

# Article

## BUT WHO OVERSEES THE OVERSEERS?: THE STATUS OF PRISON AND JAIL OVERSIGHT IN THE UNITED STATES

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This article had its roots in a project-based course I taught at the LBJ School in 2015–2016, where a team of my graduate students in public policy identified then-current prison and jail oversight models and conducted research about these organizations. Following the course, Rachel Gandy and Lucy Litt significantly added to that body of research, which allowed for a deeper analysis of the material. In a different project-based course I taught in 2019–2020, a team of my graduate students updated all the prior research on oversight bodies, conducted in-depth analyses of jail oversight mechanisms and jail standards, and assessed recent developments in this arena; some of their analyses are incorporated into this article. I am grateful to all of my students for their hard work and extensive research, which made this article possible, and the following LBJ students deserve special acknowledgment for their efforts: Mariel Dempster, Julia Durnan, Shahd Elbushra, Rachel Gandy, Kat Gross, Kelly Hogue (Texas Law), Bethany Offer, and Kaitlyn Wallace.

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Introduction .....	210
Part I: The Value of Independent Correctional Oversight.....	216
A. What is Oversight? .....	216
B. Why is Oversight Important? .....	218
1. Benefits to Incarcerated People .....	219
2. Benefits to Correctional Administrators .....	219
3. Benefits to Judges, Prosecutors, Defense Lawyers, and Policymakers.....	221
4. Benefits to the Media and the General Public .....	222
C. The United States is an Anomaly on the World Stage .....	223
Part II: America’s Overreliance on Court Oversight and its Now- Diminished Role .....	226
Part III: Increasing Calls for Independent Oversight.....	230
Part IV: The Current Research Project: Assessing the State of Prison and Jail Oversight in the United States .....	241
A. Project Purpose.....	241
B. Research Methodology.....	242
C. Defining the Criteria for Inclusion .....	243
D. Research Findings .....	246
Finding 1: A significant number of new oversight bodies have been established or strengthened since the 2010 inventory ...	246
<b>Table 1: Correctional Oversight Entities             Established or Re-Established Since 2010.....</b>	249
Finding 2: Many of these new oversight bodies, as well as those entities that existed prior to the 2010 report, were created or strengthened in response to lawsuits or negative publicity following deaths in custody, incidents of violence or brutality, or evidence of substandard conditions in prisons or jails. ....	251
Finding 3: There are clear differences between models of prison oversight and models of jail oversight. ....	252
<b>Table 2: Models of Jail Regulation by State .....</b>	256
Finding 4: Correctional oversight bodies—particularly agencies that specialize in routine, proactive monitoring of conditions— are still relatively rare in the United States, especially when it comes to statewide prison oversight and local oversight of county jails. ....	257

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(a) Prison Oversight.....	258
<b>Table 3: Prison Oversight Bodies in the United States (as of September 2020)</b> .....	259
(b) Statewide Jail Oversight .....	261
<b>Table 4: Statewide Jail Oversight Bodies in the United States (as of March 2020)</b> .....	262
(c) Local Jail Oversight .....	265
<b>Table 5: Local Jail Oversight Bodies in the United States (as of September 2020)</b> .....	266
Finding 5: Independent correctional oversight bodies often lack (1) adequate staffing and funding, (2) insulation from political pressure, and (3) unfettered access to the facilities they oversee. ....	268
Part V: Conclusion: Two Steps Forward, One Step Back .....	271

## INTRODUCTION

Criminal justice reform has become a refuge for bipartisanship in an era of tense political rivalries. Despite widespread polarization on other issues, Democrats and Republicans tend to agree on one fundamental truth—high incarceration rates in the United States create unnecessary human and fiscal costs for all communities. As a result, criminal justice reform movements have developed at local, state, and federal levels of government. These efforts have largely focused on de-incarceration initiatives, such as changes to bail and sentencing policies, that aim to divert people away from the justice system and toward community services, treatment, and productive citizenship. Even as government leaders attempt to depopulate the nation’s correctional facilities, however, 2.3 million people remain incarcerated, while many more cycle in and out of jails almost 11 million times each year.<sup>1</sup> Moreover, as a nation, the United States claims the highest incarceration rate in the world, locking up its citizens at a rate of 698 per 100,000.<sup>2</sup>

These troubling figures raise several important questions that are often overlooked:

- What do conditions of confinement in the United States actually look like, and how are people treated behind bars?
- What is being done to ensure that these conditions and the treatment of prisoners are humane?
- How can we make our prisons and jails more transparent?

Over the last several years, the public has started to discover some answers to the first of these questions through extensive media coverage of problems in prisons and jails. For example, in June 2015, two men convicted of murder escaped the Clinton Correctional Facility in upstate New York. In the weeks following the escape, investigators found evidence of staff malfeasance<sup>3</sup> and, most troublingly, a violent “campaign of retribution” perpetrated by prison guards against Clinton inmates who had no links to the escapees’ actions.<sup>4</sup> On Rikers Island, New York City’s massive jail complex, the culture of violence and inability to remediate poor conditions despite federal court involvement led to the Mayor’s and City Council’s decision in 2019 to

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<sup>1</sup> Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>2</sup> Peter Wagner and Wendy Sawyer, *States of Incarceration: The Global Context*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

<sup>3</sup> STATE OF N.Y. OFFICE OF THE INSPECTOR GEN., *Investigation of the June 5, 2015 Escape of Inmates David Sweat and Richard Matt from Clinton Correctional Facility 2–5*, (June 2016), <http://www.nytimes.com/interactive/2016/06/06/nyregion/document-inspector-general-s-investigation-of-New-York.html>.

<sup>4</sup> Michael Schwirtz and Michael Winerip, *After 2 Killers Fled, New York Prisoners Say, Beatings Were Next*, N.Y. TIMES, (Aug. 11, 2015), <http://www.nytimes.com/2015/08/12/nyregion/after-2-killers-fled-new-york-prisoners-say-beatings-were-next.html>.

plan for closure of the complex in 2026, a substantial reduction in the number of people incarcerated, and the redesign of smaller borough-based facilities.<sup>5</sup> More recently, billionaire Jeffrey Epstein's suicide in a Manhattan federal jail led to a national outcry and increased public attention to the problem of jail suicide and inadequate staff supervision.<sup>6</sup>

Farther south, atrocious conditions and a series of murders of incarcerated people in Mississippi's Parchman Prison became national headline news in 2019, resulting in a decision by the governor to close part of this infamous prison facility.<sup>7</sup> Alabama's prisons, too, generated widespread news coverage for their excessive levels of violence, brutality, overcrowding, and unsanitary conditions, culminating in an investigation by the U.S. Department of Justice.<sup>8</sup> Reporters in Florida uncovered widespread sexual abuse, corruption, and medical neglect inside Lowell Correctional Institution, the nation's largest women's prison,<sup>9</sup> and another journalistic exposé revealed enormous problems with Florida's prison work programs.<sup>10</sup>

In Texas, the death of motorist Sandra Bland in a rural county jail in 2015 dominated the national headlines and revealed insufficient mental health screenings and treatment, suicide precautions, and safety procedures in county jails.<sup>11</sup> Also, a Pulitzer Prize-winning series of articles and editorials in a small-town newspaper over a two-year period in 2018 and 2019 exposed appalling levels of medical neglect underlying deaths in custody in Texas county jails, as well as "excessive force, failures to identify or treat severe mental illness or suicidal tendencies, disregarding prisoners' pleas, excessive delays in treatment, and a culture of indifference to human suffering."<sup>12</sup> The editorials also called for stronger jail oversight.<sup>13</sup> And it's not just jails in

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<sup>5</sup> Matthew Haag, *N.Y.C. Votes to Close Rikers. Now Comes the Hard Part*, N.Y. TIMES, (Oct. 17, 2019), <https://www.nytimes.com/2019/10/17/nyregion/rikers-island-closing-vote.html>.

<sup>6</sup> Azi Paybarah, *Inside the Jail the Night Jeffrey Epstein Died*, N.Y. TIMES, (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/nyregion/jeffrey-epstein-death.html>.

<sup>7</sup> Josiah Bates, *'We Can Do Better.'* *Mississippi Governor Orders Closure of State Prison's Ward After String of Deaths*, TIME, (Jan. 28, 2020), <https://time.com/5773059/mississippi-governor-closure-parchman-prison-ward/>.

<sup>8</sup> Katie Benner, *Plans for Alabama's Deadly Prisons 'Won't Fix the Horrors,'* N.Y. TIMES, (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/alabama-prisons.html>.

<sup>9</sup> Julie K. Brown, *Bartered Sex, Corruptions, and Cover-Ups Behind Bars in Nation's Largest Women's Prison*, MIAMI HERALD, (Dec. 13, 2015), <http://www.miamiherald.com/news/special-reports/florida-prisons/article49175685.html>.

<sup>10</sup> Ben Conarck, *WORK FORCED: A century later, unpaid prison labor continues to power Florida*, JACKSONVILLE TIMES, (May 25, 2019), <https://www.jacksonville.com/news/20190525/work-forced-century-later-unpaid-prison-labor-continues-to-power-florida>.

<sup>11</sup> Matti Hautala, *In the Shadow of Sandra Bland: The Importance of Mental Health Screening in U.S. Jails*, 21 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 89, 90 (2015).

<sup>12</sup> *Death Without Conviction: PHP Editorial: Start work now on jail reforms*, PALESTINE HERALD PRESS, (Dec. 30, 2019), [https://www.palestineherald.com/news/php-editorial-death-without-conviction-start-work-now-on-jail/article\\_d0dfc57c-2b32-11ea-96be-0b7b18ce9e0a.html](https://www.palestineherald.com/news/php-editorial-death-without-conviction-start-work-now-on-jail/article_d0dfc57c-2b32-11ea-96be-0b7b18ce9e0a.html).

<sup>13</sup> *Death Without Conviction: PHP Editorial: Deadly jails need stronger state oversight*, PALESTINE HERALD PRESS, (Nov. 15, 2019), <https://www.palestineherald.com/news/death-without-conviction-php->

Texas that have demanded the public's attention. Media outlets and advocates have raised a steady stream of concerns about Texas prisons, including substantiated reports about officers falsifying disciplinary reports against incarcerated people<sup>14</sup> and sharp rises in suicide rates.<sup>15</sup> Another in-depth investigative article shone a harsh light on the Texas prison system's use of long-term solitary confinement.<sup>16</sup> Also, a high-profile lawsuit challenged the lack of air conditioning in a Texas geriatric prison and the resultant deaths of medically vulnerable people from the extreme heat.<sup>17</sup> Ongoing twists and turns in the case, including a settlement and threatened contempt rulings, ensured that this issue remained a major news story for more than a year.<sup>18</sup>

Investigators in Kentucky similarly discovered poor conditions of confinement within the state's jail system, where several preventable deaths of incarcerated individuals met with scant follow-up investigations and lax disciplinary actions.<sup>19</sup> Additionally, jails in the Pacific Northwest have recently experienced a disturbing rise in the number of deaths in custody.<sup>20</sup> Arizona's prison cells have been revealed to have faulty locks that have contributed to violence and murders over the years, leading to descriptions of prison management in that state as a "colossal failure."<sup>21</sup> Moreover, a weeks-long national prison labor strike in 2018 generated massive media coverage and highlighted inhumane conditions in prisons across the country, including what the strike organizers called "modern day slavery" where people in custody receive little to no pay for dehumanizing work.<sup>22</sup> And a national investigation of deaths in jail custody by the news organization Reuters brought public attention to the fact that there were over 7500 deaths in local jails over

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editorial-deadly-jails-need-stronger-state-oversight/article\_297189da-0830-11ea-af64-7f5060ad1882.html.

<sup>14</sup> See, e.g., Keri Blakinger, *Texas Prisons: More than 500 inmate disciplinary cases tossed after quotas investigation*, HOUSTON CHRON., (June 11, 2018), <https://www.chron.com/news/houston-texas/article/Texas-prisons-More-than-500-inmate-disciplinary-12984923.php>.

<sup>15</sup> See, e.g., Keri Blakinger, *I just kept thinking he was coming home': Suicides in Texas prisons hit 20-year high*, HOUSTON CHRON., (Apr. 25, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/I-just-kept-thinking-he-was-coming-home-13746039.php#>.

<sup>16</sup> Michael Barajas, *The Prison Inside Prison*, TEX. OBSERVER, (Feb. 2020), <https://www.texasobserver.org/solitary-confinement-texas/>.

<sup>17</sup> *Cole v. Collier*, No. 4:14-cv-1698, 2018 WL 2766928, at \*1 (S.D. Tex. June 8, 2018).

<sup>18</sup> Maurice Chammah, *"Cooking Them to Death": The Lethal Toll of Hot Prisons*, THE MARSHALL PROJECT, (October 11, 2017), <https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons>.

<sup>19</sup> R.G. Dunlop, *Trouble Behind Bars Series*, KY. CTR. FOR INVESTIGATIVE REPORTING, (2015-2016), <http://kycir.org/series/kentucky-jail-deaths/>.

<sup>20</sup> Conrad Wilson, *In the Pacific Northwest, Concern Grows Over the Number of Deaths in County Jails*, ALL THINGS CONSIDERED, NPR, (June 17, 2019), <https://www.npr.org/2019/06/17/733497757/in-the-pacific-northwest-concern-grows-over-the-number-of-deaths-in-county-jails>.

<sup>21</sup> Maria Polletta, *Locks at Arizona's prisons have had problems for decades—who's to blame?* AZCENTRAL.COM, (May 9, 2019), <https://www.azcentral.com/story/news/politics/arizona/2019/05/09/arizona-prison-system-broken-cell-locks-department-of-corrections-doug-ducey/1129754001/>.

<sup>22</sup> Nicole Lewis, *What's Really Happening With the National Prison Strike?*, THE MARSHALL PROJECT, (Aug. 24, 2018), <https://www.themarshallproject.org/2018/08/24/what-s-really-happening-with-the-national-prison-strike>.

an 11-year period, including almost 5000 deaths of people in pre-trial status, and that a veil of secrecy hides many of these deaths from the public.<sup>23</sup>

The list of horrifying stories could go on indefinitely: the media has never been more proactive in identifying, investigating, and reporting on prison and jail issues, thanks to the dogged attention of investigative reporters who specialize in this area and the establishment of news outlets, such as The Marshall Project, that focus on criminal justice coverage. At the same time, though, we have scant information from those jurisdictions where the media has been less attentive.

Beyond these high-profile examples of local reporting about deeply troubling conditions of confinement, the ongoing COVID-19 crisis has also turned a bright national spotlight on what is happening behind bars, as the public has become aware of the crowded and unhygienic conditions in prisons and jails and the potential for catastrophic loss of life from the spread of the coronavirus in these facilities.<sup>24</sup> Rikers Island in New York City and the Cook County Jail in Chicago, as of early April 2020, were epicenters for the COVID-19 crisis in the United States, with vastly higher rates of transmission and confirmed cases than their surrounding communities.<sup>25</sup> And in early September 2020, 44 of the top 50 hotspots for coronavirus in the United States were in prisons and jails.<sup>26</sup> More and more, the public is coming to understand that what happens in these closed institutions matters—and that conditions of confinement affect both public safety and public health.

While these significant problems continue to garner public outcry, correctional success stories have also started to take shape across the country. Of particular note, Colorado's former prison chief, Rick Raemisch, ended the use of long-term solitary confinement in the state's prisons, persuaded that the practice contravened the goal of public safety since it was so harmful to

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<sup>23</sup> Peter Eisler, Linda So, Jason Szep, Grant Parker, and Ned Parker, *A Reuters Investigation: Dying Inside: The Hidden Crisis in America's Jails, Part One: Why 4,998 died in U.S. jails without getting their day in court*, REUTERS, (Oct. 16, 2020), <https://www.reuters.com/investigates/special-report/usa-jails-deaths/>.

<sup>24</sup> Ned Parker, Linda So, Brad Heath, & Grant Smith, *Spread of coronavirus accelerates in U.S. jails and prisons*, REUTERS (Mar. 28, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-inmates-insigh/spread-of-coronavirus-accelerates-in-us-jails-and-prisons-idUSKBN21F0TM>; Abbie Vansickle, *Photos Show Some Prison Beds Are Only Three Feet Apart*, THE MARSHALL PROJECT (Mar. 27, 2020), <https://www.themarshallproject.org/2020/03/27/photos-show-some-prison-beds-are-only-three-feet-apart>; Michele Deitch, Alycia Welch, William Bucknall, and Destiny Moreno, COVID AND CORRECTIONS: A PROFILE OF COVID DEATHS IN CUSTODY IN TEXAS, Lyndon B. Johnson School of Public Affairs, (Nov. 2020), <https://repositories.lib.utexas.edu/handle/2152/83635>.

<sup>25</sup> Asher Stockler, *More Than 700 People Have Tested Positive for Coronavirus on Rikers Island, Including Over 440 Staff*, NEWSWEEK (Apr. 8, 2020), <https://www.newsweek.com/rikers-island-covid-19-new-york-city-1496872>; Timothy Williams & Danielle Ivory, *Chicago's Jail is Top U.S. Hot Spot as Virus Spreads behind Bars*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

<sup>26</sup> The New York Times. "Coronavirus in the U.S.: Latest Map and Case Count," *The New York Times*, Updated September 6, 2020, 1:33 A.M. E.T., <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage>.

people suffering under such extreme conditions.<sup>27</sup> Raemisch's successor, Dean Williams, has emphasized the importance of rehabilitation, preparation for re-entry, work with community partners, the dismantling of solitary confinement cells, and respect for human dignity.<sup>28</sup> Williams previously served as the Corrections Commissioner in Alaska, where he also tried to implement numerous reforms.<sup>29</sup>

Notably, a number of U.S. corrections officials have toured European prisons famous for their humane approach to incarceration, and they have returned home with ideas for how to implement changes in their facilities. For example, Connecticut's former Corrections Commissioner Scott Semple implemented an experimental prison program for young men between ages eighteen and twenty-five called the TRUE Program, which has generated acclaim for its rehabilitative programming and "radically different environment"<sup>30</sup> that allows for mentoring by older residents and a much more relaxed dynamic between staff and residents. The program has curbed violence inside the facility, and to date, has shown excellent results when it comes to re-arrests following release.<sup>31</sup> A similarly progressive program for young women in custody in Connecticut—the WORTH program—uses therapy, mentoring, and classes to transform the prison experience and reduce the recidivism rate.<sup>32</sup>

North Dakota's former prison leader, Leann Bertsch, also experimented with changes she put in place following her visit to Norway's prisons. To the extent possible, life inside the North Dakota prisons is being redesigned to more closely mirror life on the outside. Among the changes are a requirement that staff engage in conversation and activities with residents, opportunities for residents to cook and do their own laundry, rooms that look like college dorms, and reductions in the use of solitary confinement.<sup>33</sup> As one news story put it, "an air of normality is pervasive and intentional."<sup>34</sup>

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<sup>27</sup> Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N. Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html>.

<sup>28</sup> John Herrick, *Dean Williams, head of Corrections Department, talks punishment and redemption*, COLORADO INDEPENDENT (Apr. 11, 2019), <https://www.coloradoindependent.com/2019/04/11/dean-williams-corrections-death-penalty-parole/>.

<sup>29</sup> Andrew Kitchenman, *Alaska corrections leaders look to Norway for inspiration*, ALASKA PUBLIC MEDIA (Apr. 4, 2018), <https://www.alaskapublic.org/2018/04/04/alaska-corrections-leaders-look-to-norway-for-inspiration/>.

<sup>30</sup> Maurice Chammah, *The Connecticut Experiment*, THE MARSHALL PROJECT (May 8, 2018), <https://www.themarshallproject.org/2018/05/08/the-connecticut-experiment>.

<sup>31</sup> *Id.*

<sup>32</sup> Maurice Chammah, *More Women Are Behind Bars Now. One Prison Wants to Change That*, THE MARSHALL PROJECT (Oct. 9, 2018, 11:00 AM), <https://www.themarshallproject.org/2018/10/09/more-women-are-behind-bars-now-one-prison-wants-to-change-that>.

<sup>33</sup> David Kidd, *Tender Justice: North Dakota is conducting a prison experiment unlike anything else in the United States*, GOVERNING (Aug. 2018), <https://www.governing.com/topics/public-justice-safety/gov-north-dakota-prison-criminal-justice-reform.html>.

<sup>34</sup> *Id.*

A new women's jail in San Diego, Las Colinas, has been praised for its innovative approach to meeting the unique needs of women in custody.<sup>35</sup> Similarly, Travis County, Texas is planning for a reimagined jail for women that is trauma-informed, rehabilitative, and designed and operated with women in mind.<sup>36</sup> As with the problems in correctional facilities discussed above, the list of positive innovations goes on and on as well.

Unfortunately, even as public interest in correctional issues rises, along with media coverage of both scandalous conditions and welcome improvements, the number of oversight agencies equipped to monitor conditions of confinement, prevent problems, and spread awareness of best practices has not grown at a similar pace. In 2010, I published research demonstrating that external oversight over prisons and jails was a rarity in the United States.<sup>37</sup> Ten years later, this article reveals a similar conclusion—despite the extraordinary concerns surrounding conditions of confinement and the treatment of people in custody, relatively few jurisdictions have established independent agencies tasked with scrutinizing these institutions and addressing the problems they find. However, there have also been significant signs of change over the last decade: the national landscape for independent correctional oversight is improving, with greater awareness of this issue, more calls for the creation of oversight mechanisms, more concrete efforts to establish these entities, and the successful implementation of several new oversight bodies.

This article builds on my 2010 report to highlight those recent developments and to assess the current state of correctional oversight in the United States. Part I describes the concept of correctional oversight and explains its goals to improve transparency and increase accountability within prisons and jails. It goes on to outline the benefits of oversight that can accrue to diverse stakeholders, including incarcerated persons, correctional administrators, policymakers, judges, the media, and the public at large. This section also discusses the prevalence of independent oversight bodies in other countries, and how the lack of such oversight makes the United States an anomaly on the world stage.

In Part II, I discuss America's historical reliance on court oversight as a way to address problematic institutional conditions and how this has inhibited the development of preventive oversight mechanisms. But as litigation has become a less reliable tool for prison reformers, and as the drawbacks of court oversight have become more obvious, advocates have begun to emphasize the need for preventing harm through routine inspections of facilities rather than waiting until conditions hit rock bottom to get involved in reform efforts.

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<sup>35</sup> Keri Blakinger, *Can We Build a Better Women's Prison?*, WASH. POST MAG. (Oct. 28, 2019), <https://www.washingtonpost.com/magazine/2019/10/28/prisons-jails-are-designed-men-can-we-build-better-womens-prison/?arc404=true>.

<sup>36</sup> *Id.*

<sup>37</sup> Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010) [hereinafter Deitch, *50-State Inventory*].

Part III examines the growing interest in correctional oversight and discusses recent calls for the development of independent oversight mechanisms in this country. Since 2006, there has been a series of notable highlights in the nascent oversight movement, and this section sets forth a chronology of those key events.

Part IV describes a multi-year research project conducted at the Lyndon B. Johnson School of Public Affairs at the University of Texas to find, interview, and catalog all external prison and jail oversight bodies that currently exist for adult correctional facilities around the nation. This part of the article presents and analyzes the key findings about these various oversight bodies. In this section, I also highlight those jurisdictions that have established oversight bodies since 2010, to show the shifting landscape of correctional oversight in the United States. This section of the article also includes charts with lists of various prison and jail oversight bodies at the state and local levels.

Finally, Part V concludes with an overall assessment of the status of correctional oversight in the United States. That assessment mixes optimism and excitement about the future of oversight with a dose of realism about the challenges ahead and a recognition that we continue to trail our peer nations when it comes to belief in the critical importance of independent oversight. But still we must push on in our efforts to promote transparency and accountability in all places of confinement.

## PART I: THE VALUE OF INDEPENDENT CORRECTIONAL OVERSIGHT

### A. *What is Oversight?*

Over the past decade, policymakers, practitioners, and reform advocates have increasingly discussed the merits and challenges of designing systems of oversight for correctional agencies. Despite these conversations, there is often a lack of consensus regarding what the term “oversight” truly means in the correctional arena.<sup>38</sup> Oversight for other public institutions is both more clear-cut and more widely accepted as essential, in definition and in practice. Transparency and accountability are generally seen as integral to democracy. Therefore, external oversight mechanisms exist across many public and even private institutions (such as schools, hospitals, nursing homes, banks, mines, and zoos) to ensure that each institution’s operations are transparent and answerable to elected officials and to community residents. Oversight of the police has also become much more widely accepted as a norm in the last twenty-five years<sup>39</sup> through the establishment of police monitoring bodies

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<sup>38</sup> Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1440 (2010) [hereinafter Deitch, *Distinguishing the Various Functions*].

<sup>39</sup> See Joseph De Angelis, Richard Rosenthal & Brian Buchner, *Civilian Oversight of Law Enforcement: A Review of the Strengths and Weaknesses of Various Models* 4, NAT’L ASS’N FOR CIVILIAN OVERSIGHT OF L. ENFORCEMENT (Sept. 2016),

and civilian review boards, and also through public demands for the use of body cameras by the police in the wake of highly publicized shootings of unarmed citizens.

Unlike prisons and jails, however, most of these other public institutions benefit from “natural constituencies,” or empowered consumers who have a vested interest in maintaining certain performance standards and highlighting instances when those standards are not met.<sup>40</sup> In contrast, correctional institutions house disempowered individuals who lack the necessary political capital to advocate for oversight mechanisms that could improve their daily living conditions. As a result, there is not a clear consensus among powerful stakeholders about the need for independent correctional oversight. Yet, as scholar Andrea Armstrong argues, “[e]nhanced transparency of prison operations is essential for achieving a more just and safe democracy.”<sup>41</sup> Public awareness of our system of punishment should not stop at the razor wire fence.

I have previously written that the notion of “independent correctional oversight” is an umbrella term encompassing a number of different functions, including regulation, audit, accreditation, reporting, legislative, investigation, and monitoring.<sup>42</sup> Each of those functions is essential, but they are separate aspects of the effort to ensure that correctional facilities remain transparent and accountable. Effective oversight demands that we seek improvements to each of these functions.<sup>43</sup>

For the purposes of this article, though, I have a more targeted definition in mind: I use the term “correctional oversight” to refer to an independent, external mechanism designed, at a minimum, to ensure the collection, dissemination, and use of unbiased, accurate, and first-hand information about correctional conditions of confinement or the treatment of incarcerated individuals, primarily through on-site access to the facilities. This information, which would ideally be obtained through routine monitoring using a human rights framework, can help prevent an institution’s “natural drift”<sup>44</sup> toward abuse, neglect, and other forms of unconstitutional treatment. The definition offered here opens the door for many different forms and functions of oversight.

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[https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NACOLE\\_short\\_doc\\_FINAL.pdf?1481727977](https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NACOLE_short_doc_FINAL.pdf?1481727977); see also, SAMUEL E. WALKER & CAROLE A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (3d ed. 2018).

<sup>40</sup> Nicholas de B. Katzenbach, *Reflections on 60 Years of Outside Scrutiny of Prisons and Prison Policy in the United States*, 30 *PACE L. REV.* 1446, 1448 (2010).

<sup>41</sup> Andrea C. Armstrong, *No Prisoner Left Behind: Enhancing Public Transparency of Penal Institutions*, 25 *STAN. L. & POL’Y REV.* 435, 437 (2014).

<sup>42</sup> Deitch, *Distinguishing the Various Functions*, *supra* note 38, at 1439.

<sup>43</sup> *Id.* at 1440.

<sup>44</sup> Ivan Zinger, *Human Rights Compliance and the Role of External Prison Oversight*, 48 *CAN. J. CRIMINOLOGY & CRIM. JUST.* 127, 128 (2006), citing Mary Campbell, *Revolution and Counter-Revolution in Canadian Prisoners’ Rights*, 2 *CAN. CRIM. L. REV.* 285, 327 (1997).

Regardless of the type of oversight mechanism, though, the ultimate goals of these bodies are similarly focused. External oversight structures are typically tasked with achieving either or both of two interrelated goals: 1) improving transparency within the “shadow world”<sup>45</sup> of our nation’s prisons and jails, and 2) increasing accountability when the closed nature of correctional settings leads to harmful outcomes for people in custody, such as physical abuse, physical or mental deterioration, and even death. Together, these goals ensure that the rights of incarcerated persons are addressed and that correctional practices can improve so as to prevent future harm.

*B. Why is Oversight Important?*

Transparency and accountability are essential in prisons and jails where daily operations are overwhelmingly hidden from the public eye. In correctional settings, staff members hold the power to control millions of people’s lives, but that power is exercised in spaces from which the rest of the U.S. population is barred. This secrecy places all incarcerated people at risk, but these risks are particularly high for the most vulnerable groups of incarcerated persons, such as individuals in solitary confinement, those with medical or mental health issues, and those who are most likely to experience sexual abuse.<sup>46</sup> Moreover, because people of color and the poor are disproportionately represented in our nation’s prisons and jails, the impact of problematic institutional conditions is felt most keenly by marginalized groups, which, as Andrea Armstrong notes, “may, in fact, facilitate their further exclusion from society.”<sup>47</sup>

Sharon Dolovich has written: “[I]ncarceration is a dangerous state ... [that] requires constant vigilance on the part of state officials. To guard against cruel conditions, state officials must be proactive, identifying threats to prisoners’ health and safety in order to prevent possibly serious harm.”<sup>48</sup> External oversight is a cost-effective tool that jurisdictions can adopt to combat negative correctional outcomes and maximize positive ones. According to the Hawthorne effect,<sup>49</sup> oversight works because the simple act of watching something changes its entire course. By keeping an eye on the inner workings of correctional institutions, everyone involved – from incarcerated people to facility staff – is humanized, and facility practices are altered for the better.<sup>50</sup> These changes yield benefits for diverse stakeholders, including

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<sup>45</sup> *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting).

<sup>46</sup> Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AMER. J. CRIM. L. 291, 296-302 (2010).

<sup>47</sup> Armstrong, *supra* note 41, at 443.

<sup>48</sup> Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 973 (2009).

<sup>49</sup> See ELTON MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIALIZED CIVILIZATION* (MacMillan Co. 1933).

<sup>50</sup> John M. Brinkman, *The Role of Civilian Organizations with Prison Access and Citizens Members—The New York Experience*, 30 PACE L. REV. 1562, 1571 (2010).

people in custody, correctional administrators, policymakers, judges, the media, and the public at large.

### 1. *Benefits to Incarcerated People*

The clearest benefits of correctional oversight accrue to the people incarcerated inside prisons and jails. Inspections performed by outsiders provide the chance for people in custody to share their concerns about past incidents and about emerging problems, and to highlight those aspects of prison operations that are working well. Oversight presents a rare opportunity to voice a grievance to an *independent* listener, rather than to facility employees who administer an internal grievance process that is typically perceived as biased against incarcerated people. Regular monitoring also allows for the early detection of problems,<sup>51</sup> which may save people in custody from experiencing mistreatment in the first place, and improves their quality of care, programming options, and interactions with facility staff. Most importantly, oversight serves as an unmistakable reminder that while incarcerated people may have broken the law, their rights are still intact. To protect those rights, incarcerated individuals must have the opportunity to be heard and respected in these settings that have historically served to silence and disempower them.

Even where the corrections agency is implementing innovative programs and adopting a positive approach toward the treatment of incarcerated people, independent monitoring is necessary to see how such programs are working and to hold agencies accountable for the continued focus on such positive measures even when early experiments are unsuccessful.<sup>52</sup>

### 2. *Benefits to Correctional Administrators*

The second beneficiaries of correctional oversight, perhaps counter-intuitively, are individuals who often tend to push back against calls for oversight with the greatest force—correctional administrators and custodial staff. Individuals who work inside prisons and jails often claim that bringing the public spotlight into shrouded correctional institutions could threaten the security of those institutions.<sup>53</sup> In reality, however, many administrators who operate correctional systems with independent oversight in place claim that the opposite is true. Oversight does not endanger correctional facilities; rather, it creates safer institutions for both incarcerated people *and* staff members

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<sup>51</sup> Anne Owers, *Prison Inspection and the Protection of Prisoners' Rights*, 30 PACE L. REV. 1535 at 1541–42 (2010); Michele Deitch & Michael B. Mushlin, *Let the Sunshine In: The ABA and Prison Oversight*, in AM. BAR ASS'N CRIM. JUST. SEC., THE STATE OF CRIMINAL JUSTICE 2011, at 245 [hereinafter, Deitch & Mushlin, *Let the Sunshine In*].

<sup>52</sup> Jonathan Simon, *Penal Monitoring in the United States: Lessons from the American Experience and Prospects for Change*, 70 CRIME L. SOC. CHANGE 161, 170 (2018).

<sup>53</sup> Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 455 (2011); Armstrong, *supra* note 41, at 468.

alike.<sup>54</sup> As former correctional administrator Andrew Coyle has observed from his own experiences, “external scrutiny of prisons and correctional institutions can be of assistance to those who manage these institutions.”<sup>55</sup>

Those who routinely monitor conditions of confinement with fresh perspectives can highlight a facility’s burgeoning safety concerns before incarcerated people or staff are harmed or before these issues develop into intractable public scandals. Oversight practitioners can also highlight inefficiencies and weigh in on how current practices (such as staff training, staffing levels, and correctional health care) should change in order to reach optimal levels of agency performance. Oversight officials and correctional administrators often find themselves jointly supporting legislative requests for additional resources or for needed changes to the law. Moreover, monitors can also identify best practices and help spread information about successful initiatives to other facilities. As a result, both individual facilities and entire correctional systems may develop a culture of improvement, professionalism, and collaboration rather than one based on tradition, secrecy, and resistance to change.

Prison administrators have also emphasized that having an outside set of eyes on their institutions allows them to see conditions there from a fresh perspective, since even disturbing conditions can seem “normal” after one has been working in a facility for a while.<sup>56</sup> And knowing that an outside monitor can come into a facility at any time helps keep staff on their toes and serves a function of informal social control over their potential misbehavior.<sup>57</sup>

Finally, bringing monitors and investigators into correctional spaces can help administrators advocate for additional resources and policy changes that must come from outside of the organization. For example, a monitor’s report may draw attention to an issue in the prisons that can be addressed with additional funding from the legislature. Policymakers may have ignored requests for additional resources from the corrections agency, seeing these requests as self-serving, but the monitor’s independent and objective report and recommendations can provide additional support and leverage for getting the needed funds.<sup>58</sup> Similarly, correctional leaders may be able to place the “blame” on oversight officials for “making” them implement changes that

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<sup>54</sup> Andrew Coyle served for many years as the Warden of Brixton Prison in London, one of the largest prisons in Great Britain in the 1990s. Coyle argues that external inspections of correctional facilities can improve professionalism within prison management, as well as draw public attention to “the pressures which make it difficult to manage [a] prison properly.” See Andrew Coyle, *Professionalism in Corrections and the Need for External Scrutiny: An International Overview*, 30 PACE L. REV. 1503, 1508 (2010). Similarly, Stan Stojkovic provides examples of numerous correctional administrators who used external oversight mechanisms to improve outcomes within their facilities. See Stan Stojkovic, *Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1480 (2010).

<sup>55</sup> Coyle, *supra* note 54, at 1503.

<sup>56</sup> Deitch, *Distinguishing the Various Functions*, *supra* note 38, at 1443.

<sup>57</sup> *Id.*

<sup>58</sup> Coyle, *supra* note 54, at 1507; Brinkman, *supra* note 50, at 1568–69.

they know they need to make but for which they lack staff support or political backing.<sup>59</sup>

Given all these benefits that would accrue to correctional administrators, one might ask why agencies so frequently and vehemently oppose oversight. As in so many other spheres, many entities that exercise full power and free reign do not like to share that power or have their authority questioned. Moreover, there could be fears on the part of officials that being subjected to external scrutiny will expose their failures and potentially jeopardize their jobs. But no sector of our community or our government can or should operate with such unchecked power. And if administrators' concerns cause them to improve their game as a result of the scrutiny, then we all benefit from that fear of exposure.

Oversight brings correctional facilities out of the shadows and places the issues confronting administrators squarely onto the public's agenda. If oversight is implemented, no longer will prisons and jails be asked to "operate [as] public agencies . . . with infinite expectations and finite resources."<sup>60</sup> Instead, oversight enables administrators to begin a public dialogue about what their institutions can reasonably accomplish and what they need in terms of training, funding, and technical assistance for those purposes.<sup>61</sup>

### 3. *Benefits to Judges, Prosecutors, Defense Lawyers, and Policymakers*

Although U.S. prisons and jails house almost 2.3 million people, key decision-makers, such as judges, prosecutors, and legislators, often do not know what happens inside most of these facilities. External oversight practitioners can fill this gap in our collective knowledge by shining a light on the daily realities of confinement. Across government systems, oversight can empower society's leaders by equipping them with unbiased information about what is actually happening in the netherworld of the criminal justice system, and helping them break down assumptions and myths.<sup>62</sup> Therefore, oversight not only helps to ensure that incarcerated people and facility staff are safe; it also serves as a tool of good governance.<sup>63</sup>

Monitoring and inspections could potentially allow a judge to know if it is safe to sentence someone to a term of incarceration. Accurate information and data about programming outcomes, living conditions, and rehabilitative efforts could also allow other justice leaders, including prosecutors and

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<sup>59</sup> Brinkman, *supra* note 50, at 1568–69.

<sup>60</sup> Stojkovic, *supra* note 54, at 1477 (citing MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (Russell Sage 1980)).

<sup>61</sup> Stojkovic, *supra* note 54, at 1486.

<sup>62</sup> Owers, *supra* note 51, at 1544.

<sup>63</sup> Armstrong, *supra* note 41, at 458–59; Michael Mushlin and Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1384 (2010) [hereinafter *Opening Up a Closed World*].

defense attorneys, to make better arguments and decisions about each defendant's future. As an example, in 2007, the Texas juvenile justice agency came under intense media scrutiny for problems related to the sexual abuse of youth in custody by supervisory staff. As a result, juvenile judges in Travis County immediately stopped committing youth to those state-run facilities because they had no confidence the youth would be safe there.<sup>64</sup>

Additionally, oversight by independent bodies enables lawmakers to evaluate the successes and failures of various criminal justice initiatives, such as institutional reforms, implementation of programs, and efforts to prepare incarcerated people for re-entry to the community. Policymakers have an obligation to ensure that their jurisdiction's tax dollars are spent efficiently and effectively. Unfortunately, current recidivism rates demonstrate that public dollars have not been used in ways that improve public safety outcomes.<sup>65</sup> In our new "smart on crime" era, however, external correctional oversight provides policymakers with the information that they need to wield their powers of the purse—and to effectively act as the stewards of government—more productively. The information provided by oversight bodies also enhances the ability of lawmakers to provide effective legislative oversight of the corrections agency, by highlighting issues that should be the subject of hearings at which corrections officials testify and answer tough questions.

#### 4. *Benefits to the Media and the General Public*

Though prisons and jails are administered on the public's behalf, most community residents are unaware of how their tax dollars are spent within correctional institutions. Still, the public holds strong opinions about prison and jail operations. A 2016 meta-analysis of public opinion research on crime and criminal justice policy shows that the public overwhelmingly supports efforts to prioritize prevention, rehabilitation, and reintegration rather than mere punishment.<sup>66</sup> Without a system of external oversight, however, there are few ways to determine if the taxpayers' priorities are consistent with actual practice. The media may use open records requests to accumulate information about prison or jail operations (in those rare locations where there is an interested reporter), but such practices are time-consuming and expensive; moreover, past experience shows that some correctional agencies fail to comply with these requests or put up significant barriers to sharing the

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<sup>64</sup> *Consensus Developing Around Juvie Diversion Programs*, GRITS FOR BREAKFAST BLOG (Apr. 23, 2009), <https://gritsforbreakfast.blogspot.com/2009/04/consensus-developing-around-juvie.html?m=1>.

<sup>65</sup> *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, BUREAU OF JUSTICE STATISTICS 1 (May 2018), [https://www.bjs.gov/content/pub/pdf/18upr9yfup0514\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/18upr9yfup0514_sum.pdf) (according to the Bureau of Justice Statistics (BJS), 83% of state prisoners released in 2005 across 30 states were arrested at least once during a 9-year period following their release).

<sup>66</sup> Loren Seigel, *A New Sensibility: An Analysis of Public Opinion Research on Attitudes Towards Crime and Criminal Justice Policy*, THE OPPORTUNITY AGENDA 24 (June 2016), <https://www.opportunityagenda.org/explore/resources-publications/new-sensibility>.

information.<sup>67</sup> Freedom of information laws alone are not enough to keep citizens informed about prisons and jails operating in their communities. Moreover, the U.S. Supreme Court ruled in 1974 that the news media does not have any greater right of access to prisons to interview specific incarcerated individuals than the general public.<sup>68</sup> Thus, the ability of the press to shine a spotlight on prison conditions is at least somewhat hampered by these limitations. What is needed is on-the-ground, reliable information from an objective source with statutorily guaranteed access to the facilities. The reports and findings of external oversight bodies could help guide journalists to issues of critical importance<sup>69</sup> and help fill gaps in public knowledge about what is happening behind bars.

Most importantly, transparency is one of the pillars of a democratic society, and external oversight creates the opportunity to honor this value and engage the public in an important dialogue about correctional practices.<sup>70</sup> Public reporting about conditions of confinement by a government oversight body ensures that these issues that affect so many Americans remain high on the public agenda. Public awareness is the first step in any effort to address these problems, and improvements in conditions will likely lead to improved outcomes such as reduced levels of trauma and harm to incarcerated people, and thus lessened recidivism and victimization. As a result, oversight may create prison systems that both work for us and are “worthy of our values.”<sup>71</sup>

### C. *The United States is an Anomaly on the World Stage*

As my 50-State Inventory established in 2010, “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.”<sup>72</sup> In terms of the current extent of independent correctional oversight in the United States, not very much has changed since then.

The lack of external correctional oversight mechanisms in most states makes this nation an anomaly on the world stage. Scholar Jonathan Simon refers to the absence of such monitoring bodies as an example of “American exceptionalism.”<sup>73</sup> Most other western nations, particularly those in Europe, have robust mechanisms in place to perform regular inspections in all places

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<sup>67</sup> Geraghty & Velez, *supra* note 53.

<sup>68</sup> Pell v. Procunier, 417 U.S. 817, 833 (1974).

<sup>69</sup> See, e.g., Keri Blakinger, ‘The Place Is a Jungle’: Texas Youth Prisons Still Beset by Gangs, Violence, Abuse, HOUSTON CHRONICLE (Dec. 30, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/The-place-is-a-jungle-Texas-youth-prisons-14938409.php#>.

<sup>70</sup> Stojkovic, *supra* note 54, at 1478-1482; Armstrong, *supra* note 41, at 458-59, 476.

<sup>71</sup> Michele Deitch & Michael B. Mushlin, Op-Ed: *What’s Going On in Our Prisons?*, N.Y. TIMES (Jan. 4, 2016), [http://www.nytimes.com/2016/01/04/opinion/whats-going-on-in-our-prisons.html?\\_r=0](http://www.nytimes.com/2016/01/04/opinion/whats-going-on-in-our-prisons.html?_r=0) [hereinafter *What’s Going On in Our Prisons?*].

<sup>72</sup> Deitch, *50-State Inventory*, *supra* note 37.

<sup>73</sup> Simon, *supra* note 52, at 162.

of confinement.<sup>74</sup> Indeed, every country that has adopted the United Nations' Optional Protocol for the Convention Against Torture (OPCAT) is required to have in place a "National Preventive Mechanism" to monitor conditions and the treatment of people held in all detention facilities.<sup>75</sup> As of 2019, 38 Council of Europe Member States have designated a National Preventive Mechanism (also known as an "NPM"), and 26 out of 28 countries that are part of the European Union have such oversight bodies in place.<sup>76</sup> As a result, these countries are better equipped to ensure the physical and psychological safety of people in custody, facilitate their rehabilitative development, and protect their human rights. As Irish scholar Mary Rogan observes, "[t]he principle that the inspection and monitoring of prisons can promote the protection of human rights and, specifically, prevent torture and ill-treatment, has become well established in international human rights law."<sup>77</sup>

The United Kingdom is often held up as having the "gold standard" for correctional oversight, with a system of three interlocking oversight entities.<sup>78</sup> These entities work together to investigate the complaints of people in custody and prevent other harms from occurring in the future. The three components of the U.K.'s oversight system include:<sup>79</sup>

1. **Her Majesty's Inspectorate of Prisons (HMIP):** The Inspectorate has a statutory duty to inspect every adult prison (as well as other places of confinement, such as police custody facilities) in England and Wales at least twice every five years in order to determine "whether prisoners are held in safety, whether they are treated with respect for their human dignity, whether they are able to engage in purposeful activity, and whether they are prepared for resettlement back into the community."<sup>80</sup>
2. **The Prisons and Probation Ombudsman (PPO):** This office handles prisoners' individual complaints, investigates deaths in custody, and publishes non-binding recommendations for reform.<sup>81</sup>
3. **Independent Monitoring Boards (IMBs):** IMBs grant local volunteers a statutory right of entry into their community's prison, where board members must make regular visits, hold interviews with prisoners and staff, and publish annual reports.<sup>82</sup>

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<sup>74</sup> *Id.* at 162–63; see generally Silvia Casale, *Mechanisms for Custodial Oversight: The United States and Europe*, 22 WASH. U. J. LAW & POLICY 217 (2006).

<sup>75</sup> Mary Rogan, *Prison Inspection and Monitoring: The Need to Reform European Law and Policy*, EUR. J. CRIM. POLICY RES. (Aug. 10, 2019), <https://doi.org/10.1007/s10610-019-09420-8>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Owers, *supra* note 51, at 1536–37.

<sup>79</sup> *Id.* at 1536–40.

<sup>80</sup> *Id.* at 1542.

<sup>81</sup> *Id.* at 1537.

<sup>82</sup> *Id.* at 1537–38; see also Vivien Stern, *The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight*, 30 PACE L. REV. 1529, 1530 (2010).

These U.K. models of independent correctional oversight are mature structures with long track records of success at enhancing the transparency of prisons and jails, drawing public and political attention to ill-treatment of people in custody, and obtaining relief for incarcerated people who need assistance.<sup>83</sup> Indeed, many other countries have designed oversight mechanisms that are based on the British models. For example, Scotland, South Africa, and Western Australia have Prison Inspectorates that closely resemble the HMIP.<sup>84</sup>

It is also notable that a newly-formed international network of correctional oversight experts is overwhelmingly composed of non-U.S. participants.<sup>85</sup> Network participants share details about their country's oversight bodies in newsletters and at international conferences, and these descriptions bear little similarity to anything that exists in most U.S. states. Whether such oversight mechanisms should exist is not up for discussion in these other countries—their existence is an absolute given among every stakeholder group. When comparing notes with international colleagues, including corrections officials in other countries, I have often encountered incredulity at the idea that these oversight structures do not exist in the United States. It is a fair assessment to say that the lack of independent correctional oversight in our country does not reflect well on our nation's commitment to human rights for those in custody.

I turn now to an analysis of some of the factors that may explain this striking difference in attitudes towards correctional oversight between the United States and other democratic nations.

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<sup>83</sup> Dirk Van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME & JUST. 503, 531–32 (2010).

<sup>84</sup> See generally *id.* at 547–48.

<sup>85</sup> See *External Prison Oversight and Human Rights*, INT'L CORRECTIONS AND PRISONS ASS'N (ICPA), <https://icpa.org/icpa-expert-groups/external-prison-oversight-and-human-rights/> (last visited Jul. 28, 2020).

PART II: AMERICA'S OVERRELIANCE ON COURT OVERSIGHT AND ITS  
NOW-DIMINISHED ROLE

To better understand why the United States stands apart from its peers when it comes to the oversight issue, it is important to recognize a significant difference in legal approaches between the United States and other nations. Over the past four and a half decades, the U.S. federal court system has served as the primary mechanism of external correctional oversight for America's prisons and jails. In 1974, the U.S. Supreme Court ruled that there would be "no iron curtain between the Constitution and the prisons of this country."<sup>86</sup> This game-changing perspective propelled courts into their role as a bulwark against unlawful conditions of confinement. Throughout the 1970s and 1980s, judges repeatedly determined that various correctional conditions in different states were unconstitutional,<sup>87</sup> and they often appointed special masters or monitors to ensure compliance with reform efforts.<sup>88</sup> Consequently, inmates experienced many positive changes, including increased space per inmate, prohibitions against excessive use of force, the right to health care for serious medical needs, expanded programming options, enhanced facility cleanliness, and improved classification systems.<sup>89</sup>

In this respect, the United States is situated very differently than other countries where the courts never played this critical role. At roughly the same time that court involvement in corrections was expanding in America, the U.K. began establishing preventive oversight mechanisms to better protect the rights of people in custody. For example, Her Majesty's Inspectorate of Prisons for England and Wales was established in its modern form in 1982,<sup>90</sup> two years after the U.S. federal district court issued its landmark ruling (and eventual appointment of a special master) in the Texas prison class-action lawsuit *Ruiz v. Estelle*.<sup>91</sup> These different legal approaches—and the constitutional underpinning of these issues in the United States—led to a different mindset when it came to the protection of people in custody. Both countries sought to protect incarcerated people's rights, but the United States approached this in a reactive manner, looking to hold officials accountable *after* harming people in custody, not only through court involvement but also through passage of federal statutes such as 42 U.S.C. §1983, which created a

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<sup>86</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

<sup>87</sup> Derek Borhardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUMBIA HUMAN RIGHTS L. REV. 469, 470 (2012).

<sup>88</sup> Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT. REP. 236, 237 (2012) [hereinafter Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*].

<sup>89</sup> 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 (2004); see also Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, *supra* note 88, at 237-38.

<sup>90</sup> Owers, *supra*, note 51, at 1538 n.7.

<sup>91</sup> *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

cause of civil action for deprivation of rights.<sup>92</sup> In contrast, the UK and many other Western nations took a proactive approach, looking to prevent harm by emphasizing transparency.<sup>93</sup> Understanding this history and these divergent approaches can help us understand the shift in mindset that needs to take place when we talk about a desire to create independent preventive oversight bodies in the United States

Despite its widespread use in past decades, court oversight suffers from several major obstacles and drawbacks. First and foremost, litigation is a reactive rather than preventive approach to addressing prisoners' rights issues, and the objective is fairly limited—to bring the institution up to constitutional minimums. For a lawsuit to be filed against a correctional agency, conditions of confinement must be below already painfully low constitutional standards and after harm has already occurred. Also, after a successful lawsuit that results in court-ordered reforms, court-ordered supervision is only temporary, which creates the potential for conditions to backslide to their previous unconstitutional state once the court ends its jurisdiction in the case. Another concern is the significant expense associated with court-ordered oversight.<sup>94</sup>

Moreover, successful litigation is rare. The U.S. Supreme Court has imposed standards that apply to cases involving harm to people who are incarcerated that are extremely difficult (but not impossible) to meet. For example, the “deliberate indifference” standard, as established in the line of cases beginning with *Farmer v. Brennan*,<sup>95</sup> requires a subjective inquiry into the state of mind of corrections officials. Failure to meet that burden can result in conditions that fall well below civilized standards yet still not be found unconstitutional. And for cases challenging a prison regulation that impinges on an incarcerated person's constitutional rights, the standard set in *Turner v. Safley* is extremely deferential to correctional administrators, requiring only that the regulation be “reasonably related to legitimate penological interests.”<sup>96</sup> What's more, qualified immunity doctrine presents a significant barrier to successful litigation, requiring that in order for damages to be awarded, the constitutional rights allegedly violated must have been clearly established at the time of the incident.<sup>97</sup> All of these standards and doctrines present significant barriers to courts' ruling in favor of incarcerated people and ordering improvements to conditions or damages for harms caused.

The greatest obstacle to reliance on court oversight, though, is the Prison Litigation Reform Act (PLRA).<sup>98</sup> In 1996, Congress passed the PLRA

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<sup>92</sup> 42 U.S.C. §1983.

<sup>93</sup> See Van Zyl Smit, *supra* note 83, at 551–52; see also Simon, *supra* note 52, at 163–64.

<sup>94</sup> Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, *supra* note 88, at 238.

<sup>95</sup> *Farmer v. Brennan*, 511 US 825, 837 (1994).

<sup>96</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>97</sup> See Andrew Cohen, *Qualified Immunity is the Scourge of Prison Reform*, BRENNAN CENTER FOR JUSTICE (Jan. 7, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/qualified-immunity-scourge-prison-reform>.

<sup>98</sup> Prison Litigation Reform Act, 28 U.S.C. § 1915(g).

ostensibly to decrease the number of “frivolous” lawsuits brought by incarcerated persons against correctional administrators.<sup>99</sup> However, the Act went far beyond any reasonable effort to reign in such frivolous cases, thus demonstrating its true intent to limit prisoners’ access to the legal system to address their grievances.

The PLRA included numerous provisions that drastically decreased the number of prisoners’ rights cases that could be brought before a court of law, substantially lessened the chance of successful outcomes for plaintiffs, and limited the oversight that can take place thereafter.<sup>100</sup> Some of the most critical provisions include the following:

1. People in custody must exhaust all administrative remedies (i.e., prison grievance processes and appeals) before filing a lawsuit in court.<sup>101</sup> If they miss grievance deadlines (which could be as short as a week or so after an incident) or fail to comply with complicated procedural rules, they could lose the right to pursue a lawsuit.
2. Incarcerated people (even those deemed indigent) must pay court filing fees in full.<sup>102</sup>
3. Incarcerated people cannot receive compensation for mental or emotional injuries sustained while they are incarcerated unless they also demonstrate physical injuries.<sup>103</sup> This physical injury requirement minimizes prisoners’ ability to recover damages in cases involving sexual assault or psychological abuse, or even in cases where the physical injury is less serious in scope.<sup>104</sup>
4. The ability to recover attorneys’ fees is severely limited.<sup>105</sup> Most lawyers cannot afford to bring a complicated and time-consuming case with no prospects of eventual reasonable payment if they are successful. As a result, few lawyers are willing to pursue these cases anymore.
5. Courts may bar an incarcerated person from filing future lawsuits or appeals after a determination that he or she has previously filed three “frivolous” claims (subject to an exception in cases where harm is imminent).<sup>106</sup>

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<sup>99</sup> Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 156–69 (2003).

<sup>100</sup> *Id.* at 1559–60.

<sup>101</sup> Lynn Branham, *Toothless in Truth?: The Ethereal Rational Basis Test and the Prison Litigation Reform Act’s Disparate Restrictions on Attorneys’ Fees*, 89 CAL. L. REV. 999, 1003 (2001).

<sup>102</sup> *Id.*

<sup>103</sup> Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 143 (2008);

<sup>104</sup> *Id.* at 142–47 (2008); see also Geraghty & Velez, *supra* note 53, at 479 (listing horrific incidents that did not satisfy the physical injury requirement under the PLRA and thus could not lead to redress for prisoners).

<sup>105</sup> Branham, *supra* note 101, at 1005–07.

<sup>106</sup> Giovanna Shay & Joanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 301 (2007–08).

6. Courts are limited in their ability to perform oversight and enforce court orders<sup>107</sup> designed to improve conditions of confinement within prisons and jails. For example, defendants in prisoners' rights cases may move to terminate a court order after only two years if the court does not find any "current or ongoing" constitutional violations.<sup>108</sup>

The PLRA altered the trajectory of court oversight of correctional facilities in the United States more so than any other piece of legislation in history.<sup>109</sup> While the incarcerated population ballooned,<sup>110</sup> courts heard fewer and fewer cases litigating conditions of confinement, and a dramatically diminished number of these cases led to structural reforms with court-appointed monitors in place to ensure agency compliance with court orders. Within just a decade of the PLRA's passage, lawsuits filed per 1,000 prisoners dropped by 60 percent.<sup>111</sup> Horrific conditions of confinement continued to exist across the country, but the traditional vehicle for addressing those issues was largely stripped away from people in custody. Stan Stojkovic contends that the ultimate impact of the PLRA has been that "prisons have become less transparent and prison leaders, in many cases, have become less effective in what they do."<sup>112</sup> For these and many other reasons, as many advocates, scholars, and the American Bar Association have argued, the PLRA cannot be justified and should be repealed or reformed.<sup>113</sup>

Even under the constraints of the PLRA, there continues to be an important role for the courts to play in vindicating the rights of people in custody and in forcing the hand of intransigent corrections agencies, as the Supreme Court's ruling in *Brown v. Plata*<sup>114</sup> demonstrates. But the harm caused by the PLRA makes it even more imperative that we begin looking toward preventive oversight mechanisms as a way to shine a light on what's happening inside our nation's prisons and jails. As Margo Schlanger, the leading scholar

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<sup>107</sup> Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, *supra* note 88, at 239.

<sup>108</sup> See generally Elizabeth Alexander, *Getting to Yes in a PLRA World*, 30 PACE L. REV. 1672 (2010); 18 U.S.C.S. § 362 (b).

<sup>109</sup> Stojkovic, *supra* note 54, at 1481.

<sup>110</sup> Between 1990 and 2010, the number of people incarcerated in the United States almost doubled. See Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POL'Y INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/overtime.html>.

<sup>111</sup> Schlanger & Shay, *supra* note 103, at 141–42.

<sup>112</sup> Stojkovic, *supra* note 54, at 1482.

<sup>113</sup> See, e.g., American Bar Association, Resolution 102B (2007), available at [https://www.americanbar.org/groups/criminal\\_justice/policy/index\\_aba\\_criminal\\_justice\\_policies\\_by\\_meeting/](https://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting/); Michael B. Mushlin, *Unlocking the Courthouse Door: Removing the Barrier of the PLRA's Physical Injury Requirement to Permit Meaningful Judicial Oversight of Abuses in Supermax Prisons and Isolation Units*, 24 FED. SENT. REP. 268 (2012); John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* 86–87, THE VERA INSTITUTE OF JUSTICE (2006), <https://www.vera.org/publications/confronting-confinement>; Meredith Booker, *20 Years is Enough: Time to Repeal the Prison Litigation Reform Act*, PRISON POLICY INITIATIVE (May 5, 2016), [https://www.prisonpolicy.org/blog/2016/05/05/20years\\_plra/](https://www.prisonpolicy.org/blog/2016/05/05/20years_plra/).

<sup>114</sup> *Brown v. Plata*, 563 U.S. 493, 511 (2011).

on the impact of the PLRA, has observed, “Litigation has receded as an oversight method in American corrections. It is vital that something take its place.”<sup>115</sup> That “something” should be a permanent independent oversight body that conducts routine preventive inspections in the prisons and jails of each jurisdiction. We need not only an effective accountability model (involving the courts and litigation) but also a meaningful transparency model (involving routine preventive inspections with public reporting of findings).

### PART III: INCREASING CALLS FOR INDEPENDENT OVERSIGHT

Over the past decade and a half, awareness and acknowledgment of the benefits of independent correctional oversight has been growing in the United States, and an increasingly louder chorus of voices is calling for the development of oversight bodies. The year 2006 was a watershed moment in this movement, and interest in the oversight issue—and in prison conditions more generally—has only grown since that time. This section of the article highlights some of the most important developments since 2006.

#### 2006

In April 2006, 115 of the world’s leading correctional experts attended a conference at The University of Texas at Austin called *Opening Up a Closed World: What Constitutes Effective Prison Oversight*.<sup>116</sup> Participants included 20 percent of the nation’s corrections commissioners and directors, as well as lawmakers, researchers, reform advocates, and oversight practitioners from across the United States and Europe.<sup>117</sup> The four-day conference created the opportunity for attendees to discuss differing points of view, establish collaborative relationships, and examine case studies of existing oversight bodies. At the end of the event, participants reached a consensus that external forms of oversight are not only recommended but also essential to ensure that operations within prisons and jails are humane and professional.<sup>118</sup>

Also in 2006, the Vera Institute of Justice’s Commission on Safety and Abuse in America’s Prisons released a report on the state of violence within U.S. correctional facilities titled *Confronting Confinement*.<sup>119</sup> After a year of in-depth research, commission members issued findings demonstrating the widespread abuse, medical neglect, lack of data, and staff and inmate discontent that plagued U.S. prison institutions.<sup>120</sup> The report also outlined recommendations to improve the state of the nation’s correctional settings. Among

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<sup>115</sup> Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 171 (2015).

<sup>116</sup> *Opening Up a Closed World*, *supra* note 63, at 1383–84.

<sup>117</sup> *Id.* at 1384.

<sup>118</sup> *Id.* at 1385–86.

<sup>119</sup> *Gibbons & Katzenbach*, *supra* note 113, at 86–87.

<sup>120</sup> *Id.* at 11–17.

its recommendations, the Commission specifically called for increases in correctional oversight, including:

- The creation of independent oversight agencies to monitor prisons and jails;<sup>121</sup>
- A “reinvigoration” of the Department of Justice’s investigative and enforcement activities;<sup>122</sup>
- An increase in access to courts by reforming the Prison Litigation Reform Act (PLRA);<sup>123</sup>
- The strengthening of the American Correctional Association’s (ACA) standards and accreditation procedures;<sup>124</sup> and
- An increase in overall correctional transparency by enabling lawmakers, judges, media representatives, and the general public to regularly visit prisons and jails.<sup>125</sup>

## 2008

In 2008, the American Bar Association (ABA) passed a landmark resolution calling on all levels of government “to establish public entities that are independent of any correctional agency to regularly monitor and report publicly on the conditions in all prisons, jails, and other adult and juvenile correctional facilities operating within their jurisdiction.”<sup>126</sup> The ABA Resolution outlined five reasons why correctional institutions should become more transparent and accountable to the American public:<sup>127</sup>

1. Oversight can allow correctional administrators to identify and remedy operational problems, which can create facilities that are “safer; operated in conformance with the Constitution, other laws, and best correctional practices; and equipped to prepare inmates for a successful reentry into society.”<sup>128</sup>
2. Routine monitors who are independent of correctional agencies can enlighten staff members about overlooked facility problems and prevent those problems from developing into major issues.
3. External oversight is a more cost-effective and proactive way to address conditions of confinement issues than traditional legal strategies.

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<sup>121</sup> *Id.* at 79.

<sup>122</sup> *Id.* at 82.

<sup>123</sup> *Id.* at 84.

<sup>124</sup> *Id.* at 88–92.

<sup>125</sup> *Id.* at 95–99.

<sup>126</sup> American Bar Association, Criminal Justice Section, *Key Requirements for the Effective Monitoring of Correctional and Detention Facilities 1* (Aug. 2008), <http://www.ongov.net/jcoc/documents/ABAResolutionandOversight104b.Final.2008.pdf> [hereinafter ABA Resolution].

<sup>127</sup> *Id.* at 4.

<sup>128</sup> *Id.* at 4.

4. Oversight findings can lead to an increase in funding for correctional agencies in need of reform.
5. Monitoring efforts can reveal information about correctional operations and ultimately allow leaders to make better-informed decisions about justice policies within their jurisdictions.

The ABA Resolution also included 20 “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities.” These requirements include the need for true administrative, financial, and political independence from the correctional agency under review; a call for unfettered access to correctional facilities, records, and people who live and work in the facilities; and mandates for unannounced monitoring visits, public reporting, and stakeholder cooperation throughout the oversight process.<sup>129</sup>

In the years since its passage, the ABA Resolution has become a guiding force in efforts to create oversight mechanisms around the country, and a touchstone to assess the quality of any oversight structures that do exist.

## 2010

The year 2010 has been called the moment “when prison oversight finally found a place on the national corrections agenda.”<sup>130</sup> That year, two key developments made conditions of confinement issues in general (and prison oversight more specifically) a priority issue for people working on criminal justice reform, and provided reformers with the resources they needed to help shape the future of correctional oversight.

First, the ABA established its Subcommittee on the Implementation of the ABA’s Resolution on Effective Correctional Oversight. The Subcommittee, which I co-chair along with Pace Law School professor and prisoners’ rights expert Michael Mushlin, was tasked with designing an action plan that would:<sup>131</sup>

1. Increase awareness of the ABA’s 2008 resolution on expanding correctional oversight;
2. Identify states and local jurisdictions that “hold promise for expanded oversight”<sup>132</sup> in order to focus limited resources on these areas; and
3. Promote the ABA as a resource and guide for diverse groups that have a stake in correctional oversight.

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<sup>129</sup> *Id.* at 2–3.

<sup>130</sup> Deitch & Mushlin, *Let the Sunshine In*, *supra* note 51, at 243.

<sup>131</sup> *Id.* at 247.

<sup>132</sup> *Id.*

Also in 2010, the Pace Law Review published a 545-page sourcebook of articles dedicated solely to the topic of correctional oversight.<sup>133</sup> The sourcebook detailed the research and progress that followed the *Opening Up a Closed World* conference at The University of Texas in 2006. The volume included the following components:

- Nineteen diverse articles by leading scholars, correctional administrators, and oversight practitioners on relevant topics, such as the necessary features of an external monitoring body,<sup>134</sup> the impacts of the Prison Litigation Reform Act on court oversight,<sup>135</sup> and detailed descriptions of existing international<sup>136</sup> and domestic<sup>137</sup> oversight models;
- An annotated bibliography of helpful resources related to correctional oversight;<sup>138</sup> and
- A complete inventory of all existing prison oversight mechanisms in the United States.<sup>139</sup>

## 2011

In 2011, the ABA continued to advocate for improved conditions of confinement within the nation's prisons and jails. The ABA approved an updated version of its *Standards on the Treatment of Prisoners* in 2010 after six years in the drafting process, and it formally published those standards in 2011.<sup>140</sup> The standards replaced the ABA's 1981 *Criminal Justice Standards on the Legal Status of Prisoners* in order to better reflect the changed correctional landscape and high incarceration rates of the 21<sup>st</sup> century. The new document included ten categories of standards:<sup>141</sup>

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<sup>133</sup> For a listing of the articles included in the sourcebook, see *Opening Up a Closed World: A Sourcebook on Prison Oversight*, 30 PACE L. REV., no. 5, masthead (2010). <http://digitalcommons.pace.edu/plr/vol30/iss5/>.

<sup>134</sup> Deitch, *Distinguishing the Various Functions*, *supra* note 38.

<sup>135</sup> Alexander, *supra* note 108.

<sup>136</sup> Owers, *supra* note 51, at 1535–47; Coyle, *supra* note 54, at 1503–11; see also Howard Sapers & Ivan Zinger, *The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections*, 30 PACE L. REV. 1512–28 (2010); Vivien Stern, *The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight*, 30 PACE L. REV. 1529 (2010); Silvia Casale, *The Importance of Dialogue and Cooperation in Prison Oversight*, 30 PACE L. REV. 1490 (2010).

<sup>137</sup> John M. Brickman, *The Role of Civilian Organizations with Prison Access and Citizens Members—The New York Experience*, 30 PACE L. REV. 1562 (2010); Jack Beck, *Role of the Correctional Association of New York in a New Paradigm of Prison Monitoring*, 30 PACE L. REV. 1572 (2010); Richard T. Wolf, *Reflections on a Government Model of Correctional Oversight*, 30 PACE L. REV. 1621 (2010).

<sup>138</sup> Michele Deitch, *Annotated Bibliography on Independent Prison Oversight*, 30 PACE L. REV. 1687–1753 (2010).

<sup>139</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1754.

<sup>140</sup> American Bar Association, *ABA Standards for Criminal Justice Third Edition: Treatment of Prisoners* (2011), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_treatmentprisoners/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/) **Error! Hyperlink reference not valid.**[hereinafter *ABA Standards*]. I served as Reporter for the Standards Task Force from 2004 to 2007.

<sup>141</sup> *Id.*

1. Intake and classification;
2. Conditions of confinement;
3. Rules of conduct and discipline;
4. Personal security;
5. Health care;
6. Personal dignity;
7. Rehabilitation and reintegration;
8. Grievances and access to courts;
9. Administration and staff; and
10. Accountability and oversight.

In the standards on accountability and oversight, the ABA stressed the importance of developing “several layers of accountability, whereby entities internal and external to the correctional agency are responsible for routine monitoring of conditions in prisons, for the investigation and prosecution of allegations of mistreatment of prisoners, and for handling prisoner grievances.”<sup>142</sup>

## 2012

Congress unanimously passed the Prison Rape Elimination Act (PREA) in 2003, mandating the collection of data on the prevalence and experience of rape in prisons and jails across the country. Notably, the act also created the National Prison Rape Elimination Commission (NPREC), a bipartisan commission tasked with developing standards against which correctional facilities can be evaluated and subsequently held accountable for incidences of sexual abuse.<sup>143</sup> In 2009, NPREC proposed a set of draft standards, which, after considerable input from stakeholders, were adopted by the U.S. Department of Justice in 2012 and called the PREA Standards.<sup>144</sup> The standards required, among other provisions, routine audits of prisons and jails to be conducted by independent and qualified professionals to assess facilities’ compliance with the PREA requirements.<sup>145</sup> The standards also required correctional agencies to provide PREA auditors with the broad access that they need to measure facility compliance and to release public reports of relevant findings.<sup>146</sup> The DOJ’s issuance of the PREA Standards in 2012 thus enabled independent PREA audits to begin in corrections facilities across the United

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<sup>142</sup> *Id.* at 229, Part XI: Accountability and Oversight; *see also*, Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1430 (2010).

<sup>143</sup> Prison Rape Elimination Act, NATIONAL PREA RESOURCE CENTER (Apr. 28, 2020), <http://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea>.

<sup>144</sup> Brenda V. Smith, *Promise Amid Peril: PREA’s Efforts to Regulate an End to Prison Rape*, 57 AM. CRIM. L. REV. 1599, 1602–03 (2020); Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2019).

<sup>145</sup> 28 C.F.R. §115.93, 115.402.

<sup>146</sup> 28 C.F.R. §115.401(h), 115.403(f).

States, the first time there has been any requirement of mandatory inspections of all prisons and jails in this country.

That same year, a movement to end solitary confinement as practiced in U.S. prisons also gained ground. In 2012, the American Academy of Child and Adolescent Psychiatry (AACAP) released a statement opposing the use of solitary confinement within juvenile detention facilities.<sup>147</sup> Soon after, a variety of organizations, including the Center for Children's Law and Policy and the Council of Juvenile Correctional Administrators, joined together in a national campaign called Stop Solitary for Kids, which aims to end solitary confinement for all youth detained within juvenile and adult correctional facilities.<sup>148</sup> Growing opposition to isolating incarcerated youth led then-President Obama to ban solitary confinement for youth in federal facilities in 2016.<sup>149</sup>

Similar momentum also developed to end the use of prolonged segregation among incarcerated adults. In 2012, the Center for Constitutional Rights filed the *Ashker v. Governor of California* lawsuit on behalf of people who were confined in isolation for over a decade.<sup>150</sup> As the lawsuit proceeded, over 30,000 incarcerated people across California launched a hunger strike in 2013 to protest solitary confinement and other poor conditions within state prisons.<sup>151</sup> Attention to and coverage of solitary confinement issues continued to rise, and in 2014 alone, ten states passed reforms to address these problems.<sup>152</sup> Finally, in 2015, *Ashker* ended with a settlement that officially ended the indeterminate use of solitary confinement in California prisons and thus required the release of many isolated individuals into the general prison population.<sup>153</sup> Beyond California, movements against solitary confinement also developed at the federal level, when then-President Obama expressed public opposition to the practice as an unnecessarily harmful condition of confinement.<sup>154</sup> Supreme Court Justices also started weighing in on this practice

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<sup>147</sup> Juvenile Justice Reform Committee, *Policy Statement: Solitary Confinement of Juvenile Offenders*, AMER. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY (July 8, 2012), [http://www.aacap.org/aacap/policy\\_statements/2012/solitary\\_confinement\\_of\\_juvenile\\_offenders.aspx](http://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.aspx).

<sup>148</sup> *Mission*, STOP SOLITARY FOR KIDS (May 1, 2020), <http://www.stopsolitaryforkids.org/mission/>.

<sup>149</sup> Michael D. Shear, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons*, N.Y. TIMES (Jan 25, 2016), <http://www.nytimes.com/2016/01/26/us/politics/obama-bans-solitary-confinement-of-juveniles-in-federal-prisons.html>.

<sup>150</sup> *Ashker v. Governor of California*, CTR. FOR CONSTITUTIONAL RIGHTS (May 1, 2020), <http://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown>.

<sup>151</sup> Matt Ford, *The Beginning of the End for Solitary Confinement?*, ATLANTIC (Sept. 2, 2015), <http://www.theatlantic.com/politics/archive/2015/09/scaling-back-solitary/403441/>.

<sup>152</sup> *Id.*

<sup>153</sup> *See generally*, *Summary of Ashker v. Governor of California*, CTR. FOR CONSTITUTIONAL RIGHTS (July 8, 2020), <http://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf>. Note that some aspects of the settlement and its implementation are still being challenged on appeal.

<sup>154</sup> *Remarks by the President at the NAACP Conference*, WHITE HOUSE OFF. OF THE PRESS SECRETARY (July 8, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

beginning in 2015, although there have been no cases before them presenting this precise issue: Justice Anthony Kennedy was first to denounce the practice of solitary confinement,<sup>155</sup> followed by Justice Stephen Breyer<sup>156</sup> and Justice Sonia Sotomayor.<sup>157</sup>

### 2013

The lack of accountability in the justice system began to gain national prominence with the launch of the Black Lives Matter (BLM) Movement in 2013 following a series of high-profile deaths of African-Americans at the hands of law enforcement officers.<sup>158</sup> Since its creation, BLM leaders have demanded greater transparency and accountability among various actors in the justice process, particularly law enforcement officers.<sup>159</sup> In the years since the movement launched, BLM activists have also actively championed reforms focused on prison and jail conditions and efforts to reduce mass incarceration.<sup>160</sup> Local organizations affiliated with BLM have become increasingly active in legislative advocacy and have helped keep media attention focused on racial inequities and other problems in the operations of the criminal justice system. These issues have taken on even greater urgency in the wake of the 2020 protests following the murder of George Floyd by police officers.<sup>161</sup>

### 2014

The establishment in 2014 of The Marshall Project, a media outlet focused exclusively on criminal justice issues, was a landmark development.<sup>162</sup> In short order, The Marshall Project cemented its reputation as a credible source of high-quality investigative journalism, and it produced countless

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<sup>155</sup> *Davis v. Ayala*, 576 U.S. 257, 287–90 (2015) (Kennedy, J. concurring); see also Matt Ford, *Justice Kennedy Denounces Solitary Confinement*, ATLANTIC (June 18, 2015), <http://www.theatlantic.com/politics/archive/2015/06/kalief-browder-justice-kennedy-solitary-confinement/396320/>.

<sup>156</sup> See *Smith v. Ryan*, 581 U.S. \_\_\_\_, 137 S.Ct. 1283, 1283–84 (2017) (Statement of J. Breyer respecting the denial of certiorari).

<sup>157</sup> See *Apodaca v. Raemisch*, 586 U.S. \_\_\_\_, 139 S.Ct. 5, 8–10 (2018) (Statement of J. Sotomayor respecting the denial of certiorari).

<sup>158</sup> *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited July 28, 2020).

<sup>159</sup> *Solutions*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/solutions/#solutionsoverview> (last visited July 28, 2020). (Campaign Zero is the police reform campaign associated with the Black Lives Matter Movement).

<sup>160</sup> See, e.g., About Measure R, VOTE YES ON R, <https://voteyesonr.org/about> (last visited July 28, 2020). (Patrisse Cullors, one of the original founders of BLM, launched a campaign in favor of a ballot measure called Reform LA Jails, which would enhance civilian oversight of the Los Angeles County Jail by allowing for stronger investigations of staff misconduct and which advocates for reducing the jail population. According to the campaign's website, the ballot measure grew out of "a decade of organizing to stop Sheriff violence and abuse in the jails.")

<sup>161</sup> Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES, July 10, 2020, at <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

<sup>162</sup> *Mission Statement*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/about> (last visited July 28, 2020).

articles in the coming years that shone a harsh light on systemic problems in our nation's prisons and jails. The steady drumbeat of media attention from Marshall Project writers, as well as from journalists associated with other news outlets, raised awareness of conditions behind bars for both policymakers and the public and ensured that these issues remained high on the public agenda.

## 2015

In July 2015, Sandra Bland's tragic death in custody brought national attention to problem of jail suicide and to the need for improved oversight of mental health screenings and services in county jails. In rural Waller County, Texas, 28-year-old Bland was pulled over for failing to use her turn signal.<sup>163</sup> Bland was arrested and jailed following a confrontation with the state trooper. Unable to post bond, she spent three days in the county jail facility before she was found dead in her cell by apparent suicide.<sup>164</sup> After her death, jail employees were faulted for failing to follow proper screening and monitoring procedures, even though Bland reported on her intake form that she was "very depressed" and had previously attempted suicide.<sup>165</sup> Bland's arrest and death demonstrated the lack of transparency and accountability not only among law enforcement officials but also within prisons and jails in Texas and around the country.

Legislators in New York also shifted their focus to correctional oversight issues, with a great deal of fanfare. In December 2015, the New York State Assembly Standing Committee on Correction held a public hearing to discuss internal and external oversight options in the wake of a highly publicized escape from an upstate state prison and the allegations of staff brutality that followed the escape.<sup>166</sup> At the hearing, Committee Chairman Daniel O'Donnell and his colleagues listened to experts testify on the importance of establishing an independent governmental monitoring body for New York State prisons.<sup>167</sup> Committee members heard accounts from individuals involved in existing oversight agencies, such as Indiana's Correctional Ombudsman and

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<sup>163</sup> Maurice Chammah, *Sandra Bland, One Year Later*, THE MARSHALL PROJECT (updated Sept. 15, 2016), <https://www.themarshallproject.org/2016/07/12/sandra-bland-one-year-later#.9Sb7uWjeG>.

<sup>164</sup> Sophia Bollag, *Waller County Releases Sandra Bland Autopsy Report*, TEX. TRIBUNE (July 24, 2015), <https://www.texastribune.org/2015/07/24/officials-release-sandra-bland-autopsy-report/>. Bland's family has contested the coroner's finding that she committed suicide. Mitch Smith, *Grand Jury Declines to Indict Anyone in Death of Sandra Bland*, N.Y. TIMES (Dec. 21, 2015), <https://www.ny-times.com/2015/12/22/us/grand-jury-finds-no-felony-committed-by-jailers-in-death-of-sandra-bland.html>.

<sup>165</sup> Chammah, *Sandra Bland*, *supra* note 163.

<sup>166</sup> Assembly Standing Committee on Correction: Notice of Public Hearing, N.Y. State Assembly (Nov. 17, 2015), <http://assembly.state.ny.us/comm/Correct/20151030/index.pdf>.

<sup>167</sup> Pat Bradley, *Corrections Committee Holds Hearing on Prison Oversight*, WAMC, December 2, 2015, <https://www.wamc.org/post/corrections-committee-holds-hearing-prison-oversight>; *see also* Matthew Hamilton, *NY calls for more prison oversight amid homicides, escapes*, TIMES UNION, December 3, 2015, <https://www.corrections1.com/facility-design-and-operation/articles/ny-calls-for-more-prison-oversight-amid-homicides-escapes-DQI6KPWPoHZmuDiU/>.

an official from the British Prisons Ombudsman's Office.<sup>168</sup> Experts provided evidence of the need for external correctional oversight as well as advice for how to effectively structure that oversight.<sup>169</sup>

Weeks after the Assembly's hearing, Michael Mushlin and I published an editorial in the *New York Times* stressing the critical importance of oversight in correctional systems like New York's where beatings, prolonged solitary confinement, and other inhumane practices abound.<sup>170</sup> Committee Chairman O'Donnell promptly expressed his support for the editorial and publicly demanded that New York Governor Andrew Cuomo create and fund an independent oversight agency in 2016.<sup>171</sup> Chairman O'Donnell also filed legislation that would have created such a body; however, the measure did not pass during New York's 2016 legislative session.

## 2016

In 2016, the Vera Institute of Justice initiated the Reimagining Prison Project, an eighteen-month initiative with the objective of bringing together correctional officials, incarcerated people, policymakers, and the general public in order to transform U.S. prison and jail systems.<sup>172</sup> The focus of the project was improving conditions of confinement, increasing transparency and oversight, and drawing lessons from international corrections models to learn how to emphasize the principle of respect for human dignity.<sup>173</sup> In conjunction with this project, numerous corrections officials, policy makers, journalists, and others from across the country had the opportunity to visit Scandinavian and European prisons, an experience that continues to bear fruit in terms of the officials' efforts to implement similar programs in their home states.<sup>174</sup>

Also in 2016, the National Association for Civilian Oversight of Law Enforcement (NACOLE), an organization focused primarily on police oversight, decided to prominently showcase prison and jail oversight issues in a day-long track at its five-day annual conference.<sup>175</sup> During its previous conference, NACOLE leaders included a panel discussion on the need for

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<sup>168</sup> Pat Bradley, *Corrections Committee Holds Hearing on Prison Oversight*, WAMC, December 2, 2015, <https://www.wamc.org/post/corrections-committee-holds-hearing-prison-oversight>

<sup>169</sup> See, e.g., Written Testimony on Correctional Oversight of the NYS DOCCS: Hearing Before the New York State Assembly Standing Committee on Correction, 2015-2016 Leg. (Dec. 2, 2015) (statement of Michael B. Mushlin, Professor, Pace University School of Law), <http://digitalcommons.pace.edu/lawfaculty/1009/>

<sup>170</sup> *What's Going On in Our Prisons?*, *supra* note 71.

<sup>171</sup> Daniel O'Donnell, *Oversight for Prisons*, N.Y. TIMES A18 (Jan. 9, 2016), <http://www.nytimes.com/2016/01/09/opinion/oversight-for-new-york-prisons.html>.

<sup>172</sup> RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES, & NICHOLAS TURNER, *REIMAGINING PRISON* (Vera Inst. of Justice ed., 2018).

<sup>173</sup> See generally DELANEY ET AL., *supra* note 172, at "Director's Note."

<sup>174</sup> See *supra* notes 27-34 and accompanying text.

<sup>175</sup> Nat'l Ass'n for Civilian Oversight of Law EnFt, *Confronting Systemic Injustice: 22d Annual NACOLE Conference* (Sept. 9, 2016), [https://www.nacole.org/2016\\_conference\\_schedule](https://www.nacole.org/2016_conference_schedule).

increased correctional oversight in the United States. Interest following this panel led to the development of a network of individuals dedicated to expanding transparency and accountability within the U.S. corrections system. The practice of including a day-long track at the NACOLE conference focused on correctional oversight has continued since 2016, which has led to growing awareness and interest in this issue among conference attendees.

Finally, in 2016, I organized and chaired a two-day convening on prison oversight at the University of Texas that brought together fifty criminal justice experts for a deep-dive discussion and planning session. Called “Out of the Shadows: The Promise of Independent Prison Oversight,” the event was intended to tap into the national interest in criminal justice reform, law enforcement accountability, and conditions of confinement. The goal was increasing participant awareness of effective correctional oversight mechanisms and how such oversight is essential for the protection and humane treatment of people in custody as well as for more effective re-entry outcomes.<sup>176</sup> The event was geared towards practical outcomes, and many participants promised to pursue efforts to create oversight mechanisms in their home states.

### **2017 – 2020**

Interest in independent correctional oversight really began booming in 2017 and beyond. Advocates in a number of states made it a priority to develop legislative proposals to establish new oversight bodies, and while some of these proposals failed to gain much ground, others were remarkably successful. Some of these proposals followed an in-depth report by a task force or legislative committee that highlighted the importance of independent oversight. As will be discussed in more detail in Part IV, new statewide prison and jail oversight mechanisms were created in Washington State, New Jersey, Hawaii, Minnesota, and Massachusetts.<sup>177</sup> At the same time, citizens’ concerns about conditions in local jails led to the creation of some county-level oversight structures as well.<sup>178</sup>

Public attention to prison and jail issues also ramped up significantly during this period, as a result of the horrific conditions revealed in Alabama’s and Mississippi’s prisons, the national prison strike, the suicide in jail of financier Jeffrey Epstein, Congress’s passage of the First Step Act, and the COVID crisis, among other issues.<sup>179</sup> Suddenly, the dangers inherent in correctional facilities were front-page news and impossible to ignore. Ordinary citizens began calling for greater transparency and demanding accountability

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<sup>176</sup> *LBJ Professor Michele Deitch Hosts Convening of Criminal Justice Experts in Austin*, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, (Nov. 21, 2016), <https://ljb.utexas.edu/lbj-professor-michele-deitch-hosts-convening-criminal-justice-experts-austin>.

<sup>177</sup> See *infra* notes 197–205 and accompanying text.

<sup>178</sup> See *infra* notes 222–226 and accompanying text.

<sup>179</sup> See *supra* notes 3–26 and accompanying text.

from public officials. Criminal justice advocacy groups began harnessing this public sentiment and helped citizens to organize their support for independent oversight. As one example, the national organization Families Against Mandatory Minimums (FAMM) held a workshop in 2019 that brought together volunteer advocates from numerous states to learn from experts and to coordinate their efforts. That workshop included a Congressional briefing about the need for independent oversight of the federal prison system.<sup>180</sup>

Significantly, in 2019, philanthropists Laura and John Arnold decided to commit very substantial funding—\$17 million—to organizations working to improve prison and jail conditions and to bring more transparency and accountability to these correctional systems.<sup>181</sup> That subject area had never before been a high priority issue for funders, and so this investment confirmed the urgency and need for reforms in this area and galvanized the interest of numerous criminal justice reform organizations in what happens to people behind bars.

Lastly, in early 2020, just before the COVID crisis hit, a symposium co-sponsored by the NACOLE and the University of Texas provided the opportunity for scholars and oversight practitioners to discuss research relevant to corrections oversight. The day-long event (“New Frontiers in Independent Oversight of Jails, Prisons, and the Police”) drew an audience of about 150 participants from around the country, further elevating the importance of the issue and helping spread awareness of how corrections monitoring and law enforcement oversight share common goals and challenges. This article was originally presented at that symposium.

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<sup>180</sup> *FAMM, Michele Deitch, and Family Advocates to Host Briefing on Capitol Hill to Discuss Need for Independent Oversight of Federal Prisons*, FAMILIES AGAINST MANDATORY MINIMUMS (Dec. 4, 2019), <https://famm.org/famm-michele-deitch-and-family-advocates-to-host-briefing-on-capitol-hill-to-discuss-the-need-for-independent-oversight-of-federal-prisons/>.

<sup>181</sup> Diana D’Abruzzo, *Shining a Light Inside Prisons*, ARNOLD VENTURES (May 15, 2019), <https://www.arnoldventures.org/stories/shining-a-light-inside-prisons/>. In the interest of full disclosure, I have received grant funding from Arnold Ventures to conduct additional research and writing on correctional oversight, though not for the writing of this article.

PART IV: THE CURRENT RESEARCH PROJECT: ASSESSING THE STATE  
OF PRISON AND JAIL OVERSIGHT IN THE UNITED STATES

A. *Project Purpose*

Ten years after I published an inventory of correctional oversight mechanisms in the United States,<sup>182</sup> the time is ripe to see how the landscape is changing with respect to these oversight bodies. Has greater awareness of troubling conditions in prisons and jails and the need for independent oversight, as described in the preceding pages, translated into the establishment of more oversight entities? Have efforts been made to strengthen the oversight mechanisms that exist? And to what degree do the entities included in the 2010 inventory actually serve the monitoring and inspection function described by the ABA Resolution on Independent Correctional Oversight?<sup>183</sup>

The 2010 inventory aimed to (1) provide a baseline understanding about the extent to which independent correctional oversight bodies exist in the United States and (2) create a reference guide of various oversight models for interested policymakers and advocates to use as they develop oversight bodies in their own jurisdictions.<sup>184</sup> The focus was almost entirely on statewide oversight mechanisms, not those operating at the local level. Notably, because the goal was to establish a baseline, I used very broad and generous criteria for inclusion; most of the entities mentioned in that report would not qualify as the type of oversight envisioned by the ABA Resolution. Even with the expansive criteria used, the report revealed enormous gaps in correctional oversight systems in each state. As the 2010 report concluded, “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. Even more elusive are forms of oversight that seek to promote both public transparency of correctional institutions and accountability for the protection of human rights.”<sup>185</sup> The question for this article is whether this conclusion still holds.

This research project seeks to assess the current state of independent oversight bodies in the United States with a specific focus on those entities designed and actively working to monitor conditions of confinement, prevent ill-treatment, and respond to the concerns of people in custody. The objectives of this multi-year project are to: (1) gather detailed and updated information about each oversight body in order to help provide guidance to other jurisdictions, (2) compile information about local oversight entities that had not been incorporated into the 2010 study, (3) identify newly created

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<sup>182</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1754.

<sup>183</sup> See *supra* notes 126–129 and accompanying text.

<sup>184</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1755.

<sup>185</sup> *Id.* at 1762.

oversight entities, and (4) use this information to develop a deeper understanding about correctional oversight in the United States

To make the extensive information collected about each oversight body more accessible to all stakeholders, and to allow for ongoing updates, detailed descriptions of each entity are not included in this article; rather, that information will be made available online at a later time. This article delves primarily into the third and fourth aspects of this project: it is intended to share information about recent developments and key findings from an analysis of the information gathered to date.

### *B. Research Methodology*

Over the course of five years beginning in 2015, I worked with teams of my graduate students in public policy and law at the University of Texas at Austin to research the various correctional oversight bodies in the United States. As a starting point, our research team used the 2010 inventory, contacting each of the organizations listed in that report and gathering updated and more detailed information about them. Additionally, team members read academic literature and scoured media reports to find information on any efforts to increase or decrease correctional oversight in each state, and they contacted local advocates, correctional administrators, legislative staff, government officials, and other relevant stakeholders wherever possible. The primary focus of our research was on statewide oversight bodies for both prisons and jails, but we also looked for and included examples of local jail oversight mechanisms where we found them.

For each oversight entity, our research team conducted interviews, did statutory research, followed news coverage, and reviewed the entity's websites and publications to develop detailed descriptions of each oversight agency's authority, history, activities, staffing, budget, accomplishments, and challenges. Using the ABA Resolution on Independent Correctional Oversight as a rubric,<sup>186</sup> team members collected information about the agencies' independence, access to correctional facilities, duty to report its findings, available resources, relationships with correctional administrators, and other key issues stressed by oversight experts.

As with the prior research effort in 2010, locating independent, external oversight bodies in each state was difficult because no standard entity or organization holds the authority to monitor correctional facilities in the United States.<sup>187</sup> Rather, diverse entities, such as state agencies, nonprofit organizations, legislative committees, and advocacy groups, may perform this function. Moreover, oversight can occur at either a statewide or a local level. In contrast, European countries must designate a particular body as a National

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<sup>186</sup> ABA Resolution, *supra* note 126.

<sup>187</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1756.

Preventive Mechanism (also known as an NPM),<sup>188</sup> making it much easier to identify the organization that holds the authority to monitor prison conditions. While our research team aimed for accuracy and comprehensiveness in our work, it is possible that some oversight entities were overlooked.

### *C. Defining the Criteria for Inclusion*

Our research team used four main criteria for determining whether an oversight entity would be “counted” for purposes of our findings:

1. It is independent from the correctional agency it oversees;
2. Its primary function is to monitor conditions of confinement, prevent ill-treatment, or investigate complaints of incarcerated people;
3. It has a formal or informal right of access into correctional facilities to accomplish that function; and
4. It is actively engaged in this work.

#### *1. Independence.*

“Independence” refers to an organization’s formal separation from the correctional agency for which it performs an oversight function. This formal separation means that the oversight body:<sup>189</sup>

- Does not report solely to the correctional agency or its board;
- Does not receive funding directly from the correctional agency;
- Is not staffed by employees of the correctional agency;
- Is not an appointed board with the ultimate responsibility for decision-making about prison agency operations and the appointments of correctional administrators; and
- Is not included within the correctional agency’s organizational structure.

Based on this definition of independence, oversight bodies included in our findings do not serve as a correctional agency’s internal audit, management, or investigative arm. Rather, bodies included in this research project are completely external to the correctional agencies that they oversee.<sup>190</sup>

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<sup>188</sup> See *supra* notes 73–77 and accompanying text.

<sup>189</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1756–57.

<sup>190</sup> Note that there are several states in which state-level Departments of Correction (DOC) house units that monitor county-level jail systems. The research team included these specialized DOC units only if the DOC is not responsible for operation of the jail system. If a state instead operates a unified correctional system in which both jails and prisons are managed by the same state agency, the DOC’s jail monitoring unit was excluded from study because of a lack of independence.

## 2. *Function.*

The functions and forms of oversight vary across counties, states, and nations. And, indeed, I have argued elsewhere that oversight should be multi-layered, with multiple organizations serving different functions of oversight.<sup>191</sup> For this project, though, our interest is in permanent bodies whose work focuses on “the conditions faced by the prisoners, the state of facilities, the quality of services provided to the inmates, or the physical operations of the institutions.”<sup>192</sup> Thus, the following bodies were *not* included as correctional oversight entities for purposes of our findings, though we fully recognize that each of these types of entities plays a critical role in the overall effort to improve correctional facilities:<sup>193</sup>

- Bodies concerned only with population management or prison construction issues;
- Legislative committees that are statutorily responsible for overseeing state prisons but that only make occasional informational visits to those facilities;
- General government auditing bodies that conduct infrequent performance audits, those that do not prioritize conditions of confinement issues, and those that focus primarily on prison or jail management issues and financial information;
- Court-appointed monitors (such as the independent monitor appointed to oversee jail facilities on Rikers Island in 2015<sup>194</sup>) because these practitioners conduct their oversight responsibilities temporarily; and
- Protection and Advocacy (P&A) organizations, which have federal statutory authority to ensure the protection of people with physical or mental disabilities, including those in prisons and jails, because monitoring conditions in correctional facilities is not the primary function that they serve, their role does not extend to all people in custody, and only some P&A organizations make this population a priority.<sup>195</sup>

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<sup>191</sup> Deitch, *Distinguishing the Various Functions*, *supra* note 38, at 1444.

<sup>192</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1757.

<sup>193</sup> *Id.* at 1757–58.

<sup>194</sup> Rebecca Davis O’Brien, *Independent Monitor to Oversee Rikers Island*, WALL ST. J. (June 22, 2015), <http://www.wsj.com/articles/independent-monitor-to-oversee-rikers-island-1435010866>.

<sup>195</sup> While we did not include it in our analysis here, one notable example of a P&A organization that has made it a high priority to monitor conditions in prisons and jails is Disability Rights Washington. That organization has established the AVID Project in order to focus on improving conditions, treatment, services, and reentry for people with disabilities who are incarcerated in the state’s jails and prisons. See *Amplifying Voices of Inmates with Disabilities (AVID)*, DISABILITY RTS. WASH., <https://www.disabilityrightswa.org/programs/avid/> (last visited July 4, 2020).

### 3. *Access.*

Oversight agencies included in our analysis are those that either have a formal right of access into correctional facilities within their jurisdictions or have been granted an informal right of access through long-term arrangements between the oversight body and the corrections agency. Ideally, this access would include the ability to enter correctional facilities unannounced, interview inmates and staff confidentially, and review agency documents without completing an open records request. However, agencies with more restricted access than the unfettered conditions described above were also included in this research project. For example, we did not exclude oversight bodies simply because the oversight practitioners were required to announce their planned visits to correctional facilities. Entities that were *not* included in this research effort include:<sup>196</sup>

- those without statutory or routine access to correctional facilities;
- those in which staff members may visit incarcerated individuals only on a one-on-one basis, such as legal offices, human rights organizations, or advocacy groups; and
- those that have access only in order to operate programs inside a corrections facility.

### 4. *Active.*

We included in our analysis only those organizations that currently engage in monitoring or investigation activities and where this aspect of their work is a high priority. We excluded those entities that may have statutory authority to conduct this kind of work but do not take advantage of that authority for any of a number of reasons—including, for example, a lack of resources or a failure to appoint key staff or board members. The lack of any public indication about the oversight work done by an entity, such as even a rudimentary website or a news story, also served as a red flag that a potential entity did not serve the transparency function we would expect to see from an oversight body.

### 5. *Exceptions.*

Throughout the research process, we attempted to include only those agencies that met the independence, function, access, and activity criteria described above. However, on occasion our research team did identify entities that failed to meet the designated criteria but for various reasons warranted inclusion in our analysis. Sometimes the square pegs really did manage to fit in the round holes.

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<sup>196</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1758.

#### D. Research Findings

While space constraints do not permit a detailed description here of each oversight entity our team researched, this section presents a set of findings about recent developments in this arena and the nature and extent of independent correctional oversight in the United States. In addition, I offer some analytic frameworks for thinking about these issues moving forward.

***Finding 1: A significant number of new oversight bodies have been established or strengthened since the 2010 inventory.***

The ABA's call for every state and county to establish an independent oversight body to monitor conditions of confinement seems to have been taken to heart in a number of jurisdictions. While many advocates' efforts to create such entities have not yet borne fruit, there is clearly growing momentum around this issue, as indicated by recent successes in several states and localities. Just in the last few years, policymakers have established new or significantly revamped prison oversight bodies in New Jersey (2019),<sup>197</sup> Hawaii (2019),<sup>198</sup> Minnesota (2019),<sup>199</sup> Washington State (2018),<sup>200</sup> Massachusetts (2018),<sup>201</sup> and Nebraska (2015).<sup>202</sup> Additionally, the New York State Legislature passed a bill in 2020 that substantially strengthened the authority of New York's prison oversight body; an amended version of the bill was signed by Governor Cuomo in December 2020.<sup>203</sup> See Table 1, *infra*, for a complete list of newly created or substantially restructured oversight mechanisms.

Notably, several of these new entities were designed with the ABA's guidelines for effective oversight in mind. The enabling statutes, especially in New Jersey and Washington State, do a good job of incorporating provisions that give the oversight body a right of access to the facilities, the duty to conduct monitoring activities as well as investigate complaints, and a mandate to issue reports. The statutes also include other key elements that

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<sup>197</sup> A.B. 3979, 218th Leg., Reg. Sess. (N.J. 2019) (establishing the Office of the Corrections Ombudsman).

<sup>198</sup> H.B. 1552, 30th Leg., Reg. Sess. (Haw. 2019) (establishing the Correctional System Oversight Commission).

<sup>199</sup> Minn. St. § 241.90 (2019) (re-establishing the Office of the Ombudsman for the Department of Corrections).

<sup>200</sup> H.B. 1889, 65th Legislature, Reg. Sess. (Wash. 2018) (establishing the Office of Corrections Ombuds).

<sup>201</sup> Mass. Gen. Laws Ann. ch. 127, § 39G (establishing the Restrictive Housing Oversight Committee). Importantly, this new entity in Massachusetts has a limited focus and is interested solely in issues related to the use of solitary confinement in prison.

<sup>202</sup> Neb. Rev. Stat. § 47-904 (2015) (establishing the Nebraska Office of the Inspector General).

<sup>203</sup> Assembly Bill 10194, <https://www.nysenate.gov/legislation/bills/2019/a10194>; See also Gabriel Pietrorazio, *DEBRIEF REWIND: Inside the prison oversight bill that awaits Cuomo's signature (podcast)*, August 20, 2020, <https://fingerlakes1.com/2020/08/20/debrief-rewind-inside-the-prison-oversight-bill-that-awaits-cuomos-signature-podcast/>.

enhance transparency and accountability for the correctional agencies they oversee.<sup>204</sup>

Interestingly, it seems that the Ombuds model of oversight is gaining in popularity, with Washington State, New Jersey, and Minnesota<sup>205</sup> all adopting this type of structure for their new prison oversight bodies. Moreover, similarly designed legislation is under consideration in several other states, including Texas, Mississippi, and Arizona. Some of the recent interest in Ombuds legislation can be traced back to the establishment of the juvenile Office of the Independent Ombudsman in Texas in 2007.<sup>206</sup> This office received a great deal of publicity when it was established in the wake of a major scandal that engulfed the Texas juvenile justice agency, when legislators wanted to ensure the protection of the youth in custody.<sup>207</sup> While the traditional Ombuds model, which originated in Scandinavia, is designed primarily to investigate complaints,<sup>208</sup> the correctional Ombudsman entities that have been established in the United States in recent years tend to include the responsibilities to both conduct routine monitoring of correctional facilities and review complaints from people in custody and their families.<sup>209</sup> The name of an oversight organization is not always the best indication of the work that it does; it is critical to look at its activities and functions. Most new prison oversight bodies, regardless of their names, seem to have this hybrid set of responsibilities involving both routine monitoring and complaints investigation.

There have also been three new statewide *jail* oversight bodies established in the last decade. California created the independent Board of State and Community Corrections (BSCC) in 2012 to regulate county jails across the state (replacing a previous statewide jail oversight body called the Corrections Standards Authority, which was part of the California state prison agency).<sup>210</sup> Also, the Minnesota Office of the Ombudsman, mentioned

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<sup>204</sup> See *Law Signed That Establishes Oversight of Prisons and Helps Incarcerated Parents Maintain Family Bonds*, ACLU—NEW JERSEY (Jan. 9, 2020), <https://www.aclu-nj.org/news/2020/01/09/law-signed-establishes-oversight-prisons-and-helps-incarcera> (press release highlighting several of these critical features); see also *About Us*, OFF. OF THE CORRECTION OMBUDSMAN, <https://oco.wa.gov/about-us> (last visited Jul. 5, 2019) (emphasizing oversight roles and responsibilities).

<sup>205</sup> Minnesota, in fact, had one of the earliest and most acclaimed correctional ombudsman offices, originally established in 1972. Richard Fulmer, *The Prison Ombudsman*, 55 SOC. SERV. REVIEW 300, 307 (1981). The Minnesota Legislature eliminated the office in 2003, however. Minn. Sess. Laws, 2003 Leg., 1st Spec. Sess., Ch. 2, Art. 5 § 1. The office was re-established in 2019. Minn. Sess. Laws, 2019 Leg., 1st Spec. Sess., Ch. 5, Art. 3 § 3.

<sup>206</sup> S.B. 103, § 57, 80th Leg., Reg. Session (Tex. 2007).

<sup>207</sup> Ralph Blumenthal, *Civil Liberties Advocate Named Ombudsman for Texas Youth*, N.Y. TIMES (May 11, 2007), <https://www.nytimes.com/2007/05/11/us/11youth.html>.

<sup>208</sup> Indeed, most early examples of correctional ombudsman offices in the U.S. similarly served solely as vehicles for addressing complaints, though some of these offices did have onsite access to the facilities. See generally Fulmer, *supra* note 205.

<sup>209</sup> Mariel Dempster, Katherine Gross, and Bethany Offer, *Recent Developments in State and Local Correctional Oversight* 10 (Mar. 2020) (unpublished issue brief, Lyndon B. Johnson School of Public Affairs) (on file with author).

<sup>210</sup> S.B. 92, § 6024, 2011–12 Leg., Reg. Sess. (Cal. 2011). California Governor Gavin Newsom has announced that he intends to further strengthen the BSCC in the coming legislative session. Jason Pohl,

earlier, will have responsibility for overseeing complaints from people in jail custody across the state, in addition to its prison oversight duties. And Hawaii's new Oversight Commission will also provide oversight of jails, since Hawaii has a unified system where both prisons and jails are operated by the same state agency.

Beyond this welcome expansion of prison and jail oversight entities at the *statewide* level, there has also been a striking number of *local* jail oversight entities established in recent years. Unlike statewide jail oversight entities, these county-level bodies are primarily responsible for monitoring conditions in specific county-operated jail facilities, though in some cases they also have responsibility for monitoring the sheriff's patrol function.

Of particular note are the following recently established local jail oversight bodies: the Los Angeles Office of the Inspector General (2014) and its partner entity, the Los Angeles Sheriff's Civilian Oversight Commission (2016);<sup>211</sup> the Onondaga County (New York) Justice Center Oversight Committee (2015);<sup>212</sup> the Sonoma County (California) Independent Office of Law Enforcement Review and Outreach (IOLERO) (2016);<sup>213</sup> the Santa Clara County (California) Office of Correction and Law Enforcement Monitoring (OCLEM) (2017);<sup>214</sup> the Justice Committee for the Montgomery County (Ohio) Jail (2017);<sup>215</sup> the Essex County (New Jersey) Correctional Facility Civilian Task Force (2019);<sup>216</sup> the Delaware County (Pennsylvania) Jail

*California Governor's Budget Makes Stronger Jail Oversight a Priority*, PROPUBLICA (Jan. 10, 2020), <https://www.propublica.org/article/california-jail-oversight-governor-gavin-newsom-budget>.

<sup>211</sup> *Welcome to the Office of the Inspector General*, COUNTY OF LOS ANGELES, <https://oig.lacounty.gov/> (last visited Aug. 14, 2020).

<sup>212</sup> *Welcome to the Justice Center Oversight Committee*, ONONDAGA COUNTY, <http://www.ongov.net/jcoc/> (last visited Sept. 19, 2020); *see also* Patrick Lohmann, *New Onondaga County panel likely to investigate inmate death for first time*, SYRACUSE.COM [https://www.syracuse.com/news/2016/04/new\\_onondaga\\_county\\_oversight\\_board\\_could\\_investigate\\_inmate\\_death.html](https://www.syracuse.com/news/2016/04/new_onondaga_county_oversight_board_could_investigate_inmate_death.html) (last updated Mar. 22, 2019).

<sup>213</sup> *Independent Office of Law Enforcement Review and Outreach (IOLERO)*, SONOMA COUNTY, <https://sonomacounty.ca.gov/IOLERO/> (last visited Sept. 19, 2020).

<sup>214</sup> *Office of Correction and Law Enforcement Monitoring (OCLEM)*, COUNTY OF SANTA CLARA BOARD OF SUPERVISORS, <https://www.sccgov.org/sites/bos/Pages/office-correction-law-enforcement-monitoring-OCLEM.aspx> (last visited Sept. 19, 2020); *see also* Thy Vo, *Santa Clara County picks civilian watchdog to monitor sheriff, jails*, THE MERCURY NEWS, Oct. 10, 2019, <https://www.mercurynews.com/2019/10/10/santa-clara-county-picks-civilian-watchdog-to-monitor-sheriff-jails/> (last visited Sept. 19, 2020).

<sup>215</sup> *Progress Report—Justice Committee for the Montgomery County Jail*, MONTGOMERY COUNTY, [https://www.mcoho.org/news\\_detail\\_T6\\_R222.php](https://www.mcoho.org/news_detail_T6_R222.php) (last visited Sept. 19, 2020); *see also* *The Report of the Justice Committee for the Montgomery County Jail*, MONTGOMERY COUNTY, Feb. 26, 2019, <https://www.mcoho.org/REPORT%20OF%20THE%20JUSTICE%20COMMITTEE%20Final%20Version%20revised.pdf>.

<sup>216</sup> *Essex County Announces Civilian Task Force to Oversee Immigration Detention Facility*, TapIntoNewark, Dec. 12, 2019, <https://www.tapinto.net/towns/newark/sections/government/articles/essex-county-announces-civilian-task-force-to-oversee-immigration-detention-facility> (last visited Sept. 19, 2020).

Oversight Board (2019);<sup>217</sup> and the Erie County (New York) Corrections Specialist Advisory Board (ECCSAB).<sup>218 219</sup> Because the structure and role of each of these entities varies tremendously, especially given the vastly different sizes of the jurisdictions involved, it is impossible to make any generalities about these local jail oversight bodies. Each one is so clearly designed to meet the specific needs of that jurisdiction. One point worth highlighting, though, is that a few of these entities (particularly those in Essex County, Montgomery County, Delaware County, and Erie County) involve local volunteers in oversight activities.<sup>220</sup>

In short, the growing national interest in oversight is starting to translate into concrete examples of new and meaningful correctional oversight bodies at both the state and local level, for both prisons and jails.

**Table 1: Correctional Oversight Entities Established or Re-Established Since 2010**

<i>State</i>	<i>County</i>	<i>Name of Oversight Entity</i>	<i>Prison or Jail Oversight?</i>	<i>Year Establ.</i>
California		Board of State and Community Corrections	Jails (statewide)	2012
District of Columbia		Corrections Information Council	Prisons and Jails (local/national)	2010
Hawaii		Correctional System Oversight Commission	Prisons and Jails (statewide)	2019
Massachusetts		Restrictive Housing Oversight Committee	Prisons	2018

<sup>217</sup> *Jail Oversight Board*, DELAWARE COUNTY PENNSYLVANIA, <https://www.delcopa.gov/departments/prison/JailOversightBoard.html> (last visited Sept. 19, 2020).

<sup>218</sup> Press Release: *Erie County Legislature Empanels Corrections Specialist Advisory Board*, Legislator Baskin, Nov. 22, 2019, <https://www2.erie.gov/baskin/index.php?q=press/erie-county-legislature-empanels-corrections-specialist-advisory-board> (last visited Sept. 19, 2020).

<sup>219</sup> Many of these new local jail oversight entities are profiled in Dempster et al., *supra* note 209, at 6–9.

<sup>220</sup> *Id.* at 7–10.

<i>State</i>	<i>County</i>	<i>Name of Oversight Entity</i>	<i>Prison or Jail Oversight?</i>	<i>Year Establ.</i>
Minnesota		Office of the Ombudsperson for the Department of Corrections	Prisons and Jails (statewide)	2019
Nebraska		Office of the Inspector General	Prisons	2015
New Jersey		Office of the Corrections Ombudsperson	Prisons	2019
Washington State		Office of the Corrections Ombuds	Prisons	2018
	Delaware County (PA)	Jail Oversight Board	Jail (local)	2019
	Erie County (NY)	Erie County Corrections Specialist Advisory Board (ECCSAB)	Jail (local)	2019
	Essex County (NJ)	Correctional Facility Civilian Task Force	Jail (local)	2019
	Los Angeles County (CA)	Sheriff's Civilian Oversight Commission	Jail (local)	2016
	Los Angeles County (CA)	Office of the Inspector General	Jail (local)	2016
	Montgomery County (OH)	Justice Committee for the Montgomery County Jail	Jail (local)	2017
	Onondaga County (NY)	Justice Center Oversight Committee	Jail (local)	2015

<i>State</i>	<i>County</i>	<i>Name of Oversight Entity</i>	<i>Prison or Jail Oversight?</i>	<i>Year Establ.</i>
	Santa Clara County (CA)	Office of Correction and Law Enforcement Monitoring (OCLEM)	Jail (local)	2017
	Sonoma County (CA)	Independent Office of Law Enforcement Oversight and Outreach (IOLERO)	Jail (local)	2016

***Finding 2: Many of these new oversight bodies, as well as those entities that existed prior to the 2010 report, were created or strengthened in response to lawsuits or negative publicity following deaths in custody, incidents of violence or brutality, or evidence of substandard conditions in prisons or jails.***

The origin stories of diverse oversight bodies across the nation sound strikingly similar, as many agencies were founded or strengthened following distressing incidents, such as exposés of beatings, sexual assaults, deplorable living conditions, or deaths in custody. For example, in the late 1990s, California legislators expanded the correctional oversight powers of the Office of the Inspector General after learning about widespread abuse within state prisons.<sup>221</sup> Two deaths in custody in the Onondaga County jail in Syracuse, New York, catalyzed the creation of the Justice Center Oversight Committee in 2015.<sup>222</sup> The establishment of the oversight body for the Montgomery County Jail in Ohio followed fourteen lawsuits against the jail,<sup>223</sup> and, relatedly, the Ohio governor demanded more expansive jail oversight statewide due to a string of lawsuits regarding deaths of people in custody in a number of institutions.<sup>224</sup> Hawaii’s Oversight Commission was established in the wake of numerous allegations of serious problems in Hawaii’s correctional facilities; the creation of this body was one of the key recommendations of a statewide

<sup>221</sup> *Our History*, OFF. OF THE INSPECTOR GEN., <http://www.oig.ca.gov/pages/about-us/history.php> (last visited Aug. 2, 2020).

<sup>222</sup> Lohmann, *supra* note 212.

<sup>223</sup> Chris Stewart, *Citizen Group’s Jail Report Calls for Humane Treatment of Inmates*, DAYTON DAILY NEWS (Feb. 5, 2019), <https://www.daytondailynews.com/news/crime—law/citizen-group-issue-montgomery-county-jail-report-today/jbXSyrGxGeGhV83WrOa2rL/>.

<sup>224</sup> Laura A. Bischoff, *Ohio Ramping Up Jail Inspections Following Problems*, DAYTON DAILY NEWS (Jan. 21, 2020), <https://www.daytondailynews.com/news/local/ohio-ramping-jail-inspections-following-problems/3QVQxbfVhZn0RTqwoPvJ5K/>.

task force appointed to investigate those issues.<sup>225</sup> Similarly, the Los Angeles Inspector General's Office and the Los Angeles Sheriff's Civilian Oversight Commission both grew out of a recommendation from a citizens' task force charged with reviewing incidents of violence and abuse in the jail.<sup>226</sup> Similar examples abound for other correctional oversight entities.

Highly publicized scandals such as those described above push conditions of confinement into the public spotlight, and policymakers at either the state or local level are compelled to act in response. These incidents increase the political will to improve transparency and accountability within correctional settings, and oversight mechanisms show promise as a way to achieve these aims. Despite the fact that independent oversight is an appropriate and sensible strategy for *every* correctional institution<sup>227</sup> regardless of whether conditions are poor—simply because transparency and preventive monitoring help keep the quality of correctional services high—that lesson in good government does not appear to be a motivating factor in most jurisdictions. Scandals and horror stories appear to push oversight onto the policy agenda in a way that research studies and positive experiences in other jurisdictions have been unable to achieve. Unfortunately, this means that there are human costs associated with the decision to initiate independent oversight. It also means that these oversight entities often launch their work in an adversarial atmosphere of tension and distrust with the corrections agency, rather than the more ideal dynamic of cooperation and trust wherein corrections officials recognize the benefits of external oversight. It is worth noting, though, that in at least some instances, including in Los Angeles, the leadership of some of these correctional agencies changed over at the same time as the oversight body began its work, creating the opportunity for a more collaborative dynamic.

***Finding 3: There are clear differences between models of prison oversight and models of jail oversight.***

While most citizens fail to grasp the distinction between prisons and jails, our research revealed that structural differences between the two types of correctional agencies lead to significant differences in what their oversight mechanisms look like. Thus, it is extremely important to analyze prison and jail oversight separately. It is also necessary to distinguish statewide jail oversight (oversight of all jails in a state) from local jail oversight (oversight of a single facility or a couple of facilities operated by the same local agency).

When it comes to prison oversight, one state agency is overseeing another state agency—it is the same level of government involved in this

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<sup>225</sup> Yoohyun Jung, *New Prison Oversight Commission is Off to a Slow Start*, HONOLULU CIV. BEAT (Sept. 3, 2019), <https://www.civilbeat.org/2019/09/new-prison-oversight-commission-is-off-to-a-slow-start/>.

<sup>226</sup> CTY. OF L.A., CAL., REPORT OF THE CITIZENS' COMMISSION ON JAIL VIOLENCE 177–94 (2012), <https://ccjv.lacounty.gov/wp-content/uploads/2012/09/CCJV-Report.pdf>.

<sup>227</sup> See *supra*, Part 1: The U.S. is an Anomaly on the World Stage.

exercise of external scrutiny. Moreover, all prisons in the state answer to a single leader and operate under a single agency-wide set of policies and procedures, and thus there is more consistency in operational practices from facility to facility. There is also a single budget for all the prison facilities, and if any operational changes are ordered, they should (at least theoretically) be put in place system-wide. As a result, there is a single structure for oversight for all the prison facilities in the state. Some institutions naturally garner more attention from monitors than others due to their size or the issues that the institutions face. Overall, however, prison oversight bodies have a uniform approach to their monitoring activities, and there is a clear, single line of authority in the prison agency when it comes to responsibility for addressing any shortcomings in any of these institutions.

In contrast, when it comes to statewide jail oversight, the *state* is seeking to scrutinize what is typically a *county*-level function.<sup>228</sup> Most jails are operated by sheriffs, who are independently elected and autonomous government officials, and jail operations are funded by the county legislative branch rather than by the state legislature. This means that each jail in the state answers to a different authority, and there is tremendous variation in conditions and practices from jail to jail, since they vary widely in available resources and come in all sizes and designs.<sup>229</sup> Whenever the state inserts itself into county (or in some cases, city) government, there is bound to be tension among the various players, if the state can even assert this level of control over what happens in these locally run institutions. And fixing a problem in one jail only affects that institution, not other facilities in the state.

Thus, most oversight of jails at a statewide level tends to look quite different from oversight of prisons. With jails, the oversight tends to be regulatory in nature: the state asserts its authority to set minimum standards for certification to operate in the state.<sup>230</sup> Many of these oversight structures were established with the grudging assent of local sheriffs, usually back in the 1970s or 1980s when there were many class actions filed with regard to conditions in local jail facilities.<sup>231</sup> Sheriffs reasoned that they could defend themselves against liability if they could show that they were in compliance with official standards that provided more uniformity in conditions across the

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<sup>228</sup> Not all states have systems in which prisons are operated at the state level and jails are operated at the county or city level. Some states with smaller populations, including Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont, operate a unified prison and jail system. Thus, both prisons and jails in those states are operated by a single state agency. See BARBARA KRAUTH, NATIONAL INSTITUTE OF CORRECTIONS, U.S. DEPARTMENT OF JUSTICE, A REVIEW OF THE JAIL FUNCTION WITHIN STATE UNIFIED CORRECTIONS SYSTEMS 2 (1997).

<sup>229</sup> Shahd Elbushra, Kelly Hogue, & Kaitlyn Wallace, Components of Effective Jail Standards 1 (Mar. 2020) (unpublished issue brief, Lyndon B. Johnson School of Public Affairs) (on file with author).

<sup>230</sup> See Melanie K. Worsley & Amy Memmer, *Transparency Behind Bars: A History of Kansas Jail Inspections, Current Practices, and Possible Reform*, 1 J. CRIM. JUST. & L. 71, 72 (2017).

<sup>231</sup> MARK D. MARTIN, NATIONAL INSTITUTE OF CORRECTIONS, U.S. DEPARTMENT OF JUSTICE, JAIL STANDARDS AND INSPECTION PROGRAMS 13 (2007).

state. Even today, the desire to avoid litigation is a major motivator for the establishment of jail oversight mechanisms.<sup>232</sup>

Most statewide oversight of jails therefore consists of two key functions: the development of minimum standards and inspections to ensure compliance with those standards.<sup>233</sup> In some states, compliance with the standards is voluntary, but more often, it is mandatory and there are some limited consequences for agencies that do not meet the standards.<sup>234</sup> In most cases, these enforcement mechanisms amount to a form of censure of the agency that is out of compliance. Sometimes that censure involves financial consequences for the agency. More often than not, agencies receive waivers or variances that allow them to continue the noncompliant practice.<sup>235</sup> Scholars Melanie Worsley and Amy Memmer contend that efforts to exercise regulatory control over jails without a meaningful enforcement mechanism undermine the effectiveness of any regulatory function.<sup>236</sup>

Sheriffs themselves are often involved in the process of writing those standards, either as members of regulatory boards (as in Texas) or because a sheriffs' association issues the standards (as in Idaho and Utah).<sup>237</sup> The standards do tend to be quite minimal and vague,<sup>238</sup> at least in part because they have to apply to both large urban jails and to small rural facilities. Our research has also revealed that many sets of minimum standards do not cover entire substantive areas that are key to operating correctional facilities, including, for example, the lack of standards about use of force in Texas.<sup>239</sup> The oversight entities cannot usually evaluate how jails are handling issues that fall outside of their standards, so many operational areas receive little to no scrutiny even though they have a tremendous impact on the health and safety of people in custody.

While this regulatory model based on minimum standards seems to be the norm for jail oversight in the United States—some version of it exists in 28 states—there is no similar type of regulatory oversight applicable to prisons in the United States. The structure and design of prison oversight seems to be more varied from state to state, more flexible in its activities, and more focused on the treatment of people in custody rather than on the physical environment and other measurable characteristics that are easier to operationalize as standards. While this is not always the case, we also tend to see more of a focus on responding to the complaints of people in custody when it

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<sup>232</sup> Julia Durnan, Katie Barton, & Alex Sexton, *Issue Brief: Models of Jail Oversight in the United States* 2 (Mar. 2020) (unpublished issue brief Lyndon B. Johnson School of Public Affairs); Elbushra et al., *supra* note 229, at 2.

<sup>233</sup> Durnan et al., *supra* note 232, at 2–3.

<sup>234</sup> *Id.* at 7–8.

<sup>235</sup> *Id.* at 7–8.

<sup>236</sup> Worsley & Memmer, *supra* note 230, at 79.

<sup>237</sup> Durnan et al., *supra* note 232, at 4–6.

<sup>238</sup> Elbushra et al., *supra* note 229, at 6.

<sup>239</sup> *Id.* at 3–5.

comes to prison oversight. Because the nature of the oversight activities with prisons is so different than with jails, it may make less sense to think in terms of standards, compliance, or enforcement when it comes to prisons. The primary objective is to enhance transparency about what is happening inside these facilities or to help an individual in need. While an oversight body may make recommendations, it is up to the prison agency to implement those changes or the legislature that holds the purse strings to require the agency to do so.

Notably, the two most recently created statewide jail oversight models, in Minnesota and Hawaii (discussed earlier), do not follow the traditional regulatory model for jail oversight with minimum standards. But in both states, the oversight body was established to provide oversight of both prisons and jails, unlike in the other states. In the case of Hawaii, it is a unified system where a state agency operates both the prisons and jails, so it is differently situated than the other jurisdictions with jail oversight. And for Minnesota, a regulatory jail oversight body already existed when the Ombudsman's office was created to serve a very different function.

Statewide regulatory jail oversight can be categorized into four separate models: (1) state department of corrections charged with overseeing local jails not under their operational authority (15 states); (2) independent commission at the state level established to regulate the local jails (7 states); (3) professional association/sheriffs' association with a voluntary peer-to-peer system of oversight (4 states); and (4) state department of health with a jail inspection unit (2 states).<sup>240</sup> Martin discusses the advantages and disadvantages of these various ways to structure a regulatory jail oversight body.<sup>241</sup>

Certain statewide jail oversight models stand out as solid examples of each model—specifically, the Texas Commission on Jail Standards, the North Dakota Department of Corrections' Office of Facility Inspection, the Oklahoma State Department of Health, and the Idaho Sheriffs' Association.<sup>242</sup> But regardless of the specific model, Durnan et al. emphasize the importance of any jail oversight body having certain features, including “golden key” access to the facilities, thorough inspection protocols, inspection teams with diverse areas of expertise, publicly available reports, time-limited response requirements for the jail agency under review, and the availability of technical assistance.<sup>243</sup>

Table 2, on the next page, shows which states employ which type of jail oversight model.

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<sup>240</sup> Durnan et al., *supra* note 232, at 3–7.

<sup>241</sup> MARTIN, *supra* note 231, at 20; *see also* Durnan et al., *supra* note 232, at 5.

<sup>242</sup> *See generally* Durnan et al., *supra* note 232.

<sup>243</sup> Durnan et al., *supra* note 232, at 9.

**Table 2: Models of Jail Regulation by State**

<b>Department of Corrections</b>	<b>Independent Commission</b>	<b>Sheriffs Association</b>	<b>Department of Health</b>
Iowa	Arkansas	Idaho	North Carolina
Illinois	California	Florida	Oklahoma
Indiana	Maryland	Oregon	
Kentucky	Nebraska	Utah	
Maine	New York		
Massachusetts	Tennessee		
Michigan	Texas		
Minnesota			
New Jersey			
North Dakota			
Ohio			
Pennsylvania			
South Carolina			
Virginia			
Wisconsin			

*Source: Durnan et al., Models of Statewide Jail Oversight in the United States, supra note 232, at 3.*

Not only does statewide jail oversight look very different from statewide prison oversight, but *statewide* jail oversight looks quite different from *local* jail oversight. In the case of local oversight mechanisms, the county is establishing some form of accountability for a county-level agency. Since county officials hold the purse strings for the sheriff's department as well as the ultimate financial liability for any lawsuits, it is significantly easier for local leaders to insist on some structure for ensuring more public transparency about conditions and the treatment of incarcerated people. And local citizens have become more vocal about demanding changes in their county jails since what happens in these jails has an enormous impact on them, their families, and the community. Media coverage is also drawing much more attention to unsafe conditions in these under-resourced facilities, as well as to concerns about suicides in custody and the incarceration of people with mental illness.

The 2010 inventory did not include many examples of local jail oversight, but it is clear that interest in exercising more oversight over these county jails is growing rapidly. This may be related to the fact that police

oversight bodies have become ubiquitous across the nation.<sup>244</sup> The desire to keep closer tabs on what is happening in local jails seems like a natural outgrowth of that familiarity with law enforcement oversight. As with police civilian oversight mechanisms, an increasing number of local jail oversight bodies are designed in ways that include citizen participation in the oversight process.<sup>245</sup>

It is hard to characterize local jail oversight bodies—they take many different forms and seem roughly analogous to prison oversight bodies insofar as only one agency is the subject of the oversight activities. One notable local jail oversight entity—the New York City Board of Corrections, which has oversight responsibilities for the notorious Rikers Island jail facilities—is unusual in that it operates as a regulatory body that sets standards and monitors compliance with the standards, but also acts as an advocate for people in custody and addresses their complaints and concerns. No other local oversight entity has this type of structure. Other models include, for example, Denver’s Office of the Independent Monitor, which has oversight over the Sheriff’s Department and reviews allegations of misconduct by jail staff; the King County (Seattle, Washington) Office of the Ombudsman, which handles up to 3,500 complaints from jail detainees each year; the Nassau County (New York) Board of Visitors, comprised of local citizens who routinely visit the jail; and the various newly created entities discussed in Finding 1 in this part of the article. The lack of consistency in how these oversight mechanisms are structured is striking and reflects the varying needs, culture, and resources of each community.<sup>246</sup>

***Finding 4: Correctional oversight bodies—particularly agencies that specialize in routine, proactive monitoring of conditions—are still relatively rare in the United States, especially when it comes to statewide prison oversight and local oversight of county jails.***

Ten years after my previous study determined that “formal and comprehensive external oversight . . . is truly rare in this country,”<sup>247</sup> that conclusion still holds true. We do not have robust, multi-layered systems of oversight that work together in each state to help to promote transparency and accountability of that state’s prisons and jails. While it is true that the number of independent correctional oversight bodies is expanding—and that there is the

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<sup>244</sup> Sharon R. Fairley, *Survey Says?: U.S. Cities Double Down on Civilian Oversight of Police Despite Challenges and Controversy*, CARDOZO L. REV. DE NOVO 1, 1 (2020) (“civilian oversight has become sufficiently prevalent among the largest U.S. cities as to now be considered a normative element within the police accountability infrastructure”).

<sup>245</sup> See *infra* notes 271–272 and accompanying text.

<sup>246</sup> Wolf, *supra* note 137, at 1617–19.

<sup>247</sup> Deitch, *50-State Inventory*, *supra* note 37, at 1762.

promise of future expansion as well—at the present time, the oversight landscape is still dramatically different than in our peer nations.<sup>248</sup>

(a) Prison Oversight

The vast majority of states have no statutory mechanism in place to provide transparency about what is happening in their prison systems. Only 15 states plus the District of Columbia have established independent mechanisms for responding to complaints of incarcerated persons and/or for assessing and reporting on conditions of confinement. An additional two states have oversight bodies that handle a subset of correctional issues. Table 3 below lists the state-level prison oversight mechanisms we have identified.

All of these oversight structures vary substantially in their design and purpose. Most are government agencies, but three are non-governmental organizations with longstanding statutory authority or informal arrangements that allow them physical access to the prisons in order to monitor conditions, and one is a citizens' advisory panel.<sup>249</sup> In terms of staff size, the oversight entities vary from one staff person<sup>250</sup> to scores of employees.<sup>251</sup> Some have the authority and duty to conduct routine inspections of prison facilities,<sup>252</sup> while others are limited to responding to individual complaints or reviewing grievances and do not have inspection responsibilities.<sup>253</sup>

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<sup>248</sup> See *supra*, Part 1: The U.S. is an Anomaly on the World Stage.

<sup>249</sup> Those three non-governmental oversight organizations are the Correctional Association of New York (CANY), the John Howard Association of Illinois (JHA), and the Pennsylvania Prison Society (PPS). Missouri has a Citizens Advisory Committee to the Department of Corrections.

<sup>250</sup> See, e.g., the Indiana Ombudsman Bureau and the Office of Inspector General of the Nebraska Correctional System.

<sup>251</sup> See, e.g., the California Office of the Inspector General.

<sup>252</sup> See, e.g., the Washington State Office of the Correctional Ombuds and the New Jersey Office of the Corrections Ombudsman.

<sup>253</sup> See, e.g., Missouri Citizens' Advisory Committee on Corrections and the Indiana Ombudsman Bureau.

**Table 3: Prison Oversight Bodies in the United States  
(as of September 2020)**

State	Name of Oversight Body	Gov't	NGO or Advisory	Limited Focus
California	Office of the Inspector General	✓		
District of Columbia	Corrections Information Council	✓		
Florida	Executive Office of the Governor, Correctional Medical Authority	✓		✓
Hawaii	Correctional System Oversight Commission	✓		
Illinois	John Howard Association of Illinois		✓	
Indiana	Indiana Ombudsman Bureau	✓		
Iowa	The Iowa Office of the Ombudsman	✓		
Maryland	Commission on Correctional Standards	✓		
Massachusetts	Restrictive Housing Oversight Committee	✓		✓
Michigan	Legislative Corrections Ombudsman	✓		
Minnesota	Office of the Ombudsperson for the Department of Corrections	✓		
Missouri	Citizens Advisory Committee on Corrections		✓	✓
Nebraska	Office of Inspector General of the Nebraska Correctional System	✓		
New Jersey	Office of the Corrections Ombudsperson	✓		

State	Name of Oversight Body	Gov't	NGO or Advisory	Limited Focus
New York	Correctional Association of New York		✓	
Ohio	Correctional Institution Inspection Committee	✓		
Pennsylvania	Pennsylvania Prison Society		✓	
Washington State	Office of the Corrections Ombuds	✓		

While the overall number of prison oversight bodies remains quite low, seven of these prison oversight entities are new, having been created or substantially revamped since 2010 (see Table 1, *supra*). This certainly bodes well for the trajectory of independent correctional oversight, especially since several other states seem poised to establish new structures in future legislative sessions. For example, well-crafted bills to establish statutory prison oversight mechanisms were recently under consideration in Arizona,<sup>254</sup> Florida,<sup>255</sup> Mississippi,<sup>256</sup> and Texas.<sup>257</sup> Additionally, New York just passed a bill, an amended version of which was signed by the Governor, that will significantly strengthen the oversight body's authority to make unannounced inspections and to gather information.<sup>258</sup> And a New Mexico legislative committee is exploring options for establishing a prison oversight structure.<sup>259</sup> Moreover, U.S. Senator Richard Durbin has announced plans to introduce a bill to create an independent oversight body for the Federal Bureau of Prisons.<sup>260</sup> It would also be reasonable to expect that when state legislatures next convene following the COVID-19 crisis, there will be even greater pressure to develop statutory mechanisms to better protect people inside prisons, given the extraordinary and deadly impact of the coronavirus on people in custodial settings.<sup>261</sup>

<sup>254</sup> H.B. 2894, 54th Leg., 2d Reg. Sess. (Ariz. 2020).

<sup>255</sup> H.B. 419, 2020 Leg., Reg. Sess. (Fla. 2020).

<sup>256</sup> S.B. 2756, 2020 Leg., Reg. Sess. (Miss. 2020).

<sup>257</sup> C.S.H.B. 363, 86th Leg., Reg. Sess. (Tex. 2019).

<sup>258</sup> See *supra* note 203.

<sup>259</sup> Phaedra Haywood, *Lawmaker Calls For More Oversight of New Mexico Corrections Department*, SANTA FE NEW MEXICAN (Sept. 4, 2020), [https://www.santafenewmexican.com/news/legislature/lawmaker-calls-for-more-oversight-of-new-mexico-corrections-department/article\\_ade120ca-ec8-11ea-9b84-338fc1b17b9d.html](https://www.santafenewmexican.com/news/legislature/lawmaker-calls-for-more-oversight-of-new-mexico-corrections-department/article_ade120ca-ec8-11ea-9b84-338fc1b17b9d.html).

<sup>260</sup> See Kevin Ring, *Congress Should Support Independent Oversight of Federal Prisons*, THE HILL (Sept. 14), <https://thehill.com/opinion/criminal-justice/515854-congress-should-support-independent-oversight-of-federal-prisons>.

<sup>261</sup> See, e.g., Keri Blakinger, *What Happens When More Than 300,000 Prisoners Are Locked Down?*, THE MARSHALL PROJECT (Apr. 15, 2020), <https://www.themarshallproject.org/2020/04/15/what>

## (b) Statewide Jail Oversight

As noted above, jail oversight tends to be regulatory, meaning that it is designed to enforce compliance with a set of minimum standards. While 28 states<sup>262</sup> have some form of statewide regulatory oversight or voluntary oversight of local jails (see Table 4 below), and one additional state (Hawaii) has a new oversight commission that handles both prisons and jails,<sup>263</sup> 21 states have absolutely no clearly defined mechanism in place to evaluate the safety of jails. These states have no way to ensure that they comply with constitutional requirements, to address the concerns of incarcerated citizens, or even to find out what is happening behind jail walls.<sup>264</sup> And even for those states with oversight entities, some employ a voluntary (non-regulatory) inspection process, some have extremely weak or vague facility standards with glaring gaps, and few are designed to address the complaints and needs of people in custody. Moreover, not all of these oversight entities promote public transparency about jail conditions—some do not publish their inspection reports—and many lack meaningful enforcement tools. Some states even keep secret the standards that they use to evaluate the jails,<sup>265</sup> undermining any pretense that an objective of the oversight function is to ensure public awareness of conditions behind bars. So, the relatively long list of jail oversight bodies is over-inclusive and a bit misleading, if we want to capture only those that meet the ABA’s criteria for effectiveness as a correctional monitoring entity. Table 4, on the next page, identifies the statewide jail oversight bodies that currently exist in the United States<sup>266 267</sup>

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happens-when-more-than-300-000-prisoners-are-locked-down; C. J. Ciaramella, *8 Of The 10 Biggest Coronavirus Hotspots Are Prisons and Jails*, REASON (Apr. 29, 2020), <https://reason.com/2020/04/29/8-of-the-top-10-biggest-u-s-coronavirus-hotspots-are-prisons-and-jails/>; Deitch, et.al, COVID AND CORRECTIONS: A PROFILE OF COVID DEATHS IN CUSTODY, *supra* note 24.

<sup>262</sup> Our total figure differs somewhat from the total figure referenced in Worsley & Memmer, *supra* note 230, at 81, and we have quite a few discrepancies with that study in terms of how to categorize the oversight models used by certain states.

<sup>263</sup> Minnesota also established a new Ombudsman’s office, as discussed earlier, but that state already had a regulatory oversight body so it is included in the count of 28.

<sup>264</sup> We could not find any indication that the following states have a currently active statewide jail oversight mechanism: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Rhode Island, South Dakota, Vermont, Washington State, West Virginia, and Wyoming.

<sup>265</sup> Editorial Board, *Utah’s Secret Jail Standards Do Nothing to Protect Prisoners*, STANDARD-EXAMINER (Jan. 17, 2018), [https://www.standard.net/opinion/our-view/utah-s-secret-jail-standards-do-nothing-to-protect-prisoners/article\\_ef598b8c-e581-5fec-b283-342d9b77c876.html](https://www.standard.net/opinion/our-view/utah-s-secret-jail-standards-do-nothing-to-protect-prisoners/article_ef598b8c-e581-5fec-b283-342d9b77c876.html).

<sup>266</sup> There have been a few changes since the 2010 Inventory was published that are reflected in this chart. Alabama’s jail inspection statute was repealed in 2015, and thus it no longer is included here. Also, California eliminated its prior oversight entity, the Corrections Standards Authority, and established a new independent body called the Board of State and Community Corrections in 2012. In a couple of other cases, we re-categorized some of the entities we previously identified.

<sup>267</sup> Some states have statutes that require county commissioners or grand juries to conduct inspections. See Worsley & Memmer, *supra* note 230, at 83. We do not include these states in our list because these approaches to oversight are inadequate for the purposes described in our criteria for inclusion (see *supra* pp. 243-245). As Worsley & Memmer correctly observe, neither county commissioners nor grand jurors

**Table 4: Statewide Jail Oversight Bodies in the United States  
(as of March 2020)**

State	Name of Oversight Body	Non-regulatory (role does not involve use of standards)	Regulatory with req'd inspections for compliance with min. standards	Voluntary Inspections/ no enforcement of compliance with standards
Arkansas	Correctional Facility Review Committee		✓	
California	Board of State and Community Corrections		✓	
Florida	Model Jail Standards Committee			✓
Hawaii	Correctional System Oversight Commission	✓		
Idaho	Idaho Sheriffs' Association			✓
Illinois	Dep't of Correction, Office of Jail and Detention Standards		✓	
Indiana	Dep't of Correction, Sheriff and Jail Operations Division		✓	

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have the training or expertise to conduct meaningful inspections. Moreover, jail oversight is not the primary purpose of either entity.

<b>State</b>	<b>Name of Oversight Body</b>	<b>Non-regulatory (role does not involve use of standards)</b>	<b>Regulatory with req'd inspections for compliance with min. standards</b>	<b>Voluntary Inspections/ no enforcement of compliance with standards</b>
Iowa	Dep't of Corrections, Jail Inspections		✓	
Kentucky	Dep't of Corrections		✓	
Maine	Dep't of Corrections		✓	
Maryland	Commission on Correctional Standards		✓	
Massachusetts	Dep't of Corrections		✓	
Michigan	Dep't of Corrections		✓	
Minnesota <sup>268</sup>	Dep't of Corrections		✓	
	Ombudsman	✓		
Nebraska	Crime Commission		✓	
New Jersey	Dep't of Corrections		✓	
New York	Commission of Corrections		✓	

<sup>268</sup> Note that Minnesota has two separate entities that conduct a form of statewide jail oversight: one is the state Department of Corrections that regulates local jails; the other is an Ombudsman that responds to complaints by people incarcerated in local jails.

<b>State</b>	<b>Name of Oversight Body</b>	<b>Non-regulatory (role does not involve use of standards)</b>	<b>Regulatory with req'd inspections for compliance with min. standards</b>	<b>Voluntary Inspections/ no enforcement of compliance with standards</b>
North Carolina	Dep't of Health and Human Services, Div. of Facility Services, Jail and Detention Section		✓	
North Dakota	Dep't of Corrections and Rehabilitation, Office of Facility Inspection		✓	
Ohio	Dep't of Rehabilitation and Corrections, Bureau of Adult Detention		✓	
Oklahoma	State Dep't of Health		✓	
Oregon	State Sheriffs' Association			✓
Pennsylvania	Dep't of Corrections		✓	
South Carolina	Dep't of Corrections		✓	

<b>State</b>	<b>Name of Oversight Body</b>	<b>Non-regulatory (role does not involve use of standards)</b>	<b>Regulatory with req'd inspections for compliance with min. standards</b>	<b>Voluntary Inspections/ no enforcement of compliance with standards</b>
Tennessee	Tennessee Corrections Institute		✓	
Texas	Commission on Jail Standards		✓	
Utah	Sheriffs' Association			✓
Virginia	Dep't of Corrections/ Board of Corrections		✓	
Wisconsin	Dep't of Corrections, Office of Detention Facilities		✓	

### (c) Local Jail Oversight

Compared to statewide jail oversight, local oversight of jails is even more rare, with only a relative handful of counties around the nation having an established mechanism for scrutinizing what happens in these detention facilities. Yet county officials and citizens of each community need objective information about the treatment of people inside the jails. Given the enormous sums of money spent each year on jail operations, not to mention the costs associated with lawsuits, it is surprising that more county legislators do not insist on having an independent body report on what conditions are like in the jail and whether there are ways to improve jail operations.

Table 5 presents a list of the local oversight bodies that we identified through our research, though we acknowledge that there may be others we did not find.<sup>269</sup>

**Table 5: Local Jail Oversight Bodies in the United States  
(as of September 2020)**

State	County	Name of Oversight Entity
California	Los Angeles	Office of the Inspector General
	Los Angeles	Sheriff's Civilian Oversight Commission
	Orange	Office of Independent Review
	San Diego	Citizen's Law Enforcement Review Board (CLERB)
	Santa Clara	Adult Custody Office of the Ombuds (Jail Observer Program)
	Santa Clara	Office of Correction and Law Enforcement Monitoring (OCLEM)
	Sonoma	Independent Office of Law Enforcement Review and Outreach (IOLERO)
Colorado	Denver	Civilian Oversight Board
	Denver	Office of the Independent Monitor
New Jersey	Essex	Essex County Correctional Facility Civilian Task Force
New York	Erie	Erie County Corrections Specialist Advisory Board (ECCSAB)
	Nassau	Board of Visitors
	New York City	Board of Corrections
	Onondaga	Justice Center Oversight Committee

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<sup>269</sup> A number of other entities have some level of oversight over sheriffs' offices, including those offices or boards that review how sheriffs' deputies are disciplined, but our analysis focused primarily on those entities that focus on jail conditions, the treatment of people in custody, and the development of recommendations for improvement of jail operations. The line between them can sometimes be a little fuzzy.

State	County	Name of Oversight Entity
Ohio	Montgomery	Justice Committee for the Montgomery County Jail
Pennsylvania	Allegheny	Allegheny County Jail Oversight Board
	Delaware	Delaware County Jail Oversight Board
Washington	King	King County Office of the Ombudsman

This lack of consistent jail oversight across the nation is troubling. Most jail facilities—other than those in major metropolitan areas—are significantly smaller than prisons, and many are far removed from the public eye and media attention. Also, many are located in remote, poorly-resourced areas, and jail staff often do not have access to training that provides knowledge of and commitment to best correctional practices.<sup>270</sup> Also, because jails have large populations of people with mental illness and individuals who are intoxicated on drugs or alcohol, as well as limited mental health and health care services, suicides and deaths are all too often tragic features of the jail environment.<sup>271</sup> Moreover, jail populations are transient and may not use the grievance processes to highlight areas of concern.

Local jail oversight also offers more opportunities to involve citizens in the oversight process, whether as members of an oversight board or as participants in hearings or town hall meetings about conditions in a particular facility. In the first place, the distances involved and the logistics of visiting local jails are less daunting than in the prison context, where facilities are likely to be spread widely around the state and there are many more institutions to inspect. Moreover, local citizens have far more at stake in the operations and conditions of the county's jail, compared to jails or prisons across an entire state, since what happens there more directly affects them and their loved ones. Transparency around what happens in the local jail is especially critical in order to allow citizens to advocate for improvements and to ensure that the needs of their incarcerated loved ones are being addressed.

The fact that statewide jail oversight is overwhelmingly focused on ensuring technical compliance with minimum jail standards rather than checking on the actual treatment of people in custody means that we would ideally want to see a layered system of oversight that includes *both* statewide

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<sup>270</sup> David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1461 (2010).

<sup>271</sup> See LINDSAY HAYES, NAT'L INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE, NATIONAL STUDY OF JAIL SUICIDE: 20 YEARS LATER 1–2 (2010); see also UNIV. OF TEX. SCH. OF LAW CIVIL RIGHTS CLINIC, PREVENTABLE TRAGEDIES: HOW TO REDUCE MENTAL HEALTH-RELATED DEATHS IN TEXAS JAILS 5–8 (2016).

regulation and local scrutiny of conditions and responsiveness to individual complaints. This combination of approaches is more consistent with the ABA's vision and the need to ensure that policymakers at all levels exercise their responsibility for making sure that confinement is safe and humane. But we are far from that reality in most jurisdictions.

***Finding 5: Independent correctional oversight bodies often lack (1) adequate staffing and funding, (2) insulation from political pressure, and (3) unfettered access to the facilities they oversee.***

The ABA Resolution on Independent Correctional Oversight includes a list of 20 essential elements that are necessary for effectiveness as a correctional oversight body.<sup>272</sup> Among those requirements are that the oversight body has adequate resources, insulation from political whim, “golden key” access to the facilities without prior notice, and a mandate to make its monitoring reports public.<sup>273</sup> From our research team's interviews with oversight practitioners and our review of agency publications and relevant news articles, we have found that many if not most of the oversight bodies that exist in the United States experience significant challenges on several of these fronts.

*(1) Insufficient staffing and funding.*

The first and most prevalent limitation experienced by oversight practitioners is a lack of sufficient staffing and funding levels to fulfill their statutory responsibilities. Many entities are tasked with overseeing conditions within correctional facilities that incarcerate tens of thousands of people, including facilities scattered in remote locations around the state. Travel to these locations is time-consuming and expensive. Meaningful inspections can take several days per facility. Yet the oversight agencies often must undertake this challenging responsibility with only a handful of full-time employees who operate on shoestring budgets. One state's jail oversight entity has a budget of only \$70,000 for inspections,<sup>274</sup> while other jail oversight structures, primarily those using the professional association/sheriffs' association model, use volunteer law enforcement officials to conduct inspections.<sup>275</sup> Nebraska's and Indiana's prison oversight agencies each have one employee to handle all the work for the entire state. The D.C. Corrections Information Council, tasked with inspecting conditions for D.C. prisoners wherever they are housed anywhere in the country, thus requiring extensive domestic travel, has only seven staff and a budget of about \$646,000—both

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<sup>272</sup> ABA Resolution, *supra* note 126, at 2–3.

<sup>273</sup> *Id.* at 2–3.

<sup>274</sup> Personal communication with the Idaho Sheriff's Association.

<sup>275</sup> MARTIN, *supra* note 231, at 26.

representing a significant increase from a few years ago.<sup>276</sup> And the new Hawaii Correctional Oversight Commission was effectively completely defunded by the state before it was even able to hire its first staff person, leaving the all-volunteer panel with no funds to hire staff or cover travel to neighboring islands to inspect prisons.<sup>277</sup> In contrast, the corrections oversight body that oversees prisons and jails in England and Wales (with a total of about 80,000 incarcerated adults)<sup>278</sup> has a staff of about 70 and an annual budget of roughly 3.6 million British pounds for its prison monitoring activities (about \$4.5 million).<sup>279</sup>

(2) *Political pressures.*

External oversight agencies may be independent of the correctional agencies that they monitor, but many are not immune from the turmoil that permeates their state's political environment. Therefore, the few resources that oversight agencies do have may fall prey to the political process. The heads of oversight bodies may be "punished" for being too assertive in their advocacy for the rights of incarcerated people or for bringing unwanted attention to the problems they have uncovered during their monitoring activities.

For example, the Correctional Medical Authority (CMA) promotes and monitors the delivery of adequate health care within Florida's prison system, but in 2011, the Florida Legislature voted to defund and eliminate the agency.<sup>280</sup> Governor Rick Scott vetoed the bill in order to save the agency, but without any state dollars, CMA employees were forced to find other work until their funding was restored in 2012.<sup>281</sup> Similarly, in 2015, local officials in California moved to defund Orange County's Office of Independent Review (OIR), which provides civilian oversight of the Orange County Sheriff's Department; the agency was ultimately saved when the sheriff formally

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<sup>276</sup> D.C. CORRECTIONS INFO. COUNCIL, FY 2019 PROPOSED BUDGET AND FINANCIAL PLAN C-193 (2018), [https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fi\\_cic\\_chapter\\_2019m.pdf](https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fi_cic_chapter_2019m.pdf).

<sup>277</sup> Gordon Y.K. Pang, *Hawaii corrections oversight panel struggling without staffing*, STAR-ADVERTISER (Aug. 20, 2020), <https://www.staradvertiser.com/2020/08/20/hawaii-news/corrections-oversight-panel-struggling-without-staffing/>.

<sup>278</sup> U.K.: England and Wales, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-kingdom-england-wales> (last visited Aug. 4, 2020).

<sup>279</sup> H.M. CHIEF INSPECTOR OF PRISONS FOR ENGLAND AND WALES, ANNUAL REPORT 2018-19, at 81 (July 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/814689/hmip-annual-report-2018-19.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814689/hmip-annual-report-2018-19.pdf).

<sup>280</sup> Mariko K. Shitama, *A Pioneer in Prison Reform: Costello v. Wainwright and Its Paradoxical Legacy in Florida Prisons: Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), 92 FLA. HIST. Q. 381, 395-96 (2013), [www.jstor.org/stable/43487593](http://www.jstor.org/stable/43487593).

<sup>281</sup> *Correctional Medical Authority*, FLA. HEALTH, <https://www.flgov.com/correctional-medical-authority-cma/> (last visited Aug. 4, 2020).

endorsed the oversight agency.<sup>282</sup> Yet another reminder that oversight entities can be very vulnerable occurred in 2016, when members of the Ohio House of Representatives attempted to dismantle the bipartisan Ohio Correctional Institution Inspection Committee (CIIC) in favor of a new Republican-led legislative committee with less autonomy.<sup>283</sup> At least part of the effort to undermine the work of the CIIC appears to have been motivated by the fact that the oversight entity's director was dogged in her mission to address problems in the corrections agency.<sup>284</sup> The CIIC was saved only after the agency's director agreed to step down,<sup>285</sup> and its budget and staffing took a big hit in the years following. The CIIC went from a high of six employees to one person in 2016, supplemented by student interns who conducted the inspections.<sup>286</sup> The Ohio Legislature eventually decided to restore some of its funding in 2019; the oversight body currently has a director and four full-time staff.<sup>287</sup>

The experiences of the CMA, OIR, and CIIC may be extreme examples, but the political struggles that these entities encountered are by no means unique. Working in a political environment, even when the work of the oversight bodies is intended to be impartial and nonpartisan, means that these organizations face external pressures that can limit their longevity and ability to function effectively. The ABA's guidance that oversight bodies should be designed to ensure that the head of the entity is appointed for a fixed term and that the person can be removed only for just cause<sup>288</sup> certainly seems like wise policy.

### (3) *Lack of unfettered access to correctional facilities.*

Some oversight practitioners also expressed concerns that they do not have statutory authority to make unannounced monitoring visits, interview inmates and staff, or review facility documents and data. In other words, they are forced to conduct their work without so-called "golden key access" to the facilities. Unfettered access to the facilities, people, and data is critical for

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<sup>282</sup> Nick Gerda, *Supervisors Reverse Course, Continue Funding Sheriff's Department Watchdog*, VOICE OF OC (June 24, 2015), <http://voiceofoc.org/2015/06/supervisors-reverse-course-on-axing-sheriffs-review-office/>.

<sup>283</sup> Alan Johnson, *Ohio Republicans Want to Wipe Out Bipartisan Prison Watchdog Agency*, COLUMBUS DISPATCH (May 24, 2016), <http://www.dispatch.com/content/stories/local/2016/05/24/republicans-want-to-wipe-out-bipartisan-prison-watchdog-agency.html>.

<sup>284</sup> Alan Johnson, *Will Ohio's Prison Watchdog Be Silenced After Chief's Ouster?*, COLUMBUS DISPATCH (June 4, 2016), <https://www.dispatch.com/article/20160604/NEWS/306049902>.

<sup>285</sup> Alan Johnson and J. Siegel, *Ohio Prison Watchdog Agency Spared After Boss Resigns*, Columbus Dispatch (May 26, 2016), [http://www.dispatch.com/content/stories/local/2016/05/25/Prison\\_watchdog\\_barks\\_about\\_abolishment.html](http://www.dispatch.com/content/stories/local/2016/05/25/Prison_watchdog_barks_about_abolishment.html).

<sup>286</sup> John Caniglia, *'There is no oversight': Staff Cuts Leave Ohio Prison Inspections to Interns*, CLEVELAND PLAIN DEALER (Jan. 20, 2019), <https://www.cleveland.com/court-justice/2019/01/there-is-no-oversight-staff-cuts-leave-ohio-prison-inspections-to-interns.html>.

<sup>287</sup> See *Staff*, OHIO CORR. INST. INSPECTION COMM., <http://www.ciic.state.oh.us/staff> (last visited May 5, 2020).

<sup>288</sup> *ABA Resolution*, *supra* note 126, at 2.

effective monitoring.<sup>289</sup> Yet some of the oversight bodies are required to announce their monitoring visits days or weeks before they arrive, conduct interviews with incarcerated people that are not confidential, and file formal requests for correctional data. Announced inspections call into doubt the accuracy of the oversight body's observations. Non-confidential interviews provide suspect information and may also put incarcerated persons or staff who share information at risk of retaliation. And difficulties and delays in obtaining data and documents disallow timely reports and may lead to gaps in important information.

Fortunately, many of the recently established prison oversight entities provide for the essential golden-key access to both facilities and people and also provide for data sharing between the correctional agency and the oversight body. And as mentioned earlier, New York also just strengthened the statutory authority of its prison oversight body, the Correctional Association of New York, to provide the organization with expanded access both to the facilities and to important data.<sup>290</sup>

#### PART V: CONCLUSION: TWO STEPS FORWARD, ONE STEP BACK

Over the past fifteen years or so, oversight advocates have clearly made great strides in expanding the public's awareness of the need for transparency and accountability within U.S. prisons and jails. Issues related to prison and jail conditions are no longer in the shadows but are on the front pages of our newspapers and are a frequent topic of public conversation. Popular culture has embraced these issues, with television shows such as *Orange is the New Black*<sup>291</sup> and podcasts such as the prisoner-produced show *Ear Hustle*.<sup>292</sup> Citizens with no personal connection to prison issues have become vocal advocates for criminal justice reform. And it is no longer unusual to hear criminal justice reform advocates—and policymakers—calling for more extensive and effective correctional oversight as one of their signature policy demands.

There is now an informal but coordinated community of correctional oversight practitioners and advocates across the country who share advice and provide support. The size of this community has expanded substantially in the last couple of years. Some corrections directors have also lent their

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<sup>289</sup> *Id.*; Armstrong, *supra* note 41, at 470–75 (arguing that access to data is a critical aspect of transparency); see also Wolf, *supra* note 137, at 1622; see also Owers, *supra* note 51, at 1540 (noting that prison inspectors receive their own keys to the facilities during a monitoring visit).

<sup>290</sup> See *supra* note 203.

<sup>291</sup> See *Orange is the New Black* (Netflix 2013–19).

<sup>292</sup> See *Ear Hustle*, Radiotopia (2017–20), <https://www.earhustlesq.com/>.

voices to the call for independent oversight<sup>293</sup> and have made great strides towards transparency and innovation.<sup>294</sup>

We are also seeing an increasing number of efforts to pass oversight legislation across the country. Bills to create substantial prison oversight mechanisms have been filed in states from Texas to Mississippi and beyond, with some receiving hearings and positive committee votes.<sup>295</sup> Five states have passed such legislation just in the last three years and have either developed or are in the process of developing these now-authorized prison oversight bodies. Unquestionably, there is momentum behind the correctional oversight movement, providing plenty of reason to be optimistic that one day in the United States, “prison oversight, in its varied forms, will be the norm for prison leadership and management in the 21st century.”<sup>296</sup>

But, at the same time, there have been challenges, barriers, and setbacks. For example, the systemic problems and abuses in prisons and jails in Alabama, Mississippi, and on Rikers Island are seemingly insoluble and intractable; the opposition of certain correctional leaders to external scrutiny of their agencies is confounding and frustrating; some policymakers bemoan the cost of meaningful oversight even when the corrections agency’s budget is infinitely higher; and those rare models of oversight that do exist often find themselves subject to political maelstroms that result in removals of staff and budget cuts, as happened in Ohio and Hawaii. Moreover, the COVID crisis has strained the ability of the few existing oversight bodies to conduct physical inspections.<sup>297</sup>

The bottom line is that there still remain major gaps in systems of oversight across the United States that leave the vast majority of prisons and jails without an independent set of eyes to keep watch over daily correctional operations. Only 16 jurisdictions currently have anything resembling a prison oversight mechanism that is arguably designed to ensure the protection of people in custody through either routine monitoring of conditions or investigation of complaints, with an additional two states having an entity with responsibility for a more limited set of issues. As for jails, slightly more than half the states (29) have either a statewide jail regulatory body that sets minimum standards, a professional association that conducts voluntary inspections, or an oversight commission, leaving 21 states with no mechanism at

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<sup>293</sup> For example, at the annual conference of the National Association for Civilian Oversight of Law Enforcement (NACOLE) in 2019, the heads of the prison agencies in Colorado and North Dakota both spoke on a panel I moderated about the benefits of independent oversight for correctional agencies.

<sup>294</sup> See discussion *supra* notes 27–36 and accompanying text.

<sup>295</sup> See, e.g., H.B. 363, 86th Leg., Reg. Sess. (Tex. 2019) (the bill passed out of the Texas House Corrections Committee following a hearing, but it did not ultimately get a vote on the House floor).

<sup>296</sup> Stojkovic, *supra* note 54, at 1489.

<sup>297</sup> Keri Blakinger, *As COVID-19 Measures Grow, Prison Oversight Falls*, THE MARSHALL PROJECT, (Mar. 17, 2020), <https://www.themarshallproject.org/2020/03/17/as-covid-19-measures-grow-prison-oversight-falls>; see also Michele Deitch and William Bucknall, LOCKED OUT, LOOKING IN: HOW CORRECTIONAL OVERSIGHT AGENCIES ARE ADAPTING DURING THE COVID CRISIS, Lyndon B. Johnson School of Public Affairs, (Nov. 2020), <https://repositories.lib.utexas.edu/handle/2152/83748>.

all for ensuring some uniform baseline for conditions of confinement or a way to protect people in jail custody. Only a tiny number of local jurisdictions have county-level oversight bodies to promote transparency and help improve conditions in the local jail facility. Correctional oversight in the United States may be expanding, but it still has a long, long way to go. Compared to other Western nations with their commitment to routine preventive monitoring of correctional facilities as a way to ensure the protection of people in custody, we in the United States still seem trapped in the mindset of deference to correctional administrators, reliant on the courts as a backstop to the worst abuses, and drawn towards a punitive approach to incarceration. The time may be ripe for national legislation requiring independent oversight of every prison and jail in the United States, consistent with the provisions in the ABA's Resolution on correctional oversight.

We find ourselves in a curious moment. The COVID crisis has revealed the deadly danger of conditions in our nation's prisons and jails and the utter ill-preparedness of these institutions to protect their residents from harm. Never have the stakes been higher when it comes to the need for transparency and for advocacy on behalf of people in custody. Independent oversight is more essential than ever. At the same time, the ability to conduct inspections is necessarily limited due to the risks of physical access to the facilities. Oversight professionals and advocates are increasingly dependent on the trust and relationships they have built with corrections officials as a way to gather information and ensure implementation of certain safety measures. When we emerge from this crisis, it will be interesting to see not only how our country's prisons and jails will change, along with our use of incarceration, but also whether we as a society have a newly invigorated demand for transparency and meaningful oversight of these institutions. We may well also see an interest in collaboration between correctional leaders and outside advocates and oversight bodies, as the recognition dawns that their interests in promoting health and safety for everyone who lives or works behind the walls are remarkably consistent, and that independent oversight would be mutually beneficial.

