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Reflections on a Government Model of Correctional Oversight

Richard T. Wolf, Esq.*

Introduction

Beginning in the 1970s, corrections institutional reform litigation and resulting judicial oversight brought dramatic improvements in conditions of confinement and prisoner access to health and mental health care in many state prison systems and local jails. Some jurisdictions relied exclusively on the courts for correctional oversight and failed to develop non-judicial oversight mechanisms. Judicial oversight required governors, mayors and legislatures to provide funds to meet mandates imposed on corrections systems by court orders and consent decrees. Persistent prisoners' attorneys and ongoing court involvement forced correctional systems to work to maintain the improvements.

In the late 1990s however, state and local governments began invoking provisions of the Prison Litigation Reform Act ("PLRA") to end ongoing court involvement in correctional oversight.¹ Decades of judicial oversight of corrections came to an end. Jurisdictions that relied exclusively on litigation and the courts to provide oversight of the "closed world" of corrections suddenly found themselves without any external corrections oversight mechanism. It is unclear whether the absence of judicial oversight will contribute to the deterioration of conditions in affected correctional systems, or whether it already has done so. However, elected officials can be expected to devote limited resources to public works and maintenance projects that directly affect the lives of taxpaying voters (for example, schools, hospitals, and roads) rather than to

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1. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802, 18 U.S.C. § 3626 (2006).

correctional facilities—closed, “total institutions” that taxpayers do not see.

The fact that correctional facilities *are* “closed worlds” is the compelling argument for outside, independent scrutiny. Another is the costs: taxpayers should be able to have windows into the institutions costing over \$65 billion each year.² Other governmental institutions and operations are subject to oversight. Corrections should be no exception.

It is my view that even with the best efforts of well-intentioned professional corrections administrators, conditions inside prisons and jails are at risk for erosion unless jurisdictions develop, implement, and support effective non-judicial correctional oversight to fill the PLRA-inspired correctional oversight vacuum.

The New York City Board of Correction (“Board” or “BOC”) is one model of non-judicial oversight. Presented below is a description of the model, its strengths and weaknesses, and some thoughts about how the BOC model might inform jurisdictions that are seeking to establish effective oversight of corrections.

The New York City Board of Correction

A. *Structure and Authority*

The New York City Board of Correction (the “Board”) is a non-judicial, government correctional oversight mechanism. It is a hybrid that defies easy categorization because it is both a regulatory body and a monitoring and inspecting organization.

The Board is a City agency, separate and apart from the City’s Department of Correction (“DOC”), the large, complex bureaucracy that operates the City’s jails. The Board’s broad mandates are to establish minimum standards “for the care, custody, correction, treatment, supervision, and discipline of all

2. See Bureau of Justice Statistics, U.S. Department of Justice, Crime and Justice Data Online, http://bjs.ojp.usdoj.gov/dataonline/Search/EandE/state_exp_totals.cfm (select parameters “all governments,” “corrections,” and “2005”) (last visited Mar. 15, 2010) (compiling report showing that, in 2005, the total estimated amount of direct expenditures by federal, state, and local governments for corrections was \$65,091,212).

persons held or confined under the jurisdiction of the department,”³ and to evaluate the performance of the NYC Department of Correction.⁴ The Board’s present structure is designed to promote independent oversight though ongoing monitoring and inspection, but it was originally created for entirely different reasons.

The Board began as a citizens’ advisory board, established in 1957 by then Mayor Robert Wagner at the urging of his Corrections Commissioner, Anna M. Kross.⁵ The Mayor appointed nine unsalaried members to be advocates for resources to help Commissioner Kross improve conditions of confinement in the City’s jails, increase prisoner programming, and support her management reforms.⁶ The original Board members were authorized to inspect City jails and to offer long-range planning proposals, but the volunteer members were given no staff, and for many years they relied upon Department of Correction employees for clerical support.⁷

The Board was fundamentally restructured when, in 1975, New York City’s voters endorsed by referendum a plan to reshape the Board into a stronger and more independent correctional oversight agency.⁸ New provisions of the City Charter changed how members were to be appointed, and gave the Board additional authority and powers.⁹

The idea behind revising the Board’s structure was formally to establish and maintain an arms-length relationship between the Board of Correction and the Department of Correction.¹⁰ Instead of vesting sole appointing authority with the Mayor, the revised Charter provisions (which remain in effect today) provided that three unsalaried Board members be appointed by the Mayor, three by the legislature (the City Council), and three by the Mayor upon nomination by the judiciary (the Presiding Justices of the First and Second

3. N.Y. CITY CHARTER § 626(e) (2009).

4. *Id.* § 626(c)(4).

5. N.Y. City Bd. of Corr., About BOC—History of BOC, <http://www.nyc.gov/html/boc/html/about/history.shtml> (last visited Mar. 15, 2010).

6. *Id.*

7. *See id.*

8. *Id.*

9. *Id.*

10. *Id.*

Judicial Departments).¹¹ Appointments to six-year terms were to be made on a rotating basis.¹²

The new Charter provisions redefined the authority of the BOC, converting it from an advisory board to a regulatory body by directing the Board to establish minimum standards.¹³ The minimum standards are binding and enforceable regulations.¹⁴

The voters also gave the Board important monitoring and inspection tools. First, the BOC was authorized to hire its own staff.¹⁵ Second, Board members and staff were granted unfettered access to all DOC facilities and records.¹⁶ Finally, the Board was given subpoena power and was authorized to conduct investigations and to hold public or private hearings on any matter within the jurisdiction of the DOC.¹⁷

B. *Compliance Monitoring and Jail Inspection: BOC's Field Operations Unit*

The Board has a small but experienced staff. The staff members track a variety of jail violence indicators, and respond to and investigate inmate suicides, homicides and other unusual incidents. However, their primary responsibilities are to inspect the City's jails, and to monitor for compliance with three sets of minimum standards established by the Board. These regulate conditions of confinement, mental health services, and health care. The Board has a staff of fourteen employees, eight of whom comprise a full-time field operations unit.¹⁸

11. N.Y. CITY CHARTER § 626(a) (2009). *See also* N.Y. City Bd. of Corr., *supra* note 5.

12. § 626(a). *See also* N.Y. City Bd. of Corr., *supra* note 5.

13. § 626(e). *See also* N.Y. City Bd. of Corr., *supra* note 5.

14. *See* § 1041.

15. *Id.* § 626(b).

16. *Id.* § 626(c)(1)-(2).

17. *Id.* § 626. *See also* N.Y. City Bd. of Corr., *supra* note 5.

18. The Department of Correction employs 8,662 uniformed staff and 1,611 civilians, confines more than 13,000 inmates in eight major facilities on Rikers Island, two off-Island "borough" jails, and two hospital prison wards. Its budget for fiscal year 2010 is projected to exceed \$1 billion. *Mayor's Management Report, Preliminary Fiscal 2010*, at 126-27 (Feb. 2010). The Board's total budget will be approximately \$950,000. N.Y. CITY OFFICE OF MGMT. AND BUDGET, FISCAL YEAR 2011 JAN. PLAN FOR BD. OF CORR. (Jan. 28, 2010).

The Board's field representatives walk the jails each day, serving as BOC's "eyes and ears" in the facilities. Their job is to promote stable jail environments by receiving and addressing complaints from inmates and staff, and by helping to smooth the delivery of basic services. Their goal is to identify small minimum-standards compliance issues and facility-operations problems and bring them to the jail's administration for resolution before they ripen into major problems. Indeed, approximately ninety-five percent are successfully resolved in the facility and never come to the attention of DOC's central office administrators.

Increasingly, the Board's efforts have been directed towards ensuring that inmates receive timely access to medical and mental health care. Providing timely access to decent medical services and mental health care in correctional settings requires close cooperation and coordination between correctional health providers and custody staff. Occasionally, despite the best of intentions, inmates with serious medical problems sometimes fall between the cracks. When they identify such inmates, BOC field representatives get them to needed care. Then, our staff identifies systemic issues, if any, which contributed to the problem. Systemic problems sometimes are resolved at the individual jail. Oftentimes, however, they require involvement of central office administration.

Both DOC and the Department of Health and Mental Hygiene are committed to full compliance with minimum standards. This is evidenced by the prompt corrective actions that typically are taken by jails' uniformed and correctional health managers when incidents of non-compliance are reported by BOC field representatives. When noncompliance with a section of the minimum standards is not corrected at the facility level, the Board brings the matter to the appropriate agency's central office administrators for resolution.

C. *Minimum Standards*

The Board has promulgated three sets of minimum standards.

1. Conditions of Confinement

The original Minimum Standards for New York City Correctional Facilities (promulgated in 1978) included provisions calling for non-discriminatory treatment of inmates, and regulated inmate access to courts, religious services, visits, recreation, access to the outside world (telephones, mail, publications, and packages), and overcrowding.¹⁹ The standards remained substantially unchanged until 1985, when the BOC amended provisions regulating overcrowding.²⁰

In November, 1983, the City's inability to comply with orders of the Federal District Court had led to the release of 613 inmates.²¹ The outraged responses of the media and politicians caused the City to embark on a major building plan to add bed capacity.²² However, new beds could not be opened quickly enough to meet the steady influx of pre-trial detainees, and another release was feared. Recognizing the public safety risks presented by another release, the Board decided to increase the allowable capacities of dormitory housing units by twenty-five percent.²³ However, mindful of the risks to institutional safety and security of allowing DOC to house more detainees in dormitories, the Board imposed dormitory capacity limits, required sound-separated dayrooms, and incorporated into the amended standard the City's Building Code requirements for ratios of operable toilets, showers and sinks to inmates in jail dormitories.²⁴

19. See N.Y. City Bd. of Corr., Rules—Minimum Standards, http://www.nyc.gov/html/boc/html/rules/minimum_standards.shtml (last visited Mar. 4, 2010).

20. *Id.*

21. *See id.*

22. *Id.*

23. *See id.*

24. At the conclusion of a lengthy review and deliberative process, the Board passed numerous amendments to the Minimum Standards. It considered, but declined to modify, Standards provisions governing square footage per inmate in dormitories and dormitory capacities. The Board left intact the requirement that inmates be offered an opportunity to take outdoor exercise daily. See N.Y. City Rules, tit. 40, ch. 1, § 1-06 (2009), available at <http://24.97.137.100/nyc/rcny/entered.htm>. Also, the revised Standards continue to require that DOC operate a visiting program five days per week. *Id.* § 1-09.

2. Mental Health Minimum Standards

In the 1970s and early 1980s, the BOC issued comprehensive investigative reports of individual inmate suicides. New York State's "deinstitutionalization" policies emptied the state's large mental hospitals. Increasingly, detainees with mental illness entered the City's jails. The Board held public hearings in the early 1980s to explore the quality and availability of mental health services provided to inmates, and concluded that mental health minimum standards were needed. The Board worked with the Departments of Health, Mental Health, Correction, the Mayor's Office, and contract service providers to develop consensus standards, drawing upon recommendations from local mental health professionals and national professional organizations. When the Board adopted the Mental Health Minimum Standards in 1985, New York City became the first local jurisdiction in the country to voluntarily require itself—without being compelled to do so by the courts—to provide appropriate levels of quality mental health staffing and other resources. The results were immediate and significant. In 1986, the first full year of Standards implementation, there were three suicides—down from eleven the preceding year.

Key provisions of the mental health standards include mental health screening for all incoming inmates within 24 hours of arrival in DOC custody, training of correctional and medical staff in recognizing signs and symptoms of mental and emotional disorders, special mental health observation housing areas for those inmates in need of close supervision, 24-hour access to mental health services personnel for emergency psychiatric care, and an inmate observation aide program that employs carefully-selected, trained inmates to help uniformed staff monitor those inmates identified as potential suicide risks.

3. Health Care Minimum Standards

Using the same inter-agency collaborative approach that led to the creation of the Mental Health standards, the Board drew upon the expertise of health professionals from City agencies and the contract health services provider to develop

comprehensive Health Care Minimum Standards (1991). These require that the quality of medical services for inmates must be consistent with “legal requirements, accepted professional standards and sound professional judgment and practice.”²⁵ The Health Care Standards require that an inmate’s medical intake screening must occur within 24 hours of entering DOC custody, and weekday sick call must be provided within 24 hours of request.²⁶ Timely access to follow-up care and specialty clinics on Rikers Island and at off-Island hospitals must be provided.²⁷ Other sections regulate pharmaceutical services, dental, vision and eye care, pregnancy and child care, and diagnostic services.²⁸ The Standards also contain provisions addressing medical records, privacy and confidentiality, the right to refuse treatment, and quality assurance.²⁹

D. Observations

The Board’s roles as regulatory body, inspector and performance evaluator create unusual opportunities and challenges. Presented below are some observations about non-judicial oversight of local jails that have been extrapolated from New York City’s experience with the Board of Correction.

1. Local Jail Standards can Address Challenges Unique to the Local Jail

The local minimum standards established by the Board of Correction (discussed above) regulate conditions in the City’s jails only. The standards do not affect jails in the fifty-seven counties outside of New York City. A state agency, the New York State Commission of Correction, has established standards for the New York State prisons, and separate standards for all county jails.³⁰ Thus, New York City is

25. *Id.* § 3-01(a)(1).

26. *Id.* §§ 2-02(b)(1), 2-03(b)(1).

27. *Id.* § 2-04(c)(5).

28. *See id.* §§ 3-02, 3-05, 3-06.

29. *See id.* §§ 3-06 to 3-09.

30. *See* N.Y. COMP. CODES R. & REGS. tit. 9 (2009).

regulated by two separate sets of standards.

Fundamental and important differences distinguish New York City's jails from those in the non-City counties. The most obvious is size. Currently, New York City's open and available bed capacity is 14,326 beds, and the Department of Correction confines 13,377 inmates.³¹ By contrast, many of the non-City counties are rural areas that are sparsely populated, and most of the jails have very small capacities. Excluding the seven largest non-City counties, the other 50 non-City counties have a combined total of 9,774 beds—an average jail capacity of 195 beds per county.³²

Provisions in the State standards typically are less stringent than those set by the Board for New York City. This is to be expected: after all, the State standards apply to all counties in New York State, including many small jails with limited resources. For example, the New York State standards do not require jails to minimize inmates' visitors waiting time, or to provide visitors with access to bathrooms and drinking water, or to a sheltered waiting area,³³ which are all required by the Board's Minimum Standards for New York City.³⁴ There are important differences between outdoor exercise provisions as well. The State standards lack the City requirement that outdoor recreation areas must provide for direct access to sunlight and air.³⁵ The State standards require that an outdoor exercise area must contain at least 1500 square feet,³⁶ an area that would be much too small to accommodate many Rikers Island jail populations, two of which exceed 2,000 inmates.

Regulations governing small county jails sometimes are

31. OFFICE OF THE CHIEF OF CUSTODY MGMT., CORR. DEP'T CITY OF NEW YORK, 5:00 A.M. CENSUS REPORT (Sept. 29, 2009) (on file with PACE LAW REVIEW).

32. New York State Comm'n of Corr., Information as Provided by Facilities via Jails Daily Population Reporting System (Sept. 29, 2009) (on file with PACE LAW REVIEW). According to the Commission of Correction, the seven largest non-City county jails are Albany, Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester, with a combined capacity of 10,299 beds. *Id.*

33. See N.Y. COMP. CODES R. & REGS. tit. 9, § 7008.

34. See N.Y. City Rules, tit. 40, ch. 1, § 1-09(b)(3)-(4).

35. See N.Y. COMP. CODES R. & REGS. tit. 9, § 7028.4; N.Y. City Rules, tit. 40, ch. 1, § 1-06(b).

36. N.Y. COMP. CODES R. & REGS. tit. 9, § 7028.4.

inapplicable to the unique management challenges presented by the second largest municipal detention system in the country. Delivery of correspondence—including legal correspondence—presents a good example. Male inmates on Rikers Island frequently are transferred among seven large, separate jail commands, and this increases the challenge of providing timely mail delivery. Timely delivery is a substantially greater management challenge for the City's large system than it is for a small local jail, which may have fewer than 200 beds. To ensure timely mail delivery, the City's local Minimum Standards require delivery within 48 hours.³⁷ Presumably a schedule would not be needed to ensure timely delivery in a 200-bed system, so state regulations do not establish a schedule.³⁸

2. Sometimes Local Oversight is Best Able to Address the Needs of the Local Jail

The interests of local jurisdictions may conflict with those of the state. When this occurs, local jails can benefit from local oversight. An important example involved the prolonged confinement of “state ready” prisoners in New York City jails. “State ready” prisoners are prisoners who have been sentenced to serve time in state prison, but who remain in local jails pending transfer to a state facility. During a sustained period of severe overcrowding in the late 1980s and early 1990s, the New York State Department of Correctional Services (“DOCS”) slowed dramatically its acceptance of newly-sentenced prisoners. Because its prisons were severely overcrowded, DOCS allowed state-readies to languish in local jails. Frustrated city jail officials were unable to demand publicly that the State take custody of its prisoners, because corrections overcrowding was but one of many City-State issues that were in play at the time. The City's daily inmate census continued to grow rapidly. To accommodate the ever-increasing population, the City converted two homeless shelters and two ferries into make-shift jails. It entered into a contract with the State to house almost 1,500 sentenced misdemeanants in two

37. N.Y. City Rules, tit. 40, ch. 1, § 1-11(d)(1).

38. See N.Y. COMP. CODES R. & REGS. tit. 9, § 7004.

State facilities hundreds of miles north of New York City, near the Canadian border. In May, 1991, the daily inmate census reached an all-time high of 22,630.

The Board of Correction exercised its role as advocate for the City's jail system when, month after month, it reported publicly on increasing jail violence and attributed the increase to overcrowding tied to the state-ready backlog. The Board also cited the cost to the City of housing "overdue" state-ready inmates, an expense that exceeded \$1 million per week for many months.

The Board advocated for the local jail system. Had jail oversight instead been performed by a state-wide entity, there would have been no one arguing that the state's failure to take timely custody was harming the correction officers, inmates, and taxpayers in New York City. Instead, the Board's persistence in drawing public attention to the issue resulted in a swifter resolution.

3. A Structure Designed to Promote Independent Oversight Entity is Very Important

The Board was in a position to speak out and focus public attention on the state-ready problem because of its structure. As noted above, the nine members are nominated by three different authorities.

For complex political reasons, the Mayor's corrections commissioner could not comment publicly on the State's failure to take custody of prisoners that rightfully should have been in state custody. The Board was not similarly constrained, as its unsalaried members were not required to take direction from the Mayor. The members' independence allowed them to focus squarely on the corrections overcrowding problem, without having to weigh their importance against the other issues then being negotiated between the City and the State.

4. A Daily On-Site Presence Facilitates Effective Inspections and Compliance Monitoring

The Board of Correction's approach to oversight centers on ongoing compliance monitoring and facility inspection by experienced, well-trained field representatives. The daily

presence of field representatives enables them to observe jail operations without creating disruption among inmates or staff. By seeking to resolve problems at the lowest level within the institution, field representatives encourage line staff and inmates alike that their complaints will be addressed discreetly and objectively. Daily inspections and compliance monitoring provide correctional oversight that is constructive because they allow for the early identification of issues requiring resolution. Early identification reduces the likelihood that small problems will fester and become major ones.

5. A Local Oversight's Understanding of Local Jail Conditions Yields Solutions Tailored to Local Needs

An important benefit of a local oversight's daily presence in a local jail is the knowledge that the local oversight acquires regarding conditions peculiar to the local jail. This knowledge can be applied to the local jail's unique problems to fashion jail-specific solutions. An example: shortly after the Department of Correction moved its central punitive segregation area to a newer jail on Rikers Island, Board staff reported a significant increase in stabbing and slashing incidents, and noted that most incidents were occurring in two areas, the recreation yard and the law library. The Board urged DOC administrators to adopt new procedures to address the increased violence. First, the Board recommended that DOC subdivide the punitive segregation yard to reduce the number of inmates who took recreation in the same place at the same time. The Board argued that this approach would provide staff with greater control and improve inmate safety, and cited the successful implementation of subdivided outdoor recreation areas in a New York State prison. Second, the Board suggested that DOC consider providing legal research opportunities to punitive segregation inmates in their cells, rather than in the library. Inmate interviews established that large numbers of inmates were afraid to go to the law library and were unable to engage in legal research. We urged that DOC experiment with a fully auditable cell system, whereby inmates could call the legal coordinator in the law library, discuss a legal issue, and obtain copies of research materials for use in the cell. We insisted that the alternative system provide legal research

opportunities as promptly as would a visit to the law library. Both BOC recommendations were implemented.

6. The “Golden Key” of Unfettered Access is Indispensable to Effective Monitoring

When Federal District Court Judge Morris Lasker would visit New York City jails during the longstanding *Benjamin*³⁹ class-action litigation, he would be taken through freshly-painted corridors to inspect dormitories selected by the Department of Correction. Employees were known to plant flowers in front of the jails he was inspecting. Inmates reported that they were urged to remain silent during the Judge’s tours.

Any oversight organization that must make appointments in advance to inspect correctional facilities operates at a severe disadvantage. Inspectors cannot be confident that the conditions they observe accurately reflect the conditions that prevail in the facility. Furthermore, unless they are able to speak in confidence with prisoners and with staff, inspectors are unlikely to be told about problems in the institution. Oversight by appointment is not without benefit, but it lacks the potential to identify incipient problems. This in turn limits the organization’s value to the correctional system for which it provides oversight.

7. A Non-Judicial Oversight Entity Must be Assured of Ongoing, Adequate Funding

Structure alone cannot assure an oversight’s independence or viability. The oversight organization must be adequately resourced. If, as is the case with the Board of Correction, the oversight entity provides a regular, daily presence throughout a correctional system, the oversight must employ enough staff to do so.

Unfortunately the Board’s revised City Charter provisions do not include a requirement that assures adequate funding. Funding has been the Board’s Achilles heel.

39. See *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980).

The Charter notes only that the Board may appoint “professional, clerical, and support personnel within appropriations.”⁴⁰ The practical effect of this language is to vest with the Mayor considerably more control over the Board than the other nominating authorities, because the Mayor dominates the budget process. This never was more apparent than in 1994 when former Mayor Rudolph Giuliani, angered by a Board member’s comments that were critical of the Corrections Commissioner, attempted to eliminate the Board by eliminating its budget.⁴¹ By declaring his intention to no longer provide funding for the Board’s staff, the Mayor challenged the Board’s independence.

Ultimately, Mayor Giuliani’s attempt to “zero-out” the Board from the City budget failed, because the City Council refused to accede to the Mayor’s plan. The Council must approve the City budget, and it was able to negotiate restoration of some of the Board’s funding. However, the Mayor’s efforts were not entirely unsuccessful. The budget compromise that was reached resulted in a fifty percent reduction in the Board’s staff.

The extent to which the Board’s budget drama chilled its ability to accurately and fully report on jail conditions and the Department of Correction’s compliance with minimum standards is unclear. But there certainly has been a lasting effect. The smaller Board Field Operations Unit is unable to investigate inmate and staff complaints as promptly as before, which presents the danger that “fixable” problems may go unattended and become more acute. Budget cuts also resulted in the loss of most of the Board’s support staff. This has limited the Board’s ability to issue timely reports on monitoring activities.

Conclusion

Independent non-judicial correctional oversight promotes safe, secure, and humane correctional environments for staff and inmates. The Board’s structure is designed to maintain

40. N.Y. CITY CHARTER § 626(b) (2009).

41. Steven Lee Myers, *Giuliani Weighs Sharp Cutbacks, Including a New Severance Offer*, N.Y. TIMES, Oct. 9, 1994, at A1.

independent oversight, and its daily field staff presence promotes effective inspections and compliance monitoring.

The New York City Board of Correction's local jail oversight model may be useful to jurisdictions that are establishing new non-judicial correctional oversight mechanisms, or modifying existing ones. Local and state-wide correctional oversight organizations could benefit by incorporating elements of the model into their structures and operations.