

The Need for Independent Prison Oversight in a Post-PLRA World



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Introduction

If the constitutional rights afforded prisoners in the United States mean anything at all, correctional institutions must be transparent in their operations and must be held accountable for the protection of those constitutional rights. Prisons and jails are closed institutions, both literally and symbolically, and they operate far away from public view. In such closed environments, abuse is more likely to occur and less likely to be discovered. Staff members and inmates with malicious intent often find they can act with impunity, while those with more benign objectives may find their plans thwarted by a lack of resources or an institutional culture that is unsupportive of their efforts or content with the status quo. Insular environments tend to put prisoners at risk of abuse, neglect, and poor conditions, and the lack of outside scrutiny provides no challenge to this treatment.

The federal courts have traditionally been the last refuge for prisoners. Especially since the 1970s, with landmark cases such as *Holt v. Sarver*¹ (addressing conditions in Arkansas's prisons), *Rhem v. Malcolm*² (addressing conditions in the "Tombs" jail in downtown Manhattan), and *Ruiz v. Estelle*³ (addressing conditions in Texas's prisons), the courts have provided a wedge in the steel doors of prisons and jails, preventing them from being entirely sealed off from external view. Months of court testimony, followed by the news coverage of these cases and the issuance of judicial opinions detailing the horrors experienced by prisoners, provide us with glimpses of the correctional environments that are so foreign to most citizens. Injunctions that order agencies to improve these conditions or face remedies ranging from stiff fines to mass releases of prisoners provide the relief sought by aggrieved inmates. And during the remedial phase of the litigation, court-ordered monitoring of these prisons and jails provides an ongoing effort to ensure that the court has a flow of accurate and current information about conditions in the facilities and the agencies' progress in implementing court-ordered reforms.

The Prison Litigation Reform Act of 1996⁴ severely hampered the courts' ability to intervene in such prison conditions cases. Motivated in large part by state policymakers' frustrations with longstanding court orders and concerns about federalism and separation of powers,

Congress limited the circumstances under which these orders could be issued and the length of time they could last. The very notion that courts should provide oversight of conditions in correctional institutions was under attack, and the consequences were significant. Coming at a time when prison populations were expanding exponentially, with ever more remote facilities holding unprecedented numbers of prisoners while relying on insufficient funding and resources, the PLRA's restrictions nevertheless emboldened states to seek relief from decades-old court orders.⁵ And few new cases were filed, given the barriers to bringing such lawsuits (including tight limitations on attorneys' fees). Thus, at the very time such court oversight would have been most critical for ensuring transparency and accountability for constitutional prison conditions, that avenue for relief was deeply curtailed.

Whatever limitations the PLRA has imposed on prisoners' rights litigation, it is imperative to prevent the statute from pulling an iron curtain across the bars of our nations' correctional institutions. Supreme Court Justice Anthony Kennedy has spoken eloquently about the "hidden world of punishment,"⁶ and has emphasized the importance of "know[ing] what happens after the prisoner is taken away."⁷ His recognition of the need for increased transparency in correctional operations speaks to the essential value of such transparency when it comes to ensuring humane treatment of prisoners. PLRA or not, we cannot go back to a time when prisons operated outside the rule of law, confident that the courts would allow them to act without interference. Prisons should never again be "shadow world[s]."⁸

In the post-PLRA world, there is a critical need for alternative and effective forms of correctional oversight. For the last forty years or so, the courts have provided the most prevalent form of external scrutiny for prisons and jails in this country. Even if, as many hope, the PLRA is repealed and the courts regain their authority in this arena, there remains a need to be creative and look to other ways to increase transparency and accountability in prison operations. Indeed, the PLRA may provide an unexpected opportunity to improve upon the form of correctional oversight provided by the courts, which was not without significant drawbacks. This article examines

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the potential for alternative types of correctional oversight in a post-PLRA world.

The article begins by assessing the critical role the courts have played in exercising oversight over correctional facilities. It then explores the weaknesses of the judicial oversight model, and the restrictions that the PLRA has placed on the courts' ability to intervene effectively in prison conditions cases. Next, it turns to an alternative model of independent government oversight, involving routine, preventative monitoring of all correctional facilities on an ongoing basis. Such preventative inspections have long been the norm in other countries that have been less reliant on courts for the protection of prisoners' rights. The article explores how such oversight might work, and discusses examples of prison monitoring bodies. Finally, the article addresses the all-important continuing role for the courts in enforcing prisoners' rights in conditions cases.

I. The Critical Role of the Federal Courts in Providing Oversight of Correctional Institutions

Court orders directed at prison officials would hold empty promises for the protection of prisoners' constitutional rights were it not for the ultimate authority provided by an enforcement mechanism and a means for assessing the progress of implementation. The lengthy records of prison reform cases reveal years of intransigence and delay on the part of prison administrators and policy makers when it comes to implementing court-ordered reform.⁹ It is clear that the remedial phase of institutional reform litigation is as critical as the fact-finding stage, and oftentimes more complex. This phase of litigation requires ongoing judicial oversight of whatever aspects of correctional operations warranted court-ordered reform.

Judicial oversight has taken many forms, including the appointment of a special master and monitoring team. In Texas, for example, Federal District Judge William Wayne Justice appointed Ohio-based law professor Vincent Nathan as his Special Master in the case of *Ruiz v. Estelle* and issued an Order of Reference detailing the Special Master's responsibilities and powers.¹⁰ The court further authorized the appointment of five attorneys and additional staff to serve as full-time monitors of conditions in the state's prison facilities and to issue reports on the agency's compliance with the court's orders.¹¹ The Special Master, monitors, other office staff members, and consulting experts were a constant presence in the Texas prisons over the next nine years.¹² With unrestricted access to facilities, prisoners, staff, and documents, the monitoring team uncovered numerous violations of the consent decree and documented those transgressions in reports submitted to the court. This continual source of updated information provided the transparency necessary for the court to assess progress, and allowed the court to hold officials accountable for their delays through hearings, contempt orders, and more detailed agreements between the parties.¹³ Media accounts of the monitoring reports

also kept the governor and other key politicians in the loop. Somewhat ironically, these reports were also an important source of information for agency Board members, who found they had not been accurately briefed about conditions by agency staff.¹⁴

More common are models where the judge appoints a single expert to serve as either a Special Master or a Court Monitor, and where that individual can call upon a team of consulting experts as necessary to help assess specific issues such as medical and mental health care, use of force, or classification of prisoners.¹⁵ Most unusual is the appointment of a Receiver, as the Court did in the *Plata* litigation in California.¹⁶ Whatever the model or the title for the appointee, the court authorizes the monitor to access institutions and meet with inmates and staff, and requires regular reporting of findings to the court. A number of examples of court-ordered monitoring continue to the present time, although most oversight structures are modest in scope compared to the large-scale monitoring operation that existed in Texas.

While prison reform cases are a rare breed in the post-PLRA era—and successful cases even more elusive—one conclusion appears to be clear: most judges who order injunctive relief in institutional reform cases require some form of continuing oversight to ensure that their orders take hold. The nature of that oversight has been scaled back to comply with PLRA requirements, and the courts must reassess the need for their ongoing involvement every couple of years, but for some period of time after their rulings, judges remain actively involved in gathering information and ensuring agency accountability for compliance.

Judges' insistence that agencies comply with court orders ensures that inmate victories on paper are not hollow victories in practice. And indeed, there have been many tremendously important prison reform accomplishments as a result over the last few decades. In 2003, a symposium was held at Pace Law School titled "Prison Reform Revisited: The Unfinished Agenda," which took stock of the accomplishments and failures of institutional reform litigation over the previous three decades.¹⁷ While acknowledging that reformers still had a long way to go before they could rest on their laurels, conference participants pointed to the many tangible improvements that resulted from prison litigation. Chief among them, proclaimed former Special Master Vincent Nathan, are improved environmental conditions, such as the closing of ancient facilities, the replacement of dangerous open dormitories with modern cellblocks, and the elimination of environmental hazards.¹⁸ Nathan also pointed to specific examples in various jurisdictions of relief from extreme overcrowding, controls on excessive use of force, and improved medical and mental health care.¹⁹

The late Federal District Judge Morris Lasker, who handled the landmark prison reform case of *Rhem v. Malcolm*,²⁰ also was convinced that conditions of confinement "substantially improved over the years as a result of prison reform litigation."²¹ He was referring to physical conditions,

such as cleanliness and space per inmate, as well as opportunities for exercise and improved classification and disciplinary systems.²² Recognizing that the goal of achieving completely acceptable conditions had never been met even in the jail he oversaw, Judge Lasker nevertheless “cast a vote for prison reform litigation as an impressively effective instrument for assuring constitutionally acceptable prison conditions.”²³ To these formidable lists of the accomplishments of court intervention, correctional law expert William Collins added another highlight: the elimination of inmate guards in Arkansas and Texas.²⁴

Judicial oversight of prison conditions, then, is a critical element of the effort to ensure the constitutional treatment of prisoners, and can be credited with the greatest successes of the prison reform movement in this country to date. But as we will see below, we may have placed too many eggs in the judicial oversight basket, with or without the PLRA. The development of other effective means of ensuring correctional transparency and accountability was long overdue, even before the PLRA so drastically sought to diminish the effectiveness of court intervention.

II. Weaknesses of the Court Oversight Model

A. Problems with the Model

While court intervention has led to undeniable improvements in prison conditions and the treatment of prisoners, this model of oversight is not sustainable in the long term as a vehicle for prison reform. It is a model better suited for addressing extreme cases than for encouraging routine improvements in prison operations. And yet, in this country, litigation is the primary tool in the would-be reformer’s kit.

In order for a prison conditions lawsuit to be successful, let alone for a judge to exercise continuing oversight, the inmate must prove a constitutional violation. It is very hard to prove this from an evidentiary perspective—it goes well beyond showing that conditions are poor or ineffective or wasteful, or that they do not comply with best practices. Few allegations about conditions of confinement actually meet that baseline requirement, evidence of which is made even harder by the PLRA’s physical injury requirement²⁵ and the “deliberate indifference” showing required under *Estelle v. Gamble*,²⁶ *Wilson v. Seiter*,²⁷ and *Farmer v. Brennan*.²⁸ Conditions in a facility under court supervision must be truly extreme. But many institutions with conditions that fall short of violating the Constitution nevertheless present concerns about the treatment of prisoners and thereby justify the need for reform and oversight.

Related to this point is the fact that the judge’s orders are not intended to bring the prison or jail up to an ideal level, but up to a constitutional level of performance. The Constitution actually sets a very low bar. The American Bar Association recently promulgated a set of criminal justice standards on the treatment of prisoners, its first effort to revise such standards in almost thirty years.²⁹ These standards, drafted and agreed upon by a diverse group of corrections attorneys/experts and other system

stakeholders, represent what this group has determined should be the standard correctional practices in place to protect the rights of prisoners. But even these standards in some instances go well beyond constitutional minima. Thus, the court’s ability to exercise oversight leaves a gap between those facilities where conditions are constitutionally deficient under current case law and those where conditions are below the standards that experts believe should set the floor.

A further weakness of the court oversight model is that it is temporary, lasting only as long as it takes to remedy the unconstitutional conditions. But most prison conditions problems—overcrowding in particular—are chronic in nature, requiring ongoing attention rather than a one-time fix. This leaves a very large potential for backsliding on the part of the agency once the pressure is off and every action or inaction is no longer scrutinized closely. Policy makers may also be less likely to fund programs and services in an agency that has been relieved of court oversight, putting conditions at risk of deterioration. But once final relief has been granted, the lengthy and complex process of exercising judicial oversight must start all over again if there is backsliding—from filing a lawsuit, to holding a trial and establishing a constitutional violation, to developing a court order or settlement agreement, to creating and implementing a monitoring plan.

Another reason that judicial oversight is not sustainable is that it is extremely expensive. Not only are court resources expended, but the costs of high-priced experts working on a consulting basis and often traveling from great distances to monitor and write progress reports on facilities under court order can quickly become astronomical. Moreover, lawyers for both parties are involved throughout the oversight process, reviewing and possibly challenging reports, communicating with the monitor and the court, and potentially filing motions and participating in court hearings. Typically, the costs of these legal and monitoring expenses are absorbed by the defendant correctional agency. While those expenses may well be justified, in a tight budget they call upon resources that could otherwise be earmarked for making the court-ordered reforms.

The expenses alone make judicial oversight a lightning rod for political and public criticism, but the fact that such oversight arises in an adversarial context also makes it hugely controversial. Typically, because there are lawyers involved and because the stakes are so high, the parties (and other interested stakeholders) battle over court rulings, monitors’ findings, implementation of monitors’ recommendations, and decisions to increase or decrease monitoring, for example.³⁰ It is much harder to implement needed reforms in an adversarial or hostile context than in a collaborative context.

Finally, a core disadvantage of the judicial oversight model is that it is reactive rather than preventative; court intervention comes into play only after a serious incident or set of problems has occurred. With earlier identification

of the concerns, improvements could have been initiated, and tragedies, scandals, and lawsuits averted. But court involvement is, by its nature, designed to be an after-the-fact remedy.

B. PLRA Restrictions

While the inherent weaknesses of the judicial oversight model, as detailed above, render it less than ideal as a sustainable approach to prison reform, those weaknesses pale in light of the restrictions that the PLRA has placed on courts handling institutional reform cases.

To begin with, the PLRA has achieved its desired effect of dramatically reducing *pro se* civil rights filings by prisoners.³¹ The reduction was a direct result of three provisions in the PLRA: one, courts are no longer permitted to waive filing fees for indigent inmates (though inmates can be placed on a monthly payment plan);³² two, there are now strict limitations on the filing of so-called frivolous lawsuits;³³ and three, prisoners are required to “exhaust” administrative remedies before filing a lawsuit.³⁴ And increasingly few of these cases that are filed are successfully resolved in the prisoner’s favor.³⁵ Moreover, the PLRA succeeded in reducing the likelihood that attorneys would be willing to handle these lawsuits by limiting the overall recovery of fees in prisoners’ rights cases as well as by placing caps on the allowable hourly rates.³⁶ Fewer cases, of course, mean fewer opportunities for the judges to exercise oversight and for the courts to be a reliable vehicle for accomplishing prison reform.

Second, and more directly related to the oversight issue, is the PLRA’s provision regarding termination of court orders. The PLRA allows a defendant in an institutional reform case to move to terminate a court order after two years, and requires the court to grant relief unless there is a finding of “current or ongoing” constitutional violations.³⁷ The PLRA further grants standing to a wide array of government officials to seek termination in cases that involve population caps or release orders.³⁸ Provisions like these leave the court with insufficient time to ensure that complex court orders are truly implemented and that the agency is committed to long-term changes. It also minimizes the likelihood that court oversight will last more than a few years in any given case. It is impossible to imagine one of the landmark prison class action cases like *Ruiz v. Estelle* not justifying ongoing monitoring for a significant period of time. It simply takes a long time “to turn a ship around,” as corrections administrators on the receiving end of court orders have noted. Moreover, frequent evidentiary hearings are both time-consuming and expensive for the parties.³⁹

Finally, the PLRA made it exceedingly difficult for judges to order prisoners to be released from a facility to remedy overcrowding.⁴⁰ And it mandated that federal judges refuse to approve any consent decree that is not narrowly tailored to correct a violation of a federal right; relief must be the least intrusive means necessary to address the violation, taking into account the impact of

the proposed relief on public safety and criminal justice system operations.⁴¹

As attorneys involved in prisoners’ rights litigation have observed, the PLRA places difficult and frustrating barriers in their way, but there are still effective methods for working within the PLRA’s restrictions to achieve meaningful consent decrees that allow some form of court oversight.⁴² Such strategies are undoubtedly possible. The point here, though, is not what is possible in the post-PLRA world in terms of court oversight and relief for inmates, but whether court oversight is the best option for achieving transparency and accountability in prison operations. And it seems clear that whatever viability this judicial intervention model had in previous decades, its effectiveness as a vehicle for prison reform has eroded as a result of the PLRA. Thus, we must turn to other strategies for opening up the hidden world of prisons and helping to implement much-needed reforms.

III. A Call for Independent Prison Oversight as an Alternative to Long-Term Judicial Monitoring

A. Lessons from Abroad

As we consider alternatives to judicial oversight, it is instructive to look to the experience of peer nations that have neither our country’s history of civil rights litigation nor a written Constitution that enshrines a set of rights that can be protected by the courts. In England, for example, prison reformers have rarely turned to national courts to ensure the humane treatment of prisoners (though international human rights courts have recently become an important source of support for their efforts).⁴³ When abysmal conditions in the British prison system came to light amid a series of riots and became a national embarrassment in 1990, there was no lawsuit, though there was a highly public national inquiry led by Lord Justice Woolf, a member of Parliament’s House of Lords.⁴⁴ In the wake of the Woolf inquiry, England relied even more heavily on its administrative independent prison oversight mechanism—a government body known as the Prison Inspectorate, headed by a Chief Inspector appointed by Her Majesty the Queen.

Created by statute in 1981, the Inspectorate is charged with inspecting and reporting on prison conditions and the treatment of prisoners in all places of detention in England and Wales.⁴⁵ The Inspectorate falls under the auspices of Britain’s Home Office, but remains entirely independent of the prison system. Teams of inspectors conduct routine inspections and issue reports on conditions of every penal facility; they also produce occasional thematic reports that apply to the system as a whole. The Inspectorate has developed a detailed set of criteria for conducting its inspections, called “Expectations,” so that there are clear indications of the evidence covering all aspects of prison life that monitors will seek out when they visit each facility. Inspectors have unrestricted access to every part of the prison, and may speak confidentially with any inmate or staff member. Each facility is inspected at least twice in any five-year

period. While the Inspectorate maintains a healthy independence from prison administrators, its work is well-respected by prison staff, who accept the inspectors' presence and tend to agree with and implement many of their recommendations.⁴⁶ It is important to note that the inspection teams do not investigate or respond to individual grievances from prisoners; that task falls to the Prison Ombudsman, a separate oversight body.

Somewhat similarly, European countries submit to routine monitoring of their prison facilities by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), an international treaty body that operates under the auspices of the Council of Europe. Delegations of experts appointed to the CPT routinely make unannounced visits to selected prison facilities in every country every few years. Confidential reports about these visits are submitted to the country's leadership, and the country is strongly encouraged to (and in almost every case agrees to) publish those reports. The focus of the CPT's inspections is on preventive, systemic concerns about the treatment of prisoners and the conditions in which they are held.⁴⁷ As in England, this form of oversight was not motivated by judicial intervention nor was it the result of a scandal or tragedy; rather, it stems from a deeply held cultural belief that preventive monitoring is appropriate as a tool for proactively ensuring the protection of incarcerated persons.

B. The Value of Routine, Preventive Monitoring by an Independent Body

As we look for alternatives to judicial oversight of prisons, it makes sense to build upon what has worked best in the court-monitoring context at the same time that we seek to address its shortcomings. As discussed in Section I above, courts have achieved great results by opening the prison doors to experts who inspect conditions and write reports about their findings. Such independent monitoring ensures a continual flow of accurate, unbiased information about the treatment of prisoners, and it provides staff and inmates alike with a reminder that someone is watching and taking note of their actions and inactions. It opens up a closed world to scrutiny and input by those who are less bound by the cultural norms of a particular institution. That transparency allows public officials, the courts, and citizens to demand change and to hold agencies accountable.

All those benefits are magnified when monitoring occurs on a routine and permanent basis for *all* correctional institutions, and not only for those already found to be operating under unconstitutional conditions. Abuse, mistreatment, neglect, and ineffective or under-resourced programs can occur at any institution at any time, and conditions should not have had to deteriorate to unconscionable levels for there to be attention paid to these concerns. Nor should monitoring end once a facility has "achieved" a certain level of conditions, because backsliding is always possible and because most prison problems are chronic issues to be managed on an ongoing basis

rather than requiring one-time fixes. Moreover, even the best facilities can benefit from an outside set of eyes providing perspective and feedback. This is how agencies improve their practices and move to even higher levels of professionalism. External scrutiny acts as a form of "informal social control over staff behavior," as one corrections official put it; it keeps staff on their toes and aware of the importance of their work, and helps them avoid complacency.⁴⁸

Most importantly, when monitoring is done on a preventive basis, it catches problems early, before those problems result in tragic consequences, expensive lawsuits, and media scandals. Alerted to those issues of concern, correctional administrators can address the problems and improve operations. With the validation provided by objective monitors, administrators also can seek additional funding from policy makers to make needed changes. All of this can potentially be accomplished in a collaborative context, without the overlay of adversarial litigation, expensive attorneys, and judicial attention. Preventive monitoring, done correctly, is focused on improvement rather than finding fault; it is forward-looking rather than reactive to misdeeds. The dynamics between monitors and prison officials, therefore, have the potential to be more positive than in the typical judicial intervention context.

Finally, the expense involved with preventive monitoring is likely to be significantly less than the costs associated with judicial oversight. Even though more facilities would be monitored, there would likely be full-time staff conducting these inspections rather than national consulting experts, whose hourly costs and travel expenses can quickly dwarf a full-time salary.

C. The ABA's Call for Independent Prison Oversight

Recognition of the importance of independent correctional oversight led the American Bar Association (ABA) to pass a resolution in 2008 calling on all levels of government to establish public entities to regularly monitor and report publicly on conditions of confinement in all places of detention.⁴⁹ Observing that the operations of corrections facilities are insulated from the public eye, and that these agencies should be as transparent and accountable to the public they serve as any other government entity, the ABA provided an elegant and thoughtful justification of the need for routine monitoring of prisons and jails that mirrors many of the benefits discussed above:

First, the public identification of significant problems in correctional conditions and operations can and should lead to the rectification of those problems, resulting in correctional and detention facilities that are safer, operated in conformance with the Constitution, other laws, and best correctional practices, and equipped to better prepare inmates for a successful reentry into society. Second, through the objective observations of an entity that is wholly independent of the facility being inspected, potential problems that have been overlooked at the facility can be detected,

preventing them from becoming major problems for correctional officials. Third, external oversight of correctional operations and the problem solving that it catalyzes can be a cost-effective and proactive means to potentially avert lawsuits challenging the legality of conditions of confinement or the treatment of prisoners. Fourth, the factual findings of the monitoring entity can substantiate the need for funds requested by correctional administrators. And finally, the revelation by a monitoring entity of what is and is not happening behind prison walls can lead to better-informed decisions about a jurisdiction's sentencing and correctional policies.⁵⁰

The ABA's policy on this issue is an important indication that independent oversight is an idea whose time has come in this country.⁵¹ Further evidence may be found in the U.S. Attorney General's proposal requiring independent auditing of facility compliance with the Prison Rape Elimination Act (PREA) standards.⁵² No longer can (or should) the courts be relied on to provide prisons and jails with the transparency and accountability so essential for ensuring that they operate safely, humanely, and in accordance with constitutional requirements. Such assurances should be a routine matter, and the public is better served when problems can be identified and fixed early on.

D. Designing an Effective Independent Oversight System

While the existence of independent prison oversight bodies is the norm in most Western nations, administrative oversight is far from commonplace in the United States. Research on prison oversight mechanisms has found that "formal and comprehensive external oversight—in the form of inspections and routine monitoring of conditions that affect the rights of prisoners—is truly rare in this country."⁵³ Most jurisdictions have not given much thought to this issue, likely assuming that the courts can handle any concerns that come up with regard to unacceptable conditions in prisons and jails. But as we have seen, the PLRA has rendered the courts far less likely to be able to address the problems that arise in these institutions. The obvious question, then, is what might meaningful independent oversight look like, if divorced from the judicial context?

The sheer geographical size of the United States, the enormous number of people incarcerated, and the federalist structure of our correctional system make a single national system of independent oversight impractical. Governmental oversight bodies should exist at the state level in every state and should be charged with monitoring conditions in all state-run prison facilities. County-operated jail facilities should also receive oversight from a state-level authority. An independent federal entity should be in charge of monitoring conditions in federal penal institutions, wherever they are located.

A handful of examples exist in the United States of these types of oversight bodies. They take many forms

and have varied names, from independent agencies located under the executive branch of government (e.g., the Office of the Inspector General in California; the Texas Commission on Jail Standards; the Juvenile Justice Monitoring Unit of the Maryland Attorney General's Office) to legislative committees with monitoring duties (e.g., the Ohio Correctional Institution Inspection Committee).⁵⁴ Despite their different structures, they are all charged with similar responsibilities: to assess institutional conditions and, to varying degrees, the treatment of the inmates by inspecting facilities on a routine basis. These organizations, and other bodies with correctional oversight responsibilities, are profiled in a fifty-state inventory of prison oversight mechanisms in the United States,⁵⁵ and can be looked to for ideas for designing an oversight body. The international examples of monitoring entities—especially the British Prison Inspectorate—also offer tried and tested models.⁵⁶

The ABA's Resolution details the twenty key requirements for effectiveness in a monitoring body, which are too lengthy to be restated here in full but are definitely worthy of review.⁵⁷ As I have written elsewhere, it is especially critical that any effective monitoring body have the following attributes:

- (1) it must be independent of the correctional agency under review;
- (2) it must have a mandate to conduct regular, routine inspections;
- (3) it must have unfettered, "golden key" access to the facilities, prisoners, staff, and records, including the ability to conduct unannounced inspections;
- (4) it must be adequately resourced, with appropriately trained staff;
- (5) it must have a duty to report publicly their findings and recommendations;
- (6) it must use an array of methods of gathering information and evaluating the treatment of prisoners; and
- (7) the agency must be required to cooperate fully in the inspection process and to respond promptly and publicly to the monitoring body's findings and recommendations.⁵⁸

One other factor should be added to this list: the primary focus of the oversight body's monitoring duties should be on the treatment of prisoners and any risks the institution presents to their health, safety, and civil rights. While issues related to agency management, financial practices, cost-effectiveness, and efficiencies may be important from a "good government" standpoint, the monitoring focus must be on the prisoners themselves, if this form of oversight is to supplant the role that the courts have traditionally played in this arena.⁵⁹

Not surprisingly, all of these essential elements of independent correctional oversight mirror those aspects of court oversight that have been most effective. But their

effectiveness is magnified by virtue of the fact that this form of monitoring is done proactively and in a nonadversarial context.

E. Why Accreditation and Internal Audits Cannot Substitute for Independent Oversight

As correctional agencies have improved their operations in recent years and strived to implement best practices, many facilities have sought professional accreditation by organizations such as the American Correctional Association (ACA) and the National Commission on Correctional Health Care (NCCHC). Most administrators have also come to recognize the value of routinely auditing or evaluating their own operations so that they can identify and correct problem areas. Both developments are very welcome and there is no doubt that they improve correctional operations and enhance the professionalism of the agencies. They are good management tools.

But can such practices substitute for monitoring of prisons and jails by an independent governmental body? The answer is plainly no. Accreditation audits, while an important aspect of oversight, are not geared towards assessing the treatment of prisoners but rather agency compliance with certain standards.⁶⁰ There is overlap between those criteria, to be sure, and as the accreditation bodies have moved towards performance-based standards and have incorporated interviews with prisoners into the audits, they are more likely than ever before to identify problems that directly affect the inmates. But the focus remains primarily on management matters and benchmarking agency operations against best practices in the field. What's more, accreditation audits are confidential, with results reported only to the agency under review.⁶¹ Thus, they lack the public transparency provided by monitors' visits, which result in publicly available reports to which the agency must respond. Finally, accreditation in the correctional context is typically a voluntary process initiated from within the agency, and the agency usually pays for the accreditation process.⁶² So while accreditation indeed provides outside scrutiny of agency practices, the auditing body lacks the true independence of a separate government monitoring organization.

Internal auditing, meanwhile, is vital to the effective and efficient operations and programs of every prison and jail. Mechanisms such as routine audits, risk management programs, grievance systems, and internal affairs units provide an important source of management information to administrators, help evaluate the functioning of the agency, and can provide an outlet for prisoner complaints. But as internal measures, they are not replacements for external scrutiny. The findings of these internal assessments are provided to administrators only, not to the general public or the media. And in any event, those who conduct the audits do not have sufficient perceived independence from the agency to provide the public with reassurance about the credibility of their findings. As the ABA's report on correctional oversight noted, "external

monitoring can bring accountability and transparency to correctional facilities and, in turn, improve their functioning in ways that internal evaluation mechanisms simply cannot."⁶³ Transparency provides prisoners with both a form of protection from harm and an assurance that their rights will somehow be vindicated.⁶⁴ That function is especially critical as the courts' role in this arena has eroded.

IV. A Continuing Need for Court Enforcement of Rights

As we have seen, independent and administrative government oversight that includes a robust and routine correctional monitoring function can support the goals of enhancing transparency and accountability when it comes to the treatment of prisoners. But while preventive monitoring can be very effective at early identification and remediation of problems, as well as at staving off lawsuits, one critical aspect of court intervention is missing in the preventive monitoring context: the enforcement function. Judges have always held a very heavy hammer over the heads of correctional agencies: the power to punish, to hold in contempt, to impose fines or other remedies. Independent government oversight bodies, unless they have regulatory authority,⁶⁵ do not have this enforcement ability. Nor should they necessarily have this authority to impose their recommendations on the corrections agency. Typically, their recommendations are advisory, and they must use their power of persuasion to encourage changes in prison operations, policy choices, or funding allotments.⁶⁶ To allow monitoring bodies (other than those that are regulatory in nature) to demand change would be to give them supra-management functions, and might strain the collaborative dynamics at work in the monitor/agency relationship. The work of the monitor would become less of a "free consultancy that helps [the prison] to continually improve," as British Chief Prisons Inspector Anne Owers put it,⁶⁷ and more of a court substitute.

For this reason, the federal courts must retain their ultimate role as a fail-safe protector of prisoners' rights, regardless of the existence of an independent government monitoring body. For those prisons and jails that refuse to make needed changes or that do not cooperate with the inspectors, or that cannot access needed resources even in the wake of urgent monitors' reports identifying issues of immediate concern, the courts must be available to handle lawsuits, issue orders, and call agencies to task for noncompliance. But the role of the courts can properly be focused on enforcement of rights and making injured parties whole, rather than on the long-term monitoring function, which can be left to the separate monitoring body, even post-lawsuit. Moreover, the courts can serve their fact-finding function, resolving any disputes about what monitors or government investigators have found. Of course, the PLRA has vastly cut back on the ability of inmates to file these lawsuits and on the federal courts' abilities to serve these other functions and to be the ultimate enforcer of prisoners' rights. Without an ultimate remedy, those rights are in danger of becoming

meaningless. For this reason, it is imperative that the PLRA be repealed, or at least significantly amended, to eliminate these barriers to protecting the rights of prisoners.

V. Conclusion

The PLRA successfully sought to do damage to the enforcement of prisoners' rights by limiting the courts' ability to conduct long-term oversight of correctional agencies. This has created a major gap in our ability to ensure transparency and accountability on the part of prison officials for the humane treatment of prisoners. Even those who supported the PLRA's enactment would surely agree, however, that prisons and jails should be safe and humane places that respect prisoners' constitutional rights. Safe and humane institutions serve the interests not only of prisoners but of the staff who work in these facilities. They also save money and protect public safety, by reducing the likelihood of riots, assaults, recidivism, and public health risks.

Independent government oversight bodies provide a vehicle for enhancing the transparency of correctional facilities and holding them accountable for being the safe and humane institutions we expect them to be, without the controversy, expense, and complexity of long-term judicial intervention. These oversight entities can serve this goal more efficiently and more effectively than the courts, because their monitoring activities would be routine and ongoing, preventative in nature, focused on operational improvement rather than wrongdoing, collaborative rather than adversarial, and less expensive and resource-intensive. It is a form of oversight to which correctional agencies should be far more receptive than they have been to judicial intervention.

As the PLRA hits age fifteen, it is high time for us to recognize that states need to create a more sustainable and effective model of correctional oversight than the courts can provide. This oversight function is critical, and the PLRA should not be allowed to slam the iron gates shut on prisons and render their operations invisible to the public eye. State and local policy makers should be encouraged to develop and invest in these independent oversight models to be sure they are as effective as possible, drawing guidance from the ABA's policies and from examples of effective international and domestic monitoring bodies.

Notes

- ¹ Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971).
- ² Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974), *opinion supplemented*, 377 F. Supp. 995 (S.D.N.Y. 1974), *aff'd and remanded*, 507 F.2d 333 (2d Cir.1974).
- ³ Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex 1980), *amended and vacated in part by* 688 F.2d 266 (5th Cir. 1982).
- ⁴ Pub. L. No. 104-134, 110 Stat 1321 (1996).
- ⁵ For example, in *Ruiz v. Estelle*, almost immediately after the passage of the PLRA in 1996, the Texas Attorney General sought relief from all court orders and a release from jurisdiction in the case, more than four years after the court's issuance of a "Final Judgment" that eliminated detailed

compliance plans, six years after the court had ceased actively monitoring conditions in the prison system, and sixteen years after the original court ruling.

- ⁶ Justice Anthony Kennedy, Speech at the American Bar Association Annual Meeting 3 (Aug. 9, 2003), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf.
- ⁷ *Id.*
- ⁸ O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).
- ⁹ See, e.g., STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (1987) (discussing the ongoing intransigence of Texas prison officials in implementing court orders); LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM 108-67 (1989) (highlighting the lengthy fight to implement court orders in Alabama prisons); Brown v. Plata, 131 S. Ct. 1910 (2011) (emphasizing the California prison system's failure to comply with injunctive relief ordered by lower courts pertaining to the delivery of health care to prisoners).
- ¹⁰ Ruiz, 503 F. Supp. at 1389, and Order of Reference, Apr. 20, 1981.
- ¹¹ The author of this article served as one of the attorney-monitors in this office from 1987 to 1990.
- ¹² The Special Master's Office disbanded in 1990, ending the period of court-ordered monitoring, although various court orders remained in effect for the next decade or so and plaintiffs' attorneys continued to have access to the facilities to assess ongoing compliance with those court orders.
- ¹³ See generally MARTIN AND EKLAND-OLSON, *supra* note 9.
- ¹⁴ *Id.* at 189-214.
- ¹⁵ See, e.g., S.H. v. Stickrath, 251 F.R.D. 293 (S.D. Ohio 2008) (Ohio juvenile system); Does v. Stewart, CIV 96-0486-PHX-WFN (D. Ariz. July 13, 2000) (Arizona prison system).
- ¹⁶ Plata v. Schwarzenegger, C01-1351 TEH (N.D. Cal. Feb. 14, 2006) (Order Appointing Receiver).
- ¹⁷ See Michael Mushlin, *Foreword: Prison Reform Revisited: The Unfinished Agenda, October 16-18, 2003*, 24 PACE L. REV. 395 (2004).
- ¹⁸ 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, 423 (2004).
- ¹⁹ *Id.* at 423-24.
- ²⁰ Rhem v. Malcolm, *supra* note 2.
- ²¹ Morris E. Lasker, *Prison Reform Revisited: A Judge's Perspective*, 24 PACE L. REV. 427, 428 (2004).
- ²² *Id.*
- ²³ *Id.* at 429.
- ²⁴ William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 668 (2004).
- ²⁵ 42 U.S.C. § 1997(e) (1996).
- ²⁶ Estelle v. Gamble, 429 U.S. 97 (1976).
- ²⁷ Wilson v. Seiter, 501 U.S. 294 (1991).
- ²⁸ Farmer v. Brennan, 511 U.S. 825 (1994).
- ²⁹ ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (2010), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf. The author of this article served as the original drafter of those ABA standards.
- ³⁰ But see Debbie A. Hill et al., *Effective Post-PLRA Settlement Models: A Case Study of Arizona's Protective Segregation Lawsuit*, 24 PACE L. REV. 743 (2004) (providing encouraging example of how the parties can work collaboratively to settle a large-scale prisoners' rights case and design a workable monitoring model even after a hard-fought legal battle on the merits of the case).

- ³¹ See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 tbl. I.A. (2003) (using data from the United States Department of Justice to show the effect that the PLRA has had on inmate filings). See also Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 554 (2006) (noting that the PLRA caused “a significant reduction in the volume of both new and old court-order regulation” of prisons); Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 453 (2004) (calling the PLRA “a disaster for prisoner claims”).
- ³² 28 U.S.C. § 1915(b)(1) (2004).
- ³³ *Id.* § 1915(g).
- ³⁴ 42 U.S.C. § 1997(e)(a) (2006).
- ³⁵ Collins, *supra* note 24, at 670.
- ³⁶ 42 U.S.C. § 1997e (2004); Collins, *supra* note 24, at 671.
- ³⁷ 18 U.S.C. § 3626(b)(1) (1996); *id.* § 3616(b)(3); Collins, *supra* note 24, at 672–73.
- ³⁸ 18 U.S.C. § 3626(a)(3)(F) (1996).
- ³⁹ See Elizabeth Alexander, *Getting to Yes in a PLRA World*, 30 PACE L. REV. 1672, 1672 n.2 (2010) (discussing the impact that PLRA-required evidentiary hearings have on the parties).
- ⁴⁰ 18 U.S.C. § 3626(a)(3)(A), (C), (E) (1996). *But see* Brown v. Plata, 131 S. Ct. 1910 (2011) (providing rare example of the court’s successful imposition of a population reduction order consistent with PLRA requirements).
- ⁴¹ 18 U.S.C. § 3626(a)(1)(A) (2006).
- ⁴² See generally Alexander, *supra* note 39; Hill et al., *supra* note 30.
- ⁴³ See Jon Vagg, Rod Morgan & Mike Maguire, *Introduction: Accountability and Prisons*, in ACCOUNTABILITY AND PRISONS: OPENING UP A CLOSED WORLD 11 (Mike Maguire et al. eds., 1985). See also Anne Owers, *Prison Inspection and the Protection of Prisoners’ Rights*, 30 PACE L. REV. 1535, 1535–36 (2010).
- ⁴⁴ LORD JUSTICE WOOLF & JUDGE STEPHEN TUMIN, REPORT OF THE COMMITTEE OF INQUIRY INTO PRISON DISTURBANCES APRIL 1990, Cmnd. 1456 (1991).
- ⁴⁵ See generally Owers, *supra* note 43; Anne Owers, *Submission to Vera Commission*, 22 WASH. U. J.L. & POL’Y 231 (2006) (describing the function and methodology of the British Prison Inspectorate and the author’s role as the Chief Inspector); see also David Ramsbotham, PRISONGATE: THE SHOCKING STATE OF BRITAIN’S PRISONS AND THE NEED FOR VISIONARY CHANGE (2003) (providing an account of the author’s term as Chief Inspector of prisons).
- ⁴⁶ See Andrew Coyle, *Professionalism in Corrections and the Need for External Scrutiny: An International Overview*, 30 PACE L. REV. 1503, 1506–08 (2010).
- ⁴⁷ Silvia Casale, *Mechanisms for Custodial Oversight: The United States and Europe*, 22 WASH. U. J.L. & POL’Y, 217, 219–20 (2006); see also Silvia Casale, *The Importance of Dialogue and Cooperation in Prison Oversight*, 30 PACE L. REV. 1490 (2010).
- ⁴⁸ 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, at 141–42 (2006) (referencing the comments of a British prison official).
- ⁴⁹ ABA, RES. 104B KEY REQUIREMENTS FOR THE EFFECTIVE MONITORING OF CORRECTIONAL AND DETENTION FACILITIES (2008), available at <http://www.abanet.org/crimjust/policy/104b.doc>. The author serves as Co-Chair (with Professor Michael Mushlin) of an ABA subcommittee focused on implementation of this resolution.
- ⁵⁰ *Id.* at 4.
- ⁵¹ Another significant indicator of the timeliness of the oversight concept is the 2006 international conference on this topic held at the University of Texas, which attracted over 115 of the world’s top experts on oversight issues, including judges, policymakers, practitioners, advocates, scholars, and more than 20 percent of the nation’s corrections directors. The conference resulted in the publication of *Opening Up a Closed World: A Sourcebook on Prison Oversight*, in the form of a complete volume of the *Pace Law Review*. See generally Michael B. Mushlin & Michele Deitch, *Foreword: Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383 (2010).
- ⁵² As of the writing of this article, the Attorney General’s final version of the PREA Standards has not been made public; however, the draft proposed standards included such a provision. Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.393 (Audits of Standards) (2011).
- ⁵³ Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010).
- ⁵⁴ See generally *id.* Most of these oversight entities are also described in greater detail in Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291 (2010).
- ⁵⁵ Deitch, *supra* note 53.
- ⁵⁶ See *supra* text accompanying notes 43–47.
- ⁵⁷ See ABA RES. 104B, *supra* note 49, at 2–3.
- ⁵⁸ Deitch, *supra* note 54, at 302–03.
- ⁵⁹ This point echoes comments made by Anne Owers in her description of the British Prison Inspectorate. See Owers, *supra* note 45, at 231.
- ⁶⁰ Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1441–42 (2010).
- ⁶¹ David Bogard, *Effective Corrections Oversight: What Can We Learn from ACA Standards and Accreditation?*, 30 PACE L. REV. 1646, 1653 (2010).
- ⁶² *Id.*
- ⁶³ See ABA RES. 104B, *supra* note 49, at 6.
- ⁶⁴ Deitch, *supra* note 60, at 1444.
- ⁶⁵ For example, the Texas Commission on Jail Standards has the authority to enforce local jails’ compliance with state jail standards by decertifying or even closing noncompliant jails. 37 TEXAS ADMIN. CODE § 297.8 (2012). However, the Commission’s focus is primarily on the facilities’ compliance with a range of operational standards rather than on the treatment of prisoners, and without directly relevant standards, there would be no particular grounds for holding a facility accountable for prisoner abuse, for example. Similarly, the New York City Board of Correction also has regulatory authority when it comes to setting mandatory standards for the city’s jails and enforcing compliance with those standards. See generally Richard T. Wolf, *Reflections on a Government Model of Correctional Oversight*, 30 PACE L. REV. 1610 (2010).
- ⁶⁶ Deitch, *supra* note 60, at 1443. See also Owers, *supra* note 45, at 238 (describing the ways in which the British Prison Inspectorate’s work has led to important changes).
- ⁶⁷ Owers, *supra* note 45, at 238.