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Michele Deitch

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Thinking Outside the Cell: Prison Reform Litigation and the Vision of Prison Reform*

Michele Deitch[1]

There has been a great deal of discussion at this conference about whether the last three decades of prison reform litigation have been successful. But I believe that we cannot legitimately answer the question about success without knowing the objectives we sought to achieve. Are prisons better than they were as a result of litigation? Unquestionably. Have we succeeded in transforming their underlying nature? The answer depends on what a former U.S. president once described as "the vision thing."[2] What *is* our vision of the transformed prison? What are we trying to accomplish anyway?

The notion of progressive reform covers a spectrum of possibilities. Some might want to ensure that prisons are run decently, that constitutional standards and maybe even professional standards are met, that incidents are isolated occurrences rather than reflective of systemic problems, and that prisons protect both public safety and the safety of those who live and work in them. We might call this the "professionalism" vision. Others will not rest easily until the institution of "prison" is abolished. And for many, including myself, reform is

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1. Michele Deitch is an Austin, Texas-based attorney and criminal justice policy consultant with a long history of involvement in prison reform, sentencing reform, and legislative work. She previously served as a court-appointed monitor in the landmark prison reform case of Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980). She currently works with policy-makers, correctional agencies, and advocates on systemic criminal justice issues, including efforts to improve prison and jail conditions, evaluate correctional management practices, develop innovative programs and policies, and reduce reliance on incarceration. She can be reached at (512) 328-8330 or at MYDeitch@aol.com.

2. President George H. W. Bush's descriptor was extensively reported. *See, e.g.*, R. W. Apple, Jr., *The Republicans in New Orleans: Man in the News: A Self-Effacing Nominee: George Herbert Walker Bush*, N.Y. TIMES, Aug. 18, 1988, at A1.

something in between these points: the transformation of prison as we know it.

In my personal vision of the transformed prison, fewer people are locked up, and sentences are much shorter. The culture of the prison is entirely different: inmates and staff would treat each other with dignity and respect; offenders would not be psychologically or physically harmed by their prison experience; and institutions would be open and transparent, welcoming visitors and outside reviewers. Rehabilitation would be stressed above all: there would be strong efforts made to sustain bonds between inmates and the outside world; facilities would be smaller and located closer to urban communities and families; programs would be offered that help offenders treat their addictions, become educated, learn meaningful work skills, and learn to become responsible citizens. And prisons would be held accountable for meeting the needs of prisoners and rehabilitating them. The concept of "reform" is broad enough to cover any or all of these visions along the spectrum, but we cannot assume we all use the word in the same way.

But why does it matter what vision we hold? Isn't this talk about "vision" an academic luxury? Some might ask: how can you speak of revamping the notion of "prison" when we are desperately trying to keep prisoners from being gang-raped, to get medical treatment for those with chronic diseases, and to ensure that the mentally ill are not suffering as a result of the sensory deprivation in Supermax? Isn't it "vision" enough to simply desire to fix these problems and bring conditions up to a tolerable level? Reform, one might argue, is about incremental change, not about a revolution.

Incrementalism may be an appropriate *description* of reform efforts, but I believe that it should not be our *prescription*. We need to have a roadmap that articulates where we are heading with our prison reform efforts. Otherwise we run the risk of selecting piecemeal reform strategies that are not necessarily designed to meet our long-term objectives.

Having an explicit vision allows us to look critically at our own activities. For example, it allows us to thoughtfully examine whether pushing for minimum standards somehow legitimizes or perpetuates the underlying prison operation. We need to ask ourselves questions such as: does getting inmates

off the floor create a safer environment, but also lead to more prison beds being built? Does fighting for the protection of vulnerable inmates lead to their being housed in a safer, but highly restrictive setting? Does establishing a grievance system that never holds in favor of the inmates provide a record of complaints, but undercut our goal of accountability? Does increasing the number of custodial staff protect safety, but at the same time lead to a more ingrained prison culture? I could continue to list questions along these lines. I do not presume to know the answers, but I believe we need to have this conversation. And in order to have the conversation, we need to know what that long-term vision is, not just the short-term goals.

If we do want to change the fundamental nature of prison in some of the ways that I mentioned, then how do we get there? The most necessary changes of all—especially the shifts in prison culture and the problem of over-reliance on incarceration—are the ones that are least susceptible to reform through litigation: any of us who have worked on a prison reform lawsuit know all too well the limits of what litigation can achieve. Successful litigation takes us to a place of minimum standards; it does not lead to the revamping of prison as we know it.

Let me be clear: I am in no way suggesting that it is better to initiate or advocate for reforms that fundamentally change the nature of prison than it is to litigate for basics like safety, medical care, freedom from brutality, and better physical conditions. We cannot sacrifice those living under horrendous conditions today even for a long-term vision. Prison reform litigation is absolutely necessary if we are to have even incremental improvements in prison operations. Moreover, litigation is a very powerful threat that mobilizes those with the power to make changes. Litigation of course pushes the envelope of what is possible—the definition of "minimum" has changed over time because of the litigation successes. However, if we want something beyond prisons that meet minimum standards—that are only *tolerable*—then we have to think more broadly about our strategies and the need to fight the reform battle on multiple fronts. We need, for example, to be addressing the issue of mass incarceration at the same time that we seek to improve prison conditions. We need to start thinking about the fight to improve prison conditions as an important part of an overall *crimi-*

nal justice system reform effort. And, by the same token, we have to make sure that advocates for systemic reform do not overlook improved prison conditions as a key goal in their fight.

Having an articulated vision that is broader than the desire for improved prison conditions helps us to work effectively with other prison reformers who may not use litigation as their tactic. There are grassroots groups that educate and mobilize the public, legislative advocacy groups pitching a message of the need for sentencing reform, civil rights groups researching the effect of imprisonment on their constituencies, coalitions planning for the return of offenders to their communities, and legal scholars and bar associations reviewing the administration of justice and considering sentencing reform proposals. But those reform groups and the prison reform litigation crowd rarely cross paths or join forces. Unspoken lines tend to be drawn between in-prison and out-of-prison reform efforts.

Those lines are illusory and dangerous. Illusory because prison is not a black box—what happens there counts, whether we are looking at re-entry issues or expansion or privatization or prevention and treatment. We cannot, for example, successfully re-integrate an inmate into the community and into his family if he has been locked up for twenty years with no programs, if he has been treated like an animal, if he has lived in daily fear of sexual assault, and if his health has deteriorated. Effective re-entry starts the day an offender is incarcerated, not on the day he leaves prison, and it begins not only with the provision of programs but with a commitment to humane treatment and safe conditions.

And the line-drawing is dangerous because it perpetuates the distinction that is at the root of so many of our problems: seeing prisoners as wholly outside our community. Moreover, an uncoordinated strategy carries with it the risks of unintended consequences. We need to begin to recognize the ways in which the fight to improve prison conditions is inextricably linked with efforts to achieve sentencing reform, to improve parole decision-making, to oppose expanded privatization, to change police arrest practices, to enhance services and programs for community-based corrections, and even to implement death penalty reform. Each of these areas of reform has the potential to help us achieve our broader vision of prison reform,

but they also have the potential to undercut our immediate goals if we do not act in a coordinated fashion with those who are mounting campaigns to address these issues.

Let me provide a few examples to show why we need to see our work in a systemic context. Take, for instance, the battles over sentencing reform. It is too easy for our fellow reformers, in pursuit of short-term gains, to rely on the "tough on criminals" clichés that created many of the problems we now struggle with, and for policy-makers to make serious or violent offenders the "sacrificial lambs"—the trade-offs—for re-working a sentencing scheme. As a result, non-violent, drug offenders may be diverted from prison—obviously a good thing—but at the same time, the prison population will harden; there will be an increase in the number of high-security, oppressively-designed facilities built to house the remaining, still-large numbers of inmates; those who remain will serve increasingly long sentences under these harsh conditions; and there will be a huge increase in the geriatric prisoner population.

Or consider the very important efforts underway in many states to get funding for community-based treatment programs or to mobilize service agencies and providers to serve offenders on probation or parole.[3] We need to work together with those advocates to ensure that *new* money is provided for these objectives and that the money is not simply shifted *out* of prison programs and services to serve this community-based offender population.

With regard to police practices, those of us concerned with jail conditions and jail administration *ought* to care about whom the police are arresting and bringing to their facilities. Three years ago, a group of thoughtful jail experts and administrators (including several people participating in this conference) signed a Supreme Court *amicus* brief challenging the arrest of very minor offenders because of the problems such arrests can cause for the jail and the risks to those arrested.[4] Although the

3. Some of these reform efforts are discussed generally in a very helpful new report: Judith Greene, *Positive Trends in State-Level Sentencing and Corrections Policy*, FAMILIES AGAINST MANDATORY MINIMUMS, Nov. 6, 2003, *available at* http://www.famm.org/pdfs/82751_Positive%20Trends.pdf (last visited Feb. 20. 2004).

4. The brief was filed in the case of Atwater v. City of Lago Vista, 532 U.S. 318 (2001). The case involved a mother who was arrested, handcuffed, booked, and confined in a jail cell for not buckling the seat belts of her children while she was

effort lost in court, it helped shift the view of the case from one in which simple police practices were at issue to one in which jail conditions needed to be taken into account. It educated as it advocated for systemic reform.

In the privatization context, we need to stay alert to expansion efforts for a number of reasons: because they tend to undercut efforts to reduce the number of available beds; because the more a state or county relies on private beds, the less leverage there will be to remove inmates if conditions prove problematic; because they can lead to inmates being sent out of state, thereby undermining family bonds; and because privatization fosters the notion of inmates as a "commodity" rather than as human beings.

I could continue to illustrate ways in which seemingly unrelated criminal justice reform efforts tie in closely to our vision of the transformed prison and even to our intermediate goals of improving prison conditions. Is my point that prison reform litigators should cease their advocacy on prisoners' rights and shift their efforts to these other areas of reform? Absolutely not. I am simply arguing for viewing our work in a systemic context. We must ensure that those of us who care about prisoners' rights add our voices to the fight over these other reform efforts. With our focus on prison conditions, we can make sure that our immediate areas of concern are not in conflict with these other

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driving slowly down a residential street, despite the fact that the offense carried a maximum penalty of a $50 fine. The court held, in a five-to-four decision, that a police officer may impose a full custodial arrest on any individual if there is probable cause to believe she committed an offense, regardless of whether the offense carries a penalty involving jail time. The *amicus* brief was filed on Ms. Atwater's behalf and was signed by a number of correctional experts and administrators. (I was a co-author of the brief.) *See* Brief of the Institute on Criminal Justice at the University of Minnesota Law School and Eleven Leading Experts on Law Enforcement and Corrections Administration and Policy as Amici Curiae in Support of Petitioners, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408), *available at* 1999 U.S. Briefs LEXIS 1408, 2000 WL 1341293. The brief argued that it is unreasonable to allow custodial arrests for non-jailable misdemeanors and drew attention to the trauma, risks, and consequences that may befall an individual as a result of a custodial arrest. The brief further contended that arrests of low-level offenders could cause serious management problems for jail officials and produce dangerous and costly bottlenecks in the booking areas of jails. The Court cited this *amicus* brief in its opinion and apparently was persuaded by the brief that the custodial arrest practice was unreasonable (although not unconstitutional) and worthy of legislative change.

efforts, and with our eye on a long-term vision, we can work together with other reformers to take us somewhere far beyond what litigation alone can accomplish for us.

So far, I have argued for the importance of defining our vision, which I assume is something beyond minimum standards and beyond that which litigation can achieve. I have urged a thoughtful examination of the question of whether our short-term tactics might undercut our long-term goals (whatever they may be). I have emphasized the need for a coordinated approach between prison reform litigators and other reform advocates. And I have argued that it is both illusory and dangerous to draw lines that emphasize the inside-outside prison distinction because our work must be seen in a systemic context. But I have one more question to ask.

Do we need visionary leaders from inside the institution to help achieve the kinds of fundamental reforms that we want to see, the kinds that come from a shifting of institutional culture, from a willingness to experiment, from a desire to reap the benefits that come from respecting the humanity even of those who have broken the law? As outside advocates, we can develop strategies for forcing important reforms on an unwilling system (and my own experience in the *Ruiz*[5] case shows me that basic reform can be accomplished even at that level). But correctional leaders, if they are so inclined, have the power to implement a vision that includes fundamental change.

I can think of several examples of internal efforts to achieve fundamental reform. Although we can debate the effectiveness of the reforms or even whether they went far enough, it is striking to me that not one of these initiatives arose as a result of litigation or, to my knowledge, even from outside advocacy. Yet the objectives of these initiatives may match the visions held by many of us.

I think, first and foremost, about Grendon Prison in England, which I researched as a graduate student. This remarkable institution took ordinary, maximum-security inmates and

5. *Ruiz*, 503 F. Supp. 1265. *See supra* note 1. I served as a full-time, court-appointed monitor of conditions in the Texas prison system in the Office of the Special Master, *Ruiz v. Estelle*, Southern District of Texas, during the 1980s. The *Ruiz* case, of course, called for systemic reform of a prison agency that repeatedly demonstrated its resistance to court-ordered changes.

"regular" officers and placed them in a therapeutic setting that was run according to democratic principles.[6] In many ways, this prison became the prototype for the now-familiar therapeutic community drug treatment programs. I also think about the "parallel universe" created by the director of the Missouri prison system, which is premised on the ideas that life in prison should parallel life on the outside to the extent possible, and that all the activities in which the inmate engages should help him acquire the skills, work ethics, and sense of responsibility he will need to succeed once he leaves prison.[7]

I can also point to the McKean Federal Correctional Institution in Pennsylvania, which has a pro-social environment, treats inmates with a higher level of respect, and offers an unusually large number of programmatic activities.[8] And we should consider the "direct supervision" management model—once experimental, but now implemented in many jails and prisons around the country—which provides for greater levels of personal interactions between inmates and staff and does a far better job of protecting inmate safety than traditionally managed and designed facilities.[9] Each of these initiatives is a shining example of what can be accomplished by a visionary correctional leader and is a step towards the transformation of our prisons.

For those rare correctional administrators motivated by something beyond the status quo and who recognize that they have a responsibility to seek reform because our system is so far from perfect, we as advocates need to do more to encourage

6. Grendon Prison is far too interesting and complicated a place to be summarized in a single sentence. For more information, I recommend an excellent in-depth study: ELAINE GENDERS & ELAINE PLAYER, GRENDON: A STUDY OF A THERAPEUTIC PRISON (1995).

7. For a more complete description, see NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., BULL. NO. NCJ 181414, SENTENCING AND CORRECTIONS: ISSUES FOR THE 21ST CENTURY (May 2000) (featuring Dora Schriro's article *Correcting Corrections: Missouri's Parallel Universe*), *available at* http://www.ncjrs.org/pdffiles1/nij/181414.pdf (last visited Jan. 27, 2004).

8. *See* Robert Worth, *A Model Prison*, THE ATLANTIC MONTHLY (Nov. 1995), *available at* http://www.theatlantic.com/issues/95nov/prisons/prisons.htm (last visited Feb. 20, 2004) (which profiles the McKean Federal Correctional Institution).

9. Much has been written about the direct supervision model. *See, e.g.*, David Parrish, *Evolution of Direct Supervision in the Design and Operation of Jails*, 62 CORRECTIONS TODAY 84 (Oct. 2000); P. Peroncello, *Toward a New Direct Supervision Paradigm: Part II*, 9 AMERICAN JAILS 60 (Sept.-Oct. 1995).

them, to work with them, to develop a long-term vision in concert with them.

Thirty-one years ago, Fred Cohen wrote the following words, which ring even truer today:

> The task now, as I see it, is to avoid the exaggeration of what is possible through litigation, to inventory and consolidate gains and to link up with other reform efforts—ranging from high level study efforts to action oriented groups—and move in the direction of achieving overriding objectives. Bringing decency and regularity to the prison should be viewed as a transitional step on the road to the elimination of the fortress prison and the utilization of any institution as a choice of first resort.[10]

So I invite you to have the conversation about vision, to develop coordinated strategies and goals in concert with *all* members of the criminal justice reform community, whether they are litigators, non-profit advocates, grassroots groups, "grasstops" organizations, former or current prisoners, service providers, academics, or correctional administrators. If one of our objectives at this conference is to spell out the "unfinished agenda" of prison reform, then, I would submit, the list of agenda items must include those issues that never were (and likely never will be) highly susceptible to reform by litigation. We must figure out how to stem the tide of mass incarceration, and turn prison into an institution that is not inherently destructive of human relationships, that treats people with dignity and respect, that recognizes the human rights of those who are incarcerated, and that prepares them to become responsible citizens.

We need to "think outside the cell"—and beyond litigation strategies—if we hope to ever achieve something more than minimum standards in the operation of our prisons.

10. Fred Cohen, *The Discovery of Prison Reform*, 21 BUFF. L. REV. 855, 887 (1972).