

Does Anyone Care? Prison Overcrowding and Confinement Conditions in the United States and in Europe

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

Winston Churchill¹

I. Introduction

This article compares prison overcrowding, confinement conditions and reform efforts in the United States and Europe, and discusses how confinement conditions have been challenged in their judicial systems. For purposes of this article, there is a discussion of several Member States of the European Union, including Austria, Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain, Denmark, Ireland, United Kingdom, Greece, Finland, and Sweden, as well as Switzerland, which is not an EU Member State. A comparison of several of those European states in general along with the United States, is the focus of this discussion.

Statistics show that in the United States, the use of imprisonment has increased considerably over the last decades. It has been reported that the number of prisoners has doubled between 1985 and 1995 and that there has been a rise in the per-capita incarceration rate from 313 inmates per every 100,000 residents in 1985 to 600 per every 100,000 residents in 1995.² Around the world, the per-capita incarceration rate in the United States is only exceeded by Russia.³ If one word could be used to describe the state of the nation's prisons and jails, that word would be 'crowded.'⁴

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¹ As quoted by Marvin E. Frankel, *Criminal Sentences: Law Without Order*, 1973, p. 9.

² This figure also includes the number of inmates housed in jails. Bureau of Justice Statistics, U.S. Dept. of Justice, *Prison and Jail Inmates*, 1995, p. 2 (1996).

³ Marc Mauer, *Americans Behind Bars: The International Use of Incarceration*, 1994, p. 1. In 1996, Russia's per-capita incarceration rate was 690 per 100,000. Id.

⁴ Lynn S. Branham, *The Law of Sentencing, Corrections, and Prisoner's Rights*, 5th edition, 1997,

Likewise, Europe has also experienced an increase in imprisonment numbers.⁵ As one author noted, ‘in the [United Kingdom], Portugal, Belgium, Italy, and France, conditions in prisons have deteriorated, mainly as a result of overcrowding, leading to tension between prisoners and prison wardens and violence amongst prisoners.’⁶

This article looks at the overcrowding and confinement conditions by first looking at the history of prisons in the United States and Europe in Parts II and III, respectively. Then in Parts IV and V, drug use and its effects in each country’s prisons will be explored. Parts VI and VII will discuss HIV statistics in the prisons, and Parts VIII and IX will look at the mental health conditions and medical treatment the prison system provides. Part X entails procedures that have been used in Europe as well as the United States to monitor prisons and inmates’ treatment and will discuss how reform groups have caused society to look more closely at prison conditions. Part XI will explore how confinement conditions are litigated in the United States and finally, Part XII discusses how Europe handles complaints regarding its confinement conditions.

II. The History of the United States’ Prison System

Built in 1773, the first American prison was Philadelphia’s ‘Walnut Street Jail.’⁷ It was the world’s first penitentiary that carried out incarceration as punishment by implementing a classification system consisting of individual cells, and intending to provide a place for offenders to do penance.⁸ Later, the ‘Newgate Prison’ opened in New York City and was designed after the Walnut Street Jail.⁹ Then in 1787, after the United States won its independence, the world’s first prison reform organization was formed in Pennsylvania.¹⁰ The Philadelphia Society for the Alleviation of the Miseries of Public Prisons (or Philadelphia Prison Society) sought to alleviate the awful conditions in places of confinement by visiting the public prisons and jails on a regular basis, inquiring into inmates’ surroundings and reporting abuses.¹¹ Adverse conditions at the Philadelphia Walnut Street Jail caused the Philadelphia Prison Society to take action, and in

p. 504.

⁵ Sharon Spiteri, *Euro-Parliament Attacks Berlusconi’s Media Empire*, 5 Sept. 2003, available at <http://www.euobserver.com/index.phtml?sid=22> (last visited 14 Oct. 2003).

⁶ Id.

⁷ Funk & Wagnalls, *Standard Reference Encyclopedia*, Vol. 20, 1961, p. 7254. The Eastern Penitentiary in Philadelphia, ‘with its housing units all off a central rotunda to facilitate supervision, was admired and copied in France, Belgium, and Germany.’ Id.

⁸ John W. Roberts, *Reform and Retribution*, in *An Illustrated History of American Prisons*, 1997, p. 26. Providing a place for offenders to do penance is where the term ‘penitentiary’ was derived. Id.

⁹ Id. at p.27.

¹⁰ Id. at p. 24.

¹¹ Id. The organization continues to function, more than two centuries later, as the Pennsylvania Prison Society. See id.

1789 and 1790, the Pennsylvania State Legislature passed laws to implement reform.¹² The Walnut Street Jail and the Newgate Prison paved the way for the establishment of modern prisons.¹³ However, these prisons were only prototypes that were flawed in the way they were designed. As program limitations became apparent, states moved during the 1800s to build larger penitentiaries that would correct those flaws.¹⁴

In 1817, crowding at Newgate Prison caused New York to open a new state prison in Auburn.¹⁵ Auburn was the birthplace of the 'Congregate System,' which restricted inmates to their cells only during evening hours and allowed them to eat their meals together and work in factories.¹⁶ The Auburn-style prison had the advantages of being less costly due to cells being smaller and also of having inmates work in industrial jobs making prisons 'money-making' facilities.¹⁷ At that time, private business interests took over and inmates were used to work in privately owned factories, mines, logging camps and plantations.¹⁸ In an effort to maintain control in the 'Auburn System,' the use of striped uniforms and the lockstep came into being.¹⁹ Corporal punishment was also used to manage the inmates in the Auburn System.²⁰

Then, the Civil War came about and the war had an impact on the history of American Corrections.²¹ Some prisoners of war and deserters 'were put in make-shift prison tents where they literally starved to death.'²² As many as 32,000

¹² Roberts, *supra* note 8, at p. 25. The Pennsylvania system was more expensive to operate but had different goals, as '[t]he Quakers who ran the prison believed the convicts had a tendency to corrupt one another and that solitary confinement with the Bible . . . would serve a rehabilitative purpose. Michele Wagner, *How Should Prisons Treat Inmates?* 54 (Series: At Issue 2001).

¹³ Roberts, *supra* note 8, at p. 29.

¹⁴ *Id.* at p. 31.

¹⁵ *Id.* at p. 38.

¹⁶ *Id.* At this time, the 'Congregate System' or 'Auburn System' came to dominate American corrections as a system of inmate management. *Id.*

¹⁷ *Id.* at p. 39. 'Many states followed the Auburn System because it was more economical.' Marilyn Tower Oliver, *Prisons – Today's Debate* p. 24 (1997). 'For a hundred years (1829 – 1929) the effort to make the prisons self supporting by productive work had been the core of prison programs.' See Funk & Wagnalls, *supra* note 7 at p. 7254. Prisons were used as factories and gave the inmates employment plus taught them valuable skills. See *id.* However, the products of free labor caused competing private industries to protest and this method soon came to an end. See *id.*

¹⁸ Roberts, *supra* note 8, at p. 40.

¹⁹ *Id.* at p. 41. Lockstep was an in-line succession march that was devised to help maintain discipline among the prisoners when moving them from one place to another. See *id.*

²⁰ See *id.* at p. 44. The Auburn System had its flaws as:

[c]onvicts in Auburn's northern wing were confined in solitary without any opportunity to work or leave their cells. Eighteen months after this experiment began, Auburn's administrators realized they had been overzealous. On an official visit to the prison, New York Governor Joseph C. Yates witnessed one man spring from his cell the moment the door was opened and hurl himself from the gallery to the pavement. Another prisoner was witnessed beating his head against the wall of his cell until he had put one of his eyes out.

Wagner, *supra* note 12, at p. 54.

²¹ See *id.* at p. 45.

²² *Id.* at p. 50.

Union soldiers were put into these prisons where only six feet of space was allowed per man.²³ There was a distinct rise in the prisoner population at this time.²⁴ The South was hit hard by its increase in prisoner numbers, which caused 'convict leasing' – a system where prisons leased inmates to private businesses.²⁵ The prison overcrowding, Auburn System flaws, convict leasing, and the need for the federal government to play a role in corrections, altogether caused a need for a change in prison operations at this time.²⁶

After the Pennsylvania System and Auburn-style prisons were developed, the Panopticon design was created, which consisted of multiple levels of outside cells built in a circle.²⁷ The 'Elimira System' followed, taking the place of the Pennsylvania and Auburn Systems.²⁸ The Elmira System was the first prison to be established as a reformatory.²⁹ After the 1700s and 1800s, came the idea that corrections should serve a reformatory function, in addition to serving as punishment.³⁰ This was to be accomplished by reforming inmates, and a rehabilitative-modeled institution was developed.³¹ Prisons started using training programs for labor trades that inmates could use when released, in order to help them successfully re-enter society.³² Eventually, due to a lack of funding, these programs were not able to survive and problems such as incompetent medical treatment and mismanagement caused these types of programs to decline.³³ The true reformatory modeled prison was short-lived as:

Reformatories raised standards in corrections, but in the late nineteenth century, they were the exception rather than the rule. The majority of prisons and jails were crude, overcrowded, and punishment-oriented. Disciplinary practices were cruel, staff often was less likely to be professional and competent than politically appointed, and inmate labor was callously exploited.³⁴

After the inmate population increased during the end of the nineteenth century, the practice of incarcerating federal prisoners in state and county institutions became obsolete due to three reasons:

²³ Roberts, *supra* note 8, at p. 50.

²⁴ See *id.*

²⁵ *Id.*, at p. 52. 'Convict leasing' involves prisons leasing convicts to businesses in order to have them work for them at a fraction of the cost of an employee. See *id.*

²⁶ See *id.* at p. 53.

²⁷ Roberts, *supra* note 8, at p. 54. Several European prisons and a few in the United States were built on the Panopticon design. See *id.* at p. 55.

²⁸ See *id.* at p. 63. The Elimira System was named after an Elimira, New York Prison. *Id.*

²⁹ See *id.* The Elmira system was 'designed to rehabilitate first offenders sixteen to thirty years of age. . . [and] laid greater emphasis on work, vocational training, and academic education.' Funk & Wagnalls, *supra* note 7, at p. 7254. The 'Elimira Reformatory . . . had a strong influence not only on methods of treatment of the younger first offenders but upon prison methods in general.' *Id.*

³⁰ *Id.*

³¹ Roberts, *supra* note 8, at p. 117. 'It is just as much in the interest of public safety to rehabilitate those who can be redeemed as it is to keep incorrigibles behind bars.' Bryan J. Grapes, *Prisons – Current Conditions*, 2000, p. 73.

³² See Roberts, *supra* note 8, at p. 64.

³³ See *id.* at p. 65.

³⁴ *Id.* at p. 66.

1. The growing population and increasing number of federal laws meant a rise in the number of federal offences;
2. Conditions in some of the state prisons were so wretched that many members of Congress and officials to the Justice Department became opposed to sending federal prisoners to them; and
3. The national outcry against convict labor-leasing arrangements that were prevalent in state prisons led to enactment of a federal law in 1887 that prohibited the leasing of federal prisoners. That law removed much of the economic incentive for state prisons and county jails to incarcerate federal prisoners, and they began to resist accepting them.³⁵

Congress then passed the Three Prisons Act in 1891 and established three United States penitentiaries – one in Fort Leavenworth, Kansas; another in Atlanta, Georgia; and one in Puget Sound, Washington.³⁶ These new federal prisons also had their share of problems, such as wardens being politically appointed, staff members lacking training and experience, institutions quickly becoming crowded, and a serious lack of funding.³⁷ The crowding and lack of central direction inhibited federal prisons in the 1920s from responding effectively to the advances in the corrections system.³⁸

In the 1940s, state and federal inmates became volunteers for the World War II effort.³⁹ A change in the law permitted ex-felons to enter the military and tens of thousands of inmates were paroled from prison to the Army and the Navy.⁴⁰ After the war, tensions mounted due to long periods of idleness in prisons and a series of prison riots occurred in the 1950s.⁴¹ This caused the need for work and production programs to alleviate the idleness that was taking place in prisons.⁴² It was at this time that the American Prison Association became the American Correctional Association and caused rehabilitation and establishment of more humane conditions to be the primary focus of corrections through the 1960s.⁴³

After the 1960s, the Medical Model evolved.⁴⁴ This model viewed criminality as comparable to a physical disease – diagnosing the causes to be social immaturity, psychological maladjustment, alcohol or drug abuse, illiteracy, or lack of job skills.⁴⁵ In 1970, the Joint Commission on Correctional

³⁵ Id. at p. 69.

³⁶ Id. 'Although individual states had prisons as early as 1790, the federal prison system was not formed until one hundred years later.' Oliver, *supra* note 17, at p. 36.

³⁷ See Roberts, *supra* note 8, at p. 70.

³⁸ Id. at p. 126.

³⁹ Id. at p. 149.

⁴⁰ Id.

⁴¹ See id. at p. 166.

⁴² See Roberts, *supra* note 8, at p. 168.

⁴³ Id. at p. 169.

⁴⁴ See id. at p. 170.

⁴⁵ Id. 'By the late 1970s, rehabilitation was dead . . . [m]ainly due to the writings of sociologist Robert Martinson, prison rehabilitation programs were viewed as ineffective.' David. Bender,

Manpower and Training stated:

The offender is to be perceived as a person with social, intellectual, or emotional deficiencies who should be diagnosed carefully and his deficiencies clinically defined. Programs should be designed to correct these deficiencies to the point that would permit him to assume a productive, law-abiding place in the community. To achieve these goals of correctional treatment, it would be necessary only to maintain the pressure on the inmate for his participation in the treatment programs, to continue to humanize institutional living, to upgrade the educational level of the line officer, and to expand the complement of professional treatment and training personnel.⁴⁶

To help diagnose what the individual prisoner's needs were, many state prisons used reception and diagnostic centers to administer medical and psychiatric examinations.⁴⁷ Prisons also established social, vocational, educational, and family histories by administering a series of tests so that inmates could be classified as to their needs.⁴⁸

Community Corrections became one of the Medical Model's legacies in the 1960s.⁴⁹ Community Corrections involved the use of halfway houses, pre-release guidance centers, work and study release, and home confinement.⁵⁰ However, these could only be used for non-violent felons.⁵¹

In the 1970s and 1980s, American corrections underwent another change involving reform of prisons due to complaints coming from inmates, inmate rights groups, scholars, judges and prison administrators.⁵² At this time period, 'perhaps more than any other point in history, American prisons came under attack' due to questioning whether the Medical Model helped inmates at all.⁵³ Ultimately, the Medical Model ended.⁵⁴

In 1975, the Federal Bureau of Prisons formally abandoned the Medical Model which 'treated the inmate as the patient who needed to be cured,' but did not totally abandon efforts to help inmates.⁵⁵ The Balanced Model which balanced rehabilitation with punishment, deterrence and incapacitation became

America's Prisons – Opposing Viewpoints, 1997, p. 63.

⁴⁶ Roberts, *supra* note 8, at p. 170.

⁴⁷ See *id.* at p. 171.

⁴⁸ *Id.* There is a responsibility for correctional administrators to return prisoners to society 'no worse than when they entered.' Wagner, *supra* note 12, at p. 60.

⁴⁹ Roberts, *supra* note 8, at p. 189. 'The civil rights movement of the 1960s attempted to extend the guarantees of the U.S. Constitution to disenfranchised groups such as racial minorities, women, and prisoners.' Nicole Hahn Rafter & Debra L. Stanley, *Prisons in America*, in *Contemporary World Issues*, 1999, p. 13.

⁵⁰ Roberts, *supra* note 8, at p. 189.

⁵¹ See *id.* at p. 190. Alternatives such as '[w]ork release programs are commonly used in American corrections, and the public is probably more familiar with this alternative than any of the others.' Bender, *supra* note 45, at p. 141.

⁵² Roberts, *supra* note 8, at p. 195.

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ Roberts, *supra* note 8, at p. 196.

the blueprint for corrections from the 1970s to the present.⁵⁶ During all of the prison riots in the 1970s, prisons were accused of being too severe.⁵⁷ With the rise of crime in the 1990s, prisons were accused of being too soft, which also affected prison operations.⁵⁸

III. The History of Europe's Prison System

Between the early seventeenth and the mid-eighteenth centuries, the penal system in Europe changed greatly.⁵⁹ The prison emerged as the chief institution for combating crime.⁶⁰ In order to fully understand the rise of the prison during this time period, one must look at the changing social attitudes toward offenders, the family, and the human body itself.⁶¹ Court activities in Europe during that time period provide an example of how these social attitudes affected the evolution of penal systems in this part of the world.⁶² Torture was a form of questioning prisoners and 'qualified as part of the fact-finding process and both torture and corporal punishment reflected a particular attitude toward the body, an attitude that was long widespread in Europe.'⁶³ Other measures also 'reflected wider cultural significance [...] where relatives or guardians, for instance, could imprison unruly family members who, strictly speaking, had committed no crime.'⁶⁴ This type of imprisonment was recorded in the Netherlands, France, and Germany, and it was a form of private discipline to enable relatives to discipline each other; however, those wanting to apply this type of discipline had to obtain the magistrate's permission.⁶⁵ The increase of penitentiaries in Europe after 1800 was the product of gradual developments during the preceding centuries – one such development being the emergence of bondage – reflecting changing ideas about idleness and labor on the one hand and a renewed interest in trying to enforce morality on the other.⁶⁶ Early modern Europe recognized four basic forms of bondage: the galleys, public works, imprisonment at forced labor, and transportation.⁶⁷

⁵⁶ See *id.* The theory behind the Balanced Model was not to discard the treatment programs, but to discard the theory behind them, looking for a more realistic look at what the programs could and could not accomplish. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at p. 233.

⁵⁹ Norval Morris & David J. Rothman, *The Oxford History of the Prison: The Practice of Punishment in Western Society*, 1995, p. 49.

⁶⁰ *Id.*

⁶¹ *Id.* In Europe, '[t]he staging of executions, the ceremonial behavior of magistrates, and the adornment of scaffolds represent mere inherited social conventions rather than significant aspects of the punishment.' *Id.*

⁶² See *id.*

⁶³ *Id.* at pp. 49-50.

⁶⁴ Morris & Rothman, *supra* note 59, at p. 50.

⁶⁵ *Id.*

⁶⁶ *Id.* at p. 64.

⁶⁷ *Id.* at p. 66.

In France, Spain, and most Italian states, galley sentences became common and almost every Mediterranean state kept a galley fleet at sea.⁶⁸

The second form of bondage, public works, was a form of punishment which existed in Europe prior to imprisonment.⁶⁹ Public works referred to every form of compulsory labor and most commonly referred to labor that took place in the street or underground.⁷⁰ This could consist of convicts who dug ore in mines, repaired embankments, built roads or houses, or went from door to door collecting human waste.⁷¹

With regard to the third form of bondage – imprisonment – convicts did not at first inhabit separate, punitive institutions and the prison workhouses first established in Europe during the second half of the sixteenth century differed from their predecessors in that they were single-purpose institutions where inmates performed forced labor.⁷²

In Europe, the population of jails largely consisted of debtors and people under provisional detention (for example, awaiting trial), together with an occasional sentenced offender; but these offenders did not have to work.⁷³ By contrast, prisons primarily housed offenders sentenced by a court or individuals who were committed by another authority for purposes of chastisement or correction, and it was in these prisons or workhouses that convicts had to labor.⁷⁴ Records show that the first towns to establish prisons included London, Amsterdam, Copenhagen, Bremen, Belgian towns such as Antwerp, and towns in the southern Netherlands, as well as Lyon, Madrid and Stockholm.⁷⁵

The fourth form of bondage – transportation – consisted of servitude in Britain's American colonies and belongs in that category of bondage where offenders were not simply shipped overseas and then set free, but had to work after they were transported.⁷⁶ Such transportation was rare in Britain until 1718 and there is little recorded information before that date.⁷⁷ Toward the end of the seventeenth century, there were a few other European countries experimenting with this penalty, but workhouses thereafter began to be implemented.⁷⁸

Records show that there are two aspects of the workhouse: 'the concept of the prison workhouse as a household and the role of its managers in this household, and the nature of the institutional regime and the inmates' reactions to it.'⁷⁹ The role of the administrative staff housed with direct responsibility for

⁶⁸ See *id.* 'Galley fleets' involved using prisoners to row the large ships that were used for transportation during that time period. See *id.*

⁶⁹ Morris & Rothman, *supra* note 59, at p. 66.

⁷⁰ *Id.*

⁷¹ *Id.* at p. 67.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Morris & Rothman, *supra* note 59, at p. 67.

⁷⁶ *Id.* at p. 68.

⁷⁷ See *id.*

⁷⁸ *Id.*

⁷⁹ *Id.* 'Sixteenth century vagrants and, subsequently, petty offenders were committed to

running the workhouse most clearly reveals the nature of the prison program.⁸⁰ The 'staff had three main tasks: to keep the inmates busy with work, to provide them with food, and to ensure internal order.'⁸¹ Whenever speaking about the officials who ran the prisons, paternalistic terminology was used by using the word 'father' intentionally.⁸² This title appeared in Amsterdam (the Netherlands), and Bremen (Germany): 'Prisoners referred to the patriarch as *Speisemeister* (food master) or *Speisevater* (food father) and to his wife as *Speisemutter* (food mother).'⁸³ The word 'mother' was also used and married couples almost always managed prison affairs in these workhouses.⁸⁴ The prison workhouse revolved around forced labor. It was at this time that other changes came about in the way prisoners were housed.⁸⁵

In 1669, a new prison was established called the 'spighthouse,' where women prisoners would spin wool and this became the second type of criminal prison in Europe, originating in Amsterdam.⁸⁶

In France, asylums rather than prisons were used for locking up criminals.⁸⁷ In Paris, two asylum hospitals with separate wards – *la force* at Bicêtre and *la force* at Salpêtrière – were used as a means to imprison about one-seventh of the total general population in the hospital at that time.⁸⁸ The two wards ranked among the largest prisons in Europe during this time period.⁸⁹

Later, in the late seventeenth century and mid-eighteenth century, European visitors toured the United States' prisons to learn about the American prison system.⁹⁰ It was at this time that public and expert opinion agreed that imprisonment did not, and could not, fulfill its original ideal of treatment aimed at reintegrating the offender into the community.⁹¹

The rise of the prison population caused the development of the suspended sentence in Europe, with Belgium leading the way for other Western European countries by making this an alternative part of its penal policy in 1888, followed by France in 1891.⁹² The parole system was then established in France in 1885 and was based on 'the concept of conditional release joined to a strong private

correctional institutions known as workhouses.' Funk & Wagnalls, *supra* note 7, at p. 7253.

⁸⁰ Morris & Rothman, *supra* note 59, at p. 67.

⁸¹ *Id.*

⁸² *Id.* at p. 68.

⁸³ *Id.* at p. 69.

⁸⁴ *Id.* 'Records from Delft offer similar evidence that the authorities preferred to appoint couples to direct prison affairs.' *Id.*

⁸⁵ Morris & Rothman, *supra* note 59 at p. 70. Staff members usually lived in prison to complete the household structure. *Id.* at p. 69.

⁸⁶ *Id.* at 74.

⁸⁷ *Id.*

⁸⁸ *Id.* at p. 75.

⁸⁹ *Id.*

⁹⁰ Morris & Rothman, *supra* note 59, at p. 111. Europe looked to the United States' correctional system in order to seek a way to improve its own. See *id.*

⁹¹ *Id.* at p. 210.

⁹² *Id.*

patronage network.⁹³ The state made grants to private societies and private institutions for the care of prisoners released after serving half their sentences.⁹⁴ About 12,000 prisoners were released to the care of private patrons between 1886 and 1895, and parole was approved throughout Europe at the International Prison Congress, which took place in 1910.⁹⁵

Between 1914 and 1945, there was a change in modern punishment across Europe, which expanded the range of penal options.⁹⁶ At one end of the spectrum,

were experiments like the Swedish furlough program and a heavier reliance on fines in place of incarceration [and] [o]n the other end of the spectrum was the increased use of prisons and camps, which now housed newly-defined deviant populations, sometimes in the same countries that were also testing alternatives to incarceration.⁹⁷

Germany and Italy expanded their prison systems in the 1930s as crime rates also increased at this time.⁹⁸ The development of European penal systems took two wide paths in the first half of the twentieth century: one being a desire to rehabilitate and reintegrate prisoners, which led some countries to rely less on imprisonment and more on non-custodial punishments, while other countries saw imprisonment as an opportunity for abuse and exploitation.⁹⁹ Due to the horrors of World War II and the awful conditions in the concentration camps, the postwar penal reformers wanted to help move forward in the area of legal rights of prisoners.¹⁰⁰ Europeans took up the challenge of fair and humane punishment and the need to reform the institutions that housed it.¹⁰¹

France was the first to change its national penal system and, in May 1945, the Commission for the Reform of French Penitentiaries was endorsed.¹⁰² Europe believed that giving prisoners a certain degree of freedom of movement, decision-making authority within the institution, and more frequent interaction with the outside world would constitute the best means of returning offenders to their families and communities as productive citizens.¹⁰³ This constituted the behavioral and therapeutic models of correctional treatment.¹⁰⁴ It also caused the

⁹³ Id.

⁹⁴ See id. at p. 211.

⁹⁵ Morris & Rothman, *supra* note 59, at p. 211.

⁹⁶ Id. at p. 215.

⁹⁷ Id.

⁹⁸ See Morris & Rothman, *supra* note 59, at p. 216.

⁹⁹ Id. at p. 218.

¹⁰⁰ See id.

¹⁰¹ Id.

¹⁰² Id. The 'Council of Europe' was founded in May 1949 and '[o]ne of its objectives was to work for the maintenance and further realization of human rights and fundamental freedoms.' Vivien Stern, *A Sin Against the Future – Imprisonment in the World*, 1998, p. 196. The Council of Europe 'produced its own set of rules on imprisonment, the European Prison Rules, very much like the United Nations version but more detailed.' Id.

¹⁰³ Morris & Rothman, *supra* note 59, at p. 220.

¹⁰⁴ Id.

prisons to grant inmates leaves and vacations, and the 'general relaxation of punishment in Denmark and Sweden resulted in Europe's most lenient prisons.'¹⁰⁵

In the Netherlands, the Prison Act was passed in 1953 which had two important principles: 'first, that prisoners be involved in group interactions, and second, that a greater emphasis be placed on the prisoner's preparation for the return to free society.'¹⁰⁶ This led the way in the early 1960s to cause a decline of the prison and in 1965, 'Sweden enacted a new criminal code emphasizing non-institutional alternatives to punishment.'¹⁰⁷ The use of probation in 1980 increased and caused a significant decline in the number of women in prison within France.¹⁰⁸ The Netherlands' prison population declined so much that their rate of prisoners per 100,000 fell from sixty-six in 1950 to twenty-four in 1965, and continued on a decline to be the lowest rate in Europe.¹⁰⁹

During the post-war period, Scandinavia went so far as to call for a total abolition of prisons as Scandinavian countries experienced a continuing decline in prisoner population.¹¹⁰

In 1963, Denmark, Finland, Iceland, Norway, and Sweden agreed to open up their correctional system to others since their prison system had already been reduced in size.¹¹¹ The decline was attributed to the use of weekend and vacation passes, leaves for prisoners, parole, probation, and stressing less punishment, thereby concentrating on the treatment model.¹¹²

By 1965, the concern for prisoners' rights inspired by the legacy of World War II had produced penal innovations that took hold in much of Western Europe. In Denmark and Sweden, prisoners were granted extensive new freedoms to maintain ties with families and communities for the purpose of easing the eventual release from prison.¹¹³

Even with the use of community-based intermediate punishment, inmate populations in Western Europe began to rise after 1955.¹¹⁴ Even though the reformers sought the ideal prison in the early nineteenth century, that prison 'seemed as far from reality in 1965 as it had in 1865.'¹¹⁵ Currently, Europe's prisons, (mainly those of the United Kingdom, Portugal, Belgium, Italy and France) have deteriorated as a result of overcrowding.¹¹⁶

¹⁰⁵ Id.

¹⁰⁶ Id. at p. 221.

¹⁰⁷ Id. 'Social workers in the Netherlands and Sweden assumed growing responsibility for probationary activities; both countries relied on a combined program of volunteer aides and trained social workers.' Id. at p. 222.

¹⁰⁸ Morris & Rothman, *supra* note 59, at p. 221.

¹⁰⁹ Id.

¹¹⁰ Id. at p. 223.

¹¹¹ Id.

¹¹² Id. at pp. 222-23.

¹¹³ Morris & Rothman, *supra* note 59, at pp. 222-23.

¹¹⁴ Id. at p. 224.

¹¹⁵ Id.

¹¹⁶ Spiteri, *supra* note 5, at p. 1.

IV. Drug Abuse in United States' Prisons

The number of inmates in the United States has continued to climb, partly due to the war on drugs.¹¹⁷ Public concern about crime, and demand for more convictions and longer sentences have contributed to more overcrowding.¹¹⁸ In an effort to combat drug abuse, treatment programs have been developed in prisons.¹¹⁹ These programs consist of:

specialized programs in the Federal Bureau of Prisons, for example, 'Asklepieion,' which used transactional analysis to promote self-help attitudes, 'CASE,' which offered incentives to youthful offenders to succeed at education programs, and drug abuse treatment units throughout the system, as provided for by the Narcotics Addicts Rehabilitation Act. Another was 'START,' or the Special Treatment and Rehabilitative Training unit established in 1972 at the Federal Bureau of Prisons' Medical Center in Springfield, Missouri. Residents of the unit were highly disruptive inmates who otherwise faced continuous lockdown because they were such a threat to officers and fellow inmates.¹²⁰

According to a national survey of state prison inmates, over half (fifty-four percent) of those serving time for violent offences admitted they were under the influence of an illegal drug when they committed the crime.¹²¹ An estimated 'forty-two percent to seventy-nine percent of offenders arrested in twenty-three U.S. cities tested positive for an illegal drug at the time of their arrest.'¹²² Still another study showed that four out of five prisoners are addicted to some type of drug.¹²³ This imposes great difficulty for the correctional system as drug abuse needs to be addressed.¹²⁴ Today, drug offenses are the largest single source of federal prisoners, so that currently over sixty percent are convicted of drug offenses, making this an on-going problem.¹²⁵

To combat this problem, one such treatment program that has been used in the United States is the Drug Treatment Alternative to Prison (DTAP).¹²⁶ DTAP was the first 'prosecution-run' program in the country to help prison-bound felony drug offenders with residential drug treatment.¹²⁷

There are many other drug treatment programs that have evolved, such as 'very modest ones sponsored by churches and using variants of the twelve-step method . . . which are often every bit as effective as much more expensive and elaborate

¹¹⁷ Oliver, *supra* note 17, at p. 33.

¹¹⁸ *Id.*

¹¹⁹ See Roberts, *supra* note 8, at p. 172.

¹²⁰ *Id.* at p. 173.

¹²¹ Todd R. Clear and George F. Cole, *American Corrections Clear and Cole*, 4th edition, 1997, p. 117.

¹²² *Id.* at pp. 117-18.

¹²³ Rafter & Stanley, *supra* note 49, at p. 53.

¹²⁴ See *id.*

¹²⁵ Morris & Rothman, *supra* note 59, at p. 238.

¹²⁶ See Rafter & Stanley, *supra* note 49, at p. 132.

¹²⁷ *Id.*

programs.¹²⁸ Also, drug courts developed in 1994 due to Attorney General Janet Reno's personal involvement with this idea when she served as a prosecutor in the Miami Drug Court.¹²⁹ Drug courts, when they are properly run, hold promise for treating young addicts, but often times, young addicts are not the primary problem.¹³⁰

A successful self-help organization for ex-convicts here in the United States, run by former prisoners, is Delancey Street.¹³¹ Even though there have been many drug treatment programs for inmates, '[t]he real-world fact is that many treatment programs are simply not effective.'¹³² William J. Bennett and John P. Walters, former federal drug policy directors here in the United States, state that 'the ineffectiveness of many drug treatment programs makes them a less appealing option than incarcerating offenders or staunching the supply of drugs,' and they criticize 'the federal government's drug treatment bureaucracy and its misdistribution of funds.'¹³³ They state that 'the bureaucracies have consumed more and more of the resources, leaving less and less for services.'¹³⁴ We should continue to support drug treatment programs in prisons, but

as long as the drug problem is discussed in terms of treatment vs. enforcement or supply vs. demand, it will remain fundamentally misguided . . . [a]n effective drug policy should begin with this assumption: as long as young people and those who receive treatment reside in communities where the supply of dangerous, addictive drugs remain plentiful . . . for purposes of national policy, [they remain] ineffective.'¹³⁵

But, what about the supply of drugs in the prisons? How has that impacted the inmate population? The demand for drugs in prison is very high due to the desire of convicted addicts to obtain drugs and because prison is an environment where there is a captive, bored, largely depressed population eager for some release from their everyday depressing existence.¹³⁶

One way the United States has tried to keep drugs out of prisons is by using wide-area monitoring systems which hinders drug transactions in prisons.¹³⁷ These

¹²⁸ Bender, *supra* note 45, at p. 180.

¹²⁹ *Id.* at p. 181.

¹³⁰ *Id.*

¹³¹ *Id.* at p. 174. Delancey Street began in 1971 in San Francisco and the idea behind it was 'that addicts and ex-cons are best equipped to understand the experience and see through the excuses of those in similar positions.' *Id.*

¹³² *Id.* at p. 179.

¹³³ Bender, *supra* note 45, at p. 179.

¹³⁴ *Id.* at 180. Most programs are not that successful. *Id.* 'The 'Bush Administration efforts to make programs accountable – to cut off support to those that did not produce results, and match resources with the need – were not enacted by the Democratic leadership in Congress . . . and the Clinton Administration ha[d] abandoned all such efforts.' *Id.* at p. 181.

¹³⁵ *Id.* at p. 183.

¹³⁶ Stern, *supra* note 102, at p. 122. Trying to keep drugs out of prisons 'consumes a considerable part of the time and attention of those charged with the day-to-day running of prisons . . .' *Id.*

¹³⁷ Bender, *supra* note 45, at p. 162 (quoting Joseph Hoshen, Jim Sennott, and Max Winkler, *IEEE Spectrum*, Feb. 1995). Tools for monitoring vital signs such as pulse rate and blood pressure can also counter possible drug abuse within the prison. See *id.*

monitoring devices are not always helpful as prisoners try to beat the system.¹³⁸ As a result, more drug addicts are created by the prison environment because of the easy availability of drugs. Furthermore, the drug addiction problem that gets many of them into prison in the first place is never really addressed.¹³⁹ Joseph A. Califano Jr., founder and president of the National Center on Addiction and Substance Abuse at Columbia University in New York City states:

The predominant national policy of using imprisonment for punishment only is insane – a profligate waste of public funds that endangers public safety, supports the illegal drug market, defies common sense and offends against Christian compassion.¹⁴⁰

The United States has used many programs to try and rehabilitate drug addicts in prisons, but its numbers do not seem to be falling and the drugs in the prisons continue to feed their habit.¹⁴¹ Today, one of every 144 American adults is in prison for a crime in which drugs and alcohol were involved. The rate of incarceration for American adults was 868 per 100,000 in 1996, compared with less than 100 per 100,000 for most European countries.¹⁴² Looking at how drug abuse is handled within Europe's prison system can further the analysis of why the United States' current system of punishment is not helping cure inmates of their drug addiction.

V. Drug abuse in the European Prisons

Statistics show that there are serious problems with drug abuse in European prisons.¹⁴³ Europe's drug agency in Lisbon, namely the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), has estimated that 'of the 350,000 people imprisoned in Europe on an average day, the number of drug users is disproportionately high.'¹⁴⁴ The agency reports that 'drug users inside prison do not have the same access to health services as those outside prison . . . [and there are] big differences between Member States in their treatment of drug users.'¹⁴⁵

Austria has the lowest proportion of drug users in prison (ten percent to twenty percent) and Portugal has the highest (thirty-eight percent to seventy percent).¹⁴⁶ Although it is an international standard that prisoners need to have

¹³⁸ Stern, *supra* note 102, at p. 122.

¹³⁹ *Id.*

¹⁴⁰ Grapes, *supra* note 31, at p. 72.

¹⁴¹ *Id.*

¹⁴² *Id.* Continuing with this rate of increase here in the United States, one in every twenty Americans born in 1997 will spend part of his or her life in prison. *Id.* at pp. 72-73.

¹⁴³ Justice and Home Affairs: Europe's Prisons have Big Drug Problem, says EMCDDA (European Report), 5 Sept 2001, at p. 1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* Women drug abusers in prison represent a larger proportion in most European countries,

access to medical and health care, most countries do not provide truly adequate care to drug-using inmates.¹⁴⁷

The Council of the European Union sought to combat drug abuse in prisons by recommending that the European Union consider making available to drug abusers in prison access to services similar to those provided to drug abusers not in prison, in a way that does not overlook the ongoing problems with keeping drugs out of prison.¹⁴⁸ Even though the EMCDDA published a report stating that their aim was to inform policy-makers and the public about the treatment of drug users and addicts in the criminal justice system, there has not been any European country that has been able to successfully address the problem.¹⁴⁹ The report further claims, 'prisons provide an environment that sustains substance abuse among existing users and even fosters it in non-users.'¹⁵⁰

European prisons have tried to keep drugs out of prisons by administering mandatory drug testing, but this doesn't treat the inmate's drug addiction itself.¹⁵¹ Furthermore, drug testing is time-consuming and costly for prisons to administer.¹⁵² The process of drug testing is irrelevant to the drug addiction and until something is done about providing treatment when drug abusers leave prison, no strategy to help stop drug abuse in prison has any chance of success.¹⁵³

In its resolution of poor conditions in prisons in the European Union, the European Parliament, with regard to minimum rules for the treatment of prisoners adopted by the Council of Europe in 1973, called for specific measures to be taken to tackle the drug problem in prisons.¹⁵⁴ The Council pointed out that despite a rampant drug problem, doctors see prisoners only for an average of one minute and twenty seconds per visit, and often there is no qualified nursing staff, no accurate personal records are kept of patients, and there is also a lack of

although women only represent five percent of the entire European inmate population. *Id.*

¹⁴⁷ See *id.* at p. 2. Different governmental departments are responsible for treatment of drug users in prisons than are responsible for drug users in the community, but all Member States of the European Union provide some form of treatment in their prisons. Justice and Home Affairs, *supra* note 143, at p. 2.

¹⁴⁸ Council Recommendation on the Prevention and Reduction of Health-Related Harm Associated with Drug Dependence (Commission of European Communities), 18 June 2003, at p. 3.

¹⁴⁹ Justice and Home Affairs, *supra* note 143, at p. 2.

¹⁵⁰ *Id.*

¹⁵¹ Stern, *supra* note 102, at p. 125. Mandatory drug testing was introduced into British prisons in 1996; prison rule made it an offense to refuse the drug test and the prisons were required to test ten percent of their prisoners each month. See *id.*

¹⁵² See *id.* It has also been shown that random drug testing can have an opposite effect, as marijuana can show up in a drug test for fourteen to twenty-eight days whereas heroin only shows up for two to three days; so prisoners will switch from soft to hard drugs in order to obtain a negative result. *Id.*

¹⁵³ *Id.*

¹⁵⁴ Resolution on poor conditions in prisons in the European Union, (Commission of the European Communities), 18 Jan 1996 at p. 2.

psychiatric services.¹⁵⁵ The European Parliament recommended, 'prisoners who are drug addicts should have access to specialized services within prisons or provided to them by special arrangement and should be able to join external voluntary rehabilitation programmes, subject to strict conditions.'¹⁵⁶ The fact that there are large numbers of prisoners who are addicted to drugs has caused the need for 'anti-drug and anti-smuggling policies' to be introduced in all prisons in Europe.¹⁵⁷

With all of the drugs that are in prisons, how do these drugs get there in the first place? There are many ways prisoners can get drugs into prison.¹⁵⁸ One way is having packages thrown over the wall; bringing them in after the prisoner has left on a day release; swallowed outside and then recovered once the prisoner returns inside the prison walls; but the most often used way of entry is through the prisoner's visitors.¹⁵⁹ In 1990, 'nearly all visitors were questioned about what they were bringing in, nearly all had their belongings searched, over half were subjected to a "pat-down search" . . . and one in four was subjected to a "body cavity search."' ¹⁶⁰ In addition to these measures, in the United States, another way to prevent the entry of drugs is to require prisoners to change their clothes when they arrive in prison or when they return from temporary release.¹⁶¹ Drugs can also be supplied by corrupt staff, and in some American prisons, staff are given a pat-down search when they report for work.¹⁶²

The facts are clear that in the United States and Europe, criminal recidivism is very much a function of drug and alcohol abuse.¹⁶³ Unless inmates are freed of their substance-abuse problems, they are virtually sure to resume their criminal activity promptly after they are released.¹⁶⁴ It has been shown that regardless of the crimes they commit, individuals who test positive for drugs at the time of arrest have longer criminal records and have been imprisoned more often than those who do not test positive.¹⁶⁵ Therefore, drug rehabilitation should be a top priority for changes in the United States' and European prisons alike, in order to bring numbers down and deal with the overcrowding problems they cause.

¹⁵⁵ Id. '[A] large number of prisoners are addicted to illicit substances and are a danger to themselves and their fellow prisoners and, in general, increase the likelihood of malfunctions occurring in prisons (bribery attempts, etc.)' See European Parliament; Comm. On Civil Liberties and Internal Affairs (94); Resolution on prison conditions in the European Union: improvements and alternative penalties, (Pradier), 17 Dec 1998, at p. 3.

¹⁵⁶ Id. at p. 5.

¹⁵⁷ Id.

¹⁵⁸ See id.

¹⁵⁹ Stern, *supra* note 102, at p. 123.

¹⁶⁰ Id.

¹⁶¹ Id. at p. 124. This practice is now incorporated in over two-thirds of US prisons. See id.

¹⁶² Id.

¹⁶³ Grapes, *supra* note 31, at p. 74. A recidivist is '[a] habitual criminal; a criminal repeater. An incorrigible criminal. One who makes a trade of crime.' See *Black's Law Dictionary*, 6th edition, 1990, at p. 1269.

¹⁶⁴ Grapes, *supra* note 31, at p. 76.

¹⁶⁵ Id. at p. 73.

VI. HIV Statistics in United States' Prisons

Acquired immune deficiency syndrome (AIDS) is a growing problem for American correctional facilities and the numbers keep growing.¹⁶⁶ In 1994, with almost 5,000 verified inmates with AIDS in United States' prisons and jails, this accounted for a rate of 518 per 100,000 inmates compared with forty-one per 100,000 in the general American population.¹⁶⁷ In that year, over 1,600 inmates died of AIDS while they were incarcerated.¹⁶⁸ These numbers have grown considerably – the statistics show that the number of HIV infected prisoners in the year 2000 was 196,023.¹⁶⁹ The prevalence of HIV infection and AIDS among inmates in correctional institutions is increasing world-wide at such an alarming rate that this population group is currently identified as 'one of the highest risk population groups for HIV infection and AIDS.'¹⁷⁰ Preventing the spread of the disease is especially difficult for correctional facilities due to several reasons.¹⁷¹ First, suggestions to provide hypodermic needles and condoms to prisoners so that intravenous drug taking and homosexual behavior can be protected, cannot be implemented due to prison rules.¹⁷² Second, mandatory HIV testing would pose a problem with discrimination against infected inmates by preventing them from obtaining insurance, housing, and employment after they are released.¹⁷³

In July 1992, 'the three most centrally concerned national medical associations – the American College of Physicians, the National Commission on Correctional Health Care, and the American Correctional Health Care Association – officially reported their collective view on the gravity of the problem that AIDS presented to health care in prisons and jails and to the community at large.'¹⁷⁴ The associations reported that AIDS was fourteen times higher in state and federal correctional systems than in the population at large.¹⁷⁵

¹⁶⁶ See Clear & Cole, *supra* note 121, at p. 127.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* In most prisons, educational programs now inform staff and inmates about the disease and the ways in which it is spread. *Id.*

¹⁶⁹ Bureau of Justice Statistics, HIV in Prisons (2000), available at <http://www.ojp.usdoj.gov/bjs/abstract/hivp00.html>. (last visited 14 Oct 2003).

¹⁷⁰ Louis A. Pagliaro, *Sentenced to Death? HIV Infection and AIDS in Prisons – Current and Future Concerns*, 1992, available at <http://www.questia.com/PM.qst?action=openPageViewer&docId=95134378.html>. (last visited 14 Oct 2003).

¹⁷¹ See Clear & Cole, *supra* note 121, at pp. 128-29.

¹⁷² See *id.* 'The use of protective coverings, avoidance of needle injuries, and care in the handling of diseased bodies have all become standard operating procedures' for correctional facilities. *Id.*

¹⁷³ *Id.*

¹⁷⁴ Morris & Rothman, *supra* note 59, at p. 250. It was also estimated that there are many more prisoners who are seropositive (carrying the HIV virus). *Id.*

¹⁷⁵ *Id.* Tuberculosis also presents a difficult problem in correctional facilities due to its link with AIDS. See *id.* When the HIV-infected inmate's immune system is weakened, he is very susceptible to Tuberculosis, causing a risk of spreading tuberculosis throughout the prison, including infection of the correctional staff. *Id.* at pp. 251-52.

The correctional facilities in the United States handle the problem with AIDS-infected prisoners in a variety of ways.¹⁷⁶ In Nebraska and New Hampshire, prisoners are assigned single cells to prevent the spread of HIV.¹⁷⁷ Nevada and Texas house AIDS infected prisoners together in double cells.¹⁷⁸ When prisoners show AIDS-related symptoms, they are usually sent to a hospital or infirmary.¹⁷⁹ New York state legislature has approved a system of allowing prisoners near death to be released to die at home and 'near death' was interpreted by officials as not being able to walk.¹⁸⁰

Another factor to consider is that treatment for HIV and AIDS can be very costly and correctional facilities have a legal responsibility to furnish medical care to those under their supervision.¹⁸¹ The costs for treatment range from an estimated \$50,000 to \$145,000 annually per patient and for acute medical care this figure can rise to well over \$300,000 annually.¹⁸²

With increases in the prison population, coupled with the AIDS crisis, this presents a real problem in funding prison budgets.¹⁸³ Not surprisingly, the AIDS crisis is not only present here in the United States but also in Europe.¹⁸⁴

VII. HIV Statistics in Europe's Prisons

In Europe, there are also many prisoners who are HIV-infected or have AIDS.¹⁸⁵ According to a report on a joint World Health Organization for the prevention of AIDS (WHO/UNAIDS): 'HIV in [the prisons of] many European countries are at levels many times higher than those in the general population [and] [i]n some countries, more than one fifth of the prison population is HIV-positive.'¹⁸⁶

¹⁷⁶ See Clear & Cole, *supra* note 121, at p. 130.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The policies of housing AIDS infected prisoners together have been criticized due to the separate housing announcing their condition to other prisoners and staff. *Id.*

¹⁷⁹ See *id.* In New Jersey, the prisoners showing AIDS-related symptoms are placed in a hospital in the community, while other states such as California use correctional medical facilities. See *id.* Where there are large numbers of HIV infected prisoners, segregated housing is the rule even if they show no symptoms and the housing can provide medical and counseling services to them as a group. Clear & Cole, *supra* note 121, at p. 130.

¹⁸⁰ Stern, *supra* note 102, at p. 126. A twenty-nine year old prisoner with thrush, an AIDS-related cancer, hepatitis B and a tumor on his neck who could nevertheless still walk was denied medical parole and died in prison. *Id.*

¹⁸¹ Clear & Cole, *supra* note 121, at p. 131.

¹⁸² *Id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See Stern, *supra* note 102, at p. 126.

¹⁸⁶ WHO/UNAIDS European Seminar Report (Dec. 1997), available at <http://www.hipp-europe.org/events/warsaw/0020.html>. (last visited Oct. 14, 2003). WHO/UNAIDS is known for developing a health-promoting network for the European region of the World Health Organization where the Health in Prisons Project was formed at a meeting of the network in Lisbon in October 1996. See *id.*

Further research documented in 2003 shows that '[f]or three years in a row UNAIDS has reported that HIV is growing faster in Eastern Europe than anywhere in the world.'¹⁸⁷

In many countries in Europe, the respective prisoners are kept in isolation or are subjected to restrictions.¹⁸⁸ HIV-infected prisoners in Germany are given a cell where they are isolated by themselves and if they share the cell with another person, the other prisoner has to be told of their AIDS-related illness.¹⁸⁹ These prisoners are given home leave less often than the other prisoners, but they do get special foods.¹⁹⁰ This is much different than how United States' prisons treat HIV-infected prisoners, as the United States does not normally segregate HIV-infected prisoners from the rest of the prison population.¹⁹¹

In Germany, condoms are available to prisoners but clean needles and syringes are not.¹⁹² Shared needles are one of the main factors in spreading AIDS in prison. But, there is often a problem with reality and illusion between people on the outside who deny that there are any problems with drug abuse and homosexuality in prisons and those who accept that there are.¹⁹³ While the United States has longer and broader experience on how to handle the AIDS crisis in its prisons, both the U.S. and the EU have a long way to go.¹⁹⁴

VIII. Mental Health Conditions in United States' Prisons

Mentally ill prisoners present special problems to correctional facilities as their illness is often not related to the crimes they commit.¹⁹⁵ The National Commission on the Causes and Prevention of Violence recognized the problem

¹⁸⁷ International Antiviral Therapy Evaluation Center, HIV Prevention and Treatment efforts in Eastern Europe and the former Soviet Union (2002), available at <http://www.iatec.com/update.html?folder=3&page=110>. (last visited 14 Oct 2003).

¹⁸⁸ *Id.* In Germany, some prisoners were prevented from working in the prison kitchen or taking the job of prison barber, although these restrictions are now being lifted. *Id.*

¹⁸⁹ See Stern, *supra* note 102, at p. 127.

¹⁹⁰ *Id.* In Poland, infected prisoners are kept in separate cells, use separate bathrooms and washing machines and have their dishes washed separately. *Id.*

¹⁹¹ International Antiviral Therapy Evaluation Center, *supra* note 187, at p. 1. In Norway, condoms are available to prisoners in order to stop the spread of AIDS but prisoners have to ask for them from an officer outside the visiting room, which causes them to be singled out as homosexuals. See Stern, *supra* note 102, at p. 127.

¹⁹² See Stern, *supra* note 102, at p. 127.

¹⁹³ *Id.* at pp. 126-27. There was a breakthrough after years of opposition to making condoms available in England and Wales; prison doctors can now prescribe condoms but they are not often requested. See *id.* at p. 128. Furthermore, before the condoms were allowed, the law was maintained that homosexual activity in a public place was unlawful and a prison cell would be regarded a public place making it illegal to distribute the condoms. *Id.*

¹⁹⁴ See generally, International Antiviral Therapy Evaluation Center, *supra* note 187.

¹⁹⁵ See Clear & Cole, *supra* note 121, at p. 123. A 'mentally ill offender' is defined as a 'disturbed' person whose criminal behavior may be traced to diminished or otherwise abnormal capacity to think or reason as a result of psychological or neurological disturbance. See *id.*

when it concluded that:

1. The popular idea that the mentally ill are overrepresented in the population of violent criminals is not supported by research evidence; and
2. Persons identified as mentally ill generally pose no greater risk of committing violent crimes than does the population as a whole.¹⁹⁶

There is a lot of discussion regarding the insanity defense due to many publicized trials, but the greatest concern in the area of correctional facilities is the group of offenders who become mentally ill after they are imprisoned.¹⁹⁷ In trying to answer why inmates become mentally ill after they are incarcerated, we must recognize that imprisonment is a stressful experience even for the emotionally strong, and the fact that a prisoner loses contact with his family and often is humiliated by being sent to prison puts an enormous strain on the prisoner and he often loses his emotional stability.¹⁹⁸

It is evident that solitary confinement makes the psychotic even more psychotic.¹⁹⁹ Mental-health researchers estimate that ‘between ten and fifteen percent of the nation’s one million prisoners have severe mental illnesses [and] [o]nly those found not guilty by reason of insanity are housed in psychiatric hospitals.’²⁰⁰

The procedures used for mentally ill offenders who are incarcerated have changed over the years in the United States.²⁰¹ Early efforts to separate the mentally ill from other incarcerated offenders can be traced back over centuries, but it was not until 1859 when the New York State Lunatic Asylum for Insane Convicts was built, that mentally ill offenders were actually treated for their mental illness.²⁰²

In today’s correctional facility, all states have either separate facilities for mentally ill criminals or sections of mental hospitals reserved for them – some institutions being under the control of the department of corrections and others

¹⁹⁶ *Id.* at p. 124. A prisoner’s mental illness is often separate from their criminality and resolving the issues of their criminality may not require treatment of their mental illness. *Id.* The fact that a person has a mental condition does not necessarily mean that they will continue to commit crimes. *Id.*

¹⁹⁷ See *id.* Mentally ill inmates account for sixteen percent of the state prison population, and seventy-nine percent of those identified as mentally ill were receiving therapy or counseling. See USA Today, One-fifth of Mentally Ill Prisoners Not Treated (2001), available at <http://www.usatoday.com/news/washington/july01/2001-07-15-prisoners.html> (last visited 26 Oct 2003).

¹⁹⁸ Clear & Cole, *supra* note 121, at p. 125.

¹⁹⁹ Wagner, *supra* note 12, at p. 58. A 1991 study of isolation units in two maximum-security prisons in Quebec found that nearly a third of the inmates confined in long-term segregation had a severe mental illness and were three times more likely to be schizophrenic than the general prison population, and twenty-five times more likely than non-incarcerated males. *Id.*

²⁰⁰ *Id.* at p. 59. Prisons are required to provide mental health services; however, the prison overcrowding has caused fewer resources to be available to the mentally ill. See *id.*

²⁰¹ *Id.*

²⁰² Clear & Cole, *supra* note 121, at p. 125. The facility held both convicted and unconvicted patients, and it later received patients judicially transferred from civil hospitals. *Id.*

being under the supervision of the department of mental health.²⁰³

There will certainly be an increase in the number of mentally ill prisoners in United States' prisons in the future and much of this increase is due to a major policy shift in the mental health field: deinstitutionalization.²⁰⁴ With the availability of drugs that inhibit mental behavior, it becomes possible to release a multitude of mental patients to the community.²⁰⁵

However, the coerced administration of drugs while a mentally ill prisoner is incarcerated can pose a problem of depriving an inmate of his state-created liberty interest in not being able to choose whether or not he takes anti-psychotic medication.²⁰⁶ The United States Supreme Court has addressed some of the procedural due-process requirements that must be met when psychotropic drugs are involuntarily administered to a mentally ill inmate.²⁰⁷ Turning to the question of what 'process' is 'due' an inmate to whom governmental officials wish to administer anti-psychotic medication, the Court first rejected the inmate's claim that the decision was about whether such involuntary medication is warranted and whether it should be decided by a judge.²⁰⁸ The Court thereafter decided that an inmate could obtain judicial review regarding determination that anti-psychotic drugs be administered and the requirements of due process would be satisfied as long as the inmate was represented by an 'independent' person who understood the psychiatric issues in his case.²⁰⁹

But what about transfers of inmates from prisons to mental hospitals? In general, the United States Supreme Court has held that the transfer of a prisoner from one prison to another does not implicate a constitutionally-derived liberty interest, because 'when convicted of a crime through a process that is replete with due process protections, people lose their liberty to the extent that they can be confined or transferred to any prison that correctional officials deem most suitable.'²¹⁰ The Court used this same rationale with regard to transfers from the general-population unit of a prison into the administrative-segregation unit of a prison but held that the inmate's liberty interests were deprived, and authorized these transfers only in certain situations, such as when an inmate's continued presence in the prison posed a serious threat of harm to the inmate or others.²¹¹

²⁰³ Id.

²⁰⁴ See id. 'Deinstitutionalize' is defined as 'to discharge (a patient) as from a mental institution.' *Webster's New World Dictionary and Thesaurus*, 1996, p. 158.

²⁰⁵ Clear & Cole, *supra* note 121, at p. 125. The problem with the release of the mentally ill prisoner who has been put on drugs is that they often forget to take their medication and then commit further criminal acts. See id.

²⁰⁶ Branham, *supra* note 4, at p. 219.

²⁰⁷ See id. See also, *Washington v. Harper*, 494 U.S. 210 (1990).

²⁰⁸ Branham, *supra* note 4, at pp. 219-20. 'The Court recognized the substantiality of the private interest at stake; antipsychotic drugs can cause severe side effects – even death [however] [t]he Court nonetheless believed that inmates' interest in avoiding unwanted medical treatment can be protected, and perhaps even better protected, by having independent mental-health professionals make the medication decision.' Id.

²⁰⁹ See id. at p. 220. See also *supra* note 207.

²¹⁰ Branham, *supra* note 4, at p. 203. See also *Meachum v. Fano*, 427 U.S. 215 (1976).

²¹¹ Branham, *supra* note 4, at pp. 204-06. See also *Hewitt v. Helms*, 459 U.S. 460 (1983).

However, when considering whether an inmate can be transferred from a prison to a mental hospital, the Court looks at this differently.²¹² The Court still uses the 'within-the-sentence' test, but concludes that 'confinement in a mental hospital is not within the range of conditions implicitly authorized by a conviction.'²¹³

When an inmate is transferred from a prison to a mental hospital (because a state statute allows such a transfer when there is a finding that the prisoner is suffering from a mental problem that cannot be properly treated within the prison setting), the Supreme Court has held that it requires more than substantive findings that govern the exercise of official discretion for state statutes or regulations to create a liberty interest.²¹⁴ Further, the Court has noted that 'at least the most common means of creating a liberty interest required not only substantive criteria that limit officials' discretion when making a decision that has negative repercussions on the liberty of an inmate, but also a mandated result, such as a transfer, when those criteria are met.'²¹⁵

But how does Europe handle the mentally ill inmate within the prison setting? As research shows, European countries handle the situation quite differently.

IX. Mental Health Conditions in the European Prisons

According to The European Prison Rules derived from the Council of Europe Committee of Ministers, '[p]ersons who are found to be insane should not be detained in prisons and arrangements shall be made to remove them to appropriate establishments for the mentally ill as soon as possible.'²¹⁶ The rules further state, '[s]pecialized institutions or sections under medical management should be available for the observation and treatment of prisoners suffering gravely from any other mental disease or abnormality.'²¹⁷ The medical or psychiatric service of the prisons shall provide for the psychiatric treatment of all prisoners who are in need of such treatment and action should be taken by arrangement with the appropriate community agencies, to ensure that the continuation of psychiatric treatment after a prisoner is released is in place.²¹⁸

²¹² Branham, *supra* note 4, at p. 204. See also, *Vitek v. Jones*, 445 U.S. 480 (1980).

²¹³ Branham, *supra* note 4, at p. 205. See also, *Vitek*, *supra* note 212. The 'within-the-sentence' test applied by the Supreme Court when determining whether a prisoner has been deprived of a constitutionally-derived liberty interest has been criticized by some members of the Court as knowing 'few rivals for vagueness and pliability.' Branham, *supra* note 4, at p. 205. See also, *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989) (Marshall, J., dissenting).

²¹⁴ Branham, *supra* note 4, at p. 206. See also, *Vitek*, *supra* note 212.

²¹⁵ Branham, *supra* note 4, at pp. 206-07. See also, *Kentucky Department of Corrections*, *supra* note 213.

²¹⁶ Recommendation No. R (87) of the Committee of Ministers to Member States on the European Prison Rules, 12 Feb 1997, p. 14, available at <http://www.cm.coe.int/ta/rec/1987/87r3.html>.

²¹⁷ *Id.*

²¹⁸ *Id.* 'In addition to the international framework, nearly all prison systems work within the legal

Some prison systems are also responsible for secure mental hospitals where mentally disordered offenders are detained, while others are not.²¹⁹ In the Netherlands, all mentally ill who are convicted of serious crimes are ordered to go to a special mental hospital run by health authorities.²²⁰ In the United Kingdom, mental hospitals for prisoners are the responsibility of the Department of Health.²²¹

The European Prison Rules derived from the Council of Europe Committee of Ministers, further state: '[a]t every institution there shall be available the services of at least one qualified general practitioner [and] [t]he medical services shall be organized in close relation with the general health administration of the community or nation [and] [t]hey shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.'²²²

Although Europe has established this range of minimum standards for prisoners, it is still a cold, hard fact that there are many mentally ill prisoners incarcerated in Europe's prisons.²²³ But how have Europe and the United States tried to monitor how their prisoners are being treated?

X. Procedures to Monitor Prisons and Inmates' Treatment in Europe and the United States

Prisoners' complaint mechanisms began in Europe with the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1953 and the creation of the complaints mechanisms administered by the European Commission for Human Rights and the European Court of Human Rights in Strasbourg.²²⁴ Inmates in Europe have been taking their complaints to Strasbourg since the 1970s and the findings of the European Court of Human Rights have been very influential in changing the way prisoners are treated in the United Kingdom and throughout the member states of the Council of Europe.²²⁵ The scope of protection provided goes way beyond mere conditions of imprisonment. One case involved a man who was not allowed to

framework of their own country [and] [p]rison systems are normally governed by prison acts, laws and regulations made in the country's legislature.' Stern, *supra* note 102, at p. 197.

²¹⁹ *Id.* at p. 33.

²²⁰ *Id.*

²²¹ See *id.* In the Caribbean, mentally ill prisoners are left to manage as best they can where there is much sickness in prison, mental and physical. *Id.* at p. 129.

²²² Recommendation No. R (87), *supra* note 216, at p. 4.

²²³ See Michel Rotily and Caren Weilandt, *The Neglected Drug Users in European Prisons*, available at <http://www.drugtext.org/library/articles/peddr0030.html> (last visited 26 Oct 2003). The total number of inmates in the European Union's fifteen 'old' Member States is estimated to be 350,000, or ninety-four per 100,000 inhabitants. See *id.*

²²⁴ See Stern, *supra* note 102, at p. 237.

²²⁵ *Id.* In 1975, 'a prisoner was prevented from writing to his solicitor about the way he had been treated in prison and the court ruled that this was a violation of his right to a fair hearing and also a violation of his right to correspond with a solicitor.' *Id.*

get married while in prison.²²⁶ The European Commission for Human Rights found that his case had merit and helped the British government change the rules before the case went to the European Court for judgment.²²⁷

Prisoners can also take their complaints to the United Nations.²²⁸ These complaints can come from any country that has agreed to the International Covenant on Civil and Political Rights under the auspices of the United Nations.²²⁹ Since the covenant's entry into force in 1976, there have been more than 500 complaints, and many of these complaints have been ones involving mistreatment of prisoners and inadequate conditions of detention.²³⁰

There is also a separate entity called the UN Commission on Human Rights which 'has established a number of expert working groups to investigate alleged human rights abuses in certain parts of the world.'²³¹ This Commission receives communication about inhumane conditions of prisons from concerned citizens or the prisoner's family.²³² If a situation occurs where a prisoner is in physical danger or becomes physically ill, the committee established can authorize its chairman to send the complaint by cable to the minister for foreign affairs of the country that is involved.²³³

Perhaps the most dramatic way Europe has successfully intervened in efforts to monitor the treatment of prisoners is by establishing the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).²³⁴ The CPT makes reports and conducts visits to prisons and

²²⁶ See *id.* Prisoners do not always win, such as the case of a Swiss prisoner who complained that he was not able to carry on conjugal relations with his wife while in prison; however, the Commission did. see this as a violation of the prisoner's human rights or fundamental freedoms. Stern, *supra* note 102, at p. 237.

²²⁷ *Id.* In another case, '[t]he European Court ruled in 1984 that it was not right to keep prisoners in prison for 570 days longer than they reasonably expected without allowing them to be legally represented at a disciplinary hearing.' *Id.*

²²⁸ See *id.* There are two United Nations organizations that persons can complain to: the Human Rights Committee and the Commission on Human Rights. See *id.*

²²⁹ *Id.* at p. 238. All Member States of the European Union, as well as the United States, are members of the United Nations. See United Nations Membership, List of Member States, 1-7 Sept. 2000, available at <http://www.un.org/overview/unmember.html> (last visited 28 Oct 2003).

²³⁰ Stern, *supra* note 102, at p. 238. 'Although the Committee's decisions are not legally binding, countries have normally accepted its decisions and taken action to change laws when they have been found to be incompatible with provisions of the Covenant [and] [t]hey have also released people from detention when asked to do so and have paid. compensation to victims.' *Id.*

²³¹ *Id.* In 1991, the Commission on Human Rights established a working group called the 'Working Group on Arbitrary Detention'; its purpose is to investigate 'cases where people have been sent to prison without going through the proper process.' *Id.*

²³² See *id.*

²³³ *Id.*

²³⁴ See *About the CPT*, available at <http://www.cpt.coe.int/en/about.html> (last visited 28 Oct 2003). The CPT has concentrated its efforts on conditions of confinement in many prisons and has helped with the development of practices in prison administration in Europe. See Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 Brooklyn L. Rev., 719, 2002, p. 8. The CPT was developed due to many years of lobbying by a Swiss banker, Jean-Jacques Gautier, but after his death, the lobbying was continued by an organization

jails to examine the conduct of the staff and the physical picture of the facility (including measuring cells and checking lighting), examines the records relating to custody, and interviews police officers as well as detainees themselves to find out if any ill-treatment has occurred.²³⁵ The CPT was inspired by Article 3 of the European Convention on Human Rights and has the power to pay surprise visits to prisons without prior notification to the authorities, including to special and secret prisons operated in some countries.²³⁶

Although the CPT reports are not binding on the human rights tribunals, they have been used and are still used in case law as authority.²³⁷ To give a typical example, an inmate in a prison psychiatric wing who had received substandard medical care saw his case reversed after making an Article 3 claim based on a CPT report.²³⁸

While the United States does not have an established committee such as the CPT that monitors its jails and prisons, recently, Indiana's governor appointed an Ombudsman²³⁹ to investigate complaints about prison conditions and prisoner treatment.²⁴⁰ The Indiana Ombudsman Bureau has broad authority to review complaints from prisoners, the prisoner's family members and the Department of Correction staff.²⁴¹ The ombudsman program is only one way to monitor prisoner mistreatment, but as Lord Woolf stated in his report in favor of appointment of an ombudsman in England, '[t]he case for some form of independent person or body to consider grievances is incontrovertible . . . [a] system without an independent element is not a system which accords with proper standards of justice.'²⁴²

The CPT has published many reports on the conditions of Europe's prisons but has not found many problems with prison conditions in Holland or Denmark

now called the Association for the Prevention of Torture. Stern, *supra* note 102, at p. 240. The CPT monitors application of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which was signed in 1987 and entered into force in 1989. Stern, *supra* note 102, at p. 241.

²³⁵ See *A Visit by the CPT – What's it all about?* 5 May 1999, available at <http://www.cpt.coe.int/en/about.html> (last visited 28 Oct 2003). 'In recent years the Council of Europe's efforts to guarantee human rights have laid increasing emphasis on preventing violations.' *Id.*

²³⁶ See *id.* Article 3 of the European Convention on Human Rights provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.' See About the CPT, *supra* note 234, at p. 1.

²³⁷ Wolfgang Peukert, *The European Convention for the Prevention of Torture and the European Convention on Human Rights*, 2002. pp. 91-92.

²³⁸ *Aerts v. Belgium*, 1998-V Eur. Ct. H.R. 1939 (1998).

²³⁹ 'Ombudsman' is defined as 'a deputy, a public official appointed to investigate citizens' complaints.' *Webster's New World Dictionary and Thesaurus*, *supra* note 204, at p. 431 (1996).

²⁴⁰ See Editorial, *No Excuse for Filthy Prison Conditions*, The Indpls. Star, 24 Oct 2003. Kelly Whiteman was appointed as Indiana's first prison ombudsman, 'charged with investigating complaints made by prisoners against the prisons and jails that house them.' Editorial Staff, *An Indiana First*, Indiana Lawyer, 5-18 Nov 2003, at p. 6.

²⁴¹ See *How did Angel Oquendo die in this Indiana prison?* Homicide, NUVO, 3-10 Dec 2003.

²⁴² Stern, *supra* note 102, at p. 236. In 1994, a prison ombudsman was appointed in England (Sir Peter Woodhead, a retired admiral). *Id.*

as those member states seem to have the best prison conditions.²⁴³ The published reports give a good picture of what is going on in Europe's prisons.²⁴⁴ Upon a visit to the United Kingdom in 1990, the Committee found such overcrowding and bad physical conditions and lack of activities for prisoners in Brixton, Wandsworth and Leeds prisons, that the Committee held 'the United Kingdom to be guilty of submitting prisoners to inhuman or degrading treatment and punishment.'²⁴⁵ In 1993, Luxembourg was found to have committed inhuman and degrading treatment when a prisoner had given birth and soon after the birth, the baby was taken away from her by the prison staff and given to foster parents.²⁴⁶ The Netherlands was also found guilty of inhuman and degrading treatment in prison due to overcrowding, lack of activities and lack of sanitary conditions.²⁴⁷ Sweden was found to have ignored the prisoners' requests for access to doctors, lawyers or social workers and during a visit to Germany in 1991, it was found that prisoners were only allowed three books a month and were not allowed to take part in certain religious activities.²⁴⁸ In Greece, HIV-positive prisoners were held in isolation and overcrowding was so bad in Italy in 1992 that the Committee described it as 'inhuman and degrading treatment.'²⁴⁹ What these reports show is that Europe's prison conditions are not as they should be, even with the Committees that keep watch over them, and sometimes the recommendations made by the CPT come under great criticism because they can be costly or difficult to implement.²⁵⁰

Last but not least, there are numerous non-governmental organizations (NGOs) consisting of voluntary or private organizations that play an important part in watching over the business of running prisons.²⁵¹ There are local NGOs and also global NGOs such as Amnesty International.²⁵² Another NGO is the 'International Prison Watch.'²⁵³ Still another is 'Penal Reform International,' which also operates worldwide.²⁵⁴ In short, there are many rules and inspections,

²⁴³ Stern, *supra* note 102, at 242. Even though Holland and Denmark may have 'a good image . . . [in] regards [to] their conditions, the Committee has found matters that gave it cause for concern and could have become ill-treatment if they had been allowed to continue.' Id.

²⁴⁴ Id.

²⁴⁵ Id. This was the first finding of this nature in any published report of the Committee. See id.

²⁴⁶ Id. In 1991, France was found to be guilty of inhuman and degrading treatment when it chained women prisoners to their beds in hospitals during labor and after they gave birth. Stern, *supra* note 102, at p. 242.

²⁴⁷ Id.

²⁴⁸ Stern, *supra* note 102, at p. 243.

²⁴⁹ Id.

²⁵⁰ Id. at pp. 244-45. Changes recommended in 1992 by the Committee for Sweden's treatment of prisoners were not wholly accepted. Id. at p. 245.

²⁵¹ Id. at p. 246. NGOs 'bring human rights problems to the attention of the United Nations and the international community at large.' Id.

²⁵² Stern, *supra* note 102, at p. 247. Amnesty International has more than one million members around the world. Id.

²⁵³ Id. International Prison Watch is headquartered in Lyon, France. See id.

²⁵⁴ Id. 'The Prison Project of the US-based Human Rights Watch investigates prisons in various countries and produces reports which are well-publicized and draw attention of the world to

as well as local and international groups that monitor and fight for prison reform, but prisons in the United States and Europe continue to fall behind in what they should be.²⁵⁵ So how can a prisoner bring an action before a court of law when the principles behind the reformers and their groups do not help correct his or her confinement conditions?

XI. How Confinement Conditions are Litigated in the United States

The United States Department of Justice is authorized by statute to bring criminal charges or civil suits against state authorities for violating prisoners' rights under the United States Constitution.²⁵⁶ The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment, which the courts have interpreted as requiring prisons to provide prisoners with 'such basic needs as adequate food and water, shelter, clothing, sanitation, personal safety, and medical care, including mental health treatment.'²⁵⁷ 'Yet, despite these constitutional guarantees, endemic problems remain [and] [p]risoners are not a politically powerful constituency . . .'²⁵⁸

However, starting with the 1960s and 1970s, more lawyers became concerned about civil rights and became receptive to the idea of helping prisoners bring suits to win their constitutional rights.²⁵⁹ With the development of a civil-liberties bar and the more effective ways to monitor prisoners' claims, it became more and more difficult for the courts to ignore some of the problems that were taking place in the nation's prisons.²⁶⁰

In the early 1900s, the United States Supreme Court adopted what was known as the 'hands-off doctrine.'²⁶¹ Later, the notion that prisoners have no

abuses.' *Id.*

²⁵⁵ See generally Stern, *supra* note 102.

²⁵⁶ See Human Rights Watch: *Ill Equipped: U.S. Prisons and Offenders with Mental Illness: XV. Legal Standards 5*, available at <http://www.hrw.org/reports/2003/usa1003/25.html> (last visited 28 Oct 2003).

²⁵⁷ *Id.* at pp. 1, 5. The Eighth Amendment states, 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' U.S. Const. amend. VIII.

²⁵⁸ *Human Rights Watch, supra* note 254, at p. 5. The idea that prisoners have rights was not generally accepted by most courts until the 1960s and 1970s. Branham, *supra* note 4, at p. 283. '[P]risoners during [the 1960s and 1970s] became more assertive, and even militant, as they clamored for recognition of their constitutional rights.' *Id.*

²⁵⁹ Branham, *supra* note 4, at p. 282.

²⁶⁰ *Id.* Kenneth J. Falk of the Indiana Civil Liberties Union has helped immensely with prison and jail reform with his efforts against jail overcrowding and confinement conditions in a number of jails and prisons in Indiana. See *ICLU: Legal: Current Litigation, Prisons and Prisoner Rights*, available at <http://www.iclu.org/legal/current.asp> (last visited Nov. 9, 2003).

²⁶¹ Branham, *supra* note 4, at p. 280. The 'hands-off doctrine' is the court's refusal 'to adjudicate prisoners' constitutional claims, not necessarily because prisoners have no constitutional rights, but because, whatever their rights, the courts felt that they generally had neither the duty nor the

rights was gradually replaced by a different approach to prisoners' claims asserting violations of their constitutional rights and a 1961 United States Supreme Court case entitled *Monroe v. Pape* brought about an abandonment of the 'hands-off doctrine' toward prisoners.²⁶² The facts in *Monroe v. Pape* involved thirteen police officers who entered the home of the plaintiffs without a warrant and forced the plaintiffs to stand nude in their living room while a search was conducted.²⁶³ The plaintiffs claimed that they were deprived of their 'rights, privileges, or immunities secured by the Constitution' within the meaning of 42 U.S.C. §1983.²⁶⁴ The Section 1983 requirement states that 'the person sued must have acted "under color of" a state "statute, ordinance, regulation, custom, or usage" to be liable.'²⁶⁵ The 'under-color-of' state law requirement is satisfied as long as there is misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of such state law.²⁶⁶

Monroe v. Pape 'put to rest the notion that the state-action requirement of Section 1983 was not met if state governmental officials had violated state law at the same time federal constitutional rights were allegedly violated [and] [t]hat notion had lent support to courts previously opting to stay away from the task of adjudicating prisoners' constitutional claims.'²⁶⁷

After *Monroe v. Pape*, a number of cases of prisoners challenging prison conditions (where a number of constitutional protections found in the Bill of Rights operated) took place, but an important case decided was *Robinson v. California* in 1962.²⁶⁸ It was in *Robinson* that the court held 'that the Eighth Amendment right not to be subjected to cruel and unusual punishment was a right not to be infringed upon by the states as well as the federal government.'²⁶⁹

power to define and protect those rights.' *Id.* Reasons for the 'hands-off doctrine' included: separation of powers, federalism, maintenance of institutional security and furtherance of correctional goals, and dislike of prisoners' lawsuits. *Id.* at pp. 281-82.

²⁶² *Id.* at p. 280. See, also *Monroe v. Pape*, 365 U.S. 167 (1961).

²⁶³ *Monroe v. Pape*, 365 U.S. 167.

²⁶⁴ John C. Jeffries, Jr., Pamela S. Karlan, Peter W. Low and George A. Rutherglen, *Civil Rights Actions: Enforcing the Constitution*, Foundation Press, 2000, p. 27. 42 U.S.C. §1983 states:

'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. '

Branham, *supra* note 4, at pp. 283-84.

²⁶⁵ Branham, *supra* note 4, at p. 284. The reason that '[Section] 1983 was enacted was to provide a federal remedy for the violation of constitutional rights in part because the states had often failed in the past to enforce their own laws.' Braham, *supra* note 4, at p. 321.

²⁶⁶ *Id.* at p. 284. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

²⁶⁷ See *United States ex. rel. Atterbury v. Ragen*, 237 F.2d 953, 954-55 (7th Cir. 1956).

²⁶⁸ Branham, *supra* note 4, at p. 284. See also *Robinson v. Cal.*, 370 U.S. 660 (1962).

²⁶⁹ Branham, *supra* note 4, at p. 285. The courts have also decided that 'other rights of which prisoners frequently try to avail themselves, such as the first-amendment rights to freedom of speech and religious freedom and the fourth-amendment right to be free from unreasonable

Since then, courts recognize that prisoners do have constitutional rights that should be protected.²⁷⁰

There are four key elements that must be present in order for an inmate to prevail in a Section 1983 action.²⁷¹ First, it must be established that a 'person' has violated the inmate's rights.²⁷² Next, for an action to survive under Section 1983, the 'person' sued must have acted 'under color of' state law.²⁷³ The third element that must be present is 'causation.'²⁷⁴ Lastly, in order to establish a Section 1983 suit, the plaintiff must prove that the defendant violated the plaintiff's constitutional rights afforded him by federal law.²⁷⁵

State and federal courts have concurrent jurisdiction over Section 1983 suits, so a Section 1983 suit can be filed in either a state court or a federal court.²⁷⁶ While it is up to the inmate as to which court he or she files a case, most Section 1983 cases are filed *pro se*.²⁷⁷ If a prisoner cannot afford to prepay his filing fees, he can file his complaint *forma pauperis*, and if his petition is granted, the inmate is excused from prepaying the full fees that are usually due when a lawsuit is filed in a federal district court.²⁷⁸

Undoubtedly, certain laws and procedures do exist in order for inmates in the United States to file cases regarding prison conditions but how does Europe compare with the United States' judicial system?

searches and seizures, were applicable to the states through the due process clause.' *Id.* See also *Fiske v. Kan.*, 274 U.S. 380 (1927) (freedom of speech); *Stromberg v. Cal.*, 283 U.S. 359 (1931) (freedom of speech); *Cantwell v. Conn.*, 310 U.S. 296 (1940) (freedom of religion); *Wolf v. Colo.*, 338 U.S. 25 (1949) (fourth amendment).

²⁷⁰ See Branham, *supra* note 4, at p. 285.

²⁷¹ *Id.* at p. 318.

²⁷² *Id.* The Supreme Court does not interpret the word 'person' literally but 'persons' can include municipalities, counties, political and corporate entities, but do not include states or U.S. Territories. *Id.* at pp. 318-19.

²⁷³ *Id.* at p. 320. This refers to a state statute, ordinance, regulation, custom, or usage. See *id.* In *Monroe v. Pape*, 'the Supreme Court concluded that police officers had acted 'under the color of state law when entering the plaintiffs' home without a warrant, even though the warrantless entry violated the state's constitution and certain state statutes.' Branham, *supra* note 4, at p. 321. See also, *Monroe v. Pape*, *supra* note 260.

²⁷⁴ Branham, *supra* note 4, at p. 321. 'Only a person who 'subjects' another to a constitutional violation or 'causes' another to be so subjected can be liable under [Section] 1983.' *Id.*

²⁷⁵ *Id.* at p. 324.

²⁷⁶ *Id.* at p. 325. After a prisoner decides in which court to file his action, he must then 'decide whether to consent to a magistrate judge's jurisdiction over the case if the district court has authorized the magistrate judge or judges in the district to handle such cases . . . [and] [i]f both parties consent to the magistrate judge's jurisdiction, the magistrate judge can handle all proceedings in a case, even entering final judgment after a trial.' *Id.* See also 28 U.S.C. §636(c)(1).

²⁷⁷ Branham, *supra* note 4, at p. 326. 'Pro se' means that the prisoner represents himself or herself without the assistance of an attorney. *Id.*

²⁷⁸ *Id.* at p. 327. *forma pauperis* is defined as '[a] privilege given [an] indigent person to prosecute an appeal, otherwise, and independently allowable, without payment of fees and costs incident to such prosecution.' *Black's Law Dictionary*, *supra* note 163, at p. 97.

XII. How Confinement Conditions are Litigated in Britain

The constitution of the United Kingdom consists of the sovereignty of the parliament and the rule of law. Most recently, the Human Rights Act 1998 has initiated a process of fundamental reform.²⁷⁹ The Human Rights Act 1998 provides that legislation may be examined as to its compatibility with rights under the European Convention.²⁸⁰ The Court of Justice of the European Communities with its power to ensure that the body of European law is maintained throughout all the Member States is another process by which the constitution is upheld.²⁸¹

The Human Rights Act 1998 ('the Act') gives further effect to freedoms guaranteed under the European Convention on Human Rights and makes provisions for holders of certain judicial offices who become judges of the European Court of Human Rights and for other connected matters.²⁸² The Act is a significant constitutional innovation and the avowed purpose of the Government is to see 'rights brought home.'²⁸³ The Second World War and its awful horrors caused an international concern for human rights and the European Convention on Human Rights (the 'Convention') emerged.²⁸⁴ Until 1989, membership in the Council of Europe and, therefore, the applicability of the Convention, was limited to Western Europe. Since then, many Central and Eastern European States have joined.²⁸⁵

As mentioned earlier, the Convention used to be supervised by two organizations, the Commission and the European Court of Human Rights (hereinafter 'the C.H.R.'). Both institutions, over the many years of their existence, have contributed to building up a body of case law in response to petitions brought by individuals.²⁸⁶ Such individual petitions initially had to 'pass through two hurdles, . . . [namely that] the case has been examined by the Commission to determine whether it is admissible [and has any merits] [and that the case has been seen by] the Committee of Ministers [for an attempt to reach

²⁷⁹ John F. McEldowney, *Modernizing Britain: Public Law and Challenges of Parliament*, New Zealand, University of Waikato Press, 2002, p. 11.

²⁸⁰ *R v. Sec. of State for the Environment*, Transport and the Regions [2000] All ER (D) 2264.

²⁸¹ McEldowney, *supra* note 276, at p. 12.

²⁸² Human Rights Act 1998, c. 42-2 (9 Nov 1998). The Proceedings of the International Conference on Human Rights and Prison Reform by National C.U.R.E. (Citizen United for Rehabilitation of Errants) has helped pave the way towards enlightening international prison reform. See Cure's International Conference Human Rights and Prison Reform (6-11 Oct 2001).

²⁸³ Human Rights Act 1998, *supra* note 280. See also Rights Brought Home: The Human Rights Bill, Cm. 3782 (1997).

²⁸⁴ Human Rights Act 1998, *supra* note 280, at 42-2. This was 'the first international human rights instrument to provide for individual access to an international adjudication process against States Parties, including access by a State's own nationals.' *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

an amicable settlement;] [only after passing these hurdles, a case could proceed for adjudication] to the C.H.R.²⁸⁷ But in 1998, the Commission and the C.H.R., which both had been part-time bodies, were replaced with a single full-time court, removing the involvement of both the Commission and the Committee of Ministers.²⁸⁸ The result of this change was a notable simplification and acceleration of the procedures and a more transparent output for 'the creation of a body of case law to guide the interpretation of the Convention.'²⁸⁹

In the UK, the Schedules of the Human Rights Act 1998, Article 3 (Prohibition of torture) substantiates the Convention rights and states, 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'²⁹⁰ In order for a court or tribunal to determine a question that has arisen in connection with a Convention right, it must look at any judgment, decision, declaration or advisory opinion of the European Court of Human Rights to enable the court to make its decision.²⁹¹

The Human Rights Act 1998 provides the vehicle for inmates who have endured adverse confinement conditions in order for them to be able to bring an action under Article 3 of that Act when they are subjected to torture or to inhuman or degrading treatment or punishment in British prisons.²⁹² If the outcome should not be satisfactory to the applicants, they retain the right to appeal to the European Court of Human Rights, after unsuccessfully exhausting local remedies in Britain.²⁹³

XIII. Conclusion

With regard to prison overcrowding and confinement conditions in the United States and Europe, a number of signs of favorable changes are visible and the matter seems to be moving in the right direction, albeit slowly.²⁹⁴ With such mechanisms as domestic supervision via private prison reform groups, and ombudsman procedures, and the European Convention on the international level, as implemented for example by the Human Rights Act in the UK, the legal community is not only recognizing that these matters can and should be litigated.²⁹⁵ Courts have accepted that prisoners do have constitutional rights and are actively assisting in their protection.²⁹⁶

Both the United States and Europe have come a long way from the early prisons where torture and punishment were their main functions. With prison

²⁸⁷ Id.

²⁸⁸ Id.

²⁸⁹ Human Rights Act 1998, *supra* note 280.

²⁹⁰ Id.

²⁹¹ Id. at pp. 42-8.

²⁹² See generally, Human Rights Act 1998, *supra*, note 282.

²⁹³ Id.

²⁹⁴ See Branham, *supra* note 4, at p. 285.

²⁹⁵ See *id.*

²⁹⁶ Branham, *supra* note 4, at p. 285.

reform movements abounding, the world can finally hope that in the foreseeable future, there will be a truly better prison system.

While '[a] prison is still a deformed society,' there are 'vast differences between prisons and enormous amounts of efforts go into making bad prisons better and reasonable prisons better still.'²⁹⁷

'Prison reform is a cause which has touched the imaginations of many through the centuries and continues to do so.'²⁹⁸ May it continue to touch our imagination, as all countries strive for a better way to deal with the problems of overcrowding and confinement conditions.

In the future, the world will see inmate numbers increase in the United States and European prison systems alike, but only when we seek out the underlying problems that contribute to their overcrowding and try to correct those problems, will those numbers be substantially decreased and confinement conditions improve.

²⁹⁷ Stern, *supra* note 102, at p. 248. 'The basic task of the prison reformer is to change the relationships, between the staff and the prisoners, the prison and the outside community, and the prison in society.' *Id.* at p. 272.

²⁹⁸ *Id.* John Howard who was an eighteenth-century prison reformer was thought to be 'one of the greatest men in Europe,' as he brought public attention to violence and cruelty of young people's prisons thereby causing the UK-based Howard League for Penal Reform to be founded in 1866. *Id.*