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Michael B. Mushlin

Pace University School of Law, mmushlin@law.pace.edu

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From White Plains to Austin: The Road from *the Prison Reform Revisited* Conference to the *Opening Up a Closed World* Conference

Michael B. Mushlin*

In 2003, from all parts of the country and from abroad, leading experts in the field of correction including judges, lawyers, corrections professionals and academics came to Pace Law School in White Plains, New York, to attend a conference entitled *Prison Reform Revisited: the Unfinished Agenda*.¹ They did so because, at the beginning of the 21st Century, they felt a need to be with other experts to take stock of American prisons. It was not the artificiality of the turn of the calendar that drew them to Pace. They came for far more substantial reasons. The vast unprecedented growth of the American prison population,² the entry into the prison system of populations with special problems including the mentally ill and inmates with chronic and serious diseases such as AIDS and Hepatitis B,³ and the invention of supermaximum security

* Professor of Law, Pace University School of Law.

1. The conference took place on October 16-18, 2003, at Pace University School of Law, in White Plains, New York. Twenty-three papers were submitted in connection with the conference, covering a wide range of prison reform issues. A full issue of the PACE LAW REVIEW was devoted to a description of the conference and the publication of those papers. See Symposium: *Prison Reform Revisited: The Unfinished Agenda*, 24 PACE L. REV. 395 (2004).

2. The American prison system has expanded rapidly in the last thirty years, growing from a population of 300,000 in the mid-1990s to over two million at the time of the Pace conference. Michael B. Mushlin, Foreword, *Prison Reform Revisited: The Unfinished Agenda*, 24 PACE L. REV. 395, 398 (2004) (citing statistics indicating that the United States' jail and prison population at the time of the Pace conference was slightly over two million individuals).

3. See, e.g., CORR. ASS'N OF N.Y., MENTAL HEALTH IN THE HOUSE OF CORRECTIONS: A STUDY OF MENTAL HEALTH CARE IN NEW YORK PRISONS (2004),

prisons⁴ all suggested that the American prison system was undergoing major changes that required examination and thought.

Participants came to the Pace conference because they needed to find new ways to address these problems. By 2003, when the conference was held, it no longer seemed possible to rely on the courts to be the sole driving instrument of reform.⁵ Restrictive decisions by the U.S. Supreme Court⁶ and Congress's enactment of the Prison Reform Litigation Act⁷ meant that the legal receptivity to prisoners' rights cases was vastly different in 2003 than had been the case in the 1970s and 1980s.⁸ It was clear at the time of the Pace conference that

available at http://www.correctionalassociation.org/publications/download/pvp/issue_reports/Mental-Health.pdf; Heather Barr, *Connecting Litigation to a Grass Roots Movement: Monitoring, Organizing and* Brad H. v. City of New York, 24 PACE L. REV. 721 (2004) (identifying the mentally ill as a rising population in American prisons). For the unique health care needs of American prisoners, see NAT'L COMM'N ON CORR. HEALTH CARE, 1 HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS (2002), available at http://www.ncchc.org/pubs/pubs_stbr.vol11.html.

4. See Leena Kurki & Norval Morris, *The Purposes, Practices and Problems of Supermax Prisons*, 28 CRIME & JUSTICE 385 (2001). See also Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497 (2004) (describing the growth of supermaximum security prisons and how they operate in New York).

5. For an insightful discussion of the difficulties lawyers faced when litigating prisoners' rights cases around the time the Pace conference was held, see William C. Collins, *Bumps on the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651 (2004).

6. See, e.g., *Lewis v. Casey*, 518 U.S. 343 (1996) (holding that the right of access to courts is not violated even if the law library is deficient unless the inmate can show that the deficiency caused "actual injury"); *Sandin v. Conner*, 515 U.S. 472 (1996) (holding that the procedural component of the due process clause only applies to significant and atypical hardship); *Hudson v. McMillian*, 503 U.S. 1 (1992) (holding that use of force is not unconstitutional unless the force is applied maliciously and sadistically for the very purpose of causing harm); *Wilson v. Seiter*, 501 U.S. 294 (1991) (adding a subjective deliberate indifference test to the objective necessities of life test in order to determine whether the Eighth Amendment has been violated); *Turner v. Safley*, 482 U.S. 78 (1987) (imposing a reasonable relationship test to determine whether restrictions on the constitutional rights of inmates are lawful).

7. Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

8. While it has become more difficult in recent years to enforce rights in

if prison reform was to have vitality, new methods were needed.

The conference was memorable not only because of the topic; it was significant also because of the persons who attended. At Pace, we endeavored to bring together well-intended people of all stripes whether they were prison officials or prison reform advocates. This was a dramatic break from precedent. In the past, prison administrators rarely, if ever, voluntarily met with advocates. By the same token, advocates, when they wished to discuss strategies for achieving change, steered clear of prison administrators. Except during periods of conflict, these individuals lived their professional lives segregated from one another.

Those of us who organized the Pace conference had another philosophy.⁹ We believed that despite the conflicts, there was much more that united these people than separated them. My colleague and fellow organizer of the Pace and Austin conferences, Professor Michele Deitch, illustrated this point well when she said: “Most correctional professionals and most advocates for prisoners would find common ground in their belief that prisons and jails should be safe and humane places that respect inmates’ constitutional rights.”¹⁰ We thought that a significant momentum for constructive change could be unleashed if we could find a way to initiate a constructive dialogue between prison reform advocates, academics, prison administrators and government officials. We were convinced that productive things could happen if we broke the ice and brought the right people together. This simple—and in many ways obvious—insight had not been put into practice in the past. Before the Pace conference, as far as we were aware, there had not been a national meeting premised on the notion that good would come out of bringing all

court, the end of meaningful judicial oversight is far from over. *See, e.g.*, *Coleman v. Schwarzenegger*, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009) (three-judge court) (holding that California’s vast prison system was unconstitutionally overcrowded and ordering the population reduced by tens of thousands of inmates within two years).

9. In addition to myself, the organizers of the *Prison Reform Revisited* conference were Fred Cohen, William C. Collins, and Michele Deitch.

10. Letter from Michele Deitch to the Comm’n on Safety & Abuse in America’s Prisons (Feb. 8, 2006), *available at* http://www.prisoncommission.org/statements/deitch_michele.pdf.

stakeholders together in a non- adversarial setting to discuss prison reform.

There was a strong positive response to the invitation to attend the *Prison Reform Revisited* conference. Over one hundred experts from over twenty states and two foreign countries attended.¹¹ The participants at the Pace conference included leading academics in the field,¹² the nation's foremost human rights and prisoners' rights lawyers,¹³ and prison officials.¹⁴ In addition, several federal and state judges, and

11. Mushlin, *supra* note 2, at 399.

12. Academics included: Lynn Branham, Associate Dean, Thomas M. Cooley Law School, Michigan; Joe Colquitt, Beaseley Professor of Law, University of Alabama Law School; Brett Dignam, Clinical Professor of Law, Yale Law School; David Dorfman, Professor of Law, Pace Law School; Malcolm M. Feeley, Clearie Sanders Clement Dean's Chair, University of California at Berkeley School of Law; Craig Haney, Chair, Department of Psychology, University of California; Kay Harris, Professor, Department of Criminal Justice, Temple University; Michael Jackson, Professor of Law, University of British Columbia, Vancouver, Canada; James B. Jacobs, Professor of Law, New York University School of Law; Michael Jacobson, Professor of Law and Police Science, John Jay College of Criminal Justice; Charles Lanier, Professor, School of Criminal Justice, State University of New York at Albany ; Vincent M. Nathan, Professor of Criminal Justice, University of Toledo; James E. Robertson, Professor, Minnesota State University; Margo Schlanger, Associate Professor of Law, Harvard Law School; and Hans Toch, Professor, School of Criminal Justice, State University of New York at Albany.

13. Human rights lawyers included: Jamie Fellner, Director of U.S. Programs, Human Rights Watch, New York; Lisa Kung, Staff Attorney, Southern Center for Human Rights, Georgia; and Joanne Mariner, Human Rights Watch New York. Prisoner's rights lawyers included: Elizabeth Alexander, Executive Director of the National Prison Project, ACLU, Washington D.C.; Alvin J. Bronstein, Executive Director Emeritus of the National Prison Project, ACLU, Washington D.C.; Rose Braz, Critical Resistance, California; Eric Cadora, Program Officer, After Prison Initiative, Open Society Institute, New York; Jonathan Chasan, Prisoner's Rights Project, New York; Fred Cohen, Arizona; William C. Collins, Washington; Michele Deitch, Center for Criminal Justice Initiatives, Texas; Charles A. Fasano, Director, Prisons & Jail Program, John Howard Association for Prison Reform, Illinois; David C. Fathi, Staff Counsel, National Prison Project, ACLU, Washington D.C.; Jenni Gainsborough, Director, Penal Reform International, Washington D.C.; Robert Gangi, Executive Director, Correctional Association of New York; Steve Martin, Attorney, Texas; Marc Mauer, The Sentencing Project, Washington D.C.; and Karen Murtagh, Prisoners' Legal Services, New York.

14. Prison officials included: Anthony J. Annucci, General Counsel, New York State Department of Corrections; Donna Clement, Arizona Department of Corrections; Martin F. Horn, Commissioner, New York City Department of Corrections; Gary Johnson, Executive Director, Texas Department of

state legislators attended.¹⁵ As I wrote in summarizing the work of the conference, “[i]t is no exaggeration that this was as knowledgeable and committed a group of prison reformers as have assembled in this country in recent times.”¹⁶

At Pace, we took stock of the 21st century American prison system. We learned from scholars who had studied the issue closely, and from judges and participants who had first-hand knowledge, that prisoners’ rights litigation before the federal courts had led to amelioration of atrocious prison conditions in many of the country’s prisons and jails.¹⁷ We were told that one of the results of this unprecedented judicial involvement is that prison administrators in the United States had become more professional and many prisons operated more effectively.¹⁸ Nevertheless, presentations at the conference and the papers submitted by conference attendees demonstrated that severe problems continued to plague American prisons. It is hard to overlook, for example, that the United States prison system is the largest in the world and that regardless of how it is calculated, the United States is the world’s incarceration leader.¹⁹ Judge Morris L. Lasker, the judge who issued the

Criminal Justice; Carl Reynolds, General Counsel, Texas Department of Criminal Justice; Bruce Skolnick, Assistant Attorney General, Arizona; Greg Trout, Department of Rehabilitations and Corrections, Ohio; Art Wallenstein, Director, Montgomery County Department of Corrections and Rehabilitation, Maryland; Reginald A. Wilkinson, Director, Department of Rehabilitation and Corrections, Ohio; and Joseph Williams, Superintendent, Lincoln Correctional Facility, New York.

15. These included the Hon. Harold Baer, United States District Judge, Southern District of New York; the Hon. Morris E. Lasker, United States District Judge, Senior Status, District of Massachusetts; and the Hon. Richard F. Braun, New York State Supreme Court Judge, New York County.

16. Mushlin, *supra* note 2, at 400.

17. See, e.g., James B. Jacobs & Elana Olitsky, *Leadership & Correctional Reform*, 24 PACE L. REV. 477 (2004); Hon. Morris E. Lasker, *Prison Reform Revisited: A Judge’s Perspective*, 24 PACE L. REV. 427 (2004).

18. Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts, and Implications*, 24 PACE L. REV. 433, 475 (2004).

19. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:1 at n.4 (4th ed. 2009) (“According to a comprehensive census of the world’s prison population conducted by Kings College International Centre for Prison Studies in 2008 the United States had the highest prison population in the world and also had the highest rate of imprisonment, 756 per 100,000 of any country in the world” (citing ROY WALMSLY, KINGS COLLEGE INT’L CTR. FOR PRISON STUDIES, WORLD’S PRISON POPULATION LIST 1 (2009) (listing the United States first, Russia second, followed by Rwanda))).

landmark “Tombs” opinions,²⁰ spoke an important truth when in an address to the conference he said that our country is in the grips of an obsessive “love affair with imprisonment.”²¹ To make matters worse, minority persons are incarcerated in our prisons and jails in disproportionate numbers.²² Many American prisons are underfunded and understaffed, lacking adequate programs and activities; problems of abuse, including physical and sexual assaults, are unfortunately not unknown.²³ In 2003, in addition to these problems, there was no regular system of external oversight of the prison system had been developed to supplement and continue the work begun by the judiciary.

The Pace conference, of course, did not solve these problems, but it did succeed in raising awareness, generating useful discussion and establishing new lines of communication. Because of its success pressure built quickly for another gathering. One factor providing impetus was signs since the Pace conference that there had developed a greater public will to make changes. This can be seen in such developments as Congress’s action in passing the Prison Rape Elimination Act,²⁴

20. See, e.g., *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y. 1974), *aff’d*, 507 F.2d 333 (2d Cir. 1974).

21. Lasker, *supra* note 17, at 429.

22. For a graphic description of the disparate impact of imprisonment on African-American and Latino Communities, see Vincent Schiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge*, 24 PACE L. REV. 563, 564 (2004) (“African American and Latino males, the number one and two customers in our nations’ prison supermarket are being incarcerated at numbers that are truly abominable.”). See also Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27 (2009).

23. See generally COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (describing these problems in detail and thoroughly canvassing the literature on these subjects).

24. Prison Rape Elimination Act of 2003 (“PREA”), Pub. L. No. 108-79, 117 Stat. 972 (2002) (codified at 42 U.S.C. § 15601 (2006)). The PREA mandates a number of measures designed to address and eliminate the horror of prison rape. To accomplish this goal, the Act requires annual surveys to determine the scope of the problem, authorizes the creation of the National Prison Rape Elimination Commission with authority to hold public hearings, establishes a clearinghouse to aid prison officials, and provides authorization for funding to local jurisdictions to implement measures designed to lessen the possibility of prison rape. For a description of the Act, see James E. Robertson, *A Punk’s Song About Prison Reform*, 24 PACE L. REV.

The New York Times' call for prison oversight and for national standards for the operations of America's prisons,²⁵ the convening of the Commission on Safety and Abuse in America's prisons,²⁶ and the appointment of the ABA Task Force on the Legal Status of Prisoners.²⁷

The idea for the Austin conference grew out of these developments. In light of them, and taking advantage of the momentum generated by the Pace conference, we reasoned that there was much to gain by convening another national conference. However, whereas the Pace conference had a more general approach, we thought that the time had now arrived for a more focused conference—one that would concentrate on the critical question of external oversight.

We were right about the desire for another conference. The response to our invitation to the Austin conference was even more dramatic than our invitation to the Pace conference. Experts and practitioners from twenty-three states, the District of Columbia, and four foreign countries attended. As with the Pace conference, the persons attending the Austin conference were leading academics, prisoners' rights and human rights lawyers, and corrections officials. The very presence of such a prestigious and knowledgeable group sent a powerful message to the nation that the time to begin to develop meaningful prison oversight measures had arrived.

527, 551-57 (2004).

25. Editorial, *Medical Inattention in New York Prisons*, N.Y. TIMES, Sept. 15, 2009, at A32 (calling for oversight of prison health care in New York); Editorial, *Rape in Prison*, N.Y. TIMES, June 23, 2009, at A28 (calling for national standards to combat prison rape).

26. The Commission on Safety and Abuse in America's Prisons is comprised of civil leaders, corrections administrators, scholars, advocates for the rights of prisoners, law enforcement professionals, member of the religious community, and former prisoners. It was established by the non-partisan Vera Institute of Justice in the spring of 2005 with the goal of examining the safety of America's prisons. The final report of the Commission, entitled *Confronting Confinement*, was released on June 8, 2006 and is available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

27. In 2004, the American Bar Association authorized the creation of a Task Force to revise its criminal justice standards on the Legal Status of Prisoners. The Task Force submitted its draft standards to the ABA in 2007. On February 9, 2010 the ABA's House of Delegates approved the standards and promulgated them as the *ABA Criminal Justice Standards on the Treatment of Prisoners (February 9, 2010)* available at <http://www.abanet.org/crimjust/standards/treatmentprisoners.html>.

Why else would such an important group have traveled so far to a conference entitled “*Opening Up a Closed World: What Constitutes Effective Prison Oversight?*” if the persons attending did not firmly believe that the public welfare demanded that something be done to bring more openness and accountability to America’s prisons and jails?²⁸ The panel discussions that took place during those eventful days in Austin, as well as the papers presented, many of which are published in this edition of the Pace Law Review, confirm that real progress was made in Austin toward generating a national consensus that the time has come for effective external oversight of the nation’s prisons. This is all to the good. But if meaningful change is to actually happen, Austin cannot be the last station on this road.

28. To be sure, the timing for the Austin conference was right. But it took more than timing to make an event possible. The Austin conference would not have taken place had it not been for the drive, dedication, intelligence, and magnetism of my colleague Michele Deitch.