CHAPTER 5

Ensuring Rights for All: Realizing Human Rights for Prisoners *

Deborah LaBelle

When photographs depicted American soldiers, in the spring of 2004, degrading and torturing Iraqi citizens in the Abu Ghraib prison in Iraq, the actions garnered worldwide condemnation as human rights abuses. However, attempts by criminal justice advocates in the United States to parley this condemnation into recognition of the existence of human rights violations in prisons in the United States were largely unsuccessful. Despite the commonality of the abuse of prisoners in Iraq by American personnel—a number of whom had employment histories in U.S. prisons—with the abuse taking place in American prisons, the latter abuse has occasioned little censure, leading prisoners' rights advocates to decry the lack of recognition of human rights violations committed against American prisoners held in prisons and jails in the United States.

While reports of abuses in the United States have failed to elicit expressions of official outrage and disgust, Secretary of Defense Donald Rumsfeld responded to photographs revealing naked Iraqi prisoners shackled or hooded, with smiling American staff looking on, by characterizing the treatment as "fundamentally un-American," "blatantly sadistic, cruel and inhumane." Longtime advocate for humane treatment of prisoners and director of the American Civil Liberties Union National Prison Project Elizabeth L. Alexander pointed out to the media, in response to the disclosure of abuse of prisoners in Iraq, that, "Beating prisoners, sexually abusing prisoners all of those things go on in American prisons." In contrast to the official response that abuse of Iraqi prisoners constituted human rights abuses, the official response to allegations of similar abuse in state prisons in Michigan,

*Reprinted with the permission of the Greenwood Publishing Group

was to focus on the status of prisoners as warranting less humane treatment, asserting that:

> They [prisoners] should have thought before they robbed, raped, and killed people. I mean, that's what these prisoners have done. These aren't people who have human identity. They are prisoners . . . they have committed sins, cardinal sins, original sins, against Michigan's citizens.[1]

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

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

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

Over 2 million people are held in prisons, jails, and detention facilities in the United States, and the last decade saw the prison population more than double. Many states' budgets for operating prisons, jails, and parole supervision systems now outstrip all but the general fund, and well exceed budgets for education and health services. The rising costs are a reflection of rising numbers of people detained for longer periods of time, not an increase in expenditures for humane treatment. Without a human rights framework creating a baseline for humane treatment, the increasing numbers of people who are incarcerated are at the mercy of the changing social doctrines on the origins of crimes and resultant manner of punishment, protected only by equally varying judicial interpretations of what constitutes the baseline for prohibited unusual cruelty.

The absence of applicable human rights doctrines also endangers the humanity of those who operate the prisons and jails, a growing workforce in the United States. Human rights doctrines contain the inherent recognition that a failure to recognize the humanness of the object ultimately degrades the humanity of those in control. As the military personnel captured on film in the Abu Ghraib prison in Iraq were ultimately viewed as having degraded

themselves and brought shame on the United States, abuses in United States' prisons demean the officers perpetrating the abuse. The impact of the abuse extends beyond the object to alter the lives of staff, prisoners' families, the system, and our own humanity. The oft quoted reminder by Dostoyevsky that, "the degree of civilization in a society can be judged by entering its prisons" encompasses both a recognition of the duality of human rights and a warning of the cost of ignoring its application to those regarded as least entitled to its shield.

The example of Abu Ghraib evidences that, while abuses in the United States are not commonly viewed through the lens of human rights obligations, nor has the language of human rights settled into our domestic justice lexicon, advocates have begun to recognize this duality and the value of demanding transparency and adherence to international norms. This chapter explores both the import of realizing human rights as the framework for ensuring humane treatment of prisoners in the United States and analyzes the impact this strategy has had when used to address the mistreatment of women prisoners and juveniles incarcerated in this country's prisons and jails.

PRISONERS' RIGHTS ADVOCACY IN THE UNITED STATES

Penitentiaries came into broad use in this country in the 1820s, with a goal of rehabilitation. Criminal activity was generally believed to be a result of a failure of upbringing or social influences. As crime increased through the nineteenth century, empathy waned and punishment replaced rehabilitation. Both the length of confinement and the harshness of conditions increased unabated as statutes enacted during the nineteenth century divested prisoners of civil and political rights on the theory that they ceased to exist as legal persons after their conviction. These "civil death" statutes prohibited persons convicted of a felony from bringing any civil action and prevented challenges to the conditions of their confinement or treatment while incarcerated.[2] Civil death statutes had a long reign, lapsing into desuetude a hundred years later with the concurrent rise of the prisoners' rights movement. Described by then as "archaic remnant(s) of an era which viewed inmates as being stripped of their constitutional rights at the prison gate,"[3] the elimination of the civil death statute and the rise of the prisoner's rights movement in the 1960s paved the way for prisoners acting as "jailhouse lawyers" and civil rights lawyers to address mistreatment in U.S. prisons through litigation alleging violations of the Constitution.

The Rise of the Prisoners' Rights Movement: 1960s–1980s

While most grassroots movements face organizational difficulties, building a prisoners' rights movement involved the additional difficulties of a community both disenfranchised and incarcerated. Prisoners' inability to communicate freely with each other and restrictions on their communications with the outside world made organization and movement building extremely difficult.

Challenges to these restrictions were consistently rejected by the courts, which upheld prison rules prohibiting prisoner unions, limiting meetings and petitions by prisoners, and restricting visitation with the outside world.[4] Throughout the early years of the movement, lawyers, who alone (with the exception of clergy) had ready access to prisoners, became major contributors to the movement and the call for humane treatment of prisoners.

Prisoners and their families worked with organizations such as the American Friends Service Committee (which included prisoners in its Quaker mission since its founding in 1917) and established CURE (Citizens United for Rehabilitation of Errants) in 1972. However, the revolution in prisoners' rights in the United States beginning in the 1960s through 1980s has traditionally been linked to a rising assertiveness of prisoners, particularly the black Muslims, and the development of the civil rights lawyer.[5] Prisoners and lawyers alike were influenced by the civil rights movement occurring in the free world, and the federal courts were becoming responsive to lawyer-assisted prisoner petitions, raising issues as diverse as freedom to practice religion in prison to freedom from corporal punishment. Prisoners, most notably with the riots at the Attica State Prison in New York in 1971, called attention to their abysmal treatment, which included long-term isolation in dungeon-like holes, beatings, inadequate food, racial discrimination, and rampant violence. Government legal services funding and private foundation money made it possible for lawyers to make expensive and time consuming legal challenges to violation of the rights of economically and socially marginalized persons. Armed with such funding, lawyers were able to go to court to argue the constitutional rights of prisoners.

Early legal victories by lawyers challenging conditions of confinement of prisoners were brought under the Federal Civil Rights Act, which enabled prisoners to sue for violations of their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. These victories paved the way for judicial intervention in the isolated and secretive prisons and jails of the United States, which had been operating with little oversight and less restraint. One of the early victories, brought initially by jailhouse lawyers on behalf of prisoners in Arkansas and fought by court-appointed counsel, concerned the constitutionality of the whip. While formal, authorized corporal punishment, as a response to minor prison infractions, had been on the wane in the 1960s, whippings still remained the primary ad hoc disciplinary tool in prisons where few privileges existed to take away and solitary confinement space was limited. In the 1968 case *Jackson v. Bishop*, a panel of three federal court judges held that use of routine whippings as a method of controlling prisoners violated the Eighth Amendment ban on cruel and unusual punishment.[6] The panel found the imposition of uncontrolled whippings to the bare skin of prisoners with a five-foot strap was inhumane and barbarous. The court rejected the claim that the punishment was necessary for discipline, noting that, "Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike."

The next ten years saw a series of legal challenges to the mode of punishment, mistreatment, and restrictions on the rights of prisoners reach the

United States Supreme Court. In 1978, the Supreme Court returned to the conditions of prisoners in Arkansas in *Hutto v. Finney.*[7] Prisoners who had been successful, ten years earlier, in ending the official use of electric shocks and physical beatings as methods of discipline and punishment now challenged their incarceration in eight-by-ten-foot windowless cells for indeterminate periods of time as violative of the Eighth Amendment's proscription against cruel and unusual punishment. Prisoners were successful in arguing that the Eighth Amendment prevents more than physically barbarous punishment. The Supreme Court found that the Eighth Amendment prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress broad and idealistic concepts of dignity, civilized standards, humanity, and decency. Depending on the infraction, the length of time prisoners were kept in a hole and the conditions under which they were maintained, nonphysical punishment could contravene the Eighth Amendment's proscription against cruel and unusual punishment.

The *Hutto* case followed a series of decisions which recognized that while imprisonment necessarily made unavailable many rights and privileges of the ordinary citizen, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime and edged toward an understanding that prisoners were entitled to be treated in a nondegrading manner. In a talisman phrase, the Supreme Court in the 1974 case *Wolff v. McDonnell* opined that, "though his rights may be diminished by the needs and exigencies of the institutional environment, there is no iron curtain drawn between the Constitution and the prisons of this country."[8] In a series of cases from the late 1960s through the mid-1970s, the Supreme Court expanded prisoners' rights, recognizing prisoners' religious freedom, the right to access to the courts, and protection from invidious race discrimination. Prisoners were also advised they could claim the protections of the due process clause in circumstances depriving them of life, liberty, or property and could not be denied basic medical care.[9]

The general principle that prisoners do not forfeit all of their rights under the Constitution upon incarceration was now firmly established. But what rights remained and how to balance the rights of prisoners with their status and the needs of security remained to be carved out in a series of fact-dependant cases. The Supreme Court held that a prisoner retains the right to marry and some freedom of expression in the case of *Turner v. Safely.*[10] The same year the Court upheld a prisoner's' right to freedom of religion in *O'Lone v. Estate of Shabazz.*[11] However, both of these significant rulings were five-to-four decisions, presaging the retrenchment of prisoners' rights that was on the horizon. Many states continued to operate systems that were blatantly racist, with routine reports of beatings, rapes, and intolerable conditions of confinement. Before Supreme Court rulings issued in the 1970s and 1980s could take force or become institutionalized policy, the judicial pendulum began to swing the other way.

More Prisoners, Fewer Rights: 1990s Onward

Over the next ten years, just as the U.S. prison population began to soar, the Supreme Court retreated from protecting prisoners' rights. The Court

introduced new legal concepts that undermined Eighth Amendment protections. It also expressed concern about overinvolvement of the federal judiciary in the operation of states' prisons and showed increasing deference to prison officials. At the same time, previously effective mechanisms for challenging mistreatment were severely restricted by federal legislation and conservative courts.

In the 1990s, Supreme Court prisoners' rights cases largely deferred to arguments that punishments were necessary to maintain a correctional facility. Institutions' "penalogical objectives" of "security" and "order" became relevant concerns for determining whether the punishment being challenged was cruel or unusual. Taking their cue from the Supreme Court, many appellate courts overturned trial court remedial orders based on their lack of deference to prison authorities.[12] The decisions raised the specter of inmate violence and concerns for public safety should prison officials be constrained in the manner they operated prisons, including their ability to restrict prisoners' rights and the manner in which noncorporal punishment was meted out. Gone were the acknowledgments of the reality that cruel treatment begot violence and forgotten was the cause of the violence at Attica prison. Instead, it was opined that harsh treatment was necessary to prevent future violence.

The Supreme Court also failed to adhere to the Eighth Amendment as an objective standard for humane treatment in a civilized society. Instead, a new element crept into the analysis of whether punishment was cruel or unusual—whether prison officials, in meting out the challenged punishment, had a culpable state of mind. In the 1991 Supreme Court case *Wilson v. Seiter*,[13] Justice Scalia held that treatment which could objectively be characterized as abusive, inhumane, or degrading treatment would not violate the Constitution unless the punishment was implemented with a kind of knowingness—a deliberate and wanton infliction of unnecessary pain.[14] This opened the door to justifying punishment that would otherwise rise to the level of torture or other degrading treatment based on the motivations of the party inflicting the punishment or necessities of correctional management. With an increasingly narrow interpretation of what constituted cruel and unusual punishment, prisoners had little left with which to tether their challenges of inhumane treatment.

With one notable exception in the 2002 case of a prisoner in Alabama who challenged being handcuffed above his head to a hitching post in the sun without water or breaks for seven hours at a time as punishment for a rule infraction, following *Wilson v. Seiter,* the Supreme Court has found little to chastize as punishment that violates the Eighth Amendment in U.S. prisons. The hitching-post case also garnered a strong dissent, led by Justice Thomas who opined that the legitimate penalogical purpose of encouraging compliance with prison rules took the punishment out of the constraints of the Eighth Amendment. Justice Thomas's extreme position also advocates for restricting the Eighth Amendment's proscription against cruel and unusual punishment to the sentencing stage of the criminal justice process. He argues that the Eighth Amendment's protection is not applicable to claims of mistreatment or even torture during a prisoner's incarceration. Instead, he argues that cruelty within the context of confinement is best addressed by a

sort of capitalist system of human rights in which the states would naturally be concerned about real torture in prisons that lacked any legitimate penalogical purpose and regulate themselves.

Just as the Supreme Court became increasingly tolerant of ill treatment of prisoners, government funding for legal services declined overall, and prohibitions were placed on the remaining legal service organizations receiving federal funding that specifically forbade representation of prisoners or challenges to the conditions of their confinement. Foundation funding for direct legal challenges, never large, became increasingly hard to obtain. New federal statutes created barriers to both prisoners' and lawyers' ability to complain about conditions in America's prisons.

Edging back to the days of civil death, the conservative majority of the Supreme Court, in decisions like *Lewis v. Casey*,[15] limited the access of jailhouse lawyers to basic books and tools for litigation. In addition, the federal Prison Litigation Reform Act (PLRA) was past in 1996 to restrict prisoners' access to the courts to challenge their treatment. Contrary to its moniker, the PLRA was more akin to the civil death statutes of 100 years prior than the provision of reform. Its goal was to strictly limit prisoners' ability to file federal litigation challenging the conditions of their confinement, their sentencing, and their treatment by setting up onerous preconditions for filing lawsuits, dramatically limiting available remedies and judicial oversight, and creating disincentives to lawyers representing prisoners. Many states followed the federal legislation to enact their own state laws restricting not just challenges to conditions, but also challenges to sentences and denials of release, all the while increasing the length and severity of punishments.

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

Simultaneously, the rehabilitation corrections mode of the 1980s, which touted the use of vocational training and educational programs to rehabilitate prisoners, faded with the increasing numbers and costs of incarceration. It was replaced with the increased use of cold storage, super maximum facilities, and increased isolation from the outside world. Prisons in the United States had become a multibillion dollar industry. In 2006, the budget for state corrections facilities exceeded $50 billion per annum. It was this confluence of factors that created fertile ground for developing a human rights analysis to challenging inhumane treatment in U.S. prisons and jails.

Human Rights Response

International human rights documents and treaties establish basic principles for the treatment of individuals and encompass those incarcerated in prisons, jails, and detention centers around the world. The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man (1948); the UN Standard Minimum Rules for the Treatment

of Prisoners (1957); the International Covenant on Civil and Political Rights (ICCPR) (1976); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) (1987) are the most frequently cited documents in human rights reports concerning the treatment of individuals in detention.

However, prior to the 1990s, those documentation reports, created by international human rights organizations, rarely included the United States in their worldwide investigations of prison conditions. Either as a consequence or perhaps as the rationale for their exclusion, international treaties and documents played little part in the advocacy in the United States for prisoners' rights, which was waged, largely, by attorneys and jailhouse lawyers.

In 1987, however, Human Rights Watch (HRW) began a project which enlisted several of its divisions in the investigation and documentation of the treatment of prisoners with the goal of issuing a global report. In 1991, HRW issued a breakout report titled *Prison Conditions in the United States* with the worldwide report, *Human Rights Watch Global Report on Prisons*, issued two years later. Similarly, Amnesty International began turning its attention to conditions in U.S. prisons in its investigation of compliance with international documents in the prison context.

In 1993 when the United States underwent its first UN compliance review following U.S. ratification of the ICCPR, another opportunity emerged to use human rights standards to examine U.S. prison conditions. HRW, and the traditionally American civil rights organization, the American Civil Liberties Union (ACLU), worked together to issue a report on U.S. compliance with the ICCPR, urging enforcement of the ICCPR's provisions with regard to prison conditions in United States courts. The report relied heavily upon federal judicial rulings, which had found many of the abuses also violated U.S. constitutional norms, undermining the report's assertion of the need for enforcement of the ICCPR. However, the report's concern with the federal court's tendency to diminish protections of prisoners based on their crimes and its call for recognition of a guarantee of humane treatment irrespective of the prisoner's crime, presaged the events of the next decade which heightened the need for a human rights framework to address abuse in United States' prisons.

The report contributed to a broader ongoing dialogue on the need to scrutinize the United States's compliance with international norms and address "U.S. exceptionalism" with particular emphasis on an area with diminishing protections under domestic constitutional instruments. The focus on criminal justice issues—with its emphasis on torture, and racial and gender discrimination of those in detention—provided a strong argument for the relevancy of human rights documents, which specifically set minimum standards for many of these issues. The report ushered in a series of reports in the late 1990s by Amnesty International and HRW on a number of prisoners' rights issues, including custodial sexual abuse of women prisoners in American prisons: *All Too Familiar* (1996), *No Where to Hide* (1998), and *Not Part of My Sentence* (1999);[16] the human rights violations against prisoners held in SHU's or super-maximum holding units examined in *Cold Storage: Super Maximum* (1997); and the violence endemic in men's prisons, *No Escape: Male*

Rape in U.S. Prisons (1998). Amnesty International addressed many of these issues in its 1998 report, *Rights for All.*

These reports created new opportunities for human rights organizations and activists to collaborate with U.S. litigators and criminal justice advocates on specific cases in a way that had not occurred previously in the United States, although consistent with collaborations in other countries. The documentation reports were a crucial vehicle for introducing advocates for prison reform, prisoners and their attorneys to human rights organizations and individuals working on the international stage and introducing a human rights language and framework to the issue. For prisoners and their counsel, who had rarely strayed from attempts to enforce "prisoners' rights" using U.S. laws that specifically limited the concept of rights to the diminished status of a prisoner, the introduction of international rights documents and the glimpse into other countries' systems provided a number of insights that were to be instrumental in integrating human rights documents into prison reform work.

By limiting themselves to the concept of "prisoners' rights," advocates in the United States had in some manner accepted a diminished status and standard of rights. This construct had also infected the actions of corrections officials who, viewing prisoners as lesser beings deserving a different standard of humane treatment, accorded prisoners a degraded treatment in direct proportion to prison administration's conception of prisoners as lesser beings.

With larger numbers of prisoners serving longer time and with less opportunity to challenge either their treatment or their sentence, prisoners' rights advocates from the critical resistance movement to lawyers and grassroots advocates began to recognize that a different approach was necessary. The issues being impacted by incarceration could not be encompassed within any one legal theory or expertise. Incarceration affected youths and educators, who challenged the school-to-prison pipeline, the disparate impact on children of color, and the loss of education funding which was being usurped by building and operating prisons; mental health professionals, prisoners, and family members, who recognized that prisons were increasingly incarcerating people who were mentally ill as opposed to providing treatment; and activists working on women's rights and violence against women, who viewed the cycle of abuse and self-medication as leading to incarceration and more abuse. Incarceration posed obvious issues of race discrimination in the administration of the criminal justice system and the perpetuation of discriminatory treatment inside and social and economic justice issues, including the impact that incarceration was having on poor people and immigrants in the system. It also raised concerns with violence targeting gays, lesbians, and transgender persons incarcerated in jails and prisons.

The common language and the umbrella available in which to have a dialogue for remedial relief existed not in domestic legal theories or case law, but in human rights treaties. With the recognition that large swaths of American citizens would spend some part of their life in a prison or jail cell, relying solely on diminishing "prisoners' rights law" to challenge inhumane treatment was neither appropriate nor tenable. The laws and treaties establishing baseline standards applicable to all persons took on a heightened relevance. Both the difficulties and value of utilizing a human rights framework for domestic

challenges to the mistreatment of prisoners in the United States is explored in the following two case studies involving the custodial abuse of women prisoners in a state prison in Michigan and the sentencing of juveniles serving life without possibility of parole sentences in American prisons.

HUMAN RIGHTS FOR WOMEN PRISONERS IN THE UNITED STATES

In 1995, the Fourth World Conference on Women was held in Beijing, and in April of that year, Felice Gaer of the U.S. delegation spoke the following words at the United Nations Conference on Human Rights: "Our task as nations is clear; we must make our global human rights machinery expand and adapt; we must shift from neglecting women's issues, to mainstreaming them; we must mobilize the will to stop the abuses facing women throughout the world, establish instruments of accountability and effective domestic remedies."

As the international community began focusing on the human rights of women, domestic remedies for issues facing the rising population of women prisoners in the United States were becoming progressively more difficult to come by, and the number of women prisoners was skyrocketing. In 1980 there were 12,300 women in prisons in the United States. This number had increased ten-fold, to 120,000, by the mid-1990s. By the year 2000, there would be over 1 million women either behind bars or under the control of the criminal justice system in the United States.

Groups with widely diverse interests began recognizing the toll on society resulting from the increase in the incarceration of women, the vast majority of whom were mothers and family caretakers. Incarceration of these women, largely for nonviolent property and drug offenses, increased not only the corrections budget but impacted foster care and social services as their children were placed in foster homes or agencies and chronically ill, disabled, or aged family members sought replacement services for their caretakers. There was also a growing awareness of the additional punishments inflicted on women prisoners in the form of sexual and physical violence and the ripple effect the resultant trauma had on their communities upon their release. Yet, there had been neither widespread exposure of the abuse nor significant legal challenges to mistreatment of women prisoners.

Traditional Equal Protection Litigation

Previously, major prisoners' rights litigation had focused on conditions for men, who formed the majority of prisoners. Litigation on behalf of women prisoners was limited to equal protection challenges to their denial of comparable educational and vocational training in prison and denial of gender-based health care. Throughout the late 1970s and 1980s, rehabilitation and correctional opportunities for prisoners largely benefited male prisoners with the provision of education, vocational training, and apprenticeships. Education and skills training were provided based on the belief that rehabilitation of

prisoners depended on their obtaining bona fide occupational skills and that such skills would best serve them to reintegrate into society thus decreasing recidivism.

This approach was not, however, applied equally to women prisoners based, in part, on a different rationale accepted for women prisoners' status as convicted felons. Historical explanations for female lawbreakers as gender aberrants lingered through the 1980s in the United States, and the belief that criminal behavior by women could be traced to a failed femininity guided the rehabilitation programs for women. While male prisoners were receiving skills dedicated to economic redemption, women prisoners were being schooled in home economics, parenting classes, and models of obedience to reclaim their femininity.

The disparity in opportunity led a group of women prisoners in Michigan to file the first class-action case on behalf of women prisoners. They argued that their right to equal protection under the United States Constitution was violated by the absence of similar rehabilitation opportunities as those being provided to male prisoners. Their 1979 lawsuit, *Glover v. Johnson*,[17] was successful, resulting in improved educational, vocational, and apprenticeship training for women prisoners. However, it tied women prisoners' future to the treatment of male prisoners.

The problem with reliance on an equal protection model became evident a few years later as programs for male prisoners were eliminated with the decline of a rehabilitative corrections model in the United States. Because their legal claim for rehabilitative programs was based on being treated the same as men, after a few brief years of parity, women prisoners were once again deprived of participation in any programming that would provide opportunity for rehabilitation. The legal strategy of using equal protection law and addressing the problems with treatment of women prisoners through a gender discrimination lens did not advance an independent model for the treatment of prisoners based upon respect for their dignity and value as human beings, concepts imbedded in human rights documents.

Moreover, some courts had taken aim at *Glover v. Johnson*, eroding its finding that women prisoners' equal protection rights were violated when women prisoners were provided inferior programming as compared to male prisoners. In *Klinger v. Dept. of Corrections,* upon review of an equal protection case in which women prisoners in Nebraska challenged their denial of equal rehabilitation opportunities, the Eighth Circuit Court of Appeals approved the existence of separate but unequal facilities for male and female prisoners, reasoning that women prisoners were not similar situated to male prisoners due to the different profile of women prisoners (being nonviolent) and their lesser numbers.[18] The court noted that women prisoners were generally single mothers with substance abuse histories, as compared to male prisoners who were most often incarcerated for violent crimes and not the custodians of children. The court used these gender differences as a basis to deny women prisoners equal educational and program opportunities, rather than creating a model of rehabilitative opportunity that addressed differences by enhancing rehabilitative program choices. The court, after finding the male and female prisoners to be different, rejected the women prisoners' equal protection

claims stating, "dissimilar treatment of dissimilarly situated persons does not violate equal protection." Basically, the court asserted that only if two people were identical and did not receive equal treatment could you challenge the lesser treatment of one individual. The ruling moved the analysis of constitutional based rights even further away from an inclusive model of human rights and dignity for all. As a final deterrent to relying solely on the Constitution as a basis for challenging inhumane treatment of women prisoners, the PLRA wound its way through the U.S. Congress to be signed into law in April 1996, further limiting prisoners' access to the courts.

Just as the limitations of the equal protection model and prisoners' rights litigation were becoming evident, human rights standards appeared to provide some models for the minimum standards for treatment of prisoners and also a new perspective on increasing concern with endemic custodial sexual abuse in women's prisons in the United States. In addition to protections in the ICCPR, the Convention Against Torture, and the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Declaration on the Elimination of Violence Against Women prohibited any "degrading treatment or punishment . . . and any gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life," providing a framework based on universal values, which codified core values of human dignity and equality available to all individuals including prisoners. Human rights documents, based solely on one's status of as a human, provided a core set of entitlements that could not be truncated based upon incarceration, gender, or the changing perception of how to handle convicted felons in America.

Sexual Abuse of Women Prisoners

It was in this milieu that women prisoners in Michigan decided to file a class-action lawsuit seeking relief from years of sexual assaults, rapes, sexual harassment, and retaliation by male guards and staff employed by the Michigan Department of Corrections. In light of the impending implementation of the federal PLRA, cases were filed both in federal court and in state court under Michigan's Civil Rights Act in March 1996, arguing that sexual harassment, degrading treatment, and rapes of women and girl prisoners by male custodial staff in Michigan had become endemic. The complaints alleged hundreds of incidents ranging from prurient viewing of women while naked, routine groping of women's breasts and genitalia under the guise of security pat-down searches, the common and constant use of sexually degrading and demeaning language, and penetrative rapes. The lawsuits challenged the treatment under standard constitutional and civil rights frameworks and sought traditional remedies of injunctive relief and damages. Capitalizing on the recent domestic restrictions on the rights of those in detention, the state argued that both lawsuits should be dismissed because the federal suit was impermissible under the newly passed PLRA and the state civil rights act, which protected "all persons," should not be read to include prisoners. The lawsuits seemed destined to make the same arguments and follow a similar

trajectory as other women prisoners' rights cases until human rights standards and organizations began influencing advocacy around and within the lawsuit itself.

When the Michigan lawsuits were filed, Human Rights Watch was in the midst of conducting interviews in eleven state prisons for a report on the prevalence of sexual misconduct by male officers in authority over female prisoners. A year after the women prisoners filed suit, the United States Department of Justice joined the fray under its mandate to ensure the constitutional treatment of institutionalized persons. Thus, three different groups—the women prisoners themselves, the United States Department of Justice, and Human Rights Watch—were all on the field at the same time, all utilizing different frameworks from state to federal to international, to examine the abusive treatment of women held in detention in Michigan prisons. All three were to play central roles in the synthesis of the analysis and the resulting remedies for women prisoners, which, in the end, relied heavily on international standards.

While both uninformed and dubious of the ultimate value of HRW's focus on violations of international standards and treaties that appeared unenforceable, the women prisoners and their lawyers cooperated with both HRW and the DOJ by participating in interviews and responding to fact finding requests. The DOJ attorneys were wary of HRW's efforts because they did not want to appear to concede the legal applicability of the international standards because the international treaties HRW relied upon either had not been ratified by the United States or were ratified in a manner that limited their enforceability in U.S. courts. They also viewed domestic laws and statutes as adequate to ensure the humane treatment of the women prisoners.

Attorneys for the women prisoners, who were struggling to obtain positive results under familiar state and federal civil rights statutes and constitutional law, were also skeptical of the value of international human rights law in domestic courts. Historically, international human rights claims in U.S. courts had been brought primarily by foreign nationals for harms suffered on foreign soil, and there had been little development of international human rights law based upon incidents that occurred in the United States against domestic actors. In a climate where federal courts were increasingly unsympathetic to prisoners' claims challenging conditions of confinement under U.S. law, it seemed unlikely, at best, that the courts would be receptive to challenges based on international laws, treaties, and standards that had heretofore not been enforced in the domestic context.[19]

Impact of HRW Report on the Litigation

Human Rights Watch concluded its interviews and research after two and half years resulting in a documentation report released in December 2006 titled *All Too Familiar: Sexual Abuse of Women Prisoners in United States Prisons.* The report focused on five states including the state of Michigan. The report found extensive sexual abuse being perpetrated against women prisoners in U.S. state prisons. With regard to female prisoners in the Michigan system,

the report found widespread abuse including rape, sexual harassment, forced abortions, privacy violations, and retaliation, noting that:

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

The HRW report addressed the sexual abuse in Michigan as violations of the ICCPR (ratified by the United States in 1993), the Convention Against Torture (ratified in 1994), and the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Rights Convention) and made recommendations based on international standards, including that searches of women prisoners be conducted only by female staff and male officers announce their presence before entering women's housing units, toilet, or shower areas. These recommendations were echoed in Amnesty International's 1998 report *Rights for All* on human rights violations in the United States.

The HRW report garnered significant national publicity but little local attention. However, its value to the litigation became readily apparent to the women's attorneys. Although, the report was not conceptualized with domestic litigation in mind (indeed Michigan was the only state under review in which there was pending litigation), litigation with its judicial enforcement mechanisms was the most effective way to implement the report's remedial recommendations.

At the beginning stages of the litigation, the report, compiled by an independent international organization after extensive interviews with women prisoners and prison staff and documentation review, played an important role in developing factual support for both the state and federal litigation. The women's attorneys used the detailed factual findings to inform the court of the extent and range of abuses for purposes of demonstrating that there were enough women harmed to justify class-action certification in the state case. The validation of the complaint's factual allegations by an independent organization diminished the state's power to deny any problem and contributed to the federal courts' denial of the states' motions to dismiss. The detailed report and the media attention surrounding its release also made any dismissal of the suit by the court, based upon the state's mere denial, extremely unlikely.

In addition to providing factual support, the international standards referenced in the report also had a profound effect on the courts' view and treatment of the case, both in terms of the applicable standards in the case and the overall perception of the claim. While the complaints, at that time, contained only allegations of violation of the state and federal constitutions and civil

rights statutes, the HRW report raised the specter of violations of international treaties and standards. The federal judge was cognizant of the question of whether the United States domestic laws would prove to provide equal and sufficient protection of the rights of the women prisoners as those provided in international treaties and guaranteed by the majority of "peer" nation states such that the rights had reached the status of customary international law. Counsel also pointed out that if necessary, plaintiffs would seek to amend the complaint to add claims based on international law and that a number of the women prisoners were foreign nationals who might have a greater entitlement to the protections of the international documents signed and ratified by their nation states.

Federal and state judges are also, understandably, fiercely protective of the state and federal constitutions they have sworn to uphold. They often believe that the constitutions provide (or should provide) sufficient protections for the rights of all individuals, including prisoners. Judges are also not immune from the general American perception that we provide leadership and, until recently, are the standard bearer of civil and human rights around the world. To have an international human rights organization assert that the treatment of women prisoners violates international norms and standards and hold these violations up to the world, placed the domestic courts in a situation of either disregarding the findings of the report, or interpreting the United States Constitution to provide an adequate mechanism for remedying these violations.

The attorneys, by attaching the HRW report to court pleadings, also introduced an entirely new perspective on the treatment of women prisoners in Michigan. The report provided a glimpse of possible remedial measures both through the recommendations and through the opportunity to view best practices in other states and countries. Educating the court early on that there were jurisdictions that did not have the level of abuse that existed in Michigan's women's prisons significantly diminished corrections officials' standard second line of defense to challenges to conditions of confinement. After denying the problem, corrections officials often defend a challenged condition as an unavoidable consequence of housing dangerous felons and resisted remedial measures as incompatible with penalogical objectives and security concerns. Information that other countries and states have managed to house their women prisoners without pervasive sexual abuse by male guards allowed the court to disregard this defense without impermissibly failing to give deference to the expertise of corrections management. As discussed below, the information about international standards and practices also would have a profound influence on the shaping of remedies in the case.

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

The use of human rights as opposed to prisoners' rights became more than a semantic distinction in the case and began to inform the way participants viewed the issues. It is easier to disregard the statements of, as the defendant corrections department often refer to them (with a bit of redundancy), the "convicted female felon," the "prisoner inmate," or the "felony offender" than it is to disregard the human rights of an incarcerated woman. The language of humane treatment, degrading treatment of women, and human rights began to be repeated by the media as the case progressed, adopted by the women's attorneys and ultimately echoed by the court.[20]

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

Continuing Human Rights Interventions

In 1998, two years after the litigation began and the HRW report, the United Nations Commission on Human Rights appointed a special rapporteur, Radhika Coomaraswamy, to investigate the treatment of women prisoners in the United States as part of her mandate to investigate the causes and consequences of violence against women. The reports of the international human rights organizations and the supporting documentation from the litigation were largely responsible for this mission. The State Department approved the visit and the special rapporteur prepared to visit Michigan's prisons along with six other states. However, on the eve of her visit, the then-governor of Michigan, John Engler, revoked his agreement to allow her to visit women prisoners and canceled her meetings with state representatives. The refusal was grounded in part on the governor's assertion that the United Nations both lacked authority and was being used as a tool of the litigation.

Nevertheless, the special rapporteur journeyed to Michigan to meet with lawyers, academics, former guards, and former prisoners. Despite the lack of cooperation, the conditions in Michigan women prisons were included in the 1999 United Nations Human Rights Commission report on Violence Against Women. The report detailed the credible allegations of both sexual abuse and retaliation and, recognizing the UN Standard Minimum Rules for the Treatment of Prisoners, as augmented by the Basic Principles for the Treatment of Prisoners,[21] stressed the need for gender-specific supervision of women prisoners.

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

The local media then picked up on the reports in the Geneva press, reinforcing the relevance of the human rights framework and the scrutiny the state was being subjected to, in part because of the governor's refusal to acknowledge the authority of the United Nations on this issue. The state's refusal to allow inspections subjected it to scathing comparisons with rogue countries with extensive human rights violations and a history of rejecting international oversight and investigations into their conduct.

In 1998, Human Rights Watch returned to Michigan to follow up on reports that the women prisoners' cooperation with the international organizations and participation in the litigation had resulted in severe retaliatory actions by staff against them, including physical assaults and abuse, incarceration in isolation cells for long periods of time, intensified threats of sexual abuse, threats to their family, denial of visits, and loss of paroles. The resulting report, titled *Nowhere to Hide*, highlighted the near-absolute power staff had over the women prisoners—controlling their access to the world and their freedom, the risks the women incurred in speaking out, and the difficulty of addressing the abuse in this punitive and secretive environment. The report also reflected the interactive synergy between the litigation and human rights documentation. The acknowledgment both of the impact of stepping forward and the price that women prisoners were paying heightened both the credibility of HRW among the women as well as confirming the need for the litigation to seek additional remedial measures with regard to the retaliation.

The Path to Settlement

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

The accumulated negative press and pressure of the international scrutiny and local and national media coverage, and the rejection of the state's attempt to characterize the litigation as frivolous or the result of isolated acts of a few rogue guards by both the courts and the press resulted in the parties beginning settlement discussions.[22]

During the litigation, the Department of Corrections had made changes in its operations, as part of a settlement with the DOJ, including changes in

some of its process for hiring, training, and investigation of staff and structural changes in the facilities. The women prisoners, however, insisted that any settlement of their claims must include adherence to the international norms prohibiting cross-gender supervision and searches. While this relief was never specifically requested in the original pleadings, plaintiffs had prepared an amended complaint to allege violations of customary international law and specifically request injunctive relief consistent with the applicable standards set forth in the Convention Against Torture, the Women's Rights Convention, and the UN Standard Minimum Rules for the Treatment of Prisoners should the settlement negotiations fail and trial on this issue be required.[23]

Ultimately, the federal litigation was settled for significant damages and remedial relief, including the commitment to remove male staff from the housing units, intake, and transportation areas of women's prisons in Michigan and to eliminate cross-gender patdowns. The HRW report played a key role in persuading the court and the Department of Corrections to agree to remove male staff. While traditional prisoners' rights cases typically include experts who provide reports and testimony on the best practices in other states and correctional standards, it is unlikely that global standards regarding the treatment of incarcerated women prisoners would have been provided to the court absent HRW's report and Amnesty International's subsequent report in 1998. The reports revealed that while cross-gender supervision was standard practice in the United States, it was contrary to international standards that the majority of the world had accepted as a minimum standard.

In Michigan, women prisoners were largely supervised by male staff who performed the vast majority of body searches and routinely viewed women nude and performing basic bodily functions. In many instances, the midnight shift at the women prisons would be comprised entirely of male guards with full access to the women. The unfettered access, prurient viewing, and constant touching all worked to create a culture of sexual abuse and degradation in the women's facilities. The state had steadfastly refused to consider gender-specific supervision, asserting it to be near impossible, inconsistent with standard correction practices, and unlawful. The DOJ also declined to consider the remedy of elimination of cross-gender supervision and body searches, both because the federal prisons utilized male staff in their female prisons and a concern for the constitutionality of gender-based staffing raised by DOJ attorneys in the employment division.

Yet, HRW and Amnesty International maintained that internationally accepted UN standards[24] for the treatment of prisoners as well as the Convention Against Torture, the Women's Rights Convention, and the ICCPR should be considered in determining the treatment of prisoners, including women in detention. In particular, the UN Standard Minimum Rules for the Treatment of Prisoners represented a global consensus for the standards applicable to women prisoners and included the requirement that male staff shall not enter the part of the institution set aside for women unless accompanied by a female officer; and that women prisoners shall be under the authority of and attended and supervised only by woman officers. Although the United States had, in 1975, indicated its full compliance with implementation of these standards, the United States had lapsed into noncompliance beginning in the 1980s.[25]

Although no domestic standards required female supervision, plaintiffs' counsel, who heretofore had had no basis upon which to assert the provisions as a remedy, now based on the HRW and Amnesty International reports, had the entire world.

Post-Settlement

The intertwining of human rights advocacy with the domestic litigation continued when a contingent of guards challenged the Department of Corrections's implementation of the terms of the settlement, claiming that the removal of staff, based on their gender, violated their constitutional rights to equal protection under the law.[26] The women prisoners sought and obtained the right to intervene to protect their settlement and ensure compliance with both their constitutional rights and international standards of treatment. The history, as well as the current practices, in the United States and in 'peer' countries was a prominent concern of the trial judge in the case, who contacted Canadian government officials to inquire about the standards in provincial facilities housing women prisoners, and admitted into evidence the HRW and Amnesty International reports, the report of the UN Commission on Human Rights, and *The Report of the Canadian Government, Cross-Gender Monitoring Project Third And Final Report,* dated September 30, 2000, which recommended enforcement of the requirements of female-only corrections officers in female prisons in Canada. Although the court considered pleadings that directly raised the argument that failure to implement the settlement agreement would violate women prisoners' rights under both the Constitution and customary international law, it failed to directly rule on the women prisoners' claims and rejected the gender-specific assignments relying only on an analysis of the equal protection rights of the guards.

The federal trial court was, however, reversed on appeal by the Sixth Circuit Court of Appeals, which upheld the women prisoners' settlement requirement of gender-specific supervision based on women prisoners' rights under the Constitution to privacy and safe and humane treatment.[27]

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

CHILDREN TO THE WORLD, ADULTS AT HOME

If there is a group of people caught up in the criminal justice system in America that has less legal protection than women prisoners, it has to be the children. In 1997, it was estimated that less than 1 percent of the people in state prisons were under the age of eighteen. Two years later, youth under eighteen accounted for 2 percent of all new commitments to state prisons. In 2004, there were estimated to be over 200,000 children under the age of

eighteen incarcerated in adult jails and prisons in the United States. The number is estimated because no one knows for sure how many children are being held in captivity. The Department of Justice, Bureau of Statistics published a report in 2001 which attempted to identify the number children under eighteen held in adult jails and prisons in this country as well as the number held in both private and public juvenile detention facilities. However, many states do not maintain separate records of the number of children in their adult facilities, reasoning that once a child had been tried or sentenced as if they were an adult, their child or juvenile status does not follow them into the adult prisons, despite the realities of their age. Figures of youth held in county jails are not compiled by, or reported to, a central source, and separate entities altogether monitor children held in most states' juvenile facilities.

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

In stark contrast, the Convention on the Rights of the Child (CRC) recognizes that the special status of children entitles them to special protection. It provides that children are to be incarcerated as a last resort, for the least amount of time possible with mandated rehabilitative efforts. Further, the CRC flatly prohibits sentencing children to life in prison without parole, stating in Article 37(a) that "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

This provision of the CRC has near universal acceptance. 192 of the 194 countries have signed, ratified, and not registered a reservation to the CRC's prohibition on life imprisonment without release for youth offenders. The United States and Somalia are the only two countries in the world that have not ratified the CRC, although both have signed it.[28]

Life imprisonment for juveniles also violates the clear language of the ICCPR, which was both signed and ratified by the United States. Article 10(3) requires that children (under the age of eighteen) be treated appropriate to their age and legal status as children. Article 14(4), which was cosponsored by the United States, mandates that criminal procedures for youth charged with crimes "take account of the age and the desirability of promoting their rehabilitation."[29]

The harshest punishment available for a crime, in states that do not have the death penalty, is the sentence of life imprisonment. In forty-two states, in the United States, it is also a permissible punishment for crimes committed by children.

Developing an Integrated Human Rights Strategy

Despite the clear problem of juvenile life without parole sentences, little was known of the number of youth serving this sentence in the United States. Given the positive, if somewhat serendipitous, impact of interweaving

documentation of the abuse of women prisoners by international human rights organizations with domestic litigation challenging their treatment, a joint documentation project was planned as the first step in an integrated advocacy strategy incorporating human rights to address juvenile life without parole sentences in the United States.

The coalition which would become known as the *Second Chances* coalition was spearheaded by the Juvenile Life Without Parole Initiative and began in the state of Michigan in 2003 with the sponsorship of the Michigan affiliate of the American Civil Liberties Union, the research assistance of the Institute for Social Research at the University of Michigan, and Columbia Law School's Human Rights Institute. The national ACLU, a domestic civil rights organization, had recently created a Human Rights Working Group to incorporate a human rights framework in certain litigation and advocacy work, and the work around juvenile life without parole, which combined that working group's concerns with human rights, racial justice, and criminal justice, quickly became part of the national initiative.

Documentation was conceptualized as a first step for several reasons. As in the prior work around sexual abuse of women prisoners, documentation by human rights organizations would identify, humanize, and give voice to the victims of the human rights violations. In addition, documentation was necessary because there was a dearth of knowledge on the extent of the use of this punishment in the United States. Fact-finding could also function to identify potential areas of litigation.

Documentation as a first step also made sense because direct legal challenges under domestic law appeared limited. The traditional challenge used to attack the juvenile death penalty was the Eighth Amendment's prohibition on cruel and unusual punishment. The U.S. Supreme Court stuck down the death penalty for juveniles under the age of sixteen in 1988.[30] Although the U.S. Supreme Court, at the time the documentation project was initiated in 2003, had not yet rejected the death penalty for sixteen- and seventeen-year olds, the challenge was well underway to argue that this punishment had also become sufficiently unusual to warrant a ruling on its unconstitutionality.

However, the U.S. Supreme Court had also held in general that life without parole sentences were constitutional, and the laws of forty-two states allowed life without parole sentences for juveniles, making a constitutional challenge that the punishment met the conjunctive requirements of cruel *and* unusual difficult on its face.

Federal appellate courts had also held that mandatory sentences of life without parole imposed on juveniles for murder convictions do not violate the Eighth Amendment, and where review has been sought by the United States Supreme Court, it has been declined. These courts also rejected arguments that the lack of consideration of the defendants' youth posed constitutional problems.[31]

In 2004, the Supreme Court finally forced the United States into compliance with the world's standards on criminal punishment of juveniles in the context of the death penalty in *Roper v. Simmons,* which struck down the death penalty for juveniles who committed their crimes under the age of eighteen as a violation of the Eighth Amendment. Much of the Court's reasoning

about the differences between juveniles and adults, the vulnerability of juveniles to negative influences and pressures, and other developmental realities apply equally to life without parole sentences. It was clear that the human rights communities' work on this issue contributed to the Court's interpretation of the Eighth Amendment,[32] and the same international authorities that condemned the juvenile death penalty instruct that the sentence of life without parole for juveniles also violates international law and is a rare punishment around the world.[33] However, while *Roper* struck down the juvenile death penalty, it left intact laws in forty-two states which sentence children to grow old and die in a prison cell for crimes committed when they were under the age of eighteen. With the practice remaining widespread in the United States, a challenge under the Eighth Amendment, which required a demonstration of both cruelty and unusualness, was still premature.

Similarly, state constitutional challenges were not promising, although many states, including Michigan where the documentation project started, had a disjunctive constitution requiring the proof of cruel *or* unusual punishment. The Supreme Court of Michigan had held that juveniles do not have a fundamental or constitutional right to special protection, and the state appellate courts had rejected a challenge to the life without parole sentences as cruel or unusual and held that children or juveniles had no constitutional right to be treated as juveniles. The lack of a right to special protection means that there is no fundamental right to certain procedures and standards for determining when children can be treated as adults.

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

The strategy then was to begin a challenge using a human rights framework, both substantively and procedurally using traditional human rights devices to begin the advocacy. The strategy would first create a documentation project, then join together domestic advocacy groups involved with children's rights and criminal justice issues together with international human rights organizations to develop both an advocacy campaign and a coordinated legal challenge incorporating human rights law.

Human Rights Documentation

In Michigan, the documentation project involved extensive interviews with juveniles serving the life without parole sentence; collateral interviews with families of the juveniles and victims' families; extensive review of trial transcripts and records of the juveniles, pre- and postconviction; interviews with judges and prosecutors; and data collection, in order to compile a broad understanding of the impact of the laws allowing life without parole sentencing of juveniles.

The data collections and the interviews proved the most challenging and enlightening. In order to obtain a nuanced view of the data, it was planned to collect data and obtain interviews from a minimum of fifteen states from different geographic areas that allowed life without parole sentences to be imposed on juveniles. While the data collected provided a wealth of information and the beginning of an understanding of the extent of the use of life without parole sentences for children, the diverse recordkeeping of various Departments of Corrections together with divergent rules on what constituted public documents, and a patchwork of laws left some gaps in the data.

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

When it became apparent that there was an impetus for seeking remedial action in Michigan, a breakout report was issued titled, *Second Chances*: *Juveniles Serving Life Without Possibility of Parole in Michigan's Prisons*, reporting that over 300 children in Michigan alone were serving the sentence of natural life without any possibility of parole.

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

Infusing Human Rights Advocacy in Local Campaigns

The report garnered worldwide media attention, raising the consciousness of media and the public in the United States to the human rights violation involved in sentencing juveniles to life without parole, while concurrently raising the issue of the United States' violation of human rights with the worldwide body.[34]

Meanwhile, the documentation reports sparked an informal national coalition that included domestic advocacy groups, children's groups, legal academics, funders, additional domestic criminal justice advocacy groups, doctors and psychologists, and traditional human rights advocates to coordinate

national challenges to juvenile life without parole sentencing. The overarching issue and approach was to keep the human rights component alive in whatever strategies were most effective on a state-by-state and national basis. In Colorado, advocacy groups, in collaboration with Human Rights Watch, issued their own state documentation report titled *Thrown Away: Child Offender Serving Life Without Parole in Colorado*. California and Illinois began working with a private law firm to begin their own statewide documentation project in preparation for legislative and/or litigation challenges, drawing on the expertise of both Human Rights Watch and the ACLU. Mississippi, Louisiana, and Florida all began their own initiatives, again relying upon the assistance of the ACLU, Amnesty International, and Human Rights Watch in developing their state challenges.

In Michigan the documentation project continued and became more nuanced, able to address the racial injustice components of the life without parole sentence and engage advocacy groups to focus on this aspect of racial discrimination in the administration of the criminal justice system in the United States. The project also continued to weave human rights concerns with the domestic agenda, by working domestically to introduce legislation to eliminate the sentence, while filing a petition with the Inter-American Commission, with the assistance of the Human Rights Institute and clinic at Columbia Law School, directly challenging the illegality of their sentence under the American Declaration of the Rights and Duties of Man.

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

Like the situation with women prisoners, the juveniles serving the life sentence together with their families and friends also embraced the human rights language and framework. The Second Chances coalition, which grew out of the grassroots organization of family, friends, and juveniles, created a Web site with links to the domestic legislation, the Inter-American petition, the documentation reports, and the international instruments which supported the assertions of human rights violations.

International Advocacy

In addition to local efforts, activists engaged in international forums to increase international pressure on the United States. Counsel for the juveniles in Michigan attended the UN Congress on Crime Prevention and Criminal Justice in Bangkok in 2005, on behalf of Human Rights Advocates to raise the issue of juvenile life without parole sentences in this international body as a prelude to addressing the issue with the UN Human Rights Committee.

In September 2006, the United Nations Human Rights Committee addressed the issue as part of its concluding observations on the United States's compliance with the ICCPR. After recognizing the documentation reports,

the committee observed that sentencing children to life sentence without parole is of itself not in compliance with Article 24 (1) of the Covenant (Articles 7 and 24) and recommended that:

> The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.[35]

Similarly, the UN Committee Against Torture included the issue in its recommendation on the United States's compliance with the Convention Against Torture, stating: "The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment."[36]

The United Nations General Assembly also adopted a resolution calling for the elimination of this practice as violating the Convention on the Rights of the Child. This international attention, in turn, brought domestic media attention back to the human rights issues and violations, requiring state legislators to address the issues of the state's laws violating human rights norms, treaties, and conventions. Not everyone was impressed with the framework however. Alan Cropsey, the Republican chair of Michigan's Senate judiciary committee, who blocked hearings on the reform legislation, responded to the United Nations observations by asserting that "The UN is a laughing stock. They have no moral credibility." One journalist, however, noting the poor company the United States was keeping on this issue, mourned the United States's ebbing moral authority, coming full circle by connecting the abuses committed by military in Abu Ghraib with the culture of ignoring human rights obligations at home.

NOTES

1. Matt Davis, Michigan Department of Corrections spokesperson (press statement).

2. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

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

4. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

5. Many chapters could be written on the confluence of events that resulted in what is known as the modern prisoners' rights movement. *The Autobiography of Malcolm X* was first published in the United States in 1965 and Eldridge Cleaver's *Soul on Ice* in 1968. These followed Caryl Chessman's 1950s exposure of death row (in)justice and were all widely read both inside prison and out, creating a symmetry of shared knowledge and consciousness raising on prison conditions in the United States.

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

7. *Hutto v. Finney*, 437 U.S. 678 (1978).

8. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

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

10. *Turner v. Safely*, 482 U.S. 78 (1987).

11. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

12. Because prison officials often prove to be recalcitrant even after courts have found the condition and treatment of prisoners unconstitutional, federal trial court

judges have the power to issue injunctive and remedial orders specifically ordering officials to take certain steps or adopt certain measures.

13. *Wilson v. Seiter*, 501 U.S. 294 (1991).

14. Significantly, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment provides that coercion based on discrimination which causes severe harm, whether physical or mental, constitutes torture. For an action to constitute cruel, inhuman, or degrading treatment or punishment it need not be shown to be committed for a particular purpose or with any specific intent.

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

16. Amnesty International, *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody in the United States* (Amnesty International, March 1999); Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (Human Rights Watch: December 1996); Human Rights Watch, *Nowhere to Hide: Retaliation against Women in Michigan State Prisons* (Human Rights Watch, July 1998).

17. *Glover v. Johnson*, 478 F.Supp 1075 (E.D. Mich 1979).

18. *Klinger v. Dept. of Corrections*, 31 F.3d 727 (8th Cir. 1994).

19. In the criminal justice context, attempts by prisoners to challenge their criminal convictions arguing international law in the context of habeas corpus petitions had consistently been rejected, as had challenges to capital punishment against juveniles, something that was clearly violative of a number of international treaties and customary international law.

20. Counsel for the women also attempted to reframe the language and status of their clients by including claims, in the federal litigation, of violations of the federal Violence Against Women's Act, and in the state case raising their central claims under the state's civil rights act which prohibits discrimination, including sexual-based harassment against women in all public services and facilities. Unfortunately, after the cases were filed, the federal courts struck down the Violence Against Women's Act as unconstitutional. When the Act was reauthorized, it excluded protections for women prisoners. Similarly, the state of Michigan amended the state's civil rights act to specifically deprive prisoners of the Act's protection against discrimination. This amendment was, however, later struck down as unconstitutional when challenged by women prisoners as violative of their constitutional and human rights. *Mason v. Granholm,* 2007 WL 201008, ED Mich, January 23, 2007.

21. UN General Assembly, *Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, UN Doc. A/45/11 (December 14, 1990).

22. A one-hour special was aired on national television which focused in large part on the conditions in Michigan and joined comments from Human Rights Watch, the counsel for the women prisoners, the Department of Justice, and state officials in evaluating the conditions of women prisons in the program titled *Women in Prison: Nowhere to Hide.* The special garnered an American Bar Association Silver Gavel Award and a Robert Kennedy award for broadcast journalism that year.

23. See Martin A. Geer, "Human Rights and Wrongs in our Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law: A Case Study of Women in the United States Prisons," *Harvard Human Rights Journal* 13 (Spring 2000): 71.

24. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, UN Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 UN ESCOR Supp. (No. 1) at 35, UN Doc. E/5988 (1977); UN General Assembly, Basic Principles for the Treatment of Prisoner.

25. Nick Pappas, *The Jail: Its Operation and Management* (Washington, DC: United States Bureau of Prisons, 1973), pp. 19, 71–72; UN Standard Minimum Rules. For a full history of the United States lapse into noncompliance, see Martin A. Geer, "Protection of Female Prisoners :Dissolving Standards of Decency," *Margins* 2 (2002): 209.

26. *Everson v. MDOC*, 222 F.Supp 2d 864 (E.D. Mich 2002). The male guards used Title VII of the Civil Rights Act Section 703(a)(1) and (2), which states:

(a) It shall be unlawful employment practice for an employer
   1. To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment because of such individual's race, color, religion, sex or national origin; or
   2. To limit, segregate or classify his employees or applicants from employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

27. *Everson v. MDOC*, 391 F3d 739 (2004), cert. den. 126 S.Ct 364 (2005). For a good discussion of the case and the legal and social issues surrounding women prisoner abuse and privacy rights, see the work of Brenda Smith, "Sexual Abuse of Women in Prison, a Modern Corollary of Slavery," *Fordham Urb. L.J.* 33 (2006): 571; and Brenda Smith, "Watching You Watching Me," *Yale J.L. and Fem.* 15 (2004): 223.

28. The United States signed the Convention on the Rights of the Child on February 16, 1995 and Somalia signed on May 2, 2002, and while neither have since ratified it, Somalia lacks a formal government to effectuate ratification.

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

30. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (the court in holding that such a punishment has become unusual in the United States as part of our evolving standards of decency also noted the global rejection of the death penalty for youth offenders age sixteen or younger).

31. Although two state supreme courts have held that juvenile life without parole sentences were improper, the cases involved particularly troubling circumstances concerning a thirteen-year-old convicted of murder and a fourteen-year-old convicted of rape.

32. The Court specifically referred "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments," and cited two documentation reports on the limited use of capital punishment of minors in the rest of the world. *Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005).

33. According to Human Rights Watch, Amnesty, and Human Rights Advocates, there were only a handful of youth in the rest of the world combined serving a life without parole sentence.

34. There was extensive coverage in both local newspapers in Michigan as well as worldwide coverage. For example BBC radio aired an interview with a juvenile serving LWOP in Michigan and the *New York Times* included the issue in a three-part series. The national report also helped fuel ongoing coverage and attention on Michigan with segments of National Public Radio and state journals focusing on Michigan's efforts to illuminate and eradicate this human rights violation.

35. See UN Human Rights Committee, 87th Session, *Consideration of Reports Submitted By Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006).

36. UN Committee Against Torture, 36th Session, *Consideration of Reports Submitted By Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee Against Torture: United States of America*, UN Doc. CAT/C/USA/CO/2, para. 34.