

# Article

## Special Populations and the Importance of Prison Oversight

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## Introduction

Many experts in the correctional and human rights field believe that independent prison oversight is absolutely essential to the safe operation of prisons.<sup>1</sup> Transparency is critical any time an institution has total control over the lives and well-being of individuals.<sup>2</sup> So too must these closed institutions be held accountable for the protection of human rights. While I advocate for the development of effective oversight mechanisms for all prisoners, the need for such transparency and accountability is magnified in the case of especially vulnerable populations.

This article is designed to familiarize readers with the concept of prison oversight and to highlight some oversight models that exist both in the United States and abroad. Special reference is made to four groups of prisoners for whom the need for external scrutiny with regard to their treatment is critical: prisoners held in administrative segregation and other forms of isolation,<sup>3</sup> prisoners who are particularly vulnerable to sexual assault,<sup>4</sup> prisoners with mental and physical disabilities,<sup>5</sup> and prisoners with serious medical needs.<sup>6</sup>

In 2006, a group of 115 of the world's leading experts gathered at The University of Texas at Austin to examine the question of what constitutes effective prison oversight.<sup>7</sup> Among the participants were twenty

1. See, e.g., COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *CONFRONTING CONFINEMENT* 76 (2006) [hereinafter *CONFRONTING CONFINEMENT*], available at [www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf) (noting that the unique power of correctional facilities to deprive individuals of liberty underscores the critical importance of external scrutiny); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. K. REV. 639, 692 (1993) (arguing that external scrutiny and accountability are necessary to prevent correctional facilities "from routinely subjecting inmates to the brutal conditions that characterized the isolated institutions of yesteryear").

2. See NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 87 (2009) [hereinafter *NPREC REPORT*], available at <http://www.nsvrc.org/publications/reports/national-prison-rape-elimination-commission-report> ("Any time institutions bear responsibility for the control of dependent individuals, it is imperative that there be outside reviews to ensure the proper treatment and safety of persons in their care.").

3. See *infra* Part II.A.

4. See *infra* Part II.B.

5. See *infra* Part II.C.

6. See *infra* Part II.D.

7. See Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight? Conference Report*, 18 CORRECTIONAL L. REP., Aug.–Sept. 2006, at 22, 22. The conference, entitled "Opening Up a Closed World: What Constitutes Effective Prison Oversight?," was held April 23–26, 2006, at the University of Texas at Austin. CONFERENCE PROCEEDINGS, *OPENING UP A CLOSED WORLD: WHAT CONSTITUTES EFFECTIVE PRISON OVERSIGHT?* (Michele Deitch ed., 2010), [http://www.utexas.edu/lbj/prisonconference/2006\\_conference\\_proceedings](http://www.utexas.edu/lbj/prisonconference/2006_conference_proceedings). Videos of presentations made at the conference are available online at <http://www.utexas.edu/lbj/prisonconference/video.php> (last visited Feb. 9, 2010). The author of this article chaired this conference.

percent of the nation's corrections commissioners and directors. Alongside them were leading prisoners' rights advocates, scholars, journalists, judges, policy-makers, and representatives from most of the prison monitoring bodies that exist in the United States. There were also a number of high-profile international guests, including the British Chief Prison Inspector, the chair of Europe's prison monitoring body, a member of the British Parliament, and the Swedish Parliamentary Ombudsman responsible for prison inspections.<sup>8</sup> It is unlikely that a more impressive group with such a breadth of perspectives in the correctional field has been assembled in recent memory. The gathering provided an opportunity to showcase and debate the efficacy of a variety of oversight models and to understand what features are critical to effective oversight.

Of particular importance was the group's consensus that external prison oversight is appropriate and necessary for the humane operations of correctional institutions and that it should be seen as part of the effort to professionalize the correctional field.<sup>9</sup> This seminal event spurred a dialogue that is ongoing in many sectors of the corrections field and has encouraged many jurisdictions to begin investigating the potential for the development of prison oversight mechanisms.<sup>10</sup> With this article, I hope to encourage those concerned with the treatment of special populations to recognize the ways in which external oversight can benefit these prisoners,<sup>11</sup> to understand what constitutes effective oversight,<sup>12</sup> and to advocate for the creation of such oversight entities.<sup>13</sup>

## I. Systems of Accountability: An Overview

### A. The Twin Goals of Public Transparency and Accountability

Any discussion of oversight 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 and humane prisons and jails. One of the main lessons of the Texas conference is that correctional administrators and advocates for prisoners' rights share the goals of: 1) ensuring that prisons are safe for both inmates and staff; 2) treating prisoners respectfully and humanely; 3) preventing re-offending;

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8. Deitch, *supra* note 7, at 22. For a complete list of participants, see Michael B. Mushlin & Michele Deitch, *Foreword: Opening Up a Closed World: What Constitutes Effective Prison Oversight*, 30 PACE L. REV. 1384 app. A at 1411 (2010).

9. Deitch, *supra* note 7, at 22.

10. See Mushlin & Deitch, *supra* note 8, at 1386–87 (discussing the impact of the conference, including the subsequent efforts of several states to establish or strengthen prison oversight bodies).

11. See *infra* Part II.

12. See *infra* Parts III–IV.

13. See *infra* Part V.

and 4) meeting constitutional requirements.<sup>14</sup> Effective oversight allows both the public and correctional administrators to know whether these goals are being met.

Every public agency must have effective systems of accountability. The public and its elected representatives must have assurances that tax monies are being well-spent; agency managers must have access to good sources of information about agency operations; and consumers of services must have a basis for knowing whether the services they receive are appropriate and meaningful. In the correctional context, systems of accountability are even more critical because the stakes are so much higher and because we are dealing with closed institutions with total control over human beings. Human life and well being are at risk.

#### B. Internal Accountability Measures and External Oversight

Effective prison management demands both internal accountability measures and external scrutiny. The two go hand-in-hand, and neither serves as a replacement for the other. A robust system of correctional oversight involves sound internal auditing and accountability measures, complemented by credible and effective forms of external scrutiny.<sup>15</sup> These two systems of accountability are not in competition with each other. They serve different needs and different constituencies.

Systems of internal review offer a valuable management information tool for administrators, allowing them to identify and correct operational problems at an early stage.<sup>16</sup> Whether the administrator reviews data about the number and types of incidents happening at a particular facility, reads prisoner grievances to know the inmates' complaints, watches videos of use-of-force incidents, has auditors assess staff compliance with policies, or disciplines staff for wrongdoing, the goal is to improve management capability and therefore improve agency operations.

External scrutiny may sometimes look similar, but the goal is to shine a light on what happens in correctional institutions.<sup>17</sup> External scrutiny is essential any time a closed institution is responsible for the control of individuals; it is a linchpin in any effort to ensure the safety of

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14. See Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1444 (2010). These goals are similar to the tests of a "healthy prison" adopted by the British Prison Inspectorate. See Anne Owers, *Submission to Vera Commission*, 22 WASH. U. J.L. & POL'Y 231, 233 (2006) (stating that the elements of a "healthy prison" include safety, respect, the opportunity to engage in purposeful activity, and preparedness for a return to the community); see also *infra* notes 75–82 and accompanying text.

15. Owers, *supra* note 14, at 238–40.

16. See CONFRONTING CONFINEMENT, *supra* note 1, at 92 (outlining the benefits of internal compliance and early warning systems, including the prevention of future abuse, the provision of information to make early action possible, and the protection of staff).

17. See *id.* at 76 (quoting Margaret Winter, Associate Dir., Nat'l Prison Project of the ACLU ("What prisons and jails need is 'light, light, and more light.'").

prisoners.<sup>18</sup> It serves the goal of transparency as well as the goal of accountability. Such transparency provides both a form of protection from harm and an assurance that rights will be vindicated.<sup>19</sup> External oversight responds to the public's need for information and provides a credible, objective assessment of conditions in correctional facilities.<sup>20</sup> There will always be public skepticism about an agency's ability to assess itself, and so the external review complements whatever internal assessments are conducted. Moreover, external involvement is necessary whenever staff or inmate behavior crosses the line from administrative wrongdoing to criminal actions.<sup>21</sup> The power of the state must be called upon to investigate and prosecute such criminal behavior, as in the case of a sexual assault by a staff member or by an inmate.<sup>22</sup>

At the same time that external oversight serves this transparency function, it also benefits administrators by providing them with the objective feedback they need about their performance.<sup>23</sup> It adds to the toolkit of management information systems.

### C. Oversight as an “Umbrella Concept”

Before continuing, it would help to achieve some clarity as to what is meant by “oversight.” This is not a term of art, and readers might have very different concepts in mind. One of the lessons from the Texas conference is that “oversight” does not come in one flavor, and it is neither desirable nor effective to adopt a “one size fits all” strategy.<sup>24</sup> There can 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. The word “oversight” is best explained as an “umbrella” concept. It encompasses a range of discrete functions, including regulation, audit, accreditation, reporting, investigation, and monitoring.<sup>25</sup>

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18. Owers, *supra* note 14, at 239 (noting that, although prison staff have a direct interest in ensuring that prisons are well run, institutions have the tendency to “take for granted what is not acceptable, or ignore what is institutionally inconvenient”).

19. Deitch, *supra* note 14, at 1444.

20. Michele Deitch, *Why You Should Love Watchdogs: The Case for Effective Prison Oversight and the British Experience*, THE STATE OF CORRECTIONS: PROCEEDINGS OF THE AMERICAN CORRECTIONAL ASSOCIATION ANNUAL CONFERENCES 2005, 141–42 (2006).

21. CONFRONTING CONFINEMENT, *supra* note 1, at 83 (noting that criminal investigation and prosecution is an important element of external scrutiny of correctional institutions).

22. See MELISSA ROTHSTEIN & LOVISA STANNOW, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, IMPROVING PRISON OVERSIGHT TO ADDRESS SEXUAL VIOLENCE IN DETENTION 8 (2009) (asserting the importance of treating the sexual abuse of inmates as a crime, and ensuring that incidents of abuse are investigated in a through and uniform manner).

23. CONFRONTING CONFINEMENT, *supra* note 1, at 79; Owers, *supra* note 14, at 238–39.

24. See Deitch, *supra* note 14, at 1439.

25. *Id.*

Each of these functions is an essential but separate part of effective prison oversight. Each contributes to the overall goals of improving correctional institutions and making them more accountable. But there should be a variety of separate mechanisms in place to serve each of these functions. 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. Some of the functions are designed to speak to corrections professionals, some address the public's need for information, and others do both.<sup>26</sup> The goal should be to identify ways to implement and strengthen a variety of oversight mechanisms. To ensure the greatest possible amount of transparency and accountability in corrections, we need to ensure that each of these critical functions is being served effectively.

For purposes of this article, however, my comments will focus on two of these functions—investigation and monitoring—because these two functions are most immediately relevant when it comes to addressing the problems presented by special populations. Investigation is essentially a reactive form of oversight, providing accountability for past wrongdoing.<sup>27</sup> Monitoring is a preventative form of oversight, seeking to prevent such occurrences in the future.<sup>28</sup>

## II. The Need to Monitor Special Populations

In an already tightly-managed setting, certain populations of prisoners stand out for the controls placed on them or for the challenges they present to administrators and staff. These inmates demand a heightened level of scrutiny, as they are the ones most likely to be subjected to ill-treatment or the ones whose needs are least likely to be met.

### A. Prisoners in Segregation

Chief among these vulnerable prisoners are those who are locked in isolation settings for extended periods of time due to the risks they are perceived to present to staff or other prisoners. Whether the setting is known as “supermax”<sup>29</sup> or “administrative segregation,”<sup>30</sup> the prisoners

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26. *Id.* at 1439–40.

27. *Id.* at 1442.

28. *Id.* at 1443.

29. *See* *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005) (noting that supermax facilities are maximum-security prisons with highly restrictive conditions that are designed to segregate the most dangerous members of the prison population).

30. *See* *CONFRONTING CONFINEMENT*, *supra* note 1, at 53 (distinguishing short-term “disciplinary segregation”—a form of punishment for breaking the rules—from “administrative segregation”—a long-term placement that isolates prisoners based on the presumption that they pose a threat or are especially vulnerable and need to be protected).

typically have little control over their placement in these harsh conditions,<sup>31</sup> and they have limited human contact for what could be a period of many years.<sup>32</sup> Typically, prisoners are confined in austere single-cells for up to twenty-three hours per day for an indefinite period of time.<sup>33</sup> Rarely are they allowed contact with other inmates and they have only fleeting interactions with staff.<sup>34</sup> Prison administrators have a great deal of discretion when it comes to the decision to place an inmate in segregation.<sup>35</sup> Research shows that many prisoners held under these conditions experience severe deterioration of their mental health.<sup>36</sup> Virtually no outsiders have access to the parts of correctional facilities that house these segregated inmates.<sup>37</sup> Unsurprisingly, the behavior presented by some of these prisoners often generates negative encounters with staff, which can result in both legitimate and illegitimate uses of force.<sup>38</sup>

The unbridled discretion surrounding the placement decision and the lack of transparency in the parts of the facilities that house segregated prisoners call for independent review to ensure that the rights of these prisoners are respected. One scholar argues that an independent committee comprised of individuals unconnected with the prison agency should evaluate the initial decision to place a prisoner in segregation and participate in periodic reviews to maintain the prisoner in that status.<sup>39</sup> While transparency with respect to administrative decision-making in the segregation context is indeed important, the need to monitor the physical treatment of these prisoners is just as critical. Numerous publications detail the human rights abuses that can attend life in these harsh settings.<sup>40</sup>

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31. *Id.* at 52–53.

32. *See Wilkinson*, 545 U.S. at 214–15 (describing conditions in the Ohio State Penitentiary, Ohio’s supermax facility).

33. *Id.* at 214.

34. *Id.*; *see also Jones’El v. Berge*, 164 F.Supp.2d 1096, 1099–101 (W.D. Wis. 2001) (describing conditions in Wisconsin’s Supermax Correctional Institution).

35. *Wilkinson*, 545 U.S. at 228 (finding no due process violation in Ohio’s procedures for assigning a prisoner to a supermax setting, which give broad and substantial deference to the expertise of prison administrators in determining assignments).

36. *See CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT* 256–60 (2005); *see also TERRY A. KUPERS, PRISON MADNESS: THE MENTAL HEALTH CARE CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 29–36 (1999) (describing the “vicious cycle” in which mentally ill prisoners are segregated for failing to control their impulses, which causes further deterioration of their condition).

37. *See HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA* 3–4 (1997) [hereinafter *COLD STORAGE*] (describing the difficulties the human rights organization encountered in seeking access to a supermax facility); *CONFRONTING CONFINEMENT*, *supra* note 1, at 98 (remarking on a “near total lack of access” to prisoners in supermax facilities).

38. *See Madrid v. Gomez*, 889 F.Supp. 1146, 1161 (N.D. Cal. 1995) (finding numerous violations of the Eighth Amendment based on a “conspicuous pattern of excessive force” at Pelican Bay State Prison’s Secure Housing Unit); ALAN ELSNER, *GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS* 152–58 (2004).

39. Michael Jackson, *The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation*, 48 CAN. J. CRIMINOLOGY & CRIM. JUST. 157, 157–58 (2006).

40. *See, e.g., ELSNER, supra* note 38, at 140–65 (2004); HANEY, *supra* note 36, at 215–18; *COLD*

Because segregated prisoners are so vulnerable, those who monitor prisons through their work with an oversight body generally make it a priority to visit the segregation units of a prison during their unannounced inspections of the facility.<sup>41</sup> Indeed, when the author served as a court-appointed monitor of conditions in the Texas prison system in the landmark case of *Ruiz v. Estelle*,<sup>42</sup> visits to segregation were a critical part of every inspection. Those visits to segregation included, at a minimum, opportunities for visual observation of conditions and interactions between inmates and staff, interviews with prisoners, interviews with staff, review of logs and other documentation to ensure that prisoners received regular access to the dayroom or yard, and review of grievances filed by segregated prisoners. While it would be naïve to suggest that these inspections either caught or prevented all abuses of segregated prisoners, there is no question that the visits served to remind staff of the need to adhere to the rules applicable to the treatment of these inmates. What's more, sometimes the team of monitors identified systemic problems that they brought to the attention of administrators, which were then fixed. Just as importantly, the inspections provided the prisoners with a vehicle for registering their concerns and with the assurance that their complaints would be taken seriously.<sup>43</sup> The prisoners knew that they were isolated, but not forgotten.

#### B. Prisoners Vulnerable to Sexual Assault

Unlike the situation of prisoners held in isolation, prisoners who are vulnerable to sexual assault do not necessarily find themselves housed in a separate part of a correctional facility. Thus, the challenge with this special population is to identify them wherever they are housed and ensure that they are protected from abuse. The Prison Rape Elimination Act of 2003<sup>44</sup> not only drew national attention to the problem of prison sexual assault but also mandated the development of standards to reduce the occurrence of such incidents.<sup>45</sup> Among the proposed standards developed by the National

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STORAGE, *supra* note 37, at 4; HUMAN RIGHTS WATCH, OUT OF SIGHT: SUPER-MAXIMUM SECURITY CONFINEMENT IN THE UNITED STATES (2000), available at <http://www.hrw.org/legacy/reports/2000/supermax>; Daniel Mears, *A Critical Look at Supermax Prisons*, 30 CORRECTIONS COMPENDIUM 6, 48 (2005).

41. See, e.g., SHIRLEY POPE, THE WORK OF THE CORRECTIONAL INSTITUTIONS INSPECTION COMMITTEE: REFLECTIONS AND ANALYSIS 13 (2006), available at <http://www.ciic.state.oh.us/reports/randa3-16-06.pdf>.

42. 503 F. Supp. 1265 (S.D. Tex. 1980), *amended and vacated in part by*, 688 F.2d 266 (5th Cir. 1982).

43. See Vincent M. Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419, 425 (2004) (noting that correctional litigation has brought a "measure of newly found self-respect to many prisoners," who now "know they are no longer entirely outside the scope of legal protection").

44. Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601–15609 (2006)).

45. As part of this effort, the Act created a nine-member National Prison Rape Elimination



Prison Rape Elimination Commission (NPREC) are requirements that every correctional facility undergo an independent audit to ensure its compliance with operational standards designed to prevent sexual assault.<sup>46</sup> While such an audit does not necessarily include monitoring of the type envisioned in this article, it does recognize that independent oversight is critical if the problem of sexual assault is to be addressed.<sup>47</sup>

Routine monitoring of correctional facilities is an essential part of ensuring the protection of vulnerable prisoners. Monitors have the ability to speak privately with inmates and assess the degree to which they feel safe from assault from either other prisoners or staff.<sup>48</sup> Inspectors can also review incident reports, grievances, medical records, and other documents to identify the extent to which sexual assaults are reported to authorities or medical personnel.<sup>49</sup> Monitors can interview staff to ensure that they are familiar with protocol in the event that a prisoner reports a rape or fears for his or her safety. These interviews often yield helpful and previously unreported information about dangerous areas within the prison or specific prisoners who may be targets for assault. Another key part of any inspection involves a review of the facility's policies with regard to the identification and housing of vulnerable prisoners and an assessment of whether such policies are followed in practice.<sup>50</sup> Lastly, monitors develop a strong sense of a facility's "culture"—the degree to which there is a clear lack of tolerance for any behavior that contributes to the occurrence of sexual assault of prisoners.<sup>51</sup>

Sexual assault complaints also demand the involvement of

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Commission. 42 U.S.C. § 15606(a)–(b). The Commission was instructed to submit a report following a “comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape.” § 15606(d)(1). The Attorney General was required to “publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape” no later than one year after receiving the report of the National Prison Rape Elimination Commission. § 15607(a)(1).

46. See NPREC REPORT, *supra* note 2, app. B, at 219 (requiring audits of correctional facilities' compliance with the PREA Standards at least every three years under standard AU-1).

47. See *id.* at 88 (stating that, in order to enhance public confidence in the willingness of prisons to prevent sexual abuse and to provide outsiders with the information necessary to intervene when a prison is struggling to prevent sexual abuse, it is critical that auditors be independent, qualified, and have the ability to operate without constraint).

48. See, e.g., *id.* at 89 (citing the testimony of an independent investigator regarding his 2005 investigation into allegations of sexual abuse in a juvenile detention center: “When I interviewed the victims . . . I saw kids with fear in their eyes, kids who knew they were trapped in an institution within a system that would not respond to their cries for help.”).

49. See *id.* at 88 (stating that monitors “must have unfettered access to all parts of the facility as well as all documents, staff, and prisoners”).

50. See, e.g., *id.* app. B at 217 (establishing standards under NPREC standards SC-1 and SC-2 for determining whether inmates be screened during intake to assess their risk of being sexually abused and that this information be used to inform housing, work, education, and program assignments).

51. For an example of the negative effects a facility's culture can have on vulnerable inmates, see ROTHSTEIN & STANNOW, *supra* note 22, at 4–5 (arguing that the difficulties of reporting a sexual assault in prison are aggravated by the possibility of retaliation from inmates and officials, and the fact that, in the worst facilities, corrections officials facilitate or even participate in the violence).

independent investigators who can conduct appropriate criminal investigations and forensic evaluations.<sup>52</sup> Whereas the monitoring process is designed to prevent the occurrence of prison rape, investigations are intended to punish wrongdoing in this arena through the use of the criminal process (and not just through administrative disciplinary measures).<sup>53</sup>

### C. Prisoners with Mental and Physical Disabilities

Federal law provides for the external monitoring of correctional facilities to protect the rights of individuals with mental and physical disabilities housed there.<sup>54</sup> Every state must designate a particular entity—sometimes it is a governmental body and sometimes it is an NGO—to advocate on behalf of individuals with mental disabilities, including those who are housed in correctional facilities.<sup>55</sup> These federally-funded entities are known as protection and advocacy (P&A) organizations.<sup>56</sup>

These P&A entities are given a formal right of access to correctional facilities in order to ensure that persons with mental or physical disabilities are not ill-treated.<sup>57</sup> While most P&A entities around the country have little time to focus on the rights of the incarcerated (as opposed to the rights of the mentally disabled in the community or in mental institutions), there are a handful of these organizations for whom the incarcerated mentally ill population is a priority.<sup>58</sup> Still, such groups do not

52. See NPREC REPORT, *supra* note 2, at 106–09 (stating that prison facilities have a duty to investigate every complaint of sexual abuse, and outlining standards to ensure the quality of investigations).

53. See *External Oversight: The Outside World's Responsibility to Prevent and Respond to Sexual Violence: Public Hearing Before the Nat'l Prison Rape Elimination Comm'n* (Nov. 26, 2007) (written testimony of Matthew Cate, California Inspector Gen., Office of the Inspector Gen.) [hereinafter Cate Testimony], available at <http://www.nprec.us/docs3/Cate%20Testimony.pdf>.

54. There is a framework of federal statutes that provide for the protection of institutionalized individuals with mental and physical disabilities. Most prominent is the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001–15115 (2006). Provisions for the protection and advocacy of people with mental illness in mental health facilities, including prisons, also exist under The Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §§ 10801–10851 (2006).

55. 42 U.S.C. § 10805.

56. The P&A laws refer to the federal Protection and Advocacy for Individuals with Mental Illness (PAIMI) Program, authorized by the Protection and Advocacy for Mentally Ill Individuals Act, §§ 10801–10851, and the Protection and Advocacy for Persons with Developmental Disabilities (PADD) Program, authorized by the Developmental Disabilities Assistance and Bill of Rights Act, §§ 15001–15115. See *supra*, note 54 and accompanying text.

57. 42 U.S.C. § 15043.

58. For example, Advocacy, Inc., the Texas P&A organization, has been deeply involved with monitoring conditions of confinement for mentally ill juvenile offenders. See NAT'L DISABILITY RIGHTS NETWORK, THE PROTECTION & ADVOCACY (P&A) SYSTEM: EXAMPLES OF P&A JUVENILE JUSTICE ADVOCACY ACTIVITIES 3 (2007), available at [www.napas.org/meetings/Annual/2006/wkshp.htm](http://www.napas.org/meetings/Annual/2006/wkshp.htm) (describing the methods used by Advocacy, Inc. to monitor county juvenile detention centers in Texas). For more information on Advocacy, Inc., see that organization's website. ADVOCACY INC., <http://www.advocacyinc.org> (last visited Jan. 9, 2011). For a survey of P & A organizations, see

tend to conduct routine inspections of prisons or jails, but rather they seek access to facilities where their potential clients appear to have problems.<sup>59</sup>

Because the law is already in place to allow independent oversight to protect this special population, it is certainly worth exploring whether additional emphasis can be placed on the need for routine monitoring of correctional facilities under this statutory authority.

#### D. Prisoners with Serious Medical Needs

Perhaps no aspect of correctional operations is more heavily criticized than the correctional health care system.<sup>60</sup> The numbers of grievances and lawsuits filed by prisoners about inadequate medical care—not to mention the billions of dollars spent on correctional health care annually—speak volumes about the need for effective oversight of this service.<sup>61</sup> External scrutiny must be brought to bear on two fundamental issues: prisoner access to health care, and the quality of the care that prisoners receive.

Routine monitoring of health care services is essential to ensure that prisoners have a way of bringing their medical concerns to the attention of health care staff and that they receive appropriate medical care in a timely fashion. Monitors can evaluate sick call procedures, assess sanitary conditions in medical bays, report on the qualifications and availability of the facility's health care professionals, assess the availability of appropriate equipment, and ensure that prisoners receive their prescribed medications and that medical restrictions are respected by correctional staff. Much of this routine monitoring can be conducted by non-medically trained inspectors.

When it comes to conducting quality assurance, however, medical professionals are needed to serve as part of an independent assessment team.<sup>62</sup> These professionally trained monitors can review a sampling of prisoner medical files to assess the quality of care that these prisoners receive. Moreover, these team members can follow up on complaints raised by specific prisoners and ensure that these individuals receive appropriate care.

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generally Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010).

59. See generally Deitch, *supra* note 58 (surveying the activities of P&A organizations).

60. See, e.g., CONFRONTING CONFINEMENT, *supra* note 1, at 13 (discussing the health care shortcomings of American prisons).

61. See Elizabeth Alexander, "Watching the Watchmen" *After Termination of Injunctive Relief*, 24 PACE L. REV. 793, 796 n.11 (2004) (discussing cases involving oversight of health care access for incarcerated individuals).

62. See Owers, *supra* note 14, at 234–35 (noting that the teams conducting full inspections of prisons in the United Kingdom are supplemented by health care and substance abuse specialists, and that prison health care inspectors must look for "treatment and professional expertise equivalent to that which they would expect to find in community health care").

### III. The Essential Elements of Effective Prison Oversight

So far, this article has provided an overview of the concept of independent oversight and the ways in which such oversight can contribute to transparency and accountability when it comes to the treatment of prisoners, especially for those prisoners who can be considered special populations. The obvious question remains: what should an independent oversight body look like? The answer to this question is complex because there is no single best way to structure a correctional oversight mechanism. So much depends on the responsibilities assigned to the oversight entity, on the culture and politics of the jurisdiction in which it is located, and on the systems already in place in that jurisdiction.<sup>63</sup> It is less critical that all oversight mechanisms look alike than it is that they have in place the essential elements for effectiveness as an oversight body. I have identified eight fundamental criteria for effectiveness:

(1) They must be **independent of the correctional agency** and be able to do their work without interference or pressure from the agency or any other body.

(2) They must have a **mandate to conduct regular, routine inspections** of the facilities under their jurisdiction, and the authority to investigate and issue reports on, a particular problem at one or more facilities.

(3) Monitors must have a “golden key,” giving them **unfettered and confidential access** to facilities, prisoners, staff, documents, and materials, and they should have the ability to visit any part of a facility at any time of day without prior notice.

(4) They must be **adequately resourced**, with sufficient staffing, office space, and funding to carry out their monitoring responsibilities and the budget must be controlled by the monitoring entity.

(5) They must have the power and the **duty to report** their findings and recommendations, in order to fulfill the objective of transparency, and they should control the release of their reports.

(6) They must take a **holistic approach to evaluating the treatment of prisoners**, relying on observations, interviews, surveys, and other methods of gathering information from prisoners, as well as on statistics and performance-based outcome measures.

(7) There must be a **means of fulfilling both the investigative function and the monitoring function**, in order to provide accountability for past wrongdoing in individual cases and to prevent future problems. These functions need not be performed by the same oversight body.

(8) The **agency must be required to cooperate fully** with the

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63. *Id.*

oversight body and to **respond promptly and publicly** to its findings.<sup>64</sup>

While those who advocate for prisoners' rights may instinctively believe that an oversight body should also have enforcement authority when it comes to the power to implement their recommendations, my own view is that such enforcement authority is neither essential nor desirable for a monitoring entity.<sup>65</sup> The investigation and monitoring functions should not be confused with a regulatory function. Prison inspectors are not managers and they are not policy-setters. They should not exercise control over an agency or its staff, for in doing so they become yet another layer of management. Enforcement should come from a regulatory body, a budget-setting body, or the courts. In contrast, the monitor's strength comes from the power of persuasion, not control.<sup>66</sup>

#### IV. Models of External Prison Oversight

Unlike our European counterparts,<sup>67</sup> most state and local jurisdictions in the United States have either extremely limited independent correctional oversight structures in place or none at all.<sup>68</sup> Those oversight mechanisms that do exist vary widely in structure and purpose.<sup>69</sup> While meaningful prison oversight mechanisms are still relatively rare in the United States, there are a handful of very interesting models that are worth highlighting in an effort to provide guidance to jurisdictions with an interest in designing their own oversight mechanisms to address the needs of special populations of prisoners. In addition, it is instructive to consider some highly developed oversight models in other countries.

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64. *Prison Oversight and Systems of Accountability: Public Hearing Before the Nat'l Prison Rape Elimination Comm'n* 15–16 (Dec. 6, 2007) (written testimony of Michele Deitch), available at <http://www.nprec.us/docs3/Deitch%20Testimony.pdf>.

65. This view is consistent with the perspectives of various experts who conduct routine monitoring of correctional facilities. See, e.g., Silvia Casale, *Mechanisms for Custodial Oversight: The United States and Europe*, 22 WASH. U. J.L. & POL'Y 217, 223 (2006) (noting that the international Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) does not have powers of enforcement, but rather “works by persuasion”); *Beyond Government Oversight: Public Hearing Before the Comm'n on Safety and Abuse in America's Prisons* 10 (Feb. 9, 2006) (written testimony of Jack Beck, Dir., Prison Visiting Project, Corr. Ass'n of N.Y.), available at [http://www.prisoncommission.org/statements/beck\\_jack.pdf](http://www.prisoncommission.org/statements/beck_jack.pdf) (arguing that legislation authorizing a monitoring entity should not oblige a corrections department to accept the findings of the entity, but should “mandate[] that the department articulate its position on the validity of the findings and, where the department cannot dispute that a problem exists, develop a remedial plan.”).

66. CONFRONTING CONFINEMENT, *supra* note 1, at 81 (noting that independent monitors typically have no enforcement role, but instead rely on their “credibility and powers of persuasion”); see also Casale, *supra* note 65, at 223 (noting that the CPT has no enforcement powers, but instead “works on persuasion, reminding [nation] states that they have chosen to ratify the convention and must engage in a cooperative dialogue with the CPT”).

67. See *infra* notes 71–89; 108–110; 124–128 and accompanying text.

68. See Deitch, *supra* note 58, at 1762 (concluding that “formal and comprehensive external oversight—in the form of inspections and routing monitoring of conditions that affect the rights of prisoners—is truly rare in this country”).

69. See generally *id.* (surveying the prison oversight mechanisms in all fifty states).

This article turns now to a brief discussion about some domestic and international oversight entities that have an explicit mandate and the legal authority to provide correctional oversight. For the most part, these oversight bodies appear to meet most of the criteria for effectiveness as described above. The organizations can be loosely grouped into one of the following categories: independent governmental monitoring bodies; specially created legislative committees; ombudsmen; non-governmental organizations; lay citizen oversight boards; and court oversight. The title that these bodies are given is often less relevant than the specific duties they are assigned and the powers they hold. There are advantages and disadvantages to each way of structuring a monitoring entity,<sup>70</sup> which is an important issue but beyond the scope of this article.

### **British Prison Inspectorate**

The best-known example of an independent governmental monitoring body is the British Prison Inspectorate.<sup>71</sup> Although it is located under the umbrella of the British Home Office, under which the British prison agency also falls, the Chief Inspector is appointed by the Crown for a five-year term and is removable only for cause.<sup>72</sup> The British Prison Inspectorate is charged with conducting routine inspections of all places of detention in the United Kingdom at least twice every five years.<sup>73</sup> Teams of inspectors, which occasionally include outside experts on a particular issue, monitor conditions in these facilities through a combination of surprise in-depth inspections, follow-up visits, and prisoner surveys.<sup>74</sup>

The goal of these inspections is to assess whether the facility meets the test of a “healthy prison.”<sup>75</sup> Rather than applying a checklist-type approach, the teams seek answers to the questions: are prisoners safe?; are they treated respectfully?; are they given purposeful activities?; and are they prepared for re-entry?<sup>76</sup> The Inspectorate issues detailed reports following each visit, and the Inspectorate alone controls the substance and timing of the reports.<sup>77</sup> The prison agency is provided an opportunity to respond in writing to each report and is required to file an action plan for complying with any recommendation unless there is a written objection.<sup>78</sup> In addition

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70. For a more in depth discussion of different ways to structure a monitoring entity, see generally Deitch, *supra* note 64.

71. See DAVID RAMSBOTHAM, PRISONGATE: THE SHOCKING STATE OF BRITAIN’S PRISONS AND THE NEED FOR VISIONARY CHANGE (2003); Owers, *supra* note 14, at 231–32. Then-Chief Inspector Anne Owers provided an in-depth description of the Inspectorate in her presentation at the “Opening Up a Closed World” conference. See CONFERENCE PROCEEDINGS, *supra* note 7, at 25; Anne Owers, *Prison Inspection and the Protection of Prisoners’ Rights*, 30 PACE L. REV. 1535, 1540 (2010).

72. Owers, *supra* note 14, at 231.

73. *Id.* at 234; see also Owers, *supra* note 71, at 1540.

74. Owers, *supra* note 14, at 234–35; see also Owers, *supra* note 71, at 1540–41.

75. Owers, *supra* note 14, at 233.

76. *Id.*

77. *Id.* at 235–36; see also Owers, *supra* note 71, at 1543.

78. Owers, *supra* note 14, at 236.

to facility-specific reports, the Inspectorate also prepares and writes reports on special topics that cut across operations of the entire prison agency.<sup>79</sup> Some of these special topics reports include reports focusing on the needs of special populations.<sup>80</sup> It is worth emphasizing that the British Prison Inspectorate's work is entirely preventative in nature; the office does not conduct investigations of particular allegations of wrongdoing nor does it seek to assess blame for past problems.<sup>81</sup> The aim is to identify problems and correct them before they lead to deeper concerns. It is also critical to understand that the Inspectorate does not audit the Prison Service—the focus is strictly on the treatment of prisoners.<sup>82</sup>

### **European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

Somewhat similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is an international treaty body falling under the auspices of the Council of Europe.<sup>83</sup> Each of the forty-seven European countries that are members of the Council of Europe signed a treaty that allows the CPT to inspect conditions in their prisons, jails, and other places of detention.<sup>84</sup> The CPT is comprised of one representative from each European country, each of whom has expertise in correctional matters, and delegations of these CPT members make routine, surprise visits to selected prison facilities in every country every few years.<sup>85</sup> The most significant difference between the British Prison Inspectorate and the CPT is that the CPT's work remains confidential: Reports are issued solely to the leadership of the country that has been the subject of the inspection.<sup>86</sup> However, each country is strongly encouraged to publish the CPT's report, along with its own response to the report.<sup>87</sup> To date, only Russia has refused to publish the reports.<sup>88</sup> Thus, there is a healthy tradition of open dialogue about the prison conditions that exist in each country despite the fact that the CPT cannot release its own

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79. *Id.* 237; *see also* Owers, *supra* note 71, at 1543.

80. Owers, *supra* note 14, at 237; *see also* Owers, *supra* note 71, at 1543 (noting that the Inspectorate's "thematic reviews" have recently dealt with older prisoners, prisoners held in extreme custody, and the mental health of prisoners).

81. Owers, *supra* note 71, at 1538 (noting that the Inspectorate does not have statutory authority to investigate individual cases or address individual prisoners' complaints).

82. Owers, *supra* note 14, at 231.

83. Casale, *supra* note 65; *see also* ROD MORGAN & MALCOLM EVANS, *COMBATING TORTURE IN EUROPE: THE WORK AND STANDARDS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE* (2001). Then-President of the CPT Silvia Casale gave an address at the Texas conference. *See* CONFERENCE PROCEEDINGS, *supra* note 7, at 23; Silvia Casale, *The Importance of Dialogue and Cooperation in Prison Oversight*, 30 PACE L. REV. 1490 (2010).

84. Casale, *supra* note 65, at 218–19; *see also* Casale, *supra* note 83, at 1492 n.9 (defining the "European common legal space" as the forty-seven countries in which the European Convention of Legal Rights applies, and the European Court of Human Rights has jurisdiction).

85. MORGAN & EVANS, *supra* note 83, at 23, 29.

86. Casale, *supra* note 65, at 224–25; *see also* Casale, *supra* note 83, at 1495–96.

87. Casale, *supra* note 65, at 225; *see also* Casale, *supra* note 83, at 1498.

88. Casale, *supra* note 65, at 225; *see also* Casale, *supra* note 83, at 1498 n.23.

reports. As with the British Inspectorate, the CPT is solely focused on preventative, systemic concerns; there is no effort made to investigate particular incidents of wrongdoing.<sup>89</sup>

### California Inspector General

In the United States, the California Inspector General (IG) is the best example of a statewide independent governmental oversight entity.<sup>90</sup> The California IG is an independent body charged with both investigative and monitoring responsibilities for the state's adult and juvenile corrections facilities.<sup>91</sup> With a staff of ninety-five and a budget of \$15.3 million, the California IG is well equipped to conduct routine inspections of these facilities and to conduct criminal investigations of alleged wrongdoing by high-level officials.<sup>92</sup> The IG issues public reports containing its findings and recommendations for improvement.<sup>93</sup> The structure of this office is unique in the United States. California is believed to have the only Inspector General whose office is located outside the structure of the agency it investigates,<sup>94</sup> a position that gives it much more independence to publicly identify concerns about the agency and more credibility with the public.

### United States Department of Justice, Office of the Inspector General

At the federal level, there is the Inspector General of the United States Department of Justice (DOJ).<sup>95</sup> The responsibilities of the DOJ's Inspector General are broader than those falling within the California IG's realm, since issues relating to the Federal Bureau of Prisons are only a part of the wide-ranging issues arising for the DOJ.<sup>96</sup> The DOJ Inspector General has issued a number of hard-hitting reports about federal prison

89. Casale, *supra* note 65, at 219–20; *see also* Casale, *supra* note 83, at 1493.

90. *See* NPREC REPORT, *supra* note 2, at 90–91 (describing California's Office of the Inspector General as one of the most complex oversight entities in the country in terms of both formal authority and operational design).

91. Cate Testimony, *supra* note 53, at 1. Then-Inspector General Matthew Cate gave a presentation at the Texas conference. *See* CONFERENCE PROCEEDINGS, *supra* note 7, at 23.

92. *Governmental Oversight of Prisons and Jails: Public Hearing Before the Comm'n on Safety and Abuse in America's Prisons 1* (Jan. 9, 2006) (written statement of Matthew Cate, California Inspector Gen., Office of the Inspector Gen.), *available at* [http://www.prisoncommission.org/statements/cate\\_matthew.pdf](http://www.prisoncommission.org/statements/cate_matthew.pdf).

93. *Id.* at 2.

94. *Id.*

95. *What We Know, How We Know It, and Gaps in Our Knowledge: Public Hearing Before The Comm'n on Safety and Abuse in America's Prisons* (Apr. 19, 2005) (written statement of Glenn Fine, Inspector Gen., U.S. Dep't of Justice) [hereinafter Fine Testimony], *available at* [http://www.prisoncommission.org/statements/fine\\_glenn.pdf](http://www.prisoncommission.org/statements/fine_glenn.pdf); *see also* OFFICE OF THE INSPECTOR GENERAL OF THE U.S. DEP'T OF JUSTICE, <http://www.usdoj.gov/oig> (last visited Oct. 30, 2010).

96. The DOJ Inspector General also oversees the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Marshals Service, among others. *See* Completed Audits, Inspections, and Special Reviews Organized by Department of Justice Component, OFFICE OF THE INSPECTOR GENERAL OF THE U.S. DEP'T OF JUSTICE, <http://www.justice.gov/oig/reports/index.htm> (last visited Oct. 30, 2010) (listing organizations investigated by the DOJ Inspector General).



matters,<sup>97</sup> but these reports tend to be issue-specific, arising on the heels of a scandal or complaint. While the DOJ's Inspector General has the authority to inspect any federal prison facility or to follow up on any area of concern,<sup>98</sup> there is no mandate to routinely monitor every facility in order to assess conditions generally or to investigate whether prisoners are treated safely and humanely.

#### **Texas Commission on Jail Standards**

When it comes to conditions in local jail facilities, Texas has an unusual entity—the Texas Commission on Jail Standards. This independent government regulatory body sets standards applicable to jail facilities in the state and monitors facility compliance with these standards.<sup>99</sup> The Commission has the authority to sanction and even de-certify jails that are not in compliance.<sup>100</sup> It is worth noting, however, that the standards are silent on some of the key issues relevant to the treatment of prisoners and tend to be more targeted to the physical structure of the facilities, management issues, and overcrowding concerns.<sup>101</sup>

#### **City-wide oversight entities**

In a couple of major cities, there are local governmental entities that have been established to monitor conditions in the local jail facilities on behalf of city and county-level officials. New York City has the Board of Correction, established in 1957, which sets standards for the city's jails and monitors conditions in these facilities.<sup>102</sup> Los Angeles has both the Office of Independent Review,<sup>103</sup> set up by Sheriff Lee Baca in 2001, and the Office of the Special Counsel, which reports to the Board of County Commissioners, both of which provide oversight of conditions and treatment of prisoners in the Los Angeles jail system.

#### **Ohio Correctional Institution Inspection Committee**

While every state has one or more legislative committees responsible for providing legislative oversight of the state's correctional agency, only Ohio has a special committee set up for the purpose of conducting routine monitoring of conditions in prison facilities.<sup>104</sup> The Ohio Correctional Institution Inspection Committee is comprised of a bi-

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97. See Fine Testimony, *supra* note 95, at 8–11.

98. *Id.* at 3–4.

99. 37 TEX. ADMIN. CODE § 251.1 (West 2010).

100. *Id.*

101. See *id.* §§ 259–97 (providing standards for construction of facilities, life safety issues, provision of meals, etc. but not including specific regulations regarding use of force, sexual assault, or protection of vulnerable prisoners).

102. John M. Brickman, *The Role of Civilian Organizations with Prison Access and Citizen Members—The New York Experience*, 30 PACE L. REV. 1562, 1564–65 (2010); Richard T. Wolf, *Reflections on a Government Model of Correctional Oversight*, 30 PACE L. REV. 1610, 1611–12 (2010).

103. See OFFICE OF INDEPENDENT REVIEW IN LOS ANGELES, <http://www.laoir.com> (last visited Jan. 25, 2011).

104. For a detailed discussion of the history, composition, and mandate of the Ohio Correctional Institution Inspection Committee, see POPE, *supra* note 41.

partisan set of legislators from both houses and it has a full-time staff with the sole responsibility of conducting inspections, issuing reports, and responding to prisoner complaints.<sup>105</sup> Visits to the prison facilities are conducted by teams of staff members accompanied by some legislators.<sup>106</sup>

#### **Swedish Parliamentary Ombudsman**

While most ombudsmen tend to be agency employees who deal solely with individual complaints, that is not always the case. Some ombudsmen are charged with routine inspections of conditions in facilities and investigate proactively systemic issues. For example, the task of the Swedish Parliamentary Ombudsman is to ensure that public authorities comply with laws and discharge their obligations properly, including ensuring respect for the rights of prisoners.<sup>107</sup> The Swedish Ombudsman not only investigates complaints from inmates and those outside the prison system, but can also make inquiries on its own initiative, conduct prison inspections, and identify systemic concerns.<sup>108</sup> The Ombudsman can act as a special prosecutor in the case of serious malfeasance and can impose certain disciplinary measures.<sup>109</sup> Significantly, the office is structured so that it falls outside the executive branch of government. The Swedish Ombudsman reports directly to Parliament, and Parliament elects the person that holds the post.<sup>110</sup>

#### **Independent Ombudsman for the Texas Youth Commission**

In the wake of a major sexual assault scandal in the Texas Youth Commission in 2007, the Texas Legislature created the new position of the Independent Ombudsman for the Texas Youth Commission.<sup>111</sup> Intended to be an independent government agency, the Ombudsman was legislatively given the dual responsibilities of investigating and resolving concerns of individual juveniles and conducting routine monitoring of juvenile facilities.<sup>112</sup> The role of the TYC Ombudsman was designed to be much further-reaching than is typically the case for Ombudsmen in the United

105. *Id.* at 7.

106. *Id.*

107. *See* SWEDISH PARLIAMENTARY OMBUDSMEN, [http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX\\_Documents&Language=en](http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en) (last visited Jan. 25, 2011). Swedish Parliamentary Ombudsman Cecilia Nordenfelt spoke at the “Opening Up a Closed World” conference. *See* CONFERENCE PROCEEDINGS, *supra* note 7, at 25.

108. *See* CONFERENCE PROCEEDINGS, *supra* note 7, at 47.

109. *Id.*

110. *See id.* at 46 (noting that the four parliamentary ombudsmen are nonpolitical and monitor public authorities on behalf of Parliament).

111. TEX. HUM. RES. CODE ANN. §§ 64.001–64.152 (West 2010) (the act that created the Office of the Independent Ombudsman is commonly referred to as SB103).

112. *External Oversight for the Texas Youth Commission: A Legislative Response to a Closed Agency Crisis: Public Hearing Before the Nat'l Prison Rape Elimination Comm'n* (Dec. 6, 2007) (written statement of Will Harrell, Chief Ombudsman, Office of the Indep. Ombudsman for the Texas Youth Comm'n), *available at* <http://www.nprec.us/docs3/Harrell%20Testimony%20Final%20Revised.pdf>.

States, and may well prove to be a worthy model for other jurisdictions. Although the office is still in its infancy and is currently in a state of flux after a series of short-lived appointments of Chief Ombudsmen, early on it produced a number of hard-hitting reports dealing with conditions in various juvenile facilities and problems facing special needs groups. Among its most high profile reports to date are ones addressing the lack of appropriate educational opportunities for juveniles with special education needs<sup>113</sup> and problems faced by juveniles held in isolation settings.<sup>114</sup>

#### **Correctional Association of New York**

While many non-governmental organizations consider themselves to be providing a watchdog function with regard to prisons and jails in their jurisdiction, the vast majority of them do not have a formal oversight role.<sup>115</sup> But there are three statewide advocacy groups that have either formal or informal access to correctional facilities in order to monitor conditions and assess the treatment of all prisoners. The most established of these organizations is the Correctional Association of New York, with a Prison Visiting Project authorized under state law.<sup>116</sup> Since 1846, the Correctional Association has had the right of access to prisons and the duty to issue public reports on the conditions it finds in these facilities.<sup>117</sup> Notably, the Correctional Association uses inspection teams comprised of interested citizens.<sup>118</sup> Two other organizations, the Pennsylvania Prison Society<sup>119</sup> and the John Howard Association of Illinois,<sup>120</sup> have somewhat similar responsibilities, though the groups differ in some respects, including the extent of their access to the facilities.

#### **Protection and Advocacy Organizations**

Also falling within the category of non-governmental organizations providing a correctional oversight role are the federally-funded protection

113. MICHAEL P. KREZMIEN, OFFICE OF THE INDEP. OMBUDSMAN, A REVIEW OF EDUCATION PROGRAMS FOR STUDENTS IN THE TEXAS YOUTH COMMISSION'S STATE SCHOOLS (2008), available at [http://www.tyc.state.tx.us/ombudsman/rept\\_education/index.html](http://www.tyc.state.tx.us/ombudsman/rept_education/index.html).

114. WILL HARRELL, OFFICE OF THE INDEP. OMBUDSMAN FOR THE TEXAS YOUTH COMM'N, MEMORANDUM ADDRESSING YOUTH IN ISOLATION (2008), available at [http://www.tyc.state.tx.us/ombudsman/OIO\\_Isolation.pdf](http://www.tyc.state.tx.us/ombudsman/OIO_Isolation.pdf).

115. See Deitch, *supra* note 58, at 1762 (distinguishing between organizations that have either a formal (or an informal but well-established) right of access to prisons and human rights groups that "serve a watchdog function and monitor prison conditions through their contacts with prisoners" but lack such access).

116. N.Y. CORRECT. LAW § 89-e (McKinney 2006); see also Jack Beck, *Role of Correctional Association of New York in Paradigm of Prison Monitoring*, 30 PACE L. REV. 1572, 1575–76 (2010); Brickman, *supra* note 102, at 1562. Correctional Association Director Bob Gangi and Chair John Brickman spoke at the "Opening Up a Closed World" conference. See CONFERENCE PROCEEDINGS, *supra* note 7, at 23, 24.

117. Beck, *supra* note 116, at 1572; Brickman, *supra* note 102, at 1563.

118. Beck, *supra* note 116, at 1574–75; Brickman, *supra* note 102, at 1562.

119. See Deitch, *supra* note 58, at 1896–97; see also PENNSYLVANIA PRISON SOCIETY, <http://www.prisonersociety.org/index.shtml> (last visited Oct. 30, 2010).

120. See Deitch, *supra* note 58, at 1815–16; see also JOHN HOWARD ASSOCIATION, <http://www.john-howard.org> (last visited Oct. 30, 2010).

and advocacy (P&A) organizations, discussed earlier in this article.<sup>121</sup> Every state must designate an entity to ensure that the rights of those individuals with mental and physical disabilities are respected. While some P&A organizations are governmental bodies,<sup>122</sup> others, such as Advocacy, Inc. in Texas, and Michigan Protection & Advocacy Service, Inc.,<sup>123</sup> are non-governmental organizations.

### Independent Monitoring Boards

England has long had lay “Boards of Visitors,” recently renamed “Independent Monitoring Boards,” or “IMBs.”<sup>124</sup> Each prison has its own IMB, made up of local citizens from all walks of life, who provide oversight of the prison on a volunteer basis.<sup>125</sup> These individuals are in and out of the prison on a weekly, if not daily, basis and become fixtures around the institution.<sup>126</sup> They provide a link between the prison and the community in two ways. As monitors, they are the public’s eyes and ears and a voice of community opinion about prison conditions, and as community members, they help link prisoners to opportunities for jobs and participation in programs.<sup>127</sup>

Whereas the British Prison Inspectorate gets a snapshot view of a particular prison every few years, the IMBs have a more dynamic understanding of the facility and, if the members are doing their job, they catch problems and bring them to the warden’s attention immediately.<sup>128</sup> Every IMB issues an annual report that is published and provided to the Home Secretary.<sup>129</sup> But the report is meant to be a culmination of the year’s activities—it is not the place where problems are first noted. As one might expect, IMBs vary tremendously in the quality of their monitoring work and in the degree to which the members are co-opted by the staff, whom they come to know well in the course of their duties.

121. See *supra*, notes 54–59, and accompanying text.

122. See, e.g., NEW YORK COMMISSION ON QUALITY OF CARE AND ADVOCACY FOR PERSONS WITH DISABILITIES, <http://www.cqcapd.state.ny.us> (last visited Oct. 30, 2010); CONNECTICUT’S OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, <http://www.ct.gov/OPAPD/site/default.asp> (last visited Oct. 30, 2010).

123. See, e.g., ADVOCACY, INC., <http://www.advocacyinc.org/index.cfm> (last visited Oct. 30, 2010); MICHIGAN PROTECTION & ADVOCACY SERVICE, INC., see <http://www.mpas.org> (last visited Oct. 30, 2010).

124. See BRITAIN’S INDEPENDENT MONITORING BOARDS, <http://www.imb.gov.uk> (last visited Oct. 30, 2010). Baroness Vivien Stern, who is the Honorary Chair of the UK’s Independent Monitoring Boards, spoke about the work of these boards at the “Opening a Closed World” conference. See CONFERENCE PROCEEDINGS, *supra* note 7; see also Vivien Stern, *The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight*, 30 PACE L. REV. 1529 (2010).

125. Stern, *supra* note 124, at 1530.

126. *Id.* at 1531.

127. See *id.* at 1532–33.

128. *Id.* at 1531.

129. *Id.* at 1530.

### Maine State Prison Board of Visitors

United States equivalents of the IMB are rare, but Maine has its own version of a lay citizen oversight board. The Maine State Prison Board of Visitors is a board of five Governor-appointees, one of whom must be licensed in Maine to provide mental health services.<sup>130</sup> The Board's job is to represent the interests of the people of Maine in prison matters.<sup>131</sup> The primary focus is the safety and security of the public, prison staff, and inmates, as well as prisoner health, prison industries, and programs.<sup>132</sup> The Board has only advisory authority, but members have the ability to go anywhere in the prison at any time and to raise concerns directly with the prison administrators.<sup>133</sup> If unsatisfied with the administration's resolution of a problem, Board members can take their concerns to the Governor, Commissioner, or legislative committee responsible for prison issues.<sup>134</sup> The Board of Visitors also produces an annual report and provides it to key state officials.<sup>135</sup>

The use of lay monitoring boards may be most appropriate in conjunction with other forms of correctional oversight, to supplement the work of professional oversight bodies. It also may make most sense to consider using these boards when it comes to oversight of urban jails or prison facilities located near sizeable cities.

### Court Oversight

Finally, the role of court oversight of correctional facilities needs to be briefly mentioned. This option is truly a last resort, when all efforts to provide routine oversight of these facilities have failed and conditions have deteriorated to the extent that lawsuits have been filed and a court has ordered (or the parties have agreed) that unconstitutional conditions must be remedied.

Court oversight has taken many forms over the last twenty-five years. Judges have appointed Special Masters, often with full-time staff, as Federal District Judge William Wayne Justice did in Texas in the landmark case of *Ruiz v. Estelle*.<sup>136</sup> Other judges have appointed court monitors or court experts.<sup>137</sup> The latter type of appointments appear to be a more typical approach in recent years since the Prison Litigation Reform Act of

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130. See Deitch, *supra* note 58, at 1834; see also MAINE STATE PRISON BOARD OF VISITORS, <http://www.maine.gov/corrections/Facilities/msp/mspBoVisitorsNew.htm> (last visited Oct. 30, 2010).

131. Deitch, *supra* note 58, at 1834.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. 503 F. Supp. 1265 (S.D. Tex. 1980), *amended and vacated in part by*, 688 F.2d 266 (5th Cir. 1982).

137. See, e.g., *David v. Travisono*, 621 F.2d 464, 465 (1st Cir. 1980) (noting the appointment of an expert witness to investigate prison conditions and report directly to the court); *S.H. v. Stickrath*, 251 F.R.D. 293 (S.D. Ohio 2008) (noting the appointment of a team of inspectors to monitor a juvenile detention facility in a class action litigation).

1996 placed tighter restrictions on the court's remedial options.<sup>138</sup> Yet another version of court oversight is Federal District Judge Thelton Henderson's appointment of a receiver over the California prison system with regard to health care matters.<sup>139</sup> The receivership is the most extreme version of court oversight, since it involves a takeover of the management of the agency by the court's appointee.

The U.S. Department of Justice also provides a form of correctional oversight as a precursor to court involvement. The Special Litigation Section of the Civil Rights Division can conduct investigations of correctional agencies under the Civil Rights of Institutionalized Persons Act (CRIPA).<sup>140</sup> If its investigation reveals a significant problem, the DOJ enters into an agreement with the agency that it will make certain reforms, and a monitor is typically appointed to assess agency compliance with the reform measures.<sup>141</sup> In some instances, these CRIPA monitors provide technical assistance to the agency even as they report on the agency's progress in implementing reforms.<sup>142</sup> Failure of the agency to comply with the settlement agreement will result in a lawsuit filed by the DOJ and the likelihood of a significant court order.<sup>143</sup>

Court oversight has the advantage of having the power of the judicial process backing up any ordered reforms. Agencies that do not cooperate in providing information to monitors risk sanctions from the court, and judges unhappy with the pace of reform have many tools in their kit to get the attention of policymakers who control the purse strings of the agency. Many experts argue that when an agency's problems are systemic and require substantial funding to address, court involvement is essential.<sup>144</sup>

The downside, of course, is that court oversight only enters into consideration once the existence of serious constitutional violations has been established. Thus, court oversight is helpful in remedying problems but is not a vehicle for the prevention and early identification of conditions and treatment concerns as would be provided by preventative monitoring bodies. Moreover, court oversight is extremely expensive and time-consuming, not only for the judge but also for the parties.<sup>145</sup> Not least, correctional administrators lose significant control over their agencies once

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138. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (codified in scattered sections of the U.S. Code).

139. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

140. 42 U.S.C. §§ 1997-1997j (2006).

141. *The Role of the Civil Rights Division of the U.S. Dep't of Justice in Addressing Conditions in Prisons and Jails: Public Hearing Before the Comm'n on Safety and Abuse in America's Prisons* 12-13 (Feb. 9 2006) (written statement of William Yeomans, former Supervisor of Litig. at the Civil Rights Div. of the U.S. Dep't of Justice).

142. *Id.*

143. *Id.*

144. *See generally, e.g., Alexander, supra* note 61.

145. *See Hon. Morris E. Lasker, Prison Reform Revisited: A Judge's Perspective*, 24 PACE L. REV. 427, 428-29 (2004).

courts get involved.

## V. Moving Forward with Oversight for Special Populations

This brief overview of a variety of correctional oversight models illustrates that there can be many ways to structure an oversight body and provide systems that allow for transparency and accountability in correctional operations. The key is ensuring that whatever structure is developed incorporates the essential elements for effective oversight as discussed earlier. Moreover, there can be a number of oversight entities put in place to ensure that the rights of prisoners are respected and that their needs are met. Meaningful correctional oversight calls for a layered approach, involving complementary models.

While independent oversight of the treatment of all incarcerated persons should be the goal, it may be easier as both a political and a practical matter to begin with oversight for special populations. Any of the models described in this article can be tailored for a particular jurisdiction so that their primary focus is on the needs of a particular group of prisoners. Whether the aim is to ensure that segregated prisoners are treated appropriately, that vulnerable prisoners are safe wherever they are housed, or that prisoners receive adequate health care and mental health services, oversight must involve some form of routine monitoring of institutions, investigation of prisoner complaints, and regular reporting of findings. Oversight entities must also have the obligation to identify systemic problems so that these issues can be addressed proactively by administrators and policymakers. Though their work inevitably brushes up against political and financial considerations, oversight bodies must avoid getting caught up in the political fray so that their work will be seen as objective and credible.

It is important to end on a note of caution, however. Even the most effective correctional oversight mechanism will not solve the problem of sexual assault in prisons or fix inadequate correctional health care. External oversight is a piece of the puzzle, a way to ensure that the public knows what happens in prisons and jails, and a way to ensure that wrongdoers will be punished for criminal behavior. It allows both the public and correctional administrators to know whether all parties are meeting the goal of ensuring that prisons are safe, humane, and constitutional places. Transparency provides both a form of protection from harm and an assurance that rights will be vindicated. Moreover, when outsiders routinely come into an institution, their presence acts as a means of informal control over staff and inmate behavior. But effective, safe, and constitutional administration of correctional facilities is, ultimately, a task that falls squarely at the feet of corrections officials. Even the most effective oversight system will not prevent sexual abuse or brutality in a correctional facility where leadership is lacking and the culture, policies, and practices do not support safe operations. Nor can effective oversight

substitute for the legislature's inadequate provision of resources for staffing or for medical and mental health services.

### Conclusion

As correctional agencies in the United States have become more professionalized in recent years, there has been a greater emphasis on internal accountability measures.<sup>146</sup> While more can and should be done to enhance these internal measures across the board, there are many positive signs of change.

In contrast, however, there is an enormous need for additional external correctional oversight mechanisms in the United States, which lags behind the rest of the world in this respect. The United States is one of the only Western nations that lacks a comprehensive mechanism for ensuring the routine external monitoring of all correctional facilities. While the size of the country and its federal structure make design of an oversight body somewhat more complicated than it is for most other countries, it is time to ensure that every state and local government, as well as the federal system, has effective oversight structures in place to ensure transparency and accountability of the detention facilities within that jurisdiction.

National organizations have begun to recognize the importance of independent correctional oversight and are starting to make development of such oversight mechanisms a priority. In 2006, the Commission on Safety and Abuse in America's Prisons issued its high-profile report calling for the creation of oversight bodies.<sup>147</sup> Then, in 2008, the American Bar Association passed a Resolution urging the development of independent correctional oversight mechanisms and identifying the key components for effectiveness as an oversight entity.<sup>148</sup> The American Bar Association's Corrections Committee has since appointed a subcommittee to seek implementation of this Resolution in jurisdictions around the country.<sup>149</sup> And in 2010, the American Bar Association also passed a set of criminal justice standards dealing with the treatment of prisoners, revised for the first time in thirty years, and these standards also acknowledged the importance of independent correctional oversight.<sup>150</sup> So too are several jurisdictions

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146. See Carl Reynolds, *Effective Self-Monitoring of Correctional Conditions*, 24 PACE L. REV. 769 (2004).

147. CONFRONTING CONFINEMENT, *supra* note 1.

148. A.B.A., RES. 104B KEY REQUIREMENTS FOR THE EFFECTIVE MONITORING OF CORRECTIONAL AND DETENTION FACILITIES (2008), *available at* <http://www.abanet.org/crimjust/policy/104b.doc>.

149. The author co-chairs the American Bar Association subcommittee on Effective Implementation of the ABA Resolution on Correctional Oversight.

150. See A.B.A., CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS (2010). Standard 23-11.3 deals specifically with external monitoring and inspection. See *id.* at 68. The author served from 2004-07 as the original Reporter (draftsperson) to the American Bar Association's Task Force on the Legal Treatment of Prisoners Standards.



around the country beginning to express interest in developing a means to ensure that conditions in confinement are safe and meet constitutional standards.<sup>151</sup>

Independent correctional oversight is not just an idea whose time has come but a critical part of effective prison and jail operations. External oversight must be looked to as part of the solution to address the needs of special populations in prisons and jails. Indeed, oversight should be seen as one of the most important strategies in any campaign to ensure the safety and health of prisoners.

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151. Washington State, New Jersey, and New Mexico are among the states that recently have held either legislative hearings or meetings of key governmental stakeholders to examine the potential for expanded correctional oversight.