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Let the Sunshine In: The ABA and Prison Oversight

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CHAPTER 17

CORRECTIONS:

“LET THE SUNSHINE IN: THE ABA AND PRISON OVERSIGHT”

Michele Deitch and Michael B. Mushlin

I. INTRODUCTION

2010 may be remembered as the year in which prison oversight finally found a place on the national corrections agenda, thanks in significant part to the attention that the American Bar Association has focused on this topic. In this article, we briefly describe the state of American prisons, trace the recent movement toward prison oversight, describe the rationale for oversight and the benefits it provides, and describe the contribution made to this effort by the ABA through the passage of its landmark resolution in 2008, through its *Standards on the Treatment of Prisoners* calling for prison oversight, and through the follow up work of the Committee on Corrections and its Subcommittee on Implementation of the ABA Resolution on Oversight (which is co-chaired by the authors).

II. THE CLOSED AND TROUBLED WORLD OF AMERICAN PRISONS

American prisons are closed institutions. Typically surrounded by walls or other perimeter security, these tangible barriers serve to keep prisoners in and the public out. Prison walls are a vivid symbol of the reality that what goes on in prisons is largely beyond the ken of the public. Supreme Court Justice William Brennan, referring to this isolation, spoke of prisoners living in a “shadow world.”¹ For most of this country’s history, prisons were so closed that courts refused to adjudicate claims of prisoners even when inmates alleged serious violations of constitutional rights. Until the 1970s, courts would invoke the so-called “hands off” doctrine to decline to hear claims of inmates.² Under that doctrine, judges were stripped of the authority to entertain lawsuits by prisoners who complained that the conditions under which they were held violated their constitutional rights, including the right to be protected from cruel and unusual punishments. The effect of this harsh doctrine was that prisons, in practice, were institutions that operated outside the rule of law.³

Thankfully, the United States Supreme Court in 1974 sounded the death knell of the “hands off” doctrine when Justice Byron White, speaking for the Court, said that “there is no iron curtain drawn between the Constitution and the prisons of this country.”⁴ With that pronouncement, the courts began to play 243 -- and have continued to play -- a critical role in providing some oversight of prisons.⁵ Over the past two decades, however, that role has diminished in large part because the Supreme Court and Congress have limited the situations in which courts are permitted to recognize the violation of a prisoner’s rights.⁶ These doctrinal changes have made it more difficult for the judiciary to be involved in overseeing prisons.

Moreover, even if this were not the case, as we have written elsewhere “[e]xclusive reliance on the courts to serve this [oversight] function is misplaced: judges can only remedy problems once a constitutional violation is found; they are not in a position to prevent problems in the first place.”⁷ Aside from judicial oversight, which is at best episodic, reactive, and limited, and aside from some exceptions in a handful of areas of the country where meaningful oversight is provided, prisons remain institutions that operate in the dark, largely beyond the

reach of oversight by other bodies. This would be bad enough at any time. But we live in a time when prison populations have exploded and at a time when prisons are racked with problems.

Currently, one in every 99 Americans⁸ (more than one in every fifty Americans aged twenty to forty⁹) is behind bars, making America the nation that leads the world in its incarceration rates.¹⁰ Because of this explosion in the use of imprisonment, millions of persons have been confined in American prisons--more than ever in our history. And the burdens of our country's imprisonment policies are not spread equally among the population: one in nine black men between the ages of 20 and 34 is currently behind bars; at present rates, one in three African American children born today can expect to enter the prison system at some point during his or her lifetime.¹¹

While there is no doubt that there are some well functioning penal institutions and many dedicated professionals working in prisons, it also undeniable that there are serious problems in many of our prisons and jails. Indeed, it is fair to say that by and large, American prisons are troubled places. For example, studies and reports demonstrate that the rate of violence in American prisons is high,¹² that many prisons are severely overcrowded,¹³ and that sexual abuse occurs in prisons at intolerable rates.¹⁴ To take sexual abuse as one example, a recent study by the Department of Justice's Bureau of Justice Statistics (BJS) estimates that at least 88,500 adults held in U.S. prisons and jails were sexually abused at their current facility during a year-long period beginning in 2008 and ending in 2009.¹⁵ This means that during the period studied, 4.4 % of prison inmates and 3.1 % of jail inmates reported having experienced one or more incidents of sexual victimization by other inmates and/or staff at their current facility in the preceding 12 months.¹⁶ While some suffered a single instance of abuse, others were abused more frequently. Those who reported abuse on average were abused three to five times over the course of the year. A similar Department of Justice study released in January 2010 was even starker. It reported that more than 12 % of youth in juvenile detention reported sexual abuse.¹⁷

Beyond the high rates of violence, sexual abuse, and overcrowding, prisons and jails have been demonstrated to lack opportunities for education or training, have problems with preparing inmates for reentry, provide inadequate family contact, and rely on the widespread use of extreme isolation to control prisoners, to mention just a few of the additional issues of concern.¹⁸ These shortcomings not only have obvious ramifications for the prisoners and their families, but also will reverberate in the public safety of our communities.

Our country thus has a massive social institution plagued by problems, and this situation is made even worse by the vacuum that exists when it comes to meaningful oversight and public accountability.¹⁹

III. THE MOVEMENT FOR PRISON OVERSIGHT

In recent years, more and more concerns have been raised about this void in transparency and accountability of prisons and jails, with increasing calls for the establishment of effective oversight mechanisms. Among the voices that have called for external scrutiny of correctional institutions are the following:

- The National Commission on Safety and Abuse in America's Prisons, a commission made up of leading figures in the field, studied the problem of violence in American prisons over the course of a two-year period by holding hearings around the country. In its comprehensive report entitled *Confronting Confinement*, the commission issued a strong call for the establishment of prison oversight in the United States.²⁰

- In 2008, the American Bar Association passed a resolution that calls for the creation of independent entities at the federal, state, local, and territorial levels to regularly monitor and report publicly on the conditions in correctional and detention facilities, and spells out certain key requirements that must be met in order for external monitoring to be effective.²¹
- The American Bar Association in 2010 confirmed the importance of correctional oversight when it approved the *Standards on the Treatment of Prisoners* as part of its multi-set Criminal Justice Standards. These Standards emphasize oversight as an essential aspect of prisoners' rights, calling for internal accountability mechanisms as well as external monitoring and inspection of correctional facilities. The Standards provide that

“[g]overnmental authorities should authorize and fund a government agency independent of each jurisdiction’s correctional agency to conduct regular monitoring and inspection of the correctional facilities in that jurisdiction and to issue timely public reports about conditions in those facilities.”²²

- The National Prison Rape Elimination Commission, established pursuant to the Prison Rape Elimination Act of 2003,²³ issued a report in 2009 urging that a system of “accountability and oversight” be established for every prison system.²⁴ The commission explained that a strong system of independent external oversight is “crucial” to the effort to effectively diminish the incidents of prison rape.²⁵ As one of the Commissioners explained “[f]or prison rape to be eliminated correctional agencies must be subject to mechanisms that ensure accountability.”²⁶ The Commission proposed a host of standards, including one requiring independent audits to assess correctional facilities’ compliance with the rest of the standards. These proposed standards are currently under review by the Attorney General of the United States.
- In December 2010, the Pace Law Review published a 545 page volume entitled *Opening a Closed World, A Sourcebook on Prison Oversight* at 30 Pace L. Rev. 1383-1928 (2010). The issue is devoted to papers and research that grew out of a major conference on prison oversight held at the University of Texas in 2006. The conference brought together “the country’s leading prisoners rights advocates, scholars, practitioners, judges, journalists and policy-makers” from 22 states and 5 foreign countries to discuss prison oversight.²⁷ The publication, which contains 21 articles by leading academics, practitioners, international experts, and correctional oversight specialists, also includes an Annotated Bibliography of all significant resources on the topic of correctional oversight and an inventory of all correctional oversight mechanisms in the United States. The book is both an invaluable resource and a concrete expression of the consensus reached at the conference that there is a pressing “need for increased levels of oversight of prisons and jails in the United States.”²⁸

As all these documents make clear, the argument for oversight is straightforward. First, oversight makes jails and prisons more transparent. Thus, problems can be identified and brought to light—an essential first step toward making jails and prisons safer and better able to carry out their essential function of protecting the public, and toward preparing inmates for reentry to society. Second, not only does oversight lead to public identification of problems that might be known only to prison administrators, but a fresh set of eyes provided by an independent observer also can “uncover potential problems that have been overlooked at the facility . . . preventing them from becoming major problems for correctional officials.”²⁹ Third, by providing a mechanism for early identification and prevention of problems, external oversight of correctional operations can help avert expensive lawsuits. Fourth, oversight can increase public investment and involvement in the operation of prisons. In this way, prison oversight serves to further fundamental democratic values, by allowing the public to be involved meaningfully in what Stan Stojkovic has described as the “long and difficult discussion of what we, as a society, can reasonably expect of prisons.”³⁰ Put another way, oversight can engender more informed public discussion about our prisons and can thus offer the promise of better decisions about how prisons should operate to best serve the public good.³¹

IV. THE ABA RESOLUTION ON CORRECTIONAL OVERSIGHT

In 2008, the ABA gave impetus to the movement for correctional oversight when it passed a landmark resolution calling on all “federal, state, tribal, local, and territorial governments” to develop oversight systems so that that the “public is informed about the operations of all correctional and detention facilities . . . within their jurisdiction and that those facilities are accountable to the public.”³² The resolution calls on each governmental unit to establish an oversight mechanism that is wholly independent of the correctional agency it will monitor. To ensure that the oversight is meaningful, and not just a window dressing, the resolution lists “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities.” That list includes such as essentials as:

- Appointment of the head of the agency for a fixed term with removal before that time only for good cause;
- Unfettered access to the facility being inspected and to the staff and inmates in that facility;
- Ability of the monitor to make unannounced as well as scheduled inspections;
- Ability of the monitor to review all records bearing on the facility’s operations, and to conduct confidential interviews with line staff and inmates;
- A requirement that governmental officials are required to cooperate fully and promptly with the monitoring entity;
- To the extent possible, a collaborative rather than adversarial approach;
- Public reports of the monitoring entity disseminated to the public and posted on the internet;

- A requirement that facility administrators must respond publicly to the reports of the monitoring entity; and
- A requirement that the correctional facility develop action plans to rectify the problems denoted in those reports.³³

The vision of oversight embedded in this resolution is intended to ensure that the oversight process effectively goes to the heart of conditions and operations directly affecting the treatment of prisoners. When it is implemented on a national scale, a closed world will be opened, and will be much more conducive to the protection of millions of prisoners.

V. THE SUBCOMMITTEE ON IMPLEMENTATION OF THE ABA RESOLUTION ON OVERSIGHT

Because of the critical importance of this subject, the ABA is determined not to have the Resolution on Correctional Oversight exist merely on paper. Therefore, in 2010, the ABA Corrections Committee established a Subcommittee on Implementation of the ABA's Resolution on Effective Correctional Oversight, co-chaired by the authors.³⁴ The charge to the committee is to formulate a plan to keep the Resolution in the policy discourse and to offer the ABA as a resource to those who would champion the development of correctional oversight mechanisms in jurisdictions around the country. The subcommittee has met a number of times and has drafted an implementation plan to increase public awareness of the ABA Resolution,

The plan has three parts. The first part of the plan is to increase general awareness of the ABA resolution. This means developing talking points, making outreach to advocates, practitioners, State Bars, and policy-makers, and writing op ed articles and taking other steps to bring the matter of prison oversight before the public.

The second part of the plan is to concentrate our attention on situations in which the issue of prison oversight has come to the fore, and to make the ABA's voice heard in those specific situations. To do this, we plan to identify states and local jurisdictions that hold promise for expanded oversight and to focus our attention on them. We also have extensively reviewed and commented on the proposed standards to implement the Prison Rape Elimination Act, which at this writing are pending before the U.S. Attorney General.³⁵ In our response, we have stressed the critical need for a strong auditing or oversight requirement in the PREA Standards to ensure that prison rape prevention measures are being vigorously implemented. We argue that without oversight the other standards regarding rape prevention such as training, surveillance, and law enforcement those standards could end up as mere guidelines for correctional agencies.³⁶ And, responding specifically to the Attorney General's questions about the draft auditing provision in the PREA Standards, we emphasize the need for the auditing mechanism to meet the ABA's key requirements for effective oversight.

The third and final part of the plan is promoting the ABA as a resource on correctional oversight for interested stakeholders around the country. In sum, the subcommittee's work is designed to stimulate and assist a public conversation about the importance of oversight and to assist in making the promise of the ABA's pronouncements on this subject a reality.

VI. CONCLUSION

Independent, external oversight of conditions in correctional facilities is an essential tool for protecting human rights in a closed institutional environment. The work of the ABA described above is designed to ensure that the United States is brought into the mainstream of western countries, almost all of which have a comprehensive mechanism for routine inspection and monitoring of correctional facilities.³⁷ The ABA has taken this position to correct a situation that is not a healthy state of affairs for either the inmates held in prisons, most of whom will return to their communities, for the staff who work in prisons, or for the public whose tax dollars are used to operate these systems. By letting the sunshine in, this country will take a giant step toward having prisons operate in a manner that truly serves the public interest.

Endnotes, Chapter 17

¹ O'Lone v. Estate of Shabazz, 482 U. S. 342, 354-44 (1987) (Brennan, J., dissenting).

² For a discussion of the "hands off" doctrine, see MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS*, §1:3 (4th ed. 2009).

³ *Id.* at §1:4.

⁴ Wolff v. McDonnell, 418 US 539, 555-56 (1974).

⁵ See, e.g., Vincent Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419 (2004) (describing the accomplishments of the courts in eliminating many prison horrors).

⁶ Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real about Race and Prisoner Rights*, 36 FORDHAM URB. L. REV. 27, 33 (2009) (tracing the diminution of the legal rights of prisoners after the demise of the hands off doctrine). See also Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works, What Does Not* 40 No. 5 Crim. Law Bulletin at 20 (2004) (describing "decision after decision" of the Supreme Court which rejects inmates' claims).

⁷ Michael B. Mushlin & Michele Deitch, *Foreword, Opening Up A Closed World: What Constitutes Effective Prison Oversight?* 30 PACE L. REV. 1383, 1384 (2010).

⁸ THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

⁹ Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEXAS L. REV. 1693, 1694 (2006) (citing Michael Tonry, *Symbol, Substance and Severity in Western Penal Policies*, 3 PUNISHMENT & SOC'Y 517, 518 (2001)).

¹⁰ MICHAEL B. MUSHLIN, *supra* note 2, at §1:1 ("In 2008 the United States had the highest prison population in the world and also had the highest rate of imprisonment.").

¹¹ Bonczar, T.P., Beck, A.J. (2003). *Lifetime likelihood of going to state or federal prison*. NCJ 160092. Washington, DC: US Department of Justice, Bureau of Justice Statistics.

¹² The Commission on Safety and Abuse in America's Prisons, *Confronting Confinement*, 11 (2006) (describing "disturbing evidence of individual assaults and patterns of violence in some U.S. prisons and jails.").

¹³ *Id.* at 27 (noting that "the majority of prisons and many jails are crowded . . .").

¹⁴ See, e.g., U.S. Department of Justice, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09* (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ U.S. Department of Justice, Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09* (2010), available at <http://bjs.ojp.usdoj.gov/index.cfm?iid=2113&ty=pbdetail>.

¹⁸ See generally The Commission on Safety and Abuse in America's Prisons, *Confronting Confinement*, (2006). See also BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) (describing cuts in educational staff in prisons occurring at the same time that prison populations were rising). See also Fred Cohen, *supra* Note 6 at 2 (describing "the collapse of rehabilitation in prison").

¹⁹ See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 at 1762 (2010) (concluding that external oversight that focuses on the rights of prisoners is truly rare in this country).

²⁰ *Confronting Confinement*, *supra* note 18.

²¹ ABA, Rep. 104B, Summary of Action of the House of Delegates, 2008 Annual Meeting, available at www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf.

²² ABA Criminal Justice Standards on the Treatment of Prisoners, Standard 23-11.3 (2010).

²³ 42 U.S.C. §§15601-15609 (2006).

²⁴ Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 PACE L. REV. 1625, 1628 (2010).

²⁵ *Id.* at 1639.

²⁶ *Id.* at 1644.

²⁷ Michael B. Mushlin & Michele Deitch, *Foreword: Opening a Closed World: What Constitutes Effective Prison Oversight*, 30 PACE L. REV. 1383, 1384 (2010).

²⁸ *Id.* at 1385.

²⁹ ABA Resolution *supra* note 21 at 4.

³⁰ Stan Stojkovic, *Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1486 (2010).

³¹ *Id.* at 1482-85.

³² ABA Resolution *supra* note 21 at 1.

³³ *Id.* at 2-3.

³⁴ Other members of the Subcommittee, with affiliations listed for identification purposes only, are Jack Beck, Director of Prison Visiting Project, Correctional Association of New York; Alvin J. Bronstein, Director Emeritus, National Prison Project; Fred Cohen, Editor of the Correctional Law Reporter; David Fathi, Director, ACLU National Prison Project; Jamie Fellner, Senior Counsel of the US Program, Human Rights Watch; Michael S.

Hamden, Attorney at Law, Counselor, & Corrections Consultant; Martin F. Horn, Distinguished Lecturer, John Jay College of Criminal Justice; Steven G. Gobbo, Director of Legal Affairs, Michigan Department of Energy, Labor & Economic Growth, Bureau of Commercial Services; Louis A. Goodman, Esq., Assistant Director, Arizona Department of Juvenile Corrections; and Lovisa Stannow, Executive Director, Just Detention International.

³⁵ Currently, the Attorney General is reviewing proposed national standards pursuant to the Prison Rape Elimination Act of 2003 (PREA), and in February issued an Advance Notice of Proposed Rulemaking to solicit public input on the Commission's proposed national standards. See Department of Justice, Proposed National Standards To Prevent, Detect, and Respond to Prison Rape, 28 CFR Part 115 available at <http://www.regulations.gov/#!documentDetail;D=DOJ-OAG-2010-0001-0001>.

³⁶ See Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1444 (2010) (including auditing of compliance with standards among a list of the critical functions of correctional oversight).

³⁷ Michael B. Mushlin & Michele Deitch, *Foreword, Opening Up A Closed World: What Constitutes Effective Prison Oversight*, 30 PACE L. REV. 1383, 1385 (2010) (" . . . the United States is one of the only Western nations without a formal and comprehensive system in place providing for regular, external review of all prisons and jails.").