

IN THE BELLY OF THE BEAST:¹ A COMPARISON OF THE EVOLUTION AND STATUS OF PRISONERS' RIGHTS IN THE UNITED STATES AND EUROPE

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¹ JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST* (Vintage Books 1991).

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The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.²

I. INTRODUCTION

Another epidemic has hit the international community. This one, however, is not derived from an unknown bacterial agent. Instead, it originates from a variety of social agents. The epidemic? The explosion in the number of people incarcerated in the global community.³ As of June 1997, the United States' prison⁴ population exceeded 1,700,000.⁵ This figure is consistent with the United States' status as one of the world's largest jailers.⁶ Like the

² 19 PARL. DEB., H.C. (5th ser.) 1354 (1910) (statement by Sir Winston Churchill).

³ For the purposes of this Article, the term "global community" is limited to the United States and Europe. "Europe," as referred to herein, is defined as countries that are members of the Council of Europe [hereinafter "the Council"]. The Council is a regional intergovernmental public international organization that was formed in 1949 after World War II. A. REYNAUD, COUNCIL OF EUROPE, HUMAN RIGHTS IN PRISON (1986) 14 n.1; MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW (1995) 19. The organization's multiple goals include addressing the rights of the incarcerated. See *infra* pp. 21-22. Presently, the Council is composed of 40 member states: Belgium; Denmark; France; Greece; Ireland; Italy; Luxembourg; the Netherlands; Norway; Sweden; the United Kingdom; Iceland; Turkey; Germany; Austria; Cyprus; Switzerland; Malta; Portugal; Spain; Liechtenstein; San Marino; Finland; Hungary; Poland; Bulgaria; Estonia; Lithuania; Slovenia; Czech Republic; Slovakia; Romania; Andorra; Latvia; Albania; Moldova; Macedonia; Ukraine; Russia; and Croatia. See Tarcisio Gazzini, *Considerations on the Conflict in Chechnya*, 17 HUM. RTS. L.J. 93, 234 (1996); Jörg Polakiewicz, *The Application of the European Convention on Human Rights in Domestic Law*, 17 HUM. RTS. L.J. 401, 403 (1996).

⁴ The term "prison" as used here includes jails and prisons in states, the federal government, and the District of Columbia. However, this Article focuses on state prison facilities. Prisons typically confine individuals convicted of an offense with a prison sentence that exceeds one year. If the sentence is one year or less, then these convicted individuals usually remain incarcerated at the local or county jail. Jails also house pretrial detainees, individuals who are waiting for the disposition of their case.

⁵ See Stan C. Proband, *1.7 Million in Prison and Jail at Mid-year '97*, OVERCROWDED TIMES, Feb. 1998, at 2 (citing U.S. Bureau of Justice Statistics); *Prison Population Rises at Slower Pace*, CORRECTIONS ALERT, Jan. 26, 1998, at 7 (noting that as of June 30, 1997 the combined prison and jail populations in the U.S. exceed 1.7 million).

⁶ See *United States and Russia Lead the World in Incarceration Rates*, CORRECTIONS ALERT, June 30, 1997, at 1.

United States, Europe's prison population has escalated.⁷ The growth in France's prison population is representative of the epidemic's trans-Atlantic scope.⁸ As of January 1995, France imprisoned 51,623 people.⁹ Only one year earlier the prison population in France numbered 50,240 individuals.¹⁰

These statistics from both sides of the Atlantic are startling and provide a basis for concern. Numerous reasons have been proffered to explain this global penal crisis. An important one frequently given by American and French officials is that the enactment of stringent legislation aimed at fighting the "War on Drugs"¹¹ has led to an increase in the number of

⁷ See IMPRISONMENT: EUROPEAN PERSPECTIVES 84 (John Muncie & Richard Sparks eds., 1991) (observing how "the overall prison population of Europe is consistently expanding"); Kristel Beyens, *Overcrowding Getting Worse in Belgium*, OVERCROWDED TIMES, June 1997, at 1 (discussing the increase in Belgium's incarceration rate); Peter J.P. Tak & Anton M. Van Kalmthout, *Prison Population Growing Faster in the Netherlands than in U.S.*, OVERCROWDED TIMES, June 1998, at 1 (noting that "[t]he Dutch prison population is among the fastest growing in the world."); Pierre Tournier, *French Prisons, European Prisons*, PENAL ISSUES: RESEARCH ON CRIME & JUSTICE IN FRANCE (Centre de Recherches Sociologiques sur le Droit et les Institutions Pénales (CESDIP Paris, Fr.), 1994, at 3 (noting an overall rise in the number of prisoners in Europe) [hereinafter Tournier, *French Prisons*]; Claude Faugeron, *Prisons in France: Stalemate or Evolution?* in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS, 249, 271 (Dirk van Zyl Smit & Frieder Dunkel eds., 1991) [hereinafter Faugeron, *Prisons in France*]; Marie-Daniele Barre, *Criminal Statistics: International Comparisons*, PENAL ISSUES: RESEARCH ON CRIME & JUSTICE IN FRANCE, (CESDIP, Paris, Fr.) 1992, at 3; *Motion for a Recommendation*, Eur. Consult. Ass., 44th Sess., Doc. No. 6775, at para. 1 (1993); André Kuhn, *Imprisonment Trends in Western Europe*, OVERCROWDED TIMES, Feb. 1996, at 1, 4-9; COUNCIL OF EUROPE, PENOLOGICAL INFORMATION BULLETIN, (Dec. 1994-1995), at 69-77; Pierre Tournier, *The Custodial Crisis in Europe* Address at the Fourth Colloquium on Crime and Criminal Policy in Europe, Centre de Recherches Sociologiques sur le Droit et les Institutions Pénales ("CESDIP") (Lausanne, Switzerland, September 14-16, 1994).

⁸ See Faugeron, *Prisons in France*, *supra* note 7, at 249 (noting that France's incarceration rate is among the highest in Europe); Annie Kensey & Pierre Tournier, *Factors Leading to Prison Population Inflation in France*, Address Before the American Society of Criminology (Chicago, Illinois, Nov. 22, 1996); Tournier, *French Prisons*, *supra* note 7, at 3.

⁹ See Letter from Pierre Tournier, Centre de Recherches Sociologiques sur le Droit et les Institutions Pénales, to Roberta M. Harding, Associate Professor of Law, University of Kentucky, (Oct. 31, 1995) (stating that as of January 1, 1995 France incarcerated 51,623 people) (on file with author).

¹⁰ See *id.*

¹¹ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2D1.1; Tournier, *French Prisons*, *supra* note 7, at 3; see also Marc Mauer, *Russia, United States World Leaders in Incarceration*, OVERCROWDED TIMES, Oct. 1994, at 1, 10; *Prisoners in 1996*, BUREAU OF JUSTICE

people incarcerated for drug related offenses. The "get tough on crime" political regimes that exist in these two nations have also contributed to this expansion. For example, the institution of longer sentences and the correlative tightening of parole eligibility policies¹² are two of the "get tough on crime" measures that have produced swollen prison populations. As a result of these directives, more people enter the system, remain there for longer periods of time, and fewer are released. The increase in the incarceration rate in France and in other European countries is also partially attributed to the implementation of tougher national immigration policies.¹³

The rights afforded to detainees and their status are effected by the rising prison populations. Examining the history of the evolution of the rights of prisoners in the United States and Europe will assist in identifying different methodologies used to address these issues which subsequently can be

STATISTICS BULLETIN, (U.S. Dept. of Justice, Washington, D.C.) June 1997, at 1 (noting that the increase in the prison population between 1985 and 1995 is partially due to "an overall increase in the percentage held for drug offenses"); *see also* Recommendation 1257 on the conditions of detention in Council of Europe member states, EUR. PARL. ASS. TEXTS ADOPTED, 1995 Sess., at para. 2 (Feb. 1, 1995) [hereinafter Recommendation 1257] (noting an increase in drug related crimes and longer prison sentences which has led to a sharp rise in the prison population).

¹² *See* Mauer, *supra* note 11, at 10. Faugeron, *Prisons in France*, *supra* note 7, at 252-53; Tournier, *French Prisons*, *supra* note 7, at 3-4; Letter from Martine Herzog-Evans, Lecturer in Law, University of Paris-X, Nanterre, France, to Roberta M. Harding, Associate Professor, University of Kentucky College of Law (July 22, 1995) (on file with author); Recommendation 1257, *supra* note 11, at 2; Jacques Toubon, Address in Marly-le-Roi, France (Oct. 25-27, 1996), in MONITORING PRISON CONDITIONS IN EUROPE: REPORT OF A EUROPEAN SEMINAR at 23 [hereinafter MONITORING PRISON CONDITIONS] (commenting on how the imposition of longer sentences has contributed towards the increase in Europe's prison population); Claude Faugeron, A Few Questions On the Monitoring Of the Conditions Of Detention, Address in Marly-le-Roi, France (Oct. 25-27, 1996), in MONITORING PRISON CONDITIONS, *supra*, at 83 n.2; *see also*, Tak & Van Kalmthout, *supra* note 7, at 13-14 (commenting on the trend of increasing the duration of prison sentences).

¹³ *See* Faugeron, *Prisons in France*, *supra* note 7, at 253; Interview with Pierre Tournier, (CESDIP, Paris, France) (March 16, 1995); Beyens, *supra* note 7, at 12 (discussing how the rise in the number of incarcerated foreigners is partially responsible for the overall increase in the prison population); *see also* MICHAEL TONRY, ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES (1997); Michael Tonry, *Ethnicity, Crime, and Immigration*, 8 OVERCROWDED TIMES, April 1997, at 1 (discussing the impact immigration policies have on arrest and incarceration rates in European countries).

explored and contrasted.¹⁴ In the context of prisoners' rights, the time is ripe to engage in this comparative dialogue as an epidemic of this magnitude has serious ramifications.¹⁵ Examining, comparing, and contrasting the manner by which prisoners' rights have developed in the respective jurisdictions might assist in the "desperate search for instances of good practice which could help politicians and penal administrators find a solution to current ills"¹⁶ that are the consequences of a burgeoning prison population.

The Article is divided into several sections. The first section has subsections that explore and compare the historical development of prisoners' rights in the respective jurisdictions.¹⁷ Thus, each era of the evolution of the rights of the incarcerated in the United States will be identified, described, and discussed. The section devoted to the development of the rights of the incarcerated in Europe contains a brief survey of the status of prisoners' rights during the pre-World War II era. It then focuses on the evolution of these rights after World War II, the pivotal European era. This section also introduces and discusses several important regional public international law instruments that have a significant impact on the rights of

¹⁴ Comparative studies are extremely useful in the legal field as the international legal community expands, intensifies its level of interaction, and continues to encounter and experience similar legal problems. *E.g. Association is Conducting a Self-Study*, American Association of Law Schools Newsletter, (Association of American Law Schools, Washington D.C.), Aug. 1995, at 1-3; *The Association of American Law School's Role as an International Learning Society*, American Association of Law Schools Newsletter, (Association of American Law Schools, Washington D.C.) Aug. 1995, at 1-3; GEORGE F. COLE ET AL., MAJOR CRIMINAL JUSTICE SYSTEMS 7-8 (George F. Cole et al., eds. 1981) (discussing the important value of comparative study).

¹⁵ See John Muncie & Richard Sparks, *Introduction to IMPRISONMENT: EUROPEAN PERSPECTIVES* vii (John Muncie & Richard Sparks eds., 1991) (comparative study is important at a time when problems of imprisonment "are at the forefront of public consciousness and debate") [hereinafter Muncie & Sparks]; Faugeron, *Prisons in France*, *supra* note 7, at vi; see also JEROME L. NEAPOLTAN, CROSS-NATIONAL CRIME, xi-xiii (touting the benefits accruing from cross-national or comparative crime analysis). The comparative study of prisoners' rights and conditions of confinement is not a novel endeavor. In the late 1700's John Howard, the Sheriff of Bedford in England, toured Britain and Europe to survey and compare prison systems. JOHN HOWARD, THE STATE OF THE PRISONS IN ENGLAND AND WALES, WITH PRELIMINARY OBSERVATIONS, AND AN ACCOUNT OF SOME FOREIGN PRISONS AND HOSPITALS (Professional Books Ltd. 1977) (1777).

¹⁶ Muncie & Sparks, *supra* note 15, at vii.

¹⁷ The emphasis is on developments that have occurred during the 20th century. The few references to the pre-20th century status of prisoners are provided to illuminate specific aspects of the progress made in this area.

imprisoned persons. The final section compares the progress taken by the United States and Europe and also examines the current differences and similarities in the status of the prisoners' rights in both jurisdictions.

II. THE DEVELOPMENT OF PRISONERS' RIGHTS

Incarceration as the primary means of punishment is a relatively recent phenomenon.¹⁸ Prior to the adoption of this mode of punishment other punitive sanctions, such as capital punishment, corporal punishment, and banishment, were commonly used.¹⁹

A. *The United States' Experience*

Prisoners' rights in the United States have undergone a monumental transformation.²⁰ Their evolution runs the gamut from the "slave of the state" doctrine to the "rights enforcement" era to the current modified "hands-off" approach.

Initially, the rights of individuals confined in penal institutions were governed by the "slave of the state" doctrine.²¹ As its name strongly suggests, this approach did not afford any rights to incarcerated individuals. This passage aptly describes the doctrine's attributes:

¹⁸ See generally, THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (Norval Morris & David J. Rothman eds., 1995), 3-77; MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan, trans., Vintage Books 2d ed. 1995) (1978); BLAKE MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS 1-33 (1977) (describing the evolution of early American prisons).

¹⁹ See Morris & Rothman, *supra* note 18, at 3-24, 27-30, 35-45, 49-68; FOUCAULT, *supra* note 18, at 32-35; MCKELVEY, *supra* note 18, at 1-10.

²⁰ For an excellent history of the American prisons see generally MCKELVEY, *supra* note 18; see also Morris & Rothman, *supra* note 18, at 227-59.

²¹ See John J. DiIulio, Jr., *Introduction: Enhancing Judicial Capacity*, in COURTS, CORRECTIONS, AND THE CONSTITUTION 3, 3 (John J. DiIulio, Jr. ed., 1990); see also RONALD BERKMAN, OPENING THE GATES: THE RISE OF THE PRISONERS' MOVEMENT 40-41 (1979).

The "slave of the state" doctrine dominated the correctional landscape from the 1800's until the mid-1900's. However, in some jurisdictions it retained its vitality until the early 1970's. See generally DAVID M. OSHINSKY, "WORSE THAN SLAVERY:" PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996). Oshinsky's book provides a detailed, and at times disturbing, description of the "slave of the state" era in Mississippi.

For the time being, during his [the convicted felon's] term of service in the penitentiary, *he is in a state of penal servitude to the State*. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. *He is for the time being the slave of the State*. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man.²²

This absence of rights made prisoners equivalent to being state property. This in turn detrimentally impacted their conditions of confinement. The conditions were uniformly abysmal, dependent upon the whim and fancy of the governing correctional authority, and frequently bordered on the horrific. For example, Mississippi and other Southern states did not even have formal penal institutions; instead, a system was devised that leased inmates to private employers.²³ By adopting this scheme, the state could transfer the care of and responsibility for the prisoners to the contracting employers. Unsurprisingly, inmates were severely abused under this "correctional system."²⁴ The employers' refusal to provide the contractually mandated

²² LYNN S. BRANHAM & SHELDON KRANTZ, *CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS AND PRISONERS' RIGHTS* 279-80 (5th ed. 1997) (citing *Ruffin v. Commonwealth*, 62 Va. 790 (Court of Appeals of Virginia 1871) (emphasis added)); see also OSHINSKY, *supra* note 21, at 11-53 (discussing Mississippi's implementation of the slave of the state doctrine through its convict "leasing" program).

²³ See OSHINSKY, *supra* note 21, at 31-100. Oshinsky notes that [t]he South's economic development can be traced by the blood of its prisoners. In Texas, convicts worked in coal mines, lumber mills, and railroad camps across the state. The great bulk of them were shipped to the developing sugarcane plantations, where field work was exhausting and free labor scarce. Without convict leasing, the Texas sugar industry would have been hard pressed to survive. By the early 1900s more than half of the state's four thousand prisoners were on lease to outside farms at a monthly rate of \$21 for a "first class hand." [footnotes omitted] *Id.* at 60; see also MCKELVEY, *supra* note 18, at 197-216. Convict leasing schemes also existed in Northern States. LEWIS LAWES, *20,000 YEARS IN SING SING* 89 (1942).

²⁴ See OSHINSKY, *supra* note 21, at 55-62. For example, convicts leased to railroads were exposed to an extremely precarious "correctional" environment. These individuals were subjected to the following conditions:

On many railroads, convicts were moved from job to job in a rolling iron cage, which also provided their *lodging* at the site. The cage—eight feet wide, fifteen feet long, and eight feet high—housed upwards of twenty men. . . . The prisoners slept side by side, shackled together, on narrow wooden slabs. They relieved themselves in a single bucket and bathed in the same filthy tub of water. . . . *It was like a small piece of hell, an*

adequate care ultimately led to the system's failure.

Although the penal contract labor system was almost universally abolished by the late 1920s,²⁵ the inmates' situation did not significantly improve. If anything their situation remained static because the states maintained their status as "slaves of the state" vis-a-vis the adoption and implementation of penal farms, the heir to the convict leasing program.²⁶ In Mississippi this meant working many grueling hours in the penal farms' fields, being guarded by gun-toting prison trustees, who would be pardoned if they shot and killed an escapee, and being severely beaten with "Black Annie."²⁷ These conditions, and the corresponding lack of rights, remained virtually unchanged for at least the next two decades.

From the late 1940s through the early 1950s signs appeared that indicated the beginning of an advancement in prisoners' rights.²⁸ The stage was being set for the establishment of the "hands-off" era.²⁹ While this phase did not produce monumental steps towards recognizing and/or enforcing the rights of prisoners, it is nonetheless a critical phase because it marked the judiciary's increased willingness to acknowledge the plight of incarcerated individuals. Although, ultimately, few, if any, substantive changes were realized because, despite its increased awareness of the deplorable situations, the judiciary rarely intervened to correct the injustices.³⁰

The key rationales offered to support the "hands-off" approach were: the perceived propriety of deferring to the prison officials' expertise and federalism issues that could arise if federal courts intervened in controversies that existed between state penal facilities and state prisoners.³¹ These

observer noted—the stench, the chains, the sickness, and the heat.

Id. at 59 (emphasis added).

²⁵ See *id.* at 56.

²⁶ See *id.* at 109-55.

²⁷ "Black Annie" was the name given to the strap used to administer corporal punishment to the inmates. *Id.* at 135-50. See also *Gates v. Collier*, 349 F. Supp. 881, 895 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

²⁸ See *Morris & Rothman*, *supra* note 18, at 188-192; PRISON CONDITIONS IN THE UNITED STATES: A HUMAN RIGHTS WATCH REPORT (Human Rights Watch 1991), at 101-02; see generally *MCKELVEY*, *supra* note 18, at ch. 12.

²⁹ See *BRANHAM & KRANTZ*, *supra* note 22, at 280-82.

³⁰ *Procnunier v. Martinez*, 416 U.S. 396, 404 (1974) ("[t]raditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration"); see, e.g., *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) ("[t]he federal courts, including this one, entertain a natural reluctance to interfere with a prison's internal discipline").

³¹ See *DiIulio*, *supra* note 21, at 12-42.

preferred justifications appear in the following description of the “hands-off” perspective:

Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. *Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.* Judicial recognition of that fact reflects no more than a healthy sense of realism. *Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.*³²

Deferring to prison officials’ “expertise” under the guise of adopting a formal position with respect to the rights of incarcerated persons set the tone of the prisoners’ rights landscape for many years. It also effectively undermined the potential for substantive advances in this area. In fact, it was not until 1962 that the United States Supreme Court held that the Eighth Amendment’s prohibition against the infliction of cruel and unusual punishment was deemed applicable to the states through the Fourteenth Amendment.³³

³² *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) (footnotes omitted) (emphasis added).

³³ See *Robinson v. California*, 370 U.S. 660, 666 (1962).

It was not until the mid to late 1960s that federal courts finally began to exhibit a willingness to deviate from the "hands-off" course of (in)action.³⁴ Several factors were instrumental in providing the impetus for this change. Perhaps most important was that the magnitude of the horrors in the nation's prisons was such that judges could no longer justify their refusal to intervene.³⁵ The Supreme Court's ruling that the Eighth Amendment applied to the states³⁶ also led to these changes because it provided inmates with a strong foundation upon which to base suits challenging the conditions

³⁴ See BERKMAN, *supra* note 21, at 41 (noting that during the 1960's "[c]ourts became more willing to intervene and rule on issues dealing specifically with the conditions of confinement."); Human Rights Watch, *supra* note 28, at 102; MCKELVEY, *supra* note 18, at 360-61 (discussing the relaxation of the "hands-off" policy); *see, e.g.*, Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); *see* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (holding that any use of a leather strap violates the 8th Amendment); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd, remanded*, 442 F.2d 304 (8th Cir. 1971) (affirming the district court's holding that Arkansas' penitentiary system violated both the 8th and 14th Amendments because of an inmate guard system, extensive isolation, and the absence of meaningful rehabilitation); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (holding that Alabama's penal institutions violated the 8th Amendment by creating a climate of violence in which inmates feared for their personal safety); Estelle v. Ruiz, 503 F. Supp. 1265 (S.D. Texas 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982) (affirming in part and reversing in part the district court's holding that the Texas penal system violated the 8th Amendment by prisoner overcrowding and lack of space).

³⁵ *See* Gates v. Collier, 501 F.2d 1291, 1302 (5th Cir. 1974) (commenting on how for years courts "close[d] their judicial eyes to prison conditions which present[ed] a grave and immediate threat to [the prisoners'] health or physical well being") (citations omitted).

The following passage for example, describes the horrendous living conditions that men imprisoned at the Cummins Farm penal facility in Arkansas endured for years and the judiciary resolutely refused to remedy for years:

1,000 inmates [at one prison] . . . work[ed] in the fields 10 hours a day, six days a week, using mule-drawn tools and tending crops by hand. The inmates were sometimes required to run to and from the fields, with a guard in an automobile or on horseback driving them on. They worked in all sorts of weather, so long as the temperature was above freezing, sometimes in unsuitably light clothing or without shoes. *The inmates slept together in large, 100-man barracks, and some convicts, known as 'creepers,' would slip from their beds to crawl along the floor, stalking their sleeping enemies. In one 18-month period, there were 17 stabbings, all but 1 occurring in the barracks. Homosexual rape was so common and uncontrolled that some potential victims dared not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards' stations.*

Hutto v. Finney 437 U.S. 678, 681 n.3 (1978) (emphasis added) (citations omitted).

³⁶ *See* Robinson v. California, 370 U.S. 660 (1962).

of confinement in state penal facilities.³⁷ Similarly, the Court's decision that, under certain circumstances, actions for the violation of constitutional rights could be commenced against state officials reinforced the substantiality of these suits.³⁸ Consequently, the "hands-off" method gradually eroded as the removal of systemic obstacles enabled courts to become increasingly rights oriented.³⁹

Despite this favorable genesis, the movement away from the "hands-off" stage towards the "rights enforcement" stage was gradual. For example, in earlier cases, some judges, while finding problems with the disputed practice or practices, would continue to avoid granting relief by emphasizing the limited role the judiciary played when prisoners' rights were the basis for the controversy.⁴⁰ Ultimately, the "rights enforcement" stage emerged schizophrenically as the courts oscillated between applying the "hands-off" doctrine and chiseling exceptions and applying them to this traditional standard. This developmental track is best described as a "rule/exception" model, where "hands-off" was the rule and "rights enforcement" the exception.⁴¹

Increasingly this "rule/exception methodology" was used to justify the increase of judicial activity in this historically sacrosanct area.⁴² Eventually

³⁷ See, e.g., *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

³⁸ See *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (holding that 28 U.S.C. § 1983 permits individuals to seek a remedy in federal court for violations of federally guaranteed rights if the offender is acting under "color of law").

³⁹ See BERKMAN, *supra* note 21, at 41 (discussing other factors that influenced the federal judiciary's entrance into the prisoners' rights arena).

⁴⁰ The course of action taken by the court in *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967) (holding that use of the strap to discipline inmates must be accompanied by appropriate safeguards), demonstrates the use of this tactic.

⁴¹ This modus operandi is illustrated by what transpired in one case. There, before even discussing the case's substantive issues, the judges emphasized that:

[T]he court is especially conscious of the limitations of its function in cases of this kind It is well settled that the administration of state prison discipline is the primary responsibility of state officials, and federal courts have an extremely limited area in which they may act pertaining to the treatment of prisoners confined in state penal institutions. . . . However, it is equally well settled that there are exceptions to these rules when special circumstances exist and constitutional rights are involved.

Jackson v. Bishop, 268 F. Supp. 804, 807 (E.D. Ark. 1967) (emphasis added), *vacated and remanded*, 404 F. 2d 571 (8th Cir. 1968) (finding that any use of the strap was unconstitutional).

⁴² See *Gates v. Collier*, 349 F. Supp. 881, 893 (N.D. Miss. 1972) (stating that the court is "reluctant to interfere" but is obligated to because the prison is "maintained and operated in a manner violative of rights secured to inmates by the United States Constitution"), *aff'd*,

it reached the point where the "exceptions" engulfed the "rule." This state of affairs resulted in the demise of the "hands-off" era and culminated in the judiciary's decision to install a "rights" oriented approach to the resolution of prisoners' rights issues.⁴³ The acceptance of this methodology can be traced to the early 1970s⁴⁴ and is reflected in the Supreme Court's 1974 statement that:

[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, *federal courts will discharge their duty to protect constitutional rights.*⁴⁵

This same year also produced the Court's oft-quoted pronouncement that "[a] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. *There is no iron curtain drawn between the Constitution and the prisons of this country.*"⁴⁶

The phase's zenith occurred between the late-1970s and the early to mid-1980s.⁴⁷ During that time, extensive judicial activity was directed at

501 F.2d 1291, 1321 (5th Cir. 1974) (observing that "[t]he past notoriety of the protracted inhumane conditions and practices at Parchman reveals the necessity for the continuance of the injunctive order of the district court"); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304, 307 (8th Cir. 1971) (stating that federal courts should refrain from interfering with state prison operations unless "intervention is warranted . . . upon a clear showing of a violation of a federally guaranteed constitutional right"); *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated and remanded*, 404 F.2d 571, 577 (8th Cir. 1968) (recognizing that the courts' traditional hesitation to become involved in cases pertaining to prison operations ceases when there are "petitions asserting violations of fundamental rights").

⁴³ The transformation of the Arkansas prison system provides an excellent illustration of how the "rights enforcement" era came to fruition. See Appendix A.

⁴⁴ See BERKMAN, *supra* note 21, at 41-43; Human Rights Watch, *supra* note 28, at 102; MCKELVEY, *supra* note 21, at 360-63.

⁴⁵ 416 U.S. 396, 405-06 (1974) (emphasis added). The Court's statement confirmed the validity of the "rights enforcement" through the use of the phrase "will discharge their duty." This affirmative mandate is contrary to the situation that existed in the preceding era when courts were charged to act passively vis-a-vis the deference they were required to give to state prison officials.

⁴⁶ *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (emphasis added).

⁴⁷ See Human Rights Watch, *supra* note 28, at 102.

ensuring that the rights of prisoners were not trampled.⁴⁸ A prime exemplar of the federal judiciary's commitment to following the principles of the "rights enforcement" method is found in Judge Frank Johnson's decision to declare Alabama's prison system unconstitutional due to Eighth Amendment violations. Judge Johnson opined that:

While this Court continues to recognize the broad discretion required for prison officials to maintain orderly and secure institutions, constitutional deprivations of the magnitude presented here *simply cannot be countenanced*, and this Court is *under a duty to, and will, intervene to protect incarcerated citizens from such wholesale infringements of their constitutional rights*.⁴⁹

As noted by Judge Johnson, this era functioned from the perspective of making the confined's rights, as opposed to the state institution's interests, the focal point of the courts' concern. As a result of the vigorous judicial scrutiny that occurred during this time, many jurisdictions' penal facilities were, and remain, subject to an injunction or a consent decree.⁵⁰

Eventually, however, this progressive environment, from the incarcerated individual's perspective, moved into the present stage, which is a modified

⁴⁸ See *Pugh v. Locke*, 406 F. Supp. 318, 328 (M.D. Ala. 1976) (providing an extensive, but non-exhaustive list, of prisoners' rights cases); see also *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987) (addressing the constitutionality of prison conditions for inmates confined to administrative segregation housing units at specific California prisons); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd and rev'd*, 679 F.2d 1115 (5th Cir. 1982) (litigation on conditions of confinement in Texas state prisons); *Status Report: State Prisons and the Courts*, 10 THE NAT'L PRISON PROJECT J., (Am. Civil Liberties Union Found.) Winter 1994/95 at 5 (summarizing the status of cases in jurisdictions that have prison conditions litigation); see also Alvin J. Bronstein & Jenni Gainsborough, *Prison Litigation: Past, Present, and Future*, 7 OVERCROWDED TIMES, June 1996, at 1, 15.

The Supreme Court's willingness to allow the prisoners' attorneys to recover their fees also contributed to the creation of this favorable environment by making it less burdensome for counsel to pursue these cases. *Hutto v. Finney*, 437 U.S. 678, 689-700 (1978).

⁴⁹ *Pugh v. Locke*, 406 F. Supp. at 328 (citations omitted) (emphasis added); see also *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

⁵⁰ See *Status Report: State Prisons and the Courts*, *supra* note 48 (listing the states subject to consent decrees or injunctions in conditions of confinement cases). However, a substantial decrease in the number of states under judicial orders in prisoners' rights litigation is anticipated because of the Prison Legal Reform Act of 1996. See *infra* p. 19.

version of the traditional "hands-off" policy.⁵¹ The shift towards this phase could begin to be detected during the early to mid-1980s.⁵² For example, what occurred in *Rhodes v. Chapman*⁵³ is indicative of the ensuing demise of the "rights enforcement" age. In *Rhodes*, inmates filed a class action against the Southern Ohio Correctional Facility.⁵⁴ The plaintiffs alleged that the prison's double-celling policy violated their Eighth Amendment rights.⁵⁵ Agreeing with the plaintiffs, the District Court held that the conditions of confinement combined with the defendant's practice of double-celling violated the Eighth Amendment.⁵⁶ The court's determination was affirmed by the Court of Appeals for the Sixth Circuit.⁵⁷ In reversing the Court of Appeals decision,⁵⁸ the Supreme Court reasoned that, "[t]o the extent that such conditions are restrictive and *even harsh*, they are part of the penalty that criminal offenders pay for their offenses."⁵⁹ This statement, specifically the use of the word "harsh," conveys the Court's directive that the federal judiciary retreat from the prevailing rights enforcement posture that had found conditions characterized as "harsh" to constitute cruel and unusual punishment. Accordingly, the Court's message to the federal

⁵¹ See Human Rights Watch, *supra* note 28, at 102-03.

⁵² The following are among the cases that marked the change from the "rights enforcement" phase to the present "modified hands-off" era: *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-53 (1987) (holding that a specific prison regulation did not impair the free exercise of religion unless a rational basis furthering a legitimate penological goal did not exist); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (declaring that the constitutionality of prison regulations that impair or infringe an incarcerated person's constitutional rights are judged by the "rational basis" test); *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding that various prison practices did not violate the Constitution); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (holding that in cases involving Eighth Amendment challenges to medical care an inmate must establish that the prison showed "deliberate indifference to serious medical needs"). This trend was firmly established by the more recent holdings in *Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991) (holding that an incarcerated individual needs to prove that prison officials were deliberately indifferent to rights), and *Farmer v. Brennan*, 511 U.S. 825, 835-47 (1994) (adopting a stringent definition of deliberate indifference). See also Cheryl Dunn Giles, Note, *Turner v. Safley and It's Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219 (1993).

⁵³ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

⁵⁴ See *id.*

⁵⁵ See *id.* at 339-40.

⁵⁶ See *id.* at 343.

⁵⁷ *Chapman v. Rhodes*, 624 F. 2d 1099 (6th Cir. 1980).

⁵⁸ *Rhodes*, 452 U.S. at 352.

⁵⁹ *Id.* at 347 (emphasis added).

judiciary is that harsh conditions, like confinement itself, are simply part of the punishment.

Further evidence of this shift is found in *Ruiz v. Estelle*.⁶⁰ In 1972 David Ruiz, an inmate confined at a Texas correctional facility, commenced an action challenging the constitutionality of the conditions of confinement at a Texas prison.⁶¹ Ultimately, the complaint became a systemic attack on the constitutionality of various conditions of confinement at the Texas prisons.⁶² When the trial was held six years later,⁶³ it was conducted during the "rights enforcement" stage. Agreeing with the plaintiffs' allegations, Judge Justice held that the conditions at the Texas prisons violated the Eighth Amendment.⁶⁴ This decision was consistent with the principles governing prisoners' rights that prevailed in 1978,⁶⁵ the year the trial was held; namely, to ensure that prisoners' rights were not violated and, if they were, to remedy such violations.⁶⁶ In 1980 Judge Justice entered a remedial order mandating that the existing prison system undergo extensive changes because "[t]he record clearly manifests that the necessary changes cannot be effected under TDC's [the Texas Department of Corrections] existing organizational structure."⁶⁷

⁶⁰ *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Texas 1980), *aff'd in part, rev'd in part and remanded*, 679 F.2d 1115 (5th Cir. 1982).

⁶¹ *See Ruiz*, 503 F. Supp. at 1275. Later Mr. Ruiz's case was consolidated with several others and eventually the individual actions were certified as a class action. *Id.* at 1275-76.

⁶² *Id.* at 1277. The contested conditions included: health care, fire and safety, physical safety, sanitation, access to courts, overcrowding, and disciplinary hearing procedures. *Id.* at 1276-77.

⁶³ *Id.* at 1275-76.

⁶⁴ *Id.* at 1383-84, 1391.

⁶⁵ Judge Justice states that "*in the past*, courts have been particularly cautious about immersing themselves into the day-to-day management of prison systems." 503 F. Supp. at 1386-87 (emphasis added). The court's use of the past tense when referring to the traditional "hands-off" approach confirms that the issues presented in *Ruiz* were considered from the "rights enforcement" perspective. In addition, only a few years had passed since the Supreme Court declared that "federal courts *will discharge their duty* to protect constitutional rights [of prisoners]." *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974) (emphasis added).

⁶⁶ Judge Justice noted that he was compelled to take such action because "these iniquitous and distressing circumstances are prohibited by the great constitutional principles that no human being, regardless of how disfavored by society, shall be subjected to cruel and unusual punishment or be deprived of the due process of the law within the United States of America." *Ruiz*, 503 F. Supp. at 1391.

⁶⁷ *Id.* at 1387.

However, after this opinion was issued, but before the Court of Appeals for the Fifth Circuit reviewed the case, the Supreme Court rendered its decision in *Rhodes v. Chapman*.⁶⁸ Relying upon this intervening Supreme Court decision, the Court of Appeals eviscerated the District Court's order by declaring that *Rhodes* provided new guidelines pertaining to the evaluation of Eighth Amendment challenges to conditions of confinement.⁶⁹ The discovery of these new guidelines corresponded with the court's observation that "[a]s a matter of respect for the state's role and for the allocation of functions in our federal system, as well as comity towards the state, the relief ordered by federal courts must be 'consistent with the *policy of minimum intrusion into the affairs of state prison administration* that the Supreme Court has articulated for the federal courts.'"⁷⁰ Thus, *Ruiz v. Estelle* ran the modern evolutionary gamut from the "rights enforcement" stage to the adoption of the present "modified hands-off" doctrine. Throughout the 1980s and early 1990s an increasing number of cases suffered the same fate as *Ruiz* as more courts followed the new path paved by the Supreme Court.⁷¹ A few jurisdictions, however, were hold outs and

⁶⁸ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

⁶⁹ See *Ruiz*, 679 F.2d at 1137-40.

⁷⁰ *Id.* at 1145 (emphasis added) (citation omitted). This statement reveals how the central concern in prison conditions cases retreated from enforcing the inmates' constitutional rights. A posture contrary to the one propounded during the "rights enforcement" era, but consistent with that which existed during the "hands-off" phase. See *supra* at 9-10 (discussing the "hands-off" era).

⁷¹ See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-53 (1987) (holding that inmates' rights of free exercise of religion is impaired only if the regulation is not reasonably related to furthering a legitimate penological goal); *Turner v. Safley*, 482 U.S. 78, 86-91 (1987) (stating that the "reasonable relationship test" should be applied to determine the constitutionality of prison regulations); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that an inmate must establish that prison officials exhibited "deliberate indifference to serious medical needs"); *Wilson v. Seiter*, 501 U.S. 294 (1991) (reaffirming that inmates must prove that prison officials acted "deliberately indifferent"); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating that "deliberate indifference" requires proving that the prison official had knowledge of a substantial risk of serious harm to an inmate and failed to take reasonable measures to abate the risk); cf. The Religious Freedom Reformation Act of 1993, 42 U.S.C. § 200066-200066-4 (Supp. 1998) (reversing the *O'Lone* standard and reinstating the application of the "compelling state interest" test to inmate cases challenging the constitutionality of prison rules regulating prisoners' religious practices). The Act was declared unconstitutional in *Boerne v. Flores*, 117 S. Ct. 2157 (1997).

adhered to the "rights enforcement" position.⁷² However, as a general proposition the "rights enforcement" scheme lost its dominance.

The bomb that destroyed the remnants of the "rights enforcement" doctrine was dropped by the Supreme Court during its 1996 term.⁷³ In deciding the right of access to the courts issue presented by the prisoner plaintiffs in *Casey v. Lewis*,⁷⁴ the District Court was guided by the principles of the "rights enforcement doctrine."⁷⁵ After ruling favorably for the plaintiffs, an extensive remedial order was developed.⁷⁶ In reviewing the case, most of the Supreme Court Justices forcefully and unequivocally announced the cessation of the "rights enforcement" era.⁷⁷ Justice Scalia, writing for the majority, illustrates this turn of events through his pronouncement that prison litigation necessitates the application of "a deferential standard"⁷⁸ because:

it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur. Of course the two roles *briefly* and partially coincide when a court . . . orders the alteration of an institutional organization or procedure that causes the harm.⁷⁹

This argument, based on a preference for a substantially unfettered prison administration, is reminiscent of the rationales posited during the earlier "hands-off" phase.⁸⁰ In fact, Justice Scalia's view that *Casey* was "the one plus ultra of what our opinions have *lamented* as a court's 'in the name of the Constitution, becom[ing] . . . enmeshed in the minutiae of prison operations,'"⁸¹ parrots this earlier doctrine. In an effort to urge the adoption of a minimally revised "hands-off" approach, Justice Scalia scathingly admonished the trial judge in *Casey* by noting that "this case is

⁷² See, e.g., *Coleman v. Wilson*, 933 F. Supp. 954 (E.D. Cal. 1996), *cert. denied*, 117 S. Ct. 1823 (1997); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), *cert. denied*, 117 S. Ct. 1823 (1997); *Gates v. Deukmejian*, 1988 WL 92568 (E.D. Cal. Jul. 27, 1988), 977 F.2d 1300, 1303-04 (9th Cir. 1992).

⁷³ See *Lewis v. Casey*, 518 U.S. 343 (1996).

⁷⁴ *Casey v. Lewis*, 834 F. Supp. 1533 (D. Ariz. 1992), *aff'd*, 43 F.3d 1261 (9th Cir. 1994), *rev'd*, 518 U.S. 343 (1996).

⁷⁵ *Casey v. Lewis*, 834 F. Supp. at 1566.

⁷⁶ See *Casey v. Lewis*, 43 F.3d at 1261, 1272-1283.

⁷⁷ See *Lewis v. Casey*, 518 U.S. at 361-62.

⁷⁸ See *id.* at 361.

⁷⁹ *Id.* at 349 (emphasis added).

⁸⁰ See *supra* at pp. 9-10 (discussing the "hands-off" era).

⁸¹ *Lewis v. Casey*, 518 U.S. at 362 (citation omitted) (emphasis added).

a model of what should not [be done].”⁸² Echoing the traditional position, the primary reasons proffered by the Court for adopting this modified “hands-off” approach to resolve prisoners’ rights controversies are the concerns that judicial activity in this area could offend the principles of separation of powers and federalism.⁸³ Consequently, contemporary efforts to enforce prisoners’ rights will be constrained by the prevailing “modified hands-off” doctrine. Like its parent, the traditional “hands-off” standard, this position requires substantial deference to the states power to inflict punitive sanctions. Apparently, the only conceived exception is if a situation presents monstrously cruel conditions or violations.

The entrenchment of the modified “hands-off” approach was secured when Congress enacted the Prison Litigation Reform Act of 1996,⁸⁴ comprehensive legislation that adversely affects prisoners’ rights. Section 3626 focuses on the remedial facet of prison conditions cases.⁸⁵ Several provisions severely hamper prisoners’ ability to access to the courts. For example, consent decrees and injunctions that provide prospective relief can expire two years after they are granted.⁸⁶ This measure undermines the guarantees provided by the previous scheme because prior to the institution of this short remedial time frame prisoner plaintiffs were more likely to obtain full relief. Now, the PLRA confers upon the prisoner plaintiff the burden of proving why the injunction should not essentially be automatically dissolved.⁸⁷

⁸² *Id.* at 363.

⁸³ Justice Scalia states that the trial court violated the separation of powers precept by not “preventing courts from undertaking tasks assigned to the political branches.” *See id.* at 357. Justice Thomas’s concurring opinion contains an extensive discussion of how the principles of federalism and separation of powers warrant using the modified “hands-off” approach. *Id.* at 364, 385-88. He advises that the “[p]rinciples of federalism and separation of powers dictate that *exclusive responsibility for administering* state prisons resides with the State and its officials.” *Id.* at 364 (Thomas, J., concurring) (emphasis added). He argues that, “State prisons should be run by the state officials with the expertise and the primary authority for running such institutions. *Absent the most ‘extraordinary circumstances,’ federal courts should refrain from meddling in such affairs.* Prison administrators have a difficult enough job without federal court intervention.” *Id.* at 387 (citations omitted) (emphasis added).

⁸⁴ 18 U.S.C. § 3626 (Supp. 1996). President Clinton signed the Prison Litigation Reform Act (PLRA) on April 26, 1996.

⁸⁵ P.L.R.A. 18 U.S.C. § 3626 (1996).

⁸⁶ *See id.* at (b)(1)(i).

⁸⁷ *See id.* at (b)(4). The PLRA also amends the sections of the Civil Rights of Institutionalized Persons Act that apply to suits initiated by prisoners. 42 U.S.C. § 1997a, § 1997e(c) (West Supp. 1998). For example, prisoners are prohibited from initiating prison conditions litigation until all administrative remedies are exhausted. 42 U.S.C. § 1997e(a) (West Supp. 1998). Other provisions that benefit the defendants in prison cases include

The PLRA was largely developed and enacted in response to the public's perception that prisoners are overly litigious.⁸⁸ However, it is foolhardy to rely on this justification for the PLRA's existence. As previously noted, the public has been misled as to the gravity of most prisoner suits. The public also has been led to believe that the number of complaints filed by prisoners has recently increased astronomically. While the growth in prisoner complaints has not been "astronomical," it has been significant. Therefore, the public is not entirely incorrect. The information used to shape the public's impression, however, failed to include the impact another critical factor has had on the growth in the number of court petitions filed by prisoners. This omitted factor is the increase in the nation's prison population.⁸⁹ It is not surprising that the number of complaints received by the courts reflects this explosion in the national prison population.⁹⁰ In sum, the present non-receptive modified hands-off phase is reinforced by the

waiving the requirement that the defendant file a responsive pleading to an inmate complaint. 42 U.S.C. § 1997e(g)(1). In addition, this "waiver" does not constitute an admission of the allegations contained in the complaint. *Id.* Lastly, requirements for pro se inmates who request to proceed in forma pauperis were also significantly altered in a manner detrimental to the right of access to the courts. 28 U.S.C. § 1915(a)(2), (b)(1) (West Supp. 1998). See also Simone Schoenberger, Note, *Access Denied: The Prison Litigation Reform Act*, 86 KY. L.J. 257, 457 (1997-98) (discussing the PLRA's effects on prisoners' rights of access to the courts).

⁸⁸ The chunky versus smooth peanut butter case is a well-known example of a prison suit that fueled the public's perception of frivolously litigious prisoners. In that case, the media portrayed the prisoner's suit as one challenging the constitutionality of the prison's decision not to stock smooth peanut butter. *Prisoner Lawsuits*, 11 NAT'L PRISON PROJECT J., Winter 1996, at 1. The ensuing media attention the public believing that a great number of prisoner claims fit this category—untenable and inane. Regrettably, the media's irresponsibility enabled state Attorney Generals to capitalize on the situation by using the media's promotion of the event to advance their anti-prison litigation agenda. The losers are those with tenable grievances who are haunted by one person's foibles. More important is that the incident was incredibly and irresponsibly distorted. It is now known, although not widely because the media chose not to "report" it, that the issue in the case was about the "prison's failure to refund the prisoner money he was due," and not about the availability of chunky or smooth peanut butter. *Id.* Consequently, public opinion, which played a pivotal role in justifying the adoption of the bill, was based on "a great deal of disinformation." *Id.*

⁸⁹ See *supra* p. 3 (providing statistics on the U.S. incarceration population).

⁹⁰ See, e.g., Philip Hager, *Should Inmates Suit Themselves?* CAL. LAW., May 1995, at 33 (discussing how California's "Three Strikes and You're Out" legislation will increase an already burgeoning prison population and result in an increase in the number of grievances lodged with the courts).

burgeoning prison population and the contemporary mythology associated with prisoners efforts to gain access to the judiciary.

B. Europe's Experience

In general, the early stages in the development of prisoners' rights in Europe paralleled those in the United States.⁹¹ However, the devastating aftermath of the Second World War profoundly shaped the course of events in the evolution of the rights of those imprisoned in European countries.⁹² The birth of the Council of Europe in 1949 was a crucial milestone with respect to producing a general commitment to the status and treatment of detainees. The havoc wreaked upon Europe during the Second World War was the impetus for the creation of the Council. The organization's central tenets, to "achieve . . . greater unity between its members"⁹³ and "to protect human rights,"⁹⁴ reflect the circumstances of its genesis.

To achieve these goals the Council promulgated a variety of legislative initiatives. Three are notable for their recognition and advancement of the rights of the imprisoned.⁹⁵ Two are regional public international law treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms⁹⁶ and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,⁹⁷ and the

⁹¹ See generally HOWARD, *supra* note 15 (describing the rights of the incarcerated and the conditions of confinement in 18th century England and European countries); FOUCAULT, *supra* note 18 (describing the conditions of confinement at French prisons during the pre-Enlightenment era); MORRIS & ROTHMAN, *supra* note 18; JANET SEMPLE, BENTHAM'S PRISON (1993); FYODOR DOSTOYEVSKY, THE HOUSE OF THE DEAD (David McDuff trans., Penguin Books 1985) (1860) (describing the status of the incarcerated and their rights during 19th century Russia); GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Southern Illinois University Press 1979) (1833).

⁹² See JANIS, *supra* note 3, at 18-20, 122.

⁹³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 at pmb. [hereinafter ECHR]. See generally REYNAUD, *supra* note 3, at 15 (describing the Council's two statutory objectives).

⁹⁴ COUNCIL OF EUROPE, THE COUNCIL OF EUROPE: ACHIEVEMENTS AND ACTIVITIES 3 (1995).

⁹⁵ See Appendix B.

⁹⁶ See ECHR, *supra* note 93.

⁹⁷ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126 [hereinafter ECPT].

third, a set of advisory prison regulations, is the European Standard Minimum Rules for the Treatment of Prisoners.⁹⁸ These instruments directly impact the rights of prisoners, their conditions of confinement, and their status in the European Community.

1. The European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a legally enforceable and binding regional international treaty. It was signed in Rome, Italy on November 4, 1950 and came into force on September 3, 1953.⁹⁹ Although the ECHR's substantive provisions are modeled after the United Nation's Universal Declaration of Human Rights,¹⁰⁰ the Council ultimately drafted and approved a personalized version of the Universal Declaration.¹⁰¹ The Council's decision to select a European version of the Universal Declaration originated in its concern that the non-binding character of the Universal Declaration was insufficient to ensure "a collective guarantee of human rights."¹⁰² Despite this critical enforcement difference, many of the ECHR's provisions are

⁹⁸ Council of Europe, European Standard Minimum Rules for the Treatment of Prisoners, Recommendation No. R(87)3 of the Committee of Ministers to Member States (Strasbourg, Feb. 12, 1987) [hereinafter European Prison Rules]. This body of rules is commonly referred to as the "European Prison Rules."

⁹⁹ ECHR, *supra* note 93.

¹⁰⁰ The United Nation's General Assembly adopted the Universal Declaration of Human Rights, a non-binding instrument, on December 10, 1948. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. The formulation and adoption of the Universal Declaration was also prompted by the human rights abuses that occurred during the Second World War. The Declaration itself is modeled after France's 1789 Declaration of Rights. See Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUMAN RIGHTS QUARTERLY 357, 357-58 (1993). The document's status as a non-binding declaration, however, means that it is unenforceable. Nonetheless, it does exercise significant power as a "moral authority." See REYNAUD, *supra* note 3, at 12.

¹⁰¹ See ECHR, *supra* note 93, at pmbl.

¹⁰² STEPHEN LIVINGSTONE & TIM OWEN, PRISON LAW 78 (1993); see, e.g., ECHR, *supra* note 93, at pmbl. (noting that the critical objective of the Council is to achieve "greater unity between [the] members" and that this requires the "further realization of human rights and fundamental freedoms" which necessitates allowing "for the collective enforcement of certain rights").

patterned after those in the Universal Declaration's.¹⁰³

In addition to granting specific rights, the ECHR has a broad scope. In 1962 the European Court of Human Rights¹⁰⁴ decided that the ECHR encompassed individuals confined in penal facilities.¹⁰⁵ The justification for this decision was based on the ECHR's governing principle of universality.¹⁰⁶ This ruling was critical because Article 3 of the ECHR focuses on matters that are of great concern to prisoners. The most important one is Article 3's mandate that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹⁰⁷

A significant addition to the ECHR's enumeration of human rights is the existence of a control mechanism to enforce these rights. Presently this enforcement arm is bicameral. It is composed of the European Commission of Human Rights ("the Commission") and the European Court of Human Rights ("the Court").¹⁰⁸ The enforcement scheme allows a High Contracting Party (a signatory State), an individual, a group of individuals, and non-

¹⁰³ For example, both instruments guarantee the individual the right to freely practice religion. See ECHR, *supra* note 93, at § 1, art. 9; *Universal Declaration*, *supra* note 100, at art. 18.

However, some of the rights conferred by the Universal Declaration are excluded from the ECHR. The omitted guarantees include the "right to a standard of living adequate for the health and well-being of himself . . . including . . . medical care." *Universal Declaration*, *supra* note 100, at art. 25; ECHR, *supra* note 93.

¹⁰⁴ This is the highest reviewing authority in the ECHR's adjudicatory scheme. See ECHR, *supra* note 93, at § N, art. 47.

¹⁰⁵ See *Koch v. Fed. Republic of Germany*, 1962 Y.B. EUR. CONV. ON H.R. (Eur. Ct. H.R.) 126.

¹⁰⁶ This provision states that: "The rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground." ECHR, *supra* note 93, at § 1, art. 14 (emphasis added); see also Giuseppe Guarneri, Address in Marly-le-Roi, France (Oct. 25-27, 1996), in *MONITORING PRISON CONDITIONS*, *supra* note 12, at 15 (noting that the principles of universality and non-discrimination prohibit exclusion of detainees from the ECHR's protections). The appropriateness of this ruling is confirmed by the number of penal detainees in penal facilities who seek assistance under the ECHR. "Each year, about 30% of the complaints submitted to the [ECHR] emanate from people who are deprived of their freedom and most of these complaints concern their conditions of detention." *Id.* at 13-14.

¹⁰⁷ ECHR, *supra* note 93, at § I, art. 3. This prohibition is another feature shared by the ECHR and the Universal Declaration. Article 5 of the Universal Declaration states: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." *Universal Declaration*, *supra* note 100, at art. 5.

¹⁰⁸ ECHR, *supra* note 93, at § II, art. 19. Detailed descriptions of how these bodies operate are contained in LIVINGSTONE & OWEN, *supra* note 102, at 78-92.

governmental organizations to file petitions alleging a breach of a right or rights contained in the ECHR with the Commission.¹⁰⁹ Filing the petition activates the Commission's dual functions: acting as the gatekeeper and as the court of first impression.¹¹⁰ Subsequently, the Commission performs what is tantamount to a jurisdictional inquiry. This requires ascertaining whether the petitioner exhausted all domestic remedies and whether the grievance was filed within six months after a final judgment was rendered by the relevant domestic tribunal.¹¹¹ The latter inquiry also functions as a statute of limitations, which could ultimately prohibit an imprisoned person from being heard.

If the jurisdictional prerequisites are satisfied¹¹² and no other reason exists to dismiss the petition,¹¹³ then an investigation of the situation prompting the allegations is commenced.¹¹⁴ At this point, a critical function of the Commission occurs: the facilitation of a "friendly settlement" of the parties' controversy.¹¹⁵ If this objective is unattainable, then the Court becomes accessible.¹¹⁶ Since the Court's principal function is to review the Commission's decisions, it primarily acts as an appellate tribunal. Originally, only the High Contracting Parties, member states of the Council,

¹⁰⁹ See ECHR, *supra* note 93, at § III, art. 25(1).

¹¹⁰ See *id.* at § III, arts. 24-37.

¹¹¹ See *id.* at § III, art. 26. With respect to the local exhaustion requirement, the Court of Human Rights has expressed a preference for the member States to incorporate the ECHR into domestic law. Jörg Polakiewicz, *The Application of the European Convention on Human Rights in Domestic Law*, 17 HUM. RTS. L.J. 405 (1996). This "suggestion" has prompted action by the member States as the current trend is for member States to incorporate the ECHR's substantive norms into domestic legislation. *Id.* at 406. "The benefits of incorporation are obvious. Incorporation gives national authorities the opportunity to afford redress in cases of human rights violations before the case is taken to Strasbourg. Protracted proceedings in a forum that is both remote from and unfamiliar to the claimant can be spared. The settlement of litigation on the national level, saving both time and money, always remains the preferable solution." *Id.* Thus, prisoners could benefit from this policy as it could facilitate reducing what is presently a lengthy adjudicatory process, which would aid in providing timely remedies; hence, in some cases, more meaningful and effective relief.

¹¹² See ECHR, *supra* note 93, at § 111, art. 26.

¹¹³ For example, the Commission has the power to dismiss the petition for "an abuse of the right of petition." *Id.* at § III, art. 27(2).

¹¹⁴ See *id.* at § III, art. 28(a).

¹¹⁵ See *id.* at § III, art. 28(1)(b).

¹¹⁶ See *id.* at § IV, art. 47. The Court, however, like the Commission, has a statute of limitations that requires the appeal to be lodged within a designated time period. See *id.*

and the Commission had the right to seek relief from the Court.¹¹⁷ On November 6, 1990, however, individuals were given the right to petition the Court to review a Commission decision.¹¹⁸

Operationally, the ECHR's present conflict resolution scheme is best characterized as cumbersome. A major impediment to the system's success is the lengthy delay that exists between the time an action is initiated and the time it is resolved.¹¹⁹ Efforts to rectify this problem resulted in the Council's adoption of Protocol No. 11.¹²⁰ The remedy contained in Protocol No. 11 is designed to streamline the adjudicatory process. When implemented¹²¹ the ECHR's complaint and enforcement procedures will be

¹¹⁷ See *id.* at § IV, art. 44.

¹¹⁸ See Protocol No. 9 to ECHR, Nov. 6, 1990, Europ. T.S. No. 140, arts. III-V, *reprinted in The Individual's Right to Seize the Court*, 12 HUM. RTS. L.J. 51 (1991).

¹¹⁹ See *Reform of the Control System of the European Convention on Human Rights*, 14 HUM. RTS. L.J. 31, 33 (1993) (discussing the major problem that the duration of the proceedings causes in the current control system).

¹²⁰ Protocol No.11 to ECHR, May 11, 1994, Europ. T.S. No. 155. See Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism*, 15 HUM. RTS. L.J. 81 n.1 (1994); see also *Reform of the Control System of the European Convention on Human Rights*, *supra* note 119, at 31-49 (1993). The path leading to the adoption of Protocol No. 11 began with discussions about restructuring the ECHR's current organizational design because of the significant delays in resolving controversies. See Henry G. Schermers, *Has the European Commission of Human Rights Got Bugged Down?*, 9 HUM. RTS. L.J. 175 (1988). This led to the Council adopting Recommendation 1194 which advocated immediately reforming the ECHR's control machinery, preferably by the creation of a permanent full-time single court. Recommendation 1194 on the reform of the control mechanism of the European Convention on Human Rights, EUR. PARL. ASS. TEXTS ADOPTED, 44th Sess. (Oct. 6, 1992). Subsequently, the Recommendation led to the submission of Protocol No. 11.

¹²¹ There is still an unresolved issue as to when the new scheme will be operative. Although the Protocol opened for signature on May 11, 1994, it is not yet in force. See *Italy blocking new Euro rights court as Turkey signs up*, AGENCE FRANCE PRESSE, July 11, 1997, available in 1997 WL 2150844. The implementation of this single Court plan is already one year behind the most pessimistic predictions, which anticipated it being operative at the end of 1996, "at the latest." See Drzemczewski & Meyer-Ladewig, *supra* note 120, at 86.

Timely implementation is further frustrated because the plan cannot officially function until all members of the Council ratify Protocol No. 11. See Protocol No. 11, *supra* note 120, at art. 4. To date, all Member States, except Italy, have ratified the Protocol. See *Italy blocking new Euro rights court as Turkey signs up*, *supra*. On October 11, 1997, the Council held a two day summit in Strasbourg, France, and the proposed revision of the existing control mechanism was on the agenda. See *Action Plan to Strengthen Democratic Stability in the Member States*, 18 HUM. RTS. L.J. 169, 292 (1997). At the summit the Committee of

dramatically altered. The primary modification will be to replace the two major adjudicatory bodies, the Commission and the Court, with a single permanent full-time European Court of Human Rights.¹²² The principal benefit this reconfiguration is anticipated to have on prisoners is to reduce the amount of time that lapses before the controversy is resolved.¹²³ This will be a tremendous improvement as conditions or actions that are potentially violations of the rights of individuals who lack freedom will no longer linger unremedied for long periods of time. However, given the magnitude of this undertaking, the implementation of the revised grievance plan "will inevitably take a considerable time."¹²⁴ Lastly, another significant development is the decision to draft a new Protocol to the ECHR which would exclusively address the rights of the incarcerated.¹²⁵

2. *The European Standard Minimum Rules for the Treatment of Prisoners*

The European Standard Minimum Rules for the Treatment of Prisoners were initially established pursuant to a resolution promulgated by the Council on January 19, 1973.¹²⁶ The European Prison Rules were formulated to respond to the singular problems and situations encountered by the imprisoned. In fact, "[the European Prison Rules] should be seen in the context of a developing European penalty, much of it inspired by the

Ministers were directed "to take the necessary steps to set [the single court] up on 1 November 1998." *Id.*

¹²² See Protocol No. 11, *supra* note 120, at pmb1. and § II, art. 19; LIVINGSTONE & OWEN, *supra* note 102, at 92 (discussing the single court alternative).

Protocol No. 11 does not change the individual right to petition granted in Protocol No. 9. Thus, once Protocol No. 11 is in force, prisoners can directly petition the new European Court of Human Rights. Protocol No. 11, *supra* note 120, at § II, art. 34.

¹²³ See *Reform of the Control System of the European Convention on Human Rights*, *supra* note 119, at 31, 33-35 (discussing the advantages and disadvantages of merging the existing Commission and Court into a single adjudicatory body).

¹²⁴ See *id.* at 32 (discussing the recently proposed operation date); see also *supra* note 121 (discussing the problems encountered in implementing the new scheme on schedule).

¹²⁵ See Recommendation 1257, *supra* note 11, at para. 11(e).

¹²⁶ See Council of Europe, European Standard Minimum Rules for the Treatment of Prisoners, Resolution 73(5) of the Committee of Ministers (Jan. 19, 1973).

Like the ECHR, the European Prison Rules originated as a regional adaptation of a United Nations instrument, the Standard Minimum Rules for the Treatment of Prisoners. The United Nations adopted its Resolution creating these Rules on July 31, 1957. E.S.C. Res. 663, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957).

devastating experience of the European communities during the war of 1939-45."¹²⁷

Eventually concerns were voiced about whether the existing European Prison Rules adequately addressed the circumstances endured by incarcerated individuals. In 1978 the Council decided to evaluate the feasibility of revising the European Prison Rules.¹²⁸ This evaluation culminated in the extensive revision of the Rules. This new version was adopted by the Council of Europe's Committee of Ministers in February of 1987.¹²⁹ One principal feature, however, that remained unchanged was the Rules' non-binding character.¹³⁰ Nonetheless, the penal philosophy embodied in the European Prison Rules expresses the necessity of identifying the prisoners' legitimate needs and maintaining humane and equitable treatment. This philosophical stance is subject to characterization as an affirmative directive because:

the administration of prisons *must show respect* for the fundamental rights of individuals and at all times uphold the values that nourish human dignity.¹³¹

Although the European Prison Rules enumerate a multitude of standards governing various aspects of prison conditions and the treatment of prisoners,¹³² the Rules also specify that these "standards merely represent

¹²⁷ Kenneth J. Neale, *The European Prison Rules: Context, Philosophy and Issues*, 16 PRISON INFO. BULL., (Council of Europe), June 1992, at 4, [hereinafter Neale, *The European Prison Rules: Context Philosophy and Issues*]. See also Kenneth Neale, *The European Prison Rules: Contextual, Philosophical and Practical Aspects* in MUNCIE & SPARKS, *supra* note 15, at 203, 204-05 [hereinafter Neale, *The European Prison Rules: Contextual, Philosophical and Practical Aspects*] (discussing how the European Prison Rules comport with the evolution of pre and post World War II prisoners' rights).

¹²⁸ See Neale, *The European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 127, at 205-06, 208.

¹²⁹ See European Prison Rules, *supra* note 98; Neale, *The European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 127, at 217; Neale, *The European Prison Rules: Context, Philosophy and Issues*, *supra* note 127, at 4-5.

¹³⁰ See European Prison Rules, *supra* note 98, at 29, Explanatory Memorandum: Introduction (noting that "the rules have no binding legal status").

¹³¹ Neale, *The European Prison Rules: Context, Philosophy and Issues*, *supra* note 127, at 4 (emphasis added).

¹³² Key provisions of the Rules require: respect for prisoners' religious beliefs; maintenance of their health; provision of medical care; and access to adjudicatory bodies to petition for the resolution of complaints. See European Prison Rules, *supra* note 98, at part

minimum conditions."¹³³ The rationale for devising a scheme utilizing a floor, as opposed to a ceiling, reflects the Council's vision that the European Prison Rules function as an aspirational tool by providing member States with specific standards that can be used to guide officials in the development of domestic legislation.¹³⁴ The Council's reliance on a scheme whose basic tenets contain the minimum of what "should be followed in prison systems"¹³⁵ conveys its belief that it is an effective means of guaranteeing that incarcerated individuals obtain minimally adequate conditions of confinement.¹³⁶ Also this structure reflects the position that imposing the

I(2), part III(26) (religion); part I(3), part III (26-32), 15, 26-32 (right to medical care); part III(42) (right to file complaints). In terms of the traditional goals of incarceration, such as incapacitation, specific and general deterrence, retribution, punishment and rehabilitation, the Rules embrace the latter objective. See BRANHAM & KRANTZ, *supra* note 22, at 2-8; European Prison Rules, *supra* note 98, at part I, 3; part IV, 65(d); LIVINGSTONE & OWEN, *supra* note 102, at 97.

¹³³ European Prison Rules, *supra* note 98, at pmb. (a) (emphasis added); LIVINGSTONE & OWEN, *supra* note 102, at 96. In addition, the member States are encouraged to provide for the incarcerated in a manner that exceeds the contents of the Rules. See European Prison Rules, *supra* note 98, at pmb. (d) (a critical goal of the Rules is to "achieve the highest realistic level of implementation beyond the basic standards").

¹³⁴ It is "[r]ecommend[ed] that the governments of member states be guided in their internal legislation and practice by the principles set out in the text of the European Prison Rules." European Prison Rules, *supra* note 98, at Introduction. Consequently, the European Prison Rules do not purport to "constitute a model system." See European Prison Rules, *supra* note 98, at pmb. (d). This consideration and the Council's strong message to its constituents that the Rules only supply the minimum requirements, support the conclusion that all member States should strive to exceed the standards contained in the Rules in order to establish and maintain "model" penal systems.

¹³⁵ REYNAUD, *supra* note 3, at 31; see also Neale, *The European Prison Rules: Context, Philosophy and Issues*, *supra* note 127, at 6 (stating that the success of the European Prison Rules is dependent upon "moral authority, or political obligation").

¹³⁶ Apparently the Council accurately assessed the success of this "moral authority" course of action because "[o]ver the period, now more than half a century, during which the rules have been internationally valid, they have *directly*, or *indirectly*, encouraged higher standards and served to ensure the minimum conditions of humanity and decency in the prison systems." European Prison Rules, *supra* note 98, at Explanatory Memorandum: Introduction (emphasis added) (The Rules "impose powerful moral and political obligations on those member states that have accepted them"). For example, France has incorporated the European Prison Rules into the sections of domestic legislation that govern prisons. See Letter from Professor Martine Herzog-Evans, Lecturer in Law, University of Paris-X, to Roberta M. Harding, July 22, 1995 (on file with author); see, e.g., C. PR. PÉN., art. D 220 (1993-94) (listing general administrative prohibitions including committing acts of violence against

obligation to perform on the officials,¹³⁷ rather than granting prisoners specific rights, will, in the final analysis, be an effective method for improving the status and treatment of prisoners.¹³⁸

From the prisoner's perspective, this non-rights orientation is arguably detrimental, or at the minimum less beneficial. Fortunately, the magnitude of any harm that might emanate from this concern can be minimized by the European Prison Rules' capability of positively impacting efforts to obtain relief through the ECHR. For example, if an obligation contained in the Rules is not performed, a confined individual can file a petition alleging that nonperformance of that duty constitutes a violation of his or her rights under the ECHR.¹³⁹ In addition, it would not be unprecedented if the ECHR's adjudicatory body referred to the Rules for guidance in its decision-making process.¹⁴⁰

Nonetheless, the non-binding status of the European Prison Rules could pose a threat to the overall success of using the Rules to bestow benefits upon imprisoned individuals.¹⁴¹ This potential consequence exists because

prisoners and using prison labor for personal reasons); cf. LIVINGSTONE & OWEN, *supra* note 102, at 96 (noting that while some member States have incorporated the European Prison Rules into their domestic laws, the United Kingdom is not one of them); see also REYNAUD, *supra* note 3, at 34; Neale, *The European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 127, at 211.

¹³⁷ See Neale, *The European Prison Rules: Context, Philosophy and Issues*, *supra* note 127, at 6; see, e.g., European Prison Rules, *supra* note 98, at Explanatory Memorandum: Introduction (noting that "one of the principal objects [of the Rules] has been to give more emphasis to the duty of prison administrations to comply with the rules." (emphasis added)); see, e.g., Letter from Wolfgang Rau, Directorate of Legal Affairs, Council of Europe, Division of Crime Problems, Strasbourg, France to Roberta M. Harding (November 9, 1995) (on file with author) (explaining that the European Prison Rules non-enforceability is consistent with the Council's objective of facilitating Member states' appreciation of the importance of the status of prisoners' rights and how that complements the overall goal of protecting human rights).

¹³⁸ See European Prison Rules, *supra* note 98, at pmb1. (d).

¹³⁹ See Prison Information Bulletin, *supra* note 127, at 6 (noting the interaction between the non-binding European Prison Rules and the ECHR).

¹⁴⁰ See Neale, *The European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 127, at 203 ("the European Prison Rules are being cited as a yardstick against which to test prison conditions"); LIVINGSTONE & OWEN, *supra* note 102, at 96 (the European Prison Rules can be used to assist in the interpretation of the ECHR provisions).

¹⁴¹ See Neale, *The European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 127, at 210.

the Rules do not comprise "a catalogue of legally protected rights"¹⁴² for prisoners, and thus they are not legally enforceable.¹⁴³ This situation has led to charges that the Rules' unenforceability renders them ineffective. Consequently, it is argued that the target group—the incarcerated—is not benefitting as envisioned by the framers. Notwithstanding this valid criticism, the Rules do lay a foundation upon which domestic legislation aimed at minimizing incarceration concerns can be constructed.¹⁴⁴

The possibility that the status of the incarcerated might be eroded rather than advanced is minimized by the existence of another feature of the Rules: the provision regarding the regular inspection of penal institutions.¹⁴⁵ The objectives of the inspection and the subsequent reporting tasks are:

to monitor whether and to what extent these institutions are administered in accordance with existing laws and regulations, the objectives of the prison services and the requirements of [the European Prison Rules].¹⁴⁶

Including this measure in the Rules' non-mandatory scheme should aid in improving the status of prisoners because it encourages member states to devise and implement an accountability system. In addition, the Rules' effectiveness, as measured by the improved status of prisoners confined in the member States, can be further reinforced by "inviting" member States to submit reports every five years. Those reports describe the steps taken by the member state to implement the recommendations contained in the Rules.¹⁴⁷ In sum, the moral authority stance, the inspections, the incorporation of the Rules into domestic legislation, the increasing reliance of the

¹⁴² See REYNAUD, *supra* note 3, at 31; see also LIVINGSTONE & OWEN, *supra* note 102, at 96.

¹⁴³ See REYNAUD, *supra* note 3, at 32, 34 ("no public law remedy is available if one of these minimum rules is infringed").

¹⁴⁴ See *supra* note 136 (discussing the incorporation of the European Prison Rules into domestic legislation); see also European Prison Rules, *supra* note 98, at Explanatory Memorandum: Introduction (the rules, in one form or another, have had "an important influence on the moral and practical standards that govern prison administrations").

¹⁴⁵ See European Prison Rules, *supra* note 98, at part I(4).

¹⁴⁶ *Id.* at part I(4).

¹⁴⁷ See LIVINGSTONE & OWEN, *supra* note 102, at 96. These reports are submitted to the European Committee for Cooperation in Prison Affairs. This Committee was created by the European Committee on Crime Problems. See *id.*

ECHR's adjudicatory arm on the Rules, and the reporting requirements all aid in transforming a formally non-mandatory program into what can in substance be deemed a quasi-obligatory program.¹⁴⁸

The future of the European Prison Rules is positive. For example, the Council of Europe's Parliament submitted a Recommendation proposing that the European Prison Rules be revised to include "a catalogue of the rights of the prisoner."¹⁴⁹ If this recommendation is pursued, it would require enumerating the specific rights to be granted to the imprisoned. In addition, this proposed change could be indicative of a major shift in penal philosophy. For example, if the "catalogue of rights" replaces the present "*duties and obligations*" posture, then the scheme's orientation would be notably altered. An alternative view is that the recommendation to incorporate the "rights" perspective was not made to supercede the "duty/obligation" model, but to augment it. Whatever course of action is ultimately taken, the gravity of the circumstances confronted by the incarcerated and the resulting need for penal reform has been acknowledged as the Recommendation emphasizes that "[t]he adequate implementation of the European Prison Rules *should be a matter of continuous concern.*"¹⁵⁰

3. *The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment¹⁵¹ is another monumental development

¹⁴⁸ There is a suggestion that this was the drafters "hidden agenda." See European Prison Rules, *supra* note 98, at Explanatory Memorandum: Introduction (observing that the "formal status" of the Rules disguises their substantive impact).

¹⁴⁹ Recommendation 1257, *supra* note 11, at para. 11(i)(e). Two years earlier the Earl of Dundee's requested that "the Committee of Ministers invite the governors of the member states . . . to strictly apply the Council of Europe's Prison Rules of 12 February 1987." *Motion for a Recommendation on the improvement of prison conditions in Europe*, Eur. Parl. Ass., 44th Sess., Doc. No. 6775 at para. 7 (1993) [hereinafter *Motion for a Recommendation*].

¹⁵⁰ Recommendation 1257, *supra* note 11, at para. 10 (emphasis added). The Council also adopted another resolution that strengthens the position of those confined in penal facilities. This proposal advocates the implementation of policies to develop and institute educational programs for the imprisoned. Council of Europe, Recommendation No. R (89) of the Committee of Ministers to Member States on education in prison at paras. 12, 13 (Strasbourg, Oct. 13, 1989). This program is consistent with the Rules' rehabilitation, or reintegration, goal.

¹⁵¹ ECPT, *supra* note 97.

in the evolution of the rights of those confined in Europe. Like the ECHR and the European Prison Rules, the decision to enact the ECPT was partially inspired by an existing United Nations initiative.¹⁵² It also was precipitated by the Council's commitment to "promot[ing] adherence to the provisions of Article 3 of the [ECHR],"¹⁵³ which prohibits subjecting anyone "to torture or to inhuman or degrading treatment or punishment."¹⁵⁴ This objective incorporates two of the ECPT's central tenets. First, the Council's intention that the ECPT augment the ECHR¹⁵⁵ by providing another way to achieve the ECHR's goals¹⁵⁶ is demonstrated by the critical role Article 3¹⁵⁷ plays in implementing the ECPT. Second, the jurisprudence developed in connection with Article 3 of the ECHR will be used to enhance the performance of the ECPT because it will "provide the [ECPT] Committee with a point of reference for its consideration of situations liable to give rise to torture or inhuman or degrading treatment or punishment."¹⁵⁸ In sum, the Council's principal objective was to devise a mechanism that would enable the synergistic effect of these two instruments to facilitate improvements in custodial situations.

The key procedure selected to accomplish this goal was to grant the Committee for the Prevention of Torture [hereinafter CPT] the power to periodically inspect the member States' institutions that fall within the

¹⁵² See *id.* at Explanatory Report, I(2), (5); see also LIVINGSTONE & OWEN, *supra* note 102, at 93.

¹⁵³ ECPT, *supra* note 97, at pmb1.

¹⁵⁴ ECHR, *supra* note 93, at I, art. 3. "[T]he Committee's activities are aimed at future prevention [of the violation of rights] rather than the application of legal requirements to existing circumstances." ECPT, *supra* note 97, at Explanatory Report, IV(27); see also *id.* at II(12)-(13).

¹⁵⁵ See ECPT, *supra* note 97, at pmb1., Explanatory Report, I(7)-(10); see also, Malcom Evans & Rod Morgan, *The European Convention for the Prevention of Torture: Operational Practice*, 41 INT'L & COMP. L.Q. 590, 591-93 (1992) (discussing the interrelationship between the ECHR and the ECPT).

¹⁵⁶ See ECPT, *supra* note 97, at ch. IV, art. 17(2), Explanatory Report, II(13).

¹⁵⁷ See ECHR, *supra* note 93, at art. 3 (prohibits subjecting prisoners to torture or inhuman or degrading treatment or punishment).

¹⁵⁸ ECPT, *supra* note 97, at Explanatory Report, IV(22). The decisional law developed by the Court of Human Rights from adjudicating cases involving Article 3 controversies "provides a source of guidance for the Committee [for the Prevention of Torture]," ECPT, *supra* note 97, at Explanatory Report, IV(27), in the performance of its duties.

ECPT's jurisdiction.¹⁵⁹ This fundamental feature of the ECPT communicates the Council's position that a non-judicial tool—the regular inspection of institutions by a committee composed of qualified individuals—can effectively supplement efforts to improve the conditions and status of individuals deprived of their liberty.¹⁶⁰ This operational preference is confirmed in the following statement made by the CPT:

At the outset it might be useful to recall the essence of the CPT's mandate. The Committee's task is to examine the treatment of persons deprived of their liberty, with a view to strengthening, if necessary, the protection of such persons from torture and inhuman or degrading treatment or punishment *The CPT's activities are based on the concept of co-operation* The Committee's role is not to publicly criticise States, but rather to assist them in finding ways of enhancing the protection of persons deprived of their liberty from ill-treatment.¹⁶¹

Given that these inspections are critical to the scheme's success, determining the scope of the ECPT becomes a critical threshold issue.

The CPT is authorized to visit "any place within its jurisdiction where persons are deprived of their liberty by a public authority."¹⁶² Since penal facilities deprive individuals of their freedom, they conform to this description; and thus, the ECPT's jurisdiction extends to them. Additional support for this conclusion is found by examining the types of facilities inspected by the CPT. Penal facilities constitute the majority of the

¹⁵⁹ ECPT, *supra* note 97, at ch. I, art. I; Evans & Morgan, *supra* note 155, at 590; LIVINGSTONE & OWEN, *supra* note 102, at 94. The ECPT states that "[e]ach Party shall permit visits." ECPT, *supra* note 97, at ch. I, art. 2 (emphasis added).

¹⁶⁰ ECPT, *supra* note 97, at pmb. and Explanatory Report, III(15), (17). This preventative posture is also expressed in the statement that "the Committee's activities are aimed at future prevention [of the violation of rights] rather than the application of legal requirements to existing circumstances." ECPT, *supra* note 97, at Explanatory Report, IV(27).

¹⁶¹ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Second General Report, CPT/Inf (92)3, at para. 1 (Strasbourg, Apr. 13, 1992) [hereinafter CPT, 2nd General Report] (emphasis added); *see also* ECPT, *supra* note 97, at Explanatory Report, III(20), IV(33)(34).

¹⁶² ECPT, *supra* note 97, at ch. I, art. II.

institutions inspected by the CPT.¹⁶³ These facilities include pre-trial holding facilities, such as jails or remand centers, and prisons confining individuals convicted of criminal offenses.¹⁶⁴ The ECPT also applies to administrative detention facilities used to detain aliens.¹⁶⁵

The ECPT operates in a simple fashion.¹⁶⁶ There are two primary components: the visit to the facility and the report prepared subsequently. After a mandatory visit is completed, the CPT is required to prepare a report summarizing its findings and recommending how conditions can, if necessary, be improved.¹⁶⁷ The report is a vital feature of the scheme since the CPT's comments contained within it are designed to ensure that the rights guaranteed to prisoners by Article 3 of the ECHR are not violated. Since the ECPT relies upon non-judicial intervention¹⁶⁸ as the exclusive means of identifying, addressing, and resolving the problems associated with those who are imprisoned, these periodic visits are immensely important.

The terms of the Convention require the Committee to *periodically* visit facilities in the member States.¹⁶⁹ However, the ECPT and the CPT's Rules of Procedure are silent on the frequency of the visits.¹⁷⁰ An examination of the CPT's existing visitation practice reveals that it has already established a regular visitation schedule. The sequence of the CPT's initial periodic visits to the signatory Members' institutions established the

¹⁶³ Evans & Morgan, *supra* note 155, at 603 (observing how the majority of the CPT visits have been to facilities connected to the criminal justice system).

¹⁶⁴ See CPT, 2nd General Report, *supra* note 161, at paras. 43-60 (discussing a variety of issues pertaining to the treatment of prisoners in such facilities).

¹⁶⁵ See CPT, 2nd General Report, *supra* note 161, at para. 4; ECPT, *supra* note 97, at Explanatory Report, IV. 28-32.

¹⁶⁶ For a detailed description of how the ECPT functions see Evans & Morgan, *supra* note 155, at 594-614; see also LIVINGSTONE & OWEN, *supra* note 102, at 94-96.

¹⁶⁷ See ECPT, *supra* note 97, ch. III, art. 10(1); Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Rules of Procedure, CPT/Inf (91)8 at tit. IV, ch. I, rule 41(1) (Strasbourg, Sept. 20, 1991) [hereinafter CPT, Rules of Procedure]. This report is sent to the State whose facilities were inspected. See CPT, Rules of Procedure, *supra*. Furthermore, "the Committee and the Party may hold consultations concerning in particular the implementation of any recommendations set out in the report." CPT, Rules of Procedure, *supra*, at tit. IV, ch. I, rule 43. art. 10(1).

¹⁶⁸ See *infra* pp. 35-36.

¹⁶⁹ See ECPT, *supra* note 97, at ch. III, art. 7(1); CPT, Rules of Procedure, *supra* note 167, at tit. III, ch. I, rule 31(1).

¹⁷⁰ See CPT, Rules of Procedure, *supra* note 167.

basis for arranging the subsequent periodic visits.¹⁷¹ The CPT also has the power to conduct *ad hoc* visits.¹⁷² Visits of this nature typically occur if a grave situation is brought to the CPT's attention.¹⁷³ This type of visit also functions as a potent "moral suasion" tool in the ECPT's arsenal of compliance weapons.

One drawback of the ECPT's exclusive reliance on a non-judicial inspection and report model is that the CPT is limited to offering recommendations for improvements rather than imposing formal penalties for "non-compliance."¹⁷⁴ This feature could frustrate achieving the ECPT's major objectives—the strengthening of prisoners' rights and the improvement of prison conditions—because the absence of a penalty or a formal enforcement mechanism could potentially reduce a State's motivation to correct what the CPT has opined are inadequate conditions or violations of the rights of the detained.

Fortunately, the ECPT has a tool at its disposal that can overcome this shortcoming. As previously noted, the report prepared by the CPT subsequent to the visit usually includes suggestions on actions the State can

¹⁷¹ See CPT, Rules of Procedure, *supra* note 167, at tit. III, ch. I, rule 31(2). For example, during 1994, the CPT made its second periodic visit to the United Kingdom, Austria, and Spain. See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Fifth General Report on CPT's Activities, CPT/Inf (95)10 at para. 1 (Strasbourg, July 3, 1995) [hereinafter CPT, 5th General Report]. The first periodic visits to the United Kingdom and Austria were made in 1990. Thus, there was a four year interval between the periodic visits. The CPT's first periodic visit to Spain occurred in 1991, which resulted in a three year interval. See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, First General Report on CPT's Activities, CPT (91)3 at para. 54 (Strasbourg, Feb. 20, 1991) [hereinafter CPT, 1st General Report]. See also CPT, 2nd General Report, *supra* note 161, at para. 9. This data suggests that the periodic visits will be scheduled approximately every three to four years. Given the time necessary to prepare the report, have the CPT adopt the report, submit the report to the State, give the Party/Member State time to respond to the report and adopt any of the CPT's recommendations, it is more realistic to assume that a four year visitation cycle will be adopted.

¹⁷² See ECPT, *supra* note 97, at ch. III, art. 7(1); CPT, Rules of Procedure, *supra* note 167, at tit. III, ch. I, rule 32(1).

¹⁷³ For example, the CPT conducted two *ad hoc* visits to Turkish penal facilities because it had been notified that Turkish police officials were abusing detainees. The first *ad hoc* visit occurred from September 9 to September 21, 1990, and the second from September 29 to October 7, 1991. See CPT, 2nd General Report, *supra* note 164, at para. 17.

¹⁷⁴ See LIVINGSTONE & OWEN, *supra* note 102, at 96 (noting that the CPT has no enforcement power).

take to remedy the inadequacies.¹⁷⁵ "If the Party fails to co-operate or refuses to improve the situation in light of the Committee's recommendations, the Committee may decide . . . to make a public statement on the matter."¹⁷⁶ While this "sanction" does not possess any legal enforcement power, it is a form of public condemnation which can subject a nation to unwanted international scrutiny. This ability to expose a nation to the global community can transform the public condemnation tool into a powerful sanction which ultimately aids in the task of "persuading" a State to comply with the CPT's suggestions. Therefore, any imperfections in the scheme predicated on the absence of a formal judicial enforcement mechanism can be successfully overcome by publicly denouncing a nation for its treatment of individuals whose liberty it has deprived.

The CPT's experience with the Prefecture de la Police de Paris in Paris, France¹⁷⁷ illustrates the potential for using *ad hoc* visits and public state-

¹⁷⁵ See ECPT, *supra* note 97, at ch. III, art. 10(1).

¹⁷⁶ ECPT, *supra* note 97, at ch. III, art. 10(2); see also Evans & Morgan, *supra* note 155, at 609 (noting that the public statement mechanism is the only "sanction" available under the ECPT).

The action taken by the CPT with respect to the situation in Turkey aptly illustrates how public condemnation vis-a-vis publication functions as a compliance or enforcement tool. Two *ad hoc* visits were made to a Turkish penal facility. See CPT, 2nd General Report, *supra* note 161, at para. 17 (noting that the first *ad hoc* visit occurred from September 9-21, 1990 and the second from September 29 to October 7, 1991). Subsequently, the CPT admonished Turkey to rectify its dismal prison conditions. The Turkish government, however, refused to take heed of the recommendations. Ultimately, the CPT voted to issue a statement informing the public of its findings that Turkey was torturing and severely mistreating individuals held in police custody. The public statement was published on December 15, 1992. See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Third General Report, CPT/Inf (93)12 at para. 9 (Strasbourg, June 4, 1993) [hereinafter CPT, 3rd General Report]. A second public statement against Turkish penal practices was issued on December 6, 1996. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Strasbourg, Public Statement on Turkey, issued on 6 December 1996, reprinted in 18 HUM. RTS. L.J. 169, 294-96 (1997).

¹⁷⁷ The Prefecture de la Police de Paris will be referred to as the "Depot." A depot is equivalent to a jail. See WEST'S LAW AND COMMERCIAL DICTIONARY IN FIVE LANGUAGES 449 (Rolando Epstein et al., eds. 1985). It is a facility that typically holds *detenus*, or pre-trial detainees, *garde a vues*, individuals who are being interrogated but have not yet been arrested or charged, and *retenues*, foreigners held under administrative detention. See Interview with Professor Martine Herzog-Evans, Lecturer in Law, University of Paris-X, in Jayat, France (July 28, 1997) (notes on file with author); see also *supra* note 6 (discussing the difference between prisons and jails in the United States).

ments to force compliance by the member States. During the fall of 1991, the CPT conducted its first periodic inspection of French facilities.¹⁷⁸ The Depot in Paris was among those visited.¹⁷⁹ The CPT's Report to the French government included the following general observations and conclusions about the Depot: the conditions under which *garde a vue* detainees¹⁸⁰ were held needed improvement,¹⁸¹ and the conditions of the section used to house male detainees, *detenus*, were mediocre.¹⁸² More specific concerns included: the failure to meet the *garde a vue* detainees' nutritional needs;¹⁸³ the failure to issue blankets to regularly housed detainees;¹⁸⁴ the inadequacy of toilet facilities, which consisted of a hole located in the middle of the cell floor;¹⁸⁵ the continued infestation of bugs;¹⁸⁶ the unsatisfactory sanitation system (partially due to the physical location of the toilets); and problems with access to a physician.¹⁸⁷

The CPT expressed greater trepidation about the "Centre de Re'tention du Depot," the Depot's administrative detention center for foreigners. One recurring complaint was that those held in administrative detention were mistreated, including being physically abused by the guards.¹⁸⁸ Another widespread allegation was that these detainees were forcibly tranquilized before leaving the country.¹⁸⁹ The CPT was also very troubled by the

¹⁷⁸ The institutions were inspected from October 27, 1991 until November 8, 1991. CPT, 2nd General Report, *supra* note 161, at para. 17.

¹⁷⁹ *See id.* at Appendix 3.

¹⁸⁰ *Garde a vue* detainees are individuals who are confined prior to being formally charged with a criminal offense. *See* Interview with Professor Martine Herzog-Evans, Lecturer in Law, University of Paris-X, in Jayat, France (July 28, 1997).

¹⁸¹ *See* Council of Europe, Rapport au Gouvernement De La Republique Francaise R elatif   La Visite Effectu ee Par Le Comit e Europ een Pour La Pr evention De La Torture Et Dest Peines Ou Traitements Inhumains Ou D egradants (CPT) En France Du 27 Octobre Au 8 Novembre 1991 Et Response Du Gouvernement De La Republique Francaise, CPT/Inf (93)2 at para. 26 (Strasbourg, Jan. 19, 1993) (French version) [hereinafter *First French Report and Response*].

¹⁸² *See id.* at para. 28.

¹⁸³ *See id.* at para. 30.

¹⁸⁴ *See id.* at para. 28. The French prison officials claimed that blankets were not distributed because they posed a risk of being used by the prisoners to commit suicide. *Id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *See id.* at para. 43-44.

¹⁸⁸ *See id.* at para. 68.

¹⁸⁹ *See id.* at para. 69.

“gravely deficient” living environment because it was filthy and unhealthy.¹⁹⁰ Additional distressful observations made by the CPT included: the lack of outdoor exercise; the overcrowded cells; the sub-standard quality of the cells and cell furnishings; the absence of necessary toiletries (soap, towels, etc.) for some of the detainees; and the failure to provide these individuals with a change of clothing.¹⁹¹ It was also noted that the infestation of bugs was worse than that observed in the regular male quarters.¹⁹² Accordingly, the CPT’s report included recommendations on how France could remedy this situation so that the conditions would not violate Article 3 of the ECHR. Finally, the CPT advised the French government to modernize these antiquated facilities and to make more programs available to these detainees.¹⁹³ Emphasizing the gravity of the situation, as well as the corresponding need for immediate action, the CPT recommended that the French government give the necessary remodeling of the detention center “the most highest priority.”¹⁹⁴

In its response to the CPT’s report,¹⁹⁵ the French government advised the CPT that it had already implemented some of the recommendations contained in the report. For example, the government cited an improvement in satisfying the *garde a vue* detainees’ nutritional needs, the installation of additional telephones to assist the detainees in accessing family, friends, and

¹⁹⁰ See *id.* at para. 70.

¹⁹¹ See *id.* at para. 71.

¹⁹² See *id.*

¹⁹³ See *id.* at para. 72.

¹⁹⁴ See *id.*

¹⁹⁵ The report prepared by the CPT remains confidential unless the State requests the publication of the report. See ECPT, *supra* note 97, at ch. III, art. 11(1)-(3); CPT Rules of Procedure, *supra* note 167, at tit. IV, ch. I, rule 41(3), 42(1). And, although publication is not mandatory, the trend appears to be that most states request publication. See CPT, 5th General Report, *supra* note 171, at para. 11 (noting that since the majority of the States have consented to publication of the reports, this seems to be the norm).

Following this general practice the French government agreed to the publication of the report and its response to the report. See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Fourth General Report on the CPT’s Activities, CPT/Inf (94)10 at para. 9 (Strasbourg, Aug. 10, 1994) [hereinafter CPT, 4th General Report]. Republique Française, Rapport De Suivi Du Gouvernement Française En Response Au Rapport Du Comite Europeen Pour La Prevention De La Torture Et Des Peines Ou Traitements Inhumains Ou Degradants Relatifs A Sa Visite En France Du 27 Octobre Au 8 Novembre 1991, (Janvier 1994) [hereinafter *Rapport De Suivi*].

attorneys, and the placement of a television in the detention room, satisfying the "programming" recommendation.¹⁹⁶ The Government also noted that it had explored renovating the sanitation and electrical systems.¹⁹⁷ As for the CPT's concerns about the living conditions of the administrative detainees, the French government stated that these problems were primarily due to overcrowding.¹⁹⁸ Presumably, this meant that they could not be remedied.

Given the gravity of the situation and the lack of initiative by the French government, the CPT decided to conduct an *ad hoc* inspection of the Depot from July 20, 1994 until July 23, 1994.¹⁹⁹ In the report sent to the French government on September 21, 1994 the CPT reiterated its concerns pertaining to the conditions to which the administrative detainees were subjected.²⁰⁰ The letter accompanying the report advised the French government that it had six months within which to respond to the report regarding the adoption of the CPT's recommendations.²⁰¹ The government transmitted its Response to the Report on the *Ad Hoc* Visit on April 19, 1995.²⁰² The government's response described its proposal for renovating the Depot's administrative detention center.²⁰³ Six days later, on April 24th, the Depot was unexpectedly closed for complete renovations.²⁰⁴ In a subsequent letter to the CPT, the French government stated that it

¹⁹⁶ See Rapport De Suivi, *supra* note 195, at para. 122.

¹⁹⁷ See *id.* The renovations were estimated to cost 7,000,000 French Francs. *Id.*

¹⁹⁸ See République Française, Observations Du Gouvernement Française En Response Au Rapport Du Comite Europeen Pour La Prevention De La Torture Et Des Peines Ou Traitements Inhumains Ou Degradants Relatif A Sa Visite En France Du 27 Octobre Au 8 Novembre 1991, at para. 68 [hereinafter *Observations Du Français*].

¹⁹⁹ See CPT, 5th General Report, *supra* note 171, at 4, § I.A, para. 2. The CPT noted that this second visit to France was intentionally directed at the Depot de la Prefecture de Police in Paris, "which had previously been visited in the course of a periodic visit." *Id.*

²⁰⁰ See Council of Europe, Rapport au Gouvernement de la Republique francaise relatif à la visite effectuée par le Comité européen pur la prévention de la torture et des peines ou traitements inhumains ou degradants (CPT) en France du 20 au 22 juillet et réponse du Gouvernement de la République française, CPT/Inf (96)2 at para. 14 (Strasbourg, Jan. 23, 1996) (French version) [hereinafter *Second French Report and Response*].

²⁰¹ See *id.* at 9. This would require the French government to respond on or before March 21, 1995.

²⁰² See *id.* at 21.

²⁰³ See *id.* at 24.

²⁰⁴ See Philippe Bernard, Le Comité européen contre la torture avait constaté des 'traitements inhumains' au 'depot' de Paris, LE MONDE, April 28, 1995, at 13.

anticipated reopening the detainment center in the spring of 1996.²⁰⁵ The Depot has yet to reopen.²⁰⁶

Despite the CPT's strongly worded Report covering the first periodic visit, the Government relied on prison overcrowding as a justification for not implementing the most important of the CPT's recommendations.²⁰⁷ This suggests that the French government's position was that the existence of this "external" contributory factor—the burgeoning prison population—over which it had no control, exempted it from deploying the resources necessary to remedy the "grave deficiencies" noted by the CPT. Thus, arguably, the CPT's decision to conduct an *ad hoc* visit of the Depot's administrative detention section shortly after the government submitted its supplemental responses and observations to the First Report and the time lapses that existed between the pertinent events influenced the French government's decision to close the facility.²⁰⁸ As a result, *ad hoc* visits have an enforcement dimension because they can exert sufficient pressure on the state so that it will take corrective action.

While a public statement was not formally issued, the press coverage²⁰⁹ of the incident is in substance equivalent to the issuance of a public statement by the CPT. Thus, the adverse publicity that a state receives when it is disclosed to the public that the CPT "suspects" that the state is engaging in activities that violate Article 3 of the ECHR can, as it did here, perform a remedial function. In sum, the situation resulting in the closure of the Paris Depot is illustrative of how the *ad hoc* visitation system can operate and how the mere possibility that a public statement of condemnation will be issued can generate a sufficient amount of domestic and international

²⁰⁵ See *Second French Report and Response*, *supra* note 200, at 5.

²⁰⁶ See Interview with Professor Martine Herzog-Evans, Lecturer in Law, University of Paris-X, in Jayat, France (July 28, 1997).

²⁰⁷ See *Observations Du Francais*, *supra* note 198, at para. 68.

²⁰⁸ The First French Report was published on January 19, 1993 and contained the French government's responses. See *First French Report and Response*, *supra* note 181. The French government supplemented its initial response in January of 1994. See *Observations Du Francais*, *supra* note 198. The *ad hoc* visit was conducted approximately seven months later. See CPT, 5th General Report, *supra* note 171, at para. 2.

²⁰⁹ See Philippe Bernard, *supra* note 204. It warrants noting that discussions were held regarding whether the CPT should vote to issue a public statement. But, the French government closed the facility before any formal action could be taken. See Interview with Professor Martine Herzog-Evans, Lecturer in Law, University of Paris-X, Jayat, France (July 28, 1997).

pressure to facilitate the ECPT in successfully achieving its mission.²¹⁰

On the horizon are additional efforts to reinforce the ECPT's mission. For example, when the Council's Parliamentary Assembly met in 1993, a motion was made recommending that the Council's Committee of Ministers "invite the governments of the member states . . . to implement the recommendations of the [ECPT]."²¹¹ While this motion falls short of suggesting that it would be mandatory for member States to implement the CPT's recommendations for improvements, it does suggest that the member states should voluntarily adopt the recommendations. At a later date, the Parliamentary Assembly did adopt a Recommendation to "reinforce the structures and increase the resources of the [ECPT]."²¹² Although this portion of the Recommendation does not specify what action will be taken, its positive language conveys the message that the ECPT will assume an even more active role in bettering penal conditions in Europe.²¹³

III. COMPARING THE DEVELOPMENT AND STATUS OF PRISONERS' RIGHTS IN EUROPE AND THE UNITED STATES

A striking feature of the development of prisoners' rights in both jurisdictions is the impact the reform movements of the 18th century had on improving prison conditions. This result was largely due to the efforts of John Howard, an Englishman who was the Sheriff of Bedford in England. During the eighteenth century Howard traveled extensively in England and on the Continent, observed the conditions at correctional institutions in these locales, and commented on the differences.²¹⁴ His forays culminated in his authorship of the seminal book, *The State of Prisons*, in which he strenuously advocates for improving conditions of prisoners' confinement.²¹⁵ The

²¹⁰ As previously noted, a public statement was actually released in the situation involving a Turkish prison. See *supra* note 176. However, this year the CPT reviewed its concerns with the treatment by French police of "detained persons and the living conditions they must endure." See *Prisoners 'Abused' in France*, THE GUARDIAN (London), May 15, 1998. A public statement may be looming on the horizon for France.

²¹¹ *Motion for a Recommendation*, *supra* note 149.

²¹² Recommendation 1257, *supra* note 11, at para. 11(vi).

²¹³ See generally Rod Morgan, *Convention Improves European Prisons*, OVERCROWDED TIMES, Dec. 1993, at 1, 5 (discussing the ECPT's positive effect on the prison situation in Europe).

²¹⁴ See HOWARD, *supra* note 15.

²¹⁵ See *id.*

influence of his book crossed the Atlantic and exerted a tremendous influence on the Friends', or Quakers', involvement with the prison reform movement.²¹⁶ Jeremy Bentham²¹⁷ was also an active participant in penal reform activities during this period. His most notable contribution was the development of a holistic penal methodology that culminated in the creation of the Panopticon.²¹⁸ A critical facet of Bentham's Panopticon scheme concentrated on the interaction between the authoritative power of architecture and the reformation of inmates.²¹⁹ He also believed that the general conditions of confinement needed significant improvement.²²⁰

Despite these good intentions, by 1850, the correctional reform movement, which emphasized rehabilitation, had accomplished minimal substantive changes.²²¹ Ironically, the campaign's major accomplishment was to legitimize a prison system that remained relatively inhumane. This outcome was due to the combined adverse effects of overcrowding, judicial indifference to the administration of prisons, and inadequate staffing.²²² Indeed, in the 1850's the general consensus was that since the theory of reforming inmates was discredited, prisons could, and should, be cruel to deter future criminal activity.²²³

²¹⁶ See Morris & Rothman, *supra* note 18, at 89-91.

²¹⁷ Jeremy Bentham was an 18th century British philosopher known primarily for his "the greatest good for the greatest number" utilitarian writings. He was also a critic of the legal system in general, and the justice system in particular. See SEMPLE, *supra* note 91, at 20-23.

²¹⁸ See SEMPLE, *supra* note 91, at 9-13; FOUCAULT, *supra* note 18, at 200-28 (critiquing Bentham's proposal).

²¹⁹ See SEMPLE, *supra* note 91, at 114-22. The Stateville Prison at Joliet, Illinois, is an example of Bentham's panopticon. To Bentham's distress, a genuine Panopticon prison was never built in England. See *id.* at 313; see also Morris & Rothman, *supra* note 18, at 274-75 (discussing Bentham's frustration when his plan for a Panopticon at New South Wales was thwarted).

²²⁰ See SEMPLE, *supra* note 91, at 112-22.

²²¹ See Morris & Rothman, *supra* note 18, at 105.

²²² See *id.* at 104.

²²³ See *id.* at 105. Some positive strides, however, were taken toward revamping penal practices during the late nineteenth and early twentieth centuries. For example, at penal reformer Zebulon Brockway's urging a penal policy directed at reformation resulted in the establishment of the Elvira Reformatory in upstate New York. Brockway's vision "combined indeterminate sentencing and release on parole with an institutional commitment to educational programs." Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in MORRIS & ROTHMAN, *supra* note 18, at 169, 174; see also *id.* at 70-176 (describing the status of prison conditions and penal policies during the late nineteenth century).

With the advent of the 20th century, fundamental differences with respect to the status and rights of the confined began to become evident between the approaches followed by the two jurisdictions. By this time, the "slave of the state" doctrine was firmly entrenched in the United States.²²⁴ This principle represents more of a regression rather than a progression. The situation in Europe was not as dire.²²⁵ While inmates there undoubtedly experienced a decline in conditions, their plight was not as deplorable as that of the penal fraternity in the United States. The absence of contract labor and prison farm schemes, schemes which dominated the penal systems in the United States,²²⁶ was a key factor contributing to the relatively better position occupied by the European prisoners. The end of World War II, however, narrowed the disparity between the paths followed by the respective jurisdictions. The significance of this event was emphasized by Europe's intense desire to adopt and implement regional public law instruments establishing and respecting human rights.²²⁷ This leads to one of the most notable points pertaining to how the evolution of the rights of the imprisoned in the two jurisdictions differed, namely, the distinction between form and substance.

During this time, Europe acquired a heightened awareness of the rights of incarcerated individuals. A similar shift occurred in state prisons in the United States, as the mid-to late 1940's marked the renunciation of the "slave of the state" position and the endorsement of the "hands-off" doctrine. At the minimum, these actions formally represented an advancement in the penal policies in both geographic locations. Since the "hands-off" approach recognized that prisoners were no longer "slaves of the state," then, arguably, its implementation should have triggered a noticeable change in the substance of penal policies. However, this was not the case. Instead, form

²²⁴ See *supra* pp. 8-9 (discussing the "slave of the state" phase in the development of prisoners' rights in the United States); *but see* Rotman, *supra* note 223, at 178-85 (discussing a few of the advancements in the American penal system such as greater interest in the psychotherapeutic model of prison reform).

²²⁵ See Morris & Rothman, *supra* note 18, at 221-22 (discussing the leniency and reforms of various European systems).

²²⁶ See *supra* pp. 8-9 and notes 24-27 (discussing incarceration under the contract and penal farm labor systems).

²²⁷ See *supra* pp. 21-22 (describing the creation of Council of Europe conventions that address human rights); *see also* MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 14-25 (1995) (describing the human rights concerns addressed by the drafters of the ECHR).

rather than substance prevailed as the status of prisoners remained fundamentally unaltered: universally conditions remained miserable.

In contrast, Europe's progress exceeded that of mere "formal" development. The legal rules adopted by Europe generated appreciable changes in the attitudes, principles, and philosophy pertaining to the implementation of correctional policies. Thus, although the jurisdictions acknowledged the existence of problems with the plight of prisoners, a profound variance existed with respect to the manner by which the detained were treated in each local. Another critical distinction flows from this evolutionary difference.

Europe's more aggressive progress in this area could support the conclusion that it would be more likely to formulate its methodology in terms of bestowing "rights" upon the imprisoned; instead the prevailing European perspective confers duties or obligations on the prison officials.²²⁸ On the other hand, the United States, once it began dismantling the constraints imposed by the "hands-off" approach, employed a "rights" perspective towards the treatment of prisoners.²²⁹ Facially this suggests that there is another crucial difference in the approaches implemented by the two jurisdictions. The "rights" orientation appears to provide prisoners with greater protection because it embodies the affirmative grant of rights. In contrast, under the "duty/obligation" methodology, the European prisoner arguably fares worse than his American counterpart because he does not actually possess a "right." However, after conducting a more scrutinizing assessment, the "duty/obligation" method in practice might actually accomplish more than the "rights" methodology in terms of improving and maintaining the quality of the conditions of detention. Consequently, the individual incarcerated in Europe would receive more tangible benefits placing him in a position better than that of the prisoner in the United States.

First, the "duty/obligation" scheme immediately notifies prison officials of their affirmative duty to perform or refrain from performing specific acts. This scheme instantly places the burden of performance on the prison

²²⁸ An illustration of this methodology is found in the ECHR which contains an affirmative directive that: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." ECHR, *supra* note 93, at § I, art. 3 (emphasis added). The European Prison Rules, *supra* note 98, and the ECPT, *supra* note 97, are similarly oriented. Instances do exist, however, where the issue is presented in terms of individual rights. For example, the ECHR states that "[e]veryone has the right to freedom of thought, conscience and religion." ECHR, *supra* note 93, at § I, art. 9(1).

²²⁹ See Appendix A.

officials. Consequently, the European prisoner does not have to wait to exercise his or her rights in order to obtain what has been promised. In contrast, the "rights" approach operates from the other end of the continuum. Typically some event occurs, usually involving the actual or threatened deprivation of a "right," that triggers the need to establish that the right was not recognized or respected. The burden then falls on the inmate to initiate an action if he or she believes that prison officials have violated or will violate that right.²³⁰

Although the "duty/obligation" and "rights" orientations highlight a significant distinction between how the jurisdictions appreciate, examine and respond to prisoner issues, common features exist. For example, 1962 was a hallmark year for prisoners on both sides of the Atlantic. In the United States, the Supreme Court expressly approved the extension of the Eighth Amendment to the states.²³¹ This same year the Court of Human Rights acted similarly by declaring that the ECHR applied to detainees in penal facilities.²³² Interestingly, the words of the provisions are similar. The Eighth Amendment to the United States Constitution forbids the infliction of "*cruel and unusual punishments*,"²³³ while Article 3 of the ECHR bars subjecting an inmate to torture, inhuman, or degrading treatment or punishment.²³⁴ Since both statements reflect concerns about the ill-treatment of prisoners, their minimum objective is to ensure that the penally confined are not tortured or otherwise physically abused. These judicial actions suggest an enhanced sensitivity to the status of the imprisoned.

²³⁰ Of course, one can always argue that the proffered distinction between "rights" and "duty/obligation" is a sham. It can be argued that they are substantively identical; in essence, simply two sides of the same coin. If an inmate has a "right," then someone, here prison officials, has a duty to respect that right and to act in accordance with the right. Nonetheless, there could be a psychological dimension that validates the potential impact the "rights"/"duty" distinction could have on the quality of prison life. If prison employees are informed that their job responsibilities include providing specific services and treatment, then they are more likely to perform these tasks, even though they benefit their charges. It simply becomes "part of the job." In contrast, under the "rights" orientation theory more resistance might be encountered because of beliefs that: 1) prison personnel are under no obligation to provide whatever is required to satisfy the "right"; and 2) prisoners have, or should not have, "rights." This in turn could influence the status of the conditions of confinement.

²³¹ See *Robinson v. California*, 370 U.S. 660 (1962).

²³² See *Koch v. Fed. Republic of Germany*, 1962 Y.B. Eur. Conv. on H.R. 126 (Eur. Ct. H.R.).

²³³ U.S. CONST. amend. VIII (1791) (emphasis added).

²³⁴ ECHR, *supra* note 93, at art. 3.

Despite this common positive foundation, the respective systems ultimately took relatively divergent paths. A critical factor leading to this separation is that the ban in Article 3 encompasses actions and activities that qualify as inhuman, or degrading treatment or punishment.²³⁵ Thus, comparatively, the scope of Article 3 is broader and consequently bars a greater variety of negative actions directed at prisoners than does the Eighth Amendment. Accordingly, Article 3 has the potential of extending greater protection than that supplied by its American counterpart, the Eighth Amendment.

Remedial issues present another striking dissimilarity between the two regimes. Historically, the United States has used a singularly distinct coercive remedial scheme to resolve disputes in this context.²³⁶ Initially, the federal judiciary refused to adjudicate these controversies. However, with the passage of time and the transformation of public and judicial sentiment, the tribunals eventually became the primary forum for the resolution of prisoner complaints.²³⁷ Resolution is typically accompanied by a request for an injunction or a coercive equitable remedy that forces prison officials to perform or refrain from performing specified acts.²³⁸ In addition, the prevailing tendency to resort to the court system means that the adversarial model of litigation²³⁹ controls how the proceedings are conducted. The evolution of the European system discloses a different situation. While the wholesale rejection of the "traditional" litigation model in this context did not occur, there is an easily discernable preference for employing non-coercive remedies and non-confrontational means of resolving the problem. The ECPT is a prime example of this predilection. When promoting the ECPT, the Council went to great lengths to stress that it would operate pursuant to a non-judicial, non-coercive process for addressing and rectifying issues related to prisoners. In fact, this stance has resulted in

²³⁵ *Id.*

²³⁶ See *supra* note 48 (mentioning the tremendous number of U.S. jurisdictions operating penal facilities under court orders or consent decrees). Even with the passage of the PLRA the remedial status quo remains unaltered. See PLRA, *supra* note 84.

²³⁷ See Appendix A. This is not to say that grievances filed by prisoners are not resolved by other bodies, such as internal administrative grievance panels.

²³⁸ See *Status Report: State Prisons and the Courts*, *supra* note 48 (listing the number of U.S. jurisdictions under consent decrees or injunctions in prison conditions cases).

²³⁹ The adversarial model is a traditional characteristic of the American judicial dispute resolution mechanism. See JOHN J. COUND ET AL., *CIVIL PROCEDURE, CASES AND MATERIALS* 2 (7th ed. 1997).

the ECPT being criticized for lacking a formal coercive compliance tool.²⁴⁰ Nonetheless, the Council forged ahead with its prescription of "inspection and recommendations" as an effective means of generating change and improvement in the prisons. The European Prison Rules share this feature. They were specifically developed and implemented with the objective of being non-mandatory. Rather than imposing them, the member States are "encouraged" to adopt them. This further reflects adherence to the principle that positive changes are more likely to occur if made voluntarily. The validity of this precept has been confirmed as some member States, such as France, have incorporated some or all of the European Prison Rules into their domestic legislation.²⁴¹ The ECHR is the Council instrument that is closest to replicating the coercive, remedial techniques resorted to in the United States. As previously discussed, the ECHR presently has two adjudicatory bodies: the Commission and the Court.²⁴² Despite this surface similarity, the ECHR's adjudicatory arm possesses attributes that render it significantly distinct from its U.S. counterpart. First, and foremost, is the ECHR's emphasis on facilitating the parties' endeavors to reach a consensus.²⁴³ Presumably, this accord will be mutually satisfactory as the ECHR specifically requires a "friendly settlement."²⁴⁴ So, at least initially, the tribunal procedures differ from those in the United States because of the absence, or reduction, of having an acutely confrontational tone to the proceedings.

The development of prisoners' rights in Europe also includes a strong preference for establishing uniformity in the rules and practices among its members.²⁴⁵ Encouraging member States to incorporate the ECHR's provisions into their domestic legislation is one method selected to achieve

²⁴⁰ However, it should be noted that the *ad hoc* visits and the issuance of public statements can function, through their "moral suasion" powers, as strong and effective informal coercive tools. See *supra* pp. 35-41 and notes 177 & 181 (discussing the situations at the French Depot and the Turkish penal facility).

²⁴¹ See *supra* note 139.

²⁴² See *supra* p. 23 (describing the organization of the ECHR). The proposal contained in Protocol No. 11 will concentrate the adjudicatory powers into a single court, the Court of Human Rights. See *supra* note 120.

²⁴³ After the prisoner's petition is accepted by the Commission, the immediate objective is to facilitate a resolution between the parties. See *supra* p. 24 (discussing the "friendly settlement" objective).

²⁴⁴ See ECHR, *supra* note 93, at § III, art. 28(1)(b).

²⁴⁵ See Guarnieri, *supra* note 106, at 14.

this goal.²⁴⁶ This objective is also satisfied when member states incorporate the non-mandatory European Prison Rules into domestic regulations.²⁴⁷ The ECPT inspection and reporting requirements also assist in attaining the uniformity goal. These regular visits to the members' penal institutions facilitate the CPT in formulating acceptable standards for conditions of confinement and other issues pertaining to prisoners.²⁴⁸ Furthermore, if the member State consents to the publication of the report, then the CPT's comments, observations, and recommendations on various penal issues and policies, which comprise the developing body of standards, will be disseminated to the member States. This informs the member States about which measures the CPT considers acceptable and, hopefully, will cause all member States to conform their practices with the norms expressed in the CPT's reports. As a result, increased uniformity in the conditions of confinement among the members' penal facilities should occur. The ECHR might also prove to provide limited assistance in attaining uniformity. This would occur through the issuance of the Court's opinions. However, since the Court primarily addresses discrete issues, as opposed to systemic inquiries,²⁴⁹ it is doubtful that the ECHR, unlike the ECPT, will result in the implementation of broad based uniformity.

In contrast, uniformity in the United States is minimal. It exists to the extent that all states are subject to the limits imposed by the Eighth Amendment and the other constitutional rights guaranteed to detainees.²⁵⁰ However, unlike the situation in Europe, securing consistency in the treatment of offenders and their conditions of confinement is not a paramount goal in the United States. For example, while the CPT attempts to establish some degree of regular practice with respect to matters such as the

²⁴⁶ See Jorg Polakiewicz, *The Application of the European Convention on Human Rights in Domestic Law*, 17 HUM. RTS. L.J. 401, 405 (1996); see also *supra* note 114.

²⁴⁷ See *supra* pp. 28-29 and note 139 (discussing the incorporation of the European Prison Rules).

²⁴⁸ Carol Mottet, *The European Committee For the Prevention of Torture (CPT) As An International Mechanism of Supervision and Its Interaction With Other Actors of Prevention*, Address in Marly-le-Roi, France (Oct. 25-27, 1996), in *MONITORING PRISON CONDITIONS*, *supra* note 12, at 132, 135.

²⁴⁹ The ECPT has the power to exert greater systemic influence because the inspectors visit a variety of institutions in the member States and examine a variety of diverse factors in those institutions. See ECPT, *supra* note 97, at 3 (describing the scope of the inspections).

²⁵⁰ The Eighth Amendment forbids infliction of cruel and unusual punishments on inmates. See U.S. CONST. amend. XIII.

maximum number of people permitted in various sized cells, the appropriate cell sizes, nutritional needs, sufficient bed linens, outdoor exercise time, access to attorneys, and access to family members, there is a conspicuous lack of uniformity on these and other related issues in the United States.²⁵¹ These concerns are integral to ensuring the adequacy of conditions of confinement and are among those addressed in the European Prison Rules²⁵² and considered by the ECPT²⁵³ when conducting inspections and formulating unitary standards through the recommendations contained in the reports.

The most striking difference that this comparative evolutionary examination reveals is that presently the United States has regressed with respect to creating and respecting the rights of prisoners. This is exemplified by the present use of the "modified hands-off" approach to assess prisoners' rights. In sharp contrast, Europe has in a multitude of forms repeatedly expressed its commitment to continue improving the status of those who are confined and their conditions of confinement. The restructuring of the ECHR through the implementation of a single Court to facilitate the timely resolution of disputes between prisoners and prison officials, the possibility that the European Prison Rules will become mandatory, and the continued improvements that have resulted from the deployment of the ECPT's tools are representative of this objective.²⁵⁴

IV. CONCLUSION

Despite the recent parallels in incarceration trends and similarities in their historical development, the United States and Europe differ tremendously with respect to how matters pertaining to the penally detained are prioritized and handled.

²⁵¹ There are professional correctional associations, such as the American Correctional Association, which prepare guidelines on these issues. See STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (ACA ed., 3d. ed. 1990); ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS (ABA 2d. ed. 1983). These guidelines, however, are not mandatory or legally enforceable. Nor can they be informally imposed through "moral suasion" tactics.

²⁵² See European Prison Rules, *supra* note 98.

²⁵³ See ECPT, *supra* note 97, at ch. III, art. 10, para. 1.

²⁵⁴ See Rod Morgan, *Convention Improves European Prisons*, OVERCROWDED TIMES, Dec. 1993, at 1 (examining improved prison conditions in Europe as a result of the ECPT); see also Mottet, *supra* note 248, at 135.

In the years immediately following World War II, Europe and the United States both began to usher in positive changes with respect to the status and treatment of prisoners. Initially, Europe, however, surpassed the United States by instituting more substantive alterations. Eventually the United States followed suit and began to assertively implement positive alterations. Presently both the United States and Europe are besieged by burgeoning prison populations which tax human and financial resources. Despite this circumstance, Europe maintains its commitment to pursue its progressive course of action and plans to continue improving the conditions of confinement and to impose additional "duties and obligations" on prison officials.

The United States, on the other hand, opted to follow an alternative path and now has assumed a regressive posture that threatens to severely compromise the improvements in the status of prisoners and their rights that took decades to obtain. This outcome is partially due to the fact that the creation, expansion, and enforcement of the rights of prisoners has almost entirely required the judiciary's involvement. Therefore, if this governmental body's philosophy becomes non-receptive to prisoner issues, then there is an increased risk that prisoners' rights will be curtailed and their status diminished. This risk is minimized in Europe because a variety of legal bodies, executive, legislative and judicial, were, and remain, actively committed to developing and implementing legal instruments designed to benefit prisoners.

In the end, for whatever the reason, Europe, unlike the United States, has opted to forge ahead in a positive manner. Prisons will continue to be inspected, prison administrators will acquire additional duties and obligations, and access to the courts will continue to improve in order to resolve disputes more efficiently. This pattern remains consistent with that first historical step taken by Europe after World War II. Unfortunately, the United States has selected to take a course of action that partially resurrects dismal past eras in the annals of the evolution of prisoners' rights. This is a negative reflection on the United States because:

[i]f you look at prison development as a cultural indicator, then of course you can't run the prison policy in one direction and the rest of

cultural development in another. You must reflect on what sort of society you want to belong to, what sort of representation of society it is when it develops in different directions.²⁵⁵

Comparatively, Europe has adopted this credo and the recent prisoners' rights activity in the United States evidences a retreat from the previously articulated commitment to embrace it.

²⁵⁵ Nils Christie, Problems of Imprisonment In the World Today, Address in Marly-le-Roi, France (Oct. 25-27, 1996), in *MONITORING PRISON CONDITIONS*, *supra* note 12, at 33.

APPENDIX A

In 1965 several inmates incarcerated at the Arkansas State Penitentiary objected to the prison's use of a leather whip¹ to punish them for violating the prison's rules.² The plaintiffs lodged a complaint asserting that using the whip violated the Eighth Amendment's prohibition against the "infliction of cruel and unusual punishments."³ The District Court disagreed with the plaintiffs and held that whipping as a form of corporal punishment did not amount to cruel and unusual punishment.⁴ Given that the decision was rendered in 1965 this outcome is not surprising. At this time, judges remained compelled to obey the prevailing "hands-off" approach of resolving prisoner complaints, which mandated deferring to the prison officials' "expertise",⁵ especially in disciplinary and security matters. Interestingly, despite the formal display of deference to the correctional authorities' discretion, the court did manifest a conviction that this local interest, to some degree, had to be considered in conjunction with the burgeoning acknowledgment that prisoners retained some rights. This is exhibited in the court's decision to require prison officials to develop and implement "appropriate safeguards" for using the whip.⁶ In terms of moving away from the leading "hands-off" approach, this ruling represents a step, albeit slight and hesitant, towards altering the traditional approach.

¹ A strap, or lash, was used to administer corporal punishment. It was made of leather and was between four and five feet long and approximately four inches in diameter. The leather was braided and attached to a six inch wooden handle. "The strap is about one-fourth inch thick at the end attached to the wooden handle and is gradually tapered toward the end which comes in contact with the person being whipped." *Jackson v. Bishop*, 268 F. Supp. 804, 809 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968). See *Talley v. Stephens*, 247 F. Supp. 683, 687 (E.D. Ark. 1965). Typically, inmates received a maximum of ten lashes. See *Jackson*, 268 F. Supp. at 810. In addition to inflicting psychological harm it also caused physical injuries. See *id.* at 810-11.

² See *Talley*, 247 F. Supp. at 689 (attacking the use of the whip in Arkansas prisons as cruel and unusual punishment because it was used without appropriate safeguards).

³ See *id.* at 687-89.

⁴ See *id.* at 689.

⁵ See *id.* at 686 ("convicts must be disciplined, and prison authorities must be given wide latitude and discretion in the management and operation of their institutions, including the disciplining of inmates").

⁶ See *id.* at 689.

Slightly stronger efforts to remove the chains imposed by the traditional approach surfaced two years later in *Jackson v. Bishop*,⁷ another case challenging the constitutionality of using the whip and other methods of administering corporal punishment at the same Arkansas penal institution.⁸ In *Jackson*, the court's outrage at "the brutal and sadistic atrocities which were uncovered"⁹ at the prison revealed the continuation of the battle being fought to strip the "hands-off" approach of its legitimacy. However, the court also stated that it was hindered by the "settled doctrine that except in extreme cases the courts may not interfere with the conduct of a prison."¹⁰ Despite the expression of these formal reservations that complied with the party line, the court did permanently enjoin the prison officials from employing the "teeter board"¹¹ and the "Tucker telephone"¹² to administer corporal punishment.¹³ However, to avoid being accused of reaching a decision that failed to sufficiently accommodate the state's interest, the court refused to hold that the use of the whip was per se unconstitutional.¹⁴ In what amounted to a compromise, the court enjoined prison officials from using the whip to administer corporal punishment until "additional rules and regulations are promulgated with appropriate safeguards."¹⁵

The *Jackson* court's actions accurately convey the tension that existed between the traditional "hands-off" approach, which discouraged involvement by the judiciary, and the emerging "rights enforcement" approach, which focused on the identification and enforcement of the rights of the incarcerat-

⁷ 268 F. Supp. at 804 (E.D. Ark. 1967).

⁸ *Id.* (alleging that use of any form of corporal punishment, including the "hide," violates the Eighth Amendment).

⁹ *Id.* at 815.

¹⁰ *Id.* (quoting *Lee v. Tahash*, 352 F.2d 970, 971 (8th Cir. 1965)).

¹¹ The "teeter board" was an especially harsh form of punishment as it was physically exhausting and caused severe aches and pains. It required an inmate to stand on a long board and balance himself by rocking on the nails and a smaller board. See *id.* at 810 n.7.

¹² The "Tucker telephone" was a torture device. A hand-cranked telephone was used to deliver electrical shocks to "various sensitive parts of an inmate's body." *Hutto v. Finney*, 437 U.S. 678, 682 n.5 (1979); *Jackson*, 268 F. Supp. at 812.

¹³ See *Jackson*, 268 F. Supp. at 816.

¹⁴ See *id.* at 808, 815.

¹⁵ See *id.* at 815. It should be noted that prison officials had been previously charged to perform this task in the earlier litigation about the constitutionality of using the strap to inflict punishment. See *Talley*, 247 F. Supp. at 689. However, the prison officials had not yet, as required, sought judicial approval of the regulations governing the administration of corporal punishment. See *Jackson*, 268 F. Supp. at 808.

ed and necessarily required the judiciary's presence. On appeal, the Court of Appeals for the Eighth Circuit did not consider itself similarly constrained and proceeded to vacate the portion of the *Jackson* decision upholding the strap's constitutionality.¹⁶ Although the appellate court's opinion paid the requisite lip service to the "hands-off" approach, the decision to vacate marked the court's recognition that the demise of the "hands-off" doctrine loomed on the horizon. The reviewing court's statement that it had "no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment"¹⁷ communicates this acknowledgment.

A year later the federal judiciary was presented with yet another complaint about the Arkansas prison system.¹⁸ This time the complaint contested the constitutionality of several conditions of confinement in units housing the general population and segregation inmates.¹⁹ While only one year had passed since the governing appellate court had adopted an aggressive stance by refocusing the perspective of the inquiry onto the enforcement of the rights of the detainees, the trial court in *Holt I* declined to act similarly and pursued a more restrictive means of resolving the matter.²⁰ Evidence of the court's unwillingness to participate in the campaign towards the installation of the "rights enforcement" phase is exhibited by its contention that "devising a remedy in this case is both difficult and *delicate*."²¹ The "delicacy" referred to is the court's reluctance to develop a remedy which would actively enforce the inmates' rights at what it considered to be the expense of retreating from the traditional deference afforded to prison officials. A year later, however, the situation assumed a radically different posture.

The year 1970 not only signaled the beginning of a new decade, but for the prisoner plaintiffs in *Holt I*, it marked the beginning of the "rights enforcement" era which would enable them to obtain relief. In contrast to

¹⁶ *Jackson v. Bishop*, 404 F.2d 571, 581 (8th Cir. 1968).

¹⁷ *Id.* at 579.

¹⁸ *See Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) [hereinafter *Holt I*].

¹⁹ *See id.* at 826.

²⁰ The court only found in favor of the plaintiffs on their claim that the prison's unsafe environment constituted cruel and unusual punishment. 300 F. Supp. at 828.

²¹ *Id.* at 833 (emphasis added).

the situation in *Holt I*, the plaintiffs in *Holt II*²² successfully argued that the conditions of confinement of the Arkansas prison system were unconstitutional.²³ Without hesitation, the court decided that the conditions were indeed constitutionally impermissible.²⁴ It also adamantly insisted that prison officials institute the necessary changes in a timely fashion.²⁵ More importantly, as an incentive to immediately remedying the constitutional deprivations, the court threatened to close the prison farms “[u]nless the conditions at the Penitentiary farms are brought up to a level of constitutional tolerability.”²⁶ The willingness to embrace this uncompromising stance exemplifies how the focus had drastically switched from one of totally blind deference to one of guaranteeing that the rights of prisoners were properly considered and when appropriate, as was the case here, given priority over the prison officials’ interests. This configuration represents the central tenet of the “rights enforcement” era.

²² 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971) [hereinafter *Holt II*].

²³ The Court noted that “[t]his case, unlike earlier cases . . . amounts to an attack on the System itself.” *Id.* at 365.

²⁴ *See id.*

²⁵ *See id.* at 383.

²⁶ *Id.*

APPENDIX B
 APPLICABLE EUROPEAN PUBLIC INTERNATIONAL LAW INSTRUMENTS

Universal Declaration of Human Rights	United Nations	12/10/48	Not legally binding/can be evidence of binding customary public international law
Standard Minimum Rules for the Treatment of Prisoners	United Nations	7/31/57 (approved)	Non-binding/Used to fashion the European Prison Rules
European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")	Council of Europe	Nov. 4, 1950 (signed) Sept. 3, 1953 (in force) Nov. 6, 1990 (Prot. 9) May 11, 1994 (Prot. 11) (not in force)	Judicial Measure/legally enforceable/Individual focus/commission and a court/shift to single permanent full-time court
European Standard Minimum Rules for the Treatment of Prisoners ("European Prison Rules")	Council of Europe	Res of Comm. of Ministers 73(5), Jan. 19, 1973 Rec. of Comm. of Ministers No. R(87) 3, Feb 12, 1987 (revised)	Not legally binding/incorporated into the domestic law of some member countries/often used by the ECHR Court to guide its decisions.
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT")	Council of Europe	Nov. 26, 1987 (signed) Feb. 1, 1989 (in force)	Non-Judicial Measure/inspections to strengthen conditions/institutional focus/operates with ECHR's Art. 3