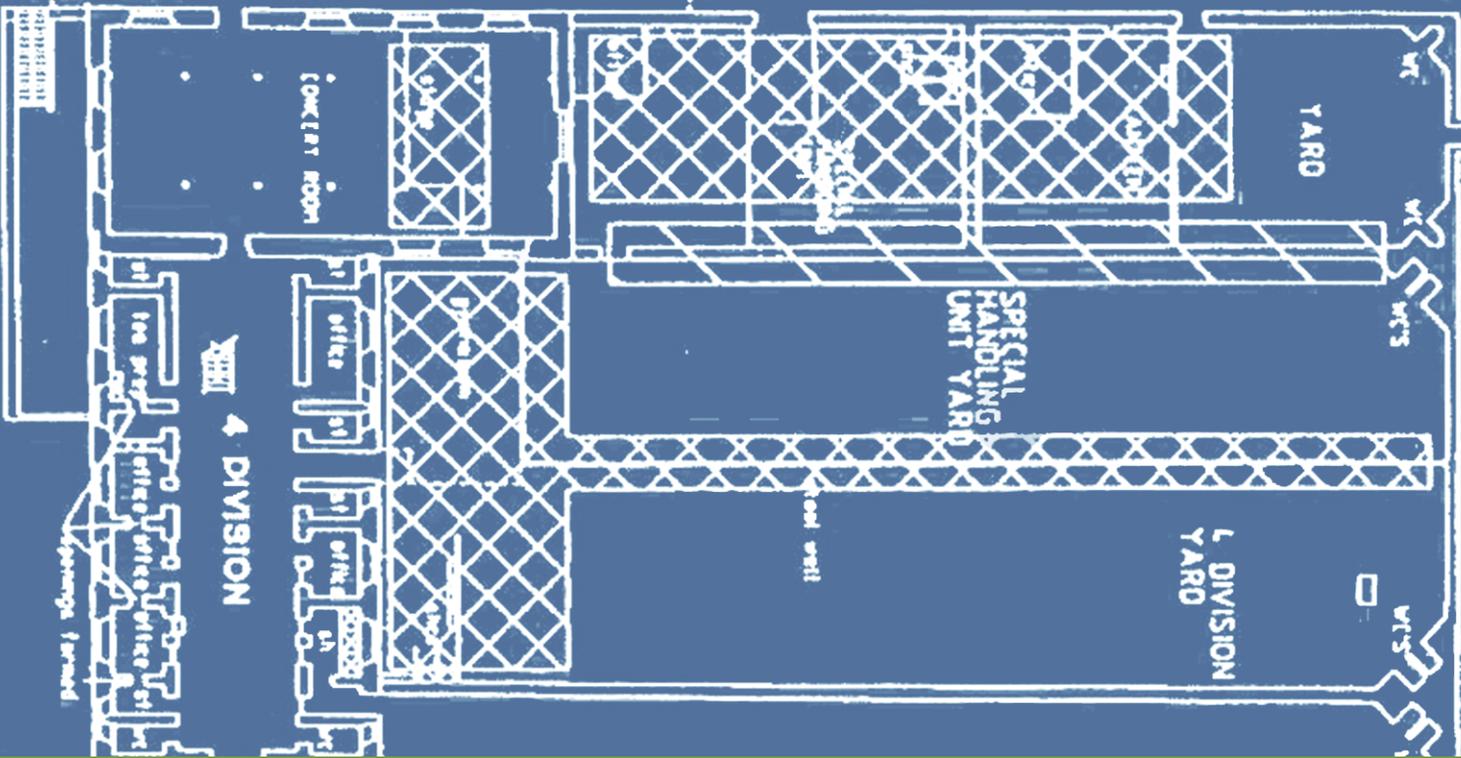
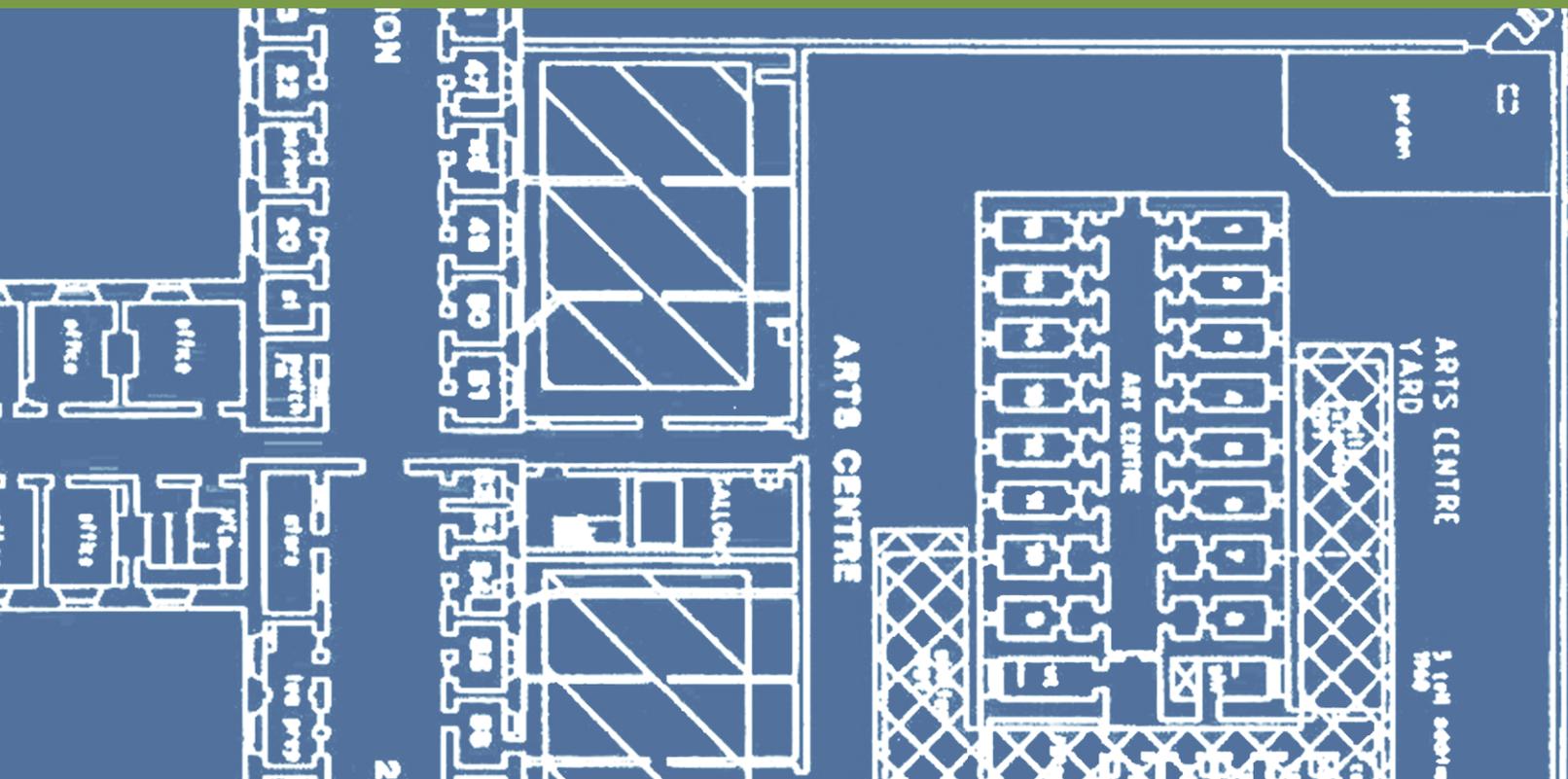


ground floor A



The Case for Independent Oversight of Texas' Prison System:

Pursuing Accountability, Efficiency, and Transparency





ACKNOWLEDGEMENTS

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The Texas Criminal Justice Coalition (TCJC) works with peers, policy-makers, practitioners, and community members to identify and promote smart justice policies that safely reduce the state's costly over-reliance on incarceration – creating stronger families, less taxpayer waste, and safer communities.

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THE NEED FOR INDEPENDENT OVERSIGHT OF TEXAS' CORRECTIONS SYSTEM

As the largest prison system in the country, employing as many paid employees as Google and spending over \$3 billion annually on corrections,¹ the Texas Department of Criminal Justice (TDCJ) is faced with the daunting task of effectively and efficiently managing an immense operation. Decades of research and experience have demonstrated that all public institutions, from schools to hospitals, benefit from strong, independent, external oversight.² It is with such knowledge and recognition of the complexity and challenges involved in managing a state correctional system that the Texas Criminal Justice Coalition advocates for independent oversight of TDCJ.

Demonstrated Need

No other population is in such great need of the benefits offered by independent oversight as incarcerated individuals. Individuals living in state prisons are a uniquely powerless population, as they have limited ways to defend their rights and interests.³ Whether as a result of being housed far away from family members and other social support systems, of being viewed as inherently “undeserving,” of having limited education, or of being disproportionately afflicted with mental illnesses, individuals in our state prisons are more at risk of mistreatment and abuse than almost any other segment of the Texas population.

Significant Benefits

External oversight is not only about protecting those most at risk; it is also a proven mechanism for identifying and addressing issues before they lead to expensive litigation, media scandals, or other human and fiscal costs.⁴ Ultimately, oversight allows state agencies to develop public trust and transparency.

TDCJ's own philosophy is to be “open, ethical, and accountable” to the public. We urge the Department to work with the Legislature and outside advocates to make its intention a reality during the 2013 Texas Legislative Session.

The stated philosophy of the Texas Department of Criminal Justice is to be, “open, ethical, and accountable to our fellow citizens and work cooperatively with other public and private entities.”

Source: TDCJ 2011 Annual Review



Prison Conditions and Court Oversight in Texas

History of Prison Conditions in Texas

Prior to 1973, the Texas prison system operated without external oversight or significant mechanisms for internal accountability. Information about prison conditions was largely anecdotal, but provided the public with a dim view of daily life in state prisons.

In 1972, a man named David Ruiz filed a 15-page handwritten complaint against TDCJ alleging that the conditions of his confinement violated his constitutional rights.⁵ Joined with seven other lawsuits from individuals incarcerated in Texas prisons, Ruiz's case became one of the most important cases in the history of Texas prison reform, resulting in court oversight of TDCJ facilities.⁶ *Ruiz v. Estelle*, and the corresponding oversight, lasted for three decades, exposing many problems with Texas prison operations that had traditionally remained hidden. Prison overcrowding, excessive use of force, substandard health care, and serious safety, sanitation, and hygiene concerns were just a few of the issues that led the presiding judge to side with Ruiz's claim that TDCJ subjected inmates to cruel and unusual punishment.⁷

A further round of intensive monitoring occurred in 1999, following a motion to vacate the consent decree⁸ against TDCJ. Though Judge Justice, the presiding judge for the case, acknowledged positive changes had occurred during the nearly 30 years since court oversight began, he still found evidence to indicate the existence of "a prison underworld in which rapes, beatings, and servitude are the currency of power."⁹ He was particularly concerned with the egregious conditions for individuals held in administrative segregation units and the continued use of excessive force by corrections officers.¹⁰

Describing the court oversight that resulted from *Ruiz v. Estelle*, Gary Johnson – a career TDCJ employee and former Executive Director of the Department – says, "... oversight which ended in 2002 was, in my opinion, critical to the success of the department over those three decades."

Source: Written Testimony Submitted to the Commission on Safety and Abuse in America's Prisons – 4th Hearing.

The court maintained oversight of TDCJ until 2002. Sadly, since then, reports of inhumane conditions have continued to emerge. In 2002 a report commissioned by attorneys from the *Ruiz* case and authored by Keith Curry, a psychologist employed by Applied Forensics LLP, detailed appalling conditions for individuals with mental health problems incarcerated in Texas prisons.¹¹ Accounts of inadequate health care have also plagued the prison system for decades, and in 2010, a report published by the University of Texas Medical Branch of Correctional Managed Care stated that ensuring that TDCJ inmates continue to receive constitutionally mandated care was becoming increasingly difficult.¹² According to a report from the National Criminal Justice Reference Service, Texas has the highest reported number of alleged incidents of sexual assault, four times the national average.¹³

In addition to concerns about the quality of health care, mental health treatment, and safety, serious questions about the physical conditions in which individuals were being held continued to be raised. In October of 2006, individuals on death row at the Polunsky Prison Unit in Livingston held a hunger strike to draw attention to the horrendous conditions at that facility.¹⁴ Individuals incarcerated in Texas prisons, as well as family and community members, have voiced serious concerns about the extreme heat experienced by both individuals incarcerated in the facilities and corrections officers working in them, a condition that resulted in at least 10 deaths in 2011.¹

The Changing Role of the Courts

Until the end of the 20th century, the main tool for oversight of federal and state prisons was the courts. In 1996, President Clinton signed the Prison Litigation Reform Act (PLRA), which severely curtailed incidents of inmate litigation in federal courts. Individuals wanting to file suit against the prisons were required to pay court fees in full, prove physical injury, and exhaust all administrative remedies, such as filing grievance reports. In addition, once an individual filed three suits, he or she was barred from filing any further suits (a three-strike provision).¹⁶ Ten years after the signing of PLRA, inmate filings were down by 60% from 1995 levels, even though the inmate population had increased by 10% during the same period.¹⁷

The exhaustion of administrative remedies requirement included in the PLRA has given corrections officers – the defendants in the majority of cases filed by incarcerated individuals – extraordinary power over an individual's access to the courts.

Source: David Fathi, American Criminal Law Review, 2011



Oversight Mechanisms within Texas Department of Criminal Justice (TDCJ)

Like many prison systems, TDCJ now has a variety of *internal* accountability mechanisms. However, these mechanisms cannot and do not serve the same role or offer the same benefits as *external* oversight.

Texas Board of Criminal Justice: The Texas Board of Criminal Justice is charged with governing TDCJ, which includes appointing TDCJ's Executive Director.¹⁸ The Board is composed of nine non-salaried lay members appointed by the Governor. In an attempt to establish more independent, internal mechanisms for oversight, the current system requires various offices to report directly to the Board, *not* the Executive Director; these include the Office of Inspector General (*discussed below*), the Internal Audit Division, the State Counsel for Offenders, and the Prison Rape Elimination Act (PREA) Ombudsman.¹⁹ While we applaud the intention behind the creation of the Board, it does not serve the same function as an independent oversight agency. The Board meets a minimum of four times per year. Membership to the Board does not require criminal justice expertise. The Board does not routinely inspect facilities and has appeared to focus on adherence to policies rather than on actual practices, improvements, or transparency

External oversight is not intended to replace TDCJ's current internal accountability mechanisms, but it is key to accountability and transparency.

External, independent oversight is not intended to replace or decrease the importance of the internal accountability mechanisms that TDCJ currently has in place. Internal evaluation is key to the efficient functioning of correctional facilities; but only external oversight can successfully introduce accountability and transparency.²⁰

Offender Grievance Program: The primary mechanism for individuals incarcerated in state prisons to file a complaint is the Offender Grievance Program, which is under the supervision of TDCJ's Executive Director, not the Board.²¹ Grievances regarding facility operations, complaints against staff, and medical- and disciplinary-related complaints accounted for nearly 81% of all grievances filed in FY 2011.²² We were unable to retrieve data prior to 2009, but since 2009, the number of Step 1 grievances has increased annually.²³

Ombudsman Program: The TDCJ Ombudsman Office is tasked with "provid[ing] a single point of contact for elected officials and members of the general public who inquire regarding the agency, incarcerated individuals, or staff."²⁴ Individuals incarcerated in Texas prisons are unable to access the Ombudsman's Office. As with the Offender Grievance Program, the TDCJ Ombudsman reports to the Executive Director, not the Board. The data we were able to obtain shows that the Ombudsman responded to 17,300 inquiries in FY 2011.²⁵ Unfortunately, the Office is not required to report information on how many inquiries were resolved or in what manner.

Office of Inspector General (OIG): The OIG, which serves an investigative and policy monitoring role, does report to the Board and purportedly opened 8,751 investigations in FY 2011, including 5,041 involving criminal investigations.²⁶ Of these investigations, only 4.5% resulted in indictments and 3.5% in convictions. Although the OIG enjoys a degree of independence, its focus is neither on inspection nor on prison conditions. OIG staff members react to alleged incidents, but they do not play a preventative role.

Additional Oversight Mechanisms

Sunset Review: The most common, yet infrequent, mechanism for effecting changes within Texas prisons in the post *Ruiz v. Estelle* years has been the Texas Sunset Advisory Commission, a 12-member appointed group of legislators and public members who conduct performance audits and look for areas in which change is needed and thought to be most beneficial. The Sunset Commission does not conduct prison inspections during its review process, and each individual state agency is generally only reviewed every 12 years. Yet the Commission has been successful in drawing attention to significant areas of concern and contributing to positive reforms.²⁷

Unfortunately, the Sunset Commission does not track cost savings for individual agencies. Its overall research has shown, however, that between 1982 and 2011, for every \$1 spent on the Sunset Review process, the state has earned approximately \$29 in return.²⁸ This clearly illustrates the cost savings that can result from additional oversight.



American Correctional Association (ACA) Accreditation: The ACA has accredited the majority of Texas prisons, but these accreditations tend to focus more on compliance to standards than on the quality of treatment of incarcerated individuals. Furthermore, there is a very real danger that the standards adopted by such private associations are more likely to reflect the interests they have been established to regulate than the interests of the public or consumers.²⁹

Effective, Independent Oversight

Components of Effective Oversight

There is no one model of external oversight that can be applied to every state's prison system. In fact, a key component of effective oversight is making use of existing state resources and developing systems specific to the particular concerns and policies of each state.³⁰ This being said, there are certain aspects that should be present in any oversight body for it to be successful and efficient. External oversight should:³¹

- Focus on how and where improvements can be made, not on finding fault.
- Acknowledge demonstrated model practices and policies.
- Be preventative rather than reactive.
- Work cooperatively and collaboratively with state agencies.
- Conduct routine monitoring of prisons.
- Have full access to prisons, correctional data, staff, and incarcerated individuals.

Unfortunately, inmates and staff in prisons throughout the country have faced retaliation for voicing their complaints and concerns. These experiences have made it clear that **oversight must also provide confidentiality to those who voice such complaints and concerns.**

Finally, one feature of successful oversight that distinguishes it from existing internal accountability mechanisms is its role in making conditions and policies in the prison more transparent and making officials accountable to the legislature and general public. **Any independent oversight operation must be set up to report its findings to the public, and must be properly resourced so as to be able to accomplish its mission.**³²

The American Bar Association (ABA) issued a resolution in 2008 calling for all governments to establish independent, public bodies to regularly monitor and report publicly on prison and jail conditions within their respective jurisdictions. The ABA's argument for independent oversight was based on the principal that oversight: (1) allows for the identification and resolution of various problems, resulting in facilities that are safer, respect constitutional rights of the individual, and are better equipped to assist inmates in preparing for reintegration into society; (2) can serve a preventative function by detecting problems within prisons that may have previously been overlooked, and by keeping those faults from developing into major problems for corrections officials; (3) is a cost-effective and proactive approach to correctional administration that helps avert expensive lawsuits; (4) can actually assist corrections administrators in demonstrating a need for additional funding for programs, etc.; and (5) can help legislators and the general public make informed decisions regarding sentencing and other correctional policies.³³

Models of Independent Oversight

The Office of the Independent Ombudsman for the Texas Juvenile Justice Department (TJJD) was established in 2007 to investigate, evaluate, and secure the rights of children committed to the Department.³⁴ **In addition to the independence of TJJD's Ombudsman, another key difference between this Office and TDCJ's Ombudsman is the former's focus on protecting the rights of the youth held in TJJD custody. By contrast, the TDCJ Ombudsman's role does not include protecting the rights of adults incarcerated in Texas prisons.**

Outside of Texas, there are many examples of external prison oversight. All prisons in member countries of the European Union are subject to independent monitoring by the European Committee for the Prevention of Torture (CPT).³⁵ Examples of independent oversight can also be seen in the United Kingdom's British Prison Inspectorate,³⁶ the California Inspector General,³⁷ Ohio's Correctional Institutions Inspection Committee (CIIC),³⁸ and the Correctional Association of New York.³⁹

Cost-Saving and Public Safety-Driven Solutions

The Case for External Oversight

With the PLRA's limitations on an individual's ability to seek recourse through litigation, as well as the fiscal crisis facing the state, the tremendous increase in special populations in TDCJ custody (including individuals with serious mental illness and substance abuse issues), and the overall explosion in the prison population since *Ruiz v. Estelle*, there has never been a time when independent, external oversight was both more needed and better positioned to advance significant improvements. Though the Texas prison system is no stranger to scandal, it has also previously served as a model for other states to follow. **We have the opportunity once again to lead the country in developing transparent, accountable, humane, and cost-effective prison policies.**

For Texas communities and the State, there are clear public safety and cost-savings benefits to developing a system of independent, external oversight for Texas prisons, but for no one will the benefits be more acutely felt than for those living and working in the prisons on a daily basis. The views of these individuals must be taken into account and given significant consideration.

In 2011 and 2012, the Texas Criminal Justice Coalition surveyed individuals incarcerated in Texas prisons, their families, and corrections officers:⁴⁰

- Fifty-six percent of responding corrections officers believed their overall work environment to be unsafe, 46% did not think safety concerns were addressed in an adequate manner, 45% did not find current safety policies and procedures to be effective, and 79% believed that TDCJ's current programs should be improved.
- Ninety-one percent of responding incarcerated individuals identified the need for an independent corrections ombudsman as a highly important issue and, similarly, 95.3% of their families and loved ones identified that as a highly important issue as well.

Overall, the best argument for independent, external oversight is that it has been shown to work better than any known alternative – for individuals incarcerated in state prisons, for staff at correctional facilities, and for society at large.

Six Critical Solutions

In light of the information provided in this report, the Texas Criminal Justice Coalition asks policy-makers and the Texas Department of Criminal Justice to consider and implement the following recommendations.

- (1) Develop an independent agency tasked with comprehensive oversight and monitoring of all TDCJ correctional facilities. The responsibilities of such an agency should include in-depth review and analysis of data, determination of long-range needs, identification of critical issues and corresponding solutions, and assessment of the efficacy of existing programs.
- (2) Provide the independent oversight body with full access to all facilities, data, incarcerated individuals, and corrections staff for routine monitoring, inspections, and gathering of information.

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- (3)** Increase oversight of the state's criminal justice and corrections agencies through an increased frequency of Sunset Advisory Commission evaluations; specifically, instruct the Commission to review TDCJ, the Texas Board of Pardons and Paroles, the Windham School District, and the Correctional Managed Health Care Committee every 4 years, instead of every 12 years.
- (4)** Increase the frequency and opportunity for public input on important criminal justice issues to the Texas Board of Criminal Justice.
- (5)** Develop independent grievance review boards.
- (6)** Give independence to the Texas Department of Criminal Justice's Ombudsman Program, consistent with the Texas Juvenile Justice Department's Ombudsman Office, as outlined in Texas Human Resources Code, Chapter 261.

Endnotes

- ¹ Perkinson, Robert, *Texas Tough: The Rise of America's Prison Empire*. Metropolitan Books, Henry Hold and Company, 2010.
- ² Gibbons, John & Katzenback, Nicholas. "Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons." *Federal Sentencing Reporter* 24, no. 1 (2011): 36-41.
- ³ Fathi, David. "The Challenge of Prison Oversight." *American Criminal Law Review* 47 (2010): 1453-62.
- ⁴ Deitch, Michele. "The Need for Independent Prison Oversight in a Post-PLRA World." *Federal Sentencing Reporter* 24, no. 4 (2012): 236-44.
- ⁵ Justice, W. W. "Origin of Ruiz v. Estelle." *Stanford Law Review* 43, no. 1 (1990): 1-12.
- ⁶ Perkinson, Robert. "Ruiz v. Estelle." *Encyclopedia of Prisons & Correctional Facilities*, (2005): 864-67.
- ⁷ *Ibid.*
- ⁸ A consent decree is an agreement between two parties that is sanctioned by the court. In this case it was the agreement between Ruiz and TDCJ that required court oversight of certain aspects of the prisons.
- ⁹ *Ibid.*
- ¹⁰ *Ibid.*
- ¹¹ Ward, Mike. "Expert Portrays Texas Prisons as Horrific Home for Mentally Ill." *Austin American Statesman*, June 23, 2002.
- ¹² Raimer, Ben; Murray, Owen & Pulvino, John. "Health Care in the Texas Prison System: A Looming Fiscal Crisis." May, 2010.
- ¹³ Austin, James; Fabelo, Tony; Gunter, Angela; & McGinnis, Ken. "Sexual Violence in the Texas Prison System." National Criminal Justice Reference Service, March 2006.
- ¹⁴ Blumenthal, Ralph. "Texas Inmates Protest Conditions with Hunger Strike." *The New York Times*, November 8, 2006.
- ¹⁵ Grissom, Brandi. "Texas Inmates Complain of Sweltering Prison Conditions." *The Texas Tribune*, August 9, 2011.
- ¹⁶ Fathi, David. "The Challenge of Prison Oversight." *American Criminal Law Review* 47(2010): 1453-62.
- ¹⁷ *Ibid.*
- ¹⁸ Texas Department of Criminal Justice. "2011 Texas Department of Criminal Justice Annual Review." Austin, 2011.
- ¹⁹ *Ibid.* The Internal Audit Division provides analyses and recommendations regarding TDCJ's internal control procedures and its performance of assigned duties. The State Counsel for Offenders provides assistance and legal counsel to indigent individuals who are outside of TDCJ's confinement divisions. The PREA Ombudsman monitors sexual assault incidents in TDCJ facilities.
- ²⁰ American Bar Association (2008). "Resolution 104B: Prison Oversight and Monitoring of Juvenile and Adult Facilities. Retrieved November 2, 2012, from <http://www.abanet.org/crimjust/policy/am08104b.pdf>
- ²¹ Texas Department of Criminal Justice. "2011 Texas Department of Criminal Justice Annual Review." Austin, 2011.
- ²² Data gleaned from TDCJ response to Open Records Request, "Offender Grievance Data", November 13, 2012.
- ²³ *Ibid.*
- ²⁴ Texas Department of Criminal Justice. "2011 Texas Department of Criminal Justice Annual Review." Austin, 2011.
- ²⁵ *Ibid.*
- ²⁶ *Ibid.*
- ²⁷ Deitch, Michele. "Independent Correctional Oversight Mechanisms across the United States: A 50-State Inventory." *Pace Law Review* 30, no. 5 (2010): 1-177.
- ²⁸ Sunset Advisory Commission. "Sunset in Texas." January, 2012.
- ²⁹ In addition to the mentioned oversight mechanisms, Texas has: (1) the Criminal Justice Legislative Oversight Committee, which holds infrequent hearings on issues regarding TDCJ; and (2) Disability Rights Texas, a non-profit organization that advocates for and protects the rights of individuals with disabilities and mental illness, including through access to TDCJ facilities.

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³⁰ Deitch, Michele. "Distinguishing the Various Functions of Effective Prison Oversight." *Pace Law Review* 30, no. 5 (2009-2010): 1438-45.

³¹ *Ibid.*

³² *Ibid.*

³³ American Bar Association (2008). "Resolution 104B: Prison Oversight and Monitoring of Juvenile and Adult Facilities. Retrieved November 2, 2012, from <http://www.abanet.org/crimjust/policy/am08104b.pdf>.

³⁴ <http://www.tjtd.texas.govombudsman/index.aspx>.

³⁵ CPT conducts visits to all detention facilities in the European Union and is given full access to all facilities and individuals. CPT sends detailed reports including findings and recommendations to the State government.

³⁶ The British Prison Inspectorate is an independent body, which reports on conditions for and treatment of those held in the country's prisons, juvenile detention centers, and immigration detention facilities. The Inspectorate conducts regular, independent inspections of all facilities.

³⁷ The Office of Inspector General in California is responsible for independent oversight of California's Department of Corrections and Rehabilitation.

³⁸ CIIC conducts unannounced inspections of all state correctional facilities and publishes reports with its findings and recommendations.

³⁹ The Correctional Association of New York is an independent, nonprofit advocacy organization with the legislative authority to monitor conditions in the State's correctional facilities and report their findings to the public and legislators.

⁴⁰ Texas Criminal Justice Coalition. "Perceptions of Texas Criminal Justice and Corrections Agencies: Incarcerated Individuals and Their Loved Ones." Survey Findings: 2012. *See also:* Texas Criminal Justice Coalition. "Perceptions of the Texas Department of Criminal Justice: Correctional Officers." Survey Findings: 2012.

