BRINGING HUMAN RIGHTS HOME TO THE WORLD OF DETENTION

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INTRODUCTION

Just over ten years ago, a poll of the American public conducted by Peter Hart Research Associates sought to gauge public knowledge and opinions on universal human rights. [1] When the pollster queried, "[d]o you believe that every person has basic rights that are common to all human beings, regardless of whether their government recognizes those rights or not, or do you believe that rights are given to an individual by his or her government?" Of those polled, 76% said "every person has such rights."[2] A minority of 17% believed that humans have rights only if they are granted by the government.[3] And yet, when asked if there is an official document that sets forth human rights for everyone worldwide (in an attempt

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1. Peter D. Hart Research Associates, Final Adult Survey Data, Nov. 8, 1997, http://www1.umn.edu/humanrts/edumat/adultsur.htm (last visited Oct. 8, 2008).

2. *Id.*

3. *Id.*

to solicit knowledge about the Universal Declaration of Human Rights signed by the United States in 1948), only 8% of those polled were able to identify the Universal Declaration of Human Rights as such an official document, and 7% were unsure of its name.[4] Two percent believed the document to be the Bible, 2% identified our Bill of Rights, and 3% said they believed it was the U.S. Constitution that ensures that every person has basic rights that are common to all human beings, regardless of whether their government recognizes those rights or not.[5]

An allegiance to an inalienable entitlement to the same basic rights, irrespective of and indifferent to geography, status, class, birth, gender, race, age, or sexual orientation is not firmly embedded in recent interpretations of our Constitution. Yet these rights do exist in international law, articulated through treaties and documents including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[6] The entitlement to basic rights in these and other international human rights documents is based solely on the unalterable status of being human.

"Home" within the title "Bringing Human Rights Home" has several connotations and implications in this Article. "Home" is certainly meant in a broad geo-political sense—bringing the concept and value of human rights home to the United States, as human rights has generally been thought to have meaning only abroad. Yet, in 1945, civil, women's, workers', and other U.S. and international rights advocates successfully came together to ensure that the United Nations Charter included human rights that *would* apply to

4. *Id.*

5. *Id.*

6. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at 72, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR] ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR] (recognizing "the inherent dignity [and] the equal and inalienable rights of all members of the human family . . .").

the United States.[7] Unfortunately, in the ensuing decades the United States has avoided accountability for these standards, and the language and import of human rights faded into disuse here at home. Bringing human rights back home to the United States entails an education and advocacy strategy that recognizes the value of U.S. compliance with human rights documents and treaties, and seeks a mechanism for their enforcement.

"Home" is also intended in a professional and local sense, to bring it home to the work that we do in our advocacy, our writing, our laws, the remedies we seek, and our clients. "Home" is meant in the sense referred to in the oft quoted Eleanor Roosevelt query: "Where, after all, do human rights begin?" to which she answered, "in small places, close to home, so close and so small that they can't be seen on any maps of the world, yet they are the world of the individual person."[8] Bringing it home means conceptualizing a human rights framework in the day-to-day aspects of our work and seeking ways to implement human rights laws into our practice in domestic courts.

Finally, bringing it home is meant in the most idiomatic, colloquial, and rallying sense: we need to "bring it home" as a unifying moral and legal foundation to enhance domestic laws that have allowed many to be marginalized and deprived them of their entitlement to "life, liberty and the pursuit of happiness." The specific value of a human rights framework in the context of addressing a justice system that has so far incarcerated more of its citizens in jails and prisons than any other nation in this world, in conditions that deprive them of basic dignity and human rights, is explored in this Article.

When photographs depicted American soldiers, in the spring of 2004, degrading and torturing Iraqi citizens in the Abu Ghraib prison in Iraq, the actions garnered worldwide condemnation as human rights abuses. However, attempts by criminal justice

7. Carol Anderson, Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955 273 (2003); Cass R. Sunstein, The Second Bill of Rights: Franklin D. Roosevelt's Unfinished Revolution and Why We Need It More Than Ever 100–01 (2004).

8. Eleanor Roosevelt, Remarks at the Presentation of *In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights*, United Nations (March 27, 1958), http://www.udhr.org/history/default.htm (last visited Oct. 8, 2008) (follow "Eleanor Roosevelt" hyperlink; then follow "In Your Hands" hyperlink).

advocates in the United States to parlay this condemnation into recognition of the existence of human rights violations in prisons in the United States were largely unsuccessful. Despite the similarity of the abuse of prisoners in Iraq by American personnel—a number of whom had employment histories in U.S. prisons[9]—and the abuse taking place in American prisons, the latter abuse has occasioned little censure. This has led prisoner rights advocates to decry the lack of recognition of human rights violations committed against American prisoners held in prisons and jails in the United States.

While reports of abuses in the United States have failed to elicit expressions of official outrage and disgust, Secretary of Defense Donald Rumsfeld responded to photographs revealing naked Iraqi prisoners shackled or hooded with smiling American staff looking on, by characterizing the treatment as fundamentally un-American, blatantly sadistic, cruel, and inhumane.[10] Longtime advocate for humane treatment of prisoners and Director of the American Civil Liberties Union National Prison Project, Elizabeth L. Alexander, pointed out to the media, in response to the disclosure of abuse of prisoners in Iraq, that, beatings, sexual abuse, and similar conduct is common in American prisons.[11] In contrast to the official response that abuse of Iraqi prisoners constituted human rights abuses, the official response to earlier allegations of similar abuse in state prisons in Michigan suggested that prisoners warranted less humane treatment.[12]

9. *See, e.g.*, Tom Bowman, *Reservist Sentenced to 8 years in Abu Ghraib Abuse*, Baltimore Sun, Oct. 22, 2004 at 1A (observing that the reservist was a former guard in Virginia state prison system); Philip Gourevitch & Errol Morris, *Annals of War: Exposure*, The New Yorker, Mar. 24, 2008, at 44, 49 (noting that a couple of the soldiers at Abu Ghraib were corrections officers back home); Edward Wong, *Top Commanders Face Questioning on Prison Abuse*, N.Y. Times, June 22, 2004, at A1 (noting that an Abu Ghraib ringleader was identified as a former corrections guard in the United States).

10. Donald Rumsfeld, Secretary of Defense, Testimony before H. Armed Servs. Comm., 108th Cong. (May 7, 2004).

11. Elizabeth Alexander, Center for American Progress, *Abu Ghraib in America*, May 24, 2004, http://www.americanprogress.org/issues/2004/05/b81802.html (last visited Oct. 8, 2008); s*ee also Rights Groups Say Abu Ghraib Abuses Extension of U.S. Prison System,* The NewStandard, May 17, 2004, http://newstandardnews.net/content/?action=show_item&itemid=360 (last visited Oct. 8, 2008) (arguing that abuses in U.S. correctional facilities were directly exported to Iraq through former American prison administrators).

12. *See* Deborah Labelle, *Ensuring Rights for All: Realizing Human Rights for Prisoners*, *in* 3 Bringing Human Rights Home 122 (Cynthia Soohoo et. al. eds.,

How is it that the mistreatment of prisoners who had officially been labeled as "enemy combatants" and "terrorists" was recognized as a human rights violation, while the very concept of human rights for incarcerated American citizens has been routinely rejected based on their lesser status as prisoners?

By focusing on the status of the victim, and not on an objective standard of humane treatment, prison officials in the United States are all too often able to avoid adherence to a standard of care that is not mutable based on the circumstances of the object of the abuse. In contrast, international human rights documents provide standards based on the non-defeasible humanness of the object of the challenged treatment. Despite the alleged "sins" of the prisoner, human rights treaties maintain the recognition of the individual as a human being entitled to basic dignity and rights accorded to all individuals based solely on their humanity.[13]

Treatment of prisoners in the United States, in contrast, has always been diminished by the construct that those detained in jails and prisons, in addition to the loss of civil and political rights associated with violating laws, are reduced to a lesser human status. Having violated the social contract they are regarded as diminished beings, not entitled to the rights which are accorded good citizens. The common official terms used are "inmate," "offender," "prisoner," or "criminal," and never the designation of "citizen" used by the Canadian Courts, for example, when analyzing claims of rights violations in Canadian prisons.[14]

Over two million people are held in prisons, jails, and detention facilities in the United States, and over the last decade the total number of inmates in custody increased by approximately 42%, with the federal prison population more than doubling.[15] Without a human rights framework creating a baseline for humane treatment, the increasing numbers of people who are incarcerated are at the

2008).

13. *See* UDHR, *supra* note 6, at 71–72 ("*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, . . . *Now, therefore, The General Assembly Proclaims* . . . All human beings are born free and equal in dignity and rights.").

14. *See, e.g.*, Sauvé v. Canada, [2002] 3 S.C.R. 519 (Can.) (analyzing claims of rights violations with respect to the right of incarcerated individuals to vote).

15. William J. Sabol et al., U.S. Dep't of Justice, Prison and Jail Inmates at Midyear 2006 1, 8 (2007), *available at* http://www.ojp.gov/bjs/pub/pdf/pjim06.pdf.

mercy of changing social doctrines on the origins of crimes and the resultant manner of punishment, protected only by equally varying judicial interpretations of what constitutes the baseline for prohibited unusual cruelty.[16]

The absence of applicable human rights doctrines also endangers the humanity of those who operate the prisons and jails, a growing workforce in the United States. Human rights doctrines contain the inherent recognition that a failure to recognize the humanness of the object ultimately degrades the humanity of those in control.[17] As the military personnel captured on film in the Abu Ghraib prison in Iraq were ultimately viewed as having degraded themselves and brought shame on the United States, abuses in U.S. prisons demean the officers perpetrating the abuse, and the impact of the abuse extends beyond the object to alter the lives of the staff, prisoners' families, the system, and our own humanity. The oft referenced reminder by Dostoevsky, that the degree of civilization in a society can be judged by entering its prisons, encompasses both recognition of the duality of human rights and a warning of the cost of ignoring its application to those regarded as least entitled to its shield. [18]

This Article explores both the import of realizing human rights as the framework for ensuring humane treatment of prisoners in the United States, and analyzes the impact this strategy has had when used to address the mistreatment of women and juveniles incarcerated in this country's prisons and jails. Part I will describe the history of the Prisoners' Rights Movement and how U.S. courts have handled challenges to prisoners' rights violations. Part II will explain how human rights concepts have become infused in domestic advocacy for prisoners' rights. In order to illustrate the positive impact of collaboration with human rights advocates in pursuing a litigation strategy, Part III will use the example of custodial abuse of

16. *See* Martin Geer, *Protection of Female Prisoners: Dissolving Standards of Decency*, 2 Margins: Md. L. J. on Race, Religion, Gender, and Class 175, 194–98 (2002) (discussing the factors that have arguably contributed to the dissolution of standards of decency in women's prisons).

17. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that corporal punishment in public schools is not prohibited by the Eighth Amendment).

18. *See* Fyodor M. Dostoevsky, Memoirs from the House of the Dead 76 (Oxford Univ. Press 1956) (1861) (memoirs written from a Russian prison in Omsk).

women prisoners in Michigan, and Part VI will use the example of sentencing juveniles to life without the possibility of parole in U.S. prisons. Lastly, Part V addresses how an integrated model using a human rights framework to address basic rights violations has been successful in the United States.

I. PRISONERS' RIGHTS ADVOCACY IN THE UNITED STATES

Penitentiaries came into broad use in this country in the 1820s with a goal of rehabilitating those caught up in criminal activity, whose criminality was generally believed to result from negative social influences or a failure of upbringing. [19] As crime increased in the 19th century, empathy waned and punishment replaced reform.[20]

Both the length of confinement and the harshness of conditions increased unabated as statutes enacted during the 19th century divested prisoners of civil and political rights on the theory that they ceased to exist as legal persons after their conviction.[21] These so-called civil death statutes prohibited persons convicted of a felony from bringing any civil action and prevented challenges to the conditions of their confinement or treatment while incarcerated.[22] Civil death statutes had a long reign, lapsing into desuetude a hundred years later with the concurrent rise of the prisoners' rights movement. Described then as "archaic remnants of an era which viewed inmates as being stripped of their constitutional rights at the prison gate,"[23] the elimination of the civil death statute and the rise of the prisoners' rights movement in the 1960s paved the way for

19. Blake McKelvey, American Prisons: A Study in American Social History Prior to 1915 7–13 (1936).

20. David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 108 (1971).

21. Allen W. Burton, *Prisoners' Suits for Money Damages: An Exception to the Administrative Exhaustion Requirement of the Prison Litigation Reform Act*, 69 Fordham L. Rev. 1359, 1363 (2001).

22. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) ("[A prisoner] 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."). *See generally* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 929 (1970) (explaining historical developments of the civil death statutes and other civil disability laws).

23. Thompson v. Bond, 421 F. Supp. 878, 882 (W.D. Mo. 1976).

prisoners acting as "jail house lawyers" and civil rights lawyers to address mistreatment in U.S. prisons through litigation alleging violations of the constitution.

While most grassroots movements on behalf of and by individuals who face discriminatory hurdles for equity and humane treatment face organizational difficulties, building a prisoners' rights movement involved the additional difficulties of a community both disenfranchised and incarcerated. Prisoners' inability to communicate freely with each other and restrictions on their communications with the outside world made organization and movement building extremely difficult. Challenges to these restrictions were consistently rejected by the courts, which upheld prison rules prohibiting prisoner unions, limiting meetings and prisoner petitions, and restricting visitation with the outside world.[24] Therefore, throughout the early years of the movement, lawyers who, with the exception of clergy, alone had ready access to prisoners became major contributors to the movement and the call for humane treatment of prisoners.

Prisoners, most notably with the riots at the Attica State Prison in New York in 1971, called attention to their abysmal treatment by pointing to how they have suffered long term isolation in dungeon-like holes, beatings, inadequate food, racial discrimination, and rampant violence in the prisons of this country. And lawyers, armed with government legal services funding and private foundation money, made possible expensive and time consuming legal challenges to violations of the constitutional rights of prisoners. As discussed below, early legal victories by lawyers challenging conditions of confinement of prisoners under the Federal Civil Rights Act,[25] which enabled prisoners to sue for violations of their constitutional rights to be free from cruel and unusual punishment, paved the way for judicial intervention in the isolated and secretive prisons and jails of the United States, which had been operating with little oversight and under few restraints.

24. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 119–20 (1977) (upholding regulations prohibiting members of a prison inmate "labor union" from soliciting members, holding meetings, and distributing their publications as constitutional).

25. *See* 42 U.S.C. § 1983 (2000 & Supp. V 2005) (providing a private right of action to any person who can claim that he or she was deprived of a constitutional right by a defendant while acting under color of state law).

One of the early victories brought initially by jailhouse lawyers, and fought by court appointed counsel, was a challenge to the constitutionality of the whip. While authorized corporal punishment for minor prison infractions had been on the wane, solitary confinement remained a consistent punishment for both minor and major violations of prison rules. With increasing numbers of prisoners and concomitant limitations on solitary confinement space, whippings were used as the primary disciplinary tool.[26] In *Jackson v. Bishop,* a case brought by prisoners in Arkansas in 1968, routine whippings as the formal method of controlling prisoners were struck down as violating the Constitution's Eighth Amendment ban on cruel or unusual punishment.[27] A panel of three federal court judges found the imposition of uncontrolled whippings to the bare skin of prisoners with a five-foot strap to be cruel and unusual.[28] The Court rejected the claim that the punishment was necessary for discipline, noting that "[c]orporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike."[29]

The next ten years saw a series of legal challenges to the mode of punishment, mistreatment, and restrictions on the rights of prisoners reach the U.S. Supreme Court.[30] In 1978, the Supreme Court returned to the conditions of prisoners in Arkansas. Prisoners, who had been successful ten years earlier in ending the official use of electric shocks and physical beatings as methods of discipline and punishment, now challenged their incarceration in 8 x 10 foot

26. Rothman, *supra* note 20, at 101–02.

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

28. *Id.* at 580.

29. *Id.* at 580–81.

30. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (holding as constitutional, regulations promulgated by the N.C. Department of Corrections prohibiting members of a prison inmate "labor union" from soliciting members, holding meetings, and distributing their publication); Procunier v. Martinez, 416 U.S. 396 (1974) (holding censorship of personal correspondence constitutional if necessary to further a legitimate governmental interest, but finding a ban against attorney-client interviews conducted by law students or legal paraprofessionals to be an unconstitutional restriction on the right of access to the courts); Wolff v. McDonnell, 418 U.S. 539 (1974) (holding that due process requires giving prisoners advance notice, a written statement of factual findings, and a right to call witnesses and present evidence prior to imposing loss of good-time or solitary confinement); Lee v. Washington, 390 U.S. 333 (1968) (holding that statutes requiring segregation of races in prisons and jails are unconstitutional).

windowless cells for indeterminate periods of time as violative of the Eighth Amendment's proscription against cruel and unusual punishment. The prisoners successfully argued that the Eighth Amendment prevents more than physically barbarous punishment, and the Supreme Court in *Hutto v. Finney* found the Eighth Amendment to prohibit penalties that are grossly disproportionate to the offense,[31] as well as those that transgress "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[32] Depending on the infraction, the length of time prisoners were kept in the hole, and the conditions under which they were maintained, nonphysical punishment could contravene the Eighth Amendment's proscription against cruel and unusual punishment.[33]

This ruling, edging toward an understanding that prisoners were entitled to be treated in a nondegrading manner, followed a series of decisions that recognized that while imprisonment necessarily made unavailable many rights and privileges of the ordinary citizen, a prisoner is not wholly stripped of constitutional protections when he is imprisoned. In a talisman phrase, the Supreme Court in *Wolff v. McDonnell* opined that "though his rights may be diminished by the needs and exigencies of the institutional environment . . . [t]here is no iron curtain drawn between the Constitution and the prisons of this country."[34] Courts held that prisoners enjoy numerous rights, including religious freedom under the First and Fourteenth Amendments,[35] the right of access to the courts,[36] and protection from invidious discrimination based on race under the Equal Protection Clause of the Fourteenth Amendment.[37] Prisoners were also advised they could claim the protections of the Due Process Clause in circumstances depriving them of life, liberty, or property[38] and could not be denied basic medical care.[39]

31. Hutto v. Finney, 437 U.S. 678, 685 (1978) (citing Weems v. United States, 217 U.S. 349, 367 (1910)).

32. *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

33. *Id.* at 686–87.

34. *Wolff*, 418 U.S. at 555–56.

35. Cruz v. Beto, 405 U.S. 319 (1972).

36. Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941).

37. Lee v. Washington, 390 U.S. 333 (1968).

38. *Wolff*, 418 U.S. at 556.

39. Estelle v. Gamble, 429 U.S. 97 (1976).

The devil, of course, was in the details, or application of the law to the facts. Many states operated systems that were blatantly racist, with routine reports of beatings and intolerable conditions of confinement.[40] Before the rulings of the Supreme Court in the 1970s and 1980s could take force, the judicial pendulum began to swing the other way.

The next ten years saw a Supreme Court in retreat from intervention in state prisons with statements of concern for the over-involvement of the federal judiciary in the operations of state prisons. Despite testimony of abuses, injunctions and remedial orders issued by federal trial court judges were overturned for their lack of deference to prison authorities.[41] This was done as prison officials raised the specter of inmate violence and concerns for public safety should they be constrained in how they operated prisons. This included concerns about their power place restrictions on prisoners' rights and the manner in which non-corporal punishment was meted

40. *See* Caryl Chessman, The Face of Justice xi (1957) (discussing intolerable conditions of confinement at San Quentin State Prison); Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections 41, 596 (1973) (characterizing correctional facilities as suffering from inhumane conditions, racial discrimination, and brutality); Justin Brooks, *How Can We Sleep While the Beds are Burning? The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later,* 47 Syracuse L. Rev. 159, 166–70 (1996) (discussing racist and violent conditions at Attica and Lucasville correctional facilities).

41. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."); Turner v. Safley, 482 U.S. 78, 84–85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources . . . [these] and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."); Block v. Rutherford, 468 U.S. 576, 588 (1984) ("[W]e are unwilling to substitute our judgment on these difficult and sensitive matters of institutional administration and security for that of 'the persons who are actually charged with and trained in the running' of such facilities." (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979))); *Bell*, 441 U.S. at 547 ("[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

out. [42] Gone were the acknowledgments of the reality that cruel treatment begot violence, and forgotten was the cause of the violence at Attica prison. Instead, it was complacently accepted that harsh treatment at prisons was a fact of life that prisoners had no choice but to tolerate as part of their punishment.[43]

Nor did the courts adhere to the Eighth Amendment as an objective standard for humane treatment in a civilized society. Rather, a new element crept into the analysis of whether punishment was cruel or unusual—whether the prison official meting out the challenged punishment had a culpable state of mind. A 1991 Supreme Court ruling by Justice Scalia held that a prisoner claiming that he was subjected to cruel and unusual punishment had to prove a culpable state of mind, or "deliberate indifference," on the part of prison officials.[44] Therefore, treatment that could objectively be construed as cruel or unusual would not violate the Constitution unless it was implemented with a kind of knowingness resulting in unnecessary pain.[45] This opened the door to punishment that would otherwise rise to the level of torture and other inhuman or degrading treatment being justified based on the motivations or necessities of correctional management.

The Supreme Court never looked back and became increasingly tolerant of ill treatment of prisoners at the same time that government funding for legal services declined overall and as prohibitions were placed on the remaining legal service organizations that received federal funding, specifically forbidding representation

42. *See Turner*, 482 U.S. at 91–93; *Block*, 468 U.S. at 587–89; *Bell*, 441 U.S. at 560–62.

43. Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("To the extent that such [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

44. Wilson v. Seiter, 501 U.S. 294, 299–302 (1991).

45. *Id.* at 305. Significantly, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . or for any reason based on discrimination of any kind" constitutes torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987) [hereinafter Convention Against Torture]. For an action to constitute cruel, inhuman or degrading treatment or punishment under the Convention, it need not be shown to be committed for a particular purpose or with any specific intent. *Id.*

of prisoners or challenges to the conditions of their confinement.[46] Foundation funding for direct legal challenges, which was never large to begin with, became increasingly hard to obtain and new federal statutes created barriers to both prisoners' and lawyers' ability to complain about conditions in America's prisons.

Edging back to the days of civil death statutes, the conservative majority of the Supreme Court, in decisions like *Lewis v. Casey*, limited the access of prisoners to basic books and tools for litigation.[47] Moreover, the federal Prison Litigation Reform Act (PLRA) enacted in 1996 explicitly erected barriers to prisoners and their lawyers in challenging their treatment in court by imposing financial punishments on lawyers, placing restrictions on judicial power to issue remedial orders, and barring the filing of federal litigation by prisoners themselves.[48] The Supreme Court stated the ostensible purpose for the PLRA: "Congress enacted [the PLRA] to reduce the quantity and improve the quality of prisoner suits."[49] Those cases that did reach the Supreme Court resulted in rulings largely deferential to the necessity of punishment involved in maintaining a correctional facility.[50] The correctional institutions'

46. 45 C.F.R. § 1637.3 (2008) ("A recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.").

47. Lewis v. Casey, 518 U.S. 343 (1996); *see also* Joseph A. Schouten, Note, *Not So Meaningful Anymore: Why a Library Is Required to Make a Prisoner's Access to the Courts Meaningful,* 45 Wm. & Mary L. Rev. 1195, 1202–04 (2004).

48. 18 U.S.C. § 3626(a)-(f) (2000 & Supp. V 2005) (restrictions on remedial relief); 28 U.S.C § 1915(b)-(g) (2000 & Supp. V 2005) (elimination of *in forma pauperis* filings and three strikes provision); 42 U.S.C. § 1997e(a) (2000 & Supp. V 2005) (exhaustion of administrative remedies requirements); § 1997e(d) (2000 & Supp. V 2005) (limits on attorney fees); § 1997e(e) (2000 & Supp. V 2005) (injury requirement). *See generally* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 Brook. L. Rev. 429 (2001) (discussing the interpretive problems, separation of powers issues, and practical obstacles to the vindication of constitutional rights that the provisions of the PLRA raise); Developments in the Law, *The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal District Judges*, 115 Harv. L. Rev. 1846, 1853–62 (2002) (reviewing the legislative history of the PLRA and analyzing specific provisions that illustrate Congress's distrust of federal district court judges).

49. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1633 (2003) (citing Porter v. Nussle, 534 U.S. 516, 524 (2002)).

50. *Id.*

penological objections of security and order were the relevant concerns for determining whether the punishment being challenged was cruel or unusual.

With an increasingly narrow interpretation of what constituted cruel and unusual punishment, prisoners had little left with which to tether their challenges of inhumane treatment. With one notable exception, *Hope v. Pelzer*,[51] the Supreme Court found little to chastise as punishment that violated the Eighth Amendment in U.S. prisons in the decade following *Wilson v. Seiter*.[52]

Hope involved the case of a prisoner in Alabama who challenged being handcuffed above his head to a hitching post shirtless in the sun without water or breaks for seven hours at a time as punishment for a rule infraction.[53] It garnered a strong dissent led by Justice Thomas who opined that the legitimate penological purpose of encouraging compliance with prison rules took the punishment out of the constraints of the Eighth Amendment.[54] Justice Thomas went as far as to advocate that the Eighth Amendment's proscription against cruel and unusual punishment was not applicable to claims of mistreatment or even torture during a prisoner's incarceration, arguing that the amendment applied solely to sentencing and was relevant only for a challenge to whether the punishment meted out by a judge was cruel or unusual.[55] In another dissenting opinion, Thomas argued that cruelty within the context of confinement was best addressed by a sort of capitalist system of human rights, in which the states would naturally be concerned about real torture in prisons that lacked any legitimate penological purpose.[56]

51. Hope v. Pelzer, 536 U.S. 730 (2002).

52. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 136–37 (2003) (holding that a two-year ban on visitation for inmates with two substance-abuse violations did not violate the constitutional prohibition against cruel and unusual punishment).

53. *Hope*, 536 U.S. at 734–35.

54. *Id.* at 759 (Thomas, J., dissenting) (distinguishing this legitimate penalogical purpose from the majority's interpretation of "gratuitous infliction of 'wanton and unnecessary' pain" (quoting *Id.* at 738 (majority opinion))).

55. *Id.* at 758, n.12 ("I continue to believe that '[c]onditions of confinement are not punishment in any recognizable sense of the term, unless imposed as part of a sentence.'" (quoting Farmer v. Brennan, 511 U.S. 825, 859 (1994))).

56. Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) (arguing that while abuse by guards may be deplorable the "responsibility for preventing and punishing such conduct rests not with the Federal Constitution

With the loss of the courts as fair arbitrators of the mistreatment of prisoners, many advocates began focusing on education, media, and legislative strategies. These advocates understood that the usual corporate concerns of cost/value analysis are often inapplicable where the issue entails both fears surrounding public safety and the rise of the prison industrial complex. This complex in turn provided its own impetus for continued prison buildups and resistance to outside oversight.

While Americans were being incarcerated in record numbers, exceeding any other country's use of incarceration for its citizens,[57] the previously effective mechanisms for challenging mistreatment were being severely restricted by federal legislation and conservative courts, as described above. Many states followed the federal legislation, enacting their own laws restricting not just challenges to conditions,[58] but challenges to sentences and denials of release, all while increasing the length and severity of punishments.[59]

Simultaneously, the rehabilitation model of corrections of the 1980s, which touted the use of vocational training and educational programs to rehabilitate prisoners, faded with increasing prison populations and the rising costs of incarceration. It was replaced with the augmented use of cold storage, super maximum facilities, and greater isolation from the outside world.[60] Meanwhile, prisons in the United States had become a multi-billion dollar industry. Indeed, in 2001 the budget for state corrections facilities exceeded thirty-eight billion dollars per annum.[61] It was this confluence of factors

but with the laws and regulations of the various States").

57. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations',* N.Y. Times, April 23, 2008, at A1; Roy Walmsley, Int'l Center for Prison Studies, King's College, London, World Prison Population List—Seventh Edition 1 (2007), *available at* http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf.

58. *See, e.g.*, Mich. Comp. Laws Ann. § 600.5503 (2000) (limiting prisoners' rights to file actions concerning prison conditions).

59. *See, e.g.*, Cal. Penal Code §§ 667, 1170.12 (West 1999, 2004 & Supp. 2007) (increasing length of incarceration for repeat felony offenders through "three-strikes" laws).

60. Human Rights Watch, Cold Storage: Super-Maximum Security Confinement in Indiana (1997), *available at* http://www.hrw.org/reports/1997/usind.

61. James J. Stephan, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf.

that created fertile ground for developing a human rights analysis to challenge inhumane treatment in U.S. prisons and jails.

II. HUMAN RIGHTS IN DOMESTIC PRISONERS' RIGHTS ADVOCACY

International covenants and treaties that establish basic principles for the treatment of individuals encompass persons incarcerated in prisons, jails, and detention centers around the world. The UDHR (1948), the Standard Minimum Rules for the Treatment of Prisoners (1957), the ICCPR (1976), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) (1987), are the most frequently cited treaties in documentation reports on the treatment of individuals in detention.[62] However, prior to the 1990s, those documentation reports created by international human rights organizations rarely included the United States in their worldwide investigations of prison conditions. Either as a consequence or perhaps as the rationale for their exclusion, international treaties and documents played little part in the advocacy in the United States for prisoners' rights, which was waged largely by attorneys and jail house lawyers.

In 1987, however, Human Rights Watch (HRW), the international human rights group, began a project which enlisted several of its divisions in the investigation and documentation of the treatment of prisoners with the goal of issuing a global report. This report, entitled *Human Rights Watch Global Report on Prisons*,[63] was issued two years after HRW issued a ground-breaking report, *Prison Conditions in the United States* in 1991.[64] Similarly, Amnesty International began turning its attention to the conditions in U.S. prisons in its investigation of compliance with international documents in the context of prisons.[65]

62. Also relevant to the specific issues addressed in this Article are CERD (1969), CEDAW (1981), and the Convention on the Rights of the Child (1990).

63. Human Rights Watch, Human Rights Watch Global Report on Prisons (1993), *available at* http://www.hrw.org/reports/pdfs/g/general/general2.936/general2936full.pdf.

64. Human Rights Watch, Prison Conditions in the United States (1991), *available at* http://hrw.org/reports/pdfs/u/us/us.91n/us91nfull.pdf.

65. Amnesty Int'l, U.S.A.: Rights for All (1998), *available at* http://www.amnesty.org/en/library/asset/AMR51/035/1998/en/dom-AMR510351998en.pdf.

In 1993, HRW and the American Civil Liberties Union (ACLU), a civil rights organization, worked together to issue a report on the United States' compliance with the ICCPR, urging enforcement of the ICCPR's provisions in U.S. courts with respect to prison conditions.[66] While this report analyzed major problems in U.S. prisons through a human rights lens, it relied heavily on federal judicial rulings, based on U.S. constitutional norms, to address violations of the ICCPR. This lessened the impact of the report's call to enforce the ICCPR in the context of U.S. prisons. However, the report's concern with the federal courts' tendency to diminish protections of prisoners based on their crimes, and its call for the recognition of a guarantee of humane treatment irrespective of the prisoner's crime,[67] presaged the events of the next decade, which heightened the need for a human rights framework to address abuse in U.S. prisons.

This report also ushered in a series of reports by Amnesty International and HRW, which in turn created collaborations between human rights organizations and activists to work directly with U.S. litigators and advocates on criminal justice issues in the United States.[68]

The documentation reports were a crucial vehicle for introducing those advocates for prison reform, prisoners and their attorneys, to human rights organizations and individuals working on the international stage. It also introduced a human rights framework and human rights language to the issue. For prisoners and their counsel—who rarely strayed from using domestic laws that specifically diminished status of prisoners—the introduction of international human rights documents proved to be instrumental in integrating human rights into prison reform work.

Those U.S. advocates who continued to limit themselves to the concept of prisoners' rights had, in some manner, accepted a diminished status and standard of rights. This construct also risked infecting the actions of corrections officials who, viewing prisoners as lesser beings, might have enforced a different standard of humane treatment and accorded prisoners a degraded treatment in direct

66. Human Rights Watch & American Civil Liberties Union, Human Rights Violations in the United States: A Report on U.S. Compliance with the International Covenant on Civil and Political Rights (1993).

67. *Id.* at 112.

68. *See supra* note 65; *infra* notes 69, 71.

proportion to the prison administration's conception of prisoners as lesser beings.

With larger numbers of prisoners serving longer time and with less opportunity to challenge either their treatment or their sentence, prisoner rights advocates from the Critical Resistance movement and lawyers and grassroots advocates began to recognize that a different approach was necessary. The breadth of the issues impacted by incarceration could not be encompassed within any one legal theory or expertise. They spilled out to affect advocacy work in the broad areas of:

- Challenges to the school-to-prison pipeline, the disparate impact on children of color, and the usurpation of education funding by building and operating prisons;
- Mental health and the recognition by professionals, prisoners, and family members that prisons were increasingly incarcerating people who were mentally ill and failing to provide treatment;
- Women's rights and the view of advocates addressing violence against women that the cycle of abuse and self-medication leads to incarceration and more abuse;
- Obvious race discrimination in the administration of the criminal justice system and the perpetuation of discriminatory treatment inside prisons;
- Volence targeted against gays, lesbians, and transgendered persons incarcerated in jails and prisons; and
- Finally, social and economic justice advocates who recognized the impact that incarceration was having on poor people and immigrants in the system.

The umbrella theory, through which advocates could engage in a single dialogue concerning relief for prisoners, existed not in domestic legal theories or case law but in human rights treaties. Human rights organizations' interest in the treatment of prisoners and the operation of U.S. prisons also increased with the production of a series of reports by HRW and Amnesty International. These reports covered a number of related topics, including custodial sexual abuse of women prisoners in American prisons,[69] the human rights

69. Amnesty Int'l, U.S.A.: "Not Part of My Sentence"—Violations of the Human Rights of Women in Custody (1999), *available at* http://www.

violations against prisoners held in super maximum holding units (SHUs),[70] and the sexual violence endemic to men's prisons.[71] Amnesty International also addressed many of these issues in its 1998 report, *Rights for All.*[72]

With the recognition that large numbers of American citizens would spend some part of their life in a prison or jail cell, reliance solely on diminishing prisoner rights law to challenge inhumane treatment was neither appropriate nor tenable. Domestic lawyers began to explore alternative theories and bases to pursue legal challenges to the mistreatment of prisoners. Thus, the laws and treaties establishing baseline standards applicable to all persons took on a heightened relevance.

Both the difficulty and value of utilizing a human rights framework for domestic challenges to the mistreatment of prisoners in the United States are explored in the following two case studies, involving the custodial abuse of women prisoners in a state prison in Michigan and the sentencing of juveniles serving life without the possibility of parole in American prisons.

III. HUMAN RIGHTS FOR WOMEN PRISONERS IN THE UNITED STATES

Domestic remedies for issues facing the rising population of women prisoners in the United States were becoming progressively difficult to come by in the 1980s and 1990s. In 1980, there were 12,300 women in state and federal prisons in the United States.[73] This number increased more than seven fold to 87,199 by June of

amnesty.org/en/library/asset/AMR51/019/1999/en/dom-AMR510191999en.pdf; Human Rights Watch, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons (1996), *available at* http://www.hrw.org/reports/1996/Us1.htm [hereinafter Human Rights Watch, All Too Familiar]; Human Rights Watch, Nowhere to Hide: Retaliation against Women in Michigan State Prisons (1998), *available at* http://www.hrw.org/reports98/women [hereinafter Human Rights Watch, Nowhere to Hide].

70. Human Rights Watch, *supra* note 60.

71. Human Rights Watch, No Escape: Male Rape in U.S. Prisons (2001), *available at* http://www.hrw.org/reports/2001/prison/report.html.

72. Amnesty Int'l, *supra* note 65.

73. Sheryl Pimlott & Rosemary C. Sarri, *The Forgotten Group: Women in Prisons and Jails*, *in* Women at the Margins: Neglect, Punishment and Resistance 55, 56 (Josefina Figueira-McDonough & Rosemary C. Sarri eds., 2002).

1999.[74] By 2006, there were over 200,000 incarcerated females in the United States.[75]

Groups with widely diverse interests began recognizing the social costs resulting from the increase in the incarceration of women, the vast majority of whom were mothers and family caretakers.[76] Incarceration of these women, largely for nonviolent property and drug offenses, increased the burden on corrections facilities while women's child-rearing responsibilities made for a uniquely problematic incarceration period.[77] There was also a growing awareness of the additional punishments, in the form of sexual and physical violence, which women were subjected to during their incarceration, and the ripple effect the resultant trauma had on their communities upon their release.[78] Yet during this time there had been neither widespread exposure of the abuse nor significant legal challenges to the mistreatment of women prisoners.

Previously, major prisoner rights litigation had focused largely on the conditions for the majority of prisoners, men, with litigation on behalf of women prisoners limited to equal protection challenges to their denial of comparable educational and vocational training and denial of gender based health care.[79] Education and skills training were provided based on the belief that rehabilitation of the majority of prisoners depended on their obtaining bona fide occupational skills which would best help them become self-supporting, reintegrated members of society.[80] This approach,

74. Allen Beck, U.S. Dep't of Justice, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 1999 4 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim99.pdf.

75. There were107,500 women in federal and state prisons and 94,600 women in local prisons. *See* The Sentencing Project, New Incarceration Figures: Thirty-Three Consecutive Years of Growth 2 (2006), *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf.

76. Pimlott & Sarri, *supra* note 73, at 74.

77. Nicole Hahn Rafter, Partial Justice: Women, Prisons and Social Control 179, 183, 186 (Northeastern Univ. Press 1985).

78. *Id.* at 178; Meda Chesney-Lind, The Female Offender: Girls, Women and Crime 165–67 (1997).

79. *See, e.g.*, Human Rights Watch, All Too Familiar, *supra* note 69, at 288–89 (discussing the case of Blackman v. Coughlin, No. 84-5698 (N.Y. Sept. 1993) (stipulation and order granting only reforms in medical treatment for prisoners in response to charges of sexual harassment and invasion of privacy)).

80. *See* Nicole Hahn Rafter, *Equality or Difference*, *in* Female Offenders: Meeting the Needs of a Neglected Population 7, 8–9 (American Correctional Association ed., 1993).

however, was not applied equally to women prisoners based, in part, on a different rationale accepted for women prisoners' status as convicted felons. Historical explanations for female lawbreakers as gender aberrants lingered through the early 1960s in the United States and the belief that criminal behavior by women could be traced to a failed femininity guided the rehabilitation programs for women.[81] Therefore, while male prisoners were receiving skills dedicated to economic redemption, women prisoners were being schooled in home economics, parenting classes, and models of obedience to reclaim their femininity.[82]

The disparity in opportunity led a group of women prisoners in Michigan to file the first class action suit on behalf of women prisoners, *Glover v. Johnson*.[83] They successfully argued that their right to equal protection under the Constitution was violated by the absence of rehabilitation opportunities similar to those provided to male prisoners. The court ordered the state to provide improved educational, vocational, and apprenticeship training for women prisoners.[84] Despite the order, the corrections system continued to deprive women prisoners of much of the programming that would provide opportunity for rehabilitation. Additional court orders to enforce the initial ruling were unable to achieve substantial parity in training programs available to male and female prisoners.[85]

The legal strategy of using equal protection law to address problems with the treatment of women prisoners through a gender discrimination lens was limited and did not advance an independent model for treatment of prisoners with respect to their dignity and value as human beings. These concepts were, however, embedded in human rights documents. Moreover, some courts had taken aim at

81. *Id.*

82. *Id.*

83. The *Glover* litigation spanned more than twenty years as the federal Courts struggled to address and enforce parity in women's treatment and rehabilitative opportunities while addressing gender differences. *See* Glover v. Johnson, 478 F. Supp 1075 (E.D. Mich. 1979); Glover v. Johnson, 721 F. Supp 808 (E.D. Mich 1989), *aff'd in part, rev'd in part*, 934 F.2d 703 (6th Cir. 1991); Glover v. Johnson, 75 F.3d 264 (6th Cir. 1996); Glover v. Johnson, 138 F.3d 229 (6th Cir. 1998).

84. *Glover*, 478 F. Supp. at 1102–03.

85. *Glover v. Johnson: Judicial Constraint and Enforcement of Constitutional Rights in Prison*, Civil Rights Litigation Clearing House, Wash. U. Sch. of L., 32–36 (1999), http://clearinghouse.wustl.edu/chDocs/resources/caseStudy_NameRedacted_1221018437.pdf (last visited Oct. 8, 2008).

the *Glover v. Johnson* ruling, finding violations of women prisoners' equal protection rights only when they were provided inferior programming as compared to male prisoners, and requiring that women prisoners be similarly situated to the male prisoners in order to warrant the same services.

The Eighth Circuit Court of Appeals, in reviewing an equal protection challenge by women prisoners in Nebraska against their denial of equal rehabilitation opportunities, approved the existence of separate but unequal facilities for male and female prisoners, reasoning that women prisoners were not similarly situated to male prisoners due to the different profile of women prisoners and their smaller numbers.[86] The Court noted that women prisoners were generally single mothers with substance abuse histories, as compared to male prisoners who were most often incarcerated for violent crimes and not the custodians of children.[87] It used these differences to deny women prisoners equal educational and program opportunities, rather than create a model of rehabilitative opportunity that took into consideration differences to enhance program choices. The Court, after finding the male and female prisoners to be different, rejected the women prisoners' equal protection claims stating, "dissimilar treatment of dissimilarly situated persons does not violate equal protection."[88] The court asserted that only if two people were identical and did not receive equal treatment, could they challenge the unequal treatment. The

86. Nebraska v. Klinger, 31 F.3d 727, 728 (8th Cir. 1994). As the dissent in a later case following *Klinger* noted: "Two people commit the same crime. Each is similarly convicted by a [court]. In all respects—criminal history, family circumstances, education, drug use, favorite baseball team—they are identical. All save one, that is: they are of different sexes. Solely because of that difference, they are sent to different facilities at which the man enjoys superior programming options. . . . The court relies on the different characteristics of *the facilities* to conclude that the otherwise identical men and women incarcerated therein are not similarly situated, and on that basis holds that there can be no judicial comparison of the differences in the treatment accorded to them." Women Prisoners v. District of Columbia, 93 F.3d 910, 951 (D.C. Cir. 1996) (Rogers, J., dissenting).

87. *Klinger*, 31 F.3d at 731–32; *see also* Keevan v. Smith, 100 F.3d 644, 647–50 (8th Cir. 1996) (finding that female inmates are not similarly situated to male inmates because female inmates have a shorter average sentence length and have committed less serious crimes and because female-only facilities have fewer prisoners and are necessarily smaller in size).

88. *Klinger*, 31 F.3d at 731.

ruling moved the analysis of constitutional based rights away from an inclusive model of human rights and dignity for all.

However, human rights documents provided a fresh perspective on growing concern for the endemic custodial sexual abuse in women's prisons in the United States. For example, the United Nations Declaration on the Elimination of Violence Against Women prohibited "any act of gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life."[89] This provided a universal framework that codified core values of human dignity and equality available to all individuals, including prisoners. Human rights documents, based solely on one's status as a human, provided a core right to entitlements that could not be truncated based upon incarceration, gender, or the changing perception of how to treat convicted felons in America.

As a final deterrent to relying solely on the Constitution as a basis for challenging inhumane treatment of women prisoners, the Prison Litigation Reform Act (PLRA) wound its way through the U.S. Congress and was signed into law in April 1996. The PLRA dramatically limited available remedies and judicial oversight and created disincentives for lawyers to represent prisoners.[90]

It was in this milieu that women prisoners in Michigan decided to file a class action lawsuit seeking relief from years of sexual assaults, rapes, and sexual harassment by male guards and staff employed by the Michigan Department of Corrections. In light of the impending implementation of the federal PLRA, cases were filed in both federal court[91] and in state court.[92] The cases argued

89. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, at 3, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

90. *See supra* notes 48–50 and accompanying text.

91. Nunn v. Mich. Dep't of Corr., No. 96-CV-71416, 1997 WL 33559323 (E.D. Mich. 1997) (female prisoners asserting claims under the First, Fourth, Eighth, Ninth, and Fourteenth Amendments to the U.S. Constitution as well as 42 U.S.C. § 1997 (1994) for various degrees of sexual assault, sexual harassment, violation of privacy, physical threats, assault, and retaliation).

92. Neal v. Mich. Dep't of Corr., 592 N.W.2d 370 (Mich. Ct. App. 1998), *appeal denied,* 649 N.W.2d 82 (Mich. 2002) (female prisoners bringing a class-action suit under Michigan's Civil Rights Act seeking injunctive and declaratory relief for alleged gender-based discriminatory conduct, sexual harassment, and retaliation).

that the sexual harassment, degrading treatment, and rapes of women and girl prisoners by male custodial staff in Michigan had become endemic. The plaintiffs alleged hundreds of incidents ranging from the prurient viewing of naked women, routine groping of women's breasts and genitalia under the guise of security pat down searches, common and constant use of sexually degrading and demeaning language, and penetrative rapes.[93] The lawsuits challenged the treatment under standard constitutional and civil rights frameworks and sought traditional remedies of injunctive relief and damages.[94] The state's response was to move to dismiss the federal lawsuit as impermissible under the newly passed PLRA, and to move to dismiss the state lawsuit by arguing that the state civil rights act which protected "all persons" did not protect prisoners who were not "persons" within the common understanding of the word.[95]

The lawsuits were filed in March 1996, while HRW was in the midst of a research project, conducting interviews in eleven state prisons on the prevalence of sexual misconduct by male officers in positions of authority over female prisoners.[96] Simultaneous to HRW embarking upon this documentation project, plaintiffs' counsel in Michigan were engaged in discovery in support of their class action litigation on similar issues.

A year after the women prisoners filed suit, and while HRW was completing its investigation, the U.S. Department of Justice joined the fray under their mandate to ensure the constitutional treatment of institutionalized persons. Six months before filing suit, the Justice Department had requested entry into the Michigan prisons to interview women and staff. The then governor of Michigan, John Engler, refused to allow the U.S. Attorney General access to the women's prisons. The Department of Justice responded with a findings letter, based upon their review of documents and correspondence, stating:

> [T]he sexual abuse of women prisoners by guards, including rapes, the lack of adequate medical care, including mental

93. *See Nunn*, 1997 WL 33559323 at *1, *4; *Neal*, 592 N.W.2d at 372; s*ee also* Human Rights Watch, Nowhere to Hide, *supra* note 69, at 17–25 (documenting cases brought in Michigan state and federal courts by female prisoners alleging rape, sexual abuse and assault, criminal sexual contact, verbal degradation, and privacy violations).

94. *See supra* notes 91–92.

95. *See Nunn*, 1997 WL 33559323 at *2; *Neal*, 592 N.W.2d at 374–75.

96. Human Rights Watch, All Too Familiar, *supra* note 69, at 1.

> health services, grossly deficient sanitation, crowding and other threats to the physical safety and well-being of prisoners, violates their constitutional rights . . . . [N]early every woman . . . interviewed reported various sexually aggressive acts of guards . . . . [A number of women reported that guards] routinely stand outside the cells of individual prisoners and watch them dress and undress [and] stand in the shower areas and observe showers and use of toilet facilities. Male maintenance workers stand and watch women inmates who are naked or in various states of undress as well—all on a regular basis without legitimate need . . . . We are unaware of any effort to accommodate the legitimate privacy interests of prisoners.[97]

Thus, three different groups—the women prisoners themselves, the U.S. Department of Justice, and HRW—were all on the field at the same time. All three groups utilized different frameworks from state, federal, and international law to examine the abusive treatment of women held in Michigan prisons. All three were to play central roles in the creation of the resulting remedies for women prisoners which relied, in the end, heavily on international standards.

The women prisoners' and the Department of Justice's lawsuits initially traveled somewhat similar paths in that they both sought increased training, adequate reporting mechanisms, investigations of allegations of sexual misconduct by correctional staff, and prompt discipline to ensure a constitutionally adequate environment for women prisoners.[98] The women prisoners also sought appropriate psychological counseling for women who had been assaulted and damages for their injuries.[99] The Department of Justice additionally sought to impose mechanisms to weed out likely predators from the state correctional staff before they were placed in

97. *Id.* at 236–37 (citing Letter from Deval Patrick, Assistant Attorney General, U.S. Dep't of Justice, to John Engler, Governor, Michigan (Mar. 27, 1995)).

98. *See, e.g.*, First Amended Complaint at 10–14, 23–24, Nunn v. Mich. Dep't of Corr., No. 96-CV-71416 (E.D. Mich. Jul. 31, 1997) (demanding relief to remedy Defendant's unlawful practices and policies and to deter future violations); Editorial, *Women in Prison: Facilities Mistreat Inmates, Disgrace State*, Detroit Free Press, Sept. 11, 1999, at 12A [hereinafter Detroit Free Press Editorial] (discussing the Department of Justice's lawsuit and settlement).

99. Second Amended Complaint at 17, 35–36, Neal v. Mich. Dep't of Corr., No: 96-6986 (Mich. Cir. Ct. Aug. 28, 2003); First Amended Complaint, *supra* note 98, at 24.

women's prisons, as well as the development of other protective standards and policies.[100]

The women prisoners and their lawyers cooperated with both HRW and the Department of Justice by participating in interviews and responding to fact finding requests. Despite their cooperation, the women and their attorneys were uninformed and dubious of the ultimate value of HRW's concern over violations of international standards and treaties, which appeared unenforceable in the women prisoners' litigation. While the United States had been a leader in the promulgation of various international treaties and documents after World War II, and had been a proponent of private international law with regard to the laws of trade and property, significant human rights conventions and treaties had not been ratified in recent years.[101] Those documents that were ratified included significant exceptions and conditions, which either limited their enforceability or declared that, when in conflict, domestic law trumped the terms of international treaties and covenants.[102] The Department of Justice's attorneys were particularly wary of appearing to concede any applicability of the international standards; they asserted that the treaties and covenants were not self-executing against the United States and that domestic laws and statutes were adequate to ensure the humane treatment of the women prisoners.[103]

Attorneys for the women prisoners, who were struggling to obtain positive results under familiar state and federal civil rights statutes and constitutional law, were unconvinced of the value of international human rights law in domestic courts. International human rights claims had been brought primarily by foreign nationals

100. Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 Yale L. & Pol'y Rev. 195, 205–06 (1999).

101. *See* David Weissbrodt & Connie de la Vega, International Human Rights Law: An Introduction 20–26 (2007) (depicting American involvement in promulgating human rights standards after World War II); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l. L. 341, 341–50 (1995) (critiquing U.S. reservations to ratifying human rights treaties).

102. Henkin, *supra* note 101.

103. *See* Letter from Regan Ralph, Executive Director, Women's Rights Division, Human Rights Watch, to Janet Reno, Attorney General, U.S. Dep't of Justice (June 11, 1999), *available at* http://hrw.org/english/docs/1999/06/11/usdom4183.htm (writing about the "gross inadequacy" of the Department of Justice's settlement with the Michigan Department of Corrections).

for harms suffered on foreign soil, and there had been little development of international human rights law in the context of claims against domestic actors based upon incidents that occurred in the United States.[104] While federal courts grew increasingly unsympathetic to any claims brought by prisoners challenging the conditions of their confinement under U.S. law, it seemed unlikely, at best, that the courts would be receptive to an argument that the conditions of confinement violated international laws, treaties, and standards that had heretofore not been enforced in the domestic context.

HRW concluded its interviews and research after two and half years with a documentation report entitled *All Too Familiar: Sexual Abuse of Women Prisoners in United States Prisons*, which focused on five states including the state of Michigan.[105] The HRW report found extensive sexual abuse perpetrated against women prisoners in U.S. state prisons. With regard to female prisoners in the Michigan system, the report found widespread abuse including rape, sexual harassment, forced abortions, privacy violations and retaliation, and noted that:

> [I]n the course of committing such gross misconduct, male officers have not only used actual or threatened physical force, but have also used their near total authority to provide or deny goods and privileges to female prisoners, to compel them to have sex or, in other cases, to reward them for having done so. . . . In addition to engaging in sexual relations with prisoners, male officers have used mandatory pat frisks or room searches to grope women's breasts, buttocks, and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas. Male correctional officers and staff have also engaged in regular verbal degradation and harassment of female prisoners, thus contributing to a custodial environment in the state prisons for women which is often highly sexualized and excessively hostile.[106]

Addressing these actions, HRW concluded that "[w]hen prison staff use force, the threat of force or other means of coercion to

104. Cynthia Soohoo, *Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer, in* 2 Bringing Human Rights Home 71, 71–98 (Cynthia Soohoo et al. eds., 2008).

105. Human Rights Watch, All Too Familiar, *supra* note 69.

106. *Id.* at 1–2.

compel a prisoner to engage in sexual intercourse, their acts constitute rape and, therefore, torture."[107] The HRW report addressed the sexual abuse in Michigan as violations of the International Covenant on Civil and Political Rights (ICCPR) [108] and the Convention Against Torture,[109] and recommend that, among other things, searches of women prisoners be conducted only by female staff and that male officers announce their presence before entering women's housing, toilet, and shower areas.[110]

The HRW report—issued at a time in the litigation[111] when the women were seeking to have the state court recognize the case as a class action, and the State of Michigan was seeking dismissal of the federal lawsuit asserting that the factual claims of abuse did not constitute a constitutional violation—garnered significant national publicity but little local attention. However, its value to the litigation became readily apparent to the women's attorneys. And while the documentation report was not conceptualized with domestic litigation in mind (indeed Michigan was the only state under review in which there was pending litigation), litigation with its judicial enforcement mechanisms was the most effective way to implement the remedial recommendations of the report.

The report, with its detailed factual findings, informed the court of the extent and range of abuses and helped to establish that there were enough women harmed to justify class action certification.

107. *Id.* at 231 (torture may also occur in instances of sexual touching involving severe physical or mental suffering).

108. ICCPR, *supra* note 6; *see also* Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) (the United States has not ratified the First Optional Protocol to the ICCPR). The United States attached five reservations, five understandings, and four declarations to its ratification of the ICCPR. Declarations and Reservations to the International Covenant on Civil and Political Rights, http://www2.ohchr.org/english/bodies/ratification/docs/DeclarationsReservationsICCPR.pdf (last visited Oct. 8, 2008).

109. Convention Against Torture, *supra* note 45. The United States attached three reservations, five understandings, and two declarations to its ratification of the Convention Against Torture, and did not declare itself bound by Article 22 of the Convention. Declarations and Reservations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm (last visited Oct. 8, 2008).

110. Human Rights Watch, All Too Familiar, *supra* note 69, at 272–80.

111. The author served as plaintiffs' counsel during the litigation and relates these experiences from her personal knowledge.

By having an independent agency document the extent and depth of the abuse being perpetrated in Michigan prisons by male correctional staff, the report also validated the factual allegations in the complaint and diminished the power of the States' denials. The detailed report, combined with the media attention surrounding its release, made any dismissal of the suit by the court based upon the state's mere denial of a problem of constitutional dimensions, extremely unlikely. While the complaint, at that time, contained only allegations of violations of the state and federal constitutions and civil rights statutes, the report raised the specter of violations of the Convention Against Torture, CEDAW, the ICCPR, and the United Nations Standard Minimum Rules for the Treatment of Prisoners. The federal judge in the case was aware of the possibility that domestic law might not sufficiently protect the rights of the women prisoners under international treaties and customary international law. Counsel had pointed out that if necessary, the plaintiffs would amend the complaint to add these claims, and observed that a number of prisoners were foreign nationals who might have had a greater entitlement to the protections of the international documents signed and ratified by their nation states. [112]

Federal and state judges are, understandably, fiercely protective of the state and federal constitutions they have sworn to uphold. They often believe that the constitutions provide more than sufficient rights for all individuals, including prisoners. Judges are also not immune from the general American perception that we provide leadership and are the standard bearers of civil and human rights around the world. To have an international human rights organization challenge the treatment of women prisoners in the U.S. as violating international norms and standards and hold these violations up to the world, gave the domestic courts a choice of either

112. *See generally* Martin Geer, *Human Rights and Wrongs in Our Backyard: Incorporating International Human Rights Protection Under Domestic Civil Rights Law—A Case Study of Women in U.S. Prisons*, 13 Harv. Hum. Rts. J. 71 (2000) (examining human rights violations in U.S. women's prisons and arguing that courts should use domestic civil rights law to incorporate international human rights standards into our domestic jurisprudence); Catherine Powell, *Dialogic Federalism Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. Pa. L. Rev 245 (2001) (examining how state and local governments have taken the lead in adopting human rights treaties and arguing for a model of "dialogic federalism," where different levels of government cooperate to implement fully international human rights law into the United States).

disregarding the findings of the report or finding a way for the Constitution to provide an adequate mechanism for remedying these violations.

By attaching the HRW Report to the pleadings filed in the state and federal courts, the attorneys also introduced an entirely new perspective on the treatment of women prisoners in Michigan, and provided the court with a glimpse of possible remedial measures both through the recommendations and through the opportunity to view best practices already in existence in other states and countries. Educating the courts early on that there were states and countries that did not have the level of abuse that existed in Michigan's women's prisons significantly diminished the standard second line of defense for corrections officials to challenges to conditions of confinement—defending the challenged condition as an unavoidable consequence of housing dangerous felons and resisting remedial measures as incompatible with penological objectives and security concerns. In possession of examples of other countries and states that managed to house their women prisoners without pervasive sexual abuse by male guards, the court could disregard this defense without impermissibly failing to give deference to the expertise of corrections management.

Outside of the courtroom, but no less important for the success of the litigation, the HRW report was distributed to the women prisoners and proved to be an important organizing and solidifying tool for the class. The women saw a concrete result from their willingness to disclose the details of their abuse with an international agency that recognized them as humans entitled to be treated with dignity and respect, lifting the veil of isolation and despair that had descended upon a group of women who believed not only that no one was listening, but also that even if they were heard no one would care. The report also introduced women to the existence of their counterparts in other states, lessening the self-blaming guilt that was a constant companion for many of the women who had been raped by guards, and provided new non-legal language in which to assert their entitlement to non-degrading treatment and basic human rights.

The use of human rights, as opposed to prisoners' rights, became more than a semantic distinction in the case and began to inform the way participants viewed the issues. It is easier to disregard the statements of the "convicted female felon," the

"prisoner inmate" or the "felony offender," as the Defendant Corrections Department often referred to them, than it is to disregard the human rights of an incarcerated woman. The language of humane treatment, degrading treatment of women, and human rights, began to be repeated by the media as the case progressed, and was adopted by the women's attorneys and ultimately echoed by the court.[113]

The HRW report, as introduced by the plaintiffs in the federal and state litigation, also provided a more intangible, but no less important, benefit to the domestic litigation. The perception by the courts that this was not just another prisoner case seeking damages, but rather a case of international human rights importance, had a lasting impact on both of the judges. The judges, who had sentenced some of the very clients that were now before them seeking protection, relief, and damages were provided a different lens through which to view the women in the litigation, as well as the goals and potential impact of their rulings beyond this case.

Finally, the report helped clarify available remedies for the abuse suffered by women prisoners in Michigan. Traditionally, the complaint, as filed, requests generalized categories of relief. This relief may include, for example, a declaration that the practices are unconstitutional, injunctive orders to remedy and prevent future unconstitutional practices and harm, and compensation for the damages and injuries suffered to date. While traditional discovery would have uncovered and detailed the abuse in the Michigan system and experts would have provided reports and testimony on the best practices in other states and detailed correctional standards, it is unlikely that a global view with regard to incarceration and treatment of women prisoners would have been provided to the court

113. Counsel for the women also attempted to reframe the language and status of their clients by including claims, in the federal litigation, of violations of the federal Violence Against Women Act. In the state case, counsel included central claims under the state's civil rights act, which prohibits discrimination, including sexual based harassment, against women in all public services and facilities. Unfortunately, after the cases were filed, the Supreme Court struck down the Violence Against Women's Act as unconstitutional, *see* United States v. Morrison, 529 U.S. 598 (2000), and when it was reauthorized it excluded the protection of women prisoners. Similarly, the state of Michigan amended the state's civil rights act to specifically deprive prisoners of protection against discrimination. Mich. Comp. Laws § 37.2301(b) (West 2001).

absent the documentation and report of HRW, and the subsequent report by Amnesty International.[114] The knowledge that several international documents supported the concept that the supervision of women prisoners should be limited to female staff, and that the majority of the world had accepted this as a minimum standard, would have eluded the parties.

In Michigan, the supervision of women prisoners was largely by male staff who performed the vast majority of body searches of women prisoners and routinely viewed women nude and performing basic bodily functions.[115] In many instances, the midnight shift at the women prisons would be comprised entirely of male guards with full access to the women.[116] The unfettered access, prurient viewing, and constant touching all worked to create a culture of sexual abuse and degradation in the women's facilities. The state steadfastly refused to consider gender-specific supervision and the Department of Justice also declined to consider the remedy of eliminating cross gender supervision and body searches.

Yet, HRW reported on the Standard Minimum Rules for the Treatment of Prisoners adopted by the first United Nations Congress on the Prevention of Crime and Treatment of Prisoners in 1955 as well as the Basic Principles on the Treatment of Prisoners adopted in 1996.[117] These rules and principles, as well as the Convention Against Torture and CEDAW, set forth international standards for the treatment of prisoners, including women in detention. The United Nations Standard Minimum Rules for the Treatment of Prisoners represented a global consensus for the standards applicable to women prisoners, including the requirement that male staff shall not enter the part of the institution set aside for women unless accompanied by a female officer and that women prisoners shall be under the authority of and attended and supervised only by woman officers.[118] Although the United States had, in 1975, indicated

114. *See* Amnesty Int'l, *supra* note 69.

115. *See supra* notes 97, 106 and accompanying text.

116. Human Rights Watch, All Too Familiar, *supra* note 69, at 239–40.

117. *Id.* at 45–47.

118. United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex I, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977); *see* Penal Reform Int'l, Making Standards Work: An International Handbook on Good Prison Practice 150–51 (2001), *available at* http://www.penalreform.org/making-standards-work-

their full compliance with implementation of these standards, the United States had lapsed into noncompliance beginning in the 1980s.[119] No domestic standards set forth these provisions. Plaintiffs' counsel, who heretofore had had no basis upon which to assert the provisions as a remedy, now had the entire world.

In 1998, Amnesty International issued an extensive report of its investigations of a variety of human rights violations in the United States and paid particular attention to abuses within correctional facilities, with specific discussions of the violations occurring in the women's prisons in Michigan.[120] Amnesty International also made recommendations to state officials on ways to comply with the international human rights standards, including the removal of male staff from the housing units of the women's prisons.[121] The women prisoners' demands for a change in supervision and cross-gender pat downs were now bolstered by two international organization's recommendations for adherence to these international norms.

In 1998, the United Nations Commission on Human Rights appointed a Special Rapporteur, Radhika Coomaraswamy, to investigate the treatment of women prisoners in the United States as part of her mandate to investigate the causes and consequences of violence against women.[122] The reports of the international human rights organizations and the supporting documentation from the litigation were largely responsible for this mission.[123]

The State Department approved the visit and the Special Rapporteur prepared to visit Michigan's prisons along with six other states. However, on the eve of her visit to Michigan, she received a

en.html (providing a detailed description of the rules and their genesis).

119. For a full history of the United States' lapse into noncompliance, *see generally* Geer, *supra* note 16.

120. Amnesty Int'l, *supra* note 65, at 36.

121. Amnesty Int'l, *supra* note 71, at 9 ("[F]emale prisoners should be supervised only by female staff, in accordance with the Standard Minimum Rules [for the Treatment of Prisoners].").

122. *See* U.N. Econ. & Soc. Council (ECOSOC), Comm'n on Human Rights, *Addendum: Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 21, 1999) (Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Radhika Coomaraswamy).

123. *Id.* ¶¶ 6, 117.

letter from the then Governor of Michigan, John Engler, revoking his agreement to allow her to visit women prisoners and canceling her meetings with state representatives.[124] The refusal was grounded in part on the Governor's assertion that the United Nations was being used as a tool of the litigation.[125]

Nevertheless, the Special Rapporteur journeyed to Michigan to meet with lawyers, academics, former guards, and former prisoners, and despite the lack of cooperation, the conditions in Michigan's women prisons were included in her 1999 Violence Against Women Report.[126] The report detailed the credible allegations of both sexual abuse and retaliation and, recognizing the Standard Minimum Rules for the Treatment of Prisoners as augmented by the Basic Principles for the Treatment of Prisoners in 1996, stressed the need for gender specific supervision of women prisoners. [127]

In an act of reciprocity, plaintiffs' counsel for the women prisoners, both prior to and following the 1999 report of the Special Rapporteur, made presentations both at the United Nations Crime Prevention and Criminal Justice Congress in Vienna and at an ancillary meeting panel at a session of the United Nations Human Rights Commission in Geneva on the ongoing human rights violations occurring in Michigan's women prisons.

The local media then picked up on the reports in the Geneva press, reinforcing the relevance of the human rights framework and the scrutiny the state was being subjected to, in part because of the Governor's refusal to acknowledge the authority of the United Nations on this issue. The state's refusal to allow inspections subjected it to criticism in the local media, which revealed the prison system's history of rejecting international oversight and investigations into their conduct.[128]

HRW also returned to Michigan to follow up on reports that the women prisoners' cooperation with the international

124. *Id.* ¶ 9.

125. Detroit Free Press Editorial, *supra* note 98 (reporting that Governor Engler wrote, "I view the United Nations as an unwitting tool in the Justice Department's agenda to discredit the State of Michigan.").

126. ECOSOC, *supra* note 122, ¶¶ 145–51.

127. *Id.* ¶¶ 207(h), 217 (stating that certain posts and procedures within women's prisons should be gender-specific).

128. *See* Detroit Free Press Editorial, *supra* note 98.

organizations and participation in the litigation had resulted in severe retaliatory actions by staff against them, including physical assaults and abuse, incarceration in isolation cells for long periods of time, intensified threats of sexual abuse, threats to their family, denials of visits, and loss of paroles. The resulting report, entitled *Nowhere to Hide*, highlighted the near absolute power staff had over the women prisoners—controlling their access to the world and their freedom, the risks they incurred in speaking out, and the difficulty of addressing abuse in this punitive and secretive environment.[129] The report also reflected the interactive synergy between the litigation and human rights documentation. The acknowledgment of the impact of stepping forward and the price that women prisoners were paying both heightened the credibility of HRW among the women and confirmed the need for the litigation to seek additional remedial measures with regard to the retaliation.

Meanwhile, the litigation was continuing at both the state and federal levels. Hundreds of depositions were taken and weekly motions were occurring in federal court to address discovery issues, retaliation, and ongoing abuse. While no formal claims for violations of human rights had been filed, the language of the litigation both in the courtroom and in the media covering the litigation began incorporating the language of the recommendations of the reports and the observations of the United Nations calling for ensuring the human rights of women prisoners in Michigan. Phrases such as "degrading treatment" and "inhumane conditions" had replaced domestic legalese terms, and the call for removing male prisoners from the housing units of the female facilities was taken up by the Michigan state legislature as well as editorials in the local newspapers.[130]

The accumulated negative press, both from the local and national media, and the pressure of international scrutiny, the litigation itself, and the rejection by both the courts and the press of the state's attempt to characterize the litigation as frivolous, and any assaults as isolated acts by a few rogue guards, resulted in the parties beginning settlement discussions.[131]

129. Human Rights Watch, Nowhere to Hide, *supra* note 69.

130. *See, e.g.*, Detroit Free Press Editorial, *supra* note 98 (describing the routine mistreatment facing female prisoners in the Michigan prison system).

131. *See Women in Prison, Nowhere to Hide* (NBC television broadcast, Sept. 10, 1999) (national television broadcast focusing in large part on the

During the litigation, the Department of Corrections had made changes in its operations, as part of a settlement with the Department of Justice, including changes in its processes for hiring, training, and investigating staff, and structural changes in its facilities.[132] The women prisoners, however, insisted that any settlement of their claims must include adherence to the international norms prohibiting cross-gender supervision and searches. While this relief was never specifically requested in the original pleadings, plaintiffs had prepared an amended complaint to allege violations of customary international law and specifically requested injunctive relief, compliant with the applicable standards set forth in the Convention Against Torture, CEDAW, and the United Nations Standard Minimum Rules for the Treatment of Prisoners, should the settlement negotiations fail and trial on this issue be required.[133]

Ultimately, the federal litigation was settled for significant damages and remedial relief, including a commitment to remove male staff from the housing units and intake and transportation areas of the women's prisons in Michigan and to eliminate cross-gender pat downs.[134] However, prior to the removal of men from the housing units, a contingent of corrections guards filed a federal lawsuit claiming that the removal of staff based on their gender, violated their constitutional rights to equal protection under the law.[135]

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conditions in Michigan state prisons and including commentary from Human Rights Watch, the counsel for the women prisoners, the Department of Justice, and Michigan officials in evaluating the conditions of women prisons. The special garnered the Robert Kennedy award for broadcast journalism that year).

132. Settlement Document at 3–6, United States v. Michigan, No. 97-CVB-71514 (6th Cir. May 25, 1999); Settlement Document at 2–4, Nunn v. Mich. Dep't of Corr., No. 96-CV-71416 (6th Cir. July 31, 2000).

133. *See* Geer, *supra* note 112, at 79.

134. Settlement Document, Nunn, et al. v. Mich. Dep't of Corr., *supra* note 132, at 5–6.

135. Everson v. Mich. Dep't of Corr., 222 F. Supp. 2d 864 (E.D. Mich. 2002). The male guards used Title VII of the Civil Rights Act section 703(a)(1) and (2), which states:

(a) It shall be unlawful employment practice for an employer—
  1) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment because of such individual's race, color, religion, sex or national origin; or
  2) To limit, segregate or classify his employees or applicants from

The intertwining of human rights advocacy with the domestic litigation continued in the trial of the guards' challenge to the Department of Corrections' implementation of the terms of the settlement. The women prisoners sought and obtained intervention to protect their settlement and ensure compliance with both constitutional guarantees and international standards of treatment. The history and current practices in the United States and in "peer" countries were prominent concerns of the trial judge in the case, who contacted Canadian government officials to inquire about the standards in provincial facilities housing women prisoners. She also admitted into evidence the HRW and Amnesty reports, the 1999 United Nations Report from the High Commissioner on Human Rights, and a report issued by the Canadian Government that recommended enforcement of a requirement of female-only corrections officers in female prisons in Canada in accordance with the U.N. Standard Minimum Rules for the Treatment of Prisoners.[136] Nevertheless, while the court considered pleadings that directly raised the argument that failure to implement the settlement agreement would violate the women prisoners' rights under both the Constitution and customary international law, it failed to directly rule on the women prisoners' claims and rejected the gender-specific assignments relying only on an analysis of the equal protection rights of the guards.[137]

The federal trial court was, however, reversed on appeal by the Sixth Circuit Court of Appeals, which upheld the women prisoners' settlement requirement of gender-specific supervision, based on the District Court's failure to accord proper deference to the decision of the Michigan Department of Corrections, and also on the women prisoners' rights to security and privacy under the Constitution.[138] The Court of Appeals cited the reports issued by

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employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

136. Correctional Service of Canada, The Cross-Gender Monitoring Project, Third and Final Report (2000), *available at* http://www.csc-scc.gc.ca/text/prgrm/fsw/gender3/toc-eng.shtml.

137. Everson v. Mich. Dep't of Corr., 222 F. Supp. 2d 864, 899 (E.D. Mich. 2002).

138. Everson v. Mich. Dep't of Corr., 391 F.3d 739, 751–54 (6th Cir. 2004), *cert. denied*, 546 U.S. 825 (2005). For a good discussion of the case and the legal and social issues surrounding women prisoner abuse and privacy rights, *see*

HRW and the Department of Justice to discuss the sexual abuse sustained by women prisoners at the hands of male prison guards and the poor prison conditions that affected their safety and well-being and violated their constitutional rights.[139]

While much of the interaction between human rights and the constitutional challenge to protect women prisoners from abuse arose from unplanned circumstances, the lessons and values learned were intentionally applied in the following challenge to the State of Michigan's treatment of its incarcerated citizens—in this case the imposition of a sentence of life in prison, without the possibility of parole, for children under the age of 18—which constituted a clear violation of their human rights.

IV. CHILDREN TO THE WORLD, ADULTS IN PRISON AT HOME

If there is a group of people in the U.S. criminal justice system with fewer legal protections than women prisoners, it is children.[140] From 1994 to 1997, the number of youth under eighteen in jails rose by 35%, a majority of which were held as adults in adult jails.[141] An estimated 9,100 youth under the age of eighteen were held in adult jails as of June of 1997—about 2% of the total jail population.[142] Despite the fact that crime rates in 1999 were similar to those in the mid-1980s, the overall rate of incarceration of juveniles in 1999 was still 70% higher than it was in 1985.[143] In June of 2004, the number of youths under eighteen held in adult jails declined to an estimated 7,083, but 87% of those were held as adults,

Brenda V. Smith, *Sexual Abuse of Women in Prison, A Modern Corollary of Slavery,* 33 Fordham Urb. L.J. 571 (2006); Brenda V. Smith, *Watching You, Watching Me,* 15 Yale J.L. & Feminism 225 (2003).

139. *Everson,* 391 F.3d at 740, 742.

140. The conditions for individuals designated as "enemy combatants" and those detained post 9/11 present a new low in legal protections; however, even within this group the lack of protection for children stands out.

141. Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report 208 (1999), *available at* http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html.

142. *Id.*

143. Deborah LaBelle et. al., Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons 2 (2004), *available at* http://www.aclumich.org/pubs/juvenilelifers.pdf [hereinafter Labelle et. al., Second Chances].

which is a greater proportion than in 2000 (80%) or in 1994 (76%).[144] This figure can only be estimated because no one knows for sure how many children are being held in confinement in the United States.[145] The National Center for Juvenile Justice, in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the Department of Justice, and the Bureau of Justice Statistics have published reports which attempted to identify the number of children under eighteen held in adult jails and prisons in this country as well as the number held in both private and public juvenile detention facilities.[146] However, many states do not maintain separate records of the number of children in their adult facilities, reasoning that once a child had been tried or sentenced as if they were an adult, their child or juvenile status does not follow them into the adult prisons, despite their age.[147] Figures of youth held in county jails are not compiled by or reported to a central source, and separate entities altogether such as NGOs monitor children held in most states' juvenile facilities.

There is no federal statute or constitutional provision that provides a child special protection, or that even protects a child's right to be treated consistent with their status as a child. Throughout the country, state laws allow prosecutors to turn a blind eye to the chronological age and corresponding maturity of children, designating them as adults and subjecting them to adult prosecution, punishment, and incarceration.[148]

144. Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, Juvenile Offenders and Victims: 2006 National Report 236–37 (2006), *available at* http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf..

145. *See* Labelle et. al., Second Chances, *supra* note 143, at 3 (stating that there were no complete national statistics on the number of juveniles sentenced to life without parole in 2004).

146. *See supra* notes 141, 144.

147. *See* Labelle et. al., Second Chances, *supra* note 143, at 2 (asserting that increases in the amount of children incarcerated in adult jails and prison are due to re-characterizing children as adults, rather than an increase in crime by children).

148. *See generally* U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions (1998), *available at* http://www.ncjrs.gov/pdffiles/172836.pdf (discussing state laws involving varying principal transfer mechanisms by which juveniles are placed in the adult criminal justice system for serious and violent crimes).

In stark contrast, the Convention on the Rights of the Child (CRC) recognizes that the special status of children entitles them to special protection. Children are to be incarcerated as a last resort, for the least amount of time possible, and with mandated rehabilitative efforts. [149] Further, the CRC flatly prohibits sentencing children to life in prison without parole: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."[150] This provision of the CRC has near universal acceptance—192 of 194 countries have signed, ratified, and not registered a reservation to the CRC's prohibition on life imprisonment without release for youth offenders. The United States and Somalia are the only two countries in the world that have not ratified the CRC, although both have signed it.[151]

Sentencing children to life imprisonment without the possibility of parole also violates the clear language of a treaty that has been both signed and ratified by the United States, the ICCPR. Article 10(3) requires that children (under the age of eighteen) be treated appropriately in light of their age and legal status as children.[152] Article 14(4), which was cosponsored by the United States, mandates that criminal procedures for youth charged with crimes "take account of the age and the desirability of promoting their rehabilitation."[153]

149. Convention on the Rights of the Child, G.A. Res. 44/25, art. 37(c), U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) (entered into force Sept. 2, 1990) [hereinafter Children's Convention] ("Every child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so . . . ."); *Id.* ("The arrest, detention or imprisonment of a child . . . shall only be used as a means of last resort and for the shortest appropriate time.").

150. *Id.*

151. The United States signed the Convention on the Rights of the Child on February 16, 1995, and Somalia signed on May 9, 2002. While neither has since ratified it, Somalia lacks a formal government to effectuate ratification. Office of the U.N. High Comm'r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, Jun. 9, 2004, http://www.unhchr.ch/pdf/report.pdf (last visited Oct. 8, 2008).

152. ICCPR, *supra* note 6, at 54.

153. *Id.* When the United States ratified the ICCPR, it attached a limiting reservation, providing that "the United States reserves the right, *in exceptional circumstances*, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14." United Nations Treaty Collection,

For those states that do not have the death penalty, the most severe sentence, for any adult and for any crime committed, is the sentence of life without possibility of parole. In forty-one states, it is also the permissible punishment for crimes committed by children.[154] Yet little was known of the number of youth serving this sentence in the United States. Given the positive, if somewhat serendipitous, impact of interweaving documentation of the abuse of women prisoners by international human rights organizations with domestic litigation challenging their treatment, a joint documentation project was planned as the first step toward addressing juvenile life without parole sentences in the United States. Documentation was conceptualized as the first step not only because there was a dearth of knowledge on the extent of the use of this punishment in the United States but also because the legal challenges under domestic law appeared limited.

The traditional challenge used to attack the juvenile death penalty was the Eighth Amendment's prohibition on cruel and unusual punishment, under which the U.S. Supreme Court struck down the death penalty for juveniles under the age of sixteen in 1988.[155] Although the Court, at the time the documentation project was initiated in 2003, had not yet rejected the death penalty for sixteen and seventeen year-olds, the challenge was well underway to argue that this punishment had also become sufficiently unusual to warrant a ruling on its unconstitutionality.

However, not only had the Court held in general that life without parole sentences were constitutional,[156] but the laws of forty-two states allowed life without parole sentences for juveniles.[157]

Declarations and Reservations to the ICCPR, Feb. 5, 2002, http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last visited Oct. 8, 2008).

154. Alaska, Kansas, Kentucky, Maine, New Mexico, New York, Oregon, Texas, West Virginia, and the District of Columbia all prohibit the sentence of life without parole for youth offenders. Labelle et. al., Second Chances, *supra* note 143, at 3.

155. Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (holding that such a punishment has become unusual in the United States as part of our evolving standards of decency and noting the global rejection of the death penalty for youth offenders age sixteen or younger); *see also* Bland v. United States, 472 F.2d 1329, 1337 (1972) (finding a United State Attorney's exercise of discretion in initiating the prosecution of persons sixteen and older as adults by charging them with certain enumerated offenses as not violative of due process.)

156. Harmelin v. Michigan, 501 U.S. 957, 994–96 (1991).

157. *Supra* note 154 and accompanying text (Texas only recently

Consequently, a constitutional challenge that the punishment met the conjunctive requirements of cruel *and* unusual was likely to be difficult on its face.

Federal appellate courts had also held that mandatory sentences of life without parole imposed on juveniles for murder convictions do not violate the Eighth Amendment, and where review has been sought in the U.S. Supreme Court, it has been declined.[158] These courts also rejected arguments that the lack of consideration of the defendants' youth posed constitutional problems.[159]

Similarly, all challenges to date under state constitutions have been rejected, even in states such as Michigan, where the documentation project started, which have a disjunctive constitution requiring proof of cruel *or* unusual punishment.[160] The Supreme Court of Michigan has held that juveniles do not have a fundamental or constitutional right to special protection, and the state appellate courts have rejected a challenge to the life without parole sentences as cruel or unusual and held that children or juveniles have no constitutional right to be treated as juveniles.[161] The lack of a right to

eliminated life without parole sentences for juveniles).

158. *See, e.g.*, Rice v. Cooper, 148 F.3d 747 (7th Cir. 1998) (holding that sentence of natural life in prison was not cruel and unusual punishment), *cert. denied*, 526 U.S. 1160 (1999); Harris v. Wright, 93 F.3d 581, 585 (9th Cir. 1996) (holding that a sentence of life imprisonment without possibility of parole was not disproportionate to the offense in violation of the Eighth Amendment and noting that "[y]outh has no obvious bearing on this problem . . ."); *see also* Rodriquez v. Peter, 63 F.3d 546 (7th Cir. 1995) (holding it was not cruel and unusual punishment to sentence defendant, who was 15 years old when he committed the murders, to life in prison without parole).

159. *See, e.g.*, *Rice*, 148 F.3d at 752 (upholding Illinois law imposing a sentence of life without parole for a sixteen-year-old mentally retarded defendant on the basis that mandatory penalties, including life imprisonment without parole, are not unconstitutional "just because (by definition) they prevent the consideration of mitigating factors [such as age]" (citing Harmelin v. Michigan, 501 U.S. 957, 994–96 (1991))).

160. Although two state supreme courts have held that juvenile life without parole sentences were improper, the cases involved a thirteen-year-old convicted of murder and two fourteen-year-old youths convicted of rape, respectively. Naovarath v. State, 779 P.2d 944 (Nev. 1989); Workman v. Com., 429 S.W.2d 374, 378 (Ky. 1968) (noting that the sentence "shocks the general conscience of society today and is intolerable to fundamental fairness"); *see also* People v. Miller, 781 N.E.2d 300 (Ill. 2002) (holding that a multiple-murder sentencing statute as applied to the fifteen year-old defendant violated the proportionate penalties clause of the state constitution).

161. People v. Launsberry, 217 Mich. App. 358 (Mich. Ct. App. 1996), *reh'g*

special protection means that there is no fundamental right to certain procedures and standards for determining when children can be treated as adults.

The strategy then was to begin a challenge using a human rights framework, both substantively, and by using traditional human rights devices to begin the advocacy. This entailed first conducting a documentation project and then joining together domestic advocacy groups involved with children's rights and criminal justice issues with international human rights organizations to create both an advocacy campaign and a coordinated legal challenge that incorporated human rights law.

The project began in Michigan in 2003 with the sponsorship of the Michigan affiliate of the ACLU and was entitled the Juvenile Life Without Parole Initiative. The national ACLU had recently created a Human Rights Working Group to incorporate a human rights framework in certain litigation and advocacy work. Because the Juvenile Life Without Parole Initiative combined the Working Group's concerns with human rights, racial justice, and criminal justice, the Initiative quickly became part of the national agenda.

Documentation, which was traditionally used as a vehicle by human rights organizations to identify, humanize, and give voices to the victims of human rights violations, was chosen for many of the same reasons in this instance. Documentation was also chosen as a fact finding method to identify potential areas of litigation.

An additional consideration contributed to a decision not to attempt domestic litigation as the first challenge to juvenile life without parole sentences. While litigation had been a significant tool in challenging human rights violations, its focus on the authority of the judiciary could, without care, disengage advocates, families, and the victims of human rights violations themselves while the litigation wound itself through courts and appellate processes. Without an advocacy movement in place, a pure litigation strategy was insufficient for building a successful human rights framework.

In Michigan, the documentation project involved extensive interviews with juveniles serving life without parole sentences, collateral interviews with families of the juveniles and victims'

denied, 454 Mich. 883 (Mich. 1997); People v. Bentley, No. 214170, 2000 WL 33519653 (Mich. Ct. App. Apr. 11, 2000), *appeal denied*, 463 Mich. 993, No. 116764, 2001 WL 33519653 (Mich. Apr. 3, 2001).

families, extensive review of trial transcripts and records of the juveniles, interviews with judges and prosecutors, and data collection, all of which were used to develop a broad understanding of the impact of laws allowing life without parole sentencing of juveniles.[162]

The data collections and the interviews proved the most challenging and enlightening. In order to obtain a nuanced view of the data, it was planned to collect data and obtain interviews from a minimum of fifteen states from different geographic areas that allowed life without parole sentences to be imposed on juveniles. The different methods of record keeping of various departments of corrections together with divergent rules on what constituted public documents and a patchwork of laws resulted in some incomplete data. For example, some states classified race simply as "white" and "other," while other states identified the sentence only as a life sentence without indication of whether the sentence allowed for parole or not. Still others maintained spotty and often incorrect records of the age of the juvenile at the time the offense was committed and many had no information on whether the youth had actually committed a homicide or whether their crime involved being a look out or accessory after the fact.

The interviews, once permission was obtained, ranged from emotional discussions with youth who had not received a single visitor since they had been arrested and lacked knowledge of the terms of their sentence, to in-depth thoughtful discussions with mature men and women who spoke of their youthful selves almost as children from another era and identity, to youths who were deeply damaged and brought to facilities after suicidal or self-mutilation incidents. Initial interviews led to follow-up interviews, letter writing, and phone calls, and eventually to the emergence of a family advocacy network and a network of incarcerated youth who began their own documentation project to detail their lives.

When it became apparent that there was an impetus for seeking remedial action in Michigan, a break-out report was issued entitled *Second Chances*: *Juveniles Serving Life Without Possibility of Parole in Michigan's Prisons*, which reported that over three

162. LaBelle et. al., Second Chances, *supra* note 143, at 4.

hundred children in Michigan alone were serving the sentence of natural life without any possibility of parole.[163]

Shortly after *Second Chances* was released, the Supreme Court finally forced the United States into compliance with the world's standards on criminal punishment of juveniles in the context of the death penalty by issuing *Roper v. Simmons*, which struck down the death penalty for juveniles who committed their crimes under the age of 18, as a violation of the Eighth amendment to the Constitution.[164] The Supreme Court in an oft-cited passage held:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult, as the personality traits of juveniles are more transitory and less fixed.
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape

163. *Id.* at 9.

164. Roper v. Simmons, 543 U.S. 551 (2005).

> negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[165]

When the Court struck down the death penalty based upon the Constitution's prohibition against cruel and unusual punishment, it was clear that the human rights communities' work on this issue contributed to the Court's interpretation of the Eighth Amendment. The Court specifically referred "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments," and cited to documentation reports on the limited use of capital punishment of minors in the rest of the world.[166]

These same international authorities instruct that the sentence of life without parole for juveniles also violates international law and is a rare punishment around the world.[167] However, while *Roper* struck down the juvenile death penalty, it left intact laws in forty-two states which sentence children to grow old and die in a prison cell for crimes committed when they were under the age of eighteen. With the practice remaining widespread in the United States, a challenge under the Eight Amendment requiring a demonstration of both cruelty and unusualness, was premature.

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165. *Id.* at 569–70 (citations omitted).

166. *Id.* at 575–77.

167. According to Human Rights Watch, Amnesty International, and Human Rights Advocates, there were only a handful of youth in the rest of the world combined serving a life without parole sentence. Michelle Leighton & Connie de la Vega, Center for Law and Global Justice, Sentencing Our Children to Die in Prison: Global Law and Practice 2 (2007), *available at* http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf. Since this report was issued, Israel, the only nation other than the United States using life without parole sentences for juveniles, renounced the practice and advised that parole would be offered for the seven youths serving the sentence. Michelle Leighton & Connie de la Vega, *Sentencing Our Children to Die in Prison: Global Law and Practice,* 42 U.S.F. L. Rev. 983, 1002–03 (2008).

After the publication and attendant publicity of *Second Chances*, Amnesty International and HRW partnered together, for the first time, to complete and issue a national documentation report on juveniles serving life without possibility of parole in the United States. The report was able to utilize the data collected by the ACLU's Juvenile Life Without Parole Initiative and take advantage of the findings compiled from focus groups and statewide polling conducted in Michigan on the issues.[168] The report, entitled *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, [169] was issued in the late Fall of 2005 and its unveiling at the ACLU offices in Michigan recognized the combined efforts of these three organizations to adopt a human rights framework approach to challenge juvenile life without parole sentences in this country.

The report garnered worldwide media attention, raising the consciousness of the media and the public in the United States to the human rights violation involved in sentencing juveniles to life without parole, while concurrently raising the issue of the United States' violation of human rights with the worldwide body.[170]

168. Focus groups conducted in Michigan revealed that the term "life without parole" failed to convey the reality of a natural life sentence, with most participants of the focus group interpreting the language to indicate a sentence of around ten years (with no parole during that time) and polling reflected a strong opposition to abandoning juveniles to prisons without an opportunity for release. Press Release, American Civil Liberties Union, ACLU of Michigan Applauds Introduction of Legislation to Reform "Juvenile Life Without Parole" Sentences (Nov. 3, 2005), http://www.aclu.org/crimjustice/juv/21196prs20051103.html (last visited Oct. 8, 2008).

169. Human Rights Watch & Amnesty Int'l, The Rest of Their Lives, Life Without Parole for Child Offenders in the United States (2005), *available at* http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf [hereinafter The Rest of Their Lives].

170. There was extensive coverage in both local newspapers in Michigan as well as worldwide coverage. For example, BBC radio aired an interview with a juvenile serving life without parole in Michigan, and the N.Y. Times included the issue in a three part series. *See, e.g.*, Adam Liptak, *The Youngest Lifers Locked Away Forever After Crimes As Teenagers,* N.Y. Times, Oct. 3, 2005, at A1 [hereinafter Liptak, *The Youngest Lifers*] (providing an overview of the report while profiling individuals sentenced to life without parole for crimes committed as juveniles); Adam Liptak, *Lifers As Teenagers, Now Seeking Second Chances,* N.Y. Times, Oct. 17, 2007, at A1 [hereinafter Liptak, *Lifers as Teenagers*] (comparing American sentencing practices of juveniles with other legal systems to find that America is "an island in the sea of international law"). The national report also helped fuel ongoing coverage and attention on Michigan with segments of National Public Radio and state journals focusing on Michigan's

Meanwhile, the documentation reports sparked an informal national coalition, which included domestic advocacy groups, children's groups, legal academics, funders, additional domestic criminal justice advocacy groups, doctors, psychologists, and traditional human rights advocates, to coordinate national challenges to juvenile life without parole sentencing. The overarching issue and approach was to keep the human rights component alive in whatever strategies were most effective on a state-by-state and national basis. In Colorado, advocacy groups, in collaboration with HRW, issued its own state documentation report entitled *Thrown Away: Child Offenders Serving Life Without Parole in Colorado*.[171] California and Illinois began working with a private law firm to begin their own state-wide documentation project in preparation for legislative and/or litigation challenges, drawing on the expertise of both HRW and the ACLU.[172] Mississippi, Louisiana, and Florida all began their own

efforts to illuminate and eradicate this human rights violation. *See, e.g.*, *All Things Considered: Report Compares Sentencing Around the World* (NPR radio broadcast Oct. 17, 2007) (covering the release of the Equal Justice Initiative Report comparing U.S. juvenile sentencing with other jurisdictions); Sharon Cohen, *Second Thoughts on Adult Court for Violent Kids: States Respond to Research Showing that Adult Court Makes Teens Worse Off*, Wis. St. J., Dec. 2, 2007, at A1 (exploring how states are rethinking and retooling their juvenile sentencing laws).

171. Human Rights Watch, Thrown Away: Child Offenders Serving Life Without Parole in Colorado (2005), *available at* http://hrw.org/reports/2005/us0205/us0205.pdf.

172. For California, *see* Human Rights Watch, When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California (2008), *available at* http://hrw.org/reports/2008/us0108/us0108webwcover.pdf (providing a detailed picture of Californians serving life without parole for crimes committed as youth). On April 8, 2008, the California Senate's Public Safety Committee voted in favor of the Juvenile Life Without Parole Reform Act, S.B. 1199, which would eliminate sentences of life without parole for offenders under the age of eighteen. Press Release, Human Rights Watch, US: California May End 'Life Without Parole' for Youth (Apr. 8, 2008), *available at* http://www.hrw.org/english/docs/2008/04/08/usdom18477.htm. For Illinois, *see* The Illinois Coalition for the Fair Sentencing of Children, Categorically Less Culpable: Children Sentenced to Life Without the Possibility of Parole in Illinois (2008), *available at* http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf (providing an overview of Illinois juvenile sentencing practices as well as those serving life-without-parole sentences). On January 10, 2008, a bill was introduced in the Illinois state legislature, H.B. 4384, which would allow periodic review of life sentences for juveniles. That bill has been re-referred to the Rules Committee.

initiatives, again relying upon the assistance of the ACLU, Amnesty International, and HRW in developing their state challenges.[173]

In Michigan, the documentation project continued and became more nuanced. It was able to address the racial injustice components of the life without parole sentence and to engage advocacy groups to focus on this aspect of racial discrimination in the administration of the U.S. criminal justice system.[174] The project also continued to weave human rights concerns with the domestic agenda. While working domestically to introduce legislation to eliminate the juvenile life without parole sentence, the project filed a petition with the Inter-American Commission on Human Rights, with the assistance of the Human Rights Institute housed at Columbia Law School, to directly challenge the illegality of the sentence under the Declaration of the Rights of Man, which was signed and ratified by the United States, as well as the incorporating treaties.[175]

173. For Mississippi, *see* NAACP Legal Defense & Educational Fund, No Chance to Make it Right (2008), *available at* http://www.naacpldf.org/content/pdf/No_Chance_to_Make_it_Right.pdf (documenting the effects of life-without-parole sentencing on African-American youth in Mississippi and recommending the elimination of that sentence). For Louisiana, *see* Gregg Halemba et. al., Model for Change, Louisiana Background Summary (March 2006), *available at* http://www.modelsforchange.net/pdfs/Louisiana_Background_Summary_2006-03-24_final.pdf (outlining reform efforts in Louisiana's juvenile justice system). For Florida, *see* The Rest of Their Lives, *supra* note 169, at 89.

174. Youth of color comprise seventy-one percent of those serving a life without parole sentence for crimes committed as a juvenile. *See* The Rest of Their Lives, *supra* note 169, at 39; Labelle et. al., Second Chances, *supra* note 143, at 6; Human Rights Watch, Submission to the Committee on the Elimination of Racial Discrimination During its Consideration of the Fourth, Fifth and Sixth Periodic Reports of the United States of America, CERD 72nd Session, Vol. 20, No. 2(G) (February 2008), at 19, *available at* http://hrw.org/reports/2008/us0208/us0208web.pdf; *see also see also* NAACP Legal Defense & Educational Fund, *supra* note 173, at 5 (sixty percent of children sentenced to life without parole are African-American); Amnesty Int'l, Betraying the Young: Children in the U.S. Justice System 20 (1998), *available at* http://www.amnesty.org/en/library/asset/AMR51/060/1998/en/dom-AMR510601998en.pdf (documenting the ways in which juvenile incarceration in the United States violates children's fundamental human rights).

175. The petition, although not a public document, is available at http://www.aclu.org/images/ asset_upload_file326_24232.pdf; *see also* Press Release, American Civil Liberties Union, Children Sentenced to Life Without Parole Bring Plea to Human Rights Body (Feb. 22, 2006), *available at* http://www.aclu.org/crimjustice/sentencing/24237prs20060222.html (announcing the filing of the petition with the Inter-American Commission and summarizing the human rights arguments supporting it).

Counsel for the juveniles in Michigan also attended the United Nations Congress on Crime Prevention and Criminal Justice in Bangkok in 2005, on behalf of Human Rights Advocates, to raise the issue of juvenile life without parole sentences in this international body as a prelude to addressing the issue with the Human Rights Committees.

The media reports on all of these events often included specific reference to the fact that this practice violated international norms, treaties, and covenants.[176] This was a perspective that was not usually included in media reports of domestic sentencing issues involving the criminal justice system in America, and it thereby impacted the language of the debate. The discussion was more and more about children's rights, human rights, and second chances for youth, and less and less about violent predators/felons and hardened criminals (language used by the opposition).

As with the women prisoners, the juveniles serving life sentences, together with their families and friends, also embraced the human rights language and framework. The *Second Chances* coalition, which grew out of the grassroots organization of family, friends, and juveniles, created a website with links to the domestic legislation, the inter-American petition, the documentation reports, and the international instruments which supported the assertions of human rights violations.[177] The filing of the petition also contributed to the international advocacy campaign to urge the United Nations bodies to address the imposition of the life without parole sentence on over 2000 children in the United States.

176. *See, e.g.*, Editorial, *A Lifetime for Youths' Crimes,* St. Louis Post-Dispatch, Oct. 18, 2005, at B6 (arguing that the U.S. practice of allowing children to be sentenced to life without parole contradicts international law and the laws of at least 130 nations); Liptak, *Lifers as Teenagers*, *supra* note 170 (referring to how the United States cast the only dissenting vote on a U.N. resolution calling for the abolition of life imprisonment without the possibility of parole for children and young teenagers); Liptak, *The Youngest Lifers*, *supra* note 170 (describing how the Supreme Court's decision to ban the juvenile death penalty took into account international attitudes about crime and punishment; Editorial, *Too Harsh: California Can Sentence Criminals Under 18 to Life Without Parole. It's Cruel and Unusual Punishment*, L.A. Times, Jan. 16, 2008, at A20 (referencing that sentencing youths under eighteen to life without the possibility of parole is a violation of international law and has been banned in nearly every other country).

177. Second Chances For Youth, Save America's Children, http://www.secondchanceforyouth.com (last visited Oct. 8, 2008).

The United Nations Human Rights Committee addressed the issue as part of its concluding observations on U.S. compliance with the ICCPR in September 2006. After recognizing the documentation reports, the Committee observed that sentencing children to life without parole is of itself not in compliance with Articles 7 and 24(1) of the Covenant and recommended that:

> The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.[178]

Similarly, the United Nations Committee against Torture included the issue in its recommendation on U.S. compliance with the Convention Against Torture, stating: "The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment."[179] The United Nations General Assembly also adopted a resolution calling for the elimination of this practice as violating the Convention on the Rights of the Child.[180]

This, in turn, brought domestic media attention back to the human rights issues and violations requiring state legislators to address state laws that violated human rights norms, treaties, and conventions. Not everyone was impressed with the framework, however. Alan Cropsey, the republican chair of Michigan's Senate Judiciary Committee who blocked hearings on the reform legislation, responded to United Nations' observations by asserting that "[t]he U.N. is a laughing stock. They have no moral credibility."[181] At least one journalist, however, noting the poor company the United States was keeping on this issue, mourned the United States' ebbing moral authority by connecting the abuses committed by the military in Abu

178. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm., U.S.*, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

179. U.N. Comm. against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, U.S.*, ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

180. G.A. Res. 61/114, ¶31, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/146 (Dec. 19, 2006).

181. Ronald J. Hansen, *Should Teens Get Life Prison Terms?* The Detroit News, Aug. 5, 2006, at A1.

Ghraib with the culture of ignoring human rights obligations at home.[182]

V. WOMEN AND CHILDREN IN DETENTION FIND A HOME IN HUMAN RIGHTS

February 2008 saw the fruition of a combined strategy utilizing human rights, documentation, education, advocacy, and litigation when, for the first time, a group of women prisoners abused in U.S. prisons were able to argue to a jury that their treatment while incarcerated in Michigan state prisons amounted to torture.

In *Neal v. Michigan Department of Corrections*, ten women, two of whom were serving a sentence of life without possibility of parole for crimes they committed when they were sixteen, initially challenged their treatment and abuse while in detention as violative of their civil rights protected under a state civil rights act.[183] The women filed a class action lawsuit in 1996 alleging sexual assaults and sexually abusive and degrading treatment by male prison guards while they were incarcerated in Michigan's prisons and camps.[184] The women described a culture of abuse that had been created by the state's failure to intervene and cure a sexually hostile environment despite their knowledge of endemic and rampant sexual abuse by male staff which subjected incarcerated women to a pervasive risk of harm in Michigan's prisons.[185]

The state's first response to the litigation was to argue that the state civil rights act was never intended to, and did not, protect women prisoners from sexual abuse and discrimination as these incarcerated women were not "persons" for purposes of the act's protection of "all persons" against discrimination.[186] The state argued

182. Editorial, *Looking the Other Way*, N.Y. Times, Mar. 3, 2005, at A30.

183. *See* Neal v. Mich. Dep't of Corr., 583 N.W.2d 249, 250 (Mich. Ct. App. 1998) (case brought under the Elliott-Larsen Civil Rights Act, which has the purpose of promoting equal protection and opportunity to all racial minorities and women in Michigan, *see* Mich. Comp. Laws Ann. § 37.2101 *et seq*. (West 1985) (current version at Mich. Comp. Laws Ann. § 13.2101 *et seq.* (West 2001))).

184. *Neal*, 583 N.W.2d at 250 (Neal I); Neal v. Mich. Dep't of Corr., 592 N.W.2d 370, 372 (Mich. Ct. App. 1998) (Neal II), *appeal denied*, 649 N.W.2d 82 (Table) (Mich. 2002).

185. *Id.*; Second Amended Complaint, *supra* note 99.

186. Defendants' Brief in Support of Their Motion for Summary Disposition at 4–5, Neal v. Mich. Dep't of Corr., 583 N.W.2d 249 (Mich. Ct. App. 1998) (No. 96-6986-CZ).

that prisoners, based upon their incarcerated status, were not entitled to be free of sexual abuse or discriminatory treatment as such protections were reserved for "members of the general public," a classification that did not include prisoners.[187]

When the Michigan appellate courts ultimately rejected this argument, the state responded by proposing an amendment to the state civil rights act, carving out people in detention from all protections against abuse and discrimination based on sex, race, age, or disability.[188] After the amendment to Michigan's Civil Rights Act became law, the state courts refused to apply the amendment retroactively and the case on behalf of the class of women prisoners reached trial, twelve years after the case was filed.[189]

The first case to go to trial involved ten women who were sexually abused throughout their incarceration from 1993 to 2000. A jury of ten people heard the women describe their treatment at the hands of the state over a three week period. One plaintiff testified that she was nineteen in the winter of 1993 and had been in prison for a little over a year when she was first ordered out of her cell and raped by a male guard.[190] This same guard raped her six more times over the course of the next three years, and also repeatedly performed groping searches of her body in plain sight of supervisory employees and intimidated her with threats of retaliation to place her in solitary confinement to ensure that she would be denied parole if she resisted. Each of the woman testified about multiple rapes or

187. *Id.*

188. Mich. Comp. Laws 37.2301(b) (West 2001), *amended by* 1999 Mich. Pub. Acts 202, Eff. March 10, 2000; *see also* Editorial, *Attacking Prisoners Rights*, N.Y. Times, Dec. 21, 1999, at A30 (castigating Michigan for the amendment to its civil rights act that would apply retroactively to eliminate the statutory grounds for *Neal*).

189. Neal v. Mich. Dep't of Corrections, No. 253543, 256506, 2005 WL 326883, at *8 (Mich. Ct. App. Feb. 10, 1005), *appeal denied*, 707 N.W.2d 193 (Table) (Mich. 2005); s*ee also* Mason v. Granholm, No. 05-73943, 2007 WL 201008, at *4 (E.D. Mich. Jan. 23, 2007) (holding that "the ELCRA amendment essentially permits the state to discriminate against female prisoners without fear of accountability under Michigan's civil rights law. Given the state's abhorrent and well-documented history of sexual and other abuse of female prisoners, the court finds this amendment particularly troubling. . . . There is no rational basis for denying *all* prisoners (including those who have been released)—and no one else—the ability to seek redress for illegal discrimination that occurred in prison. . . . Accordingly, the court concludes that the ELCRA amendment violates prisoners' equal protection rights and is unconstitutional.").

190. Transcript of Record is not public and is on file with the author.

sexual abuse, including male guards entering their cells at will to grope them while they were sleeping, lie on top of them, squeeze their breasts, pinch their nipples, and rub their groin against them. There was also extensive testimony regarding male prison guards who would watch the women shower or order them to open their robes or lift their shirts to expose their nude bodies to them.

The reports and documentation by HRW, Amnesty International, and the United Nations detailed above, became evidence in the trial for purposes of detailing the state's knowledge of what amounted to torture of these women and the state's failure to intervene or to even acknowledge the harm being wrought. The United Nations Standard Minimum Rules for the Treatment of Prisoners, which prohibits supervision of women prisoners by male guards,[191] served to isolate this state's practices in allowing such supervision without precaution where the rest of the world had adopted stringent rules on the privacy and treatment of women prisoners.

The trial expanded beyond the violation of the domestic civil rights of these women to include testimony on the responsibility of the state, at large, to ensure these women's basic human rights and to prevent degrading treatment at the hands of the state. In order to prevail, it was necessary that the jury discount the state's argument that these women who had committed serious crimes were not entitled to the same level of dignity and consideration as a "non-offender."

After three weeks of trial, in which the state essentially argued that these women were unworthy of humane treatment because of their criminal backgrounds and/or incarcerated status,[192] the central issue became whether *all* humans were entitled to be treated with dignity irrespective of their status and whether the jury would refuse to diminish the damage to these women because of their status as prisoners.

191. *See supra* note 118 and accompanying text.

192. Transcript of Closing Arguments at 177–78, Neal v. Mich. Dep't of Corrections, No. 96-6986 (Mich. Cir. Ct. Jan. 31, 2008) (Richard A. Soble summarizing the closing argument of Defendants: "What you have heard in this courtroom today is what women have heard every day of their lives in prison, they're liars, they're cheaters, they can't be believed, they're sluts, they're drug addicts and they're prisoners.").

The jury, upon advising the court that they had reached a verdict, asked the court if they could read a statement to the parties. The foreperson then read the following statement which in and of itself validated the humanity of the women and the obligation of the state: "We, the members of the jury, as representatives of the citizens of Michigan would like to express our extreme regret and apologize for what you've been through."[193] The jury also awarded over fifteen million dollars in compensatory damages to the women.[194]

193. David Jesse & Amalie Nash, *Jury Awards Female Prisoners $15 Million*, The Ann Arbor News, Feb 1, 2008, http://blog.mlive.com/annarbornews/2008/02/jury_awards_female_prisoners_1.html (last visited Oct. 8, 2008) (letter on file with author).

194. *Id.* One juror reflected on the deliberations after trial: "I mean this was just torture. Like in any other country, the United States would be mad about it and here it was happening twenty minutes away from us." Interview with Tiffany Beckerleg, Juror in Neal v. Mich. Dep't of Corrections (Feb. 28, 2008) (conducted by the Institute for Continuing Legal Education (ICLE)).