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Prison Oversight and Human Rights: The US Experience

Michele Deitch

I. Introduction and agenda

Good morning, I am thrilled to be here on a panel with such a distinguished group of colleagues in the oversight field. What I have learned from them and from their offices over the last couple of decades has really helped shape much of my thinking about these issues, and has persuaded me that the United States has a great deal of catching up to do if we want to hold ourselves out as a leader in progressive corrections and as a country that respects human rights.

I want to talk to you today about two things: first, I want to talk a bit about the importance of prison monitoring as a form of oversight and the benefits it offers prison administrators; second, I want to briefly discuss the current state of prison oversight in the US.

II. The importance of prison monitoring

I first came to this issue over 30 years ago, when I served as a court-appointed monitor of conditions in the Texas prison system. Texas prisons at that time were terribly brutal places. For example:

- the toughest prisoners were put in charge of cellblocks and exercised control over other inmates with an iron fist;
- there was minimal staffing;
- violence was rampant, including frequent fatal stabbings and gang activity;
- prisoners were thrown into dark solitary cells with no due process;
- medical care was negligible and prisoners sometimes performed medical tasks on each other; and
- prisoners could be denied access to their attorneys and the legal system.

A landmark class action lawsuit called *Ruiz v. Estelle* brought attention to these horrors, and a federal judge ordered numerous reforms to the prison system. The judge also ordered the establishment of an office to monitor the implementation of those reforms.

Over the course of the next decade, prison monitors continued to shine a light on these terrible conditions and reported on what they found. Despite the prison agency's initial resistance to the court-ordered reforms, the system eventually came

to embrace the changes, become more professional, and operate within constitutional norms. While there are certainly plenty of problems that continue to exist, or that have arisen since then, there is no question that the Texas prison system is not the same place as it was before the court intervention.

The experience of working on this case taught me a number of lessons about prison oversight. **THE FIRST** is that transparency is absolutely critical any time an institution has total control over the lives and well-being of individuals. There needs to be external scrutiny of conditions of confinement, and ways of ensuring that people inside these facilities have a way to voice their concerns to an independent entity. Prisons are dark places, and sunlight is a disinfectant. Transparency helps prevent harm; it provides hope; and it allows for others to hold prison agencies accountable for ensuring that the correctional environment is safe, healthy, and humane.

At least in the US, it is also the norm in every other context involving public institutions and potentially dangerous systems EXCEPT prisons. No one bats an eye about ensuring transparency in the operations of banks, corporations, schools, nursing homes, mines, and nuclear power plants, for example.

THE SECOND LESSON I learned is that we cannot rely on the courts to provide that oversight function. The courts have traditionally been the last resort in the US for prisoners seeking redress for poor conditions, and, of course, courts need to be involved in the most egregious situations. But court involvement is REACTIVE. Courts only get involved, if at all, when conditions are so far below constitutional norms that people have already died or been seriously injured. And, at least in the US, strict limitations have been placed on prisoners' ability to bring lawsuits and on judges' ability to order reforms.

What is needed is PREVENTIVE MONITORING, where an outside body has the authority to routinely monitor conditions of confinement and report publicly on those conditions, whether they are good or bad. The oversight entity doesn't need to wait until conditions have deteriorated to the point of unconstitutionality; they aim to prevent transgressions from occurring in the first place. This is the kind of monitoring that has been described to you by Peter Clarke and Ivan Zinger.

The **THIRD LESSON** I learned from the Ruiz case is about the ways that oversight benefits prison administrators:

By routinely inspecting facilities, independent monitors can identify problems early, allowing prison officials to fix them before they escalate into larger issues that result in deaths, injuries, lawsuits, or scandals with negative headlines.

Even where conditions are reasonably good, monitoring helps keep the quality of correctional services high. An outside set of eyes sees conditions from a fresh perspective and can call them to an administrator's attention. Their objective

feedback often causes facility administrators to reconsider practices that they have always taken for granted, and helps the agency continually improve. A problematic institutional culture can be changed when there are observers who watch staff-inmate interactions and who ask questions about policies and practices. Also, external monitors bring community norms and values into institutions that tend to be very insular places.

Another benefit for administrators is that outside monitors help informally control staff behavior. Knowing that they might be observed at any time keeps staff on their toes and less likely to violate policy.

Monitors can also add their support to prison officials' requests for additional resources, staff, programs, or improvements to the physical plant.

THE FOURTH LESSON I learned from my experience monitoring the Texas prison system is that monitoring should never be a game of "gotcha". It is not about identifying problems to embarrass or critique the prison agency. Rather, it is about helping an agency to improve, and it can be about highlighting best practices.

Too often, oversight is framed in negative ways—it is just about preventing abuse. But I think the goal of oversight should be seen as much more positive than that, and it should be values-based: a good prison is not one in which there is simply the absence of harm. We need to be looking towards the kinds of prisons we want to have—prisons based on principles like those espoused by the British Prison Inspectorate—prisons that are safe and humane; that respect the dignity of people who are incarcerated; that offer productive activity; and that prepare inmates for re-entry. And oversight can assist in that goal, by letting us know whether those objectives are being met, and how facilities can get there.

In this way, I think that those who provide oversight and those who operate prisons share a common goal—to move forward in our operation of prisons and towards what we know works best.

The LAST LESSON I want to mention is that external oversight has to be IN ADDITION TO whatever INTERNAL ACCOUNTABILITY MECHANISMS exist within the prison agency, such as internal affairs divisions, internal auditors, data tracking systems, or inmate grievance systems. All of those internal mechanisms are critical, but their purpose is primarily to serve management needs, not to shed light on what's happening behind the walls or to protect the rights of prisoners. The pairing of internal accountability with external oversight may instead strengthen correctional administrators' ability to improve practices within their facilities.

And monitoring is also IN ADDITION to whatever ACCREDITATION assessments may occur. Many facilities undergo an accreditation process by professional associations such as the American Correctional Association. Those accreditation audits are important and very helpful as a way for peers to give feedback to agencies

about their compliance with ACA Standards. But they are not designed to achieve public transparency about the conditions, which is the ultimate goal with monitoring.

I am a believer in the importance of LAYERED OVERSIGHT—there is a need for many different types of oversight—monitoring, accreditation, investigations, regulation, legislative reviews, media access, and the courts, when it comes to ensuring that prisons are properly operated and that they are protecting human rights.

III. The status of prison oversight in the US

Let me shift gears now and talk a bit about the current status of prison oversight in the United States. You heard Michael Horowitz talk about the important oversight function he performs for the Federal Bureau of Prisons. But there are 50 states in the US, and each of them (plus DC and Puerto Rico) operates its own separate prison system for convicted felons. And every county operates its own local jail system for pretrial detainees and for convicted misdemeanants.

So correctional oversight in the US is far more complicated than in most countries. We don't have—and we wouldn't want to have—a single oversight mechanism for the whole country.

But sadly, the US lags behind most of the Western world when it comes to the existence of state-level versions of such entities. Correctional facilities are almost completely non-transparent, with minimal opportunities for outside observers to proactively monitor conditions of confinement and report publicly on their findings.

Yet the need for such transparency is obvious, as we are reminded repeatedly in the wake of tragic incidents such as the recent prison riot in South Carolina in which seven inmates were killed, high-profile abuses of inmates in New York and Florida, and recent media revelations that prisoners in Texas without any teeth were not allowed to get dentures and were being forced to have pureed foods.

Several years ago, I conducted a 50-state survey to determine what oversight mechanisms existed, and I can tell you that meaningful oversight—in the form of robust monitoring bodies—is very rare indeed in the US.

We have a few examples of statewide Ombudsman with authority to investigate prisoner complaints and, in some instances, to inspect facilities.

California has an Inspector General that, despite its name, is basically an Inspectorate.

Ohio has an Inspectorate that is based in the Legislature.

There are a few examples—notably in Texas and in New York City--of entities with authority to regulate local jails, by setting minimum standards and assessing compliance with those standards. A number of prison agencies also have the opportunity to assess jails in their state, with varying levels of authority.

Every state also has a designated entity, which could be either governmental or an NGO, with authority to protect the rights of people with physical or mental disabilities, including those who are incarcerated. But only in a few states do these organizations choose to exercise that authority on behalf of people in prison.

There are also three states in which a nonprofit advocacy group has either statutory authority or longstanding agency permission to inspect prison facilities.

I don't think any one model is the ideal, and I truly believe that each state needs to develop something that works for that jurisdiction. You can't just lift a model and transplant it somewhere else. Also, the type of entity and what it is called is much less important than the specific duties it is assigned and the powers it holds.

The limited extent of prison monitoring in the US is starting to change, though. In 2008, the American Bar Association adopted a policy calling on every state in the US to establish a public prison monitoring body. While there is plenty of work to be done to implement the ABA's call, there is increasing awareness of both the policy and the importance of developing oversight mechanisms.

The ABA policy also set out the essential elements for effectiveness of monitoring bodies—such things as independence, the need for routine monitoring and public reporting of findings, golden key access to the facilities, and the need for agencies to cooperate with the oversight organizations. Many current efforts to establish oversight bodies are using the ABA policy as a checklist to ensure that these entities are given appropriate authority in their enabling legislation.

In recent years, several jurisdictions have established new or reinvigorated oversight bodies. Washington State just created a statewide Ombudsman for its prison system, for example, and Texas created a statewide Ombudsman for its state and local juvenile facilities. The District of Columbia has begun an inspections program for anywhere that DC inmates are held. Quite a few local jurisdictions have established different types of monitoring bodies for their local jails.

I am also working with policymakers and Task Forces in a number of states that are seeking to develop statutory authority for a new oversight structure.

Attitudes towards oversight are also changing on the part of prison officials and legislators in the US. As the public's interest in criminal justice reform has grown, along with a deeper commitment on the part of policymakers to effective re-entry

and evidence-based practices, there is growing recognition that meaningful oversight is necessary to help support those goals.

The Prison Rape Elimination Act and its requirement that prison agencies be audited for compliance with the PREA Standards has also heightened awareness of the need for transparency and accountability when it comes to prison operations.

Policymakers are starting to demand more accountability for results for the huge investments they make in prisons. The social and financial costs of practices such as the use of solitary confinement, unnecessary detention, negligent medical care, and lack of programming raise concerns for legislators. Policymakers also want data-driven analyses that help them understand what's happening behind the walls and whether there are successful outcomes for prisoners.

And prison administrators are also starting to appreciate the benefits of oversight. They see the ways it can help the agency gain support for a more rehabilitative mission that not only better protects prisoners, but also improves safety and working conditions for staff.

In conclusion:

The theme of this conference is "The Way Forward." The way forward in correctional management, both in the US and abroad, must begin with an understanding of the importance of transparency in prison operations, and with a commitment to supporting the need for external monitoring.

Thank you.