INVISIBLE AGENCIES: TRANSPARENCY, OVERSIGHT, AND ACCOUNTABILITY IN THE CARCERAL STATE

*Erin E. Braatz**

Legal scholarship on the carceral state tends to focus on managing inputs into that system—criminalization, policing, and prosecution—with attention to the practice of incarceration limited to the constitutional protections afforded (or denied) prisoners. It thus largely fails to address the actual structure of the carceral state and the experience of those incarcerated. At the same time, prison departments take deliberate steps to ensure that their activities are not visible either to the voting public or the legislative branch, creating distinct challenges for scholars seeking to fill this gap.

This Article addresses one necessary precondition for any meaningful agency oversight—transparency—and examines what it currently means and what it could mean in the carceral context. In the framework of the administrative state generally, transparency is lauded as a valuable form of accountability and legitimacy. Through a detailed analysis of one prison department, this Article reveals the uniqueness of prison departments as administrative agencies and argues that in this context transparency mechanisms that have been developed for the administrative state writ large are inadequate given the extreme marginalization of the carceral population.

While increasing the transparency of carceral spaces is a valuable goal, on its own it will not guarantee meaningful accountability or oversight. Rather, scholars of the carceral state should give greater attention to agency governance so that the practices of prison departments are visible to those capable of holding them accountable and that there are actual mechanisms for ensuring accountability. Focusing on techniques of oversight and accountability offers the best approach for improving prisoners' access to basic constitutional protections and providing some measure of human dignity.

* Associate Professor of Law, Suffolk University Law School. Thank you to the members of the Suffolk University Women and Incarceration Project, including Amy Agigian, Rachael Cobb, Rachel Roth, Susan Sared, Rebecca Stone, and Norma Wassal; the attendees of CrimFest, including Erin Collins, Carissa Byrne Hessick, Christina Koningisor, and Madalyn Wasilczuk; and the always thoughtful feedback provided by Micky Lee, Monika Raesch, and Frank Rudy Cooper. For this and all things, thank you to John Infranca.

Introduction

In 2021 the *Boston Globe* Spotlight team reported that two prisoners[1] had been removed from a cell in Massachusetts' maximum-security prison using fists, tasers, and a dog who bit one of the individuals in the chest, attempted to pull off his boxer shorts, and sunk his teeth into the prisoner's upper thigh.[2] The incident had occurred a year and a half earlier, on January 22, 2020.[3] It happened during a prison-wide crackdown that followed an incident on January 10, during which three guards were injured. While the attack on the guards was immediately reported upon in the *Boston Globe*,[4] it took twenty-one days before the

1. I have opted to use the term prisoner in line with a similar choice made by Justin Driver and Emma Kaufman in *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515, 525 (2021) (arguing that by using the term to refer to people held in state and federal prisons, "we stress that they are subject to the extraordinary and dehumanizing exercise of state power known as imprisonment.").

2. Mark Arsenault, *The Taking of Cell 15*, Bos. Globe (Aug. 14, 2021), https://apps.bostonglobe.com/metro/investigations/spotlight/2021/08/department-of-corrections-investigation/ [perma.cc/KW3T-J87S].

3. *Id.*

4. Travis Anderson, *Correctional Officer Attacked at State Prison in Shirley*, Bos. Globe (Jan. 10, 2020), https://www.bostonglobe.com/2020/01/10/metro/correctional-officer-attacked-state-prison-shirley/ [perma.cc/AAL3-2DPM] (citing as its only sources the statement issued by the Department of Correction and one issued by the Massachusetts Correction Officers Federated Union). Two days later, the Globe reported that the governor had visited the injured officers in the hospital. Andrew Stanton,

Globe began reporting on the subsequent crackdown[5] and a year and half before the Spotlight investigation revealed a more complete picture of what had occurred. Following this investigation the two individuals profiled in the story filed a lawsuit alleging civil rights violations, prompting the federal Department of Justice to open an investigation.[6] In response to the Spotlight investigation, the executive agency that oversees the Massachusetts Department of Correction announced that prison guards would now be required to wear body cameras,[7] mimicking a technique for transparency and accountability that has become popular in the area of policing reform.[8]

Both the Constitution itself and administrative law impose limits on the arbitrary exercise of governmental power.[9] Transparency is one possible mechanism for preventing or redressing capricious acts by carceral actors. Transparency as a mechanism for government accountability turns on the theory that some portions of government activity[10] are closed off to the public or its representatives; that excluding the public from these processes hinders the proper functioning of democracy; and that

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Governor Baker Visits Correctional Officers Injured During Friday Attack, Bos. Globe (Jan. 12, 2020), https://www.bostonglobe.com/metro/2020/01/12/governor-baker-visits-correctional-officers-injured-during-friday-attack/MQi4OZbyZIMlgZf4mARkZP/story.html [perma.cc/F8X3-MC55].

5. Matt Stout et al., *Brutal Crackdown on Inmates Alleged at Shirley Prison*, Bos. Globe (Jan. 31, 2020), https://www.bostonglobe.com/2020/01/31/metro/brutal-crackdown-inmates-alleged-shirley-prison/ [perma.cc/A7LW-NLRV].

6. Mark Arsenault, *Federal Lawsuit Accuses State Officials of Retaliatory Violence Against Souza-Baranowski Prisoners*, Bos. Globe (Jan. 10, 2022), https://www.bostonglobe.com/2022/01/10/metro/federal-lawsuit-accuses-state-officials-retaliatory-violence-against-souza-baranowski-prisoners/ [perma.cc/JM6Z-YYJZ]. Editorial, *The Taking of Cell 15 Aftermath: A Brutal Assault Sets the Stage for Overdue Reforms,* Bos. Globe (July 26, 2024) (citing Deborah Becker, *New Court Filings Indicate Feds are Investigating Alleged Retaliation at Mass. Max Security Prison*, WBUR (May 11, 2023), https://www.wbur.org/news/2023/05/11/lawsuit-department-justice-souza-baranowski-correctional-center).

7. Mark Arsenault, *Corrections Officers at Souza-Baranowski to Get Body Cameras for the First Time*, Bos. Globe (Jan. 27, 2022), https://www.bostonglobe.com/2022/01/27/metro/corrections-officers-souza-baranowski-get-body-cameras-first-time/ [perma.cc/YZ39-YXXC].

8. Ronald J. Coleman, *Police Body Cameras: Go Big or Go Home?*, 68 Buff. L. Rev. 1353, 1355 (2020).

9. On the limits the Constitution places on prison departments, see generally, Driver & Kaufman, *supra* note 1. For a discussion of the potential of administrative law concepts to provide oversight and accountability to prison departments, see Erin Braatz, *Prison Administrative Law*, 74 Am. U. L. Rev. 45, 88-105 (2024).

10. These could include: the drafting of reports and documents, the conducting of hearings involving key decisions, or, central to our account, the decisions by "street level bureaucrats" to deprive an individual of a right or liberty. Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services (1980) (describing the large amount of discretion vested in lower-level bureaucrats).

it is only through greater openness that proper checks on government agencies can be assured.[11] Because information and knowledge about what occurs within carceral spaces is not easily accessible to elected officials or the general public, mechanisms that might constrain or limit harmful agency action often prove inadequate in the carceral context.[12]

The concept of transparency and its opposite, opacity, can illuminate the struggles that confront both the legislature and the public in monitoring and holding accountable prison departments. At the same time, transparency alone is insufficient to provide proper accountability. This is particularly true when the officials in question have oversight over vulnerable populations—here, incarcerated individuals. By delegating extraordinary power to a prison department, often with minimal oversight, the legislature manages to avoid the politically challenging task of insisting upon and paying for humane treatment of incarcerated individuals. Thus, the carceral context creates a unique challenge for transparency. While greater transparency of prisons can be obtained and is necessary, transparency alone will not provide the crucial accountability and oversight that the penal context requires. [13]

By foregrounding transparency, this Article situates itself between two dominant strains of scholarship on criminal legal system reform:[14]

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11. *See* Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 619 (2010).

12. This is true whether those controls come from within the structure of the administrative state itself or outside that structure, whether from other branches of the government or, most relevantly here, "the media, and civil society organizations." Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L. J. 423, 425 (2009). Elsewhere I have argued that this occurs not simply because the information is not easily accessible but through deliberate decisions by departments of correction to keep secret the things that occur behind their walls. Erin E. Braatz, *Democratizing the Eighth Amendment*, 68 VILL. L. REV. 1, 5 (2023).

13. Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 460 (2014).

14. Unaddressed here is a third path: abolition of prisons entirely. This position asserts that it is impossible to reform carceral spaces in a way that comports with human dignity and, for this reason, argues for their complete abolition. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1159, 1172, 1207 (2015). *See generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) (inaugurating the contemporary movement towards prison abolition); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2014–16 (2022) (summarizing recent scholarship). This article does not address this position, instead opting to focus on more immediate changes in practice that could improve the lives of the incarcerated in the short term. In taking this position, I am arguing for a non-reforming reform. *See generally* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497 (2023). This is non-reforming in the sense that my conclusion is not that the prison is capable of realizing some idealized state of perfectibility. Rather, I am arguing that, while legal

expert-led administrative reform[15] and democratically-led local community reform.[16] Both these approaches purport to address the entirety of the criminal legal system, from policing through incarceration, though in practice they focus much more heavily on inputs into the system, such as decisions to criminalize particular behavior, the policing of certain acts or groups, and decisions about sentence length rather than on the lived realities of prisoners.[17] Indeed, the entire field of criminal legal system scholarship largely leaves questions of prison conditions to prison law scholars, even while that group of scholars has been arguing for years that clear constitutional violations go unaddressed because of the procedural barriers that law imposes.[18]

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scholars debate the future of the system as a whole, we should not abandon those who are currently incarcerated to the dehumanizing conditions that currently prevail in U.S. prisons.

15. In the area of criminal legal system reform, this position is most fully articulated by Rachel Barkow, whose book PRISONERS OF POLITICS (2019) best articulates her position. *See also* her earlier article, *Administering Crime*, 52 UCLA L. REV. 715 (2005). This approach was also espoused by John Rappaport in his critique of the democratization perspective. *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 811–13 (2020).

16. The core position of the scholars embracing this approach was articulated in a co-authored white paper: Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. L. REV. 1693 (2017). Primary scholarship advancing this view includes Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. L. REV. 1455, 1466 (2017) (connecting his prior work on reconstructivism with democratic theory and arguing that "in a democratic society, law and other exercises of governmental power should reflect and respond to the ethical life of the people living under that law and government"); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 29, 147 (2012) (identifying exclusion of the public as one of the problems of the contemporary criminal legal system and arguing for greater public participation as a corrective); DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE (2008) (examining the relationship between democracy and policing); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973–74 (2008) (arguing that a decline in local-level democracy in the criminal legal system explains its contemporary problems and asserting that if we "[m]ake criminal justice more locally democratic, justice will be both more moderate and more egalitarian").

17. Barkow provides one chapter on confinement, though only four pages address prison conditions. RACHEL ELISE BARKOW, PRISONERS OF POLITICS, 69–72 (2019). Rappaport does discuss prison conditions. *See* Rappaport, *supra* note 15. Neither Bibas, Sklansky, nor Stuntz focus on prison conditions. *See generally* BIBAS, THE MACHINERY, *supra* note 16 and SKLANSKY, DEMOCRACY AND THE POLICE, *supra* note 16; Stuntz, *Unequal Justice*, *supra* note 16. The Democratic Criminal Justice white paper has one point on prison conditions. Kleinfeld et al., *White Paper*, *supra* note 16, at 1703–04. The 2017 volume of the Northwestern University Law Review dedicated to democratic criminal justice has only one short article focused on punishment, but it does not discuss prison conditions. *See* Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. L. REV. 1437 (2017).

18. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015). *But see* Driver & Kaufman, *supra* note 1, at 541–66,

Prison conditions challenge many core assumptions underlying both the democratization and the administrative expertise perspectives on the criminal legal system generally. Legal scholars who argue for more expertise must acknowledge practices adopted by alleged penal experts with little awareness or engagement by the public, including but not limited to the prolonged use of solitary confinement[19] and other everyday indignities such as chaining pregnant prisoners during their labor.[20] Scholars arguing for greater democratization may agree with some of the claims made in this Article, including its calls for greater public oversight of prison conditions. Yet they must contend with arguments that the public, on its own and without accountability mechanisms built into the administrative state, will be unable to do little more than bear witness to institutionalized atrocities.[21]

Both strands of the literature fail to recognize the unique problem of government accountability presented by the prison context, specifically the limitations of their own forms of accountability for addressing the carceral state. Prisons remain largely closed off from both the public and other branches of the government. At the same time, even when

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for the argument that prison law fails to hold together as a logical and well-reasoned field.

19. Keramet Reiter, *Reclaiming the Power to Punish: Legislating and Administrating the California Supermax, 1982-1989*, 50 Law & Soc'y Rev. 484, 484-85 (2016) (arguing that "[a]s of 2011, more than 500 prisoners had been in isolation in the Pelican Bay SHU for more than ten years."). For a discussion of the overall lack of oversight during the development of this system, see generally, Keramet Reiter, 23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement (2016).

20. Meredith Derby Berg, *Pregnant Prisoners are Losing their Shackles*, Bos. Globe (Apr. 20, 2014), https://www.bostonglobe.com/magazine/2014/04/18/taking-shackles-off-pregnant-prisoners/7t7r8yNBcegB8eEy1GqJwN/story.html [perma.cc/AB5X-EBSC].

21. An example would be Rikers Island, which has seen numerous reports of violence and mismanagement. *See, e.g.*, Jan Ransom & Jonah E. Bromwich, *Tracking the Deaths in New York City's Jail System,* N.Y. Times (July 23, 2023), https://www.nytimes.com/article/rikers-deaths-jail.html [perma.cc/65TE-5LTH] (reporting that since the start of the COVID pandemic, some inmates have gone without food and medical care due to chronic staff shortages); Chelsia Rose Marcius, *A Report on Violence at Rikers Is to Be Kept Secret,* N.Y. Times (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/nyregion/rikers-jail-violence-report.html#:~:text=A%20report%20tracking%20violence%20at,a%20federal%20judge%20has%20ordered [perma.cc/463Z-RFN2]. Amid these reports, the Board of Correction, which has had independent oversight over New York City jails (see its own description on its website: "About," https://www.nyc.gov/site/boc/about/about.page), "issued no notices of violation since the pandemic began, not even after board members documented 'horrible' conditions while investigating a death at Rikers in April. Many of the board's minimum standards—including the rules governing personal hygiene and how long detainees were in intake—appeared to have been violated." James Barron, *The Jail Oversight Board That Failed to Sound the Alarm*, N.Y. Times (Nov. 9, 2021), https://www.nytimes.com/2021/11/09/nyregion/board-of-corrections-jails-nyc.html [perma.cc/84Z8-MBV3].

aspects of prison policies are available for examination, prisoners often experience indifference from the public or the legislature. The concept of transparency elucidates what it means practically, theoretically, and normatively for a penal space to be closed and sealed off from legislative and public scrutiny. It does not, however, address situations where the public or legislature may be indifferent to the population subjected to secretive government action. This scenario begs the question of what to do when practices are knowable, yet no one wishes to know or meaningfully engage with them.

The challenge, this Article asserts, is the limited efficacy of transparency theory and its concomitant reliance on the democratic process to protect the most vulnerable members of our society. Most legal scholars who write about transparency theory do so in the context of the administrative state writ large. In that context, there is a heavy emphasis or reliance on the possibility of the democratic process to limit or check the excesses of administrative action. But this work fails to grapple with the limited efficacy of transparency in situations where the public may be indifferent to the population being mistreated. Indeed, as John Rappaport argued in his response to the democratization literature cited above, "empirical facts" may not support the ideals sought by scholars.[22] A close examination of what and how much is actually known about prison practices reveals that a lack of transparency is only part of what prevents meaningful oversight and accountability for prison departments. Prisoners and other institutionalized individuals face public and institutionalized indifference. In this context, the administrative state must develop a more robust system of oversight and accountability to protect those confined from arbitrary government action and ensure humane and dignified care.

This Article proceeds in three parts. Part I highlights a concept of central importance for understanding the unique relationship of carceral spaces to public or legislative scrutiny: transparency. In the criminal legal system especially, transparency is a concept embedded in our constitutional framework and built into that framework's assumptions about the role of the public in curbing government abuses. The theory was further refined in the early twentieth century during the Progressive Era, with the expansion of the administrative state, and then again in the 1970s amid an emphasis on good governance.[23] During these periods, transparency was lauded as a key aspect of administrative agency accountability and legitimacy. Transparency is both an idea and

22. Rappaport, *supra* note 15, at 716–17.
23. David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 102 (2018).

a practice, and this Part argues that it has a role to play in the carceral state given its unique degree of opacity.

Part II highlights the importance of transparency by carefully documenting how uniquely closed contemporary prison systems are. Although this fact is assumed in much of the literature, this Part demonstrates this point empirically by examining what information is (or is not) publicly available about one prison system: the Massachusetts Department of Correction ("the Department"). Through original research in newspapers, court filings, and legislative and executive documents, this Article traces the various ways the Department selectively reveals information about its own practices. This Article focuses on a single state in order to provide the degree of particularized examination of the political processes and the relative roles of the legislature, the Department, and the public necessary to reveal the opacity that veils the Department's actions.[24] In addition, the study of the Massachusetts Department of Correction in Part I provides "facts on the ground" that give concrete form to the claims made by existing scholarship on government transparency and administrative agency accountability, that were examined in Part I.

Yet, while transparency may appear a seductive response to the closed world of prisons, Part III argues that transparency's actual benefits are quite limited. This Part draws on work examining the limited impact of transparency, examining prison oversight programs operating in multiple jurisdictions. It argues that rather than relying on a limited administrative solution, such as transparency, lawyers and prisoner advocates should address more directly the field of administrative governance. Absent a greater focus on reforms to agency governance, the limited constitutional protections courts have provided are unlikely to prove effective in light of the nearly complete discretion and deference granted to prison departments.

I. Transparency Theory

This first Part traces the meaning of and reasons for transparency in the criminal legal system specifically and administrative agencies more generally. It is perhaps ironic that contemporary penal practices

24. Stephanos Bibas has argued for a more state-centered approach to the criminal legal system, particularly given that the majority of prisoners in the United States are incarcerated under state sentences and held in state institutions. *The Real-World Shift in Criminal Procedure*, 93 J. Crim. L. & Criminology 789, 800–04 (2003). This is particularly striking given that the majority of administrative law scholarship that will be cited in this article focuses on federal administrative law, thus providing one explanation for the failure of that scholarship to consider or contend with the carceral state. *But see* Nestor M. Davidson, *Localist Administrative Law*, 126 Yale L.J. 564 (2017).

are so opaque, given the iconic image of the panopticon that coincided with their birth[25] and that reemerged in the 1970s as the metaphorical explanation for how power operates within penal spaces.[26] Michel Foucault's account of the modern prison suggests a form of disciplinary action that depends on the possibility of constant visibility.[27] The panopticon is a style of architecture whose purpose was to render continuously observable the acts of the prisoner,[28] who would, because they are under the possibility of unceasing surveillance, conform their behavior to that expected by the institution.[29]

Although internally the prison depended upon a form of visibility to function, externally the prison was hidden behind a bureaucratic façade. Foucault contrasted the panopticon with older, public punishments, in which the public played an active role in observing the exercise of sovereign power. He argued that, by shifting to imprisonment, "[p]unishment . . . will tend to become the most hidden part of the penal process," allowing "justice" to be "relieved of [public] responsibility for it by a bureaucratic concealment of the penalty itself."[30] Thus, Foucault

25. Jeremy Bentham, The Panopticon Writings (1995). *See also* Roger Barlett, The Bentham Brothers and Russia: The Imperial Russian Constitution and the St. Petersburg Panopticon (2022); Beyond Foucault: New Perspectives on Bentham's Panopticon (Anne Brunon-Ernst ed., 2016); Janet Semple, Bentham's Prison: A Study of the Panopticon Penitentiary (1993).

26. Michel Foucault, Discipline & Punish 195 (Alan Sheridan trans., 1979).

27. *Id*. For contemporary discussions of the panopticon, see Julie E. Cohen, *Privacy, Visibility, Transparency and Exposure*, 75 U. Chi. L. Rev. 181 (2008); Kumar Katyal, *Architecture as Crime Control*, 111 Yale L.J. 1039 (2002); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 Mich. L. Rev. 291 (1998).

28. Foucault, *supra* note 26. He vividly described how power would operate within panoptic spaces:

> [A]t the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; . . . All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell . . . a condemned man . . . one can observe from the tower . . . the small captive shadows in the cells of the periphery. They are like so many cages . . . in which each actor is alone, perfectly individualized and constantly visible

29. *Id*. at 195. The result of being subjected to a panopticon, according to Foucault, is that the prisoner will begin to monitor himself and constrain his own actions. *Id*. at 203 ("He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.").

30. *Id*. at 9–10.

recognized that one effect of shifting punishment to imprisonment was the hidden and concealed aspects of the contemporary carceral state.

The panopticon has rarely been evoked in the other direction, as an explanation of the goals or possibilities of oversight that the state might seek over its own institutions.[31] Hidden within Foucault's account of the panopticon, however, is a renewed place for the public. He argued that the panopticon, while enabling the prisoner to be perfectly and always observed, "also enable[s] everyone to come and observe any of the observers," meaning that the prison would be a "transparent building in which the exercise of power may be supervised by society as a whole."[32] Thus, the metaphor of the panopticon revealed a central assumption Foucault made about the operation of power within a carceral state: power operates through observation, and this applies both to the observed (the prisoners) and the overseers (the prison's managers).

In contemporary accounts of the administrative state, this insight, that power and accountability can function through constant observation (or, at least, the possibility of constant observation), is captured in the concept of transparency. This Part distinguishes three sets of arguments that scholars and advocates of transparency have made. The first emphasizes the importance of public participation and democratic deliberations. The second focuses on a unique subset of the public: experts. The third highlights the importance of a system of checks and balances for constraining government actions. What all three groups of arguments depend upon, however, is a belief that once the public or relevant government agent becomes aware of potential misuses of power, they will take action to check that misuse. This argument is weakest, however, when the population subjected to the misuse of power is itself politically weak. In other words, not all misuses of government power will receive the same public or governmental response, which suggests that in some contexts, transparency is only the beginning of a problem that extends beyond not knowing what occurs in prisons to not caring what happens within them.

For this reason, this Part develops a theory of transparency as an aspect of our constitutional system and of good governance developed as part of the administrative state. However, it does so while simultaneously emphasizing something transparency theorists have

31. For an example of someone who does evoke this metaphor, see Fenster, *Seeing the State*, *supra* note 10, at 668. He argues that "the transparency metaphor urges the construction of an inverted panoptic penal facility, one that puts the public—or some subset thereof—in the position of the guard and that casts government officials as the incarcerated." *Id.*

32. FOUCAULT, *supra* note 26, at 207.

long known but do not always emphasize: transparency is not enough.[33] Rather, transparency speaks to a broader concern with administrative accountability. In some contexts, transparency may be sufficient to ensure accountability (one might theorize that these contexts include situations where the public might have particular concerns, such as national security). In other contexts, however, true accountability will only come when specific individuals are given both the ability to see and the authority to enforce recommendations based on what they saw. This point will be further developed in Part III, where I argue for a more robust system of oversight and accountability given the limitations of transparency theory in this context.

A. Origins of Transparency Theory

Transparency theory has two distinct historical antecedents. The first, while not entirely unique to the criminal legal system, is well developed within that and derives from constitutional guarantees to transparency at various stages of the criminal legal system process. The second developed in the early twentieth century and is specific to the administrative state. Both strands come together in contemporary prison departments, which play a significant role in the criminal legal system while also being, themselves, administrative agencies.

Scholars of the contemporary criminal legal system have highlighted transparency as an aspect of the history of that and embedded in constitutional guarantees. For example, Stephanos Bibas begins his article on transparency in criminal procedure by contrasting colonial practice, dominated by lay participation where "[e]veryone could witness punishment in the town square, as convicts swung from the scaffold or languished in the stocks," with contemporary practice, where "[a] gulf divides the knowledgeable, powerful participants inside American criminal justice from the poorly informed, powerless people

33. Pozen, *supra* note 23, at 161 (arguing that we should view transparency "as a complement to, not a substitute for, substantive regulation" (italics removed)); Mark Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 936 (2006) (arguing that transparency theory should abandon the notion that transparency is inherently valuable and instead acknowledge that "transparency's goals require a context-specific definition of transparency, viewed in terms of specific policy objectives" among other things). *See also* Fenster, *Seeing the State*, *supra* note 10, at 623 ("[T]he debate over how best to make the government open too often focuses on how to make the state permanently and entirely visible rather than on devising means to improve public oversight and education."). To support this point he cites Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 Governance 529, 537 (2009) and Mark Schmitt, *Transparency for What?*, Am. Prospect (Jan. 29, 2010), https://prospect.org/special-report/transparency-what/ [https://perma.cc/T36A-JUGG]. *Id.*

outside of it."[34] This divide between "insiders" and "outsiders" animates his work, though we will see in Part II that in the carceral context this dichotomy is somewhat more challenging—prisoners are, after all, the ultimate insiders, even while they experience the powerlessness that Bibas identifies with outsiders. Bibas' framework was developed to explain the criminal courtroom, even while he implicitly draws penal practices into his ambit.[35] The prison, however, presents a similar, though distinct, set of challenges. All the same, his insight that the problem is not transparency on its own, but rather an imbalance of knowledge between those on the inside versus those on the outside, will be a useful framework as we evaluate the opacity of prison departments in Part II.

Aliza Cover similarly draws on the history of public punishments in illustrating the historical move towards seemingly less transparency in penal practices in the United States.[36] Her work is carefully grounded in the many aspects of criminal legal system transparency guaranteed in the U.S. Constitution, which she argues provide "a trans-clausal constitutional guarantee of transparency in criminal justice proceedings."[37] The struggle for Cover's argument in the context of the carceral state is that the Constitution provides "no explicit protection for public participation, either as decision maker or audience, in the act of punishment itself."[38] Thus, while she draws upon the same history of public punishments as Bibas,[39] she is unable to rely on the Constitution to ensure transparency in carceral practices, except by evoking her

34. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 912 (2006). He also argues that "the abolition of these punishments and professionalization of the system have brought with them unnoticed costs," *id.* at 920 n.24. Jenia Turner developed a similar though rather more specific argument than Bibas in the context of plea bargaining: Jenia I. Turner, *Transparency in Plea Bargaining*, 96 Notre Dame L. Rev. 973 (2021). Other scholars have focused on disappearance of the trial. *See, e.g.*, Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 Geo. Wash. L. Rev. 99 (2018); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173 (2014). Finally, others have focused on the criminal legal system generally, though typically also excluding the punishment phase. *See, e.g.*, Meghan J. Ryan, *Criminal Justice Secrets*, 59 Am. Crim. L. Rev. 1541 (2022); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 Cardozo L. Rev. 965 (2008).

35. Bibas, *Transparency and Participation*, *supra* note 34, at 920 (arguing that "laymen ran the system and watched the process and results firsthand").

36. Aliza Plener Cover, *The Constitutional Guarantee of Criminal Justice Transparency*, 74 Ala. L. Rev. 171 (2022).

37. *Id*. at 175–76.

38. *Id*. at 208.

39. *Id*. (arguing that "[a]s a historical matter . . . punishment took place before a public audience.").

"trans-clausal" approach.[40] As the rest of this section will assert, however, the Constitution is not the only guarantor of transparency practices. Transparency is also an aspect of administrative governance, developed over the course of the twentieth century as a key mechanism of administrative agency accountability.

While transparency thus has a historical antecedent in public punishments and is carefully embedded in Constitutional guarantees for other aspects of the criminal legal process, it emerged as an aspect of administrative governance during the progressive era. Legal reformers "imagined that increasing transparency would decrease certain sorts of exploitation and abuse," which would in turn "promote bureaucratic rationality, secure confidence in government, and distribute power more equitably."[41] Charles Edward Russell, a progressive reformer and "muckracking provocateur," asserted that "[t]o right any wrong in the United States is, after all, a simple process. You have only to exhibit it where all the people can see it plainly."[42] Future Supreme Court Justice Louis Brandeis was also an early proponent of transparency, famously saying that "[s]unlight is . . . the best of disinfectants."[43] Brandeis is also famous for the "Brandeis brief," which fused "sociological data" with "traditional legal argument," providing an example of the progressive "conviction that 'facts were necessary to good governance,' especially with respect to vulnerable populations, and that 'publicity and sunlight produced those necessary facts.'"[44] During the Progressive Era, "[e]xposing the inner workings of institutions was not an end in itself, but rather a precondition for new modes of responsive regulation and democratic action."[45] Thus, the period was known for exposés that

40. *Id*. at 211 (admitting that "[w]ith a clause-bound interpretive approach to the Constitution's transparency guarantees, the Constitution has little to say about this lack of transparency.").

41. Pozen, *supra* note 23, at 102.

42. *Id.* at 108 (citing Charles Edward Russell, The Story of the Nonpartisan League: A Chapter in American Evolution 64 (1920)).

43. *Id.* (quoting Louis D. Brandeis, *What Publicity Can Do*, Harper's Wkly., Dec. 20, 1913, at 10). *See* Armstrong, *supra* note 13, at 459 (drawing on the Brandeis quote to argue for penal transparency). This use of sunlight to capture the exposure or "seeing" that transparency would enable is present in Foucault's description of the panopticon. He refers to the cells as each having a window "on the outside, [that] allows the light to cross the cell from one end to the other" and "[b]y the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery." Foucault, *supra* note 26, at 200.

44. Pozen, *supra* note 23, at 110 (citing *Neil M. Richards, The Puzzle of Brandeis, Privacy, and Speech*, 63 Vand. L. Rev. 1295, 1316 (2010)).

45. *Id.* at 113–14.

revealed the inner workings of seemingly closed off spaces that then led to regulation and reform of those spaces.[46]

Decades later, in the 1960s and 70s, when Congress passed measures to enhance government transparency (including, famously, the Freedom of Information Act (FOIA)), reformers believed that greater transparency would increase government legitimacy and enable the public to protect itself against industry insiders.[47] One justification for the passage of the first FOIA in 1966 was that "Congress presumed that requiring government to make its information available to the public would in turn improve the quality of voter decisionmaking [sic] and, as a result, the quality of governance as representatives respond to a more 'intelligent' electorate."[48] In this theory of public participation, the voting public is better able to exercise its choice in elections if it is properly informed about government action. This view of government legitimacy depending on government openness persists, especially in the context of the criminal legal system.[49] In all these iterations, however, the commonality in claims about the value of transparency is that it operates as a check that improves or limits government action by providing information to the public, who then make informed choices in their vote. Thus, according to its proponents, transparency enables the public to monitor and engage with agency actions.

B. Transparency's Many Goals

While the foregoing traced the history of the transparency idea in both the criminal legal system and the administrative state, this section will focus on three reasons why transparency has been so often lauded as a key to preventing arbitrary government action. The first, cited above, is that it enables proper public participation in the criminal legal system.

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46. Perhaps most famous was Upton Sinclair's *The Jungle*, published in 1906. Nellie Bly had earlier, in the 1880s, gone undercover on New York's Blackwell Island to expose the state's treatment of the mentally ill. Susannah Cahalan, The Great Pretender (2020). This approach still occurs today, especially in the carceral context. *See, e.g.*, Shane Bauer, American Prisons: A Reporter's Undercover Journey into the Business of Punishment and Ted Conover, Newjack: Guarding Sing Sing (2001).

47. Pozen, *supra* note 23, at 120 ("By opening up legislative and administrative bodies to 'critical public view,' these laws aimed to prevent well-heeled insiders, especially industry groups, from exercising undue influence over those bodies—and consequently to enhance the fairness, the deliberativeness, and . . . the public interestedness of their work.").

48. Fenster, *The Opacity*, *supra* note 33, at 898.

49. Bibas, *Transparency and Participation*, *supra* note 34, at 949 ("People respect the law more when it is visibly fair and when they have some voice or control over its procedures.").

Bibas was concerned with better informing outsiders of what occurred inside the criminal courtroom because, without that information, outsiders were likely to promote or approve of policies inconsistent with the various goals of that system. Similarly, Cover argued that "[t]he government must be transparent to earn its legitimacy through the informed consent of the governed, and the populace must be well-informed to exercise its electoral power rationally and effectively."[50] The second goal of transparency, less recognized in the literature on the criminal legal system, is the role of experts in legitimizing and providing a check on administrative action. The third goal of transparency is to facilitate the checks and balances that are built into our Constitutional system of government. For example, the legislature cannot play its role in checking the executive if it is unaware of what the executive is doing.

Here, the idea of checks and balances covers two distinct concepts: the checks and balances provided by the Constitution, which allow each branch to check incursions on their own power;[51] and, subconstitutional checks, which include public participation in checking agency action.[52] Both constitutional and subconstitutional checks rely on some degree of agency transparency. Both also depend on either a branch of the government or the public knowing or being aware of what occurs within the administrative agency. Arbitrary power cannot be checked unless some entity in a position to limit agency action knows about the arbitrary exercise of power. The role of the judiciary in providing meaningful checks on penal power has been thoroughly examined elsewhere and is beyond the scope of this Article.[53] The role of the legislature, however, and, through it, the public, has been less closely examined.

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50. Cover, *supra* note 36, at 177.

51. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 REGUL. 14, 19 (1982) (arguing that "[t]he major exposes of recent times . . . owe virtually nothing to the FOIA but are primarily the project of the institutionalized checks and balances within our system of representative democracy").

52. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 533–35 (2015) (identifying three primary subconsitutional checks on agency power: agency leaders, civil service and civil society. For reasons that I will discuss *infra* Part II, with regards to the Massachusetts Department of Correction, the agency head and the civil service are currently largely aligned, leaving civil society as the primary check on agency power).

53. There are almost too many works studying judicial interventions into carceral spaces to cite. Some of the most recent include: Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 516, 536, 539 (2022) (arguing that the Turner v. Safley standard for reviewing prison agency action created "a long tradition of deference to prison officials" and arguing that "Safley's deeper legacy has been to render prison law so unfavorable to prisoners' civil rights claims that they are almost invariably extinguished by lower courts."); Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95

1. Public Participation

One scholar of transparency defines the concept in relation to public participation, stating that transparency is "the degree to which information is available to outsiders that enables them to have informed voices in decisions and/or to assess the decisions made by insiders."[54] Mark Fenster argues that the logic of transparency theory is that "[g]overnment institutions operate at a distance from those they serve. To be held accountable and to perform well, the institutions must be visible to the public. But in the normal course of their bureaucratic operation, public organizations . . . create institutional impediments that obstruct external observation."[55] He argues that the metaphor of transparency suggests two solutions to this perceived failure of the administrative state: "allow the public to view the state directly or require the state to make its work available for the public to review."[56]

These arguments in favor of transparency are already recognized within the literature on the carceral state. For example, Andrea Armstrong connects transparency to the democratic project of "popular participation, which in turn presupposes an informed electorate."[57] Michele Deitch suggests that "[t]here can be—and should be—many different effective ways to identify and correct safety problems in

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Denv. L. Rev. 457 (2018); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 Notre Dame L. Rev. 2021 (2018); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357 (2018); Sharon Dolovich, *Forms of Deference in Prison Law*, 24 Fed'l Sen'g Rept. 245 (2012); 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 (2008); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550 (2006); Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 Pace L. Rev. 433 (2004); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994 (1999).

54. Ann Florini, *Introduction: The Battle over Transparency, in* The Right to Know: Transparency for an Open World 1, 5 (Ann Florini ed., 2007).

55. Fenster, *Seeing the State*, *supra* note 10, at 619.

56. *Id.* at 621.

57. Armstrong, *supra* note 13, at 458. This argument is repeated in her conclusion: "In the absence of information about how certain conditions foster recidivism, our national conversation about inmates further subordinates the incarcerated population by stamping them as morally flawed or forever criminal. Accordingly, increasingly punitive penal policies are justified by the flawed character of people who commit crimes, instead of by assessing why one bad act can become multiple criminal acts over time." *Id.* at 475. *See also* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 Stan. L. & Pol'y Rev. 455, 455 (2011) ("public scrutiny is often a prerequisite for changing harmful, entrenched practices").

correctional institutions, and to increase public awareness."[58] Geri Lynn Green argues that we need "transparency *and* accountability to reinvigorate the active participation of its citizenry to demand responsible solutions to the problems in the [] penal system."[59] A major finding of the Commission on Safety and Abuse in America's Prisons was that "[m]ost correctional facilities are surrounded by more than physical walls; they are walled off from external monitoring and public scrutiny to a degree inconsistent with the responsibility of public institutions."[60] This is of particular concern in prisons, where even the Constitutional protections intended to protect prisoners cannot properly function without public observance of penal space.[61]

One problem with this aspect of transparency theory, however, is that it assumes "the existence of an interested public that needs and wants to be fully informed. This presumption badly needs proof."[62] Scholars who study American democracy know that not only is there often a vast lack of knowledge on the part of voting members of the public,[63] but there is also little incentive for most members of the public to spend the time and resources necessary to acquire more knowledge.[64] John Rappaport's forceful critique of the criminal legal system democratization body of scholarship draws on this insight that in fact voters are often quite apathetic.[65] He specifically cites as an example attempts to provide space for community engagement with police departments and reports that they have "consistently disappointed over the long run," specifically "encounter[ing] great difficulty in cultivating and maintaining community involvement."[66]

These arguments all turn on an assumption that the public is not, at this point, as engaged with carceral spaces as might be hoped. It is

58. Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 Pace L. Rev. 1438, 1439 (2010).

59. Geri Lynn Green, *The Quixotic Dilemma, California's Immutable Culture of Incarceration*, 30 Pace L. Rev. 1453, 1453 (2010). Later she argues that reform will "only happen with an informed electorate. Transparency and accountability are the first steps that must be taken to garner the political will to make the necessary changes towards responsible democratic governance." *Id.* at 1475.

60. Gibbons & Katzenbach, *infra* note 292, at 408.

61. *See generally* Braatz, *supra* note 12 (arguing that public awareness of punishments is essential to the proper development of evolving standards of decency, a key component of the Eighth Amendment's protection against cruel and unusual punishment).

62. Fenster, *The Opacity*, *supra* note 33, at 928.

63. Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 Critical Rev. 413, 417–19 (1998).

64. Jeffrey Friedman, *Introduction: Public Ignorance and Democratic Theory*, 12 Critical Rev. 397, 408–09 (1998).

65. Rappaport, *supra* note 15, at 750–57.

66. *Id.* at 753.

often observed that there is no natural constituency likely to petition the legislature for changes in carceral practice.[67] This leads to a lack of political will to meet the needs of an underrepresented minority.[68] There is also a view that "[t]he proverbial 'public' wants everything, yet has a limited knowledge base from which to make informed choices about what are reasonable aims for prisons."[69] This leads some scholars to argue in favor of an increased role for administrative expertise in criminal legal policy making. For these scholars, the democratic process is uniquely unlikely to lead to desired outcomes in the carceral space, because, they argue, the public is overly swayed by news reports of dramatic, and unrepresentative, crimes that lead to irrational and inefficient policies. This concept is referred to as "penal populism," and it is a primary justification in scholarship that argues for a move towards greater administrative (and thus less legislative) control in criminal legal policy making.[70] The corollary to this position is that prisoners, their family members, and their communities are unable to counter the political narrative developed by the media and other individuals or groups committed to the tough on crime narrative. These arguments raise questions about the potential efficacy of transparency theory in situations such as the carceral state, where the fact of knowing is not the only barrier to action. Additional obstacles are created by a public that is perhaps indifferent to the situation of prisoners, such that even greater transparency will not lead to greater knowledge on the part of the voting public or action even if the public acquired that knowledge.

2. Experts

Public participation turns on the public as voters, who can use the democratic process to hold administrative agents accountable. There is

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67. Nicholas deB. Katzenbach, *Reflections on 60 Years of outside Scrutiny of Prisons and Prison Policy in the United States,* 30 PACE L. REV. 1446, 1448 (2010). This is also seen in Barkow's argument that the public is the problem in that it supports a "criminal justice policy in the United States [that] is largely based on emotions and the gut reactions of laypeople." BARKOW, PRISONERS OF POLITICS, *supra* note 17, at 1. *See also* JOHN PRATT, PENAL POPULISM (2006); JULIAN V. ROBERTS ET. AL., PENAL POPULISM AND PUBLIC OPINION (2002); Trevor Jones, *Symbolic Politics and Penal Populism: The Long Shadow of Willie Horton*, 1 CRIME, MEDIA, CULTURE 72 (2005).

68. Plata v. Schwarzenegger, 2005 WL 2932253, at *3 (N.D. Cal. Oct. 3, 2005) (describing failure of the California prison system to adapt to rapid growth in prisoner population and the need for significant changes "in order to function effectively and in compliance with basic constitutional standards").

69. Stan Stojkovic, *Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1477 (2010).

70. *See, e.g.,* PRATT, *supra* note 67; BARKOW, PRISONERS OF POLITICS, *supra* note 17, at 105–24.

a specific subset of the public that can also, through their research and scholarship, hold agencies accountable. This argument turns on certain members of the public being equally capable of evaluating agency action as the administrators themselves. This position asserts that the government will perform better if it makes public the information it gathers and the bases of its decisions because informed members of the public will be able to correct erroneous assumptions made by government officials working in "echo chamber[s]" that allow "plausible but incorrect hypotheses and false or partial intelligence to face no public vetting or internal criticism."[71] In other words, the expertise that is often lauded as foundational to administrative legitimacy will function better if it is checked by outside experts.[72]

The development of outside expertise as one aspect of public participation is especially acute in the carceral context. In that context, prison departments create and control access to the physical space under study. Their own practices both create and supervise prisons, which is a distinct problem from other administrative agencies where the work of the agency impacts some area outside in the world that can be studied on its own terms, unmediated by the regulatory agency.

An example of the power of this outside perspective can be seen in Gersham Sykes' now iconic work, *The Society of Captives*, which provided a detailed ethnographic account of the internal structure and management of the New Jersey State Prison.[73] Syke's work became "a cornerstone of prison sociology."[74] Over half a century later the field of prison sociology is vastly different, in part because social scientists have "less of a welcome" inside prisons, where their involvement is

71. Fenster, *The Opacity*, *supra* note 33, at 900 (citing the failure to recognize the growing collapse of the Soviet state, failure of law enforcement to prevent 9/11, and failure of the Bush administration to recognize its incorrect assumptions about Iraq's weapons program as examples of government failures that could have been prevented had information been shared with the public).

72. Elena Kagan provides an excellent summary of this lauded expertise: "Fear not this official, Landis implied, for 'expertness' imposed its own guideposts, effectively solving the problem of administrative discretion. Expert professionals could ascertain and implement an objective public interest; administration could become a science." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2261 (2001) (citing James McCauley Landis, The Administrative Process 75 (1938)).

73. Gresham Sykes, The Society of Captives (1958).

74. Bruce Western, *Introduction* to Gresham Sykes, The Society of Captives, ix–xxv, x (1958). *See also* Michael Reisig, *The Champion, Contender, and Challenger: Top-Ranked Books in Prison Studies*, 81 Prison J. 389 (2001) (describing the decision by a panel of 20 prison researchers to select *The Society of Captives* as the most influential book in prison studies published in the twentieth century).

seen as "virtually all political risk for prison administrators."[75] Whereas from the 1950s through 1970s, prison sociologists could enter, observe, study and thereby contribute to the expert knowledge developed around prisons,[76] by the end of the twentieth century (and continuing to this day) outside researchers were systematically denied access.[77]

In part because of this lack of research within prisons, "[t]he public has little idea what happens behind prison walls."[78] Karamet Reiter provides a vivid description of our state of knowledge about the practice of imprisonment: "Imagine the thousands of pixels that render a digital image clear and vivid; the lack of access to and research about U.S. prisons leaves observers trying to make sense of an image with too few pixels. Those few pixels that do compose the image are blurry and magnified out of proportion."[79] The result, she argues, is "the invisibility of the modern-day American prison."[80] Reiter points to several structural factors that contribute to this invisibility, including the routine practice of excluding researchers and journalists[81] as well as refusing to collect or release information about prison practices.[82]

This struggle over access can be seen in the work of sociologists and anthropologists who report resistance from prison officials over access to study penal spaces. Often these disputes go underreported in the final research, but when researchers do discuss the process of gaining access, they reveal a system in which the prison departments create "access barriers" that "not only prevent certain kinds of research from occurring in the first place, but . . . also shape the kinds of projects that eventually get approved, and therefore . . . have a substantial impact on carceral knowledge overall."[83] This has clear implications

75. Jonathan Simon, *The 'Society of Captives' in the Era of Hyper-Incarceration*, 4 Theoretical Criminology 285, 303 (2000).

76. *Id*.

77. Christina Rathbone, A World Apart: Women, Prison, and Life Behind Bars xi–xiv (2005).

78. Armstrong, *supra* note 13, at 436.

79. Karamet Reiter, *Making Windows in Walls: Strategies for Prison Research*, 20 Qualitative Inquiry 387, 420 (2014).

80. *Id.*

81. *Id*. at 421.

82. *Id*.

83. Tara Marie Watson & Emily van der Meulen, *Research in Carceral Contexts: Confronting Access Barriers and Engaging Former Prisoners*, 19 Qualitative Rsch. 182, 184 (2018) (discussing the Canadian context, though the argument clearly translates to the United States' context as well). Reiter echoes this same argument: "[i]n the United States, prison inaccessibility is intertwined with prison administrators' lack of accountability to the public, courts, and legislators. This multi-faceted lack of accountability reinforces the inaccessibility of prisons." Reiter, *Making Windows*, *supra* note 79, at 421. She argues that this inaccessibility operates in two directions: "[p]rison

for examining whether or how prisoners are protected from arbitrary government action.

3. Constitutional and Subconstitutional Checks

In an influential article, then-Professor Antonin Scalia argued that public transparency is unnecessary because of the system of checks and balances that the Constitution creates.[84] Rather than rely on the "public" to hold government agencies accountable, this approach asserts that the other branches of government are best positioned to do so. He asserted that at that time (in 1982) FOIA had done little to expose problematic government action and that notable examples of exposure instead demonstrated the regular workings of a system of checks and balances. In other words, our system of government ensures that each branch can learn about and use the information it needs to keep the other branches informed. In this sense, the point was not transparency with the public but rather between the branches of government.[85] Although as an empirical matter Scalia overstates his case,[86] the larger point that publicity and public engagement with the government is only one form of accountability should be taken seriously.

Note, however, that Scalia is pointing to checks and balances as an alternative to transparency. What Scalia's article does not explore is the extent to which the process of checks and balances itself depends on transfers of information and, indeed, transparency between the branches of government. Part II will give as an example legislative committees created by the Massachusetts legislature to learn more about certain aspects of the Department's activities (such as budget and the use of solitary confinement). It will also reveal that those entities have faced significant obstacles to acquiring information from the Department, which often will

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administrators not only resist public accountability by keeping civilians out, they also resist public accountability by keeping information in." *Id*. *See also* Ann L. Cunliffe & Rafael Alcadipani, *The Politics of Access in Fieldwork: Immersion, Backstage Dramas, and Deception*, 19 Org. Rsch. Methods 535, 536 (2016) (arguing that "the experience of gaining and maintaining access can itself tell us a lot about practices, processes, and power in the organizations we want to study").

84. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 Regul. 14, 19 (1982) (arguing that "[t]he major exposes of recent times . . . owe virtually nothing to the FOIA but are primarily the project of the institutionalized checks and balances within our system of representative democracy").

85. *Id*. at 19.

86. While his examples were not ones in which FOIA played a role, they were instances of the government improperly withholding or hiding information and concerted efforts by the press and others to find and report on the hidden information. Fenster, *The Opacity*, *supra* note 33, at 903 n.74. His examples were "CIA mail openings," "Watergate," and "FBI COINTELPRO operations." Scalia, *supra* note 84, at 19.

simply not answer questions or fail to show up for hearings. This finding is in tension with the scholarly literature that asserts that the legislative branch effectively controls agency action.[87] Instead, the examples provided in Part II support the arguments of scholars who are skeptical of relying on legislative oversight to provide administrative accountability. These scholars tend to focus on the difficulty of passing legislation, even changes in budgets, that will overrule or punish agencies.[88] Moreover, legislative action tends to occur in response to interest groups pressuring the legislature and therefore tends to be "ad hoc rather than [a] systematic consideration of administrative policy."[89] This can be seen in the case of Massachusetts, where the legislature was able to pass legislation narrowly targeted to change specific aspects of prison policies rather than enacting sweeping changes to prison practice or policies.[90]

Scalia's argument that the best way to constrain government action is through the constitutional system of checks and balances finds support in one strain of criminal legal system reform scholarship which itself emphasizes the role of checks and balances.[91] These scholars argue that it is the failure to separate the powers of the distinct forms of lawmaking that the Constitution recognizes (legislative criminalization, executive enforcement, and judicial adjudication) that has led to our current problem of mass incarceration.[92] For example, Rachel Barkow argues

87. Kagan, *supra* note 72, at 2257–59.

88. *Id.* at 2260 ("Statutory (including most budgetary) punishments require the action of the full Congress—action which is costly and difficult to accomplish."). To support this point, Kagan cites Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance',* 12 Legis. Stud. Q. 475, 486–90 (1987).

89. Kagan, *supra* note 72, at 2260. *See also* Barkow, Prisoners of Politics, *supra* note 17, at 4–6.

90. Berg, *supra* note 20. For example, pregnant prisoners used to be routinely restrained while giving birth. Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 Calif. L. Rev. 1239, 1251 (2012). In one of the few examples of concerted legislative action to limit DoC decision making, 34 states have passed anti-shackling bills. Incarcerated Women: Pregnancy & Childbirth, Women & Justice Project (2020), https://womenandjusticeproject.org/pregnancy-infographic/ [https://perma.cc/YE5P-JU7U]. There is reason to believe that these bills continue to be violated, however. *Id.* at n.23. *See also* Rachel Roth et al., Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law (2016), https://www.plsma.org/wp-content/uploads/2016/05/Breaking-Promises_May2016.pdf [https://perma.cc/2VS8-2CHN].

91. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 997 (2006). In the context of the criminal legal system, *see also* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 Notre Dame L. Rev. 1071, 1073 (2017). In the wider administrative state, *see* Tom Ginsburg & Eric A. Posner, *Subsonstitutionalism*, 62 Stan. L. Rev. 1583 (2010).

92. There is some crossover between the two groups. For example, William Stuntz is often cited as being a founding creator of the democratic criminal justice strain of thought, and one of the reasons he articulates for this stance is the failure of separation

that part of the problem with plea bargaining in our current system is that it combines various governmental functions (adjudicative and executive power) in a single person or office, which is not subject to the same constraints on agency action that we see in other contexts.[93] Shima Baughman argues that one reason this persists in a system that James Madison thought would entail each branch "resist[ing] encroachment of the others"[94] is because the different branches are unwilling to check each other. Baughman argues that, for this reason, there should be a series of subconstitutional checks that will "compensate for the lack of functional structural checks in modern criminal justice."[95]

However, as Daniel Epps notes, separation of powers is a distinct concept from checks and balances; rather than focusing on the first, as the above scholars do, it may be far more productive to focus on the second.[96] He argues that we should pay closer attention to how state power is checked rather than how its idealized forms are or ought to be dispersed.[97] Greater attention should be given to "the importance of permitting different government actors and institutions to check each other's exercise of power."[98] Thus, rather than focusing on separation of powers, as criminal legal reform literature has done, Epps would argue that instead the focus should be on ensuring that there are sufficient checks and balances on the exercise of power. Epps does not emphasize transparency, although his account has another helpful insight. He argues that the key to checks and balances is ensuring that multiple perspectives are considered. Within the carceral state, this is an especially salient consideration. It also reveals the significance of the unevenness of knowledge accumulation as identified by Stephanos Bibas.[99]

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of powers in the criminal legal realm, with too much power concentrated in the hands of prosecutors. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 599 (2001). Similarly, Stephanos Bibas has written favorably of democratic criminal justice but also sees a failure of the separation of powers in the person of the prosecutor to be one of the major impetuses behind mass incarceration. *Prosecutorial Regulation Versus Prosecutorial Accountability,* 157 U. PA. L. REV. 959, 961 (2009).

93. Barkow, *Separation of Powers*, supra note 91, at 1021–25.

94. THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

95. Baughman, *supra* note 91, at 1122.

96. Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1 (2021). For a discussion of the two conceptions of separation of powers that this argument draws from, see M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

97. Epps, *supra* note 96.

98. *Id*. at 5.

99. Bibas, *Transparency and Participation*, *supra* note 34, at 913 (identifying a "tension" between "insiders" who have "firsthand knowledge and understanding" versus "outsiders" who "find criminal justice opaque.").

Taking Epps' insight into both transparency theory and the carceral state, one major limitation in the transparency literature is that it fails to account for the damage that partial or biased forms of transparency impose. Part II will provide examples of the various ways by which the Massachusetts Department of Correction produces numerous reports, is covered in the local media, and is subject to investigations by the legislature, and yet retains a high level of control over the information shared. In other words, the problem is not transparency per se, but rather that it is a transparency that is very one-sided. Part III will argue that one of the goals of prison oversight is to ensure "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 facilities."[100] This argument helps make clear that transparency that does not allow for or facilitate multiple perspectives on what is occurring within the agency is not really transparency.

Moreover, this approach aligns with scholarship on the administrative state that urges greater attention to the need to study "how power is actually concentrated"[101] and "the underlying interests that control its decision making."[102] Although often this is seen as a problem for transparency regimes to solve (campaign finance laws, for example, target this problem), there might be additional transparency considerations. In the carceral context, there are competing interest groups, including correctional officers unions and executive officials, on the one hand, and prisoners and their families, on the other. Each group has access to some information about the institution, and each is engaged in some degree of sharing of that information. However, the Department's strength and ability to disseminate its message, augmented by the power of the correctional officer's union, ensures that its perspective receives the greatest attention. Thus, transparency is both a solution to and a victim of the competing interest groups that attempt to control public perception of this highly secretive space.

This imbalance of power is at the heart of a body of scholarship focused on "internal separation of powers" with which Epps' piece is

100. *See* Michele Deitch, *But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States,* 47 Am. J. Crim. L. 207, 217 (2020).

101. Epps, *supra* note 96, at 29.

102. Daryl J. Levinson, *The Supreme Court, 2015 Term—Forward: Looking for Power in Public Law*, 130 Harv. L. Rev. 31, 83 (2016).

aligned.[103] These works defend the administrative state by pointing to "a secondary, subconstitutional separation of powers that triangulates administrative power among politically appointed agency leaders, an independent civil service, and a vibrant civil society" (as opposed to constitutional checks and balances that focus on the checks each branch—executive, legislative and judicial—impose on the others).[104] All of these subconstitutional checks turn, to some degree, on information about the state being made available or transparent to those outside of the state, or at least the particular state institution at issue.[105] For example, Epps argues that, rather than focusing on functional separation of powers, we could more effectively check government power if we focused on structuring institutions "so that decision making power is shared and diffused among different interests in democratic society."[106] He argues that this focus on social group preferences and attempt to amplify differing voices might lead to a tempering of what some scholars have argued is a monolithic tough-on-crime perspective.[107]

While Epps' argument is focused on political preferences varying due to "numerous factors like race, class, age, gender, zip code, and previous exposure to the system," what this does not address is why people's preferences might change. One significant factor could simply be the informational inequalities that many of these factors create. People with different amalgamations of these factors have different exposure to the actual functioning of the prison system and therefore have different opinions as to how well it is functioning or accomplishing

103. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006). *See also* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

104. Michaels, *supra* note 102, at 520. A similarly vibrant account of "courts, members of Congress and their staff, human rights activists, journalists and their collaborators, and lawyers and watchdogs inside and outside the executive branch" all play a role in monitoring executive action in the national security context. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 207 (2012).

105. *See, e.g.*, Michaels, *supra* note 102, at 547 ("empowered and often highly motivated members of civil society use administrative procedures to educate and hold agency leaders (and civil servants) accountable, limiting opportunities for those officials to proceed arbitrarily, capriciously, or abusively").

106. Epps, *supra* note 96, at 60.

107. *Id*. at 61. Note that in many ways this view is consistent with the claims of those calling for a democratic criminal legal system. They are also focused on amplifying the voice of those most directly impacted by the criminal legal system. Epps does not cite this scholarship but is supportive of many tenets of this position. *See, e.g.*, *id*. at 68–70.

its many goals.[108] Similarly, he suggests a robust role for the media "in drawing attention to particularly serious injustices or abuses of power in the criminal justice system,"[109] but, of course, the media can only play this role if they are somehow made aware of those injustices. When the media themselves are systematically excluded from penal spaces, their role in checking the power of prison departments is severely curtailed.[110]

Ultimately, this argument that administrative action is constrained in ways that expand beyond constitutional checks and balances is useful in attempting to understand the various forms of accountability that administrative agencies are subjected to. At the same time, however, a focus on the carceral state reveals that greater attention needs to be paid to the informational asymmetries that may hinder this process. While transparency literature tends to focus on information being available to the public, the literature on both constitutional checks and balances and subconstitutional checks emphasizes that it is not only the public that constrains agency action. At the same time, however, government actors, including the legislator and other members of the executive branch face the same barriers to knowing what occurs behind prison walls as the public does.

* * *

This Part has traced the origins of transparency theory from the Constitution to the twentieth century development and expansion of the administrative state. It has argued that in its various iterations, transparency theory has focused on the need to hold government agents accountable for their actions and enable voters to make informed

108. Of course, as we saw in Part I, it is not only information on the internal functioning of the prison system that explains these different political preferences. Guards and prisoners arguably each have the same amount of information on the internal functioning of the prisons system and yet quite clearly have different political preferences as to how that system should function. My point in Part I was to demonstrate that one perspective based on one set of information inequalities (that of the Department and the guards) has much more control in shaping the information than individuals outside of the system with less access to internal information can access.

109. Epps, *supra* note 96, at 74.

110. It should not be surprising that for this reason the news media has often taken a very active role in advocating for and enforcing through litigation if necessary FOIA access. For a discussion of the role of the news media in providing a check on government action, see, e.g., Walter H. Annenberg, *The Fourth Branch of the Government, in* IMPACT OF MASS MEDIA: CURRENT ISSUES 290, 290–93 (Ray Eldon Hiebert & Carol Reuss eds., 1985); William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections,* 59 TUL. L. REV. 243, 243 (1984); DOUGLAS CATER, THE FOURTH BRANCH OF GOVERNMENT 3–4 (1959).

decisions. Whether the information on government action is made available to the public, experts, or other branches of the government, the focus is on ensuring that individuals in a position to evaluate the appropriateness of government action are given information on what that action actually is. The next Part will provide a concrete example of how this works, and when it does not, by drawing on a specific state-level example: that of the Massachusetts Department of Correction.

II. The Opaque Prison

While Part I focused on the theory behind why transparency is a valuable goal within our system of government, scholars writing about transparency also focus on the methods by which the government makes information about its own functioning available (examining the effectiveness of FOIA or sunshine laws, for example). For this reason, this Part turns to an empirical example of how a single prison department does or does not make available information about its own functioning. This Part provides a foundation for understanding what the Massachusetts Department of Correction is revealing in order to demonstrate what it is not, which will then provide the basis for the recommendations in Part III. By empirically grounding a discussion of transparency, this approach enlists a specific administrative setting to frame theoretical discussions of transparency and potential reforms.

The Department oversees fifteen institutions across the state of Massachusetts.[111] Ten of these are traditional prisons.[112] This Part traces the various ways the Department has historically created and currently maintains a practice of secrecy around its decisions, enabling it to control

111. *Massachusetts Department of Correction*, Mass.gov (2024), https://www.mass.gov/orgs/massachusetts-department-of-correction.

112. *Massachusetts Department of Correction Locations*, Mass.gov (2024), https://www.mass.gov/orgs/massachusetts-department-of-correction/locations?page=0. The remaining five include a hospital unit for inmates needing inpatient hospital care, a state hospital for those held under civil commitment, a treatment center for convicted sex offenders, a drug and alcohol treatment center, and a pre-release center. An additional 15 institutions that are characterized as jails or houses of correction fall outside of the jurisdiction of the Department, though there is considerable interaction between the two systems. In Massachusetts, the houses of correction hold individuals who have a sentence of two years or less. *See* Mass. Sheriffs' Ass'n, Mass.gov, Operational Capacity Report January 2024–June 2024 3, https://www.mass.gov/lists/operational-capacity-reports#operational-capacity-reports-2024-. The houses of correction have even less oversight than the state prisons. Women & Incarceration Project, Women and Massachusetts County Jails: An Introduction 12 (Mar. 2024), https://sites.suffolk.edu/wiproject/women-in-jails/ (describing the difficulties in collecting basic information on who is detained in Massachusetts jails).

debate and discussion over any future changes or reform.[113] This empirical discussion focuses on a single state in order to provide a sufficiently detailed examination of the political process and relative roles of the legislature and the Department. A nuanced understanding of the context within which the Department functions is necessary to understand how the theories of accountability propounded by constitutional and administrative law scholars function in practice.[114] While focused on a single state, these findings have applicability elsewhere. Massachusetts is more representative than outliers, and the problems identified here are prevalent across the United States.[115] Throughout the discussion, I note parallels identified by scholars focusing on other states.

Although this Part centers around official sources of information, as the focus is on the degree to which the Department is transparent about its own practices, the final section foregrounds the voices of (formerly) imprisoned individuals as a counterfoil to the official version. Indeed, a central claim of this Part is that one aspect of the opacity of carceral spaces is the general reluctance to take seriously the claims and stories of these individuals.[116] This is done by relying on the published statements of these individuals.[117] The university institutional review board (IRB) process, designed to prevent egregious abuses against the imprisoned, now places steep barriers to engaging the voices of this same group.[118] This should not stop scholars from seeking out these voices, and published statements are a work-around in this piece.

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113. Rathbone, *supra*, note 77, at 3 ("Despite an annual budget of close to $860 million, [the Massachusetts] Department of Corrections operates with an almost complete lack of oversight and a level of fiscal opacity that would be unacceptable in any other government agency. On matters of policy, the commissioner of corrections (herself a political appointee) answers only to the governor. There are currently no legislative checks to discourage the abuses of power that such a closed system can so readily promote.").

114. The vast majority of penal history has taken a similar granular approach in studying the penal system of a single jurisdiction. *See* Reiter, *Reclaiming the Power*, *supra* note 19, at 488 (arguing that there is "a growing body of socio-legal literature describing punitive trends as place-based and driven by local innovators").

115. For example, Reiter points to systemic opacity in California. Reiter, 23/7, *supra* note 19.

116. Kitty Calavita & Valerie Jenness, Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic 103 (2015) (in discussing interviews of prison department officials concerning prisoner complaints states "they often referred with disdain to those who exercise [the right to file a complaint]").

117. *See, e.g.*, Driver & Kaufman, *supra* note 1, at 524 (referencing the use of prisoners' memoirs).

118. For examples of the abuses leading to human research subjects regulation, see Karamet Reiter, *Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations*, 97 Cal. L. Rev. 501, 507 (2009). Federal regulations limit participation by prisoners to "(a) research about the effects of incarceration, (b) research about prisons

The goal of this section is not to exhaustively examine what is or is not known about the Massachusetts prisons. Rather, the goal is to provide examples of the way information is carefully managed to allow some awareness of internal decisions without providing the level or type of information that could allow for meaningful oversight of the Department's policies or procedures. Ultimately this section will demonstrate the unevenness of knowledge that occurs around carceral spaces. Some individuals, including prison department employees and contractors as well as current and formerly incarcerated individuals (and, to a lesser extent, their families), may have significant firsthand knowledge regarding what occurs within carceral spaces. Others, however, including members of the legislature, the media, academic researchers, and advocates for prison reform have limited access to carceral spaces.[119] The unevenness of access to this space, and the knowledge of actual practices that can only come through such access, undermines attempts at oversight.

The first two sections will focus on the extent to which constitutional checks function to monitor the Department's actions, emphasizing the role of transparency in this process. The third section will turn to civil society and focus on the potential for subconstitutional checks to ensure agency accountability.

A. Executive: Official Reports

This section evaluates information revealed by the executive branch through official reports. While most of these reports come from the Department itself, the Department of Public Health also inspects and reports on the state of prisons. These reports are written at the level of the relative departments and then shared with both the governor and the legislature.

1. Department of Correction

The Department of Correction is required by various legislative provisions to provide the legislature and the public with numerous reports. These reports are one of the primary ways that the Department

as institutions, (c) research about conditions particularly affecting prisoners, or (d) research about practices expected to improve the health of individual subjects." Reiter, *Making Windows*, *supra* note 79, at 422 (citing 45 C.F.R. § 46.306(a)(2)(i)- (iv) (2007)).

119. Stephanos Bibas refers to these two groups as insiders and outsiders. *See generally* Bibas, *Transparency and Participation*, *supra* note 34. Though he is focused on the criminal legal courtroom, and sentencing in particular, his framework focuses on who has deep knowledge about the system's practices and who does not. This framework has wider applicability.

exposes its own activities. A close examination of the reports reveals the types of information that are available, as well as the limitations on what information is shared. Scholars have pointed to the very limited nature of prison departments' data collection generally, emphasizing the lack of data regarding certain key metrics such as "rates of violence and assault . . . or how many prisoners are labeled as gang-affiliated."[120] The information that the Massachusetts Department regularly shares falls into some very discrete and limited categories: basic demographic information, prison capacity, prison classification, recidivism,[121] gap analysis in prisoner programming (examining gaps between the number of prisoners who are deemed to need a particular type of programming and the number who actually complete the program),[122] medical parole,[123] medicated assistance treatment programs,[124] the annual cost per inmate per institution,[125] and, finally, the federal government requires annual reports pursuant to the Prison Rape Elimination Act.[126] I will consider three of these reports—the annual report, the capacity reports, and the objective prison classification system reports—in closer detail in order to examine what the Department both reveals and continues to conceal with each of these reports.

120. Reiter, *Making Windows*, *supra* note 79 at 421. *See also* Karamet Reiter, *Parole, Snitch, or Die: California's Supermax Prisons & Prisoners, 1987-2007*, 14 PUNISHMENT & SOC'Y 530, 534 (2012) (noting the lack of information about supermaxes, including on who is detained within them or for how long).

121. One year recidivism rates: Mass. Dep't of Corr., *One-Year Recidivism Rates*, MASS.GOV, https://www.mass.gov/lists/one-year-recidivism-rates. Three-year recidivism reports go back to 2007: Mass. Dep't of Corr., *Three Year Recidivism Rates*, MASS.GOV, https://www.mass.gov/lists/three-year-recidivism-rates. Recidivism related evaluations for high school equivalency and correctional industry program participation: Mass. Dep't of Corr., *Recidivism Related Evaluations*, MASS.GOV, https://www.mass.gov/lists/recidivism-related-evaluations.

122. Mass. Dep't of Corr., *Inmate Gap Analysis*, MASS.GOV, https://www.mass.gov/lists/inmate-gap-analysis.

123. Mass. Dep't of Corr., *Medical Parole Reports*, MASS.GOV, https://www.mass.gov/lists/medical-parole-reports.

124. Mass. Dep't of Corr., *Medication Assisted Treatment Programs Annual Reports*, MASS.GOV, https://www.mass.gov/lists/medication-assisted-treatment- programs-annual-reports.

125. Mass. Dep't of Corr., *Per Capita Cost Reports*, MASS.GOV, https://www.mass.gov/lists/per-capita-cost-reports. There appears to have been some contention about these reports. In 2010 the requirement was vetoed with the explanation that "the required report is unduly burdensome." *89000001 – Department of Correction Facility Operations*, BUDGET.DIGITAL.MASS.GOV, https://budget.digital.mass.gov/bb/gaa/fy2010/app_10/act_10/h89000001.htm [https://perma.cc/GZE3-PXE2] (showing the FY 2010 Massachusetts Correction Department Budget). But they reappeared in the 2011 budget without a veto.

126. Mass. Dep't of Corr., *PREA Reports*, MASS.GOV, https://www.mass.gov/lists/prea-reports#annual-reports-dashboard-.

The annual report has been required since the nineteenth century.[127] The Department is required to "report annually to the secretary of health and human services, the governor and the general court."[128] The General Laws further specify that in the report to the legislature, the Department shall include "the actual condition" of each facility, "the number of inmates in each," and "the industries which have been carried on in the institutions, . . . the number of prisoners employed in each . . . the kind and quantity of goods manufactured, the amount thereof sold to such institutions and elsewhere." The report also must include the individual reports made by "the officers of the correctional institutions of the commonwealth."[129]

In an overview of each individual institution, the Department reports each institution's security level, year of initial ACA accreditation, year opened, annual cost per individual, population as of January 1 of that year, average daily population, and operational capacity. The report provides shifts in population over time, as well as a breakdown of the population by race/ethnicity, age, mental health status, and offender status (including a sentence of more than three years, a violent governing offense, and a mandatory drug sentence). The report also includes information on prison industries and the Department's strategic plan. While the annual report can provide a snapshot of the size of the population that the Department oversees, basic demographic information, and a sense of some of the programming available within the prisons, the report ultimately provides few details on the daily experience of imprisoned individuals.

In addition to the annual report, in more recent decades the legislature imposed, as part of its approval of the Department's budget, additional reporting requirements for topics of more contemporary relevance. For example, in response to concerns about prison overcrowding, it imposed a quarterly reporting requirement, which "shall include, by facility, the average daily census for the period of the report and the actual census on the first and last days of the report period. Said report shall also contain such information for the previous twelve months and a comparison to the rated capacity of each such facility."[130] The Department was required to file this report with various

127. 1828 Mass. Acts 819–32 § 7.
128. Mass. Gen. L. ch. 124, § 1(p).
129. Mass. Gen. L. ch. 124, § 6.
130. 1985 Mass. Acts, ch. 799, § 21. Note that this report was recently repealed as part of the State's 2023 budget. https://budget.digital.mass.gov/summary/fy23/outside-section/section-106-doc-and-sheriff-facility-reporting-2. *See infra* note 141, and accompanying text for the statutory replacement.

government entities and to "make sufficient copies available to the general public."[131] These reports are available on the state website.[132]

The act creating these reports specified that its goals were to "relieve the serious overcrowding problems in the correctional institutions of the commonwealth, which will lead to improved health, safety and sanitary conditions therein."[133] To this end, each report provides information on the average population of each facility compared to its design capacity. The most recent report defines "design capacity" as: "The number of inmates that planners or architects intended for the institution [as defined by the U.S. Department of Justice, Bureau of Justice Statistics (BJS)]."[134] Starting in 2009, the reports began to also refer to "rated capacity,"[135] which was defined as "the number of beds or inmates assigned by a rating official to institutions within the jurisdiction, essentially formally updated from the original design capacity."[136] In other words, the design capacity can be modified (usually increased) by either prison departments alone, or, for those that are accredited, such as in Massachusetts, in consultation with the rating agency.

Buried in these labels and statistics are the policy decisions that determine what capacity is and how it is measured. Simon Bastow has argued, in the context of the U.K., that "[t]o be able to say whether a prison or a prison system is crowded, one must have a set of standards in mind that demarcate a threshold between states of being 'too crowded' or 'not crowded enough' . . . These subjective states are likely to involve policy and practical judgments which are complex and open to interpretation."[137] Thus, the simple concept of design or rated capacity depends upon policy judgments regarding how much space determines a structure's "capacity." A statement issued by Attorney General William Barr in 1992 reveals the elasticity of this concept. Barr argued that the federal prisons operated at 165% of rated capacity, whereas state prisons were only operating at 115% of their rated capacity, and suggested this meant that the states could easily increase their incarceration numbers

131. *Id.*

132. Mass. Dep't. of Corr., *Prison Capacity*, Mass.gov, https://www.mass.gov/lists/prison-capacity [https://perma.cc/MS95-2MRX].

133. 1985 Mass. Acts, ch. 799, preamble. The title of these reports reflects this goal: "Quarterly Report on the Status of Prison Overcrowding."

134. Mass. Dep't of Corr., Quarterly Report on the Status of Prison Capacity 11 (4th Quarter 2022), https://www.mass.gov/doc/prison-capacity-fourth-quarter-2022/download.

135. Mass. Dep't of Corr., Quarterly Report on the Status of Prison Capacity 1 (1st Quarter 2009), https://www.mass.gov/doc/1st09overcrowdingpdf/download.

136. Mass. Dep't of Corr., *supra* note 134, at 11.

137. Simon Bastow, Governance, Performance, and Capacity Stress 97 (2013).

without any increase in the number or size of facilities.[138] In response to Barr's statement, Franklin Zimring pointed out that "[r]ated capacity is arbitrarily within the discretion of correctional administrators" and suggested more "objective indicators such as the amount of double or triple bunking of persons in the same cell, or the amount of square footage per inmate available in living space in comparable institutions."[139] Thus, this debate over capacity ratings reveals the extent to which reports that purport to reveal aspects of the Department's practices actually conceal far more than they reveal.[140]

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138. *How Should Prison Capacity be Measured*, 4 FED. SENT'G REP. 345, 345 (1992) (reprinting Department of Justice Press Release: Attorney General Announces New Prison Policy).

139. Franklin Zimring, *Are State Prisons* Under*crowded*, 4 FED. SENT'G REP. 347, 347 (1992). *See also* Susan Lynne Rhodes, The Politics of Confinement: Prison Population and Capacity Change in Post-War California 4 (1987) (Ph.D. Dissertation, University of Illinois at Urbana-Champaign) (ProQuest) ("[A]ny capacity figure is necessarily based on some normative standard relating to the proper living conditions for incarcerated offenders. Construction of new buildings or other alterations in the physical plant used to house offenders can change that plant's capacity. But the capacity of any prison system can change when no building or demolition has taken place. The capacity of a given amount of physical space can increase or decrease of the standard used to define how much space is allotted to each resident is altered."). Rhodes compares "measured capacity" with "rated capacity." Measured capacity is defined by measuring "the total number of square feet of space contained in a correctional system," though even this requires "[a] well-defined standard regarding the dimensions of the living area that should be allowed for each inmate." *Id*. Rated capacity, on the other hand, is "[t] he number of individuals which corrections officials claim an institution can or should house." *Id*. at 5. "Administrators generally have discretion over rated capacity and the standards used to define it. Those standards may vary over time and usually have not been made public." *Id*. She argues that although there is "ambiguity involved in the rated capacity concept, it is the only indicator of available prison space routinely accessible to individuals outside the corrections bureaucracy," and "because correctional officials can claim particular expertise in determining the appropriate standards for prison housing space, it would be difficult for non-experts to challenge rated capacity figures even if they had access to information about the exact amount of space inside institutions." *Id*.

140. Related to the prison capacity reports are the admissions and releases reports. These are required of the Department by the legislature each year in its approval of the Department's budget, starting with the budget for fiscal year 2012. *89000001 – Department of Correction Facility Operations*, BUDGET.DIGITAL.MASS.GOV, https://budget.digital.mass.gov/bb/gaa/fy2012/app_12/act_12/h89000001.htm [https://perma.cc/9MH2-HK95] (showing the FY 2010 Massachusetts Correction Department Budget; "provided further, that to maximize bed capacity and reentry capability, the department shall submit quarterly reports, utilizing standardized reporting definitions developed mutually with the Massachusetts Sheriffs Association on caseload, admissions, classification, releases and recidivism of all pre-trial, sentenced and federal inmates"). These reports focus on changes in the rate of admissions to the Department, with the totals disaggregated by sex and sentencing jurisdiction (but not by institution as in prison capacity reports). These reports can be found here: https://www.mass.gov/lists/admissions-and-releases. *See, e.g.,* MASS. DEP'T OF CORR., QUARTERLY REPORT OF ADMISSIONS AND RELEASES (2nd Quarter 2024).

Recognizing the elasticity of "capacity" as a reporting category, the Massachusetts legislature recently passed a new reporting requirement that seeks to impose greater clarity on this issue.[141] The new report "shall include": 1.) "an inventory of all buildings . . . used to house inmates since January 1, 2018;" 2.) "a catalog of changes in use or purpose for all housing units and buildings" during the reported period; 3.) the "original design capacity" of the housing units; 4.) "all cells or rooms in each housing unit and the number of beds in each cell or room;" 5.) a description of the housing unit, including "custody level and function of the unit;" 6.) "the average daily amount of time offered out of cell for recreation, programs, education or employment;" 7.) "the average inmate count;" 8.) "an inventory of all buildings . . . regardless of whether the building has ever been occupied by inmates;" and 9.) the last date an inmate was held in a building that no longer holds inmates.[142] This reporting requirement is so new that no reports have, at this time, been submitted under it, but the extensive details required by the legislature indicate the breadth and depth of the legislature's current lack of understanding of some of the basic aspects of how the Department uses its budget (especially the building inventories and how essential infrastructure is being used by the Department). It is unknown how this new information will be used either by the public or the legislature, but it reflects longstanding concern with how the Department is using its budget given a trend towards lower rates of incarceration.[143]

In a similar process of appearing to reveal information while actually keeping its practices opaque, the legislature requires the Department to report on the classification system that it uses to determine whether prisoners are placed in minimum-, medium-, or maximum-security settings. This report is required in each annual budget to include "the point score compiled by the department of correction's objective classification system for all prisoners confined in each prison

141. Mass. Gen. L. ch. 124, § 6A.

142. *Id.* at (a).

143. *See, e.g.*, The Boston Foundation, Criminal Justice Reform in Massachusetts: A Five-Year Progress Assessment 11-12 (Jan. 24, 2024) (https://www.tbf.org/news-and-insights/reports/2024/january/criminal-justice-reform-in-ma-report); Ben Forman, *What to do with the state's half-empty prison system*, Commonwealth Mag. (March 19, 2022); Milton Valencia, *State prison spending soars despite falling population*, Bos. Globe (May 15, 2017); Benjamin Forman & Michael Widmer, Getting Tough on Spending: An Examination of Correctional Expenditure in Massachusetts (May 2017) (https://massinc.org/2017/05/15/correctional-spending-soars-while-prison-population-declines-according-to-new-report-from-massinc/).

operated by the department."[144] This classification system determines which institution a prisoner is placed in, a determination with profound consequences for that individual's experience within the system. According to the Department's report, the "objective classification system" that it uses is:

> "The [Objective Point Base] standardized custody level assignment of an incarcerated individual based on objectively defined criteria. The criteria are weighed, scored and organized into a valid and reliable classification instrument accompanied by an operational manual for applying the instrument to incarcerated individuals in a systematic manner. OPB classification systems rely on factors that have been proven to predict prison adjustment and address issues of overclassification and underclassification.[145]

This description is replete with terms suggesting expertise and scientific criteria: "objectively defined criteria," "valid and reliable," "systemic manner," and "factors that have been proven." Despite these terms, this paragraph does not actually tell the public anything about the specific factors used to determine a prisoner's placement among the Department's institutions and, indeed, it does not even state which classification system is used. As an example of how this can operate in practice, consider prisoner Ivan Hodge's perspective on this process:

> I was caught passing a fishing line. A fishing line is a bed sheet, battery pin and a piece of laundry bag. This device is utilized to navigate throughout the prison toiletry system to retrieve what the prison deems as contraband while in segregation. It was considered to be material likely to be used in an escape. Even though the prison security noted what the device was for (retrieving contraband such as

144. *89000001 – Department of Correction Facility Operations*, BUDGET.DIGITAL.MASS.GOV, (2011), HTTPS://BUDGET.DIGITAL.MASS.GOV/BB/GAA/FY2011/APP_11/ACT_11/H89000001.HTM [HTTPS://PERMA.CC/D9RL-QL3J] (showing the FY 2011 MASSACHUSETTS DEPARTMENT OF CORRECTION BUDGET). Reports for FY21, FY22, and FY23 are available online:

> MASS. DEP'T CORR., MASSACHUSETTS DEPARTMENT OF CORRECTION OBJECTIVE POINT BASE CLASSIFICATION REPORT FISCAL YEAR 2021 (2021), https://www.mass.gov/doc/fy21-objective-point-base-classification-report/download [https://perma.cc/3REQ-8958]; MASS. DEP'T CORR., MASSACHUSETTS DEPARTMENT OF CORRECTION OBJECTIVE POINT BASE CLASSIFICATION REPORT FISCAL YEAR 2022 (2022), https://www.mass.gov/doc/fy22-objective-point-base-classification-report/download [https://perma.cc/5TNY-AZXA]; MASS. DEP'T CORR., MASSACHUSETTS DEPARTMENT OF CORRECTION OBJECTIVE POINT BASE CLASSIFICATION REPORT FISCAL YEAR 2023 (Feb. 2023), https://www.mass.gov/doc/fy23-objective-point-base-classification-report/download [https://perma.cc/EV4C-6467].

145. MASS. DEP'T CORR., MASSACHUSETTS DEPARTMENT OF CORRECTION OBJECTIVE POINT BASE CLASSIFICATION REPORT FISCAL YEAR 2023, *supra* note 144, at 2.

> commissary food, radios, razors, etc.) I was placed on Level A status for five years, and was given seven points which lasts up to ten years on my classification report. As a prisoner who is incarcerated for a crime that involves a loss of life I am automatically given 6 points that will stay with me for the remainder of my sentence.[146]

Hodge conveys the arbitrariness he perceives infects the classification process, with the Department controlling what counts as "material likely to be used in an escape," even when "prison security" knew the material was actually used to retrieve contraband (a less serious offense). This story reveals that the scientific terms used by the Department mask the extent to which security classifications often entail arbitrary determinations made by individual guards that greatly impact how daily behavior gets categorized into these "objectively defined criteria."[147]

Hodge's account makes clear another impediment to transparency: the Department's size. A chart of the Department's administrative structure might suggest that it is a highly structured hierarchical organization, with the top dictating the policies and practices of the bottom,[148] but bureaucracies are never this simple. Local bureaucrats (in this case, guards) implement policies and practices often with little oversight.[149] Thus, however transparent the Department may be at the departmental level, this leaves much opacity at the level of the individual institution and the actions of any given guard at any given moment.

The reports that the Department provides to the legislature under this requirement only provide two data points: what percentage of prisoners are held at each of three custody levels (minimum, medium, and maximum) and what the override rates were, meaning at what rate the Department deviates from stated policy and places someone at a higher or lower level than their point score would indicate. Thus, despite the significance of these systems for the experience of

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146. Ivan Hodge, *Hello World* in Emancipation Initiative, *Selected Essays from the Emancipation Initiative*, 6 UCLA Crim. L. Rev. 271, 281 (2022).

147. This can be particularly arbitrary when models developed for white men are applied to women and individuals of color. *See, e.g.*, Kelly Struthers Montford & Kelly Hannah-Moffat, *The Veneers of Empiricism: Gender, Race, and Prison Classification*, 59 Aggression & Violent Behavior 1 (2021). For an example of this phenomenon in Massachusetts, see Susan Sered, *Unwarranted Restrictions, Gratuitous Harm—Women and Prison Security Classification in Massachusetts*, Women & Incarceration Project (Aug. 26, 2024), https://scholars.org/contribution/unwarranted-restrictions-gratuitous-harm-women.

148. Mass. Dep't Corr., Annual Report 4 (2021), https://www.mass.gov/doc/annual-report-2021-0/download [https://perma.cc/32UC-SVXP].

149. Lipsky, *supra* note 9, at 13–14.

prisoners held within the prisons, the reports themselves do not shed light on the Department's standards and actual practices of classifying prisoners.

This should not be surprising. As Max Weber argued, a central feature of bureaucracy is that it "keep[s] secret its knowledge and intentions."[150] Moreover, much of the Department's activities are not captured in meetings or on paper. Rather, the most troubling aspects of the Department's activities might, like unobserved police activity, not have any official record that could be captured by traditional approaches to transparency. While Public Records Requests (the Massachusetts version of FOIA) can capture information the Department collects, they have no effect if the Department deliberately (or even inadvertently) fails to gather particular information.

2. Department of Public Health

The Department of Health is another executive agency required by the General Laws to "advise the government concerning the location and other sanitary condition of any public institution."[151] As to prisons specifically, they are required to "semiannually, inspect each correctional institution . . . [and] file a report of its findings and recommendations, with respect to the compliance of each such facility with the [relevant] rules and regulations."[152] These inspections go back to the year 1911.[153] Ostensibly, these provisions give the commissioner of health a great deal of power, allowing him to close any facility that is not in compliance with the rules and regulations, though in practice, this has never happened.[154]

These reports contain detailed notes on every space in the prison. For example, the report for MCI-Shirley (Souza-Baranowski) covers everything from "Dry Storage" in the "Culinary Arts" space to the "Janitor's Closet."[155] Buried in these details are some indications that the Department of Public Health has a very different view of how prison

150. Max Weber, Economy and Society 992 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Bedminster Press 1968) (1921).
151. Mass. Gen. L. ch. 111, § 5 (2024).
152. Mass. Gen. L. ch. 111, § 20 (2024).
153. An Act Relative to the Inspection of Jails, Houses of Correction, Prisons and Reformatories, 1911 Mass. Acts, ch. 282, 238.
154. *Cf.* Mass. Gen. L. ch. 111, § 21 (2024) ("[S]hall, following a public hearing, cause any facility failing to comply with the rules and regulations . . . to close until said facility is found to be in compliance and receives written notification from the department to that effect.").
155. Mass. Dep't of Pub. Health, Correctional Facility Inspection Report, MCI-Shirley 7 (May 20, 2010), https://www.mass.gov/doc/mci-shirley-shirley-may-20-2010/download [https://perma.cc/H5SA-6QM4].

capacity should be calculated by the Department of Correction. In the category of "Cell Size," the report consistently notes "Inadequate floor space in cells."[156]

Viewed collectively, these reports provide an image of the prison's interior: cells of inadequate size (and double-bunked) with ceiling tiles that are water stained and dirty around the ceiling vents.[157] Numerous cells are reported to have damaged floor tiles and wall paint. Showers have damaged and dirty walls, floors, ceilings, and doors. They leak and water pools on the floor. Wall fans are dusty in the common areas. There are probably rodents.[158] On the one hand it is hard to gain a clear view of what this living space feels like, full as it is of cells, showers, janitor's closets, and control areas (the only spaces in which no violations are ever found). On the other hand, it is hard not to feel the bleakness of a space full of peeling paint, dust, rust, mold, and rodent droppings.

B. Legislative: Commissions & Committees

While the previous section examined the extent to which the Executive Branch shares information about the Department with the public and the legislature through various reports, this section considers instances where the legislature attempted to play its oversight role through commissions and committees tasked with studying the Department.[159] As this section will demonstrate, the legislature's ability to monitor and check agency action is significantly hampered by the Department's refusal to share information not only with the general public but also with its elected officials.

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156. *Id*. at 7–13.

157. Mass. Dep't of Pub. Health, Correctional Facility Inspection Report, MCI-Shirley 3 (May 25, 2022), https://www.mass.gov/doc/mci-shirley-may-17-2022/download [https://perma.cc/6NGL-ASDC].

158. *Id*. at 5 ("Upper Janitor's Closet," "Rodent droppings observed").

159. The power of the legislature to oversee agency action is often noted. *See, e.g*. Richard J. Pierce et al., Administrative Law and Process 43 (6th ed. 2014) (noting numerous forms of legislative control over agencies including through the enabling legislation, overruling specific agency decisions, and appropriations.). At the same time, the practical limits to this power have also been frequently noted. *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Colum. L. Rev. 515, 533 (2015) ("There is, after all, a reason why Congress signed off on an expansive administrative state: The sheer complexity and diversity of federal responsibilities in modern times is often too much for the legislators, by themselves, to manage on a day-to-day basis."). The reporting requirements discussed *infra* Part II.B. also represent a form of legislative oversight, Jack Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61, 106 (2006).

1. Commission on Correctional Funding[160]

As part of the 2020 budget, the state legislature created a Commission on Correctional Funding ("the Commission") tasked with conducting "a comprehensive study to evaluate and make recommendations regarding the appropriate level of funding for the department of correction."[161] The Commission was granted broad powers to collect data to make its recommendations.[162] There were three major motivations for the Commission: first, although the population of Massachusetts prisons is declining, the budget has increased; second, there are disparities in funding across the different institutions overseen by the Department; and third, it was unknown how much money was being spent on inmate programming as opposed to staff and other expenses.[163] This last point proved particularly challenging to evaluate. The Commissioners worked with the National Institute for Corrections (NIC) to evaluate staffing, and the findings suggest some difficulty on the part of the Commission in understanding and evaluating staffing needs.[164] From the beginning, some commissioners expressed a desire

160. Massachusetts is not the only jurisdiction to rely on commissions to improve transparency and accountability. The Prison Rape Elimination Act (PREA), unanimously passed by Congress in 2003, created a commission "tasked with developing standards against which correctional facilities can be evaluated and subsequently held accountable for incidences of sexual abuse." Deitch, *But Who Oversees the Overseers?*, *supra* note 100, at 234. This commission differed from the Massachusetts Commission on Correctional Spending, however, in that it was authorized to draft standards that were then adopted by the Department of Justice and that require "routine audits of prisons and jails to be conducted by independent and qualified professionals to assess facilities' compliance with the PREA requirements." *Id*. The standards themselves are available here: Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2019). While Commissions in Massachusetts are tasked with acquiring information and making recommendations, they lack the ability to impose new standards and modify their implementation. The lack of such direct oversight likely further undermines their ability to obtain the relevant information.

161. An Act Making Appropriations for the Fiscal Year 2020 for the Maintenance of the Departments, Boards, Commissions, Institutions and Certain Activities of the Commonwealth, for Interest, Sinking Fund and Serial Bond Requirements and for Certain Permanent Improvements, 2019 Mass. Acts ch. 14, § 101.

162. *Id*. ("The commission shall have access to data, documents and information necessary for the performance of the commission's duties under this section. The commission may request, and the department of correction and each sheriff's department shall provide, any such data.").

163. Special Comm'n on Corr. Spending, Report of the Special Commission on Correctional Spending 5 (Jan. 31, 2022), https://correctionalfunding.com/wp-content/uploads/2022/01/Final-Report-of-the-Special-Commission-on-Correctional-Spending-For-Filing.pdf [https://perma.cc/U8HD-46UC].

164. *Id*. at 25–26 (referring to the NIC approach as "heavily depend[ent] on the judgment of the team involved and may be more useful as a management tool than as a legislative-level budgeting instrument"). The assessment led by the NIC was a

for the process to be as transparent as possible,[165] a desire supported by the NIC[166] and reiterated by one of the legislative members of the commission.[167] Ultimately, however, even members of the commission were denied access to the evaluations made by the NIC, much less the public. The only recommendations that the commission was able to make with regard to staffing involved reporting requirements.[168]

In its final report the Commission emphasized the difficulties posed by "vastly different reporting methods by and between corrections agencies."[169] It found inconsistency in how key terms were used,[170] which made "a complicated system opaque and stubbornly resistant to substantive analysis."[171] For example, reported rates of substance abuse and mental illness across the facilities vary greatly and are unlikely to actually reflect differences in the population.[172] The Commission emphasized that its recommendations with regard to programming was "*not* to increase reporting requirements," and yet the best they could do was recommend a new structure to improve reporting, with substantive suggestions occurring at a high level of generality (for example: "[s]tandardize a portfolio of responsive programs to meet inmate needs

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self-assessment in that it directed management of the Department and the various Sheriff's offices through a process to evaluate their own staffing needs.

165. Special Commission on Correctional Spending Meeting (Nov. 6, 2020), https://correctionalfunding.com/recorded-meetings/ [https://perma.cc/E5DS-GZJT] (Ben Forman at 11:38 discussing role of "external stakeholders" and their ability to evaluate the methodology used).

166. *Id*. (Stephen Amos at 16:05: "all of our information and all of our resources are in public domain and we welcome sending out our curriculum … the curriculum as it is has already been validated … one of the three tenants of our agency is information dissemination. We believe that an informed public make better decisions and one of the things that we would welcome is making that curriculum available.").

167. *Id*. (Senator William Brownsberger at 26:10: "in terms of the long-term effectiveness of what we do here we want the public to have a sense of confidence in the product we're generating, and so the more transparency we have on that the better").

168. Report of the Special Commission on Correctional Spending, *supra* note 163, at 28 (containing three recommendations for improved reporting: "Streamline and improve existing capacity and population reports," "Define capacity uniformly," and "Improve transparency as to inmate density and use of space—provide regular counts of beds by cell (or dormitory), housing unit, and facility").

169. *Id*. at 33. The commission covered correctional spending at the level of the Department of Corrections and the individual sheriff departments, which between them oversee the 15 jails of the Commonwealth. For a list of Massachusetts county jails, see Mass. Sheriffs' Ass'n, Mass.gov, Operational Capacity Report January 2024–June 2024 3, https://www.mass.gov/lists/operational-capacity-reports#operational-capacity-reports-2024-.

170. *See id.* ("There is little to no uniformity of definitions for even basic terms such as 'evidence based,' 'recidivism,' or 'substance use disorder.'").

171. *Id*.

172. *Id*. at 34–35.

and reduce recidivism").[173] Ultimately the Commission's report indicated significant disagreement around the programmatic needs of prisoners, which resulted in a lack of concrete suggestions. Thus, while programming itself is a highly contested aspect of the Department's work, it does not get closely evaluated by outside experts or the public.[174] The final page of the commission's report argued that "[t]he Legislature should also work with the Sheriffs, DOC, and concerned advocates to build uniformity in all correctional reporting," further indicating that the Commission's ability to provide concrete suggestions was significantly hampered by a lack of uniform reports that accurately portray the internal workings of the prisons and jails.[175]

2. Restrictive Housing Oversight Committee

In 2018, Massachusetts passed a Criminal Justice Reform Act.[176] This legislation imposed limits on the use of solitary confinement, referred to in Massachusetts as "restrictive housing."[177] It created an oversight committee, tasked with "gather[ing] information regarding the use of restrictive housing in correctional institutions to determine the impact of restrictive housing on inmates, rates of violence, recidivism, incarceration costs and self-harm within correctional institutions."[178] In order to do this, the committee was provided "access to all correctional institutions consistent with their duties" and "allowed to interview prisoners and staff."[179] The statute specified that the committee would be comprised of individuals from a range of perspectives, including: the Department (two members: the commissioner of the Department and an additional member of the Department with expertise in prison discipline); the commissioner of mental health; the correctional union; the judiciary; academia; a licensed social worker; the president or a representative of the Massachusetts Sheriffs Association; and the executive director (or a representative) of the Disability Law Center, Prisoner Legal Services, and the Massachusetts Association for Mental Health, Inc.[180]

A review of the committee meeting minutes indicates that this committee could be a valuable forum for sharing information that is

173. *Id*. at 42.
174. I will address this aspect of the Department in a future piece on penal expertise.
175. *Id*. at 46.
176. 32 Mass. Prac. Crim. L. § 9.50.
177. Embodied in statute at: Mass. Gen. L. ch. 127, § 39–39H (2024).
178. *Id*. at §39G.
179. *Id*.
180. *Id*.

not available elsewhere (notably, for example, the reports issued by the Department which focus on number of individuals and their duration in restricted housing). For example, at the October 27, 2022, meeting of the committee, the representative from Prisoner Legal Services had three of their attorneys share stories from clients of their experiences under the new rules and regulations instituted following the 2018 Act. One of the attorneys reported:

> [T]he law defines the hours in cell when we should be looking at the quality of time spent outside of the cell. When the inmate does have out of cell time, they are often chained to tables[,] putting into question the practices of the BAU [Behavior Assessment Unit]. They are strip searched each time they enter and exit the cell, and for some individuals there is a limit on visitations and phone calls. How is this any different from Restrictive Housing Units?[181]

A key aspect of this testimony from Prisoner Legal Services is the extent to which the experience of prisoners does not match what the legislature intended when it implemented the 2018 reforms or what is suggested by reading the Department's policies. An approach to transparency that only focuses on expanding access to the agency's policies, procedures, and internal reports will miss when actual performance does not match the stated procedure.[182] Because the prison is a closed and concealed space, however, such departures can best be recognized if the individual prisoner has a mechanism for voicing their experience. By providing a forum for transmitting the information, the legislative committee contributes an additional source of transparency.

C. Civil Society: Voices from the Inside

This Part has focused on the transparency of the Department's practices. One of the primary concerns of transparency theory (and of those scholars who argue that subconstitutional checks have a significant role to play in holding agencies accountable) is that the public and coordinating branches of government need to be able to

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181. MASS. RESTRICTIVE HOUS. OVERSIGHT COMM., RESTRICTIVE HOUSING OVERSIGHT COMMITTEE MEETING MINUTES at 2 (Oct. 27, 2022), https://www.mass.gov/lists/restrictive-housing-oversight-committee-meeting-documents [https://perma.cc/PQ9R-XSHL] (click "October 2022 Meeting Minutes" to download the document).

182. For example, the debate over solitary confinement in Massachusetts demonstrates the extreme ability of the Department to adhere to the letter of reforms while deliberately flouting their spirit. Ivy Scott, *'My concern is precedent': Mixed responses to DOC promise to end solitary confinement*, BOS. GLOBE (July 6, 2021), https://www.bostonglobe.com/2021/07/06/metro/my-concern-is-precedent-mixed-responses-doc-promise-end-solitary-confinement/ [https://perma.cc/K9KS-FA5H]; Editorial, *Mass. DOC is making a mockery of new solitary confinement regulations*, BOS. GLOBE, July 15, 2019, at A8.

monitor administrative agencies and hold them accountable. This section considers the extent to which external actors can access needed information to push the Department towards greater transparency.

In *Pell v. Pecunier*, the Supreme Court rejected the notion that reporters have a greater First Amendment right to access prison spaces than the public at large.[183] The case assumed, however, that prisons were extremely open and visible to the public. Justice Stewart, writing for the majority, declared "both the press and the general public are accorded full opportunities to observe prison conditions"[184] and "that the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance."[185]

The Court rejected the argument that limiting prisoners' access to the press violates their right to "petition the government for a redress of grievances."[186] Rather than being hampered in this regard, Justice Stewart argued that prisoners have "alternative means of communication with the press that are available to [them]" and that "the substantial access to prisons that California accords the press and other members of the public" suffices.[187] While the justices stated that they valued public access to prison spaces, they also believed that California afforded the press this access, with the limitations the California department imposed (in this case, denying reporters access to prisoners of their own choosing). The result is a curious opinion that strongly applauds the necessity of public access to prison spaces—because it recognizes that prison conditions are of "great public importance"—and yet does so while upholding a very deferential approach to the state department of correction's control over that access.

While the *Pell* Court believed there were mechanisms for the public to be informed about what occurs within prison walls, this section suggests that *Pell*'s confidence should be tempered. There is simply no reason to think that there are "full opportunities" for the press and public to "observe prison conditions." Rather, there is significant contestation over every opportunity for such observation to occur.[188]

183. Pell v. Procunier, 417 U.S. 817, 831 n.8 (1974) ("the press is granted the same access in this respect to prison inmates as is accorded any member of the general public"). *See also* Houchins v. KQED, Inc., 438 U.S. 1 (1978).

184. *Pell,* 417 U.S. at 830.

185. *Id*. at 830 n.7.

186. *Id*. at 828–29 n.6.

187. *Id*.

188. I am not directly addressing Public Records Requests. Although FOIA and its related state laws are a quintessential aspect of transparency, they rely on an interested public to be effective. This section focuses on two such groups and identifies how they have used Public Records Requests in their advocacy and reporting. Other than pointing

1. Prisoners themselves

One of the primary shortcomings of the attempts at transparency described above is that only one of them, the Restrictive Housing Committee, includes the voices of those currently or formerly incarcerated. One aspect of institutional transparency is the ability of different interest groups to have a say in and influence policy making (either through democratic practices or through some form of checks and balances). From this perspective, the lack of the voices of incarcerated individuals in these reports is deeply troubling. However, it would be incorrect to say that those incarcerated lack any voice. One simply needs to look harder and farther afield to find it.

It has become axiomatic within the criminal legal system reform literature to point to the structural problems that arise from the disempowerment of those subjected to the system.[189] While these accounts rely on important evidence of this process, particularly the disenfranchisement of individuals who have a criminal conviction, scholars need to be attuned to the ways by which their accounts contribute to rather than redress that process. Currently and formerly incarcerated individuals are active in asserting a voice in policy making and shaping current and future carceral space, but their voices often are not heard within academic circles.

One significant source of prisoner views is their own published documents.[190] In Norfolk prison, a group of individuals imprisoned for life published their own report on the Department.[191] Another group

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to times it has been used effectively, however, it is difficult to qualify the effectiveness of this transparency mechanism.

189. *See, e.g.*, BARKOW, PRISONERS OF POLITICS, *supra* note 17, at 115–16 (noting that there are "[v]ery few powerful groups [that] stand in the way of the push for broader and more severe criminal laws" and that "those who have been incarcerated or otherwise entangled with the criminal justice system [] have the greatest knowledge about how the system operates and where its failings are, but they have traditionally stood in a poor position to challenge the status quo." She cites disenfranchisement, poor voter turnout among those who still have a right to vote, and lack of organization and funding as explanations for this group's disempowerment).

190. An example from outside the state of Massachusetts is the incredible work done by The Indiana Women's Prison History Project. *See* THE INDIANA WOMEN'S PRISON HISTORY PROJECT, WHO WOULD BELIEVE A PRISONER?: INDIANA WOMEN'S CARCERAL INSTITUTIONS, 1848–1920 (2023).

191. Their reports can be found here under "Dirk E. Greineder" and "Gordon Haas." Dirk E. Greineder et al., *Writing from Prison*, REAL COST OF PRISONS PROJECT (last visited Oct. 4, 2024), http://www.realcostofprisons.org/writing/ [https://perma.cc/Y3JS-NW2P]. Another approach to amplifying the voices of prisoners is to engage them directly in the practice of writing legal scholarship. In a forthcoming piece on participatory legal scholarship, Rachel López discusses this approach. *Participatory Legal Scholarship*, 123 COLUM. L. REV. 1795 (2023). She modeled this approach in an earlier article: Terrell Carter at al., *Redeeming Justice*, 116 NW. L. REV. 315 (2021).

of prisoners, the Emancipation Initiative, publishes in their own voice their experiences of incarceration.[192] They have worked with the UCLA Criminal Justice Law Review to publish a selection of writings. They also have a website where they publish what they term "slave narratives," which are accounts written by incarcerated individuals recounting their experiences within Massachusetts prisons.[193] Legal services providers can also be a valuable conduit for the voices of prisoners, as was demonstrated above with the restrictive housing committee. In other cases, attorneys have directly published reports relaying the accounts of prisoners.[194]

Another pathway envisioned by the *Pell* court for prisoner voices to find a hearing outside of the institution was through their friends and families.[195] A final example, involving debate over the construction of a new women's prison,[196] will demonstrate both the possibilities and the limits of this form of engagement. This example reveals that while prisoners themselves hold a great deal of knowledge about the Department's practices, they cannot provide the sole check to the Department's action. In this instance, the Department's lack of transparency centered on something completely out of view of the prisoners themselves: debate and discussion around the future of Massachusetts's only female prison.

192. Emancipation Initiative, *Selected Essays from the Emancipation Initiative*, 6 UCLA Crim. J. L. Rev. 271 (2022).

193. *Slave Narratives*, Emancipation Initiative https://emancipationinitiative.org/slave-narratives/ [https://perma.cc/J7PW-H434].

194. *See, e.g.*, Sarah Nawab, Prisoners' Legal Services of Massachusetts, A Different Way Forward: Stories from Incarcerated Women in Massachusetts and Recommendations (2022).

195. Pell, 417 U.S. at 824–25 (acknowledging that prisoners could have visits from "their families, the clergy, their attorneys, and friends of prior acquaintance."); *see also id*. at 827 n.5 (responding to argument by defendants that communicating with the media via the mail is insufficient for illiterate inmates and arguing that in those instances family or friends of such inmates could manage the communication). Like the Pell court, Justice Marshall in his concurrence in Procunier v. Martinez also saw communication with inmates through the mail as serving a role in revealing to the public the internal functioning of the prisoners. 416 U.S. 396, 427 (1974) ("The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.").

196. A basic introduction to this issue can be found here: Katy Naples-Mitchell, Testimony Supporting a Moratorium on Jail & Prison Construction, S.2030, *Joint Committee on State Administration and Regulatory Oversight, Massachusetts State House*, Charles Hamilton Houston Inst. for Race & Just. (Aug. 6, 2021) [hereinafter *Testimony Supporting a Moratorium*], https://charleshamiltonhouston.org/news/2021/08/testimony-supporting-a-moratorium-on-jail-prison-construction/).

On October 8, 2019, in an attempt to defend his decision to stop accepting ICE detainees from the federal government (and to argue that this was not a "political" decision influenced by extensive protests in front of his jail), the Suffolk County Sheriff, Steve Tompkins, said that he needed to free up beds for more female detainees since "they were going to close" MCI-Framingham, the state's only all-female prison.[197] Activists from a local group of formerly incarcerated women and their families, Families for Justice and Healing (FJAH), immediately began asking questions, as none of them had been aware of a plan to close MCI-Framingham. In fact, a few of the women involved in FJAH were members of a Justice Involved Women panel created as part of a comprehensive criminal justice reform bill passed earlier that year (the same legislation that created the Restrictive Housing Committee discussed above). The group had been asking the Department about its plans for MCI-Framingham and had been explicitly told by the Department that there were no plans to close the facility. In response to the sheriff's revelation, the Department immediately issued a statement declaiming any plans to either close or renovate MCI-Framingham. FJAH, along with attorneys at Harvard's Charles Hamilton Institute, began filing Public Record Requests to try to determine if, in fact, the Department was preparing to close MCI-Framingham. Through these requests, they discovered that, in July 2019, the Department had requested a facilities assessment from an architectural firm to determine the feasibility of renovating nearby facilities to allow the Department to move women out of MCI-Framingham. By December 2019 the Department was forced to concede that it was, in fact, planning to close MCI-Framingham when it issued a public bid for architects for a proposed new women's facility, with an estimated cost of around $50 million.

Work by FJAH forced the Department to admit that it had not followed required procedures in announcing the bid process.[198] On January 22, 2020, the Massachusetts Designer Selection Board met to evaluate the bids it had received.[199] It chose three firms to develop bids: Finegold

197. *Id.* Forced by the Department to backtrack, Sheriff Tompkins said later that week: "The Framingham facility for women is challenged. You know, whether it's going to be closed or renovated you know we're not exactly sure, but some of the ladies are going to come out of that facility." The Codcast, *Suffolk sheriff explains decision to cancel ICE ties*, COMMONWEALTH BEACON, at 1:13 (Oct. 21, 2019), https://soundcloud.com/massinc/the-codcast-ep-174 [https://perma.cc/9L28-3ENQ].

198. *Testimony Supporting a Moratorium*, *supra* note 196, at 1. *See also* Sarah Betancourt, *Prepping to move female prisoners at MCI-Framingham*, COMMONWEALTH MAG. (Jan. 24, 2020), https://commonwealthmagazine.org/criminal-justice/prepping-to-move-female-inmates-at-mci-framingham/ [https://perma.cc/E97J-4TEE].

199. *Id.*

Alexander Architects, Kleinfelder Northeast, Inc., and SMRT Architects and Engineers. The stated intentions of these architecture firms to build a "gender responsive" and "trauma informed" new prison further reveal the extent to which policy choices were being made via an architectural bidding process rather than through public discussion and debate.

This exchange is significant because it highlights the role of family members of current prisoners in revealing discussions and debates that were deliberately being kept out of view of the public. Rather than debate the future of women's incarceration, the Department sought to present the public with a fait accompli in the form of an architectural design and fully developed plan for the new institution. At the same time, the decision to turn to an architect ensured that debate over the future of incarceration in Massachusetts focused on *how* to incarcerate women rather than *whether* to incarcerate them. In other words, the space in which to contemplate a future without the prison or with a reimagined version of the prison was eliminated entirely.

According to the tenets of transparency theory and subconstitutional checks, as traced in Part I.B, this might be taken as an example of prison transparency. Although the Department clearly sought to keep secret its plan to build a new women's prison, as indicated by outright misstatements made to the Justice Involved Women panel and the attempt to receive architectural bids without first going through the public process of the Designer Selection Board, once advocates heard of the proposal, they worked to hold the Department accountable and force a conversation about the future of women's incarceration in Massachusetts. Despite this, it continues to be the case that all decisions about the future of MCI-Framingham are being made outside of public view. To date the only avenue concerned members of the legislature have pursued has been an attempt to impose a prison building moratorium to slow down momentum towards this new institution.[200]

2. Media

The Court's decision in *Pell* clearly saw the media as playing an important role in monitoring prison departments and did not perceive its decision as significantly limiting media access to carceral spaces. The example of the *Boston Globe*'s report on a cell extraction using, among other things, dogs to remove prisoners from a cell, demonstrates the possibilities and limits of media access. In the *Globe*'s report, one prisoner

200. Laura Crimaldi & Matt Stout, *House lawmakers to consider moratorium on constructing correctional facilities*, Bos. Globe (May 18, 2022), https://www.bostonglobe.com/2022/05/18/metro/house-lawmakers-consider-moratorium-constructing-correctional-facilities/ [https://perma.cc/3X43-BQED].

is quoted as saying "The walls are there not just to keep us in, they're to keep you guys out."[201] This sense of the difficulties of access inherent in prison news reporting permeates accounts by reporters. Although the Department's own rules and regulations suggest a deferential standard to requests for access by the news media,[202] in practice, there has been very little access granted. One journalist, Cristina Rathbone, recounted her attempts to gain access to MCI-Framingham: "nearly five years of research, two successful lawsuits, and countless trips to court," after which "the Massachusetts Department of Correction continues to deny me access."[203]

Rathbone argues that this is not unique to Massachusetts and points to severe restrictions in California, Arizona, Pennsylvania, South Carolina, and Connecticut.[204] She argues that "[m]ost states are less severe in their restrictions, at least on paper" and says that "Alabama, North Carolina, Indiana, Kansas, Louisiana, Nevada, and Massachusetts all officially allow media access to their prisons as long as interviews pose no threat to security."[205] Rathbone argues that in practice, however, this means very little, pointing to Idaho as an example: although the state has a policy of allowing interviews, in practice, not a single one had been granted in five years.[206] Rathbone argues that one consequence of this stonewalling is that journalists only force access "when confronted with extreme examples of abuse."[207]

The *Boston Globe* Spotlight investigation is an example of the type of information investigative reporting can reveal about the internal policies and practices of departments of correction.[208] What is

201. Mark Arsenault, *The Taking of Cell 15*, Bos. Globe (Aug. 14, 2021), https://apps.bostonglobe.com/metro/investigations/spotlight/2021/08/department-of-corrections-investigation/ [perma.cc/KW3T-J87S].

202. Massachusetts Department of Corrections, News Media Access to Correctional Institutions, 103 CMR 131.08 ("Requests for visits by news media representatives shall not be unreasonably denied. As a general rule, subject to the superintendent's recommendation and Commissioner's approval, the legitimate requirements of maintaining security and order within a correctional institution, the protection of the privacy rights of inmates and employees, and the maintenance of other legitimate penological interests, news media representatives may be admitted to state correctional institutions for one of the following purposes: (a) To interview an inmate(s); (b) To interview an employee(s); (c) To take a scheduled tour; (d) To create a documentary; (e) To observe a program; (f) To take photographs or video recordings.").

203. Rathbone, *supra*, note 77, at xi.

204. *Id*. at xii.

205. *Id*.

206. *Id*.

207. *Id*. at xiv.

208. *See* Mark Arsenault, *The Taking of Cell-15*, Bos. Globe (Aug. 14, 2021), https://apps.bostonglobe.com/metro/investigations/spotlight/2021/08/department-of-corrections-investigation/ [https://perma.cc/W2WK-LJNX].

especially intriguing about the article, with regards to transparency, is the extent to which the Department and the *Boston Globe* painted vastly different pictures of what occurred in the prison in January 2020. The Department focused on a conflict between prisoners and guards that occurred on January 10. Its initial statement was the basis of the first *Globe* report, which only cited the Department and the correctional officer's union.[209] The Department released a video of the conflict that was still on the Department's Facebook page when the Spotlight article was published over a year later. The Department's view was that a serious conflict arose as a result of prisoner violence, and their response was a "swift action to restore order." It was not until twenty-one days later that the *Globe* reported on what was clearly a brutal crackdown on prisoners following the January 10 incident.[210] By this point, advocates were alleging "unprovoked beatings at the hands of officers dressed in tactical gear," receiving "half-portions for meals," "little to no contact with attorneys," and confinement in "cells for all but 15 minutes a day."[211] A member of the legislature was cited by the *Globe* as stating that "his office received roughly 30 calls or e-mails with complaints about conditions inside the prison since the Jan. 10 attack," compared with a more common response of five or six complaints following "high-profile incident[s]."[212] A family member of a prisoner reported that the prisoner had been beaten "to the point of unconsciousness," and "taken to an outside hospital."[213] Less than a month after the crackdown began, prisoners filed a lawsuit, and members of the legislature conducted a surprise visit of the facility.[214]

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209. Travis Anderson, *Correctional officer attacked at state prison in Shirley*, Bos. Globe (Jan. 10, 2020), https://www.bostonglobe.com/2020/01/10/metro/correctional-officer-attacked-state-prison-shirley/ [https://perma.cc/AAL3-2DPM] ("[a] group of inmates at a maximum-security prison in Shirley attacked a correctional officer Friday, setting off a melee that prompted a lockdown of the facility . . . The union lamented what it said was recently enacted legislation that 'grants inmates more rights, freedom, housing, and tier time. This This [sic] has allowed inmates to manipulate the system, and engage in violent action, increased gang activity, intimidation and assaults on officers and other inmates.").

210. *See* Matt Stout et al., *Brutal crackdown on inmates alleged in Shirley prison*, Bos. Globe (Jan. 31, 2020), https://www.bostonglobe.com/2020/01/31/metro/brutal-crackdown-inmates-alleged-shirley-prison/ [https://perma.cc/A7LW-NLRV].

211. *Id.*

212. *Id.*

213. *Id.*

214. Gal Tziperman Lotan & John Hilliard, *Inmates at Mass. Prison Denied Full Access to Attorneys, Face Abuse from Correctional Officers, Lawsuit Says*, Bos. Globe (Feb. 3, 2020), https://www.bostonglobe.com/2020/02/03/metro/inmates-mass-prison-denied-full-access-attorneys-face-abuse-correctional-officers-lawsuit-says/ [https://perma.cc/82T6-GRHX].

While reporting on events within the prison continued,[215] it was only after over a year of investigation that a clear picture of the tactics used by guards emerged. The *Boston Globe* Spotlight team published an investigative report recounting what the team called a "shakedown" that the Department conducted in Souza-Baranowski following the January 10 incident. Although the report indicated that "[m]ost of what happened . . . is all but impossible to know, hidden behind the thick cloak of secrecy that routinely blocks scrutiny of prison life here—and almost all efforts at accountability in the state correction department," reporters were able to recount what happened in one particular cell, cell 15, using "available records," "cellblock video and photos, as well as sound files recorded as the cell was entered and its occupants rousted" and accounts by "key players willing to risk being interviewed and quoted by name."[216] The Spotlight piece reported that, during the almost two months following the January 10 incident, there were 118 prisoner complaints of excessive force, compared to four the year before and six the year after during those same two months of the year. The Department sought to focus the narrative on the conflict that led to the injury of three of its personnel and to avoid close examination of the response that followed. The *Boston Globe*, however, through interviews and Public Records Requests, was able to provide a detailed look at the violence inflicted on inmates in the aftermath of the inciting incident.

While these events demonstrate the possibilities for accountability that can occur when practices inside the closed world of prisons are made known, they also represent a singularly unique event. The scale of the Department's crack down led to extreme interest in what was occurring within the prison. Prior to this event, however, it is unclear who knew, for example, that the Department was using dogs to remove

215. *See, e.g.*, Adrian Walker, *The 'Crackdown' in State Prisons Shows Why Reform is Urgently Needed*, Bos. Globe (Feb. 2, 2020), https://www.bostonglobe.com/metro/2020/02/02/the-crackdown-state-prisons-shows-why-reform-urgently-needed/npwU6MspoBaUVMspoBa7EK/story.html [https://perma.cc/534H-QBKU]; Travis Anderson, *Here's What We Know About the Prison Controversy in Shirley*, Bos. Globe (Feb. 3, 2020), https://www.bostonglobe.com/2020/02/03/metro/souza-baranowski-prison-crisis-what-we-know/ [https://perma.cc/DU4F-F9P8]; Gal Tziperman Lotan, *Advocates for Prisoners Decry Conditions at Maximum-Security Prison*, Bos. Globe (Feb. 3, 2020), https://www.bostonglobe.com/2020/02/04/metro/advocates-prisoners-decry-conditions-maximum-security-prison/ [https://perma.cc/TYU4-Y5Y5]; John Hilliard, *DOC Responds to Allegations About Abuse of Prisoners*, Bos. Globe (Feb. 9, 2020), https://www.bostonglobe.com/2020/02/10/metro/doc-responds-allegations-about-abuse-prisoners/ [https://perma.cc/HK7H-7NMH].

216. Mark Arsenault, *The Taking of Cell 15*, Bos. Globe (Aug. 14, 2021), https://apps.bostonglobe.com/metro/investigations/spotlight/2021/08/department-of-corrections-investigation/ [https://perma.cc/KW3T-J87S].

prisoners from their cells, a uniquely controversial practice.[217] Thus, untold numbers of similar incidents have almost certainly occurred with no one on the outside knowing or seeing what the Department was doing. In response to the *Boston Globe*'s report, the Massachusetts Governor required guards to wear body cameras. While this decision highlights the importance of "seeing" executive official action in order to ensure accountability for arbitrary and unlawful acts, in the prison context, it barely scratches the surface in terms of truly enabling the public to see and understand the day-to-day decisions that officials make.[218]

The key is that while investigative pieces like this are important, they "tend[] to reduce those involved to their role[] in the particular scandal revealed," and what is missing is "the lives of [individuals] in prison [rendered] as fully and humanly as possible—with all their varied, often maddening complexities intact."[219] Thus, while the *Globe* article provides a comprehensive look at the prisoners' experiences during this one window in time, and is to be lauded for it, it does little to expand our knowledge of the experiences of these individuals outside of this single event. Indeed, the *Globe*'s coverage of the prison on a more regular basis turns largely on public statements by the Department, which overwhelmingly focus on harm to guards by prisoners.[220] Collectively, these accounts of prisoners, their advocates on the outside, and news media demonstrate the challenges to presenting an accurate

217. *See* Jeremy Conrad, *Behind the Walls: Transparency in Prison Practices*, 36 Wash. L. 32, 33 (2021) (providing examples of cell extractions in Virginia that used dogs and arguing that the only reason these incidents came to light was because of the Pen Pal Program at Interfaith Action for Human Rights (IAHR)). IAHR's executive director said that one goal of the program was to shed light on conditions in prisons, stating: "The walls around prisons not only keep people in . . . [but] they also keep the rest of us out." *Id*. Conrad further recounts efforts by attorneys to learn of the regulations governing the use of dogs to extract prisoners from their cells, but these details were not provided in response to their Virginia FOIA request because, according to the Virginia Department of Corrections, redaction was necessary "to protect the safety and security of the prison facility, building or structure." *Id*. at 34.

218. Indeed, the incident recounted in the spotlight report was of a type that Department policy and national best practices would already require to be videotaped, so it is unclear what the additional requirements of a body camera will accomplish in a space controlled environment and created by the Department.

219. Rathbone, *supra*, note 77, at 5.

220. *See, e.g.*, Travis Andersen, *Corrections officer stabbed at Souza-Baranowski maximum security prison; attacker subdued after fight*, Bos. Globe (May 23, 2023), https://www.bostonglobe.com/2023/05/23/metro/corrections-officer-stabbed-maximum-security-prison-lancaster-attacker-subdued-after-fight/ [https://perma.cc/YM7J-4APJ]; Nick Stoico, *Inmate allegedly attacks correction officer with metal object at MCI-Shirley*, Bos. Globe (Aug. 31, 2022), https://www.bostonglobe.com/2022/08/31/metro/inmate-allegedly-attacks-correction-officer-with-metal-object-mci-shirley/ [https://perma.cc/3TA8-55NV].

and truly transparent picture of life inside the state prisons.[221] The Department controls access to such an extent that the lived experiences of incarcerated individuals disappear or only come to light in times of significant crisis.

III. The Future of Prison Oversight

As a field, prison law tends to focus on the Constitution to establish and enforce minimal standards inside prisons.[222] From the 1960s to the 1980s, accountability in the carceral state was addressed through litigation in the courts. The response of prison departments was to shift towards greater bureaucratization. Feeley and Swearingen assert that the move by contemporary prison departments towards modern bureaucracy is foundational to their legitimacy: "[i]n large-scale organizational settings, bureaucracy does not just foster the rule of law; it is the rule of law. Modern public bureaucracy is a rational-legal organization, and as such it is a web of rules and regulations whose legitimacy stems from the authority of law itself."[223] Although they concede limits to this approach ("[i]t can cloak conflict in the guise

221. It is beyond the scope of this article and this section to consider the extent to which part of the problem is the simple desire to not know. When a high-profile, white, female individual (mother) faces imprisonment, the news media does attempt to capture what occurs on a day-to-day basis within the prison. As soon as Elizabeth Holmes entered, for example, reports of conditions inside FPC Bryan appeared. *See, e.g.*, Catherine Thorbecke, *What Elizabeth Holmes' Life in Prison Could Look Like*, CNN (May 30, 2023), https://www.cnn.com/2023/05/30/tech/elizabeth-holmes-prison-texas/index.html [https://perma.cc/3KQS-B5NH] (describing "dormitory-style arrangements featuring a four-bunk cubicle and communal bath facilities"; uniforms ("khaki pants and a khaki shirt"); and job placements, including teaching); Luke Barr, *Former Inmate at Elizabeth Holmes' Prison Describes What She'll See Behind Bars*, ABC News (May 30, 2023), https://abcnews.go.com/US/former-inmate-elizabeth-holmes-prison-describes-shell-bars/story?id=99699808 [https://perma.cc/GP83-ZH4H] (quoting a former prisoner as saying that everyone entering FTC Bryan must start out working in the kitchen for 90 days, that Holmes will sleep on a bed that feels "like you're laying directly on steel," that the facility has "moldy showers and little hot water in the winter," and that "[m]issing your family is gut wrenching"); Breck Dumas, *Elizabeth Holmes in Prison: What Life is Like Inside Texas Facility*, Fox Bus. (May 31, 2023), https://www.foxbusiness.com/lifestyle/elizabeth-holmes-prison-what-life-like-texas-facility [https://perma.cc/73H5-3GX8] (reporting that Holmes will have to purchase her own hygiene products at the commissary and will only have 300 minutes per month to speak with family and friends). *People* magazine managed to publish a picture of Holmes walking on the prison grounds. *See* Nicole Acosta & Tristan Balagtas, *Elizabeth Holmes is Seen for the First Time Since Beginning Her 11 Year Prison Sentence*, People (June 3, 2023), https://people.com/elizabeth-holmes-seen-first-time-prison-sentence-7507769 [https://perma.cc/B5RZ-KVNP].

222. This is true even for arguments in favor of greater transparency. *See* Cover, *supra* note 36.

223. Feeley & Swearingen, *supra* note 53, at 467.

of consensual roles and mask power in the guise of due process"), they argue that law "imposes a regime of rights and duties that clarify responsibilities and standardize relationships. Through a web of rights it can locate and protect the individual, and through a web of duties it can define and constrain power."[224] They thus see the move towards greater bureaucracy as providing better protections to prisoners than existed in the mid-twentieth century.

At the same time, the twenty-first century carceral state reveals the limits of relying on bureaucracy to protect individuals subject to its totalizing power. Although some regulations oversee everything the Department does, accounts by those held within the Department do not suggest they are protected by the Department's own regulations or that the duties imposed by those regulations limit arbitrariness in any meaningful way. For example, although the legislature required the Department to reform its restrictive housing practices and the Department-adopted policies reflected acknowledgment of that requirement, the example cited above indicates that the Department substantively continued to engage in a practice of severely restrictive housing.

While the prison litigation of the 1960s, 70s, and 80s may have transformed prison departments into modern bureaucracies, continuing focus on litigation over administrative law has caused the field of prison law to miss the extent to which prisons do not function as transparent and accountable agencies in the traditional sense. Attention to litigation rather than administrative governance has meant that prison law scholarship has not drawn from contemporary debates over the legitimacy of, and need for greater accountability in, the administrative state, nor has that literature itself drawn from or touched upon the experiences of prison departments.

All the same, Feeley and Swearingen offer an insight into the present moment: "from the outset the concern with the individual *rights* of prisoners was understood by the courts, as well as plaintiffs' attorneys and the defendants themselves, as a concern with structural reform of the *organization*."[225] If rights are best protected through organization, then much greater attention needs to be paid to how prison departments lack many of the protections that administrative law assumes are present in other administrative agencies. This is because they oversee closed spaces that are not open to the types of subconstitutional checks on

224. *Id.*
225. *Id.* at 468.

agency power that scholars have found in other contexts. It is to the further possibilities of oversight and accountability that Part III turns.[226]

This Part explores what it could mean to acknowledge that prisoners require more protection than they have traditionally received under the Constitution and examines the types of administrative oversight that could provide those protections. One administrative mechanism that has been the focus of this Article thus far has been greater transparency. The first section will specify the types of information that are still not known about our prisons and argues that at a minimum there should be greater transparency in these areas. But Part I already demonstrated that even scholars of transparency admit that transparency is a necessary but insufficient prerequisite for accountability, and Part II showed that even when things are known about prison practices, actual accountability can be difficult to achieve.[227] The second section of this Part thus examines how transparency can be facilitated not by requiring information to be shared but by building actual accountability mechanisms.

A. Shining Light into Darkness: Transparency

Within the scholarship on transparency there is a tendency to see transparency as what David Pozen terms a "primary virtue worth attaining for its own sake."[228] He defines a primary virtue as one that "concern[s] the basic contours of government action" and therefore may be a "prerequisite[] to individual and collective self-determination," which means that it "can be justified without consequentialist assumptions."[229] While Pozen quickly moves beyond this level of justification for transparency of the administrative state more generally, there are good reasons to argue that in the carceral context transparency is a primary virtue, one that goes to the very "basic contours of government action," and for that reason is a "prerequisite" to "self-determination." It is

226. It is beyond the scope of this paper to consider this problem, but it is worth highlighting an additional warning that Feeley and Swearingen point to: "strengthening prisoners' rights through bureaucratic enhancement also strengthens the prison administration's capacity to control." *Id.* at 468. This same insight has been noticed elsewhere in the administrative state where transparency requirements lead to a larger administrative state. *See also* Fenster, *The Opacity*, *supra* note 33.

227. *See generally* Armstrong, *supra* note 13.

228. Pozen, *supra* note 23, at 103 (citing Alasdair MacIntyre, Secularization and Moral Change 24 (1967) for his definition of primary virtues, and Michael Schudson, The Rise of the Right to Know: Politics and the Culture of Transparency, 1945-1975 22–23 (2015), arguing "that transparency's strongest advocates treat it as a primary virtue").

229. *Id.* at 161.

impossible to evaluate governmental practice in the absence of knowing about or actually understanding that practice.

This valuation of transparency for its own sake is supported by those who argue that "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."[230] A similar argument asserts that such observation works in a manner analogous to the panopticon. Here the theory is that if the prison space can be viewed at any time, those within it will act better at any given moment.[231]

For this reason, this section focuses on the greater transparency that is still required of our carceral spaces, even while the next section urges a move beyond transparency to firmer forms of accountability. This section will focus on two types of transparency: transparency of information and observational transparency.[232] Transparency of information involves collecting and sharing the basic information that can help the public and the legislature understand the contours of incarceration in a given jurisdiction. Observational transparency, on the other hand, relates to the ability of outsiders to actually observe carceral space.

1. Informational Transparency

Even while advocates point to the harm perpetuated by the long-term use of solitary confinement,[233] it continues to be the case that there are significant challenges to data collection on how many individuals

230. Deitch, *But Who Oversees the Overseers?*, *supra* note 100, at 218.

231. *See id*. at 220 for this type of argument ("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").

232. I am borrowing the idea to identify different types of transparency from Aliza Plener Cover, though I am modifying her categories somewhat. Cover, *supra* note 36, at 214. She also refers to informational transparency. *Id*. at 196–202. What she terms "participatory" transparency I am terming "observational." *Id*. at 184–89. Her participatory category includes moments in the criminal legal system when the public can actually participate, such as the jury trial, which is a more challenging concept in the carceral context. Here I am more interested in the act of seeing, though observation is of limited value without the ability to force adherence and require action. She also refers to corporal transparency, which is relevant as a general matter here but does not necessarily assist in developing a specific program of accountability in the carceral context. *Id*. at 189–95.

233. Bruce Western et al., *Solitary confinement and institutional harm*, 3 Incarceration 1 (2021); Judith Resnik et al., *Punishment in Prison: Constituting the 'Normal' and the 'Atypical' in Solitary and Other Forms of Confinement*, 115 Nw. L. Rev. 45, 156 (2020).

are currently held in solitary confinement in the United States, and how long anyone is so held.[234] Similarly, during the COVID-19 pandemic, it was well known that institutions posed particularly challenging spaces to prevent the spread of the disease,[235] and family members and activists faced considerable struggles in knowing what was occurring in carceral spaces.[236] Indeed, information on who dies of what in carceral spaces, a piece of information that should be the most basic aspect of carceral life to record, is not easily obtained.[237] These two examples demonstrate the challenges to debating the future of carceral policy in the United States, where basic pieces of information about carceral practice are simply unknown.

Informational transparency is the type of transparency advocated by Andrea Armstrong, and her extensive list of required information remains relevant and urgently needed.[238] She argues that our carceral spaces require a national reporting system analogous to the No Child Left Behind Act that will collect basic information about prison performance.[239] The strength of her suggestion lies in the capacity and ability of the federal government to demand this type of reporting given the amount of financial support that state institutions receive. Indeed, the Prison Rape Elimination Act itself imposed significant reporting

234. Chase Montagnet et al., Mapping U.S. Jails' Use of Restrictive Housing 2–4 (2021); Allen J. Beck, Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12 2 (2015).

235. *See generally* Hadar Aviram & Chad Goerzen, Fester: Carceral Permeability and California's COVID-19 Correctional Disaster 24–36, 47–49 (2024); Laura Hawks et al., *COVID-19 in Prisons and Jails in the United States*, 180 JAMA Internal Med. 1041, 1041 (2020).

236. Shelley Murphy, *Coronavirus Surges at Prison; Hospitalized Inmate's Family Seeks Answers*, Bos. Globe (Nov. 27, 2020), https://www.bostonglobe.com/2020/11/27/metro/coronavirus-surges-prison-hospitalized-inmates-family-seeks-answers/ [https://perma.cc/K7AE-CJU7]. *See also* Philippa Tomczak & Roisin Mulgrew, *Making Prisoner Deaths Visible: Towards a New Epistemological Approach*, 4 Incarceration 1 (2023). For Massachusetts specifically, see Bridget Conley, *Who Has Died of COVID-19-Related Causes in Massachusetts' Prisons?: a discussion of data discrepancies*, World Peace Found. (May 20, 2021), https://worldpeacefoundation.org/blog/who-has-died-of-covid-19-related-causes-in-massachusetts-prisons-a-discussion-of-data-discrepancies/ [https://perma.cc/76Z2-64JL].

237. *See* Conley, *supra* note 236. The Incarceration Transparency project was started to collect data on deaths in custody in Louisiana and has expanded to include South Carolina. Their reports demonstrate the continuing struggles to obtain this basic category of information. *About Us*, Incarceration Transparency, https://www.incarcerationtransparency.org/about-us/ [https://perma.cc/4HQZ-KU3K].

238. Armstrong, *supra* note 13, at 470–73 (proposing a list of "minimal data points for annual collection," grouped into five categories: "1) physical safety; 2) medical; 3) institutional employment/education; 4) internal discipline; and 5) recidivism." *Id*. at 471).

239. *Id.* at 439.

requirements on jails and prisons, demonstrating the ability of the federal government to establish these reporting requirements.[240]

2. Observational Transparency

Expanding beyond informational transparency, however, observational transparency recognizes that the data required by informational transparency cannot capture the full range of prison life. For this reason, regular visits to and observations of prison life are required to ensure that prison officials are not the sole entity responsible for ensuring proper government action and the basic human dignity of prisoners. There are some examples of observational transparency in United States jails and prisons, though these programs have been little studied for their effectiveness.[241]

The value of monitoring comes from the fact that oftentimes the government action that the public needs or wants to observe does not fit into a neat category within the bounds of a particular report. For example, the practice of videotaping police action would be considered a transparency practice because it reveals or makes known to the public and to the government potentially arbitrary government action that would otherwise have gone unaddressed, unnoticed, or unknown.[242] This is particularly true in the carceral context, where much of what prisoners argue is objectionable are the daily indignities and arbitrary acts of guards who act with impunity because of the lack of oversight. There is no piece of paper that a Public Records Request could reveal that would demonstrate, or alleviate, this problem in its daily instantiation, even if the public were inclined to advocate on behalf of prisoners.

Any monitoring regime must also confront how to enforce or ensure the implementation of the monitor's findings. Hilde Tubex argues "prison staff often self-monitor, an autonomy not afforded in other institutions charged with the care of human life; although staff are experts at prison operations, this freedom from scrutiny has yielded substandard, inhumane, and even deadly conditions for people who are incarcerated."[243] She goes on to argue that there is a danger

240. Kevin Corlew, *Congress Attempts to Shine a Light on a Dark Problem: An In-Depth Look at the Prison Rape Elimination Act of 2003*, 33 Am. J. Crim. L. 157, 178–82 (2005).

241. For a discussion of observations of Rikers Island, see *supra* note 21. For an overview of prison and jail oversight mechanisms in the United States, see Deitch, *But Who Oversees the Overseers?*, *supra* note 100.

242. *See, e.g.*, Jocelyn Simonson, *Copwatching*, 104 Calif. L. Rev. 391, 407–13 (2016).

243. Hilde Tubex, *Reach and Relevance of Prison Research*, 4 Int'l J. for Crime, Just. & Soc. Democracy 4, 6 (2015).

in emphasizing accountability, however, in that it can feed into a "managerial" approach to imprisonment, in which "criminal justice agencies [will] need to demonstrate effectiveness in their outcomes, and prison management [will] become a 'business,'" with "their approach need[ing] to be 'evidence-based.'"[244] Thus, while recognizing the limits of self-monitoring, she warns against accountability mechanisms that focus too heavily on checklists or other indicator type monitoring.

In the European context, monitoring has come to mean external monitoring, where it often exists as a form of outside observation coupled with some form of persuasion. Examples include the European Committee for the Prevention of Torture (CPT), which sends experts into European prisons where they "examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."[245] CPT issues specific and general recommendations following their visit, and the country must respond within six months, with a final response due one year after the visit.[246] CPT's recommendations are only made public with the consent of the country involved, but there is a great deal of moral pressure on countries to accept publication, so most CPT reports have been published.[247] One key to effective monitoring is that it must rely on a set of identifiable standards against which the monitor can compare actual performance. In Europe, the CPT is itself a source of such standards, as are the European Prison Rules and the European Court of Human Rights.[248]

England and Wales resemble the United States in that the "substantive standards that prison conditions must meet are relatively

244. *Id*.

245. Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME AND J. 503, 518 (2010). For a more detailed description of how CPT works, see Silvia Casale, *The Importance of Dialogue and Cooperation in Prison Oversight*, 30 PACE L. REV. 1490, 1493 (2010). She argues that although they have no authority to enforce compliance, the moral persuasion that results from their observations of conditions can lead to meaningful changes in conditions for the incarcerated. *See id.* She writes that most frequently, the torture found related "to poor conditions, including overcrowded accommodation and lack of time and activities out of cell, or other shortcomings in the system," and that "[s]taff may themselves be keen to point out these organizational failings, since they are often frustrated in their work by these inhibiting factors. In prisons, CPT and SPT oversight tends, therefore, to centre on the gap between policy and practice or the lack of capacity (human and other resources) leading to systemic shortcomings." *Id.* at 1493. Later she argues that "[t]he important point arising from this example is that identifying problems is not an exercise in laying blame." *Id*. at 1495.

246. Van Zyl Smit, *supra* note 245, at 519.

247. *Id*. at 520.

248. *Id*. at 519, 521–23

poorly developed in legislation."[249] Instead, the prisons system there has developed "key performance indicators (KPIs)," which "are techniques for measuring specific organizational goals," with indicators created that can measure the extent to which the goal is being accomplished.[250] These internal mechanisms for review are supplemented by an external monitoring system, His Majesty's Inspectorate of Prisons (HMIP), which, while based in the government, is entirely independent of the prisons service.[251] This entity has created its own standards and engages in scheduled and unscheduled inspections.[252] Like with the CPT, the reports of HMIP "are routinely published and contribute strongly to the public debate about prisons."[253] England has another level of independent monitoring in the form of the Independent Monitoring Boards (IMBs) that are created for each institution. The IMBs "act as watchdog of the daily life and regime in an individual prison."[254] These boards are composed of volunteer lay citizens and "have access to all prisoners, who can complain to them about prison conditions, and to all parts of the prison for which they are appointed."[255] In the United States, a number of jurisdictions have outside monitors, though each demonstrates the limitations of this approach.[256]

In the United States, aside from the minimal requirements of the Eighth Amendment, there are no minimum standards applicable to all

249. *Id*. at 529.

250. *Id*. at 530–31.

251. *Id*. at 531–32. Andrew Coyle points to the significant value of independent reports in his piece, *Professionalism in Corrections and the Need for External Scrutiny: An International Overview*, 30 PACE L. REV. 1503, 1508 (2010) ("The process of change and improvement which we began in Brixton in 1991 was greatly assisted by these two independent reports because they were able to draw public attention to all the pressures which made it difficult to manage the prison properly. These were pressures which everyone connected with the prison were already aware of, but it took external inspections to get them on the public agenda."). For a further discussion of this process, see Anne Owers, *Prison Inspection and the Protection of Prisoners' Rights*, 30 PACE L. REV. 1535 (2010).

252. Van Zyl Smit, *supra* note 245, at 531.

253. *Id*. at 532. South Africa has a similar inspection process, although in its case it is a high court judge who is appointed the "Inspecting Judge." *Id*. at 547.

254. *Id*. at 532 (quoting S. LIVINGSTON ET AL., PRISON LAW 11 (4th ed. 2008)). For a discussion of how these work, see Vivien Stern, *Revised and Updated Speech by Baroness Vivien Stern to the Conference on Prison Oversight, Austin, Texas, April 25, 2006: The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight*, 30 PACE L. REV. 1529 (2010).

255. Van Zyl Smit, *supra* note 245, at 532.

256. For example, the New York State Commission of Correction monitors local and state correctional facilities. *Overview*, N.Y. STATE COMM'N OF CORR., https://scoc.ny.gov/. *But see supra* note 21 for discussion of the numerous problems observed at Rikers Island.

state systems. [257] The United States also has the American Correctional Association, which is available to accredit prisons and jails in the United States.[258] It published its first manual of correctional standards in 1946, which "set[s] forth a host of standards that are grounded in the ideas of bureaucratization and rehabilitation."[259] Feeley and Swearingen argue that this manual was influential within the courts as they were deciding the wave of prison conditions cases that arose in the 1960s and 70s.[260] Indeed, they argue that it is because the judges and litigators confronting these prison conditions had a notion of what a good prison looked like (influenced by the ACA) that they were able to be so successful in forcing improvements, as opposed to mental hospitals, where they all agreed that the conditions were terrible but no one agreed on how to improve them.[261]

However influential the ACA may have been in forcing prison departments to become modern bureaucracies, today their accreditation process is entirely voluntary, with a key problem being that the states that voluntarily undertake the accreditation process are the ones that pay for the ACA's budget. Thus, there is a strong incentive for the ACA not to create too burdensome or onerous of an approach.[262] An additional limitation of the ACA as an outside monitor is the fact that while it may provide objective standards, it has no grounding in human rights concepts, like the European CPT. The result is that it has been entirely ineffective in addressing issues such as the prolonged use of solitary confinement. Isolation for longer than fifteen consecutive days is considered to be torture outside the United States, but isolation for much longer periods continues to be tolerated in the United States, even in ACA-accredited prisons.[263]

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257. Geri Lynn Green, *The Quixotic Dilemma, California's Immutable Culture of Incarceration*, 30 Pace L. Rev. 1453, 1468 (2010) (arguing that California is "one of the only states to adopt a state regulatory scheme setting forth minimum standards of treatment of prisoners" (citing CAL. PENAL CODE § 6030 (Deering 2009)). *See also* California Board of State and Community Corrections, 2019 Regulations Revisions, Title 15, Minimum Standards for Local Detention Facilities. These standards are not mandatory, however, thus reducing their effectiveness.

258. All of Massachusetts' prisons are ACA accredited. *See Accredited Facilities*, Am. Corr. Ass'n, https://www.aca.org/ACA_Member/ACA/ACA_Member/Standards_and_Accreditation/SAC_AccFacHome.aspx?CCO=2 [https://perma.cc/QN7G-SF9Z] (search by Massachusetts).

259. Feeley & Swearingen, *supra* note 53.

260. *Id*.

261. *Id*. at 439–40.

262. David M. Bogard, *Effective Corrections Oversight: What Can We Learn from ACA Standards and Accreditation*, 30 Pace L. Rev. 1646, 1649–50 (2010).

263. *See Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, United Nations (Oct. 18, 2011), https://news.un.org/en/story/2011/10/392012

As these examples demonstrate, the notion of transparency as understood in federal legislation such as FOIA or even the Sunshine Act cannot capture the type of transparency that the carceral environment requires. Rather, in the carceral context, the ability to inspect and actually see what is occurring behind closed walls is essential to any program of monitoring or evaluation. In the empirical discussion of Part II, there were no examples of this type of observational transparency because none exist in Massachusetts. It continues to be the case that prisoners, and their lawyers and family members, are the best independent source of information as to what occurs behind prison walls. One slight exception is visits by members of the legislature, which are permitted and can occur with little advanced notice (although they can also be canceled with little explanation).[264] Indeed, the Massachusetts legislature sees unannounced visits as "a crucial tool necessary for the oversight of correctional facilities."[265] Given the demands of the legislative job, however, this tends to only occur in response to high profile events and does not constitute a regular practice.

B. Moving Beyond Transparency to Accountability

While transparency may have a heightened importance in the carceral space, where it is uniquely necessary to enable understanding of "the basic contours of government action," it may not, on its own, be sufficient to either understand or successfully hold accountable that government action. Here, it is important to recognize the centrality of transparency and the availability of information to any system of accountability.[266] Fenster argues that "[t]he metaphoric understanding of

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[https://perma.cc/5XFG-9QND]; *see also* Rod Morgan, *Developing Prison Standards Compared*, 2 PUNISHMENT & SOC'Y 325, 337 (2000).

264. Matt Stout et al., *Brutal Crackdown on Inmates Alleged at Shirley Prison*, BOS. GLOBE (Jan. 31, 2020), https://www.bostonglobe.com/2020/01/31/metro/brutal-crackdown-inmates-alleged-shirley-prison/ [https://perma.cc/J3UF-2C8W] (reporting that Senator Jamie Eldridge's visit to MCI-Shirley was canceled due to "scheduling conflicts"). Two days later state lawmakers "led an unannounced inspection" of MCI-Shirley. Gal Tziperman Lotan & John Hilliard, *Inmates at Mass. Prison Denied Full Access to Attorneys, Face Abuse from Correctional Officers, Lawsuit Says*, BOS. GLOBE (Feb. 3, 2020), https://www.bostonglobe.com/2020/02/03/metro/inmates-mass-prison-denied-full-access-attorneys-face-abuse-correctional-officers-lawsuit-says/.

265. Jeremy C. Fox, *Senate Investigation Finds Bristol Sheriff's Office Broke Law in Denying State Senator Access to Jail*, BOS. GLOBE (Dec. 18, 2020), https://www.bostonglobe.com/2020/12/18/nation/senate-investigation-finds-bristol-sheriffs-office-broke-law-denying-state-senator-access-jail/ [https://perma.cc/RM5U-BXN6] (quoting Senator John F. Keenan).

266. Armstrong, *supra* note 13, at 459–60 (arguing that transparency does not, itself, always provide accountability but it is often a required first step towards accountability). *See also* Pozen, *supra* note 23; Peter M. Shane, *Legislative Delegation,*

transparency animates deeply held beliefs about the state's legitimacy,[267] escalating to the level of a preeminent democratic imperative the technocratic legal issue of how best to make the official administrative bureaucracy accessible."[268] Public participation and checks and balances both relate back to recurring foundational debates about the legitimacy of administrative agency action.[269]

In the area of prison oversight, there has been an observable shift away from courts as a mechanism for oversight towards more administrative mechanisms.[270] At the same time, there has been little attention to the details of how prison actors assimilate or respond to administrative reforms.[271] Without this attention to how reforms work

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the Unitary Executive, and the Legitimacy of the Administrative State, 33 HARV. J.L. & PUB. POL'Y 103, 108 (2010) ("The essence of accountability lies in the transparency of government actions."); Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARV. J. ON LEGIS. 369, 370 (2000) ("Transparency and accountability in government are two principles crucial to securing the public trust.").

267. It is worth considering what legitimacy means in this context. Richard H. Fallon, Jr. argues that there are three distinct strands of legitimacy in American legal thought—legal, sociological, and moral—in his piece, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789–92 (2005). Legal legitimacy turns on legal norms. *Id*. at 1790. Sociological legitimacy he traces to Max Weber who argued that legitimacy "signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest." *Id*. at 1792. Finally, moral legitimacy turns on political theories justifying either the state as a whole or particular aspects of state action. *Id*. at 1796–1801. This article primarily involves itself with the first two theories of legitimacy, although the third is probably the most discussed in the literature evaluating the legitimacy of the carceral state as it reflects the persistent debates over the theoretical justifications of that state, typically reduced to rehabilitation, deterrence, and retribution. For a basic description of these theories, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 13–25 (8th ed., 2018). For an attempt to articulate an alternative to these three traditional theories, *see* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

268. Fenster, *Seeing the State*, *supra* note 10, at 628.

269. JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 11 (1978) (describing a "recurrent sense of crisis" in the administrative state, with "each generation [tending] to define the crisis in its own terms" and "[fashioning] solutions responsive to the problems it [] perceives"). *See generally* Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016) (collecting recent evidence of the continuation of this sense of crisis or lack of legitimacy in the administrative state).

270. Robert Schuhmann & Eric Wodahl, *Prison Reform Through Federal Legislative Intervention: The Case of the Prison Rape Elimination Act*, 22 CRIM. JUST. POL'Y REV. 111, 112 (2011).

271. Danielle S. Rudes et al., *Sex Logics: Negotiating the Prison Rape Elimination Act (PREA) Against Its Administrative, Safety, and Cultural Burdens* 23 PUN. & SOC'Y 241, 242 (2020).

in practice, intended oversight mechanisms are likely to be ineffectual at best.[272]

Part I cited Epps' argument that the benefits of checks and balances are achieved by empowering "individuals or interests with the appropriate incentives to check each other"[273] and "[w]hether a criminal justice system will be used tyrannically [] seems to depend on whether enough distinct interests have a hand in controlling the system's machinery to prevent any one interest from consolidating power and abusing it."[274] One important role of oversight is to provide a "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."[275]

While there is a slowly developing body of literature on prison oversight, greater attention needs to be paid to this question of which interests and whose voices are being given a voice in any oversight mechanism.[276] Michele Deitch has done the most work to advance our knowledge of prison oversight and how it might function and to empirically establish the lack of oversight throughout the United States.[277] While she argues that there are a number of different forms oversight could take, she does not distinguish between them in terms

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272. *See, e.g.*, Ivy Scott, *'My Concern is Precedent': Mixed Responses to DOC Promise to End Solitary Confinement*, Bos. Globe (July 6, 2021), https://www.bostonglobe.com/2021/07/06/metro/my-concern-is-precedent-mixed-responses-doc-promise-end-solitary-confinement/ [https://perma.cc/QZ9A-2KK2]; Editorial, *Mass. DOC is Making a Mockery of New Solitary Confinement Regulations*, Bos. Globe (July 14, 2019), https://www.bostonglobe.com/opinion/editorials/2019/07/14/mass-doc-making-mockery-new-solitary-confinement-regulations/MD4zte2yRouYmfk7cIIWcO/story.html#:~:text=What's%20the%20state%20Department%20of,a%20leader%20in%20prison%20reform [https://perma.cc/G653-9D6N].

273. Epps, *supra* note 96, at 41.

274. *Id*. at 44.

275. Deitch, *But Who Oversees the Overseers?*, *supra* note 100, at 219.

276. *Id*. and two volumes in Pace Law Review entirely dedicated to prison oversight: 30 Pace L. Rev. (2010) and 24 Pace L. Rev. (2004). There is a larger literature on police oversight, though a key claim of this article is that prisons are unique spaces with very unique (and pressing) needs for oversight that are unique to this context. For an overview of policing oversight, *see* Joseph De Angelis, et al., *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. Enf't (Sept. 2016), https://www.fortworthtexas.gov/files/assets/public/v/1/opom/documents/civilian-oversight-law-enforcement.pdf [https://perma.cc/E68R-QKDP].

277. Deitch, *But Who Oversees the Overseers?*, *supra* note 100. This article is an update of an earlier one: Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 Pace L. Rev. 1754, 1755, 1762 (2010).

of which voices are being given a voice in a given mechanism.[278] This section will focus on two major perspectives on our carceral state: prisoners and the prison departments themselves.

1. Prisoner Voices

Prisoners are rarely given an opportunity to express their perspective on how prisons are being run. The one place where the prisoner voice does enter into the conversation is in investigations. These are inherently reactive responses to events that have already occurred and represent a type of oversight that transparency is particularly concerned with. The goal in investigation is to determine what happened and, through knowing this, to prevent future such occurrences.[279] Two sources of investigation that are particularly relevant in the carceral space are the media and the courts. The first is common to the more general aims of governmental transparency as that concept developed over the course of the twentieth century: investigative journalism and the media's role in exposing individual incidents of (typically) gross misconduct. Although this can be a powerful tool for forcing change, its limits can be seen in the example cited in Part II of the *Boston Globe* Spotlight investigation. While that investigation pushed the Governor to adopt a practice of requiring body cameras on guards, it did not lead to a more meaningful examination of or revision to prison policies in removing prisoners from cells. In particular, the use of a dog to assist in that practice was never explicitly addressed by the Governor, the Department, or the state legislature.

The second type of investigation is individual court cases, which seek to assert a claim under either the Constitution or statutes that on a particular occasion or over time a right has been violated. While this type of investigation was not examined in Part II, it is another instance where an investigation can shift information from those on the inside (who are aware of the incident or the conditions giving rise to the investigation) and particular groups on the outside (in the case of media, the public;

278. She identifies the following: investigation, monitoring, reporting, regulation, audit, and accreditation. Deitch, *But Who Oversees the Overseers?*, *supra* note 100, at 217. Reporting is the form of oversight most directly implicated in the list of pieces of information that we need to know about our prisons given in the previous section. Regulation was addressed to a certain extent in Part I. Audit and accrediting will be addressed as a subpart of monitoring.

279. *See* Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1442 (2010). An example of an institutionalized form of investigation outside of the courts can be seen in Canada's Office of the Correctional Investigator. Howard Sapers & Ivan Zinger, *The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections*, 30 PACE L. REV. 1512, 1518–19 (2010).

in the case of the courts, the courts themselves, though through them the public also receives insider information).[280]

In the twentieth century, perhaps the most well-known source for public information about prison systems came from lawsuits aimed at redressing systemic violations of prisoner rights. These lawsuits can be categorized as investigative in nature in that they all depended upon a prior violation that led to litigation over a previously existing factual situation (the state of the prison at the time of the alleged violation), though in this form the prisoner rights litigation ultimately merged with the next category, accountability, because the redress sought by prisoners typically required fundamental changes in the carceral space and long-term monitoring to ensure that those changes were implemented.[281]

Courts can no longer be counted on to serve as the primary oversight mechanism for our prisons, however. That is not to say that they do not have a role to play. At the margins, courts continue to step in when particularly egregious conditions arise. Although the Prison Litigation Reform Act (PLRA) fundamentally altered the landscape of prisoner rights litigation, it did not eliminate it, and a similar process of oversight can be seen in the California litigation that led to the Supreme Court case of *Brown v. Plata*.[282]

In addition to constitutional requirements, there are a limited number of federal statutory schemes that give litigants access to the courts. The one with the most well-developed body of law is the Religious Land Use and Institutionalized Persons Act (RLUIPA), which protects the religious rights of prisoners. A second piece of legislation, the Prison Rape Elimination Act (PREA), could have created another right of action but failed to do so, instead focusing more on developing reporting requirements and monitoring.[283]

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280. *See, e.g.*, Felice J. Freyer, *Suit Alleges Massachusetts Prisons Deny Treatment to Addicted Inmates*, Bos. Globe (Dec. 20, 2019), https://www.bostonglobe.com/metro/2019/12/20/suit-alleges-massachusetts-prisons-deny-treatment-addicted-inmates/LAHVdQGvzESaxM0hBRPp6L/story.html [https://perma.cc/ZU3Q-EWG7] (using lawsuit as basis of reporting on treatment of addicted prisoners).

281. Deitch, *Distinguishing*, *supra* note 279, at 1440.

282. 563 U.S. 493 (2011). The PLRA fundamentally transformed how prisoners can access the courts, imposing strict requirements that prisoners follow all internal grievance procedures before filing suit in federal court. Schlanger, *Trends in Prisoner Litigation*, *supra* note 18 at 153-54.

283. Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 Stan. L. & Pol'y Rev. 489, 490–91 (2011). For a discussion of how the standards were adopted, see Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 Pace L. Rev. 1625, 1625–28 (2010).

A third form of investigation has not been used much in the context of the United States but has been used elsewhere: ombudsmen.[284] In its regular formulation, an ombudsman investigates instances when a government official fails to perform their duties correctly. An example of how this might work in practice is in Sweden, where "[t]he ombudsman has wide powers of investigation," and "it would be unthinkable to deny the ombudsman information." The ombudsman can make "recommendations to government on practices that should be changed to improve prison conditions," "taking disciplinary steps [or prosecuting] against officials . . . if necessary."[285] Canada also has an ombudsman who performs this role.[286] Monitoring is different from investigation in that it represents an attempt at ongoing observation of the internal affairs of a prison.[287] Whichever oversight mechanism is chosen, however, transparency is central to its effectiveness. [288]

The key to the effectiveness of these types of engagement is that they take seriously the prisoner perspective. In order to ensure greater accountability in the carceral state, attention needs to be paid to the ways the voices of incarcerated and formerly incarcerated individuals can be incorporated into accountability mechanisms.

2. Prison Departments

Rather than expand upon all the ways in which prison departments are allowed to exercise their voice, this final section will consider why prison departments work so hard to keep their work outside of public view. Max Weber posits that it is in the nature of bureaucracies to keep their activities secret, but the reasons behind this impetus could be better teased out in the American carceral context. The sociologist

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284. This is true even though several states have recently adopted ombudsmen. Deitch, *But Who Oversees the Overseers?*, *supra* note 100, at 247. In these instances, however, the ombudsmen "tend to include the responsibilities to both conduct routine monitoring of correctional facilities and review complaints from people in custody and their families." *Id*.

285. Van Zyl Smit, *supra* note 245, at 543–44.

286. Howard Sapers & Ivan Zinger, *The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections*, 30 Pace L. Rev. 1512, 1518–19 (2010).

287. Deitch, *Distinguishing*, *supra* note 279, at 1442–43.

288. Cassandra Ramdath & Bethany Young, Transforming Prisons 40 (2023) ("[A]lthough the impact of oversight is likely governed by the degree to which oversight entities can access the spaces, people, and records relevant to prison operations . . . no rigorous studies have evaluated various oversight models in the prison context."). *See also id*. at 44 ("Other lessons from the Justice Reinvestment Initiative are that codifying reform through legislation is necessary to sustain reform efforts, and that establishing oversight entities to track faithful implementation of reforms is essential. Ideally, these entities will make their findings and the data used to generate them public, which can support future research inquiries.").

David Beetham argues that "[o]penness is the keystone of democratic politics, but proposals to achieve it are likely to prove insufficient when they take no account of the pressures causing secretiveness in the first place."[289] Katzenbach argues that "people in power, in my experience, rarely think they need a lot of advice from other people as to what they should do, because they consider they know what it is that they should do and they are in the process of doing it."[290] This perspective suggests that prison departments will rarely voluntarily open themselves up to outside perspectives. This can be seen in the example of journalist Christina Rathbone cited in Part II who wanted to write a book based on the experiences of female prisoners and was continually blocked by the Department in her petitions to visit the prison despite policies that explicitly stated an openness to journalists.[291]

Sarah Geraghty and Melanie Velez have a somewhat more negative view, arguing that "there is a culture in the corrections field that fosters the notion that keeping quiet about correctional operations and incidents is the correct, moral thing to do."[292] Pointing to numerous examples of egregious refusals to comply with public records requests, Geraghty and Velez conclude that the primary reason departments wish to remain opaque is because they have something to hide.[293] The public-facing argument is often that "bringing the public spotlight into shrouded correctional institutions could threaten the security of those institutions."[294] These claims, however, should be subject to some level of scrutiny given that there are examples of oversight in the United States and Europe that have not resulted in security concerns.[295]

Conclusion

At a time when many high-profile groups, including the American Bar Foundation and the Commission on Safety and Abuse in America's Prisons, have called for greater transparency in carceral spaces,[296] it is

289. David Beetham, Bureaucracy 101 (2d ed. 1996).
290. Katzenbach, *supra* note 67, at 1448.
291. Rathbone, *supra* note 77.
292. Geraghty & Velez, *supra* note 57, at 455.
293. *Id*. at 455, 458–63.
294. Deitch, *But Who Oversees the Overseers?*, *supra* note 100, at 219. This was the argument used by the California Department of Corrections in implementing the regulation at issue in Pell v. Procunier, 417 U.S. 817, 819 (1974). Driver & Kaufman, *supra* note 1, at 568 n.303 ("Prison officials viewed his escape attempt and death as a reflection of disciplinary problems created by media attention to prison conditions during the civil rights revolution.").
295. *See, e.g*., Coyle, *supra* note 251, at 1506–08 and Stojkovic, *supra* note 69, at 1480.
296. *Criminal Justice Standards: Treatment of Prisoners*, Am. Bar Ass'n (2010), https://www.americanbar.org/groups/criminal_justice/publications/criminal_

worth pausing to consider what this concept means, what goals it might advance, and how it might overpromise with regards to its potential to curb significant individual and systemic abuses in prisons. It has long been recognized that the United States is an outlier in its lack of prison oversight, and it seems likely that there will be increasing moves in that direction as the United States continues to grapple with the expansion and legacy of a mass incarceration system that is now over half a century old.[297] While greater transparency may alleviate some of the problems within American prisons, transparency is only one of a broader set of the administrative failures that must be addressed to remedy the lack of basic human dignity that permeates carceral spaces.

This Article has demonstrated the high level of opacity that currently exists in prison departments. These departments are unique in that they create the physical space within which they operate and serve as the sole authority therein. The secretiveness of agency action is addressed by transparency theory, which posits that transparency of administrative agencies increases public oversight of those agencies, improves the functioning of checks and balances, and ultimately contributes to agency legitimacy by ensuring that agencies are held accountable to the public and the other branches of government. This Article demonstrated that this view of transparency is too simplistic for the carceral context. Rather there is a need to put in place mechanisms that ensure actual accountability. All of the examples of prison oversight that were examined, however, started with a robust concept of prison spaces being open to examination. Thus, while transparency may not be enough, on its own, to ensure accountability, it is a necessary prerequisite for any meaningful approach to accountability.

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justice_section_archive/crimjust_standards treatmentprisoners/#23-9.2 [https://perma.cc/L2PX-4Z65] (Part XI concerns accountability and oversight and contains numerous provisions that link to transparency concerns, including Standard 23-11.1(g), (h) & (i); Standard 23-11.2 & 11.3 (all paragraphs); Standard 23-11.4(b); Standard 23-11.5 (all paragraphs); John J. Gibbons & Nicholas deB. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 408 (2006).

297. *See* Michele Deitch, *But Who Oversees the Overseers?*, *supra* note 100, at 223–25 ("The lack of external correctional oversight mechanisms in most states makes this nation an anomaly on the world stage."). Jonathon Simon, *Penal Monitoring in the United States: Lessons from the American Experience and Prospects for Change*, 70 CRIME L. SOC. CHANGE 161, 162 (2018) (arguing that this is another form of "American exceptionalism").