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"It should be emphasized that when confronted with an obstinate, obdurate and unregenerate defendant, a more detailed remedy is needed. . . . [W]hen a defendant exhibits a stubborn and perverse resistance to change, extensive court-ordered relief is both necessary and proper."[1]

I. INTRODUCTION

Consider a prison where prisoners are bound with "fetal" restraints,[2] chained to toilets,[3] and locked naked in outdoor cages.[4] Imagine a prison in which inmates' bones are broken,[5] their skulls lacerated,[6] and their skin peeled off after being bathed in boiling water.[7] In such a place, inmates are routinely extracted from their cells with tasers, batons, mace, and shotguns that fire rubber blocks.[8] A "code of silence" reigns[9] and authorities regularly turn a blind eye to the ritualized infliction of pain by prison guards.[10] In this place, guidelines about the use of firearms and lethal force are routinely violated[11] and guards may shoot to kill or injure if confronted with violence because no warning shots are permitted.[12]

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1. William Wayne Justice, Judge, E.D. Tex., The Two Faces of Judicial Activism, Address Before the George Washington University National Law Center (Mar. 10, 1992), *in* 61 GEO. WASH. L. REV. 1, 7 (1992) (explaining 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)).

2. Madrid v. Gomez, 889 F. Supp. 1146, 1168 (N.D. Cal. 1995) ("[Fetal restraints involve] 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.").

3. *Id.* at 1169.

4. *Id.* at 1171.

5. *Id.* at 1165 (describing 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 and the inmate suffered a fractured jaw).

6. *Id.* at 1162 (describing the first of many factual scenarios in a section entitled "Staff Assaults on Inmates").

7. *Id.* at 1166-67.

8. *Id.* at 1172-78 (citing a member of the Pelican Bay staff: Cell extractions are often viewed as "opportunities to punish, and inflict pain upon, the inmate population for what were often minor rules violations").

9. *Id.* at 1164.

10. *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.* at 1157 n.4, 1158 n.6.

11. *Id.* at 1179.

12. *Id.* at 1184 (citing the deposition transcript of Pelican Bay Prison Associate Warden Garcia).

The prison is neither Abu Ghraib nor Guantanamo Bay; it is Pelican Bay State Prison located in Northwest California.[13] In 1990, just one year after the prison opened, a class of prisoners confined in Pelican Bay's Secure Housing Unit (SHU) brought suit in *Madrid v. Gomez*.[14] In *Madrid*, the prisoners challenged the constitutionality of the conditions of their confinement.[15] At the conclusion of the trial, after more than fifty-seven witnesses had testified and more than six thousand exhibits were entered into evidence,[16] Judge Thelton Henderson appointed a Special Master to monitor prison conditions at Pelican Bay and work with the plaintiffs and defendants to develop a remedial plan to address numerous constitutional violations.[17] Judge Helton held that the court would retain jurisdiction over conditions of confinement at Pelican Bay Prison until "all Constitutional violations found [through the litigation] have been fully and effectively remedied."[18] As of May 2005, more than eleven years after the trial began, the court maintains jurisdiction.[19]

Judge Henderson uncovered horrific abuse[20] in Pelican Bay's SHU during an active fact-finding process. Before the trial commenced, Judge Henderson spent two days touring Pelican Bay.[21] He also maintained an active role in the *Madrid* case by supervising and approving the implementation of a remedy. Eventually, he threatened a federal court takeover of the California Department of Corrections and Rehabilitation (CDCR) to correct systemic problems, including undue influence and abuse of power by the California Correctional Peace Officers Association (CCPOA).[22]

Critics of the type of judicial intervention undertaken by Judge Henderson decry such federal court action as activism and outside the realm of legitimate judicial decision-making.[23] Such criticism in the context of prison reform led to

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13. *Id.* at 1155.

14. *Id.*

15. *Id.*; *see also* 42 U.S.C.A. § 1983 (West 2000) (allowing federal suits based on a deprivation of constitutional rights).

16. *Madrid*, 889 F. Supp. at 1156.

17. *Id.* at 1282-83.

18. *Id.* at 1283.

19. Madrid v. Woodford, No. C90-3094-TEH (N.D. Cal. Nov. 17, 2004) (order regarding (1) Special Master's Report Re "Post Powers" Investigations and Employee Discipline and (2) CCPOA's Motion to Intervene).

20. *See supra* notes 2-12 and accompanying text; *see also infra* note 223 and accompanying text.

21. *Madrid*, 889 F. Supp. at 1146, 1156.

22. *See* discussion *infra* Part III.A.

23. Both liberals and conservatives have criticized federal courts for being activist. *See* Michael C. Dorf, *After Bureaucracy*, 71 U. CHI. L. REV. 1245, 1247-1248 (2004) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)); *see also* William Rehnquist, *Decisions Shouldn't Lead to Judges Impeachments*, SACRAMENTO BEE, Jan. 24, 2005, at B5 (defending judicial independence, articulating the view that the framers of the Constitution wanted to protect judicial independence, and arguing that judicial decision making should not be swayed by popular opinion); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 1-13 (1998) (articulating a similar view regarding judicial intervention in state prison systems).

the passage of the Prison Litigation Reform Act of 1995 (PLRA or "Act"), which limits the power of federal courts to intervene in state prison systems.[24] The PLRA was promulgated as a solution to the perceived twin problems of runaway prisoner litigation and abuse of federal court power;[25] the PLRA's proponents sought to leave reform of state prisons to state political processes.[26] Congress, however, passed the PLRA based on mistaken assumptions about the nature of prisoner litigation,[27] thereby improvidently eliminating enforcement mechanisms designed to ensure the constitutionality of state prisons.[28]

By limiting federal court power to hear prisoner's cases, the immediate result was an upsurge in constitutional violations of individual prisoner's rights.[29] Indeed, prisoner abuse claims have risen since the passage of the PLRA because the political power of prison authorities and guards has grown and their control of state prison systems has been consolidated.[30] Furthermore, prisoners are increasingly shut out of the political process, especially in states that disenfranchise and otherwise hinder the social participation of convicted felons.[31] This lack of political power suggests that majoritarian political processes remain an ineffective mechanism to enforce prisoner rights.[32] Federal judicial intervention is an effective and legitimate method of prison reform; the critique of federal judges as activist and the assumptions underlying the PLRA are misguided when illustrated by the facts and results of the Pelican Bay litigation.[33]

The 1960s and 1970s saw federal judicial intervention in state prisons peak when federal courts across the Southern states reformed state prison institutions, and moved en masse from an "hands-off" policy to an interventionist policy based on the Eighth Amendment.[34] With its numerous constitutional deficiencies, Pelican Bay State Prison was a archetypal case for federal court intervention.[35] The PLRA,[36] however, limits federal court power to intervene in state prisons through structural reform and, when passing the Act, Congress wrongly assumed

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24. *See* discussion *infra* Part II.B.

25. *Id.*

26. *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).

27. *Id.* at 1692 (finding that although inmate suits outnumbered non-inmate suits per capita in federal courts, once state case filings were included, the filing rates for both groups were very similar).

28. *See infra* pp. 427-28.

29. ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA'S PRISONS 22-27, 32 (2004).

30. *Id.* at 20-22.

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

32. *Id.* at 32-33.

33. FEELEY & RUBIN, *supra* note 23, at 50.

34. *Id.* at 30-51.

35. *Cf. id.* at 166-67 (noting that court action can be successful).

36. Prison Litigation Reform Act of 1995, Pub. L. 104-134, § 802(a) 110 Stat. 1321, 66-77 (codified at 18 U.S.C.A. § 3626, 28 U.S.C.A. § 1932 (1996)).

that the need for such structural intervention had ended.[37] Nevertheless, as demonstrated by *Madrid*[38] and the hundreds of California prison and prisoner cases of the last decade,[39] judicial intervention remains the only viable tool to remedy constitutional deficiencies in state prisons because majoritarian political processes failed to produce serious reform.[40] Moreover, 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 have actually implemented reform.[41]

For example, since *Madrid* was decided in 1995, the California prison system has received increased judicial scrutiny as a result of lawsuits brought by the Prison Law Office on behalf of California prisoners.[42] Before Judge Henderson threatened to place the entire California prison system under the supervision of the federal court in 2004,[43] state-elected officials were unwilling to act.[44] Only since then have the Legislature and the governor seriously proposed or enacted nascent prison reforms.[45] Although there are other reasons that help explain the recent shift towards prison reform, including legislative term limits and the 2003 recall election,[46] federal judicial intervention has been a necessary catalyst for institutional change in California's prisons.[47]

This Comment will examine *Madrid*, the last major prison case before the passage of the PLRA in which a federal court broadly intervened in a prison system through fundamental structural reform litigation.[48] Part II outlines the

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37. *See infra* p. 433; *see also infra* notes 86-89 and accompanying text.

38. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

39. *Id.* at 1169; *see also* discussion *infra* Part III.A.

40. *See* discussion *infra* Part III.A.

41. *See, e.g.*, FEELEY & RUBIN, *supra* note 23, at 73 (quoting an Arkansas state official as saying that the state would do "whatever it takes to get out from under" federal court supervision).

42. The Prison Law Office is a public interest law firm located in San Quentin, California. It 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 www.prisonlaw.com.

43. *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 (detailing Judge Henderson's criticism of California's prison system).

44. Inaction by state officials in California is partly attributable to the influence of the CCPOA. *See, e.g.*, Mark Martin, *Guards Union Corrupts Prisons Report Finds*, S.F. CHRON., June 5, 2004, at A1 (discussing the influence of the CCPOA in California political culture); 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 (explaining the slow progress in prison reform in recent years); *see also* discussion *infra* Part III.A.

45. *See* discussion *infra* Part III.D.

46. *Id.*

47. *Id.*

48. *Madrid* may be the last serious, ongoing vindication of prisoners' 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.

historical and jurisprudential foundations that serve to legitimize federal judicial intervention. Part III examines the California prison system through the lens of the *Madrid* litigation[49] and the ongoing social and political problems caused by the prison crisis. Part IV concludes that it is important to preserve the power and independence of the federal judiciary because judicial intervention remains the only viable tool to remedy constitutional deficiencies in state prisons so long as majoritarian political processes fail to produce serious reform and to protect the rights of the most politically powerless societal sector.[50]

II. CORRECTIONAL REFORM

In a significant speech to the American Bar Association in 2003, Supreme Court Associate Justice Anthony M. Kennedy implored members of the Bar to pay more attention to the problems of this nation's prison systems.[51] He noted that one goal of the nation's current correctional systems is to "degrade and demean the prisoner" and he declared this goal unacceptable in "a society founded on respect for the inalienable rights of the people" because individual constitutional rights do not end with incarceration.[52] He further called on civil litigation 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.[53]

Certainly, many public policy litigation lawyers have struggled to do as Justice Kennedy proposed: to ensure the individual constitutional rights of prisoners through various reform efforts, including litigation.[54] Prison litigation has forced federal courts to move from a "hands-off" approach toward a more interventionist posture regarding prisoner rights cases.[55] However, assessing the impact that litigation has had on prison systems is difficult because of the complex forces operating to influence correctional systems.[56] At the least, the

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49. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

50. Given the fluid and ongoing California correctional crisis, this Comment limits itself to the situation as it stood in early 2005.

51. Anthony M. Kennedy, Associate Justice, United States Supreme Court, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.abanet.org/media/kencomm/amkspeech 03.html [hereinafter Kennedy Speech] (on file with the *McGeorge Law Review*).

52. *Id.*

53. *Id.*

54. Susan Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 641 (1993) (observing that hundreds of cases have been "brought and won by lawyers on behalf of inmates challenging the conditions and practices of our nation's" correctional institutions).

55. *Id.* at 659. *But see* FEELEY & RUBIN, *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 explaining that significant reform litigation did not emerge until the federal courts shifted from civil rights jurisprudence to an Eighth Amendment jurisprudence).

56. Sturm, *supra* note 54, at 648.

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,[57] the development of bureaucratic policies and procedures designed to ensure compliance with these standards,[58] and finally, the increased political and public awareness of conditions within correctional institutions.[59]

A. *The History and Evolution of Prison Reform*

Prior to the eighteenth century, punishment operated on the body of the condemned through public torture designed to be "a gloomy festival of punishment"[60] that objectified the accused, demonstrated the state's power to punish, and deterred crime.[61] In the late eighteenth century, the modern prison emerged,[62] bringing with it chronic calls for penal reform.[63] From the workhouses of England in the early eighteenth century, to the Philadelphia model of the nineteenth century, to Bentham's infamous Panopticon,[64] expressions of penal power have historically been accompanied by internal and external proposals for reform to better discipline and rehabilitate prisoners and humanize the entire prison institution.[65]

These changes in penal theory, from public punishment to institutional rehabilitation, mirror the evolution of the twentieth century welfare state.[66] The last quarter century has seen a swing away from the promise of the "Great Society:" political rhetoric has shifted from the aspirations of a social welfare state that would provide for all, to a discourse of personal responsibility and ever increasing punishment.[67] Increased state power, premised on crime control and punishment, merges with the penal elements of political emphasis on personal

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57. *Id.* at 662.

58. *Id.* at 667.

59. *Id.* at 669-70.

60. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 8 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

61. *Id.* at 48-49.

62. *See id.* at 16 (observing that there was a "reduction in penal severity" in the period from 1775-1975 because prisons began to focus less on punishment of the condemned's body and more on rehabilitation).

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

64. *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).

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

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

67. *Id.*

responsibility rather than underlying social conditions.[68] This shift in rhetoric—both a symptom and consequence of increased crime rates, the "Just Say No" campaign, and an ongoing drug war that resulted in a concurrent prison-building boom[69]—has resulted in broad acceptance of the notion that politicians must favor harsher punishments and lobby for tougher crime-control measures to gain and maintain political power.[70]

As political discourse and sentiment switched to the crime-control model, so did penal philosophy itself; penal theory shifted from a model focused on rehabilitation and post-incarceration societal re-integration towards a neo-classic punishment regime designed to punish the prisoner[71] through extra-legal dehumanizing methods, which include the use of excessive force, actual torture, and abuse of guard power, especially with female prisoners.[72] Furthermore, as prisons became increasingly hidden from public view,[73] the possibility of these extra-legal means of punishment increase and state action further dehumanizes "part of the family of humankind."[74] This dehumanization continues when prisoners are "re-integrated" into a society in which they are barred from anything approaching full social participation.[75]

While society moved from a penal regime focused on rehabilitation to one focused on punishment and control, the federal courts responded by shifting towards a more interventionist, active posture.[76] First, federal judges enforced

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68. *See id.* at 70-71 (identifying three factors that underlie changes in the United States 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 the prison population increases due to more prosecutions and the 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 and argued that such mechanisms have a tendency to "swarm" and emerge from the "closed fortresses [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.

69. ELSNER, *supra* note 29, at 18-27.

70. Caplow & Simon, *supra* note 66, at 70 (1999).

71. *Cf.* FOUCAULT, *supra* note 60, at 113 (noting the link between prisons and broader society and articulating the notion of the punitive city).

72. *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 supra* notes 2-12 and accompanying text; *see also infra* note 223 and accompanying text.

73. Pelican Bay is near the town of Crescent City located almost four hundred miles north of San Francisco. *Id.* at 1155.

74. Kennedy Speech, *supra* note 51.

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

76. 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); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (extending the holding to all conditions within the prisons and finding that the conditions of confinement violated "any judicial definition of cruel and unusual punishment"); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) (holding the denial of medical care to be a willful and intentional violation of both the Eighth and Fourteenth Amendments). *See generally*, FEELEY & RUBIN, *supra* note 23. *See also supra* notes 66-74 and accompanying text.

constitutional norms in Southern prisons by creating legal doctrines designed to produce more "moral" prisons.[77] Then, they opened to public scrutiny, previously closed state prison institutions where members of the media, government, and volunteers witnessed the fact that notions of rehabilitation had been discarded in favor of a revival of archaic forms of physical torture and control.[78] Federal judges used special masters, experts, and other administrative means to make quasi-administrative decisions that reformed prisons.[79] In *Judicial Policy Making and the Modern State*,[80] professors Malcolm Feeley and Edward Rubin argued that the prison cases of the 1960s and 1970s were vital to eliminating the last vestiges of Southern slavery by "imposing national standards on state institutions."[81] To achieve the reform of those prisons, federal district court judges used bureaucracy as a coordinating idea with which to reshape Southern prisons.[82] This coordinating idea enabled courts to promulgate standards and policies to professionalize corrections regimes and enforce individual constitutional rights.[83]

Federal courts sought to impose a modern bureaucratic scheme of governance in archaic Southern prisons.[84] Regardless of methodology, courts sought to bring Southern prisons from the dark ages and into the modern age where evolving standards of civil society began to transform Southern prisons into establishments that adhered to national constitutional standards.[85] The Southern prison cases fit nicely into that project since, arguably, the practices and conditions in Southern prisons were the final vestiges of feudal slave systems of the nineteenth century.[86] The imposition of constitutional norms on state government actors fits into any theory of federal judicial action, since judges are the final enforcers of the constitutional rights of all individuals, regardless of social status.[87]

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77. FEELEY & RUBIN, *supra* note 23.

78. *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).

79. *Id.* at 305-11.

80. *Id.*

81. *Id.* at 149.

82. *Id.* at 271 (noting that bureaucratization of prison administration was a second such "coordinating idea").

83. *Id.* at 281.

84. *Id.* at 271.

85. *Id.* at 166-67.

86. *Id.* at 151-57.

87. ALEXANDER HAMILTON, THE FEDERALIST NO. 78, at 146-47 (Andrew Hacker ed. 1964) (arguing that the federal judiciary must protect the Constitution and the rights of individuals and minorities).

B. *The Prison Litigation Reform Act of 1995*

Since federal court intervention in state prisons successfully altered prison life for hundreds of thousands of prisoners,[88] Congress then passed the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), which authorized the United States Attorney General to bring actions against state institutions, including prisons, in an effort to secure the constitutional rights of prisoners.[89] Although section 1983 actions ensured access to federal courts and achieved substantial reform of some state prisons,[90] CRIPA provided an additional avenue through which the Federal Department of Justice (DOJ) could intercede to enforce the constitutional rights of prisoners.[91] However, the DOJ rarely brought suit under the provisions of CRIPA, leaving section 1983 actions as the main vehicle for inmates to enforce rights or to allege excessive force by prison staff.[92]

Although federal judicial intervention remedied conditions of confinement in prisons across the United States, Congress then limited judicial discretion in hearing such claims by enacting the PLRA in 1995.[93] The PLRA was enacted to address a perceived problem that frivolous prisoner complaints were overloading federal court dockets.[94] Support for the law also had the additional political benefit of appearing tough on crime.[95] Political emphasis on the rhetoric of crime control and punishment again drove the enactment of the PLRA.[96] 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 forty thousand cases filed in 1995.[97] 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.[98] In introducing the Act, Senator Orrin Hatch, then chair of the Senate Judiciary Committee, stated that the legislation would "bring relief to a civil

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88. *See supra* notes 56-59, 75-80 and accompanying text.

89. Pub. L. No. 96-247, § 1, 94 Stat. 349 (codified at 42 U.S.C.A. § 1997-1997i (1980)).

90. 42 U.S.C.A. § 1983 (West 2004).

91. *Id.* § 1997a.

92. *See, e.g.*, United States v. Connecticut, 931 F. Supp. 974 (D. Conn. 1996) (initiating suits against state institutions for mentally retarded persons); United States v. L.A., 635 F. Supp. 588 (C.D. Cal. 1986) (initiating suit over conditions in juvenile hall); United States v. Hawaii, 564 F. Supp. 189 (D. Haw. 1983) (initiating suit over prison conditions). However, CRIPA has most often been invoked to protect patients in mental health units and developmentally disabled living centers. *See, e.g.*, United States v. Oregon, 839 F.2d 635 (1988) (initiating suits over conditions at a state mental health facility).

93. Prisoner Litigation Reform Act of 1995, Pub. L. 104-134, § 802(a) 10 Stat. 1321-66 to 1321-77 (codified at 18 U.S.C.A. § 3626 and 28 U.S.C.A. § 1932, codified as amended at 42 U.S.C.A. § 1997e (1996)).

94. 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).

95. *Id.*

96. *See id.* at 539 (indicating that the PLRA was driven in part by conservative dissatisfaction with "imperial" or activist judging).

97. 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).

98. *See supra* note 27 and accompanying text.

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."[99]

Specifically, the PLRA limited prisoner access to federal courts by amending a provision of CRIPA.[100] Previously, a district court had discretion to continue a case to require the prisoner to exhaust all administrative remedies before the case could go forward in federal court.[101] In contrast, the PLRA mandates that a prisoner exhaust administrative remedies prior to commencing litigation in federal court.[102] Requiring prisoners to exhaust all administrative remedies means that the majority of prisoner suits will never reach federal district courts because most prisoners proceed pro se[103] and prisoners are often exposed to retaliation by prison authorities, chilling the possibility of future prison reform through section 1983 actions.[104]

Many commentators have criticized the PLRA as an unnecessary intrusion into the discretion and inherent powers of federal court judges.[105] In addition to removing judicial discretion concerning the exhaustion of administrative remedies, the Act limits the remedies available in prisoner civil rights lawsuits.[106] The Act also restricts prospective injunctive relief through a tripartite need, narrowness, and intrusiveness requirement:[107] 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."[108]

The Act requires federal judges to limit preliminary injunctive relief to no more than ninety days,[109] limits the types of prophylactic remedies that may be imposed,[110] and sets time limits on the relief[111] by requiring that a court may extend prospective relief only by issuing written findings that prospective relief is necessary and that such relief is the least intrusive relief possible to correct the federal right in question.[112] In practice, the needs, narrowness, and intrusiveness,

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99. *Id.* at 1565-66 (2003) (quoting Senator Orrin Hatch in 141 Cong. Rec. S14, 418 (daily ed. Sept. 27, 1995)).

100. 42 U.S.C.A. § 1997e (West 2000).

101. Pub. L. No. 96-247, § 7, 94 Stat. 349 § 7 (codified at 42 U.S.C.A. § 1997e (1980)).

102. 42 U.S.C.A. § 1997e.

103. David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1690 (2001) ("[A] full ninety-six percent of prisoner Section 1983 suits are brought pro se [and] eighty-two percent of prisoners are high school dropouts.").

104. Mathews, *supra* note 92, at 555.

105. 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.

106. 18 U.S.C.A. § 3626(a) (West 2000).

107. *Id.* § 3626(a)(1)(A).

108. *Id.*

109. *Id.* § 3626(a)(2).

110. *Id.*

111. *Id.* § 3626(b).

112. *Id.* § 3626(b)(3).

criteria for prophylactic injunctive relief, coupled with termination provisions, mean that federal intervention in state prisons is largely a relic of the past.[113] The Pelican Bay Prison case (*Madrid*) may be the last instance where a federal district court has exercised equitable discretion to compel prisons to honor the compulsory constitutional rights of prisoners over an extended period.[114]

Most critiques of federal court intervention in state prisons focus on the alleged misuse of federal court power rather than the misuse of power by prison guards and administrators, causing commentators to misapprehend the problems of power.[115] Judge Henderson's ongoing and successful supervision of Pelican Bay undercuts the rhetoric that drove passage of the PLRA and the ongoing wails of those politicos who criticize federal judges as activist.[116] Federal courts in prison cases challenge state government power that violates constitutional norms, only to the extent necessary to end constitutional violations.[117]

The CCPOA's power within state government and a resistance to change within the CDCR are recurring themes in the legal texts of the Pelican Bay case and are powerful political forces to be reckoned with in any attempt to reform the California correctional system.[118] Judge Henderson is using the limited power of the district court to publicize conditions of confinement in California prisons, to expose entrenched political power structures resistant to change, to professionalize the CDCR, and ultimately, to transform California's prison system from a system where prison guard power destroys constitutional rights into one where guards honor those rights.[119]

C. *Legitimacy of Judicial Intervention*

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 executive branch power.[120] Critics from both the left and

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113. *See* discussion *supra* Part II.B.

114. *Id.*

115. John Choon 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).

116. *See infra* notes 117-18 and accompanying text.

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

118. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995), *enforced sub nom.* Madrid v. Woodford, No. C90-3094-TEH (N.D. Cal. Nov. 17, 2004).

119. *See* discussion *infra* Part III.B.2.

120. *See* Charlie LeDuff & 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 Ninth Circuit panel's reliance on *Bush v. Gore*, 531 U.S. 98 (2000), to delay the 2003 gubernatorial recall election); *see also* Yoo, *supra* note 112, at 1123 (criticizing federal court involvement in structural reform litigation). *But see* Chayes, *supra* note 114, at 1296-1311 (defending the role of a judge as an active fact finder and arguing that public law litigation is particularly well suited to the nature of the federal judiciary).

the right have characterized judicial activism as anti-democratic and anti-majoritarian, arguing that judges must interpret rather than make the law.[121] Past decisions that compelled broad institutional or social reforms, such as *Brown v. Board of Education*,[122] were particularly criticized at the time they were rendered.[123] Still, 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 complex institutional reform, such criticisms of judicial intervention are flawed.[124]

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,[125] the framers envisioned judicial advancement of unpopular positions as the final protection of minority groups' constitutional rights.[126] Since federal judges do not face the electorate and therefore are insulated from political pressures, they can compel needed reforms by acting in ways that are politically unpopular.[127] Although it may be preferable for local political processes to take care of structural reforms, such changes often languish, because elected officials have little incentive to act on behalf of politically unpopular minority groups.[128]

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, they question the notion that judges should interpret the law according to existing rules without considering the social results of those decisions.[129] They further argued that regardless of whether structural prison reform cases are viewed as policy-making or constitutional rights enforcement, such decisions are firmly

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121. *See supra* note 23 and accompanying text.

122. 347 U.S. 483 (1954).

123. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

124. *See* discussion *infra* Part III.D.

125. Alexander M. Bickel first described the "counter-majoritarian difficulty" in THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

126. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 268-69 (1972) (Brennan, J., concurring) ("[The Court] must not, in the guise of 'judicial restraint,' abdicate our fundamental responsibility to enforce the Bill of Rights."); *see also* Stephen B. Bright, *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 who described the constitutional role of the federal judiciary in *Chambers v. Florida*, 309 U.S. 227(1940)).

127. *See* Bright, *supra* note 126, at 327-29 ("[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 . . . .").

128. For example, one commentator argues that the reason civil rights cases are mainly enforced by federal courts, 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, 853-60 (1998).

129. FEELEY & RUBIN, *supra* note 23, at 13-17.

within the powers of the federal judiciary.[130] In analyzing judicial action, Feeley and Rubin defined policy-making as "officials exercis[ing] power on the basis of their judgment that their actions will produce socially desirable results,"[131] which means that all judicial decision-making is intertwined with policy-making.[132] Such interpretive and ongoing judicial decision-making and intervention in state prisons is a slow process that, over time, results in constitutional conditions of confinement and the professionalization of state correctional departments.[133]

In the Pelican Bay litigation, Judge Henderson's role fell within an established doctrinal framework of prison reform litigation and Eighth Amendment jurisprudence.[134] 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 paying more than lip service to the Constitution. As the litigation proceeded, he realized that the problems uncovered in the implementation stage extended throughout the CDCR and merited a restructuring of the entire Department through the use of federal court power.[135] Many commentators have defended mandatory injunctive relief, such as the relief Judge Henderson ordered, as a legitimate adjudicatory function by federal court judges.[136] Even with the positive results of prison reform litigation, the problem in such litigation is that the courts still struggle to enforce and implement court ordered remedies.[137]

Bureaucratic institutions are notoriously difficult to change,[138] and prisons are no exception.[139] Enforcing remedies remains a problem, even when society acknowledges prison failures.[140] Given the difficulty of institutional change, there is no other effective check on "correctional institutions other than litigation or the threat of litigation."[141] Thus, since state political processes will not protect the constitutional rights of prisoners, federal judges must enforce constitutional

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130. 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 117, at 1282-84.

131. FEELEY & RUBIN, *supra* note 23, at 5 (noting that Ronald Dworkin criticized such action by judges in LAW'S EMPIRE (1986)).

132. *Id.* at 9.

133. *Id.* at 169-70.

134. *See* discussion *infra* Part III.B.1.

135. *See infra* Part III.D; Madrid v. Woodford, No. C90-3094-TEH (N.D. Cal. June 24, 2004).

136. *See, e.g.*, FEELEY & RUBIN, *supra* note 23; Thomas, *supra* note 130, at 303-06; Chayes, *supra* note 117, at 1282-84 (defending judicial action that is administrative, active, ongoing, and uses non-adversarial methods, such as the use of special masters and outside experts, to accomplish fact-finding).

137. Sturm, *supra* note 54, at 673.

138. FEELEY & RUBIN, *supra* note 23, at 300-01.

139. Madrid, 889 F. Supp. 1146. *See generally* CORRECTIONS INDEPENDENT REVIEW PANEL, REFORMING CALIFORNIA'S YOUTH AND ADULT CORRECTIONAL SYSTEM (June 2004), *available at* http://www.report.cpr.ca.gov/corr/index.htm [hereinafter Deukmejian Report] (on file with the *McGeorge Law Review*).

140. Sturm, *supra* note 54, at 691.

141. *Id.*

norms.[142] 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.[143] Therefore, plaintiff's counsel or federal courts[144] must oversee prisons because political officials are unable to endorse or engage in substantive prison reform due to high political costs.[145]

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."[146] Rather, federal courts have stepped in only when state officials and agencies have failed to enforce the constitutional rights of prisoners and when constitutional violations were so egregious as to constitute the "unnecessary and wanton infliction of pain" or where "the soul-chilling inhumanity of conditions in American prisons [was] thrust upon the judicial conscience" and become impossible to ignore.[147] Faced with these continuing violations, 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 an initial order.[148] However, the PLRA limited this power even though prison litigation transformed state prisons in the United States by mandating constitutional norms.[149] The chilling abuses outlined in *Madrid*, symptomatic of wider problems within the CDCR, are strong evidence of why passage of the PLRA was a policy mistake.[150]

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142. *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).

143. Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM. 1, 10 (1993).

144. This is exactly the type of litigation Professor Abram Chayes describes in his seminal article as constitutional policies that "embod[y] affirmative values." *See* Chayes, *supra* note 117, at 1284, 1295. Chayes explains that judges play an increasingly prominent role in fact evaluation during the remedial phase of institutional change litigation, because the judges oversee the implementation of a judgment or consent decree. *Id.* at 1297-1300. This type of judicial action has been both 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. Charles F. Sabel & William H. Theodore Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1017-19 (2004). *But see generally* FEELEY & RUBIN, *supra* note 23, at 1-13 (taking an opposite view).

145. Caplow & Simon, *supra* note 66, at 70-71; *see* discussion *infra* Part III.A.

146. Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring).

147. *Id.* at 354-55 (Brennan, J., concurring) (listing inhumane conditions confronted by federal inmates, including vermin in living quarters and food, overcrowding, sexual assault by other inmates, brutality by prison guards, and rampant violence and citing these conditions from Judge Frank Johnson's extensive factual findings in *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds sub nom.*, Alabama v. Pugh, 438 U.S. 781 (1978)).

148. Hutto v. Finney, 437 U.S. 678, 687 (1978); Milliken v. Bradley, 433 U.S. 267, 281 (1977).

149. FEELEY & RUBIN, *supra* note 23, at 50 ("[The] nation's prisons, jails, and juvenile facilities have been Constitutionalized.").

150. *See supra* notes 2-12 and accompanying text; *see also infra* note 223 and accompanying text.

III. THE CALIFORNIA CRISIS

Scandal,[151] broken promises of systemic reform by prison officials,[152] increased tensions between prison guards and prisons and an increased prison population[153] characterized California's prison system between 1990 and 2005.[154] 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 change.[155] State elected officials abdicated their responsibility to oversee and control the CDCR to the CCPOA.[156] The only effective efforts at reform—at Pelican Bay State Prison and Corcoran State Prison—were the result of intervention by the federal courts.[157]

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

Vested political interests, including those of 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.[158] During testimony to the American Bar Association's Justice Kennedy

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

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

153. LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES, EXECUTIVE SUMMARY ii (Nov. 2003), *available at* http://www.lhc.ca.gov/lhcdir/172/report172.pdf [hereinafter LHC *Executive Summary*] (on file with the *McGeorge Law Review*) (noting that in 1980, California incarcerated approximately 25,000 inmates, but in 2000, it had incarcerated more than 160,000 inmates).

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

155. Arax & Warren, *supra* note 152 (noting that repeated scandals in the department stemmed from the same cause: a general lack of oversight by the legislative and executive branches, coupled with untrammeled CCPOA influence and power within the CDCR and political branches).

156. *Cf.* Mark Gladstone & Mark Arax, *Attorney General's Office to Investigate 24 Shootings by Corcoran Prison Guards*, L.A. TIMES, Jan. 24, 1999, at A3 (describing how the shifting blame between the CDCR and the CCPOA ultimately led to a lack of any accountability).

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

158. *See* discussion *infra* Part III.D.

Commission,[159] Michael Alpert, chair of California's "Little Hoover" Commission,[160] advocated a return to a rational rehabilitation system in California's state prisons, noting that the practical goal of incarceration should be preventing recidivism.[161] However, such proposals are antithetical to the CCPOA as substantial reforms could lead to fewer prisoners, fewer new prisons and prison guards, and a concurrent weakening in the political power of the union.[162]

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 CDCR during the 2003-2004 legislative term, expressed concern about the CCPOA's undue influence.[163] Intense lobbying by the CCPOA killed most of Senator Romero's bills, leading the Senator to declare that "justice took a walk" when the Legislature ruled against Senate Bill 1731, which would have overturned a clause in the CCPOA's contract that 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.[164] CCPOA power is such that the CCPOA need only remind a legislator of the political cost of appearing soft on crime and threaten to withhold political campaign contributions in the next election cycle to obtain cooperation.[165]

The CCPOA has the most at stake in any attempted reform of California's prison system.[166] Consequently, the union has been the most resistant to any reform perceived as weakening the CCPOA's control of the prison system.[167]

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159. American Bar Association, Press Release, ABA Forms New Commission to Review Mandatory Minimum Sentences, Prison Conditions and Pardons (Oct. 6, 2003), *available at* http://www.abanet.org/media/oct03/100603_1.html (on file with the *McGeorge Law Review*).

160. 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 Comm'n, About the Commission, http://www.lhc.ca.gov/lhcdir/about.html (last visited Feb. 13, 2005) (on file with the *McGeorge Law Review*).

161. Testimony of Michael Alpert, Chair, Little Hoover Comm'n, before the Am. Bar Ass'n's Justice Kennedy Comm'n at McGeorge School of Law (Apr. 15, 2004) (notes on file with the *McGeorge Law Review*).

162. *See infra* notes 163-65 and accompanying text.

163. Senator Romero introduced several bills during the 2003-2004 legislative session that were designed to reform the CDCR, including bills designed to give the media access to prisoners (SB 1164), create an independent Inspector General to oversee the Youth and Adult Corrections Agency (SB 1352), and reform internal affairs procedures within the CDCR (SB 1400). *See generally* SENATE COMMITTEE ON PUBLIC SAFETY, 2004 BILL SUMMARY: MEASURES SIGNED AND VETOED, http://www.sen.ca.gov/htbin/testbin/seninfo_dated?sen.committee.standing.publicsafety.bills (last visited Oct. 14, 2005) (on file with the *McGeorge Law Review*).

164. Jenifer Warren, *Some Reforms Blocked, but Prison System Is Improving, Senator Says*, L.A. TIMES, Oct. 16, 2004, at B6.

165. *Id.* (noting that the union warned lawmakers that a "yes" vote was fraught with peril).

166. Susan Beck, *Inside Story*, RECORDER (S.F., Cal.), May 14, 2001, at 1 (stating that the CCPOA has more than 28,000 members who pay more than $1.5 million dollars in dues per month).

167. *See* Harriet Chang, *State to Revamp Parole System: Lawsuit Settlement Seeks to Reduce Inmate Population*, S.F. CHRON., 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); *see also* State Net Ballot Book, *November 2000 Ballot Initiatives—Once More With Feeling?*, CAL. J., Sept. 1, 2000 (noting

Inmate complaints about guard misconduct had to be disclosed to the guard in question prior to the initiation of any investigation, and correctional officers have had little to fear from internal investigations.[168] This requirement has likely had a chilling effect on prisoner complaints, as retribution by some guards is almost certain after a prisoner files a complaint.[169] 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.[170] Observers hope the Bureau will be able to undertake independent investigations of correctional officer wrongdoing that is free of the improper influence that has marked past investigations.[171] Until recently, the political influence of the CCPOA has blocked this type of reform.[172]

The politically connected union exercises the kind of "raw power and privilege" possible only in a society where criminal punishment is the prevailing political motif.[173] 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.[174] 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."[175] Over the last two decades, California's political leaders made policy choices based on ideology and political expedience rather than the rule of law leaving federal courts to remedy constitutional deficiencies and to push for real reform in California's prisons.[176]

CCPOA opposition to Proposition 36 that proscribed treatment rather than incarceration for first time drug offenders).

168. 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.

169. *Id.*

170. Jenifer Warren, *Prisons Promise a New Code for Guards*, L.A. TIMES, Sept. 13, 2004, at A1.

171. *Id.*

172. Mark Arax, *Union Crushed Bid to Let State Prosecute Guards*, L.A. TIMES, July 19, 1999, at A1 ("Sorry, but I'm whoring for the CCPOA." (quoting Cal. Assembly Member Jim Battin (R-La Quinta))). Assembly Member Battin made that statement to California 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. *Id.*

173. Warren, *supra* note 164 (quoting Senator Romero).

174. Editorial, *State Prisons' Revolving Door: A Siege Against Success Series*, L.A. TIMES, Nov. 23, 2003, at M4.

175. LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES 84 (November 2003), *available at* http://www.lhc.ca.gov/lhcdir/172/report172.pdf [hereinafter LHC PAROLE REPORT] (on file with the *McGeorge Law Review*).

176. *See* discussion *infra* Part III.D.

B. Federal Judicial Reform

Pelican Bay State Prison's SHU, the subject of *Madrid v. Gomez*,[177] was designed to better control the most dangerous prisoners within the California correctional system.[178] CDCR 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.[179]

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. In doing so, Judge Helton publicized their plight while maintaining the legitimacy of judicial intervention and upholding a core principle of the Eighth Amendment.[180] Thus, Judge Henderson acted within a well-established doctrinal framework of federal judicial intervention in state prison systems to vindicate the constitutional rights of incarcerated prisoners at Pelican Bay.[181] The relevant legal standard for Judge Henderson's decision was the cruel and unusual punishment clause of the Eighth Amendment. 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."[182] 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."[183] Society punishes prisoners through incarceration, not by unnecessarily cruel treatment once jailed.[184]

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 that began with reconstruction.[185] The judges in the Southern prison cases sought to impose national social values on state prisons by requiring prison administrators to conform with accepted bureaucratic patterns and practices[186] resulting in more

177. 889 F. Supp. 1146 (N.D. Cal. 1995).

178. *Cf.* FOUCAULT, *supra* note 60, at 82 (theorizing ever expanding forms of state control).

179. *See supra* notes 2-12 and accompanying text; *see also infra* note 223 and accompanying text.

180. After 1995, the number of stories about prison cases and conditions in California rose dramatically. Prior to 1995 there were very few stories, but after the Pelican Bay decision, more than 1,000 stories were listed in the California daily newspapers between 1995 and 2004. *See* Lexis-Nexis, http://www.lexisnexis.com.

181. 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 (M.D. Ala. 1976); FEELEY & RUBIN, *supra* note 23, at 245.

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

183. *Id.* at 1161.

184. *Id.* at 1245 ("[P]ersons are sent to prison as punishment, not for punishment." (citing Gordon v. Faber, 800 F. Supp. 797, 800 (N.D. Iowa 1992))).

185. FEELEY & RUBIN, *supra* note 23, at 245.

186. *Id.* at 151-57.

moral prisons.[187] 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 CDCR.[188]

Where Southern prisons had little or no modern bureaucratic institutions to control guards and inmates, California's CDCR has both too much and too little bureaucracy.[189] 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.[190] Recently, the state admitted that prison medical care is a "broken system" and state officials warmed to the idea of a federal court takeover.[191] Ideally, political processes should have modernized the bureaucracy within CDCR to comply with modern administrative practices and procedures and to prevent a recapture of the management system by the CCPOA.[192] However, given that the political process had failed to produce such reform and ensure accountability, the only effective way to reform the CDCR was through federal court intervention.[193]

1. The Eighth Amendment

Over the last half-century, the United States Supreme Court has developed modern normative principles in prisons to establish standards for the previously non-justiciable "cruel and unusual punishment clause" of the Eighth Amendment.[194] These principles have constitutionalized the nature of state punishment and prison conditions and include the right to adequate medical care,[195] the right to freedom from punitive or retaliatory physical force,[196] 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."[197] For two decades

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187. *Id.* at 245.

188. *See* discussion *supra* Part III.A.

189. John O. Hagar, Lunch and Lecture at the University of the Pacific, McGeorge School of Law (Apr. 6, 2005) (on file with the *McGeorge Law Review*).

190. *Id.*

191. Claire Cooper, *Prison Health Takeover Looms*, SACRAMENTO BEE, May 11, 2005, at A1.

192. *Id.*

193. *Id.*

194. *See generally* William H. Danne, Jr., 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 Eighth Amendment).

195. Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate 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 194, at §15 [a]-[c].

196. *Gregg*, 428 U.S. at 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) ("[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 194, at §§ 6-7[a].

197. Courts will consider the totality of the circumstances in a prison to decide whether or not the Eighth Amendment's prohibition against cruel and unusual punishment has been violated. Their inquiry includes the

beginning in the mid 1960s, the Court decided a number of prison condition cases that claimed Eighth Amendment violations.[198] The Court developed flexible tests to determine whether a condition or practice constitutes cruel and unusual punishment, allowing or mandating federal court intervention to enforce the Constitution behind prison walls.[199] The United States Supreme Court's Eighth Amendment jurisprudence has changed over the last half century, with an eye toward the evolving standards of civilized society.[200] Prisons need not be comfortable places but neither may they deprive their inhabitants of basic constitutional protections.[201] Prisoner constitutional rights include the right to the minimum necessities of life, including "food, clothing, sanitation, medical care, and personal safety."[202]

In assessing claims of cruel and unusual punishment, courts must inquire into both objective and subjective factors.[203] Generally, a prison official who acts reasonably cannot face liability under the Eighth Amendment.[204] 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 to implicate the cruel and unusual punishment clause of the Constitution.[205] The subjective component is an inquiry into prison officials' state of mind to establish that the pain inflicted was "unnecessary and wanton."[206] 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.[207] 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.[208] The "core judicial inquiry [becomes] whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[209]

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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).

198. *See supra* notes 195-97 and accompanying text.

199. The Court's tests for whether or not a practice or combination of practices violates the Eighth Amendment include, whether or not a punishment is inherently cruel, abhorrent to contemporary society, disproportionate in nature, or involves the arbitrary or discriminatory administration of discipline. Rhodes v. Chapman, 452 U.S. 337, 345-48 (1981) (noting the flexible nature of the Eighth Amendment standards for determining whether a particular situation constitutes cruel and unusual punishment).

200. *Madrid*, 889 F. Supp. 1146, 1245 (M.D. Cal. 1995) (noting that Eighth Amendment rights are fundamentally "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976))).

201. *Id.* at 1161 (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

202. *Id.* at 1245.

203. *Id.* at 1246.

204. *Id.* at 1246-47.

205. *Id.* at 1252.

206. *Id.* at 1246 (citing Jordan v. Gardner, 986 F.2d 1521, 1525-28 (9th Cir. 1993) (en banc)).

207. *Id.*

208. *Id.* at 1247.

209. *Id.* (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992)).

Rather than simply ruling on the validity of Pelican Bay's regulations or the legality of any individual guard's use of excessive force, Judge Thelton Henderson characterized the issues as whether 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."[210] This characterization allowed the judge to apply the lower culpability standard of deliberate indifference rather than the more stringent malicious and sadistic standard.[211] Further, this characterization enabled the judge to find that 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.[212]

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.[213] Further, the level of force was "open, acknowledged, tolerated, and sometimes expressly approved" by the prison administration, thus meeting the standard of "deliberate indifference."[214] In the words of one expert, "I have never observed . . . the level of officially sanctioned unnecessary and excessive force that exist[ed]" at Pelican Bay Prison.[215]

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.[216] The rise of the super-maximum security prison[217] 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.[218] As the level of

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210. *Id.* at 1251.

211. Judge Henderson did, however, find that prison administrative officials would be liable under either theory of culpability. *Id.* at 1245, 1251-52. He noted that the policies allowing for 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. *Id.*

212. *Id.* at 1260.

213. *Id.* at 1161.

214. *Id.*

215. *Id.*

216. *Id.* at 1247-48.

217. FEELEY & RUBIN, *supra* note 23, at 129 (describing a super-maximum prison as a place where inmates are single-celled for twenty-two to twenty-three hours each day, allowed out for only one hour of exercise, and typically fully shackled—both ankles and wrists—and escorted by multiple guards when leaving their cells).

218. *Id.* at 132 (noting that Marion Federal Prison was the first "level six" prison in the federal system since Alcatraz was closed and that it was designed to control particularly dangerous inmates in the federal

violence between guards and inmates increases, a "supermax" institution is always close to spiraling out of control.[219] 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.[220] However, in denying excessive force problems, prison authorities enable the "code of silence" to prevent staff reporting and allow abuse of inmates to persist.

Judge Henderson addressed the ideal 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 society . . . [who have] 'human dignity.'"[221] In restoring humanity to prisoners dehumanized by prison conditions and demonized by political rhetoric, Judge Henderson recast the problem as one implicating both fundamental human rights and constitutional violations.[222] 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.[223] Finally, Judge Henderson undertook a lengthy recitation of the facts, which covered eighty-nine pages of the *Federal Supplement* and detailed numerous and egregious constitutional violations.[224] 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 CDCR.[225]

The judicial text exposed a previously hidden system in which secrecy, autonomy, and total power by guards over prisoners facilitated persecution through corporal punishment and violent retaliation for perceived slights rather than legal discipline and rehabilitation.[226] Prisoners have greater value than as mere objects for the exercise of state power: "[T]he 'mind' [is more than] a surface of inscription for power" and the body is more than the device through which that power is inscribed.[227] The language of Judge Henderson's opinion

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system).

219. Because of this danger, supermax prisons generally include some type of "control unit" where prisoners can be perpetually locked down. *See id.* at 131-33 (describing Marion Federal Prison's "control unit"); *see also Madrid*, 889 F. Supp. at 1227-31 (describing Pelican Bay's "Secure Housing Unit" or SHU).

220. *Madrid*, 889 F. Supp. at 1178.

221. *Id.* at 1244.

222. *Id.*

223. *See generally id.*

224. *Id.* at 1155-1244.

225. *Id.* at 1160-65.

226. *Cf.* FOUCAULT, *supra* note 60, at 129 (positing that texts could expose hidden power structures).

227. *Id.* at 102 ("[O]ne 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

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 society by the state, eventually return to society and should be viewed and treated as part of society.[228]

In evaluating conditions within the SHU, Judge Henderson noted that "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."[229] 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 and throughout the CDCR.[230] 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.[231] The court distinguished the use of force in this case from "normal disciplinary channels" that defendants were entitled to use in administering the prison.[232] 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."[233] The constant reminder of a common human bond deepened and humanized the factual scenarios, which included tales of beatings and other physical abuse by guards that rose abhorrent levels: torture motivated solely by the desire for revenge or retaliation;[234] willful deprivations of Constitutionally mandated medical[235] and mental health care;[236] routine and systematic use of maximum rather than minimum force in everyday situations;[237] a "code of silence" that pervaded the internal prison culture;[238] and a blind eye to all of these problems by prison administrators, wardens, and those within the CDCR who were mandated to undertake internal investigations into such violations.[239]

According to Judge Henderson, the defendants, after lengthy litigation, had yet to acknowledge there was a problem within the prison, and had shown no tendency

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vanishing trace." *Id.*

228. *Madrid*, 889 F. Supp. at 1244.

229. *Id.* at 1261.

230. *Id.* at 1159-78.

231. *See generally id.*

232. *Id.* at 1173.

233. *Id.* at 1168-76.

234. *See supra* notes 2-8 and accompanying text.

235. *Id.* at 1200-14 (declaring the medical care system at Pelican Bay to be "grossly inadequate and unsatisfactory").

236. *Id.* at 1214-27 ("[T]he record in this case reveals a deliberate, and often shocking, disregard for the serious mental health needs of inmates at Pelican Bay.").

237. *Id.* at 1181-92 (characterizing prison administrators' policies and training as "strikingly deficient").

238. *Id.* at 1164.

239. *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").

to attempt to remedy any of the constitutional violations described at trial.[240] Based on these facts and because of a previous pattern of "delay and obstruction"[241] 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.[242] 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 CDCR management just as federal judges in the 1970s constitutionalized state prison systems in Arkansas, Alabama, and Texas.[243]

C. *Internal Results of Judicial Intervention*

The special master appointed by Judge Henderson in 1995 issued a final report in the spring of 2004.[244] The special master concluded that, after nine years of court monitoring and supervision, repeated special inquiries, and federal prosecutions of prison employees by the Department of Justice, "fundamental changes in leadership, operations, and attitudes are necessary before the [CDCR] achieves compliance with the Court's use of force remedial orders."[245] The special master recommended further court oversight and intervention to ensure that the defendants continued to move towards compliance with the remedial plan.[246] The special master found undisputed evidence of continued violations of court orders and noted the intransigence of CDCR officials who "characterize[d] their misconduct as gross incompetence and negligence rather than deliberate actions."[247]

The problems at Pelican Bay have been largely put to rest, but by far the most serious concern for both the court and the special master is the "code of silence" within the CDCR and the entire California Prison System, which is facilitated by the growth in external and internal political, administrative, and managerial power of the CCPOA.[248] Increased power of the CCPOA is well documented[249] as is the inability of CDCR officials to discipline prison guards for excessive force complaints and other constitutional violations.[250] Finally, the

240. *Id.* at 1252.

241. *Id.* at 1281 (noting that in previous prison reform cases from the 1980s and early 1990s, the CDCR was repeatedly held in contempt for noncompliance with court orders). The Legislative Analyst also noted that the CDCR lacked any sort of long term plan to address system wide deficiencies. *Id.*

242. *Id.* at 1282.

243. *Id.* at 1245.

244. *Id.*

245. *Id.* at 127.

246. *Id.*

247. *Id.* at 10.

248. *Id.* at 11.

249. *See, e.g.*, Editorial, *Reform in Name Only: Prison Numbers Tell a Different Story*, SACRAMENTO BEE, Nov. 21, 2004, at E4 (noting that although prison "reform" has been attempted for decades, nothing has actually been done); *see also* Deukmejian Report, *supra* note 139, at 229-32.

250. *See* Deukmejian Report, *supra* note 139, at 229 (finding that CDCR officials continue to "silence

special master concluded that the problems at Pelican Bay "exist at other CDCR prisons" and "emanate from the CDCR's Central Office in Sacramento, which serves all prisons."[251] 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.[252]

D. External Results of Judicial Intervention

Although the CDCR as an institution remains resistant to serious reform, making progress only in fits and starts,[253] federal court intervention has substantially changed conditions within Pelican Bay Prison[254] and has brought the issue of prison reform to the forefront of state politics.[255] Pelican Bay is an entirely different prison today from the one Judge Henderson toured in 1994.[256] 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 CDCR operates.[257] Judge Henderson's decision and ongoing oversight substantially transformed Pelican Bay itself into a prison where staff take pride in their level of professionalism.[258] 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.[259] Any problems that remain are indicative of larger problems that permeate the CDCR.[260]

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

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whistle blowers, block investigations, hide facts, and cover up staff misconduct" and recommending the creation of an independent Internal Affairs Unit and other systemic reforms).

251. *Madrid*, 889 F. Supp. 1146.

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

253. Jenifer Warren, *supra* note 164 (noting that all three branches of government took on the prison system and the CDCR with mixed results).

254. Hagar, *supra* note 189 (stating that very few problems remain at Pelican Bay and it is an entirely different prison than it was in the early 1990s).

255. *See, e.g.*, George Deukmejian, *It Is Time to Overhaul Corrections System*, SACRAMENTO BEE, Sept. 19, 2004, at E3 (stating that the prison system is long overdue for reorganization).

256. Hagar, *supra* note 189.

257. *Id.* (explaining that the few problems remaining at Pelican Bay are indicative of larger and more serious systemic problems within the CDCR).

258. *Id.* (emphasizing that reform benefits both prisoners and staff).

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

260. Hagar, *supra* note 189.

run.[261] 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 a known advocate for prisoner rehabilitation, as the new director of the CDCR.[262] Both appear committed to substantial reform but face serious obstacles, including entrenched bureaucracy, the undue influence of the CCPOA,[263] and a culture of silence and cover-up surrounding allegations of prison guard misconduct.[264] The slow pace of reform, coupled with formidable structural obstacles, led Judge Henderson to threaten a federal court takeover of the CDCR midway through 2004.[265]

While ongoing crisis within the CDCR marked 2004, the year also presented an opportunity for nascent reform. The California Senate held special committee hearings.[266] Legislators introduced twenty-eight prison reform related bills, and Governor Schwarzenegger signed seventeen of those bills, including some opposed by the CCPOA.[267] The Governor appointed the Deukmejian Commission to investigate and recommend systemic reforms.[268] The executive branch also began to implement reforms, including restructuring YACA and creating an Independent Bureau of Review[269] to investigate allegations of correctional officer wrongdoing outside of the CCPOA's sphere of influence and corruption.[270]

Unfortunately, some improvements had already begun to deteriorate in 2005 due to the slow pace of change and the continued opposition of the CCPOA.[271] The plan to reorganize and rename YACA,[272] which would create the Department of Corrections and Rehabilitation, is set to be approved by the California Legislature, but observers question whether centralizing control of the system will be an adequate solution.[273] The plan makes wardens accountable to

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261. Arax & Warren, *supra* note 152.

262. Editorial, *State Prisons' Revolving Door*, L.A. TIMES, Apr. 15, 2004, at B14; Jenifer Warren, *Prison Guard Turned Boss Presses for Reform*, L.A. TIMES, Mar. 18, 2004, at A1.

263. Andy Furilllo, *Probe Sought Over Union Ties, Prison Overhaul*; SACRAMENTO BEE, Aug. 3, 2006, at A3. Both Rod Hickman and Jeanne Woodford resigned after Governor Schwarzenegger brought in Gray Davis' chief of staff, Susan Kennedy, to deal with prison reform and the CCPOA. The CCPOA knew they had to work with Hickman. They now know they can roll over Susan Kennedy with impunity. *Id.*

264. Pamela J. Podger, *Promises to Fix State Prisons Have Been Heard Before*, S.F. CHRON., Jan. 24, 2004, at A1.

265. *See, e.g.*, Jahna Berry, Jeff Chorney & Jill Duman, *Judge Threatens Federal Oversight for State Prisons*, THE RECORDER (S.F., Cal.), July 21, 2004, at 1.

266. Editorial, *A Prison System in Disarray*, S.F. CHRON., Jan. 19, 2004, at B6.

267. Warren, *supra* note 168.

268. Mark Martin, *Deukmejian to Lead Prison Review Panel*, S.F. CHRON., Mar. 16, 2004, at A17.

269. Warren, *supra* note 168.

270. Patt Morrison, *Union Knows All About Crime, But Nothing About Punishment*, L.A. TIMES, Feb. 10, 2004, at B3.

271. Jenifer Warren, *Victim's Rights Group Blasts Prison Rehab Plan*, L.A. TIMES, Apr. 1, 2005, at B7.

272. Press Release, Youth & Adult Corr. Agency, Governor Schwarzenegger Sends Government Reorganization Plan to Little Hoover Commission (Jan. 6, 2005), *available at* http://www.governor.ca.gov/state/govsite/gov_htmldisplay (on file with the *McGeorge Law Review*).

273. Mark Martin, *Governor Drops Plan to Combine Youth, Adult Prisons*, S.F. CHRON. Mar. 31, 2005,

the executive branch and attempts to insulate prison management from political pressures, including CCPOA influence.[274] State Senator Romero believes that reorganization of this nature "won't stop the scandals" but he does give "this governor credit for having the internal fortitude to deal with prison reform."[275] Further, victim's rights groups, funded by the CCPOA, have stymied other reforms scheduled to take place, including alternative sanctions for parole violators.[276]

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,[277] excessive force complaints,[278] medical[279] and mental health care,[280] and parolee procedural due process rights.[281] Although federal court intervention may not have directly caused recent political attempts to reform the CDCR bureaucracy, the publicity generated by federal court action and the subsequent exposure of systemic abuses contributed to the steps taken by both the California legislative and executive branches.[282] 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." In this system, the power of prison industries and corrections employees grows as prison populations increase.[283] Increased power is 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.[284]

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at B3 (since writing this article the department is now the "California Department of Corrections and Rehabilitation" (CDCR)).

274. *Id.*

275. Arax & Warren, *supra* note 152.

276. Jenifer Warren, *State to Scrap Key Parole Reform*, L.A. TIMES, Apr. 9, 2005, at A1.

277. Jenifer Warren & Tim Reiterman, *Crowding at State Prisons Has State in a Jam*, L.A. TIMES, Mar. 13, 2005, at A1.

278. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

279. Plata v. Davis, No. C-01-1351 TEH (stipulation for injunctive relief E.D. Cal. 2002); Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1993).

280. Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995).

281. Valdivia v. Davis, 206 F. Supp. 2d 1068 (E.D. Cal. 2002).

282. *See* discussion *supra*, Section III.A.

283. Caplow & Simon, *supra* note 66, at 72-73.

284. LHC PAROLE REPORT, *supra* note 175 (outlining California's administrative parole revocation

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 because systematic use of excessive force, punishment, and retaliation by prison guards has escalated.[285] 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.[286] Increased government control and abuse of prisoners leads to increased government control and abuse of individuals outside prison walls.[287]

Torture was classically condoned by the state as the regulated production of pain in a ritualized setting.[288] At Pelican Bay, however, physical violence by guards was prevalent and systematic and used by prison guards and administrators to establish their power, rather than perform a legitimate penological purpose.[289] Judge Henderson sought to bring the prison, and eventually the CDCR, back into line with accepted penal practices and 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: "[T]ere must be a principle of moderation for the power of punishment" lest unrestrained state power filter into the rest of the social order.[290] 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.[291] 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

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process).

285. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730 (2002) (describing the ordeal of an inmate handcuffed to a post for hours at a time); Farmer v. Brennan, 511 U.S. 825 (1994) (alleging a constitutional violation when guards forced a transsexual inmate to live in the general population); Hudson v. McMillian, 503 U.S. 1 (1992) (holding that the use of excessive force violates the Eighth Amendment regardless of whether the inmate suffers serious harm); *see supra* notes 2-8 and accompanying text.

286. FOUCAULT, *supra* note 60, at 78.

287. *Id.*

288. *Id.* at 33, 39 (characterizing the goal of torture as crime deterrence or confession).

289. Madrid v. Gomez, 889 F. Supp. 1146, 1160 (N.D. Cal. 1995).

290. FOUCAULT, *supra* note 60, at 90.

291. FEELEY & RUBIN, *supra* note 23, at 66-79 (noting that Arkansas officials were caught in a cycle of prison scandals and turned the corner only after federal judicial intervention gave them an 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).

the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.[292]

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.[293] 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.[294] Prisoners are one such class, many of whom, if given a chance, could become a full part of society.

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 unabated.[295] Judge Henderson's actions, culminating in a threatened takeover of California's prisons, have resulted in some steps toward reform by California's legislative and executive branches.[296] Still, whether such reforms will be implemented remains to be seen.

The Pelican Bay case illustrates the ambivalence about federal judicial power.[297] 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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292. McCleskey v. Kemp, 481 U.S. 279, 343 (Brennan, J., dissenting).

293. *See, e.g.*, 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); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (extending the holding to all conditions within prisons and finding the conditions of confinement within the prisons violated "any judicial definition of cruel and unusual punishment"); 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).

294. *See* discussion *supra* Part II.C.

295. *See* discussion *supra* Part III.A.

296. *See* discussion *supra* Parts III.C-III.D.

297. *See* discussion *supra* Parts I-II.

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