under investigation is unlawful, unreasonable, unjust, oppressive, improperly discriminatory, factually deficient, or otherwise wrong."[129] Alarcon has gone so far as to draft proposed legislation for an independent California prison ombudsman, arguing that such a body will enhance confidence and integrity in the system, decrease litigation, reduce costs, more responsively address inmate complaints, and provide the CDCR with effective guidance as to how to comply with constitutional standards. Similarly, a recent proposal by Andrea Jacobs in the *California Western Law Review* posits that the investigation and adjudication of inmate claims by an independent ombudsman agency rather than the correctional department itself will more effectively and efficiently secure the constitutional rights of inmates.[130]

How can an independent ombudsman mitigate the problems inherent in internal grievance procedures? First, an ombudsman trained in principles of correctional management and case law may be able to provide relief that more closely resembles outcomes that would be seen if the dispute was tried in court. An impartial organization would foster confidence that inmate complaints would be heard and judged fairly. Moreover, a neutral arbiter could more effectively address and resolve inmate complaints, especially given the repeat-actor power dynamics presented by the intersection of Sturm and Krawiec's theses. Rather than self-interested officials wielding power subjectively, an independent agency staffed by neutral magistrates, or complaint handlers familiar with the relevant law, could operate under legally-recognized norms of fairness, justice, efficiency, and impartiality.

The administration of grievances by an outside ombudsman would help overcome the two weaknesses that Krawiec identifies with negotiated governance: the under-deterrence of misconduct and the operation of costly but ineffective compliance structures. Moreover, an independent agency could work with professional administrators within the Attorney General's Office and within the department of corrections to make suggestions to reform the types of practices that courts have found unconstitutional.

The ombudsman could also more effectively channel deserving claims into federal court. On the other hand, an independent ombudsman agency could provide additional

flexibility in responding to complaints that could stave off expensive litigation costs. For instance, employing registered nurses within the ombudsman office could reduce health care litigation by effectively screening and responding to inmate complaints before they end up in court. The additional resources required to fund such an agency would be justified by the fact that the resolution of inmate grievances would be more effective, and thus, perhaps, less costly in the long run. Most importantly, however, such an agency would more securely guarantee inmates fair access and review of their complaints.

Judge Alarcon's proposed legislation for an independent ombudsman in California has little chance of adoption, as the governor and state legislature have shown little interest in true reform. Similarly, lacking political capital, inmates nationwide are unlikely to have the capacity to initiate legislation instituting fair grievance procedures. Until our elected leaders show true leadership in the area of prison administration, the courts must oversee and attempt to correct the mismanagement that has resulted in the court supervision of prison operations over the past four decades.

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1. *See* Michel A. Foucault, Discipline and Punish: The Birth of the Prison 30 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing inmate revolts "against an entire state of physical misery that is over a century old: against cold, suffocation and overcrowding, against decrepit walls, hunger, physical maltreatment" as well as revolts against the increasingly modern "model prisons, tranquilizers, isolation, [and] the medical or educational services").
2. For example, the Pennsylvania Prison Society has been active in prison reform efforts since 1787. *See* Norman Johnston, *Prison Reform in Pennsylvania*, http://www.prisonsociety.org/about/history.shtml.
3. S*ee* Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State (1998).
4. *See generally* Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 Pace L. Rev. 433 (2004).
5. "Cosmetic compliance," a concept describing procedural safeguards that have only the appearance of complying with legal or legislative requirements, is borrowed from Professor Kimberly Krawiec. *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487, 489-90 (2003).
6. *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979). In *Bell*, the U.S. Supreme Court stated that the federal courts have recently "discarded this 'hands-off' attitude and have waded into this complex arena." *Id.* The Court continued, "[t]he deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems." *Id.*
7. *See* 344 U.S. 86 (1952). *See also, e.g.*, *Dye v. Johnson*, 338 U.S. 864 (1949) (similarly denying a habeas corpus petition by a fugitive prisoner from Georgia who alleged that his confinement in Georgia amounted to cruel and unusual punishment).
8. *Sweeney*, 344 U.S. at 91-92 (Douglas, J., dissenting).
9. *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953, 954 (7th Cir. 1956). The petitioner also claimed he had "been denied mail including a copy of the constitution of Illinois sent to him at his request by the Secretary of State." *Id.*
10. Feeley & Rubin, *supra* note 3, at 30.
11. *Atterbury*, 237 F.2d at 955 (quoting *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1954).
12. Feeley & Rubin, *supra* note 3, at 13.

13. *See Courtney v. Bishop*, 409 F.2d 1185 (8th Cir. 1969); *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968); *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965). These three cases represent "the very first cases in which judges gave serious and sustained attention to the general conditions in state prisons." Feeley & Rubin, *supra* note 3, at 57. For a thorough history of this transformation, see generally Feeley & Rubin, *supra* note 3.

14. Feeley & Rubin, *supra* note 3, at 159.

15. Fred Cohen, President's Comm'n on Law Enforcement & Admin. of Just., Legal Norms in Corrections, 102 (1967) ("Prison officials, in resisting or restricting these claims, generally take the position that these are matters of internal administration over which the courts have little or no control.").

16. *See, e.g., Rhodes v. Chapman*, 452 U.S. 337 (1981) (Ohio); *Ruiz v. Estelle*, 688 F.2d 266 (5th Cir. 1982) (Texas); *Newman v. Alabama*, 578 F.2d 565 (5th Cir. 1978) (Alabama); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971) (Arkansas).

17. Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 Yale L.J. 513 (1980).

18. Feeley & Swearingen, *supra* note 4, at 455-56.

19. *Id.* at 466-75. For a history of similar transformations specifically taking place in the Texas Department of Corrections, see also Ben M. Crouch & James W. Marquart, An Appeal to Justice (1989).

20. Court-ordered reform was widely perceived as an affront to state sovereignty as well as the autonomy of prison administrators. *See* Christopher E. Smith, *The Governance of Corrections: Implications of the Changing Interface of Courts and Corrections*, 2 Crim. Just. 113, 126 (2000) ("Correctional institutions could no longer operate quietly, according to the whims and predilections of individual wardens. States could no longer run prisons and jails according to their own values and for their own convenience.").

21. Feeley & Rubin, *supra* note 3, at 167-68.

22. *See* Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. Pa. L. Rev. 805, 848-61 (1990).

23. *See* Feeley & Swearingen, *supra* note 4, at 443-50 (describing courts' use of standards promulgated by institutions such as the American Correctional Association, the National Institute of Corrections, and the American Bar Association's Standards for Criminal Justice project).

24. Resistance was so widespread that Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA) in 1980, authorizing the use of federal resources to challenge prison conditions that exist "pursuant to a pattern or practice of resistance" by state officials and to correct "egregious or flagrant" violations that "deprive [inmates] of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ...." Pub. L. No. 96-247, § 4, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997a(a) (2000)).

25. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428, 434 (1977).

26. *See* Feeley & Swearingen, *supra* note 4, at 433.

27. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)) (substitution in original). In *Turner*, the U.S. Supreme Court held that inmates retain the fundamental right to marry, even though, "like many other rights, [it] is subject to substantial restrictions as a result of incarceration." *Id.* at 95-96.

28. Because inmates lack political power, litigation has been the primary method to secure prisoners' rights. *See* Wayne N. Welsh, Counties in Court: Jail Overcrowding and Court-Ordered Reform (1995).

29. *See, e.g.*, J. Michael Keating, Jr., Nat'l Inst. of Law Enforcement & Crim. Justice, Prison Grievance Mechanisms Manual 16 (1979) ("The reason most cited in the general literature for the obvious interest of administrators in having grievance mechanisms is a desire to avoid violence and litigation."); Nat'l Ass'n of Att'ys Gen., Prison Grievance Procedures 2 (1976) ("The two major benefits to be derived from the introduction of an inmate grievance procedure are: (1) the effect on the institution, by creating a more stable and rehabilitative atmosphere; and (2) the effect on litigation, by reducing the number of cases."). Much of the concern over prison violence and stability arose directly from the 1971 Attica prison riots. Based in part upon prisoners' demands for better living conditions, the riots left 32 inmates and 11 state employees dead. *See* Tom Wicker, *Attica's Forgotten Victims*, N.Y. Times, Sept. 23, 2000.

30. *See* J. Michael Keating, Jr. et al., Nat'l Inst. of Law Enforcement & Crim. Justice, Grievance Mechanisms in Correctional Institutions 3-4 (1975) (stating that the need for administrative responsiveness to inmates' grievances arose in response to institutional violence and the courts' abandonment of the "hands-

off" attitude towards prisoners' claims). Internal inmate grievance procedures were uncommon during the "hands off" era. *Id.*

31. Nat'l Ass'n of Att'ys Gen., *supra* note 29, at 4.

32. This is not to say that proponents of such policies did not have inmates' interests in mind. As discussed *infra*, many of the calls for the adoption of grievance procedures came from reform-minded administrators and national criminal justice standards-making organizations, both of which were committed to providing fair and effective mechanisms for addressing inmate complaints.

33. J. Michael Keating, Jr. et al., *supra* note 30, at v.

34. Fed. Judicial Ctr., Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts 29 (1980) (quoting Chief Justice Warren E. Burger, Speech to the National Association of Attorneys General in Washington, D.C. (Feb. 8, 1970)).

35. *See Procunier v. Martinez*, 416 U.S. 396, 405 n.9 (1974); Warren E. Burger, Report on the Federal Judicial Branch-1973, 59 A.B.A. J. 1125, 1128 (1973); J. Michael Keating, Jr. et al., Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions (1975). This feeling was widely held. The length of time and the resources required to pursue a case through the courts, the continued reluctance of judges to deal with the problems that do not rise to constitutional dimensions, and the difficulty of enforcing court orders in closed institutions all led to growing disillusionment with the judicial process as the primary vehicle for resolving prisoners' grievances.

36. *See, e.g.*, J. Michael Keating, Jr. et al., *supra* note 30; Nat'l Ass'n of Att'ys Gen., *supra* note 29.

37. Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections (1973) (emphasis added).

38. *See* J. Michael Keating, Jr. et al., *supra* note 30, at 3-4 (identifying the adoption date for sixteen surveyed systems: Federal Bureau of Prisons (1974); California (1973); Connecticut (1973); Illinois (1973); Iowa (1972); Kansas (1972); Maryland (1971); Minnesota (1972); New Jersey (1974); Ohio (1972); Oregon (1971); Rhode Island (1972); South Carolina (1972); Washington (1969); Wisconsin (1972)).

39. U.S. Gen. Accounting Office, Grievance Mechanisms in State Correctional Institutions and Large-City Jails, Report of the Comptroller General of the United States, app. I (1977).

40. Pub. L. No. 96-247, § 2, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997 (2000)).

41. Samuel Jan Brakel, *Ruling on Prisoners' Grievances*, 8 Am. B. Found. Res. J. 393, 394 (1983).

42. *See Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("Prison administration is, moreover, a task that has been committed to the responsibility of [the legislative and executive] branches. ... Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate prison authorities.").

43. *See* Fed. Judicial Ctr., *supra* note 344, at 29.

44. *See* Krawiec, *supra* note 5, at 487.

45. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1681-82 (2003). *See also supra* notes 29-30 and accompanying text.

46. *See* Feeley & Swearingen, *supra* note 4, at 436-39.

47. For a description of the extent to which these elements are present in the grievance procedures of sixteen surveyed institutions, see J. Michael Keating, Jr. et al., *supra* note 300, at 3-4. They are also contained in the California Department of Corrections and Rehabilitation's internal grievance procedures. *See infra* Part III.

48. *See* Feeley & Swearingen, *supra* note 4, at 491-92.

49. *Id. See also* David M. Adlerstein, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 Colum. L. Rev. 1681, 1694 (2001) ("Correctional administrators are largely cognizant of the benefits of effective grievance procedures, including the ... improvement of the facility's credibility with courts ....").

50. *See* Krawiec, *supra* note 5, at 491.

51. *See* Sturm, *supra* note 22, at 816.

52. *Id.* at 835.

53. *See* Sturm, *supra* note 22, at 837.

54. *See, e.g.*, Shadd Maruna & Anna King, *Public Opinion and Community Penalties*, *in* Alternatives to Prison 83, 86 (Anthony E. Bottoms et al. eds., 2004).

55. Neil M. Singer, *Economic Implications of Standards for Correctional Institutions*, 23 Crime & Delinquency 14 (1977) (finding that compliance with standards usually raises costs by at least 50% over the previous set of policies).

56. *See* Sturm, *supra* note 22, at 823.

57. *Id.* at 824.

58. *See supra* Part I.

59. *Cf.* Krawiec, *supra* note 5, at 494.

60. *See supra* note 57 at 812-15, 825, 827 and accompanying text.

61. *See supra* note 50 at 494 and accompanying text.

62. *See* Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 Law & Soc'y Rev. 497 (1993) [hereinafter Edelman et al., *Internal Dispute Resolution*].

63. *See id.*; Lauren B. Edelman & Stephen M. Patterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 Research in Social Stratification & Mobility 107 (1999) [hereinafter Edelman & Patterson, *Symbols and Substance*]; Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 Ann. Rev. Soc. 479 (1997); Lauren B. Edelman, Christopher Uggen, & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 Am. J. Soc. 406 (1999) [hereinafter Edelman et al., *Endogeneity*].

64. *See generally* Edelman et al., *Endogeneity*, *supra* note 63.

65. *Id.* at 503-04.

66. *See* Edelman et al., *Endogeneity*, *supra* note 63, at 408-09, 447.

67. *See supra* note 41 and accompanying text.

68. In 2005 the California Legislature approved SB 737, which reorganized the structure of the California Department of Corrections (CDC) and renamed it the California Department of Corrections and Rehabilitation (CDCR). This comment uses the current acronym, "CDCR," to refer to the Department of Corrections, past and present.

69. *See, e.g.*, *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984), *aff'd*, 801 F.2d 1080 (9th Cir. 1986) (declaring general conditions of confinement in segregated lock-up units at San Quentin, Folsom, Soledad, and Deuel Vocational Institute to be unconstitutional); *Deukmejian v. Super. Ct.*, 191 Cal. Rptr. 905 (Cal. Ct. App. 1983) (finding conditions in the general population units at San Quentin unconstitutionally cruel and unusual).

70. Anthony C. Newland, Managing Prison Conditions-of-Confinement Litigation: Lessons for California Administrators 131 (1989) (Ph.D. Thesis, Golden Gate University).

71. *Id.* at 145.

72. California's prison population has increased over 500% over the past twenty-five years. *See Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *3 (N.D. Cal. Oct. 3, 2005).

73. Newland, *supra* note 70, at 150.

74. *See, e.g.*, *Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995); *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994); *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1993).

75. *See Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

76. *See, e.g., id.*; *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995). *See also* cases cited *supra* note 74.

77. *See, e.g.*, cases cited *supra* note 74.

78. *See, e.g.*, *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997); *Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997).

79. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *3 (N.D. Cal. Oct. 3, 2005).

80. *See* J. Michael Keating, Jr. et al., *supra* note 30, at 3-4.

81. Cal. Code Regs. tit. 15, § 3084.1(a) (2008).

82. Cal. Dep't of Corr., Operations Manual § 54100.4 (1995) *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html.

83. Cal. Code Regs. tit. 15, § 3084.1(a) (2008).

84. There was no exhaustion requirement prior to 1980. *See* Samuel Jan Brakel, *Administrative Justice in the Penitentiary: A Report on Inmate Grievance Procedures*, 7 Am. B. Found. Res. J. 111, 132 (1982). CRIPA provided federal judges with discretionary authority to require exhaustion prior to hearing an inmate's claim. 42 U.S.C. § 1997e(a) (1988) (codified as amended at 42 U.S.C. § 1997e (2000)). The Prison Litigation

Reform Act of 1995 (PLRA) modified CRIPA, making exhaustion of administrative remedies mandatory prior to resolution in a federal court. Pub. L. No. 104-134, 1110 Stat. 1321 (1996) (codified at 42 U.S.C. § 1997e(a) (2000)).

85. Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Employers' Handling of Discrimination Complaints: The Transformation of Rights in the Workplace*, 27 Law & Soc'y Rev. 497 (1993).

86. *See* Sturm, *supra* note 22.

87. *See* articles cited *supra* notes 62-63.

88. Edelman et al., *Internal Dispute Resolution*, *supra* note 62, at 508-09.

89. Cal. Dep't of Corr., Operations Manual § 54100.4, *supra* note 82. Because of the exhaustion requirements of the PLRA, a claim found to be barred through the 602 grievance process is likely to be barred in court.

90. *Id.* § 54100.8.1; Cal. Code Regs. tit. 15, § 3084.3 (2008).

91. Cal. Dep't of Corr., Operations Manual § 54100.12, *supra* note 82.

92. *See* Schlanger, *supra* note 45, at 1670.

93. *Id.* at 1671.

94. *See* Brakel, *supra* note 84, at 132 (describing Illinois correctional officers as having "considerable negativism in attitude toward the [grievance] procedure").

95. James B. Jacobs, Stateville 107 (1977).

96. *See* Edelman et al., *Internal Dispute Resolution*, *supra* note 62, at 513-15.

97. Indeed, "[m]any correctional officers lack the experience or educational background to construct an applicable, concise, or understandable response to a grievance." Adlerstein, *supra* note 49, at 1696.

98. *See* Schlanger, *supra* note 45, at 1670.

99. *See supra* Part I.

100. As discussed *supra* Part I, courts tend to be the driving force behind system-wide change.

101. *Cf.* Edelman et al., *Internal Dispute Resolution*, *supra* note 62, at 514.

102. 42 U.S.C. § 1983 ("Every person who, under color of any statute ... subjects, or causes to be subjected, any ... person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.").

103. *See* Smith, *supra* note 20, at 140.

104. *See* Schlanger, *supra* note 45, at 1617-18.

105. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.); *see also* H.R. 3019, 104th Cong. (1996).

106. *See* Schlanger, *supra* note 45, at 1558-59.

107. 42 U.S.C. § 1997e(a) (2000).

108. 28 U.S.C. § 1915(b) (2000).

109. 42 U.S.C. § 1997e(e) (2000).

110. *Id.* § 1997e(d) (2)-(3).

111. 28 U.S.C. § 1915(g) (2000).

112. *See* Schlanger, *supra* note 45, at 1559-60.

113. In *Booth v. Churner*, 532 U.S. 731 (2001), the Supreme Court held that inmates must exhaust administrative remedies, regardless of the relief offered through administrative procedures. Despite this ruling, the Ninth Circuit has held that an inmate has no constitutional right to a prison grievance procedure. *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) ("There is no legitimate claim of entitlement to a grievance procedure.").

114. *See*, *e.g.*, *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997).

115. *See Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate prison authorities."); *Gerber v. Hickman*, 291 F.3d 617, 626 (9th Cir. 2002) (en banc) (Tashima, J., dissenting) (noting that "the Warden's interpretation of the regulation is entitled to deference"); *People v. Goodloe*, 4 Cal. Rptr. 2d 15, (Cal. Ct. App. 1995) (granting the Department of Corrections' interpretation of the Penal Code "great weight," unless clearly erroneous or unauthorized); *In re Semons*, 256 Cal. Rptr. 641 (Cal. Ct. App. 1989) (applying same principle to the warden's and the Department of Corrections' interpretation of a regulation).

116. *See*, *e.g.*, *Alexandroai v. Cal. Dep't of Corr.*, 985 F. Supp. 968 (N.D. Cal 1997); *Buckley v. Cal. Dep't of Corr.*, No. C 01-1975 SI (PR), 2001 U.S. Dist. LEXIS 7577 (N.D. Cal. May 30, 2001); *McCoy v. Scott*, C 98-2190 THE (PR), 1999 U.S. Dist. LEXIS 940 (N.D. Cal. Feb. 1, 1999).

117. *Ellison v. Cal. Dep't of Corr.*, No. C 02-1393 CRB (PR), 2003 U.S. Dist. LEXIS 8545, *1 (N.D. Cal. May 19, 2003).

118. *Id.* at *5.

119. *See* Krawiec, *supra* note 5, at 491.

120. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 391 (1978).

121. Ann Chih Lin, Reform in the Making 5 (2000).

122. *See* Brakel, *supra* note 84, at 127.

123. *See* Edelman et al., *Internal Dispute Resolution*, *supra* note 62, at 515.

124. *See, e.g.*, Arthur L. Alarcon, Essay, *A Prescription for California's Ailing Inmate Treatment System: An Independent Corrections Ombudsman*, 58 Hastings L.J. 591 (2007); Matthew Silberman, *Dispute Mediation in the American Prison: A New Approach to the Reduction of Violence*, 16 Pol'y Stud. J. 522 (1988); Lance Tibbles, *Ombudsman for American Prisons*, 48 N.D. L. Rev. 383 (1972); 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 (2004); U.S. Ombudsman Ass'n, Governmental Ombudsman Standards 8 (2003), *available at* http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf.

125. In his prescription for a neutral ombudsman to review California inmate grievances, U.S. Court of Appeals Senior Judge Arthur Alarcon traces the use of an ombudsman from ancient Rome through 19th Century Sweden up to the present. Alarcon, *supra* note 124, at 597-98.

126. Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 406 (1958).

127. *See, e.g.*, Nat'l Advisory Comm'n on Crim. Just. Standards & Goals, Report on Corrections 56 (1973) (Standard 2.14 states that the "entity responsible for receiving and investigating grievances ... preferably should be independent of the correctional authority.").

128. Alarcon, *supra* note 124, at 599.

129. *Id.* at 598.

130. Jacobs, *supra* note 124.