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Distinguishing the Various Functions of Effective Prison Oversight

Michele Deitch*

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Introduction

One of the challenges in organizing a conference—or an edited volume of papers—on prison oversight is that the term “oversight” is hardly a term of art. While the phrase is often used, there has been little effort made either on the part of professionals or in the literature to understand what is meant by those words.

I thought it would be helpful as we begin this endeavor if we could identify and work from a shared analytic framework, and to create a common terminology to guide our thinking and discussions as we move forward.

While the conference and this volume highlight the importance of oversight, any discussion of this issue in the correctional context must begin with the recognition that oversight is not a goal in and of itself. Rather, oversight is a means of achieving the twin objectives of transparency of public institutions and accountability for the operation of safe

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and humane prisons and jails. My own professional experiences have persuaded me that “oversight” does not come in one flavor, and that it is neither desirable nor effective to adopt a “one size fits all” strategy. There can be—and should be—many different effective ways to identify and correct safety problems in correctional institutions, and to increase public awareness. In combination, these mechanisms can work to provide the levels of transparency and accountability that public institutions demand.

I should mention at the outset that I am referring to external oversight mechanisms, that is, to entities that exist outside the correctional agency. While it is critical that prisons and jail systems have their own internal accountability mechanisms—for identifying problems, informing management about these concerns, and addressing wrongdoing—such internal measures do not provide public accountability. Moreover, most internal review processes are designed to remain confidential. They support the needs of management for information and accountability without being designed to further the additional goal of public transparency.

“Oversight” as an Umbrella Concept

It might be helpful if we begin to frame the concept of “prison oversight” as a catch-all, umbrella term that refers to at least seven distinct functions:

- Regulation
- Audit
- Accreditation
- Investigation
- Legal
- Reporting
- Inspection/Monitoring

I would argue that each of these functions is an essential—but separate—part of effective prison oversight. Each contributes to the overall goals of transparency and accountability—sometimes to one of these goals and sometimes to both. But there should be a variety of separate mechanisms in place to

serve each of these functions. While there are certainly some examples of hybrid models combining two or three of these functions, it would be a mistake to seek to combine all these functions within one entity. No one entity can meaningfully serve every function, if for no reason other than the fact that there are different constituencies involved with regard to each function.

The problem is that when we speak of “oversight,” we tend to merge these concepts and assume that they are in competition with each other when it comes to which is “most effective.” Moreover, we each have in mind a different one of these functions when we talk about oversight, which makes communication about these issues very difficult: we are often talking at cross-purposes. I think we need to begin to talk about these as separate functions, and consider how to make each of these specific functions as strong and effective as possible.

Distinguishing the Discrete Functions of Correctional Oversight

Let me be more precise about the key differences I see among each of these oversight functions, with particular emphasis on the least known of these—the inspection/monitoring function.

The **regulation** function is served by those governmental entities that have some ability to wield a hammer over the correctional agency. Those entities may license correctional facilities or set mandatory standards or policies, and they have the power to enforce these standards and policies through, for example, the imposition of fines, the ability to close an institution, or the ability to hire or fire directors. Similarly, legislative bodies also serve a regulation function, since they control the operations of the agency through the passage of laws and the ability to control the purse strings of the agency. The key concepts at work here are “enforcement authority” and “control.”

The **audit** function is concerned with whether the agency is meeting established performance indicators, standards, or policies, or whether it is being fiscally responsible. While we typically think of audits as focused on financial issues, many

auditing bodies similarly audit agency performance. The standards against which audits are conducted could be performance indicators mandated by the legislature, standards required by an accreditation body such as the ACA, generally accepted accounting standards, or even requirements or procedures set by the agency itself. Audits could be as simple as a paper review involving a checklist, or they could be a more complex audit to see if an agency is worthy of accreditation. They could be either comprehensive or focused on just a single issue. But as a general matter, the auditing function is designed to give either prison administrators or those who regulate or accredit them some objective measures of how the agency is doing and/or whether tax monies are being well-spent. The emphasis is on the audit as a management tool: are agency staff following established policy or standards? Is there any gap between policy and practice? Are statistics changing over time and, if so, why? Answers to those questions are very valuable to prison administrators and they aid in effective and proactive prison management. But audits do not necessarily focus on the treatment of prisoners or even on issues of direct concern to prisoners.

The **accreditation** function is a form of oversight insofar as it requires an agency to meet certain standards in order to be eligible to receive what amounts to a stamp of approval by a professional organization in the field. As the standards developed by these professional organizations (such as the American Correctional Association and the National Commission on Correctional Health Care) have become more performance-based in recent years, accreditation has become more meaningful as a form of correctional oversight. Accreditation is designed to measure an agency's specific operations against best practices in the field, rather than to assess whether any wrongdoings or human rights violations have occurred. It is also a relatively static form of oversight, as it is based on a snapshot view of the facility at a particular point in time. Accreditation is typically a voluntary process in the correctional context, which means that it is initiated from within the agency, and the agency under review usually pays for the accreditation process. Accreditation is often associated with an audit of the facility to assess institutional compliance with the applicable standards. There is little transparency

associated with the accreditation process, as reports of accreditation audits—and any determination not to accredit a facility—are typically not made public.

Investigations are a critical aspect of oversight because they offer a means to ensure accountability for wrongdoing. This function can encompass everything from an ombudsman's investigation of a prisoner's complaint, to an inspector general's review of an excessive use of force claim, to an independent commission's review of agency operations in the wake of a series of complaints, to criminal prosecution of staff for official misconduct. What distinguishes the investigation function from some of the other oversight functions is that it is essentially reactive. The function is only triggered once a complaint is received or a scandal breaks.

The **legal** function involves the use of the courts and the legal process to achieve redress for wrongdoing as well as corrective action. In conjunction with a lawsuit over prison conditions or mistreatment of prisoners, a court may order either damages or injunctive relief, and it can back up its orders with legal sanctions such as contempt or fines. In rare cases, of course, the courts have exercised long-term supervision over correctional agencies to ensure compliance with orders. Federal law also allows for the involvement of and oversight by the United States Department of Justice at a stage prior to the filing of a lawsuit, under the Civil Rights of Institutionalized Persons Act (CRIPA). A CRIPA investigation of poor correctional conditions may lead to an agreed-upon set of standards that the agency must meet and to long-term monitoring by the Justice Department to assess compliance with these standards. The legal function, like the investigation function, is reactive in nature, though the ongoing supervision of the legal system is designed to fix an unacceptable set of conditions and not just punish wrongdoing. Transparency may be a by-product of court oversight, but it is not the primary goal.

The **reporting** function refers to the role of the media, human rights groups, and temporary commissions in exposing prison conditions or investigating a particular incident. Through news articles and reports, these entities shine a light on the closed world of correctional facilities. This function goes to the heart of the goal of transparency, of course, because it

increases public awareness of prison-related issues. In some cases, this can lead to public pressure on elected or appointed officials to change policies or practices, so it potentially serves the goal of accountability as well. Typically, those who perform this oversight function do not have the ability to demand access to prisons, so information has to be gathered through other means. The distinguishing feature of the reporting function is that it primarily serves the needs of the public for information and analysis of prison conditions.

Finally, there is the **inspection and monitoring** function, which is perhaps least familiar of all the oversight functions and thus most in need of our attention at this conference. Monitoring involves an entity outside of the corrections agency with the power and the mandate to routinely inspect all correctional institutions in a jurisdiction—not just those with publicized problems—and to report publicly on how people within each prison or jail facility are treated. More so than any other oversight function, the inspection/monitoring function is intended to be preventative in nature. (In contrast, investigations, for example, are focused on past behavior, and accreditation provides a snapshot.) Routine and regular reviews of every institution allow problems to be identified (and hopefully corrected) before there are lawsuits about conditions or incidents that make the front page of the newspaper. Regular monitoring helps keep the quality of correctional services high, because the staff's knowledge that an inspector could arrive at any time acts as a means of informal control over staff behavior. In other words, it “keeps staff on their toes” and helps them avoid complacency, even when everything is going well. Monitoring is not about blame for past mistakes, it is about preventing occurrences in the future and about improving the current state of the correctional facilities. It is about finding ways for the agency and outside stakeholders to meet agreed-upon goals. Notably, the monitoring function does not necessarily have an enforcement mechanism (unlike a regulatory body); the recommendations of an inspector are advisory in nature. The monitor's strength comes from the power of persuasion, not control.

Another distinguishing feature of the inspection function is that the emphasis is on how prisoners are treated and how

prison life affects them. The monitor looks holistically at interactions and institutional cultures that are not always captured by standards and policies, or even by performance measures. Similarly, an inspector does not rely too heavily on general statistical measures for his assessments, given that aggregate statistics can sometimes mask the fact that appropriate treatment or services may have been denied to certain prisoners or groups of prisoners. External scrutiny of this type helps reassure citizens that prison and jail conditions are appropriate and consistent with constitutional requirements.

Conclusion

In sum, oversight should be thought of as an umbrella concept rather than as a word with a single meaning. A robust system of correctional oversight is one that is multi-faceted and multi-layered, serving each of the seven critical functions, and is one that involves numerous players both inside and outside the correctional agency. It involves sound internal accountability measures, complemented by credible and effective forms of external scrutiny. Systems of internal review offer a valuable management information tool for administrators, allowing them to identify and correct operational problems at an early stage. At the same time, however, external scrutiny is essential any time that a closed institution is responsible for the control of individuals. Such transparency provides both a form of protection from harm and an assurance that rights will be vindicated. External oversight also benefits administrators by providing them with the objective feedback they need about their performance. Internal accountability measures and external forms of oversight are neither in competition nor mutually exclusive; they are designed to meet entirely different—but complementary—needs.

Most corrections professionals and most advocates for prisoners would find common ground in their belief that prisons and jails should be safe and humane places that respect inmates' constitutional rights. Effective oversight allows both the public and correctional administrators to know whether that goal is being met. As we continue to discuss the

importance of prison oversight, I hope we can keep in mind that the best way to ensure that oversight is effective is to ensure that each of these critical functions is being served effectively, through whatever oversight mechanisms exist in a particular jurisdiction. Readers need to ask themselves whether each of these functions is served in their own jurisdictions, or whether there is too great a reliance on a particular function, perhaps to the exclusion of all others. We should not be comparing and contrasting the value of different oversight functions, but rather encouraging the development of a range of both effective internal accountability measures and robust external oversight mechanisms. Public institutions—and correctional facilities in particular—demand such transparency and accountability.