Pace Law Review

Volume 30
Issue 5 *Fall 2010*
Opening Up a Closed World: A Sourcebook on Prison Oversight

Article 13

11-18-2010

The Role of Civilian Organizations with Prison Access and Citizen Members—The New York Experience

John M. Brickman

Follow this and additional works at: http://digitalcommons.pace.edu/plr

Recommended Citation
John M. Brickman, *The Role of Civilian Organizations with Prison Access and Citizen Members—The New York Experience*, 30 Pace L. Rev. 1562 (2010)
Available at: http://digitalcommons.pace.edu/plr/vol30/iss5/13

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

The Role of Civilian Organizations with Prison Access and Citizen Members—The New York Experience

John M. Brickman*

"You can only expect what you inspect."[1]

Even as incarceration represents the most intrusive power of the state, the deprivation of citizens' liberty, we demand that modern government be transparent and accountable. But no government institution presents more opacity, and is less answerable, than the prison. The independent civilian overseer addresses and ameliorates the conundrum.

New York offers two models of citizen oversight[2] agencies for correctional facilities, one a private organization with statutory rights of prison access and the other a government agency with powers mandated by law. The Correctional Association of New York, which visits and inspects state prisons, is non-governmental but operates with citizen volunteers and a professional staff under a legislative grant of authority. The New York City Board of Correction, a New York

---

* Mr. Brickman served as the Executive Director of the New York City Board of Correction (1971-75) and the Chair of the Board of The Correctional Association of New York (2005-08). He is a member of Ackerman, Levine, Cullen, Brickman & Limmer, LLP, located in Great Neck, New York, where he practices commercial litigation, and is also a Commissioner of the New York State Commission on Public Integrity. He speaks and writes regularly on issues relating to prisons and jails, as well as lawyers' ethics. Mr. Brickman received his B.A. degree from The Johns Hopkins University in 1966, and his J.D., *cum laude*, from Columbia University School of Law in 1969. This paper presents an expanded version of his presentation at the "Opening of a Closed World" conference.

1. JACK MAPLE & CHRIS MITCHELL, THE CRIME FIGHTER: HOW YOU CAN MAKE YOUR COMMUNITY CRIME FREE 187-88 (1999).

2. A civilian overseer is someone who is not a correctional professional, or at the very least, someone who may have worked in corrections but no longer does, and hence presents the prospect of independence.

City government agency, oversees city correctional facilities and functions with unpaid board members appointed by different (and sometimes competing) branches of government, assisted by a professional staff.[3] Each body offers lessons for effective oversight.

In existence for 166 years, the Correctional Association enjoys the statutory right of access to New York state prisons.[4] From its organization in 1844, the Association has sent citizen volunteers to visit, monitor, and evaluate New York state correctional facilities. Since 1846, the Association has had the right, by statute, to visit state correctional facilities.[5] It guards its privilege vigorously and exercises it frequently. The Association typically visits ten or more state prisons annually and prepares and presents detailed reports on its visits to the Department of Correctional Services ("DOCS," the agency that operates the facilities), the legislature, and the public.[6] It also issues extensive topical reports[7] and conducts public education

---

3. N.Y. CITY CHARTER § 626 (1977).

4. Chapter 163 of the Laws of 1846, which incorporated the Prison Association of New York (its original title; the name changed in 1961), provided that the executive committee of the Association,

> [b]y such committees as they shall from time to time appoint, shall have power, and it shall be their duty to visit, inspect and examine, all the prisons in the state, and annually report to the legislature their state and conditions, and all such other things in regard to them as may enable the legislature to perfect their government and discipline.

1846 N.Y. Laws ch. 163, § 6, *available at* http://www.correctionhistory.org/html/chronicl/cany/html/cany02a.html.

4. The Association is a New York not-for-profit corporation with tax-exempt status under the Internal Revenue Code. *See* I.R.C. § 501(c)(3) (2006).

5. Accordingly, the Association plays a rare, perhaps unique, role in the oversight of American prisons. Its only counterpart appears to be the Pennsylvania Prison Society, the authorized members of which may visit Pennsylvania correctional institutions. 61 PA. CONS. STAT. ANN. §§ 3512, 3513 (West 2009).

6. For a roster of available reports, see Correctional Association of New York, Reports and Policy Briefings, http://www.correctionalassociation.org/publications/reports.htm (last visited Mar. 28, 2010).

7. *See, e.g.*, CORR. ASS'N OF N.Y., HEALTHCARE IN NEW YORK PRISONS 2004-2007 (2009), *available at* http://www.correctionalassociation.org/publications/download/pvp/issue_repor

programs.

In its early years, the roster of Correctional Association citizen volunteers included New York's most prominent, and accordingly, most affluent men (until the twentieth century, Correctional Association activists were virtually all male). They included Theodore Roosevelt, John D. Rockefeller, Andrew Carnegie, Cornelius Vanderbilt, Benjamin F. Butler (Attorney General of the United States and later United States Attorney for the Southern District of New York), John J. Astor, Jr., Samuel F. B. Morse, Jacob H. Schiff, and a host of other names that are recognizable instantly as representative of New York's elite.

The profile of the Correctional Association visitor has changed dramatically. In addition to prominent citizens, Association volunteers now include men and women with diverse racial, ethnic, economic, educational, and vocational backgrounds. Some have long advocated the improvement of prison conditions and programs. Others have enjoyed distinguished professional careers as physicians and lawyers, or in academia. In addition, the list includes ex-offenders, whose special experiences present an irreplaceable resource for the work of the Association, indeed for any monitor of prison operations, programs, and conditions.

The New York City Board of Correction was established in 1957, upon adoption of Section 626 of the City Charter.[8] Its powers and duties have included, among others, the inspection and visitation "at any time[9] of all institutions and facilities under the jurisdiction" of the New York City Department of

---

ts/Healthcare_Report_2004-07.pdf.

8. For a history of the Board of Correction, see Annette Gordon-Reed, *Watching the Protectors: Independent Oversight of Municipal Law Enforcement Agencies*, 40 N.Y.L. SCH. L. REV. 87, 91-105 (1995). *See also* Harold Baer, Jr. & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The* Benjamin v. Malcolm *Consent Decrees*, 52 N.Y.L. SCH. L. REV. 3, 18 n.62 (2008).

9. Charter revision approved in 1975, *infra* note 12 and accompanying text, added the phrase "at any time." The City Charter Revision Commission included the phrase in the referendum at the suggestion of the Board, which was concerned about limitation on its access that jail administrators might impose. The original charter language, which governed until the effectiveness of the changes approved in 1977, provided simply for "[t]he inspection and visitation of all institutions and facilities under the jurisdiction of the department."

Correction, which operates the city's jail and prison system;[10] the inspection of all department records; the evaluation of departmental performance; and the establishment of grievance procedures for inmates and department employees.[11]

In a major expansion of the Board's authority, beyond its initial "relatively undefined mandate,"[12] a 1977 City Charter amendment gave the Board the additional power to establish minimum standards for the "care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the Department."[13] Since the amendment, the Board also has had the power to issue subpoenas, conduct hearings, require the attendance of witnesses, and compel the production of documents.[14]

From the establishment of the Board until 1977, the mayor selected all nine members and appointed its chair. Consequently, the Board was only as independent and aggressive as the mayor wished, and a mayor who preferred seeming harmony, or to avoid public criticism of one mayoral appointee (the correction commissioner) by others (the Board), had the obvious opportunity to defang the Board. In practice, mayors have taken various approaches. For example, Rudolph Giuliani tried repeatedly to abolish the Board.[15] Conversely,

---

10. The mayor appoints the Commissioner of Correction (chief executive of the Department of Correction), who has responsibility for the operation of the department. N.Y. CITY CHARTER § 623.

11. N.Y. CITY CHARTER § 626.

12. Gordon-Reed, *supra* note 8, at 92. An empowered Board (and especially an active and independent chair) can use the Board's influence to bring progressive change to the jails. William J. vanden Heuvel, who chaired the Board from its revitalization in October 1970 until February 1973, provided a remarkable example of provocative leadership, even before the Board had power to set minimum standards for the Department of Correction. Under vanden Heuvel, the Board and its staff visited institutions regularly, exercising the singular power that gives the Board purpose and permits it to fulfill its mandate.

13. N.Y. CITY CHARTER, ch. 25, § 626(e) (1977) (adopted by referendum in 1975, effective January 1, 1977). Board members recognized the risks of their added duties. At a board meeting before the referendum, member David A. Schulte reminded colleagues that adopting the expansion would change the nature of members' responsibilities, and noted that some might not welcome the new burdens. As the staff head, I attended that meeting.

14. N.Y. CITY CHARTER § 626(g).

15. *See, e.g.*, Francis X. Clines, *Rikers Is Tense as Cuts Loom, and Official Warns of Crisis*, N.Y. TIMES, Nov. 17, 1994, at B1*;* Alison Mitchell *Council Passes a Deficit-Cutting Package,* N.Y. TIMES*,* Feb. 3, 1995, at B7;

after riots raged throughout the department in October 1970, John V. Lindsay revived the Board by appointing William J. vanden Heuvel as chair, and tolerated, indeed welcomed, the Board as activist foil to the department, a move that lead to the "retirement" of the incumbent correction commissioner.[16]

It was clear that allowing the mayor to appoint, and thus control, both the watchdog and the watched made little sense. Accordingly, since the 1977 City Charter changes, the mayor has shared the authority to appoint board members with the City Council (the city's legislative body) and the presiding justices of the Appellate Division for the First and Second Judicial Departments (the two intermediate state appellate courts located in the city).[17] Each appoints three members for terms of six years, with staggered expirations.[18]

Although the mayor appoints the chair, the arrangement is structured to avoid mayoral dominance. The practical result has varied. In 2007, advocates coalesced in opposition to proposals before the Board to truncate minimum standards for jails that the Board had established three decades earlier. The proposed changes, proffered by the Department of Correction, among other things would have reduced permitted cell sizes, cut back contact visits, subjected inmates in need of protection to twenty-three-hour lock-in status, and eliminated required Spanish-language translation at all jails.

The proposals generated vociferous objection. Many of the complaints centered on the Board's reliance on the Department of Correction, its apparent acquiescence to the administrative demands of senior departmental leadership, and the majority's seeming indifference to outside opinion—no matter how expert. The proposals would have made institutional life more difficult for inmates and allowed the department to save money without affording commensurate benefits. One group of experienced prison overseers wrote that "the board has squandered its independence . . . . An oversight body must not become part of

---

David Rohde, *City Board Asks to Step in to Oversee Jail Health Care*, N.Y. TIMES, Nov. 21,1998, at B3.

16. *See, e.g.*, Maurice Carroll, *McGrath Quits, Jail Post; Says He Was Not Ousted*, N.Y. TIMES, Nov. 20, 1971, at A1.

17. N.Y. CITY CHARTER § 626(a).

18. *Id.*

the political practicalities of the day."[19] In my testimony before the Board, I was blunter:

> When the watcher and the watched become too close, when they share not simply common goals but common activities, the oversight agency no longer acts independently, and it fails in its purpose . . . . With regret, I believe that your proposals to revise the minimum standards reflect your loss of independence and, accordingly, your failure to fulfill the purpose for which the board was created some [fifty] years ago, and to follow the example created by the board during the years in which it had its most sustained impact on the Department of Correction. Here, you give the appearance of a behind-the-scenes partnership with the Department of Correction . . . .[20]

Facing severe public pressure, the Board rejected all but two of the proposed amendments to the minimum standards. Since the 2007 controversy, new board members, appointed by the presiding justices of the Appellate Divisions, the City Council, and the mayor himself, seem to offer a degree of activism and a willingness to assert independence from the Department of Correction.

While some correctional administrators may not welcome the presence of outsiders, others concede the watchdog's virtue. According to Martin Horn, the New York City correction commissioner at the time, "[t]he role of oversight" is "critical to the operations of prisons and jails in democratic societies."[21]

---

19. Michael B. Mushlin, John Horan, David Lenefsky, Madeline deLone, John M. Brickman & Clay Hiles, *Independent Oversight of N.Y. Jails*, N.Y. L.J., May 17, 2007, at 2, *available at* http://www.law.pace.edu/news/inTheNews/Mushlin%20op%20ed%20NYLJ.0507.pdf.

20. John M. Brickman, Address before the New York City Board of Correction (Apr. 17, 2007), *available at* www.nycjailreform.org/documents/CA/CA_Brickman.doc.

21. Clyde Haberman, *NYC; Breaking the Chains of Inhumanity*, N.Y. TIMES, July 30, 2004, at B1. At the "Opening of a Closed World" conference, Mr. Horn noted that prison oversight "makes you better" and moves the

Yet challenge to oversight by civilians, whose primary vocational interests are not in the corrections field, comes easily. So too do efforts by administrators to truncate overseers' access to facilities, the civilian agencies' critical right. For the Correctional Association, it happened as early as 1847[22] and has remained an issue into the twenty-first century. In 2004, the Association sued the New York State Department of Correctional Services to enjoin new restrictions on its visitation rights.[23]

The value of civilian monitors to inmates and their families is intuitively obvious, indeed axiomatic. The New York experience, however, demonstrates that civilian overseers also bring benefits to prisons and their administrators. For example:

- Citizen volunteers, who are often prominent in their communities and active in government, can influence legislators and budget officials. These relationships provide support for corrections administrators, who might be well-advised to forego blanket resistance to overseers' calls for increased budget allocations and enhanced programs. Prison professionals can make these civilians their allies in demanding a larger budget share (or, in difficult economic times, maintenance of existing appropriations).
- Their status in the community places many civilian monitors in favorable positions to influence journalists, editorial writers, and media outlets. At a time when correctional administrators need all available assistance, they can look to overseers to help make their case to the public.

---

administrator toward fulfillment of an important goal, the need to be self-reflective.

22. *See* ILAN K. REICH, A CITIZEN CRUSADE FOR PRISON REFORM: THE HISTORY OF THE CORRECTIONAL ASSOCIATION OF NEW YORK 13-14 (1994).

23. *See* Paul von Zielbauer, *Prison Officials and Monitors are Headed for a New Battle*, N.Y. TIMES, Mar. 18, 2004, at B1; Haberman, *supra* note 21.

- With access to charitable and corporate philanthropy, citizen volunteers can match corrections personnel to sources of funds for non-traditional or innovative activities that are not feasible with governmental revenues. Furthermore, citizens can facilitate financing for demonstration projects that might later receive public funding.[24]
- Civilian overseers can provide "cover" to administrators who wish to take steps that may be unpopular within their departments.[25]
- Endorsements by oversight agencies give "street cred," or helpful external endorsement, to good work by corrections administrators and line-level professionals.[26]
- The presence of the civilian overseer keeps professional administrators at the top of their game, to the collective benefit of the government, staff, and inmates.

Each of the New York models offers advantages and presents drawbacks. The non-governmental organization, exemplified by the Correctional Association, can maintain

24. In the years following its revival in 1970, the Board of Correction won foundation grants for a variety of projects in city facilities. These included a program that brought hundreds of volunteer clergy to visit jail housing units, a program to provide prenatal services to pregnant inmates (after the program demonstrated its effectiveness, the city administration assumed the funding responsibility), a project that recruited volunteers to teach literacy to inmates, and other activities otherwise unavailable for lack of resources. *See* N.Y. CITY BD. OF CORR., ANNUAL REPORT (1972); N.Y. CITY BD. OF CORR., ANNUAL REPORT (1973).

25. For example, in and after 2007, when the New York State Department of Correctional Services sought to close institutions for budgetary and other reasons, the support of the Correctional Association helped overcome resistance by correctional staff unions protecting members' jobs and municipal officials, who feared the impact of prison shutdowns on local economies. *See* Nicholas Confessore, *Spitzer Seeks Way to Find State Prisons He Can Close*, N.Y. TIMES, Feb. 5, 2007, at B1; Robert Gangi, *Ease State Budget Woes by Closing More Prisons*, NEWSDAY, Nov. 12, 2009.

26. Administrators might welcome more of this praise: "Mr. [Martin] Horn said it wouldn't kill monitors to throw more bouquets when they see things going right." Haberman, *supra* note 21.

leadership that is less likely to change arbitrarily with corresponding shifts in the political landscape.[27] The government body, such as the Board of Correction, is susceptible to budgetary variations in lean times or because of political disagreement with agency activities, with particular risk when it challenges a jail administration that enjoys the mayor's favor. The not-for-profit organization, however, must also sustain itself—similarly an issue in a downturn—and must continually devote substantial resources and the attention of senior personnel to development issues and activities.[28]

The principal power of the Correctional Association is its ability to visit and inspect the prison, return to the outside world, and report its findings. Its authority, of course, has been bolstered by its 166 years of activity and its credibility among legislators, the media, the criminal justice system, and broader communities. The Board of Correction also enjoys the right to visit the jails, emerge, and report, but since 1977, its principal power has been rooted in its standard-setting function. Although dissatisfied mayoral administrations have suggested abolishing the Board and hence vitiating this authority, public pressure and resistance from the City Council have thwarted these efforts.[29] Moreover, the decentralized appointment process has tempered, if not eliminated, the risk of mayoral dominance. And perhaps precisely because when the Board speaks it does so as an agency of government, its challenges to the system seem more likely to be newsworthy than the voice of a private, although venerable, organization.

To which model should a jurisdiction seeking to establish or strengthen a correctional oversight function look? Each

---

27. Ironically, the incumbent Executive Director of the Correctional Association has held the post since 1982, while there have been only four executive directors of the Board of Correction since its revitalization in 1970; the last has held the post since 1983. Neither job offers formal tenure or civil service protection, but the point remains that the public employee position is more likely to turn over frequently, the Board of Correction experience notwithstanding.

28. The Correctional Association generates operating revenues from foundations, private and corporate contributors, and government grants for targeted programs. Since 2007, it has also enjoyed a significant endowment that stems from its sale of a Manhattan building that it had owned and occupied for some 120 years.

29. *See, e.g.*, Clines, *supra* note 15; Mitchell, *supra* note 15.

offers advantages and risks and there seems little reason to favor one paradigm over the other. Either approach, or a combination of both, will benefit the public good.

Werner von Heisenberg's uncertainty principle, an axiom of physics, teaches that the fact of observation will alter the subatomic reaction being investigated. Watching something affects its course. In facilities that confine people, the presence of civilian overseers humanizes everyone—inmates and staff—and makes the prison a better, more effective, and more enlightened institution for all.