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NOTES

AN OMBUDSMAN FOR LOCAL GOVERNMENT

The 1967 session of the Indiana General Assembly saw four bills introduced to establish an office similar to the ombudsman.¹ One of these provided for the creation of a local office,² as contrasted with the more general trend toward a statewide office. In June 1966, Nassau County, New York, by resolution of its board of supervisors, had instituted an ombudsman for that county,³ but the resolution was rejected by referendum on November 7, 1967, when included as a part of a new County Charter.⁴ Hawaii passed a bill in April, 1967, establishing a statewide office of ombudsman.⁵

The ombudsman concept⁶ is that an independent governmental officer should exist with the sole function of asserting the interests of the citizen vis-a-vis his government.⁷ As one commentator has said,

The . . . concept is very simple. It means only that a citizen

1. H. 1234, H. 1246, S. 120, S. 123, 95th Session of Indiana General Assembly (1967). All failed to be reported from committee.

2. H. 1246, *supra* note 1 [hereinafter cited as Indiana Bill]. Most states have considered an ombudsman with jurisdiction over state government, not local units. See Aaron, *Ombudsman in Utah: The American Proposals*, 1967 UTAH L. REV. 32, 49, 50.

3. N.Y. Times, June 1, 1966, at 1, col. 4.

4. N.Y. Times, Nov. 9, 1967, at 30, col. 6. The vote was 261,000 in opposition to 192,000 in favor. The rejection indicates the need for massive public education in regard to the concept if it is to be accepted. See note 89, *infra*. In spite of this defeat, the basic reasons for the establishment of such an office remain.

5. No. 306, [1967] Hawaii Session Laws 489 [hereinafter cited as Hawaii Acts].

6. GELLHORN, WHEN AMERICANS COMPLAIN 9-10 (1966), where Professor Gellhorn, who is probably the leading American commentator on the topic, sets forth the following as common elements of foreign ombudsmen:

1. All are instruments of the legislature but function independently of it, with no links to the executive branch and with only the most general answerability to the legislature itself.

2. All have practically unlimited access to official papers bearing upon matters under investigation, so that they can themselves review what prompted administrative judgment.

3. All can express an ex officio expert's opinion about almost anything that governors do and that the governed do not like.

4. All take great pains to explain their conclusions, so that both administrators and complaining citizens will understand the results reached.

Presumably, they will be likewise typical of any American office. Cf. Hawaii Act § 3, and Indiana Bill § 3 (c) (item 1); Hawaii Act § 11, and Indiana Bill § 10 (item 2); Hawaii Act §§ 14, 17, and Indiana Bill § 6 (item 3); Hawaii Act § 13, and Indiana Act § 9 (requiring notice of the complainant to the agency, item 4); Hawaii Act § 14 (5), and Indiana Bill § 6 (c) (requiring report of opinions and recommendations to the agency, item 4); Hawaii Act § 15, and Indiana Bill § 9 (requiring notice to the complainant of the disposition of his request, item 4).

7. See, e.g., GELLHORN, *supra* note 6, at 9.

aggrieved by an official's action or inaction should be able to state his grievance to an influential functionary empowered to investigate and to express conclusions.⁸

Out of this process comes an additional equally important benefit of the institution, *i.e.*, a study of governmental process and procedure with an aim of modifying it so that abuses will be minimized.⁹ The American proposals have provided the ombudsman only with the power of publicity, and of investigation and recommendation for legislation to achieve his goals.¹⁰ Even abroad, where his powers are, in instances, more extensive, he relies primarily upon persuasion and opinion to achieve his goals.¹¹

The prime justification for the office is that some areas and aspects of government have lost the confidence of at least a portion of the public.¹² This breach may be justified or unjustified,¹³ it may be the result of misfeasance, nonfeasance, or malfeasance of governmental personnel;¹⁴ it may be an element of the fantasy of the aggrieved;¹⁵ it may be an inevitable concomitant of a changing society.¹⁶ But it does exist. And the ombudsman concept is capable of providing at least a partial means of alleviating the resultant stress¹⁷ by providing a legitimate and trusted

8. Gellhorn, *Ombudsman in New Zealand*, 53 CALIF. L. REV. 1155, 1156-57 (1965).

9. *E.g.*, Christensen, *The Danish Ombudsman*, 109 U. PA. L. REV. 1100, 1111 (1961).

10. See the Hawaii Act, *supra* note 5, and the Indiana Bill and Aaron, *supra* note 2.

11. Gellhorn, *The Swedish Justitionombudsman* 75 YALE L.J. 1, 12, 19, 21 (1965); as to possible abuse by the ombudsman because of lack of review of his opinion, 49-51; as to the use of the press to influence civil servants, 31-34.

12. See, Aaron, *supra* note 2, at 35, 36, where it is suggested that a loss of confidence by even a small minority would justify an ombudsman type office; and Reich, *The Law of the Planned Society*, 77 YALE L.J. 1227, 1229 (1967):

It is interesting to note a parallel between the concerns of the ordinary citizen, or the practicing lawyer and the so called new left. One of the chief concerns of the "new left" is the alienation of government from the people, and lack of adequate popular participation in governmental decision making. Organization like Students for a Democratic Society or allies of the housewives of Morristown (who protested the location of a highway) in that they want local people to have some say in the action of the highway building. SDS is also like the housewives in that it has figured no method better than demonstration by which such participation can be brought about.

Conceivably an ombudsman would tend to alleviate the alienation, encourage citizen's participation and increase citizen's trust in government.

13. *Cf.*, Aaron *supra* note 2, at 35-36.

14. No effort is made to clarify the possible intervention by the ombudsman among these categories. Presumably all would occur, although the bulk of his activities would involve minor problems.

15. *Cf.*, Kass, *We Can Indeed Fight City Hall*, 19 AD. L. REV. 75, at 83-84 (1966).

16. See Christensen, *supra* note 9, at 1126, where he suggests, *inter alia*, that the change of Denmark from an agricultural to an industrial society was one reason the ombudsman was adapted willingly to that country's needs, and Jolliffe, *The Inevitability of the Ombudsman*, 19 AD. L. REV. 99 (1966).

17. See Kass, *supra* note 15, at 79:

On the whole, however, the average individual has very little recourse against actions taken by his government. There is today a great cleavage between the

means of seeking redress,¹⁸ or at least the assurance an action was properly undertaken.¹⁹ Presently, only limited remedies usually exist outside expensive litigation. Even if the aggrieved party is willing to go to court, the question may be non-judicable, or conversely may be galling but so trivial as to not justify court costs.²⁰ There may be a void or aberration in legislation or regulation which permits the vexation but could easily be remedied. Or the potential complainant may be ignorant of his remedies.²¹ In any case, the ombudsman is capable of entering the gap, and mitigating if not ending the citizen's uncertainty.²²

Foreign Background

The office developed in Sweden after 1809 initially as a counter-vailing force to the King's power which answered to parliament.²³ Its spread was slow. Finland, after independence from Russia in 1917, established a similar office in 1919.²⁴ Thereafter Denmark adapted the

so-called Common Man and his government. Frustration begins to build up, and we find ourselves seeking some form of "Kigmy" to kick; this may not always help, but at least we feel better.

18. See note 8 *supra*, and accompanying text.

19. Kass, *supra* note 15, at 85:

(T)he unfounded complaint will also be answered with an explanation of the propriety of the agency's action. In many cases, this is all the complainant wants—an official explanation, in language that does not smack of government-ese.

20. *Id.* at 76:

Whether it is the local garbage collector, the state licensing authority, or an agency of the federal government, all represent a bureaucratic obstacle which often cannot be hurdled by the average citizen.

21. This will, of course, remain a very real problem with the ombudsman. To this end, Sweden provides for the teaching of his functions in the schools. Davis, *Ombudsmen in America: Offices to Criticize Administrative Action*, 109 U. PA. L. REV. 109, 1057-59 (1961). Finland has experienced considerable problems in familiarizing the public with the ombudsman's functions, Gellhorn, *Finland's Official Watchmen*, 114 U. PA. L. REV. 327, 342-43 (1966). In America, those who should be the prime beneficiaries of such an office would likely be among the last to hear about it and are largely unreachable by traditional means of communication. Thus, the school dropout who runs afoul of school discipline, may become a welfare recipient, probably will deal extensively with police or prison authorities, use public health facilities, live in neighborhoods with inadequate governmental services, and be a special victim of surly public servants, probably will ignore the exhortations of his teachers, or the news media, or circulars printed by the welfare department. The solution is unclear. Perhaps the traditional methods of information, and effective implementation of the concept, and word of mouth coupled with an informative campaign carried on by those responsible for current programs in the war on poverty would suffice. Certainly one grave problem closely associated with a lack of communications may be a failure to achieve results—even the modest ones properly expected and a consequent rejection of the concept. The willingness to develop slowly a widely known and used program may be the most essential element for success. Cf. GELLHORN, *supra* note 6, at 132.

22. Kass, *supra* note 15; the psychological impact may be the ombudsman's greatest impact, particularly in that he will tend to provide an assurance of proper conduct or a change in its absence.

23. Orfield, *The Scandinavian Ombudsman*, 19 AD. L. REV. 7, 9 (1966).

24. *Id.*, at 24.

office to her needs in 1954;²⁵ Norway followed in 1963.²⁶ New Zealand became the first nation with a common law tradition to create the office in 1961.²⁷ Great Britain established a similar office in 1967.²⁸ Ireland, Holland and Canada²⁹ have shown varying interest in such an institution.

While it is often the case that public institutions will not prosper in new environments,³⁰ the ombudsman has done well in somewhat differing systems.³¹ While all foreign experiences have been within the parliamentary system, there are variances. The most important is that in Sweden the ministers are much less directly involved in carrying out administrative decisions, while the ministers in the other European states have virtually total responsibility for doing so.³² Equally important, the New Zealand experience indicates that the system can be adapted to a common law system³³ while the other systems were civil law ones.

The jurisdiction of the ombudsman over local action varies. Some nations have created an ombudsman whose functions include only national offices.³⁴ Sweden and Finland, however, give him power to investigate local official acts.³⁵ Denmark extended the authority to local government amid controversy.³⁶ Norway³⁷ and New Zealand³⁸ do not include local government within the ombudsman's jurisdiction. Where carried out, the scrutiny of local officers seems functional and free of problems.³⁹

The Local Office

A local officer is probably preferable in America.⁴⁰ For a national office, the population and geographic extent of the nation are obviously restrictive of potential effectiveness.⁴¹ These considerations are obviated

25. Christensen, *supra* note 9, at 1100; the first Danish Ombudsman was appointed in 1955.

26. Gellhorn, *The Norwegian Ombudsman*, 18 STAN. L. REV. 293 (1966).

27. See, Gellhorn, *supra* note 8, at 1158 and Orfield, *supra* note 23, at 49.

28. 1967 PUBLIC LAW 155.

29. Rowat, *The Ombudsman*, PROPOSED SCHEMES 173-213 (1965).

30. *Id.*; MARX, THE IMPORTATION OF FOREIGN INSTITUTIONS 255-63.

31. Orfield, *supra* note 23, where the adaptation of the Swedish concept to other nations is discussed in some detail.

32. Petersen, *The Parliamentary Commissioner: A Danish View*, 1962 PUBLIC LAW 15, 18-19. Finland has a mixed parliamentary and presidential system, but the office is less used or less important because others discharge much of his functions. Gellhorn, *supra* note 21, and note 47 *infra*.

33. Gellhorn, *supra* note 8, at 1155.

34. *E.g.*, Orfield, *supra* note 23, at 49.

35. *Id.*, at 16 (Sweden) and at 25 (Finland).

36. See Christensen, *supra* note 9, at 1107-08.

37. Orfield, *supra* note 23, at 49.

38. Gellhorn, *supra* note 8, at 1176.

39. Notes 21-22, *supra*.

40. GELLHORN, *supra* note 6, at 131; Davis, *supra* note 21, at 1073-74; THE OMBUDSMAN, Report of the Thirty-Second American Assembly, October 26-29, 1967 [herein after cited as 32nd American Assembly Report].

41. Davis, *supra* note 21, at 1073-74.

at the state level and disappear at the local level. From the point of view of work load and staffing, a city, county or regional application appears more fruitful, although a statewide one might well be feasible and useful.⁴²

The exact geographic limits of the ombudsman's jurisdiction is an intriguing problem. Most urban areas encompass more than one jurisdiction, including cities, towns, counties and independent districts. Presumably, also, the rural resident would feel at least an occasional need for his services. However, many jurisdictions, rural and urban, might not be willing to pay the salary required to attract a qualified person. One solution would be the creation of regional ombudsmen by state action. The political subdivisions of a state are creatures of the state—not independent entities such as the states themselves. Additionally, many of the functions of the local government are established by state legislation. Thus, from the overview point of view, the state legislature has some considerable interest in local actions. Additionally, this proposal has the virtue of removing the office from local squabbles, political or otherwise, which might influence the selection or retention of an ombudsman, or his decision in a particular case. This concept is also harmonious with the idea of metropolitan government—and might prove conducive to its development.

Alternatively, if a state ombudsman were created, local political subdivisions could be given the option of being covered by his authority.⁴³ However, this might fragment metropolitan areas where some services are area wide. The alternatives, however, could be melded beneficially; provision for creation of an ombudsman for metropolitan areas could exist with local option coverage by a state ombudsman remaining for more sparsely populated areas. Both the decisions should be made by referendum.

The greatest problem for a local office serving a multiple jurisdiction area would be the mechanics of selection, if not done by the state. It should be carried out by legislative bodies,⁴⁴ but they might not be coterminous with his authority. The best solution in this situation would be an adaption of Sweden's selection by a committee of parliament,⁴⁵ with their number being selected from the constituent subdivisions. This solution might also further a nonpartisan selection. In areas where only one

42. See GELLHORN, *supra* note 6, at 131, where both are discussed, and Aaron, *supra* note 2, where the American proposals, most of which suggest a state office, are discussed.

43. Aaron, *supra* note 2, at 50.

44. Cf., GELLHORN, *supra* note 6, especially item 1.

45. Anderman, *The Swedish Justitianombudsman* 11 AM. J. COMP. L. 225 (1962). A committee of forty-eight chosen on the basis of party representation in parliament makes the selection.

governmental units exists, selection by the legislators would be the proper means.

Relation to Other Elements of Government

None of these nations which have an ombudsman has the distinct separation of powers which marks American government.⁴⁶ The division between parliament and ministers is minimal when contrasted to the separation of powers in the United States.⁴⁷ This philosophical concept might create problems.⁴⁸ To meet the problem created by the distinct branches, certain powers would of necessity be removed from any ombudsman in America. For example, the authority to oversee the courts would probably have to be totally eliminated,⁴⁹ as it has been in the Hawaii Act⁵⁰ and in most other proposals.⁵¹

Of more pertinence is the degree of intrusion into the executive

46. The philosophical roots of the ombudsman and the American separation of powers may be quite similar, however *see*, Jakerskrold, *The Swedish Ombudsman* 109 U. PA. L. REV. 1077, 1078 (1961), where he comments on the relationship of Montesquieu's ideas on checks and separation of power as it influenced the Swedish constitution of 1809. And *see*, Davis, *supra* note 21, at 1075, where he says:

The idea rests heavily upon the cardinal principal of check which has played such an important role in the historical development of protections against unfair government action. The check is all the more effective because it is made by an officer with a different focus from that of an administrator whose action is criticized, and by one who has a much broader perspective.

47. *A State Statute to Create the Office of Ombudsman*, 2 HARV. J. LEGIS. 213, 219-20 (1965):

The Ombudsman is generally identified with nations that have parliamentary systems of government. Some question may therefore arise about the applicability of such an institution to the "presidential" systems of government found in the United States. But the office fits as well with the separation of powers theory of American state governments as with the combined powers found in parliamentary government. The ombudsman was originally created in Sweden as a means of strengthening the parliament against the royally controlled judiciary. Its purpose was to protect the parliament and citizenry against executive power. Furthermore, the Ombudsman has operated effectively for almost half a century in Finland, which has a mixed presidential and parliamentary system of government.

48. *Id.* The problem is probably illusory. See the discussion of the foreign background, *supra* notes 32 and 33.

49. *See*, Orfield, *supra* note 23, at 67.

Conversely, the courts would lack the authority to review the activities of the ombudsman. *Cf.*, Hawaii Act § 18 and Indiana Bill § 15; and *see* 2 HARV. J. LEGIS., *supra* note 47, at 226 where § 603 provides that there shall be no judicial review of the ombudsman's acts unless he violates the act creating his office; the reason is:

Since the ombudsman has no power to revise agency actions, it is unlikely that anyone would be held to have standing to object to his recommendations. . . . This provision is included to guarantee that the ombudsman will not be frequently involved in litigation when an agency disagrees with his appraisal of its actions. (*Id.* at 237-38.)

50. Hawaii Act § 2(a) (1).

51. *See* Aaron, *supra* note 2, at 48.

function.⁵² Review of discretionary acts might need to be restricted,⁵³ and political and policy supervision must be minimal.⁵⁴ Nor should power to prosecute be included within his authority.⁵⁵ The means of attaining the ombudsman's goals should be elsewhere. His influence should be in the power to investigate and to make recommendations based thereon to the appropriate administrative agency, legislative body, or other policy making entity that a modification of a rule, law or customary mode of conduct would be appropriate.⁵⁶ In this context, the element of persuasion of the civil servant would become important.⁵⁷ A highly qualified, respected party might do more to settle an argument than even a well-informed, articulate, but committed advocate.⁵⁸ Likewise, a widely experienced, dispassionate observer may avoid irrelevancies and deal with the essence of a problem where others fail. If accommodation of the parties was impossible at this junction, the use of public opinion would become necessary. Potentially this sanction could do much to modify the position of a recalcitrant public servant. The publicity might be achieved by the use of a recommendation to a legislative body.⁵⁹ Added to adverse opinion, the possibility of imposed change may result in as much or more action in an atrophied administrator as any other

52. One method of dealing with the problem is to create a schedule of included agencies, as has New Zealand, Gellhorn, *supra* note 8, at 116, and as has been suggested by some American proposals, Aaron, *supra* note 2, at 47. The result might be however, to create a desire to be excluded rather than to simplify the problem as to reluctance of agencies to be covered. See Note 57 *infra*, and accompanying text.

53. See Christensen, *supra* note 9, at 1109, 1110.

54. Davis, *supra*, note 21, at 1060; but, Professor Davis states:

The Ombudsman must obviously avoid taking positions on questions of political opinion. . . . He can act successfully only when he keeps informed opinion with him. But he can still take strong positions. Because of his great prestige, he can and does lead public opinion on some ideas.

55. *E.g.*, Orfield, *supra* note 23. Sweden permits this, *id.*, at 14-15, as does Finland, *id.*, at 25. Denmark permits referral to the appropriate authority for prosecution, but has left the power essentially unused, Christensen, *supra* note 9, at 1114, 1115; the same is true of New Zealand. Gellhorn, *supra* note 8. The Hawaii Act § 16 provides for referral to appropriate authority.

56. See note 10 *supra*, and accompanying text.

57. The entire question of relation to the civil servant would be a problem. While civil servants have often opposed the office, they have usually grown to accept it. See, Christensen, *supra* note 9, at 1125 where the change in attitude in Denmark is set forth, and Gellhorn, *supra* note 8, at 1155-56, where the change in New Zealand's civil servants outlook from unfavorable to favorable is described. This results from the exposure of the unjustified nature of most complaints, and the resultant easing of criticism. The Norwegian civil servants did not object after observing Norway's experience.. Gellhorn, *supra* note 26, at 294. Opposition by the police has been met in the United States, note 87 *infra*, and welfare leaders, *Ombudsman*, WISCONSIN LEGISLATIVE BUREAU INFORMATION BULLETIN 67-6, at 7 (1967).

58. Cf. GELLHORN *supra* note 6, at 16-17 and Davis, *supra* note 21, at 1075-76.

59. See *e.g.*, Aaron, *supra* note 2, at 56. The Hawaii Act is unclear. See § 13 dealing with recommendations and § 14 dealing with publication recommendations. The Indiana Bill, § 14, requires a report to the legislative body, as well as public release of the report, if the agency does not rectify the situation.

conceivable approach. It is essential that the ombudsman have this power if he is to function.

Additionally, he should be regarded as a legislative official, cloaked with the legislative branch's authority and providing a means of bolstering the effectiveness of that branch.⁶⁰ Both to assure this function, and to buttress his insulation from political controversies, his selection should be by a legislative body.⁶¹ Additionally the investigation of the administrative function will be furthered if the executive is not involved in his selection.⁶² Thus, with the exception of the New Zealand office, the foreign ombudsman is selected exclusively by parliament, or a committee of that body.⁶³ Further, Hawaii provides for legislative selection.⁶⁴

However, he must otherwise be independent of the legislature,⁶⁵ his term must be a reasonably lengthy one⁶⁶ with removal difficult to achieve.⁶⁷ Hawaii chooses a six-year term,⁶⁸ which has the added virtue of not being coterminous with that of the legislative bodies which select him.⁶⁹ Likewise an adequate salary must be paid. Foreign institutions, generally establish the salary as that of a member of the Supreme Court.⁷⁰ Hawaii established a salary of \$22,000.⁷¹ The compensation should provide financial independence while adding a degree of prestige to the office, and should aid the necessary development of a tradition of nonpartisanship and eminence. This would also be well forwarded by appointing a person of attainment in his profession, probably law, to the position.⁷² Finally, a custom of appointing a fairly old man as in Sweden

60. See Christensen, *supra* note 9, at 1103-04.

61. Cf. GELLHORN, *supra* note 6, especially item 1.

62. See Aaron, *supra* note 2, at 43. But see, 2 HARV. J. LEGIS., *supra* note 47, at 222, where § 202 of their model act provides: "The governor, with the advice and consent of the [S]enate, shall appoint the [O]mbudsman." And *id.* at 228-29 where this method is justified because it is "generally accepted American procedure."

63. See Orfield, *supra* note 23.

64. The Hawaii Act § 3 provides the ombudsman shall be elected by a majority of each house of the legislature meeting in joint session. The Indiana Bill § 3 (c) provides for selection by a majority vote of the local legislative authority (which § 2 (i) defines as city council, town board or county council). American proposals generally provide for legislature selection. See, Aaron, *supra* note 2, at 43. But see 2 HARV. J. LEGIS., *supra* note 47, at 222.

65. Cf. GELLHORN, *supra* note 6, especially item 1.

66. Orfield, *supra* note 23.

67. *Id.*

68. The Hawaii Act § 3; the Indiana Bill provides a four-year term, § 4.

69. 32nd American Assembly Report, at 7.

70. Orfield, *supra* note 23, at 14 (Sweden), at 27 (Finland), at 42 (Norway), and 48-49 (New Zealand) and Christensen, *supra* note 9, at 1104. In New Zealand the ombudsman is paid 4,100 pounds, or \$12,300, a sum substantially lower than a Supreme Court Justice.

71. The Hawaii Act § 3; the Indiana Bill provides for compensation equal to the county auditors, which varies with population, § 3(d).

72. Anderman, *supra* note 45, at 226.

should be followed.⁷³ This would serve as an added assurance of his attainment and prestige, as well as partly assuring a lack of future political ambition. Within the context of these safeguards and selection procedures for the ombudsman, particularly for the first person to serve in this office, it should become and remain independent.

Another aspect of government to which the ombudsman would, of necessity, relate is the poverty programs. To some extent he might alleviate problems such as inadequate government services⁷⁴ that are of concern to community action programs. Additionally, he might relieve some of the burden of the legal service groups to the poor in areas such as potential welfare litigation.⁷⁵ His intervention in such areas, not as a protagonist but as an observer without a particular position, might also be more acceptable to some elements of societies.⁷⁶ He might also fill gaps existing because some questions are not judicable for some reason⁷⁷ or because people fear to approach any legal action.⁷⁸ In any case, the poor should extensively benefit from an ombudsman.

Procedure

The bulk of the ombudsman's work should come from complaints directed to him⁷⁹ without charge for the undertaking.⁸⁰ Written complaints by the aggrieved, without need for an attorney should comprise the bulk of the workload; however, inquiry on the ombudsman's own initiative should also be permitted,⁸¹ as should periodic inspections, which have proven most effective abroad in the control of penal and hospital abuses.⁸²

By permitting inquiry on the ombudsman's own initiative the citizen will be assured that exposés of government malfunction which he reads in his newspaper, if not treated by other authority, will be reviewed by the ombudsman, and that an institution's secrecy and administrative arrangements shall not hide the misconduct of those in authority.⁸³ It will also render moot, to a large degree, the problem of a time limit for

73. *Id.*

74. See note 112, *infra*.

75. See section on Welfare, *infra*.

76. See e.g., note 129 *infra*, and accompanying text.

77. See GELLHORN, *supra* note 6, at 27-28.

78. Kass, *supra* note 15, at 77-78:

Even when legal aid systems are helping to defray quick costs, we are discovering that habits and fears are often so deeply rooted that the average citizen does not want to avail themselves of the court review.

79. Aaron, *supra* note 2, at 51; Hawaii Act § 7; Indiana Bill § 6 (a).

80. Aaron, *supra* note 2, at 52; no provision for charge appears in the Hawaii Act or Indiana Bill.

81. Aaron, *supra* note 2, at 51; Hawaii Act § 7 (b); Indiana Bill § 6 (b).

82. Aaron, *supra* note 2, at 56.

83. See Anderman, *supra* note 45, at 229.

asserting complaints as the ombudsman will, if a limit of say a year is established, be able to examine violations barred by the limit of his own initiative.⁸⁴

The grave problem of the unjustified complaint can be partially handled by requiring an opportunity for the agency to reply to the charge before it is made public.⁸⁵ With a rejection on the merits at this stage the complainant should be informed with explanation of the reasons for rejection.⁸⁶ This would hopefully prevent an excessive use of the bludgeon of publicity,⁸⁷ while the explanation should at least partially satisfy the complainant.⁸⁸ To prevent the agency from acquiescing in the ombudsman's decision for fear of adverse publicity, all adverse decisions should be mandatorially publicized,⁸⁹ as well as periodic reports with full statistical information concerning the rejected complaints.⁹⁰

If the complaint goes beyond this initial stage, the problem of access to the files of the agency arises.⁹¹ In Sweden, an historic right of access to all files exists.⁹² Many American states, as does the federal government, have anti-secrecy laws.⁹³ However, their effectiveness and scope are open to some question. To be effective, an ombudsman must have access to the information which forms the basis of decision; therefore, his resources must include a broad right of inspection—probably unrestricted—at the local level where questions of national security do not exist.⁹⁴ Subpoena power over these records should exist if needed.⁹⁵ Likewise, compulsory process must exist to summon public employees⁹⁶ or other relevant but reluctant witnesses;⁹⁷ the right to compel answers

84. Aaron, *supra* note 2, at 53-54.

85. *Id.* at 55; Hawaii Act § 12; Indiana Bill § 6 (c).

86. Kass, *supra* note 15, at 86.

87. *Cf.* The Indianapolis Star, Jan. 22, 1967, at 1, § 2, col. 4. Other Indiana newspapers opposed for the same reason.

88. Kass, *supra* note 15, at 86.

89. The Hawaii Act is permissive, § 14; the Indiana Bill requires reporting of all improper activities, § 6 (d).

90. The Hawaii Act requires an annual report § 17; the Indiana Bill contains no such provision.

91. Aaron *supra* note 2, at 55-56.

92. *See, e.g.,* Blix, *A Pattern of Effective Protection: The Ombudsman* 11 How. L.J. 386 (1965).

93. *E.g.,* IND. ANN. STAT., §§ 57-601 to 609 (1961); and *see*, Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, wherein the federal act, 8 U.S.C. § 552 is discussed. Professor Davis feels that the Attorney General's memorandum on the act, which follows the House Committee report, would permit greater withholding of information than is desirable and would prefer an interpretation based upon the Senate Committee report and a more literal reading of the act.

94. Aaron, *supra* note 2, at 59.

95. *Id.*, at 55-56; Hawaii Act § 11 (2); Indiana Bill § 10.

96. Aaron, *supra* note 2, at 56; Hawaii Act, § 11 (1); Indiana Bill § 11.

97. Aaron, *supra* note 2, at 56.

to questions must also exist.⁹⁸ Without effective means to gather information not voluntarily furnished, he will remain a mere sham, meaningless to society at large.

An important element of procedure—and the entire ombudsman concept—is the means of reporting. The individual complainant must be apprised of the results of the inquiry of the ombudsman, including both the basis on which the agency's decision was made and on which the ombudsman made his decision.⁹⁹ Additionally, an annual report should be made to the legislative body creating the ombudsman.¹⁰⁰ This should serve both as a means to recommend needed legislative changes, and as a vehicle to highlight both common and extreme problems. More importantly, it should emphasize patterns of misconduct which can be corrected by appropriate administrative action.¹⁰¹ This quasi-educational aspect of the ombudsman should be as important—if not more so—than the *ad hoc* solution of individual grievance, because in this manner new complaints should be avoided. The report should also bring attention to the relative lack of reason for complaint by indicating the lack of merit to many charges. Additionally, the report should provide a means to bring publicity to the existence of the office, which will be one of the more difficult problems to surmount.¹⁰²

Staff

Staff size exists as a concern, albeit less so at the local level than at the state or national.¹⁰³ The personal attention of the ombudsman would tend to give validity to his acts. Personal attention also assures that full consideration will be given to all problems.¹⁰⁴ Additionally, it should add a sort of charisma if not to the individual to the office.¹⁰⁵ Therefore, a limited organization of hopefully high quality but minimal costs should evolve. It would be most unfortunate if a bureaucracy should develop to cope with the problems created by bureaucracy, while the concept would

98. *Id.*

99. *Cf.* Kass, *supra* note 15, at 86; Hawaii Act § 15; Indiana Bill § 9.

100. Hawaii Act § 17; Indiana Bill has no such provision.

101. *See* note 9 *supra*.

102. *See* note 84 *supra*.

103. The desirability of a small staff with the basic control in the hands of the ombudsman himself is one reason for preferring a local or state ombudsman to a national one. *See* Davis, *supra* note 21, at 1073-74; The Hawaii Act provided a limit of four members in its original form. *Hawaii Legislature Standing Committee Report #869*, 3 (1967).

104. *Id.*

105. *Cf.* GELLHORN, *supra* note 6, at 48-50 and at 225-27 where he discusses the "cult of personality," rejects it, and suggests that the ombudsman could be institutionalized. He argues that this is possible without being destructive of the concept and that the emphasis on the smallness of staff is a faulty conclusion which is not necessarily drawn from the foreign experience.

be effectively invalidated.¹⁰⁶

The degree of delegation of authority should also be limited.¹⁰⁷ Authority of the ombudsman should generally be exercised by him. Major decisions should be made by the ombudsman only. Any authority that is delegated should be for only express periods, and of a limited nature.¹⁰⁸ Similarly, the ombudsman should exercise full control of his staff without external hindrance.¹⁰⁹ As in other matters, if a locale cannot find a person for the office who is capable of supervising his own office without external control, the concept should perhaps be scrapped.¹¹⁰

The Areas of the Ombudsman's Activities

The scope of activities of an ombudsman is difficult to draw. Certainly he would be but a segment of the total governmental function.¹¹¹ He might relieve some of the burdens on some parts of government, but this would not be a primary purpose. Hopefully, he would handle many matters not now litigated or otherwise properly handled, such as complaints on street conditions, or garbage collection, or park maintenance.¹¹² While these subjects are clearly ones that may evoke bitter grievances and cause much distress, they are seldom the subject of court consideration or action. Indeed, the aggrieved may feel that no true remedy exists.¹¹³ Likewise no redress is readily available for the occasional brusque or rude conduct of the civil servant.¹¹⁴ Additionally, some areas are beyond the reach of the courts because of questions of standing, or are precluded by policy consideration.¹¹⁵ Thus, the courts will not ordinarily order the carrying out of laws by public authorities

106. Cf. Davis, *supra* note 21, at 1073-74. But see the views of Professor Gellhorn's position, note 105, *supra*.

107. Hawaii Act § 4; Indiana Bill § 7.

108. *Id.*

109. *Id.*

110. GELLHORN, *supra* note 6.

111. See, e.g., Davis, *supra* note 21, at 1061, 1062, where he notes that (1) good personnel, (2) procedural safeguards, and (3) administrative and judicial appeals are essential to a well functioning administrative system, and they are well established in America.

112. There is some question as to whether these functions are such that the ombudsman should deal with them. Compare Kass, *supra* note 15, and GELLHORN, *supra* note 6, where he suggests that this type complaint is now adequately treated. Mayor John V. Lindsay of New York agrees, asserting that a vigorous mayor using a complaint commissioner and "little city halls" can do as well as an ombudsman. N.Y. Times, May 12, 1967, at 36, col. 1. However, New York City has experienced a virtual breakdown of garbage collections. N.Y. Times, Oct. 24, 1967, at 41, col. 1. The cause is apparently a lack of personnel and equipment which could have been highlighted by an ombudsman during the decline of service. Fund allocation and other important political decisions are involved *but quare* isn't this the sort of relatively nonpartisan public opinion an ombudsman could influence, as Professor Davis suggests, *supra* note 54.

113. See note 83, *supra*.

114. See Blix, *supra* note 92, at 386.

115. See GELLHORN, *supra* note 6, at 25-28.

when a broad area requiring continued supervision is involved,¹¹⁶ as a result, many areas such as open housing legislation and housing codes often are ill enforced. There is too often an absence of a completely satisfactory remedy in our present governmental framework. The creation of an ombudsman to spotlight the nonenforcement of such laws might result in their implementation, or in a more realistic approach to the matters involved if the existing laws are not truly enforceable.¹¹⁷ In this manner an ombudsman might have an extended impact upon such problems of society as ill-maintained slum housing, excessive prices in slum stores, and an increasingly polluted atmosphere throughout metropolitan areas even though the problems are created and might be solved largely by private parties outside his direct responsibility.¹¹⁸

Other broad areas presently litigated might be partially involved. The problems coincident with zoning might, for example, be handled in some degree by an ombudsman although the entire area could hardly be so treated. The amounts of money potentially involved in many cases are probably such as to require settlement in court in view of the parties. The same is probably true of displacement of citizens for government projects such as highway construction, university expansion, and urban renewal.¹¹⁹ Seemingly the impact upon those uprooted has not been seriously considered by proponents of these programs in the past with the result that slight provision is made to cope with the new problems created.¹²⁰ But even if a well-conceived master-scheme for handling displacements were available to avoid general dislocation, individual hardship might result for those whose property is taken for eminent

116. *E.g.*, State *ex rel.* Bartlett v. Dunne, 219 Ill. 346, 76 N.E. 570 (1906).

117. *Cf.* Davis, *supra* note 21, at 1163-65.

118. The burden created by private activity is probably as much a problem for the poor person in our society as is governmental action or inaction. Presumably, the enforcers of housing codes could have a salutary effect upon landlords renting substandard property as could the welfare department upon stores selling to their recipients. See N.Y. Times, *infra* note 150, where the adverse effect of illicit case worker activity is commented upon and N.Y. Times, Oct. 31, 1967, at 34, col. 2, where the demands of a group of housewives on Mayor John V. Lindsay for a check on prices is reported.

119. See Reich, *supra* note 12, at 1227-29 and at 1256-57, where examples of disruptive highway building are given and the N.Y. Times, July 13, 1967, at 1, col. 2, where it is stated that displacement of Negroes in Newark, N.J., was one of the primary underlying causes for the riots in that city, and the Indianapolis Star, June 5, 1966, at 1, col. 5, where the formation of a group known as Homes before Highways is reported. This organization subsequently has opposed the proposed location of interstate highways in Indianapolis. See also note, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398 (1968), where changes in Indiana law to meet this problem and their effect is discussed.

120. *Id.*, and see Comment, *Urban Renewal in the Bay Area: The Need to Study Human Conditions*, 55 CALIF. L. REV. 826, 827 (1967):

Relocation often fails to provide displaced persons with "decent, safe, and sanitary" housing [as required by 42 U.S.C. § 1455 (c) 1964)]. This deficiency normally takes two forms—a failure to trace displaced residents and a tendency to relocate them in substandard housing.

domain—or those left facing an earthen-embankment as a new neighbor—which might be mitigated with the assistance of an influential figure, especially those cases which turn on fairly inconsequential elements. The following specific areas often not litigated are among those that a local ombudsman might consider.

Police Review

Review of police action probably has been discussed more often and intensely than any other matter in connection with the ombudsman.¹²¹ The Indiana bill, the Hawaii act and the initial Nassau County resolution implicitly permitted this,¹²² although the rejected charter provision in that county partially exempted the police.¹²³ In actual practice, Sweden and Denmark have had no adverse effects from review of police activities.¹²⁴ Only conjecture is possible on the effect an ombudsman would have had on police interrogation, search and such if he had existed as an alternative to court action.¹²⁵ One can only speculate on the reaction the American police would have had absent the continuing controversy as to whether any significant police brutality exists.¹²⁶ Of course, the review would extend beyond allegations of this sort to areas of inefficiency or simple rudeness as with other civil servants.¹²⁷ However, the controversy

121. See, Davis, *supra* note 21, at 1074: "If political leaders in any city are searching for a practical procedure to eliminate or reduce police abuses, I think that they may find the idea of an ombudsman exceedingly attractive," and GELLHORN, *supra* note 6, at 170-96, where this application is developed in some detail.

122. See, the Hawaii Act and the Indiana Bill, where no restriction appears, and N.Y. Times, Oct. 30, 1967, at 26, col. 1, where the procedure developed by Nassau County's ombudsman of referring such complaints initially to the police commissioner is discussed.

123. Cf. N.Y. Times, Oct. 30, 1967, at 26, col. 1; the rejected charter *required* referral to the police commissioner.

124. See Marino, *A Detailed Study on the Need for the Office of Public Protector* (unpublished report to the Nassau County Board of Supervisors) 23-24 (1966) and Cahn, *Ombudsman Report* (unpublished report to the Nassau County Board of Supervisors) 21-22 (1966).

125. Cf. *Mapp v. Ohio* 367 U.S. 643, 670 (1960) (Douglas, J., concurring):

There are, of course, other theoretical remedies (to prevent unlawful entry into a home). One is disciplinary action within the hierarchy of the police system, including prosecution of the police officers for a crime.

Yet as Mr. Justice Murphy said in *Wolf v. Colorado*, 338 U.S. at 42:

[S]elf scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a district attorney to prosecute himself or his associates for well-meaning violation[s] of the search and seizure clause during a raid the district attorney or his associates have ordered.

Mr. Justice Douglas then sets out other theoretical remedies, and their actual futility concluding that exclusion is the only effective remedy however, a willingness to suggest remedial measures and formulate tolerable procedures might have flown from the recommendations of an ombudsman. *Accord*, *Wolf v. Colorado*, 338 U.S. 25, 42-44 (1948) (Murphy, J., dissenting).

126. Cahn, *supra* note 124, states that there has been no complaint by police abroad, but still recommends their exclusions.

127. See Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966), wherein some of the author's personal experiences of police stopping and ques-

has raged and the police have felt cruelly maligned.

Some of the recurring questions and their relevancy to the ombudsman concept are: (1) The singling out of the police for attention. But, as the New York City Policemen's Benevolent Association has pointed out, the ombudsman concept does not single out the police for special attention, and thus the inquiries would not cast aspersions on the police that would not fall likewise on other civil servants¹²⁸—all of whom presumably are capable of human error or weakness. (2) The problem of undermining the authority of the chain of command has also been asserted.¹²⁹ However, since the ombudsman would have no authority to punish or to promulgate orders but only to point out and make recommendations to those with this authority on the force, the objection would seem to be spurious.¹³⁰ (3) The problem of political manipulation of review boards also has been raised,¹³¹ while a politically inclined or controlled ombudsman could conceivably create a similar problem, such a political inclination would—or should—destroy the office of itself¹³² and therefore would of necessity be carefully avoided in the context of police review or otherwise.

The danger to police operations would be illusory if the ombudsman functioned as he should; if not, the concept should be abandoned.

Small Business

The ombudsman has an especially important function to perform for the benefit of the smaller businesses. While large concerns are pestered by regulations, small businesses face decisions upon which their very existence often depends. Thus when reinstatement was procured by the Danish ombudsman to a taxi driver whose permit has been unjustly suspended for thirty days,¹³³ a great injustice was obviously avoided; any legal remedy might have consumed as much in legal fees as the loss of business and might have been less than timely. Likewise, in a situation analogous to our extensively regulated food service industry, the license

tioning are set forth and solutions suggested, among which the ombudsman is not included.

128. See N.Y. Times, Nov. 12, 1966, at 1, col. 2 and at 28, col. 1 (editorial) and Nov. 13, 1966, at 85, col. 3. Gellhorn develops the point in *WHEN AMERICANS COMPLAIN* 191-92 as does Marino, *supra* note 124, at 22.

129. See Cox, *The Philadelphia Police Advisory Board*, 2 *LAW IN TRANSITION* at 182-83.

130. *E.g.*, Kass, *supra* note 15, at 77.

131. See Cox, *supra* note 129, at 102-82.

132. Christensen, *supra* note 9, at 1109:

It is of prime importance to the ombudsman as an institution that it keeps from becoming involved in the general political struggle. The institutions will survive only if it is accepted by all influential groups as impartial and unbiased.

133. *Id.*, at 1119.

of a kiosk was reinstated in Denmark.¹³⁴ A situation in Indianapolis, Indiana, involving condemnation of the city market as unsanitary, and its change to a parking lot resulted in the city winning litigation.¹³⁵ However, the market continues to function with the community unable to offer a solution—no one seems to really want to close the market; a number of people regard the shopkeepers' service a unique amenity that complements the city and oppose closing without an alternative; and no one can offer an acceptable alternative, so a desired service, but with substandard sanitation situated on extremely valuable property because of its location remains dysfunctionally utilized.

One major aspect of the ombudsman's intervention in such affairs would be encouragement of uniformity of action by issuers of licenses, inspectors and similar regulatory activity.¹³⁶ The administrative inspector has been permitted great discretion in entry without warrant, although it is now more circumscribed.¹³⁷ More so than in the criminal area, the administrative evolution of such entry is probably desirable, although loss in business for revocations of licenses or other sanctions and possible criminal prosecutions may create such potentially damaging situations as to require rather stringent standards. At any rate, the numerous occasions that the small businessman deals with the government would be more pleasant if he were assured of a quick, inexpensive, reliable recourse—a situation which might also appeal to larger business.

Schools

An area of great concern to the public where there is little judicial intervention in day to day affairs is education.¹³⁸ The greater controversies, in those areas such as continued segregation, de facto or otherwise, education of the economically or culturally deprived and other general policy considerations are beyond the potential ambit of the ombudsman. However, other issues, including specific elements of the foregoing, are clearly within the limits of his potential operation. The exercise of discipline is of considerable importance to the child, and basically is without review.¹³⁹ Ultimate social and monetary consequences of expulsion are great, but typically no counsel is present at the time of determination.¹⁴⁰ Immediate consequences are also possible including

134. *Id.*

135. *Wetter v. City of Indianapolis*, — Ind. —, 226 N.E.2d 886 (1967).

136. *Cf.* note 10 *supra*.

137. See *v. City of Seattle*, 87 S. Ct. 1737 (1967) bars such searchers; however, *Frank v. Maryland*, 359 U.S. 360 (1958), overruled by *Camara v. Municipal Court*, 87 S. Ct. 1741 (1967), permitted search of dwelling by health authorities without a warrant.

138. The problem is discussed in Comment, *School Expulsion and Due Process*, 1 IND. LEGAL F. 413 (1968).

139. GELLHORN, *supra* note 6, at 210 and see, Comment, *supra* note 138.

140. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

financial loss.¹⁴¹ What to the parent or teacher may be routine could have extended impact on the child. Or the action may just be of a questionable nature. Thus, the Swedish ombudsman intervened to ameliorate a situation where a headmaster censored the school paper before publication.¹⁴² Similarly, the typical justification of dress regulation, *i.e.*, that deviant dress creates disorder may be open to some question.¹⁴³ A sensible discussion could often in some cases avoid controversy.

More far reaching social and economic consequences may flow from other exercises of school discretion. While expulsion may cause irreparable harm to an individual child, massive misplacement due to intelligence or other psychological testing with their bias against nonmiddle class students will have a more dilatorious effect upon the community at large.¹⁴⁴ Many of the problems inhering in any testing program might be solved—or alleviated—if a dispassionate observer could intervene between parents and student on the one hand and the administrative, counseling, and instructional staff on the other. It is probably better to develop a testing program acceptable to all elements of a community than to force a decision upon the courts, leaving the unsuccessful litigants unhappy with their schools, and the schools without a program.

Welfare

The broadening scope of litigation and controversy in welfare administration is an area of unusual potential for an ombudsman.¹⁴⁵ Some elements are capable of solution within the context of existent welfare organization. Thus, recipients in New York City who have recently demanded that benefits due them under law and regulation be

141. *Ferrell v. Dallas Independent School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966) in which the court refused to intervene in the expulsion of three high school students whose "beatle" haircuts were required by a contract with a promoter, which they found to be voidable under Texas law because of the students' infancy. The promoters uncontroverted testimony indicated that \$4,000 had been expended in establishing the trios' reputation. Interestingly, their repertoire included a song celebrating students expulsion for such a haircut, which the judge set forth.

142. Blix, *supra* note 92, at 396 set forth the example.

143. See Comment, *The Right to Dress and Go to School*, 37 U. COLO. L. REV. 492 (1965).

144. Cf. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

145. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issue*, 74 YALE L.J. 1245 (1964), where in it is stated at 1257:

We need organized legal research to examine statutes, regulations, manuals and practice[s] to determine where changes are needed. We need institutions capable of financing both legal research and test cases to determine the extent of rights in given areas. And we need lawyers to represent individual clients who cannot pay for help or secure that help from an[y] existing organization[s]; it is only through individual cases that the law comes into being and keeps on growing.

paid, have had some success.¹⁴⁶ However, this has not been total; hearings internal to the welfare department as well as litigation are probably in the offing.¹⁴⁷ The prospect is not likely to enthuse the typical welfare recipient, just as the prospect of such a hearing might deter a member of the middle class.¹⁴⁸

Other welfare practices are harder for an ombudsman to reach. The resident requirements for welfare recipients have recently been invalidated.¹⁴⁹ Due to the existence of statutes, potential costs and political feeling, it is dubious that this result would have been possible without litigation. However, there is reason to believe that the decision may be ignored or begrudgingly complied with in some jurisdictions. The ombudsman might well facilitate full compliance. Likewise, the midnight raid may well continue.¹⁵⁰ However, it appears somewhat at variance with the legislative intent of the aid to dependent children acts; the payments are aimed to aid the child, who is punished for the mother's indiscretion.¹⁵¹ Of course, the mother's right to privacy is likewise invaded.¹⁵² It is of course dubious that consent is ordinarily given voluntarily when entry is demanded. While valid considerations may support the policy being forwarded, due process and a regard for human dignity call into question the means of implementation. More careful consideration of these niceties would probably result with an ombudsman emphasizing them.

This leaves aside the entire question of the adequacy or relevancy of executing a program. A major function of the ombudsman as observer is to suggest changes in procedure and rules, as well as possible legislation. The scrutinizing of programs would benefit all concerned; explanation of reasons for implementation would also have a positive effect. Certainly welfare, which is criticized alternately for doing too little and for being overly generous, could benefit in its public image by the explanations and recommendations of an unbiased observer.

Finally a more subtle area in welfare operations exists. No one is

146. N.Y. Times, Oct. 3, 1967, at 1, col. 5; see Reich, *supra* note 145, at 1252-53, in regard to procedure in welfare determinations—or its absence.

147. N.Y. Times, *supra* note 146.

148. Cf. Reich, *supra* note 145, at 1246, where he states:

If even [our] biggest corporations sometimes find government (no matter how well-meaning) to be arbitrary and oppressive, we may expect to find that the welfare beneficiary often suffers far more from heavy-handed government regulation.

149. See *Thompson v. Shapiro*, 270 F. Supp. 331 (D.C. Conn. 1967).

150. See Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1962).

151. *Smith v. King*, — F. Supp. — (S.D. Ala. 1967), 36 U.S.L.W. 3601; and see Reich, *supra* note 145, at 1247.

152. Reich, *supra* note 145, at 1248.

more incapable of fending off the abusive treatment of a government employee than one dependent upon that employee for a major portion of his income. No way of mitigating rude conduct is conceivable within the ordinary framework of a judicial or administrative system on the cavalier conduct by a welfare worker in the foregoing situation,¹⁵³ just as it is impossible to compensate for the pressures involved in the request for "permission" to search in the midnight raid.¹⁵⁴ The oversight of an ombudsman might serve to alleviate such potential abuses when they exist.

Institutions

An important aspect of the foreign ombudsman's function is the investigation of custodial institutions, primarily penal and mental health.¹⁵⁵ While the first impression may be that it is less a local than a state or federal problem, the trend may be in the opposite direction. Presently, petty offenders are imprisoned in local institutions. It is these offenders who probably are most amenable to be rehabilitated. Yet, the rehabilitation efforts of local jails are quite limited. The conditions, albeit transient, should recognize that the "[i]mprisonment will breed further contempt for the system unless the inmate understands that he is still *human* and as such, still has enforceable rights and can successfully overcome abuses of overzealous or over-cautious prison officials."¹⁵⁶ Such, however, is not generally the case. While transgressions against such basic liberties as freedom of religion may be prevented,¹⁵⁷ the courts are loath to look closely at prison complaints because of fear of undermining discipline or encouraging vexatious complaints.¹⁵⁸ The fear is possibly valid, but the foreign ombudsman has had the wherewithal to deal with the situation created by the prison complaints.¹⁵⁹

Two classes of persons presently widely imprisoned may be in the process of creating a new problem. If a person who is an alcoholic lacks the *mens rea*¹⁶⁰ to be a criminal, what shall be done with him? The

153. The treatment may well not be cavalier, but the recipient may well be abused because "[T]hey are subject to the social worker's urges to prescribe what is best." *Id.* at 1246 (footnote omitted). And see Reich, *supra* note 145, at 1359-60 and N.Y. Times, *supra* note 146, where the discharge of a number of caseworkers because of acceptance of bribes to direct their clients to various merchants is described.

154. Reich, *supra* note 150, at 1348-50.

155. See, e.g., Blix, *supra* note 92, at 396 and ANDERMAN, *supra* note 45, where it is stated that the Swedish Ombudsman is more active in these areas than the Danish.

156. Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397 (1965).

157. Cf. Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964).

158. E.g., United States *ex rel.* Oakes v. Taylor, 269 F. Supp. 1022 (E.D. Pa. 1967).

159. Gellhorn, *supra* note 26, at 312.

160. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

same question arises with the narcotic addict.¹⁶¹ The potential lack of an immediate answer could provide a fruitful field for an ombudsman. Absent an attorney, the potential alcoholic may face modification of present practices whereby a charge such as creating a public disturbance is utilized to jail him. But, even if such practices do not continue under another guise, such as arrests for creating a public disturbance, a problem remains. Most cities lack facilities to treat their mentally disturbed at present. Shall the alcoholic or narcotic addict be treated in these over-taxed facilities, or shall new facilities be created? And, if created, will they be adequate and properly operated? Abroad, alcoholic treatment centers have been subject to many complaints.¹⁶²

In this regard, the present widespread practice of jailing insane or emotionally disturbed persons before treatment might be expanded to the alcoholic—a step of remarkably limited progress. The mentally distressed benefit little from incarceration; deaths do result, both among the disturbed¹⁶³ and their fellow inmates.¹⁶⁴ Additionally, the psychological impact upon the mentally distressed may be great. It is doubtful if jail would be the milieu of choice for treatment of most mental diseases.

Additionally, the expansion of treatment of mental disorders in community mental health centers or wards of general hospitals presents an area of inquiry. While the terribly bad condition of previous years has probably passed from most of these treatment facilities, the possibility of occasional abuse must remain with such a degree of discretion that is necessary for the operation of such facilities.¹⁶⁵ In this same regard

161. *Robinson v. California*, 370 U.S. 660 (1962), wherein it was held that narcotics addiction, per se could not be a crime. And *see*, Comment, *Civil Commitment of Narcotics Addicts*, 76 YALE L.J. 1161, 1166 (1966):

Civil commitment thus provides an antiseptic way of doing thoroughly what the criminal law could not do at all. Prolonged incarceration of the sick, barbaric when called "punishment," is now granted respectability on the basis of "treatment." Unfortunately, this humane therapeutic gloss on confinements of addicts is invalidated by a very poor prognosis.

The comment concludes a civil commitment under the present New York and California laws cannot be justified under the police powers or the doctrine of *parens patriae*, and is unconstitutional.

162. In Sweden, where alcoholic treatment facilities are relatively extensive, the ombudsman devoted a considerable amount of his energy to observing them. Blix, *supra* note 92, at 396 and Anderman, *supra* note 45, at 229.

163. The Indianapolis Star, Sept. 1, 1967, at 1, col. 6, the deceased party had been examined at Marion County General Hospital for mental disorder.

164. The Indianapolis Star, March 25, 1966, at 1, col. 4. The insane party was acquitted on the grounds of insanity, Marion County Criminal Court No. 2, cause number 661452.

165. DE HARTAG, *THE HOSPITAL* (1964), describes the poor conditions of Houston: Jefferson Davis Hospital and states, at 5-6:

It [Jefferson Davis Hospital] was overcrowded, understaffed, its accreditation had almost been withdrawn after a staph infection in its maternity ward during which sixteen babies had died; but it was probably no more backward,

public hospitals have been exposed as sometimes extremely haphazard in their treatment of patients.¹⁶⁶ Likewise, the allegation that patients are used without consent¹⁶⁷ in experimental programs is an area that needs investigation—with either proof of its nonexistence, or the establishment of a reasonable program wherein the patients' rights are recognized and controlled experimentation with rational consent is possible.

Conclusion

The ombudsman concept has been successful in northern Europe and New Zealand, where the feasibility and usefulness of this undertaking has been established. He is highly praised by the citizens, who, nevertheless, have made a realistic appraisal of his functions and value. As one writer describes his place in the governmental framework of those countries which have adopted the idea:¹⁶⁸

The office of the ombudsman is only one element among others that help to promote the rule of the law and of justice. It is, however, generally acclaimed to be an important element, and it offers, at least in our [Sweden's] constitutional and administrative context, very definite advantages. For the ordinary citizen, he is a tribune to which one may turn with one's complaint without the need of a lawyer; for the public servant who has been unjustly criticized he offers rehabilitation. In a modern welfare state with an expanding administration and growing latitudes given to it, the ombudsman has a healthy preventive influence upon officials who might tend to be high-handed, arrogant, negligent or forgetful of the limits of their powers. He is in a position, moreover, to assist in bringing about consistency in the interpretation and application of some legislation and to suggest improvements in deficient laws.

politics ridden or neglected than similar institutions of charity all over the country.

166. See Comment, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 88-89 (1967):

Much of the care received today in our gigantic state mental institutions is merely custodial. Most of these institutions are woefully overcrowded and include within their walls many senile patients and others who could be more effectively care for elsewhere if society wanted to provide for them. Complicating the situation still further is a severe manpower shortage which includes both psychiatrists and other personnel such as psychologists, nurses, social workers, and attendants. Our state mental hospitals have not attracted a sufficient number of trained psychiatrists, who often feel greater professional satisfaction and earned a higher income in private practice. A community attitude of fear and rejection of the mentally ill complicates this problem (footnotes omitted).

While the statement concerns state institutions, the same is presumably true of local mental hospitals.

167. Note, *Experimentation on Human Beings*, 20 STAN. L. REV. 99 (1967). Accord, Beecher, *Ethics and Clinical Research*, 274 NEW ENGLAND J. MEDICINE 1359 (1966).

168. Blix, *supra* note 92, at 396.

In America, safeguards against administrative abuse are extensive and well-developed.¹⁶⁹ But there remain areas where inadequate remedies exist, and considerable improvement can be achieved.¹⁷⁰ The ombudsman could well operate in these areas, providing both a remedy for individual abuses and guidance for future conduct. That the ombudsman concept can be put comfortably within the American framework, at least locally, is demonstrated by the Nassau County experiment even though it was rejected finally. While no miracles¹⁷¹ should be expected in such an office and some questions may exist such as whether a qualified person can be attracted to the office or whether political involvement can be avoided or whether a tendency toward bureaucracy will develop, such a concept is worthy of careful and thoughtful consideration and experimental implementation.

TOM A. COLLINS

169. Note 88 *supra*, and accompanying text.

170. Davis, *supra* note 21, at 1075-76.

171. Such expectation may be one of the gravest pitfalls the ombudsman would face if established. GELLHORN, *supra* note 6, at 132.