

# THE NEED FOR AN INDEPENDENT FEDERAL JUDICIARY: PRISON REFORM LITIGATION SPURS STRUCTURAL CHANGE – THE CALIFORNIA PENAL CRISIS

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*It should be emphasized that when confronted with an obstinate, obdurate and unregenerate defendant, a more detailed remedy is needed ... when a defendant exhibits a stubborn and perverse resistance to change, extensive court-ordered relief is both necessary and proper.<sup>1</sup>*

## I. INTRODUCTION

Consider a prison where prisoners are bound with “fetal” restraints,<sup>2</sup> chained to toilets,<sup>3</sup> and locked naked in outdoor cages.<sup>4</sup> A prison in which inmate bones are broken,<sup>5</sup> their skulls are

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<sup>1</sup> Honorable William Wayne Justice, *The Two Faces of Judicial Activism, Address at the George Washington University National Law Center* (Mar. 10, 1992), in 61 GEO. WASH. L. REV. 1, 7 (1992) (Judge Justice was one of the Texas District Court judges involved in lengthy and ongoing litigation over unconstitutional state prison conditions in *Estelle v. Gamble*, 429 U.S. 97 (1976)).

<sup>2</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1168 (N.D. Cal. 1995) (describing fetal restraint protocol as “handcuffing an inmate’s hands at the front of his body, placing him in leg irons, and then drawing a chain between the handcuffs and legs until only a few inches separate the bound wrists and ankles”).

<sup>3</sup> *Id.* at 1169.

<sup>4</sup> *Id.* at 1171.

<sup>5</sup> *Id.* at 1165 (detailing a guard applying enormous force to break a prisoner’s arm in order to inflict pain rather than assert control); *id.* at 1163 (observing that a correctional officer repeatedly punched an inmate until blood started shooting out of the inmate’s mouth resulting in a fractured jaw).

lacerated,<sup>6</sup> and where they are bathed in boiling water until their skin peels off.<sup>7</sup> A prison where inmates are extracted from their cells with shotguns that fire rubber blocks, tasers, batons, and mace.<sup>8</sup> A place where a “code of silence” reigns<sup>9</sup> and administrative authorities regularly turn a blind eye to the ritualized infliction of pain by prison guards.<sup>10</sup> A place where guidelines about the use of firearms or lethal force are routinely violated<sup>11</sup> and where no warning shots are permitted – guards must shoot to injure if confronted with violence.<sup>12</sup>

The prison is neither Abu Ghraib nor Guantanamo Bay, but rather Pelican Bay State Prison, located in northwest California.<sup>13</sup> In 1990, just one year after the prison opened, a class of prisoners confined in Pelican Bay Prison’s Secure Housing Unit (SHU) brought suit under the federal Civil Rights Act of 1871<sup>14</sup> challenging the constitutionality of the conditions of their confinement in *Madrid v. Gomez*.<sup>15</sup> At the conclusion of the trial, after more than fifty-seven witnesses had testified, and more than six-thousand exhibits had been entered into evidence,<sup>16</sup> Judge Thelton Henderson appointed a Special Master to monitor prison conditions at Pelican Bay and to work with plaintiffs and defendants to develop a remedial plan addressing numerous Constitutional violations.<sup>17</sup> The court would retain jurisdiction over conditions of confinement at Pelican Bay Prison until “all Constitutional violations found [through the litigation] have been

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<sup>6</sup> *Id.* at 1162 (describing the first of many factual scenarios in a section entitled “Staff Assaults on Inmates”).

<sup>7</sup> *Id.* at 1166-67.

<sup>8</sup> *Id.* at 1172-78 (noting that cell extractions are viewed as “opportunities to punish, and inflict pain upon, the inmate population for what were often minor rules violations”).

<sup>9</sup> *Id.* at 1164.

<sup>10</sup> *Id.* at 1177 (quoting Charles Fenton, former warden of the federal super-maximum prison Marion Penitentiary and witness for the plaintiffs). This was the only case in which Warden Fenton testified on behalf of an inmate class. *Id.*

<sup>11</sup> *Id.* at 1179.

<sup>12</sup> *Id.* at 1184 (quoting Pelican Bay Prison Associate Warden Garcia).

<sup>13</sup> *Id.* at 1155.

<sup>14</sup> 42 U.S.C. § 1983 (2004).

<sup>15</sup> 889 F. Supp. at 1155.

<sup>16</sup> *Id.* at 1156.

<sup>17</sup> *Id.* at 1282-83.

fully and effectively remedied.”<sup>18</sup> As of May 2005, more than eleven years after the trial began, the court continued to maintain jurisdiction.<sup>19</sup>

Judge Henderson uncovered the horrific abuse<sup>20</sup> in Pelican Bay’s SHU during an active fact-finding process. Before the trial commenced, Judge Henderson spent two days touring Pelican Bay.<sup>21</sup> He also maintained an active role supervising and approving the implementation of the remedy – eventually threatening a federal court takeover of the California Department of Corrections to correct systemic problems, including the undue influence and abuse of power by the California Correctional Peace Officers Association (CCPOA).<sup>22</sup>

Critics of the type of judicial intervention undertaken by Judge Henderson decry such federal court actions as "activist" and outside the realm of legitimate judicial decision-making.<sup>23</sup> Such criticisms in the context of prison reform led to the passage of the Prison Litigation Reform Act of 1995 (PLRA), which limited the power of federal courts to intervene in state prison systems.<sup>24</sup> The PLRA was promulgated as a solution to the perceived problems of runaway prisoner litigation and abuse of federal court power<sup>25</sup> and the Act’s proponents sought to leave the reform of state prisons to state political processes.<sup>26</sup> However, Congress passed the PLRA on

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<sup>18</sup> *Id.* at 1283.

<sup>19</sup> *Madrid v. Woodford*, No. C90-3094-T.E.H., Order Re (1) Special Master's Report Re "Post Powers" Investigations and Employee Discipline, and (2) CCPOA's Motion to Intervene (N.D. Cal. Nov. 17, 2004).

<sup>20</sup> See notes 2-12, 223 and accompanying text.

<sup>21</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1156 (N.D. Cal. 1995).

<sup>22</sup> See discussion *infra* Part III.A.

<sup>23</sup> The critique of federal courts as activist has been levied by both liberals and conservatives, see Michael C. Dorf, *After Bureaucracy*, 71 U. CHI. L. REV. 1245, 1247-1248 (2004) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)); compare Honorable William Rehnquist, *Decisions Shouldn't Lead to Judges Impeachments*, SACRAMENTO BEE, Jan. 24, 2005 at B5 (defending judicial independence and articulating the view that the framers of the Constitution wanted to protect judicial independence and that judicial decisionmaking should not be swayed by popular opinion); but see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 1-13 (1998).

<sup>24</sup> See discussion *infra* Part II.B.

<sup>25</sup> See discussion *infra* Part II.B.

<sup>26</sup> See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003) (indicating that the PLRA was driven in part by conservative dissatisfaction with “imperial” or activist judging).

mistaken assumptions about the nature of prisoner litigation<sup>27</sup> and improvidently eliminated enforcement mechanisms designed to ensure the Constitutionality of state prison policies.<sup>28</sup>

By limiting federal court power to hear prisoner cases, Congress ensured an upsurge in Constitutional violations of individual prisoner rights.<sup>29</sup> Indeed, prisoner abuse claims have risen since the passage of the PLRA as the political power of prison authorities and guards has grown and their control of state prison systems has been consolidated.<sup>30</sup> Prisoners are increasingly shut out of the political process, especially in states that disenfranchise and otherwise hinder the social participation of convicted felons.<sup>31</sup> This lack of political power guarantees that majoritarian political processes remain an ineffective prisoner rights enforcement mechanism.<sup>32</sup> A comparison of the critique of federal judges as activist and the assumptions underlying the PLRA with the facts and results of the Pelican Bay litigation will show that such critiques of federal court power are misguided and that federal judicial intervention is an effective and legitimate method of prison reform.<sup>33</sup>

The 1960s and 1970s saw federal judicial intervention in state prisons peak when federal courts across the Southern states reformed state prison institutions, moving en masse from a “hands-off” policy to intervention based on the Eighth Amendment.<sup>34</sup> Pelican Bay State Prison, and its numerous constitutional deficiencies, was a model case for federal court intervention.<sup>35</sup>

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<sup>27</sup> *Id.* at 1692 (finding that although inmate suits outnumbered noninmate suits per capita in federal courts that once state case filings were included that the filing rates for both groups was very similar).

<sup>28</sup> *See* notes 93-96 and accompanying text.

<sup>29</sup> ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS 22-27, 32 (2004).

<sup>30</sup> *Id.* at 20-22.

<sup>31</sup> *See id.* at 206-07 (noting that ex-felons face other barriers such as exclusion from public assistance benefits, government housing, diminished employment prospects and exclusion from federal student loan programs).

<sup>32</sup> *Id.* at 32-33.

<sup>33</sup> FEELEY, *supra* note 23, at 50.

<sup>34</sup> *Id.* at 30-51.

<sup>35</sup> *Cf. id.* at 166-67.

However, Congressional passage of the PLRA<sup>36</sup> limited federal court power to intervene in state prisons through structural reform litigation, wrongly assuming that the need for such intervention was over.<sup>37</sup> Thus, as demonstrated by *Madrid*<sup>38</sup> and the California prison crises of the last decade,<sup>39</sup> judicial intervention remains the only viable tool to remedy Constitutional deficiencies in state prisons, because majoritarian political processes fail to produce serious reform.<sup>40</sup> Comparing the type of federal court intervention with the ensuing state prison reform provides evidence of a nexus between intervention and reform: the broader and more intrusive the threat of judicial action, the more quickly state officials implement reform.<sup>41</sup>

For example, since *Madrid* was decided in 1995, the California prison system has received increased judicial scrutiny as the result of lawsuits brought on behalf of California prisoners by the Prison Law Office, a public interest law firm located in San Quentin, California.<sup>42</sup> However, until 2004, when Judge Henderson threatened to place the entire state prison system under the supervision of the federal court,<sup>43</sup> state elected officials were unwilling to act.<sup>44</sup> Only since 2004 have the legislature and the governor seriously proposed or enacted

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<sup>36</sup> Prison Litigation Reform Act of 1995, Pub. L. 104-134, 10 Stat. 1321-66 to 1321-77 (codified at 18 U.S.C. § 3626 and 28 U.S.C. 1932 (1996)).

<sup>37</sup> See notes 86-89 and accompanying text.

<sup>38</sup> 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>39</sup> *Id.* at 1169; see discussion *infra* Part III.A.

<sup>40</sup> See discussion *infra* Part III.A

<sup>41</sup> *E.g.*, FEELEY, *supra* note 23, 73 (quoting an Arkansas state official as saying the state would do “whatever it takes to get out from under” federal court supervision).

<sup>42</sup> The Prison Law Office, located in San Quentin California, has successfully challenged the constitutionality of prison conditions in a number of contexts including general prison conditions, excessive force, medical care, mental health care, and parole revocation proceedings. A description of the office and a list of its cases are available at <http://www.prisonlaw.com/> (last visited 03/13/2005).

<sup>43</sup> See, *e.g.*, Jenifer Warren, *Takeover of State Prisons Is Threatened; a Federal Judge Assails the Schwarzenegger Administration on Lack of Reform, its Deal with Guards*, L.A. TIMES, July 21, 2004, at A1.

<sup>44</sup> Inaction by state officials in California is partly attributable to the influence of the California Correctional Peace Officers Association (CCPOA), see discussion *infra* Part III.A; see *e.g.*, Franklin Zimring, *California Commentary: A Gulag Mentality in the Prisons; A Burgeoning Population and Powerful Guard Union Allowed Prisons Like Corcoran to Slip Out of Control*, L.A. TIMES, July 16, 1998, at B9; Mark Martin, *Guards Union Corrupts Prisons Report Finds*, S.F. CHRON., June 5, 2004, at A1.

nascent prison reforms.<sup>45</sup> Although there are other reasons, including legislative term limits and the 2003 recall election,<sup>46</sup> that help to explain the recent shift towards prison reform, federal judicial intervention has been a necessary catalyst for institutional change in California's prisons.<sup>47</sup>

This Article examines *Madrid*, the last case before the passage of the PLRA in which a federal court broadly intervened in a state prison system through structural reform litigation.<sup>48</sup> Part II outlines the historical and jurisprudential foundations that legitimate federal judicial intervention in state prisons. Part III examines the California prison system through the lens of the *Madrid* litigation<sup>49</sup> and the ongoing social and political problems caused by the prison crisis. Part IV concludes that judicial intervention remains the only viable tool to remedy constitutional deficiencies in state prisons when majoritarian political processes fail to produce serious reform.<sup>50</sup> Therefore, it is essential that the power and independence of the federal judiciary be preserved to ensure the rights of the politically powerless and mitigate Constitutional harms.

## II. CORRECTIONAL REFORM

In a significant speech to the American Bar Association in 2003, Supreme Court Justice Anthony M. Kennedy implored members of the Bar to pay more attention to the problems of the nation's prison systems.<sup>51</sup> He noted that one goal of the nation's current correctional systems is to "degrade and demean the prisoner" and that this goal is unacceptable in "a society founded on

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<sup>45</sup> See discussion *infra* Part III.D.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Madrid* may be last serious, ongoing vindication of prisoner's Constitutional rights in light of the passage of federal legislation designed to curb prisoner complaints and limit federal court power. See discussion *infra* Part II.B.

<sup>49</sup> 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>50</sup> A note about the scope of this endeavor: given the fluid and ongoing situation in the California correctional crisis, this study limits itself to the situation as it stood in early 2005.

<sup>51</sup> U.S. Supreme Court Justice Anthony M. Kennedy, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003) at <http://www.abanet.org/media/kencomm/amkspeech03.html> [hereinafter Kennedy Speech] (on file with author).

respect for the inalienable rights of the people” – individual Constitutional rights do not end with incarceration.<sup>52</sup> He further called on civil lawyers who “have expertise in coordinating groups, finding evidence, and influencing government policies” to take up the cause of prison reform because such lawyers “have great potential to help find more just solutions and more humane policies” for incarcerated individuals.<sup>53</sup>

Certainly, many public lawyers have struggled to do as Justice Kennedy proposed: to ensure the individual Constitutional rights of prisoners through various reform efforts including litigation.<sup>54</sup> Prison litigation has forced federal courts to move from a “hands-off” approach toward a more interventionist posture regarding prison cases.<sup>55</sup> However, assessing the impact that litigation has on prison systems is difficult because of the complexity of forces operating to influence any correctional system.<sup>56</sup> At the least the shift towards judicial intervention has resulted in measurable positive changes in state correctional institutions, including the understanding and internalization of Constitutional standards by correctional officials,<sup>57</sup> the development of bureaucratic policies and procedures designed to ensure compliance with these standards,<sup>58</sup> and finally, increased political and public visibility and awareness of conditions within correctional institutions.<sup>59</sup>

#### *A. The History and Evolution of Prison Reform*

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Susan Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. Pa. L. Rev. 639, 691 (1993) (observing that hundreds of cases have been “brought and won by lawyers on behalf of inmates challenging the conditions and practices of our nations” correctional institutions).

<sup>55</sup> *See id.* at 659; *but see* FEELEY, *supra* note 23, at 39-46 (noting that there were hundreds of civil rights prison cases brought prior to 1965 before the federal courts began to take them seriously and that the federal courts shifted from civil rights jurisprudence to an Eighth Amendment jurisprudence thus enabling significant reform litigation to emerge).

<sup>56</sup> *Id.* at 648.

<sup>57</sup> Sturm, *supra* note 54, at 662.

<sup>58</sup> *Id.* at 667.

<sup>59</sup> *Id.* at 669-70.

Prior to the eighteenth century, punishment operated on the body of the condemned through public torture, “a gloomy festival of punishment”<sup>60</sup> designed to objectify the accused, demonstrate the state’s power to punish, and to deter crime.<sup>61</sup> However, in the late eighteenth century the modern prison was born,<sup>62</sup> and along with it, recurring calls for penal reform.<sup>63</sup> From the workhouses of England in the early eighteenth century to the Philadelphia model of the nineteenth century to Bentham’s Panopticon,<sup>64</sup> expressions of penal power have historically been accompanied by internal and external proposals for reform designed to better discipline and rehabilitate prisoners and to humanize the prison institution.<sup>65</sup>

This change in penal theory, from public punishment to institutional rehabilitation, mirrored the evolution of the twentieth century welfare state.<sup>66</sup> However, the last quarter century has seen a swing in the other direction: political rhetoric has shifted from the aspirations of the social welfare state to a discourse of personal responsibility. Increased State power premised on crime control and punishment comprise the penal element of political emphasis on person responsibility.<sup>67</sup> This shift in rhetoric, both a symptom and consequence of increased crime rates,

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<sup>60</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 8 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

<sup>61</sup> *Id.* at 48-49.

<sup>62</sup> *See id.* at 16 (observing that there has been a “reduction in penal severity” in the period from 1775-1975 as prisons began to focus less on punishment of the body of the condemned and more on rehabilitation).

<sup>63</sup> *Id.* at 115 (describing the rapid growth of imprisonment as taking up almost the entire field of punishment). Foucault also traces the history of efforts both internal and external to reform the prison institution over time. *Id.* at 121-26.

<sup>64</sup> *See id.* at 205 (identifying the Panopticon as a manifestation of state power that has become a “figure of political technology” and assures surveillance of the subject whether in or out of prison).

<sup>65</sup> *Id.* at 94-98 (identifying six major rules that underlie the power to punish that should be adhered to in order to obtain maximum results both on the individual and society).

<sup>66</sup> *Cf.* Theodore Caplow & Jonathon Simon, *Understanding Prison Policy and Population Trends*, 26 *CRIME AND JUST.* 63, 70-71 (1999) (indicating that over the course of the New Deal and Great Society eras that rehabilitative imprisonment was “rationalized as a form of state benefit”).

<sup>67</sup> *See id.* at 70-71 (identifying three factors that underlie changes in U.S. prison population: political culture, public policy, and institutional organizations). The authors argue that this shift has set in motion a “Reflexivity of the Penal System” in which the power of prison industries and corrections employees grows as prison population increases through increases in the numbers of prosecutions and the increasing tendency of parole and probation officers to return people to prison. *Id.* at 72-73. Foucault also identified the danger of an increase in disciplinary mechanisms arguing that such mechanisms have a tendency to “swarm” and to emerge from the “closed fortresses

the “Just Say No” campaign and an ongoing drug war that resulted in a concurrent prison-building boom,<sup>68</sup> has resulted in broad acceptance of the notion that politicians must favor harsher punishments and tougher crime control measures to gain and maintain political power.<sup>69</sup>

As political discourse and sentiment switched to one of crime-control, so did penal philosophy – from a model focused on rehabilitation and post-incarceration integration back into society toward a neo-classic punishment regime designed to punish the body,<sup>70</sup> through extra-legal methods including the use of excessive force, torture, and retaliation.<sup>71</sup> As prisons became more hidden from public view,<sup>72</sup> the possibility of these extra-legal means of punishment increased and State action further dehumanized “part of the family of humankind.”<sup>73</sup> This dehumanization continued when prisoners were “re-integrated” into a society in which they are barred from full participation.<sup>74</sup>

As society began to move from a penal regime focused on rehabilitation to one focused on punishment and control, federal courts responded by shifting toward a more interventionist, active posture.<sup>75</sup> Federal judges mitigated national social trends toward prison-based physical punishment and torture, first by enforcing Constitutional norms in Southern prisons through the

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[prisons] in which they once functioned and to circulate in a ‘free’ state” in which discipline evolves into ever more flexible methods of state control. FOUCAULT, *supra* note 60, at 211.

<sup>68</sup> ELSNER, *supra* note 29, at 18-27.

<sup>69</sup> Caplow, *supra* note 66, at 70 (1999).

<sup>70</sup> Cf. FOUCAULT, *supra* note 60, at 113 (noting the links between prisons and broader society – the notion of the punitive city).

<sup>71</sup> See, e.g., Madrid v. Gomez, 889 F. Supp. 1146, 1161 (N.D. Cal. 1995) (concluding that the “Eighth Amendment’s restraint on using excessive force has been repeatedly violated at Pelican Bay); see notes 2-12, 223 and accompanying text.

<sup>72</sup> Pelican Bay is near the town of Crescent City, almost four hundred miles from San Francisco. *Id.* at 1155.

<sup>73</sup> Kennedy Speech, *supra* note 51.

<sup>74</sup> See ELSNER, *supra* note 29, at 206-07 (noting that ex-felons face other barriers such as exclusion from public assistance benefits, government housing, diminished employment prospects and exclusion from federal student loan programs).

<sup>75</sup> See generally, FEELEY, *supra* note 23; see e.g., Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) (holding the lack of medical care to be a willful and intentional violation of both the Eighth and Fourteenth Amendments); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (extending the holding to all conditions within the prisons; the conditions of confinement violated “any judicial definition of cruel and unusual punishment”); Newman v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979) (placing the entire state prison system into receivership after eight years of willful intransigence by an uncooperative defendant); see notes 66-74 and accompanying text.

creation of legal doctrine in order to create more “moral” prisons, and then by opening closed state prison systems where notions of rehabilitation had been discarded in favor of neo-classic forms of physical torture and control.<sup>76</sup>

Federal judges used special masters, experts, and other administrative means in order to make quasi-administrative decisions to reform prisons.<sup>77</sup> In *Judicial Policy Making and the Modern State*,<sup>78</sup> professors Malcolm Feeley and Edward Rubin argue that the prison cases of the 1960s and 1970s were vital, among other reasons, to eliminate the last vestiges of Southern slavery by “imposing national standards on state institutions.”<sup>79</sup> In order to achieve the reform of those prisons, federal district court judges used bureaucracy as a coordinating idea with which to reshape Southern prisons.<sup>80</sup> This coordinating idea enabled courts to promulgate standards and policies to professionalize corrections regimes and enforce individual Constitutional rights.<sup>81</sup>

Federal courts sought to impose a modern bureaucratic scheme of governance in archaic Southern state prisons.<sup>82</sup> Regardless of methodology, courts sought to bring prisons in line with evolving standards of civil society by transforming Southern state prisons into institutions that adhered to national standards.<sup>83</sup> In particular, the Southern prison cases fit nicely into that framework since arguably, the practices and conditions in Southern prisons were the last vestiges of feudal slave systems of the previous century.<sup>84</sup> The imposition of Constitutional norms on

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<sup>76</sup> *Id.* at 265 (arguing that the “moral prison” was one of the central “coordinating ideas” that explains why federal judges suddenly found prison cases to be justiciable within the Eighth Amendment).

<sup>77</sup> *Id.* at 305-11.

<sup>78</sup> FEELEY, *supra* note 23.

<sup>79</sup> *Id.* at 149.

<sup>80</sup> *Id.* at 271 (noting that bureaucratization of prison administration was a second such “coordinating idea”).

<sup>81</sup> *Id.* at 281.

<sup>82</sup> *Id.* at 271.

<sup>83</sup> *Id.* at 166-67.

<sup>84</sup> *Id.* at 151-57.

state institutions fits into any framework of federal judicial action since judges are the final enforcers of the constitutional rights of individuals, incarcerated or not.<sup>85</sup>

*B. The Prison Litigation Reform Act of 1995*

Given that federal court intervention in state prisons successfully altered prison life for hundreds of thousands of prisoners,<sup>86</sup> Congress acted to authorize the United States Attorney General to bring actions against state institutions, including prisons, to secure the Constitutional rights of individuals through passage of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA).<sup>87</sup> Although Section 1983 actions ensured access to federal courts and achieved substantial reforms of state prisons,<sup>88</sup> CRIPA provided an additional avenue through which the federal government could intervene to enforce the Constitutional rights of prisoners.<sup>89</sup> However, the United States rarely brought suit under the provisions of CRIPA, leaving Section 1983 actions as the main vehicle for prison conditions and excessive force litigation.<sup>90</sup>

Although federal judicial intervention remedied conditions of confinement in prisons across the United States, Congress limited judicial discretion in hearing such claims by enacting the PLRA.<sup>91</sup> The PLRA was enacted in response to a perception among politicians that frivolous

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<sup>85</sup> THE FEDERALIST NO. 78, at 146-147 (Alexander Hamilton) (Andrew Hacker ed. 1964) (arguing that the federal judiciary must protect the Constitution and the rights of individuals and minorities from the majority).

<sup>86</sup> See notes 56-59, 75-80 and accompanying text.

<sup>87</sup> Pub. L. No. 96-247, 94 Stat. 349 (codified at 42 U.S.C. § 1997-1997i (1980)).

<sup>88</sup> 42 U.S.C. § 1983 (2004).

<sup>89</sup> 42 U.S.C. § 1997a (2004).

<sup>90</sup> U.S. v. State of Mich., 62 F.3d 1418 (1995); U.S. v. State of Hawai'i, 564 F.Supp. 189 (D.Hawai'i, 1983); (initiating suit over prison conditions); U.S. v. Los Angeles County, 635 F.Supp. 588 (C.D. Cal., 1986) (initiating suit over conditions at juvenile hall). However, CRIPA has most often been invoked to protect patients in mental health units and developmentally disabled living centers. See e.g., U.S. v. Com. of Pa., 902 F.Supp. 565 (W.D. Pa., 1995); U.S. v. State of Or., 839 F.2d 635 (1988) (initiating suits over conditions at state mental health facility); U.S. v. State of Tenn., 925 F.Supp. 1292 (W.D. Tenn., 1995); U.S. v. State of Conn., 931 F.Supp. 974 (D. Conn., 1996) (initiating suits against state institution for mentally retarded persons).

<sup>91</sup> Prisoner Litigation Reform Act of 1995, Pub. L. 104-134, 10 Stat. 1321-66 to 1321-77 (codified at 18 U.S.C. § 3626 and 28 U.S.C. 1932, codified as amended at 42 U.S.C. § 1997e (1996)).

prisoner complaints were overloading federal court dockets.<sup>92</sup> Political emphasis on the rhetoric of crime control and punishment drove the enactment of the PLRA.<sup>93</sup> In the decade prior to the enactment of the PLRA, inmate filings in federal court increased during eight of the ten years to a maximum of 40,000 cases filed in 1995.<sup>94</sup> But a comparison of inmate filing rates and the overall filing rates of the general population showed that inmates were no more litigious than the general population.<sup>95</sup> In introducing the Act, Senator Orrin Hatch, then chair of the Senate Judiciary Committee, stated the legislation would “bring relief to a civil justice system overburdened by frivolous prisoner lawsuits” and help “slam shut the revolving door on the prison gate and to put the key safely out of the reach of overzealous federal courts.”<sup>96</sup>

Specifically, the PLRA limited prisoner access to federal courts through the amendment of a provision of CRIPA.<sup>97</sup> Previously, a district court had discretion to continue a case in order to require the prisoner to exhaust all administrative remedies before the case could go forward in federal court.<sup>98</sup> In contrast, the PLRA mandates that a prisoner must exhaust administrative remedies prior to the commencement of litigation in federal court.<sup>99</sup> Requiring prisoners to exhaust all administrative remedies means that most prisoner suits will never reach federal courts for two reasons: first, most prisoners proceed pro se<sup>100</sup> and second, the exhaustion requirement

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<sup>92</sup> Ann H. Mathews, *Note: The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U.L. REV. 536, 538 (2002).

<sup>93</sup> *See id.* at 1559 (indicating that the PLRA was driven in part by conservative dissatisfaction with “imperial” or activist judging).

<sup>94</sup> Schlanger, *supra* note 26, at 1558 (noting that inmate litigation took up nineteen percent of the federal civil docket and that fifteen percent of federal civil trials were civil rights cases brought by inmates).

<sup>95</sup> *Id.* at 1692 (finding that although inmate suits outnumbered noninmate suits per capita in federal courts that once state case filings were included that the filing rates for both groups was very similar).

<sup>96</sup> *Id.* at 1565 (2003) (quoting Sen. Orrin Hatch in 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995)).

<sup>97</sup> 42 U.S.C. 1997e (2004).

<sup>98</sup> Pub. L. No. 96-247, 94 Stat. 349 § 7 (codified at 42 U.S.C. § 1997e (1980)).

<sup>99</sup> 42 U.S.C. § 1997e (2004).

<sup>100</sup> David M. Adlerstein, *Note: In Need of Correction: The “Iron Triangle” of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1690 (2001) (noting that “a full ninety-six percent of prisoner Section 1983 suits are brought pro se, and that eighty-two percent of prisoners are high school dropouts”).

exposes prisoners to retaliation by prison authorities chilling the possibility of future prison reform through Section 1983 actions.<sup>101</sup>

Many commentators have criticized the PLRA as an unnecessary intrusion into the discretion and inherent powers of federal court judges.<sup>102</sup> In addition to removing judicial discretion concerning the exhaustion of administrative remedies, the Act limits the remedies available in prisoner civil rights lawsuits.<sup>103</sup> The Act also restricts prospective injunctive relief through a tripartite need, narrowness, and intrusiveness requirement:<sup>104</sup> the relief must be “narrowly drawn” to extend “no further than necessary to correct the violation” and must be the “least intrusive means necessary to correct the violation of the federal right.”<sup>105</sup>

The Act further requires that federal judges limit preliminary injunctive relief to no more than ninety days,<sup>106</sup> limits the types of prophylactic remedies that may be imposed,<sup>107</sup> and sets time limits on the relief,<sup>108</sup> requiring that a court may extend prospective relief only by written findings that prospective relief remains necessary and that such relief is the least intrusive relief possible to correct the federal right.<sup>109</sup> In practice, the needs, narrowness, and intrusiveness criteria for prophylactic injunctive relief, coupled with automatic termination provisions, mean that extensive federal intervention in state prisons is a thing of the past.<sup>110</sup> The Pelican Bay

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<sup>101</sup> Mathews, *supra* note 92, at 555.

<sup>102</sup> See generally William B. Mack III, *Justice for Some: Excessive Force Claims after Porter v. Nussle*, 36 COLUM. J.L. & SOC. PROBS. 265 (2003); Mathews, *supra* note 92; Adlerstein, *supra* note 100.

<sup>103</sup> 18 U.S.C. § 3626(a) (2004).

<sup>104</sup> *Id.* at § 3626(a)(1)(A) (2004).

<sup>105</sup> *Id.* at § 3626(a)(1)(A) (2004).

<sup>106</sup> *Id.* at § 3626(a)(2) (2004).

<sup>107</sup> *Id.* at § 3626(a)(3) (2004).

<sup>108</sup> *Id.* at § 3626(b) (2004).

<sup>109</sup> *Id.* at § 3626(b)(3) (2004).

<sup>110</sup> See discussion *supra* Part II.B.

Prison case may be last instance where a federal district court has exercised its equitable discretion to enforce the Constitutional rights of prisoners over an extended period.<sup>111</sup>

Most critiques of federal court intervention in state prisons misapprehend the problem of power by focusing on the alleged misuse of federal court power rather than the misuse of power by prison guards and administrators.<sup>112</sup> Judge Henderson's supervision of Pelican Bay undercuts the crime control rhetoric that drove passage of the PLRA and the arguments of those who criticize federal judges as activist.<sup>113</sup> Federal courts in these cases match state power that violates Constitutional norms with federal power only to the extent necessary to end Constitutional violations.<sup>114</sup>

The power of the CCPOA within state government and a resistance to change within the California Department of Corrections (CDC) are recurring themes in the legal texts of the Pelican Bay case and are real political forces to be reckoned with in attempted reform of the California correctional system.<sup>115</sup> Judge Henderson used the limited power of the district court to publicize the conditions of confinement of California prisoners, to expose entrenched power structures resistant to change, to professionalize the CDC, and ultimately, to use federal court power to transform California's prison system from a system where power destroys Constitutional rights into a system that honors those guarantees.<sup>116</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> John Yoo, *Recognizing the Limits of Judicial Remedies: Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, 84 CAL. L. REV. 1121, 1123 (1996) (criticizing federal court involvement in structural reform litigation).

<sup>113</sup> See notes 117-118.

<sup>114</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1296-1311 (1976).

<sup>115</sup> See generally *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), *enforced sub nom* *Madrid v. Woodford*, No. C90-3094-T.E.H., Special Master's Final Report Re Department of Corrections Post Powers Investigation and Employee Discipline (N.D. Cal. June 24, 2004).

<sup>116</sup> See discussion *infra* Part III.B.2.

### C. Legitimacy of Judicial Intervention

Lately, attacks on so-called activist judges have increased as concerns about federal judicial power have regained currency in lockstep with the resurgence of federalist ideology and power.<sup>117</sup> Critics from both the left and the right have characterized judicial activism as anti-democratic and anti-majoritarian, arguing that judges must interpret, rather than make, the law.<sup>118</sup> Past decisions that compelled broad institutional or social reforms, such as *Brown v. Board of Education*,<sup>119</sup> were particularly criticized at the time they were rendered.<sup>120</sup> However, judicial intervention in state prison systems during the remedial stage of litigation often spurred state elected officials to act, suggesting that, at least in the context of prison reform litigation, such criticism of judicial intervention is flawed.<sup>121</sup>

Judges, particularly Article III judges, are in a unique position to encourage broad institutional reform. Despite criticism that wide-ranging judicial intervention is anti-democratic or counter-majoritarian,<sup>122</sup> the framers envisioned judicial advancement of unpopular positions as the final protection of the Constitutional rights of minority groups.<sup>123</sup> Because federal judges

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<sup>117</sup> See generally John Yoo, *Recognizing the Limits of Judicial Remedies: Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, 84 CAL. L. REV. 1121, 1123 (1996) (criticizing federal court involvement in structural reform litigation); Charlie LeDuff and Nick Madigan, *The California Recall: The Candidates; New Twist Brings Anger from Right*, N.Y. TIMES, Sept 16, 2003, at A1 (reporting former California GOP Chairman Shawn Steel's critique of the reliance of the 9th Circuit panel on *Bush v. Gore* in delaying the 2003 gubernatorial recall election); but see Chayes, *supra* note 114, at 1296-1311 (defending the role of the judge as an active fact finder and arguing that the public law litigation is particularly well suited to the nature of the federal judiciary).

<sup>118</sup> The critique of federal courts as activist has been levied by both liberals and conservatives, see Dorf, *supra* note 23, at 1247-1248 (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)); compare U.S. Supreme Court Chief Justice William Rehnquist, *Decisions Shouldn't Lead to Judges Impeachments*, SACRAMENTO BEE, Jan. 24, 2005 at B5 (defending judicial independence and articulating the view that the framers of the Constitution wanted to protect judicial independence and that judicial decisionmaking should not be swayed by popular opinion).

<sup>119</sup> 347 U.S. 483 (1954).

<sup>120</sup> See generally GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

<sup>121</sup> See discussion *infra* Part III.D.

<sup>122</sup> Alexander Bickel first described the "counter-majoritarian difficulty" in *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

<sup>123</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 268-69 (1972) (Brennan, J., concurring) (stating that the purpose of the Bill of Rights was to withdraw certain rights from the political arena and from majority control and declaring "[the Court] must not, in the guise of "judicial restraint," abdicate our fundamental responsibility to enforce the Bill

do not have to face the electorate and are insulated from political pressures they may act in ways that are politically unpopular in order to force needed reforms.<sup>124</sup> Although it may be preferable for local political processes to take care of structural reforms, such changes often languish if not for federal judicial intervention, as elected officials have little incentive to act on behalf of politically unpopular minority groups.<sup>125</sup>

In the context of prison reform, Professors Feeley and Rubin have attacked the social myths that delineate the proper role of the judge, most notably that judges should only interpret the law according to existing rules without considering the social results of those decisions.<sup>126</sup> They further argue that regardless of whether structural prison reform cases are viewed as policy making or Constitutional rights enforcement, such decisions are firmly within the powers of the federal judiciary.<sup>127</sup> In analyzing judicial action, Feeley and Rubin define policy making as “officials exercis[ing] power on the basis of their judgment that their actions will produce socially desirable results,”<sup>128</sup> which means that all judicial decision making is policy making.<sup>129</sup> Such interpretive and ongoing judicial decision-making and intervention in state prisons is a

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of Rights”); Stephen B. Bright, *Speech: Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 326 (1997) (quoting Justice Hugo Black describing the Constitutional role of the federal judiciary); RONALD WEICH, AMERICAN CIVIL LIBERTIES UNION, UPSETTING CHECKS AND BALANCES: CONGRESSIONAL HOSTILITY TOWARD THE COURTS IN TIMES OF CRISIS, 11-17 (2001) available at <http://archive.aclu.org/congress/courtstripping.pdf> (on file with author).

<sup>124</sup> Bright, *supra* note 123, at 327-29 (noting that the Bill of Rights is “regularly denigrated in political discourse in the United States today as nothing more than a collection of technicalities. Someone needs to step forward and remind everyone that the procedural guarantees of the Bill of Rights are fundamental principles”); WEICH, *supra* note 123, at 10-13.

<sup>125</sup> For example, one commentator argues the reason civil rights cases are mainly enforced by federal rather than state courts is that elected state court judges are not independent enough to protect the rights of unpopular minorities, see Stephen B. Bright, *Can Judicial Independence be Attained in the South? Overcoming History, Elections and the Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998).

<sup>126</sup> FEELEY, *supra* note 23, at 13-17.

<sup>127</sup> *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *Milliken v. Bradley*, 433 U.S. 267, 281 (1977); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 303-06 (2004); Chayes, *supra* note 114, at 1282-84.

<sup>128</sup> FEELEY, *supra* note 23, at 5 (noting that Ronald Dworkin, in *LAW’S EMPIRE*, criticized such action by judges).

<sup>129</sup> *Id.* at 9.

slow process that, over time, results in Constitutional conditions of confinement and the professionalization of state correctional departments.<sup>130</sup>

In the Pelican Bay litigation, Judge Henderson’s active role falls within a well-established doctrinal framework of prison reform litigation and Eighth Amendment jurisprudence.<sup>131</sup> Judge Henderson used hermeneutic interpretation and mediation to work towards the creation of a more moral prison system by professionalizing the Pelican Bay Prison administration, and as the litigation proceeded, realizing that the problems uncovered in the implementation stage extended throughout the Department and merited a restructuring of the entire CDC through the use of federal court power.<sup>132</sup> Many commentators have defended prophylactic relief as a legitimate adjudicatory function by federal court judges.<sup>133</sup> But even given the positive results of prison reform litigation, the biggest problem in such litigation is the enforcement and implementation of court ordered remedies.<sup>134</sup>

Given the difficulty of institutional change, there is no other effective check on “correctional institutions other than litigation or the threat of litigation.”<sup>135</sup> The “institutional change model,” targeting “particular institutions or systems with illegal practices” offers the greatest promise in achieving prison reforms to ensure compliance with Constitutional standards.<sup>136</sup> Additionally, the enforcement of remedies remains a problem, even when society

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<sup>130</sup> *Id.* at 169-70.

<sup>131</sup> See discussion *infra* Part III.B.1.

<sup>132</sup> See *infra* Part III.D; see generally Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995), *enforced sub nom* Madrid v. Woodford, No. C90-3094-T.E.H., Special Master’s Final Report Re Department of Corrections Post Powers Investigation and Employee Discipline 127 (N.D. Cal. June 24, 2004).

<sup>133</sup> E.g., FEELEY, *supra* note 23; Thomas, *supra* note 127, at 303-06; Chayes, *supra* note 114, at 1282-84 (defending judicial action that is administrative, active, and ongoing and where fact-finding is done by non-adversarial methods including the use of special masters and outside experts).

<sup>134</sup> Sturm, *supra* note 54, at 673.

<sup>135</sup> *Id.* at 691.

<sup>136</sup> Susan Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. Mich. J.L. Ref. 1, 10 (1993).

acknowledges prison failures.<sup>137</sup> Bureaucratic institutions are notoriously difficult to change,<sup>138</sup> and prisons are no exception.<sup>139</sup> Therefore, plaintiff’s counsel or federal courts,<sup>140</sup> must oversee prisons, as political officials, because of high political costs, are unable to endorse or engage in substantive prison reform.<sup>141</sup> Since state political processes will not protect the Constitutional rights of prisoners, federal judges must enforce Constitutional norms.<sup>142</sup>

Although federal courts must enforce the Constitutional rights of prisoners, “no one familiar with litigation in this area could suggest that the courts have been overeager to usurp the task of running prisons.”<sup>143</sup> Rather, federal courts have stepped in when state officials and agencies have failed to enforce the Constitutional rights of prisoners and when Constitutional violations are so egregious as to constitute the “unnecessary and wanton infliction of pain;” where “the soul-chilling inhumanity of conditions in American prisons has been thrust upon the judicial conscience” and became impossible to ignore.<sup>144</sup> Faced with these continuing violations

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<sup>137</sup> *Id.* at 36.

<sup>138</sup> FEELEY, *supra* note 23, at 300-01.

<sup>139</sup> *See generally* CORRECTIONS INDEPENDENT REVIEW PANEL, REFORMING CALIFORNIA’S YOUTH AND ADULT CORRECTIONAL SYSTEM, (June 2004) at <http://www.report.cpr.ca.gov/corr/index.htm> [hereinafter Deukmejian Report] (on file with author); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), *enforced sub nom* *Madrid v. Woodford*, No. C90-3094-T.E.H., Special Master’s Final Report Re Department of Corrections Post Powers Investigation and Employee Discipline (N.D. Cal. June 24, 2004).

<sup>140</sup> This is exactly the type of litigation described by Professor Abram Chayes in his seminal article, *The Role of the Judge in Public Law Litigation*, *supra* note 114, at 1284, as the vindication of Constitutional policies that “embod[y] affirmative values. *Id.* at 1295. Chayes describes an increasingly prominent role for the judge in fact evaluation during the remedial phase of institutional change litigation as the judge oversees implementation of the judgment or consent decree. *Id.* at 1297-1300. This type of judicial action has been vigorously criticized and defended over the years; the arguments center on whether federal courts violate separation of powers and federalism principles when they undertake supervision of state administrative agencies. *See* Charles Sabel & Theodore Simon, *How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1017-19 (2004); *but see generally* FEELEY, *supra* note 23.

<sup>141</sup> Caplow, *supra* note 66, at 70-71; *see* discussion *infra* Part III.A.

<sup>142</sup> *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 268-69 (1972) (Brennan, J., concurring) (stating that the purpose of the Bill of Rights was to withdraw certain rights from the political arena and from majority control and declaring “[the Court] must not, in the guise of “judicial restraint,” abdicate our fundamental responsibility to enforce the Bill of Rights”)

<sup>143</sup> *Rhodes v. Chapman*, 452 U.S. 337, 354 (1981) (Brennan, J., concurring).

<sup>144</sup> *Id.* at 354-55 (Brennan, J., concurring) (listing inhumane conditions confronted by federal courts including vermin in living quarters and food, overcrowding, sexual assault by other inmates, brutality by prison guards, and rampant violence (citing these conditions from Judge Frank Johnson’s extensive factual findings in *Pugh v. Locke*, 406 F.Supp. 318 (MD Ala. 1976), *aff’d as modified*, 559 F.2d 283 (CA5 1977), *rev’d in part on other grounds*, 438 U.S. 781 (1978)).

the Supreme Court has held that District Courts have broad remedial authority to address Constitutional violations and can modify earlier orders and direct more intrusive relief if such violations remain uncorrected after the initial order.<sup>145</sup> However, the PLRA limited this power even though prison litigation transformed state prisons in the United States by mandating Constitutional norms.<sup>146</sup> The chilling abuses outlined in *Madrid*, symptomatic of wider problems within the CDC, are strong evidence of why passage of the PLRA was a policy mistake.<sup>147</sup>

### III. THE CALIFORNIA CRISIS

Scandal,<sup>148</sup> broken promises of systemic reform by prison officials,<sup>149</sup> and increased tensions between prison guards and prisoners as the prison population grew<sup>150</sup> characterized California's prison system between 1990 and 2005.<sup>151</sup> During the same period, California politicians, while paying lip service to the notion of reform by creating committees and commissions to investigate the problems made no effective effort to implement systemic

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<sup>145</sup> *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *Milliken v. Bradley*, 433 U.S. 267, 281 (1977).

<sup>146</sup> FEELEY, *supra* note 23, at 50 (noting that the “nation’s prisons, jails, and juvenile facilities have been Constitutionalized”).

<sup>147</sup> See notes 2-12, 223 and accompanying text.

<sup>148</sup> See e.g., Dan Morain, *California’s Profusion of Prisons*, L.A. TIMES, Oct. 16, 1994, at A1 (detailing the explosion in prison growth and union power noting that the CDC has no controls and that the CCPOA was able to deploy an officer to help plan new prison growth); Mark Arax and Mark Gladstone, *Officials Stymied Corcoran Probe, Investigators Testify*, L.A. TIMES, Aug. 4, 1998, at A1 (describing testimony before the California Legislature that then CDC Director James Gomez blocked investigations into the staging of fights and subsequent murders by Corcoran prison guards).

<sup>149</sup> Mark Arax and Jenifer Warren, *Despite State Promises, Reform Eludes Prisons*, L.A. TIMES, Dec. 28, 2003, at B1 (describing the resignation of then CDC Director Edward Alameida, known as “Easy Ed” for his acquiescence to the wishes of the CCPOA leadership and noting that the CDC “remains troubled by allegations that rogue guards still go unpunished, union bosses continue to exert strong influence, and top administrators still thwart whistle-blowers.”).

<sup>150</sup> LITTLE HOOVER COMMISSION, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES, *Executive Summary* at ii (November 2003) available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf> [hereinafter LHC *Executive Summary*] (on file with author) (noting that in 1980 California incarcerated approximately 25,000 inmates while in 2000 California incarcerated more than 160,000 inmates).

<sup>151</sup> Dan Morain, *Era of Higher Tensions Seen at State Prisons*, L.A. TIMES, Feb. 20, 1995, at A1 (describing the interplay of a growing prison population due to the passage of the three-strikes law, longer prison terms, and the loss of inmate privileges and programs).

change.<sup>152</sup> State elected officials abdicated their responsibility to oversee and control the California Department of Corrections to the CCPOA.<sup>153</sup> The only effective efforts at reform – at Pelican Bay State Prison and Corcoran State Prison – were the result of intervention by the federal government.<sup>154</sup>

#### A. California's Prison System and the CCPOA

Vested political interests, including the CCPOA, have captured California's political processes, thus federal court intervention remains the only effective mechanism to enforce the Constitutional rights of California's prisoners.<sup>155</sup> Michael Alpert, chair of California's "Little Hoover" Commission,<sup>156</sup> advocated a return to a rational rehabilitation system in California's state prisons, noting that the practical goal of incarceration should be preventing recidivism<sup>157</sup> during testimony to the American Bar Association's Justice Kennedy Commission.<sup>158</sup> However, such proposals are antithetical to the CCPOA as substantial reforms could lead to fewer

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<sup>152</sup> Arax, *supra* note 144 (noting repeated scandals in the department stemming from the same cause: a general lack of oversight by the legislative and executive branches coupled with untrammelled CCPOA influence and power within the CDC and political branches).

<sup>153</sup> Cf. Mark Gladstone and Mark Arax, *Attorney General's Office to Investigate 24 Shootings by Corcoran Prison Guards*, L.A. TIMES, Jan. 24, 1999, at A3 (describing the shifting blame between the CDC and the CCPOA ultimately leading to a lack of any accountability).

<sup>154</sup> See discussion *infra* Part III.B.2 (describing the district court's intervention in Pelican Bay); Morain, *supra* note 146 (noting the U.S. Department of Justice investigation of prison guards at Corcoran accused of staging prisoner cockfights and then using lethal force in response to subsequent fights). The investigation ultimately led to the indictment and trial of eight Corcoran prison guards in federal court and Corcoran went from being the deadliest prison in the U.S. in 1994 to seeing no fatalities between 1994 and 2000. Mark Arax, *Jury Sought for 8 Corcoran Prison Guards*, L.A. TIMES, April 12, 2000, at A1.

<sup>155</sup> See discussion *infra* Part III.D.

<sup>156</sup> The bi-partisan Little Hoover Commission is a statutory body designed to "investigate state government operations and -- through reports, recommendations and legislative proposals -- promote efficiency, economy and improved service." Little Hoover Commission, *About the Commission*, at <http://www.lhc.ca.gov/lhcdir/about.html> (last visited Feb. 13, 2005) (on file with author).

<sup>157</sup> Testimony of Michael Alpert before the American Bar Association's Justice Kennedy Commission at McGeorge School of Law (April 15, 2004) (on file with author).

<sup>158</sup> American Bar Association, *Press Release*, at [http://www.abanet.org/media/oct03/100603\\_1.html](http://www.abanet.org/media/oct03/100603_1.html) (last visited Feb. 13, 2005) (on file with author).

prisoners, fewer new prisons and prison guards, and a concurrent weakening in the political power of the union.<sup>159</sup>

State Senator Gloria Romero, Chair of the Senate Select Committee on the California Correctional System and author of a number of bills introduced to reform the CDC during the 2003-2004 legislative term, expressed concern about the CCPOA's undue influence.<sup>160</sup> Intense lobbying by the CCPOA killed most of Senator Romero's bills, leading the Senator to declare that "justice took a walk" when SB 1731, which would have overturned a clause in the CCPOA's contract which currently requires all information, including the accuser's name, to be turned over to the guard under investigation prior to the commencement of the inquiry, was voted down.<sup>161</sup> CCPOA power is such that it only need remind a legislator of the political cost of appearing soft on crime and threaten to withhold political campaign contributions in the next election cycle in order to obtain cooperation.<sup>162</sup>

The CCPOA has the most at stake in any attempted reform of California's prison system.<sup>163</sup> Because of this, the union has been the most resistant to any reform perceived as weakening the CCPOA's control of the prison system.<sup>164</sup> Inmate complaints about guard misconduct had to be disclosed to the guard in question prior to the initiation of any

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<sup>159</sup> See notes 159-162 and accompanying text.

<sup>160</sup> Senator Romero introduced six bills during the 2003-2004 legislative session designed to reform media access to prisoners (SB 1164), to create an independent Inspector General to oversee the Youth and Adult Corrections Agency (SB 1352 and SB 1768), to reform internal affairs procedures within the CDC (SB 1400 and SB 1731), and to reform the state's parole revocation system (SB 1640). See generally CCPOA, *Legislative Grid June 2004*, (last visited Feb. 13, 2005) at <http://www.ccpoanet.org/> (on file with author).

<sup>161</sup> Jenifer Warren, *Some Reforms Blocked, but Prison System Is Improving*, *Senator Says*, L.A. TIMES, Oct. 16, 2004, at B6.

<sup>162</sup> Warren, *supra* note 161 (noting that the union warned lawmakers that a "yes" vote was fraught with peril).

<sup>163</sup> Susan Beck, *Inside Story*, THE RECORDER, May 14, 2001, at 1 (noting that the CCPOA has more than 28,000 members paying more than 1.5 million dollars in dues per month).

<sup>164</sup> State Net Ballot Book, *November 2000 Ballot Initiatives -- Once More With Feeling?*, CALIFORNIA JOURNAL, Sept. 1, 2000 (noting CCPOA opposition to Proposition 36 which proscribed treatment rather than incarceration for first time drug offenders); See Harriet Chang, *State to Revamp Parole System: Lawsuit Settlement Seeks to Reduce Inmate Population*, S.F. CHRONICLE, Nov. 19, 2003, at A-1 (noting CCPOA opposition to any reform in the parole revocation process and indicating that the current prison population stands at 162,000 inmates and that each year about 100,000 parolees are returned to prison through the parole revocation process).

investigation, and correctional officers have had little to fear from internal investigations.<sup>165</sup>

This requirement has likely had a chilling effect on prisoner complaints, as retribution by guards is almost certain after a prisoner files a complaint.<sup>166</sup> The recent creation of an independent Bureau of Review to investigate allegations of guard misconduct and excessive force threatens to make inroads on CCPOA power.<sup>167</sup> Observers hope the Bureau will be able to undertake independent investigations of correctional officer wrongdoing free of the improper influence that has marked past investigations of correctional officer wrongdoing.<sup>168</sup> Until recently, the political influence of the CCPOA has blocked this type of reform.<sup>169</sup>

The politically connected union exercises the kind of “raw power and privilege” only possible in a society where criminal punishment is the prevailing political motif.<sup>170</sup> The coercive power of the CCPOA in the halls of prisons and the state Capitol is troubling in a state that once pioneered a “national model for prison-based rehabilitation” under then Governor Earl Warren.<sup>171</sup> In a critique of the current system, the Little Hoover Commission concluded that real change depended upon whether “California’s leaders have the will to make the policy choices based on evidence rather than ideology, on facts rather than fears.”<sup>172</sup> Over the last two decades, California’s political leaders made policy choices based on ideology and political expedience

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<sup>165</sup> Jenifer Warren, *Major Prison Reform Eludes Lawmakers; A Few Measures Pass, but Significant Changes Opposed by Guards Union are Voted Down*, L.A. TIMES, Aug. 31, 2004, at B1.

<sup>166</sup> *Id.*

<sup>167</sup> Jenifer Warren, *Prisons Promise a New Code for Guards*, L.A. TIMES, Sept. 13, 2004, at A1.

<sup>168</sup> *Id.*

<sup>169</sup> Mark Arax, *Union Crushed Bid to Let State Prosecute Guards*, L.A. TIMES, July 19, 1999, at A1 (quoting Attorney General Bill Lockyer after the CCPOA successfully killed a bill that would have given the California Attorney General’s Office jurisdiction to investigate prison guard and administration illegalities as saying state Assemblyman Jim Battin (R-La Quinta) told him “Sorry, but I’m whoring for the CCPOA.”).

<sup>170</sup> Warren, *supra* note 161 (quoting Senator Romero).

<sup>171</sup> Editorial, *State Prison’s Revolving Door; Judge’s Last Chance Demand*, L.A. TIMES, July 23, 2004, at B12.

<sup>172</sup> LITTLE HOOVER COMMISSION, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES, at 84 (November 2003) available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf> [hereinafter LHC PAROLE REPORT] (on file with author).

rather than the rule of law leaving federal courts to remedy Constitutional deficiencies and to push for real reform in California's prisons.<sup>173</sup>

### *B. Federal Judicial Reform*

Pelican Bay State Prison's Secure Housing Unit, the subject of *Madrid v. Gomez*,<sup>174</sup> was designed to better control the most dangerous prisoners within the California correctional system.<sup>175</sup> CDC designed the SHU to house "the worst of the worst" and since prison authorities accept the syllogism that guards are only as violent as the inmates warrant, this has led to a host of Constitutional violations at Pelican Bay.<sup>176</sup>

Because of his unique role as an Article III judge, Judge Thelton Henderson could begin the job of prison reform at Pelican Bay by undertaking an impartial evaluation of prisoner claims, and in doing so publicize their plight while maintaining the legitimacy of judicial intervention and upholding a core principle of the Eighth Amendment.<sup>177</sup> Thus, Judge Henderson acted within a well-established doctrinal framework of federal judicial intervention in state prison systems established by earlier prison cases to vindicate the Constitutional rights of incarcerated prisoners at Pelican Bay.<sup>178</sup> The relevant legal standard for Judge Henderson's decision was the cruel and unusual punishment clause of the Eighth Amendment to the Constitution. The Supreme Court has held that the prohibition against such punishment applies to conditions of incarceration – the Constitution "retains its 'full force' behind prison doors."<sup>179</sup>

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<sup>173</sup> See discussion *infra* III.D.

<sup>174</sup> 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>175</sup> Cf., FOUCAULT, *supra* note 60, at 82.

<sup>176</sup> See notes 2-12, 223 and accompanying text.

<sup>177</sup> After 1995 the number of stories about prison cases and conditions in California rose dramatically in number. Prior to 1995 there were very few stories but after the Pelican Bay decision more than 1,000 stories are listed in the California Daily Newspapers between 1995 and 2004 according to Lexis-Nexis.

<sup>178</sup> *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Hutto v. Finney*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Pugh v. Locke*, 406 F.Supp. 318 (MD Ala. 1976); FEELEY, *supra* note 23, at 245.

<sup>179</sup> *Madrid*, 889 F. Supp. at 1245 (citing *Michenfelder v. Summer*, 860 F.2d 328, 335 (9th Cir. 1988)).

Prison administrators and guards must treat inmates as full human beings: “there is no place for abuse or mistreatment, even in the darkest of jailhouse cells.”<sup>180</sup> Society punishes prisoners through incarceration, not by unnecessarily cruel treatment once jailed.<sup>181</sup>

The Pelican Bay case differs from the Southern prison cases in several important respects. The Southern prison cases were important because prison reforms were the final step of the process of national re-integration begun with reconstruction.<sup>182</sup> The judges in the Southern prison cases sought to impose national social values upon state prisons by requiring prison administration conformity to accepted bureaucratic patterns and practices<sup>183</sup> resulting in more moral prisons.<sup>184</sup> In contrast, the Pelican Bay case sought to restrain a runaway correctional system where the CCPOA, rather than agency directors and prison wardens, ran the CDC.<sup>185</sup>

Where Southern prisons had little or no modern bureaucratic institutions to control guards and inmates, California’s CDC has both too much and too little bureaucracy.<sup>186</sup> For example, there is too much bureaucracy in the prisoner classification and assignment process but far too little bureaucracy in providing adequate medical care to prisoners.<sup>187</sup> Recently, the state admitted that prison medical care is a “broken system” and state officials warmed to the idea of a federal court takeover.<sup>188</sup> Ideally, political processes should have modernized the bureaucracy within CDC to comply with modern administrative practices and procedures and prevent a recapture of the management system by the CCPOA.<sup>189</sup> However, given that the political process had failed

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<sup>180</sup> *Id.* at 1161.

<sup>181</sup> *Id.* at 1245 (citing *Gordon v. Faber*, 800 F.Supp. 797, 800 (N.D. Iowa 1992) “persons are sent to prison as punishment, not for punishment”).

<sup>182</sup> FEELEY, *supra* note 23, at 245.

<sup>183</sup> *Id.* at 151-57.

<sup>184</sup> *Id.* at 245.

<sup>185</sup> See discussion *supra* Part III.A.

<sup>186</sup> John O. Hagar, Lunch and Lecture at McGeorge School of Law (April 6, 2005) (on file with author).

<sup>187</sup> *Id.*

<sup>188</sup> Claire Cooper, *Prison Health Takeover Looms*, SACRAMENTO BEE, May 11, 2005, at A1.

<sup>189</sup> *Id.*

to produce such reform and ensure accountability, the only effective way to reform the CDC was through federal court intervention.<sup>190</sup>

### *1. The Eighth Amendment*

Over the last half-century, the United States Supreme Court has developed modern normative principles in the prison context to govern the previously non-justiciable “cruel and unusual punishment clause” of the Eighth Amendment.<sup>191</sup> These principles have Constitutionalized the nature of state punishment and prison conditions and include the right to adequate medical care,<sup>192</sup> the right to freedom from punitive or retaliatory physical force,<sup>193</sup> and the right to freedom from confinement where the totality of prison conditions and practices are so bad that they are “shocking to the conscience of reasonably civilized people.”<sup>194</sup> For two decades beginning in the mid 1960s the Court decided a number of prison condition cases that claimed Eighth Amendment violations.<sup>195</sup> The Court developed flexible tests to determine whether a condition or practice constitutes cruel and unusual punishment, allowing or mandating federal court intervention in order to enforce the Constitution behind prison walls.<sup>196</sup> The

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<sup>190</sup> *Id.*

<sup>191</sup> See generally William H. Danne, Jr., Comment Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R. 3d 111 (1973) (describing the history, jurisprudence and standards of the 8th Amendment).

<sup>192</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain.’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))); Danne, *supra* note 189, at §15[a]-[c].

<sup>193</sup> *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976) (holding that physical punishment must not “involve the unnecessary and wanton infliction of pain” or be “grossly out of proportion to the severity of the crime”); *Jackson v. Bishop*, 404 F.2d 571, 579 (1968) (holding that corporal punishment “runs afoul of the Eighth Amendment” and “offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess”); Danne, *supra* note 189, at §§ 6-7[a].

<sup>194</sup> Courts will consider the totality of the circumstances in a prison to decide whether or not the Eighth Amendment’s prohibition on cruel and unusual punishment has been violated including the interplay between health care, diet and exercise, discipline, protection of inmates from violence and the physical conditions of the facility itself. See, e.g., *Gates v. Collier*, 501 F.2d 1291, 1300-01 (5th Cir. 1974); *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970, *aff’d* 442 F.2d 304 (8th Cir. 1971).

<sup>195</sup> See note 181.

<sup>196</sup> The Court’s tests for whether or not a practice or combination of practices is a violation of the Eighth Amendment include: whether or not a punishment is inherently cruel, abhorrent to contemporary society, disproportionate in nature, or the arbitrary or discriminatory administration of discipline. *Rhodes v. Chapman*, 452

United States Supreme Court’s Eighth Amendment jurisprudence has evolved over the last half century, with an eye toward the evolving standards of civilized society.<sup>197</sup> Prisons need not be comfortable places but neither may they deprive their inhabitants of basic Constitutional protections.<sup>198</sup> Prisoner Constitutional rights include the right to the minimum necessities of life including “food, clothing, sanitation, medical care, and personal safety.”<sup>199</sup>

In assessing claims of cruel and unusual punishment, courts must inquire into both objective and subjective factors.<sup>200</sup> Generally, a prison official who acts reasonably cannot face liability under the Eighth Amendment.<sup>201</sup> The objective component of the test for cruel and unusual punishment is an inquiry into the seriousness of the infliction of pain – the harm must be sufficiently serious in order to implicate the cruel and unusual punishment clause of the Constitution.<sup>202</sup> The subjective component is an inquiry into prison officials’ state of mind to establish that the pain inflicted was “unnecessary and wanton.”<sup>203</sup> The court determines the objective component as a matter of law while the subjective component is a question of fact satisfied through proof of deliberate indifference, a standard equivalent to proof of subjective recklessness in criminal cases.<sup>204</sup> However, whenever a prisoner alleges excessive force against individual prison guards the standard of proof is higher; the prisoner must show more than deliberate indifference.<sup>205</sup> The “core judicial inquiry [becomes] whether force was applied in a

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U.S. 337, 345-48 (1981) (noting the flexible nature of Eighth Amendment standards for determining whether a particular situation constitutes cruel and unusual punishment).

<sup>197</sup> Madrid v. Gomez, 889 F. Supp. 1146, 1245 (N.D. Cal. 1995) (noting that Eighth Amendment rights are fundamentally “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.” Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

<sup>198</sup> *Id.* at 1161 (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994) (1994)).

<sup>199</sup> See note 181.

<sup>200</sup> Madrid, 889 F. Supp. at 1246.

<sup>201</sup> *Id.* at 1246-47.

<sup>202</sup> *Id.* at 1252.

<sup>203</sup> *Id.* at 1246 (citing Jordan v. Gardner, 986 F.2d 1251, 1525-28 (9th Cir. 1993) (*en banc*)).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1247.

good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”<sup>206</sup>

Judge Thelton Henderson characterized the question presented to the court in *Madrid* as whether or not the defendants “[had] a policy of permitting and condoning a pattern of excessive force and whether that policy is attributable to a culpable state of mind” rather than simply ruling on the validity of prison regulations ostensibly designed to restore order or the legality of any individual guard’s actions in regard to the use of excessive force.<sup>207</sup> This characterization allowed the judge to apply the lower culpability standard: deliberate indifference rather than the more stringent malicious and sadistic standard.<sup>208</sup> Further, this characterization also allowed the judge to find that defendant prison administration officials had not dealt with conspicuous Constitutional shortcomings in the operation of Pelican Bay Prison and that such deficiencies required extensive judicial supervision, mandating the appointment of a special master to aid prison authorities during the remedial stage of the litigation and to modernize the prison bureaucracy.<sup>209</sup>

The Eighth Amendment’s prohibition on the use of excessive physical force “ha[d] been repeatedly violated at Pelican Bay ... [where the] force applied was so strikingly disproportionate to the circumstances” that it clearly contravened Constitutional norms.<sup>210</sup> Further, the level of force was “open, acknowledged, tolerated, and sometimes expressly approved” by the prison administration, thus meeting the standard of “deliberate indifference.”<sup>211</sup> In the words of one

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<sup>206</sup> *Id.* (quoting *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)).

<sup>207</sup> *Id.* at 1251.

<sup>208</sup> Although Judge Henderson found that the prison administrative officials would be liable under either theory of culpability, *see id.* at 1245, 1251-52, he noted that the policies allowing routine use of force at Pelican Bay occurred “over an extended period of time that allowed for ample reflection, calculation and forethought” by prison authorities.

<sup>209</sup> *Id.* at 1260.

<sup>210</sup> *Id.* at 1161.

<sup>211</sup> *Id.*

expert, “I have never observed ... the level of officially sanctioned unnecessary and excessive force that exist[ed]” at Pelican Bay Prison.<sup>212</sup>

## 2. *MADRID V. GOMEZ*

In *Madrid*, prisoners alleged a pattern of excessive force and sought to show that prison officials acted with deliberate indifference and malicious intent.<sup>213</sup> The rise of the super-maximum security prison<sup>214</sup> over the last quarter-century has produced tension between the state’s desire to control the most dangerous of prisoners by transferring them to supermax facilities and the problems that come with concentrating the most egregious offenders in one facility<sup>215</sup> rather than throughout a prison system. A “supermax” institution is always close to spiraling out of control as the level of violence between guards and inmates increases.<sup>216</sup> Proponents of supermax facilities characterize them as efficient, claiming that guards are only as violent as an inmate population warrants, justifying the use of maximum rather than minimum force in any given situation, and reinforcing perpetual instability and violence within prison walls.<sup>217</sup> However, in denying excessive force problems, prison authorities enable the “code of silence” that prevents staff reporting of abuse of inmates to persist.

Judge Henderson addressed the requirement of a moral prison that comported with Constitutional values using several techniques. First, Judge Henderson characterized the prisoner’s claim as a case about “fellow human beings -- most of whom will one day return to

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<sup>212</sup> *Id.* at 1161.

<sup>213</sup> *Id.* at 1247-48.

<sup>214</sup> FEELEY, *supra* note 23, at 129 (describing the characteristics of a super-maximum prison as a place where inmates are single-celled for 22-23 hours of each day, where they are generally allowed out for only one hour of exercise and where when prisoners do leave their cell, they are generally fully shackled, both ankles and wrists, and are escorted by multiple guards).

<sup>215</sup> *Id.* at 132 (noting that Marion Federal Prison was the first “level six” prison in the federal system since Alcatraz was closed and that Marion was designed to control particularly dangerous inmates in the federal system).

<sup>216</sup> Because of this danger supermax prisons generally include some type of “control unit” where prisoners can be locked down perpetually. *See id.* at 131-33 (describing Marion Federal Prison’s “control unit”); *Madrid*, 889 F. Supp. at 1227-31 (describing Pelican Bay’s “Secure Housing Unit” or SHU).

<sup>217</sup> *Madrid*, 889 F. Supp. at 1178.

society ... [who have] ‘human dignity.’”<sup>218</sup> In restoring humanity to prisoners generally dehumanized by prison conditions and demonized by political rhetoric, Judge Henderson recast the issue as implicating both fundamental human rights and Constitutional violations. Second, Judge Henderson’s acknowledgement of a common human bond served to bridge the gap between those within and those without the prison’s walls while tacitly destabilizing accepted governmental structures, calling for renewed vigilance by the public, and critically re-examining the links between prison power and Constitutional values.<sup>219</sup> Finally, Judge Henderson undertook a lengthy recitation of the facts, detailing numerous and egregious Constitutional violations over the course of eighty-nine pages of the *Federal Supplement*.<sup>220</sup> The facts presented are so abysmal that only a few pages into the opinion it is clear that something had gone horribly wrong at Pelican Bay and perhaps throughout the CDC.<sup>221</sup>

The judicial text opened a previously closed system in which secrecy, autonomy, and total power by guards over prisoners facilitated persecution through corporal punishment and violent retaliation rather than discipline and rehabilitation.<sup>222</sup> Prisoners have greater value than as objects for the exercise of state power: “the ‘mind’ [is more than] a surface of inscription for power” and the body as the device through which that power is inscribed.<sup>223</sup> The language of the opinion underscored the seriousness of the Constitutional violations and the importance of the recognition that prisoners are part of the polity; prisoners, although temporarily removed from

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<sup>218</sup> *Id.* at 1244.

<sup>219</sup> *See generally id.*

<sup>220</sup> *Madrid*, 889 F. Supp. at 1155-1244.

<sup>221</sup> *Id.* at 1160-65.

<sup>222</sup> *Cf.* FOUCAULT, *supra* note 60, at 129.

<sup>223</sup> FOUCAULT, *supra* note 60, at 102 (asserting in 1975 that “one will have to wait a long time before *homo criminalis* becomes a definite object in the field of knowledge.” At Pelican Bay this happened much sooner than Foucault supposed it might. Foucault argued that the opposing strand of objectification is that of a “criminal ... outside the law, as natural man.... a vanishing trace”).

society by the state, are eventually returned to civilization and must be viewed and treated as part of society.<sup>224</sup>

In evaluating conditions within the SHU Judge Henderson noted, “all humans are composed of more than flesh and bone -- even those who, because of unlawful and deviant behavior, must be locked away not only from their fellow citizens, but from other inmates as well.”<sup>225</sup> The opinion outlined events that buttressed the legal conclusion that severe Constitutional violations had occurred and were likely to continue to occur at Pelican Bay.<sup>226</sup> Judge Henderson continually juxtaposed the overarching theme of shared common humanity and individual Constitutional rights with the regimen of pain and deprivation in the SHU to underscore the seriousness of the issue.<sup>227</sup> The court distinguished the use of force in this case from “normal disciplinary channels” which defendants were entitled to use in administering the prison.<sup>228</sup> Plaintiff’s experts testified that punishment at Pelican Bay was: “repugnant and humiliating,” “a ritual of inflicting punishment,” “grossly excessive, utterly unbelievable, and without parallel in present-day American corrections.”<sup>229</sup> The constant reminder of a common human bond deepened and humanized the factual scenarios that included tales of beatings and other physical abuse by guards that rose to the level of torture and motivated solely by the desire for revenge or retaliation,<sup>230</sup> willful deprivations of Constitutionally mandated medical<sup>231</sup> and

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<sup>224</sup> *Id.* at 1244.

<sup>225</sup> *Madrid*, 889 F. Supp. at 1261.

<sup>226</sup> *Id.* at 1159-78.

<sup>227</sup> *See generally id.*

<sup>228</sup> *Id.* at 1173.

<sup>229</sup> *Id.* at 1168-76.

<sup>230</sup> *Id.* at 1159-78 (including beatings with batons, shocks with stun guns, naked incarceration in outdoor cages, shootings with rubber blocks and live rounds, tear gas in small cells, chaining prisoners to toilets using fetal restraints, and routine severe beatings by several officers resulting in abrasions, broken bones, and lacerations).

<sup>231</sup> *Id.* at 1200-14 (declaring the medical care system at Pelican Bay to be “grossly inadequate and unsatisfactory”).

mental health care,<sup>232</sup> routine and systematic use of maximum rather than minimum force in everyday situations,<sup>233</sup> a “code of silence” that pervaded the internal prison culture,<sup>234</sup> and a blind eye to all of these problems by prison administrators, wardens, and those within the CDC who were mandated to undertake internal investigations into such violations.<sup>235</sup>

According to Judge Henderson, the defendants, after lengthy litigation, had yet to acknowledge there was a problem within the prison, and worse had shown no tendency to attempt to remedy any of the Constitutional violations described at trial.<sup>236</sup> Because of these facts and because of a previous pattern of “delay and obstruction”<sup>237</sup> by state prison officials, Judge Henderson appointed a special master to oversee institutional reform and to work with plaintiffs and defendants to devise a remedial plan.<sup>238</sup> By employing a special master, extending the remedial stage of the litigation, and expanding the scope of federal court intrusion, Judge Henderson attempted further reform of CDC management just as federal judges in the 1970s in Constitutionalized state prison systems in Arkansas, Alabama, and Texas.<sup>239</sup>

### *C. Internal Results of Judicial Intervention*

The special master appointed by Judge Henderson in 1995 issued a final report in the spring of 2004.<sup>240</sup> The special master concluded that after nine years of Court monitoring and supervision, repeated special inquiries, and federal prosecutions of prison employees by the

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<sup>232</sup> *Id.* at 1214-27 (stating that the “record in this case reveals a deliberate, and often shocking, disregard for the serious mental health needs of inmates at Pelican Bay”).

<sup>233</sup> *Id.* at 1181-92 (characterizing policies and training by prison administrators as “strikingly deficient”).

<sup>234</sup> *Id.* at 1164.

<sup>235</sup> *Id.* at 1261 (finding that investigations into prison guard misconduct are “counterfeit investigation[s] pursued with one outcome in mind: to avoid finding officer misconduct as often as possible”).

<sup>236</sup> *Id.* at 1252.

<sup>237</sup> *Id.* at 1281 (noting that in previous prison reform cases from the 1980s and early 1990s that the CDC had repeatedly been held in contempt for noncompliance with court orders and that the Legislative Analyst also noted that the CDC lacked any sort of long term plan to address system wide deficiencies).

<sup>238</sup> *Id.* at 1282.

<sup>239</sup> *See* note 181.

<sup>240</sup> *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), *enforced sub nom* *Madrid v. Woodford*, No. C90-3094-T.E.H., Special Master’s Final Report Re Department of Corrections Post Powers Investigation and Employee Discipline (N.D. Cal. June 24, 2004).

Department of Justice that “fundamental changes in leadership, operations, and attitudes are necessary before the [CDC] achieves compliance with the Court’s use of force remedial orders.”<sup>241</sup> The special master recommended further court oversight and intervention to be sure that the defendants continue to move towards compliance with the remedial plan.<sup>242</sup> The special master found undisputed evidence of continued violations of court orders and noted the intransigence of CDC officials who “characterize their misconduct as gross incompetence and negligence rather than deliberate actions.”<sup>243</sup>

The problems at Pelican Bay remain largely unabated, but by far the most serious concern for both the court and the special master is the “code of silence” within the department facilitated by the growth in external political and internal administrative power of the CCPOA.<sup>244</sup> Increased power of the CCPOA is well documented<sup>245</sup> as is the inability of CDC officials to discipline prison guards for excessive force complaints and other Constitutional violations.<sup>246</sup> Finally, the special master concluded that the problems at Pelican Bay “exist at other CDC prisons” and “emanate from the CDC’s Central Office in Sacramento, which serves all prisons.”<sup>247</sup> Continued gross contraventions of the Eighth Amendment at California prison institutions other than Pelican Bay illustrate both the dichotomy between problems of penal administration and the goals of effective punishment and the lack of serious reform.<sup>248</sup>

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<sup>241</sup> *Id.* at 127.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 10.

<sup>244</sup> *Id.* at 11.

<sup>245</sup> *E.g.*, DEUKMEJIAN REPORT, *supra* note 139, at 229-232; Editorial, *Reform in Name Only*, SACRAMENTO BEE, Nov. 21, 2004, at E4.

<sup>246</sup> *See* DEUKMEJIAN REPORT, *supra* note 139, at 29 (finding that CDC officials continue to “silence whistle blowers, block investigations, hide facts, and cover up staff misconduct” and recommending the creation of an independent Internal Affairs Unit along with other systemic reforms).

<sup>247</sup> Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995), *enforced sub nom* Madrid v. Woodford, No. C90-3094-T.E.H., Special Master’s Final Report Re Department of Corrections Post Powers Investigation and Employee Discipline 11 (N.D. Cal. June 24, 2004).

<sup>248</sup> FOUCAULT, *supra* note 60, at 90 (theorizing that there must be a principle of moderation for the power of punishment to be effective).

#### *D. External Results of Judicial Intervention*

Although the CDC as an institution remains resistant to serious reform, making progress only in fits and starts,<sup>249</sup> federal court intervention has substantially changed conditions within Pelican Bay Prison<sup>250</sup> and has brought the issue of prison reform to the forefront of state politics.<sup>251</sup> Pelican Bay is an entirely different prison today from the one Judge Henderson toured in 1994.<sup>252</sup> The transformation of Pelican Bay from a prison where gross abuse of prisoners was routine to one where prison officials honor Constitutional rights was only the first step in altering the way the CDC operates.<sup>253</sup> Judge Henderson's decision and ongoing oversight substantially transformed Pelican Bay itself into a prison where the staff takes pride in their level of professionalism.<sup>254</sup> It is no longer necessary for the federal court to exercise tight oversight and control of day-to-day operations because of the fundamental changes in prison operations.<sup>255</sup> However, the problems that do remain cannot be solved at the level of prison operations but are indicative of larger problems that permeate the CDC.<sup>256</sup>

In 2004, after the recall election of then Governor Gray Davis, state politicians began to pay serious attention to the systemic problems within the CDC. Governor Schwarzenegger and State Senators Gloria Romero and Jackie Speier began to work seriously on transforming the

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<sup>249</sup> Jenifer Warren, *Some Reforms Blocked but Prison System is Improving*, Senator Says, L.A. TIMES, Oct. 14, 2004, at B6 (noting that all three branches of government took on the prison system and CDC with mixed results).

<sup>250</sup> Hagar, *supra* note 186 (stating that Pelican Bay is an entirely different prison today than the one the federal court confronted in the early 1990s and that very few problems remain today).

<sup>251</sup> See e.g. George Deukmejian, *It is Time to Overhaul Corrections System*, SACRAMENTO BEE, Sept. 19, 2004, at E3.

<sup>252</sup> Hagar, *supra* note 186.

<sup>253</sup> *Id.* (explaining that the few problems remaining at Pelican Bay are indicative of larger more serious systemic problems within the CDC).

<sup>254</sup> *Id.* (emphasizing that reform benefits both prisoners and staff).

<sup>255</sup> Chris Durant, *Pelican Bay State Prison: Behind the Walls*, EUREKA TIMES-STANDARD, Jan. 18, 2004, at A1 (reporting that the federal court no longer routinely monitors most areas of prison operations).

<sup>256</sup> Hagar, *supra* note 186.

way California's prisons are run.<sup>257</sup> The newly elected Governor appointed former guard Rod Hickman as the Secretary of the Youth and Adult Correctional Agency (YACA) and Jeanne Woodford, former warden of San Quentin and known as a strong advocate for prisoner rehabilitation, as the new director of the CDC.<sup>258</sup> Both appear committed to substantial reform but face serious obstacles, including entrenched bureaucracy, the undue influence of the CCPOA, a culture of silence and cover-up surrounding allegations of prison guard misconduct coupled with bureaucratic resistance to change.<sup>259</sup> The slow pace of reform, coupled with formidable structural obstacles, led Judge Henderson to threaten a federal court takeover of the CDC midway through 2004.<sup>260</sup>

While ongoing crisis within the CDC marked 2004, the year also presented an opportunity for nascent reform. The California State Senate held special committee hearings.<sup>261</sup> Legislators introduced twenty-eight prison reform related bills, and Governor Schwarzenegger signed seventeen of those bills, including some opposed by the CCPOA.<sup>262</sup> The Governor appointed the Deukmejian Commission to investigate and recommend systemic reforms.<sup>263</sup> The executive branch began to implement reforms including a restructuring of YACA and the creation of an Independent Bureau of Review<sup>264</sup> to investigate allegations of correctional officer wrongdoing outside of the CCPOA's sphere of influence and corruption.<sup>265</sup>

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<sup>257</sup> Mark Arax & Jenifer Warren, *Despite State Promises, Reform Eludes Prisons; Court and State Senators are Investigating Cover-up Allegations*, L.A. TIMES, Dec. 28, 2003, at B1.

<sup>258</sup> Jenifer Warren, *Prison Guard Turned Boss Presses for Reform*, L.A. TIMES, March 18, 2004, at A1; Editorial, *State Prisons' Revolving Door*, L.A. TIMES, April 15, 2004, at B14.

<sup>259</sup> Pamela J. Podger, *Promises to fix State Prisons have been Heard Before*, S.F. CHRONICLE, Jan. 24, 2004, at A1.

<sup>260</sup> See e.g., Jahna Berry, Jeff Chorney & Jill Duman, *Judge Threatens Federal Oversight for State Prisons*, THE RECORDER, July 21, 2004, at 1.

<sup>261</sup> Editorial, *A Prison System in Disarray*, S.F. CHRONICLE, Jan. 19, 2004, at B6.

<sup>262</sup> Warren, *supra* note 240.

<sup>263</sup> Mark Martin, *Deukmejian to Lead Prison Review Panel*, S.F. CHRONICLE, March 16, 2004, at A17.

<sup>264</sup> Warren, *supra* note 240.

<sup>265</sup> Patt Morrison, *Union Knows all About Crime, but Nothing About Punishment*, L.A. TIMES, Feb. 10, 2004, at B3 (recounting the fact that one associate warden who attempted reform was forced to ask for protection from the California Highway Patrol).

Unfortunately, some improvements have already begun to deteriorate in 2005 due to the slow pace of change and the continued opposition of the CCPOA.<sup>266</sup> The plan to reorganize and rename YACA,<sup>267</sup> creating a Department of Corrections and Rehabilitation, is set to be approved by the California Legislature but observers question whether centralizing control of the system will prove to an adequate solution.<sup>268</sup> The plan makes wardens accountable to the executive branch and attempts to insulate prison management from political pressures including CCPOA influence.<sup>269</sup> State Senator Romero believes that reorganization of this nature “won’t stop the scandals” but gives “this governor credit for having the internal fortitude to deal with prison reform.”<sup>270</sup> Further, the advocacy of victim’s rights groups funded by the CCPOA has stymied other reforms scheduled to take place including alternative sanctions for parole violators.<sup>271</sup>

Sustained political attention to the problems in California’s prison system requires political courage. Whether California politicians are able to continue the recent nascent shift toward rehabilitation and humane prison conditions remains to be seen. Regardless, federal courts will continue to exercise oversight and monitoring to ensure Constitutional conditions of confinement in the areas of prison overcrowding,<sup>272</sup> excessive force complaints,<sup>273</sup> medical<sup>274</sup> and mental health care,<sup>275</sup> and parolee procedural due process rights.<sup>276</sup> Although federal court intervention may not have directly caused recent political attempts at reform; the publicity

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<sup>266</sup> Jenifer Warren, *Victim’s Rights Group Blasts Prison Rehab Plan*, L.A. TIMES, April 1, 2005, at B7.

<sup>267</sup> Press Release, Youth and Adult Correctional Agency, Correctional Agency Blows up Organizational Boxes (Jan. 6, 2005) (on file with author) (proclaiming that “most of the system’s ills can be traced to the structure of the Youth and Adult Correctional Agency”).

<sup>268</sup> Mark Martin, *Governor Drops Plan to Combine Youth, Adult Prisons*, S.F. CHRONICLE, Mar. 31, 2005, at B3.

<sup>269</sup> *Id.*

<sup>270</sup> Warren, *supra* note 257.

<sup>271</sup> Jenifer Warren, *State to Scrap Key Parole Reform*, L.A. TIMES, April 9, 2005, at A1.

<sup>272</sup> Jenifer Warren & Tim Reiterman, *Crowding at State Prisons has State in a Jam*, L.A. TIMES, Mar. 13, 2005, at A1.

<sup>273</sup> *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995).

<sup>274</sup> *Plata v. Davis*, No. C-01-1351 TEH (E.D. Cal. 2002); *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1993).

<sup>275</sup> *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. Cal. 1995).

<sup>276</sup> *Valdivia v. Davis*, 206 F.Supp. 2d 1068 (E.D. Cal. 2002).

generated by federal court action and subsequent exposure of systemic abuses contributed to steps by both the California legislative and executive branches to attempt a transformation of the CDC bureaucracy. The state is finally acting – albeit ten years after serious federal judicial intervention began.

#### IV. CONCLUSION

The shift from modern penal systems, which focused on individual rehabilitation and preparation for re-integration into general society, to a neo-classical mode in which state power accumulates at the expense of the individual, has resulted in a “reflexivity of the penal system” where the power of both prison industries and corrections employees grows as prison populations increase.<sup>277</sup> Increased prison power is then further reinforced by heightened prosecutions for what were previously minor offenses and by the tendency of parole and probation officers to return parolees to prison for technical violations.<sup>278</sup>

Although lawyers and public interest law groups have undertaken structural prison reform litigation since the 1960s, there has been a resurgence of claims of prisoner abuse over the last decade as the systematic use of excessive force, punishment, and retaliation by prison guards to control prisoners becomes more widespread.<sup>279</sup> If prisons map the “social body,” this diachronic trend away from rehabilitation and back toward physical discipline and punishment threatens the legal and social order.<sup>280</sup> Increased government control and abuse of prisoners leads to increased government control and abuse of individuals outside prison walls.<sup>281</sup>

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<sup>277</sup> Caplow, *supra* note 66, at 72-73.

<sup>278</sup> LITTLE HOOVER COMMISSION, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES, at 10 (November 2003) available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf> [hereinafter LHC REPORT] (outlining California’s administrative parole revocation process).

<sup>279</sup> *E.g.*, Hope v. Pelzer, 536 U.S. 730 (2002); Farmer v. Brennan, 511 U.S. 825 (1994); Hudson v. McMillian, 503 U.S. 1 (1992); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>280</sup> FOUCAULT, *supra* note 60, at 78.

<sup>281</sup> *Id.*

Torture was classically condoned by the state as the regulated production of pain in a ritualized setting,<sup>282</sup> but at Pelican Bay, physical violence by guards against inmates was prevalent and systematic, used by prison guards and administrators to establish their power rather than for any legitimate penological purpose.<sup>283</sup> Judge Henderson sought to bring the prison, and eventually the CDC, back into line with accepted penal practices and within the scope of the Eighth Amendment's evolving standards of civilized society.

The prisoner-guard conflict at Pelican Bay mirrors the ongoing tension between state power and individual rights while illustrating the problem of excessive power in closed institutions: "there must be a principle of moderation for the power of punishment" lest unrestrained state power filter into the rest of the social order.<sup>284</sup> Legal texts and judicial intervention, rather than the political process, may be the only effective ways to mediate the power of prison officials with the rights of prisoners, especially when felons are shut out of the political process through disfranchisement and political pragmatism; it is the rare elected official who can take up the mantle of prison reform without judicial prodding.<sup>285</sup> In the words of Justice William Brennan:

Those who we would banish from society  
or from human community itself often speak  
in too faint a voice to be heard above society's  
demand for punishment. It is the particular role  
of courts to hear these voices, for the Constitution  
declares that the majoritarian chorus may not alone  
dictate the conditions of social life.<sup>286</sup>

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<sup>282</sup> *Id.* at 33,39 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (characterizing the goals of torture as crime deterrence or confession).

<sup>283</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1160 (N.D. Cal. 1995).

<sup>284</sup> FOUCAULT, *supra* note 60, at 90.

<sup>285</sup> FEELEY, *supra* note 23, at 66-79 (noting that Arkansas officials were caught in a cycle of prison scandals and were only able to turn the corner after federal judicial intervention gave them and excuse to act). Of course in other states elected officials were reluctant to undertake any reform and deeply resented judicial intervention. *Id.* at 80-85 (describing the history of Texas' experience with prison reform).

<sup>286</sup> *McCleskey v. Kemp*, 481 U.S. 279, 343 (Brennan, J. in dissent).

Federal judges, in the context of structural prison reform litigation, have compelled remedies of Constitutional deficiencies and the enforcement of individual Constitutional rights when the political process has failed.<sup>287</sup> The recent California experience shows that intervention in state institutions by federal courts is justified to protect the Constitutional rights of those shut out of the political process.<sup>288</sup> Prisoners are one such class.

Without the publicity generated by the Pelican Bay Prison case, it is likely that Constitutional violations of prisoner civil rights by California prison guards and administrators would have continued.<sup>289</sup> Judge Henderson's actions, culminating in a threatened takeover of California's prisons, resulted in real steps toward reform by California's legislative and executive branches.<sup>290</sup> However, whether such reforms are implemented remains to be seen.

The Pelican Bay case illustrates a national ambivalence toward federal judicial power. The tension between the tenets of democratic elections and the dictates of the Constitution is exemplified by Judge Henderson's actions. Continued critiques of activist federal judges may lead to fewer judges willing to endure such criticism and take the steps required to remedy violations of our individual Constitutional rights. Judicial independence continues to be threatened – California's prisons demonstrate why such independence is necessary.

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<sup>287</sup> See *e.g.*, *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (holding the lack of medical care to be a willful and intentional violation of both the Eighth and Fourteenth Amendments); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976) (extending the holding to all conditions within the prisons; the conditions of confinement violated “any judicial definition of cruel and unusual punishment”); *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979) (placing the entire state prison system into receivership after eight years of willful intransigence by an uncooperative defendant).

<sup>288</sup> See discussion *supra* Part II.C.

<sup>289</sup> See discussion *supra* Part III.A.

<sup>290</sup> See discussion *supra* Part III.C-III.D.