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Gary Wood

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NOTE

RECENT APPLICATIONS OF THE BAN ON CRUEL AND UNUSUAL PUNISHMENTS: JUDICIALLY ENFORCED REFORM OF NONFEDERAL PENAL INSTITUTIONS

Mercy without justice is the mother of dissolution. Justice without mercy is cruelty.

St. Thomas Aquinas

Since its inception, the American penal system has been dominated by the concept of "incarceration." Isolation of nonconformists was deemed the solution to social problems as early as the days of the Puritans. Unfortunately, confinement in an institution set apart from society is still regarded by many authorities—prison officials and others—as the most effective device to achieve behavioral "normalization."

Until recently, the judiciary did little to alter the effect of this viewpoint. Indeed, the inadequacy of the process and conditions of prison confinement were rarely confronted as issues for the courtroom. Rather, federal tribunals long enunciated legal doctrines designed to avoid intervention in affairs which could be categorized as relating to prison administration; whenever possible, the federal bench disdained from inquiring into "local" penal matters.

In response to challenges of the constitutionality of confinement, reference constantly was made to the inappropriateness of a petition for

3. Criticism of this judicial hesitancy has now begun to come from some of the leading members of the federal bench. For example, Chief Justice Burger recently commented as follows: "[W]e must soon turn increased attention and resources to the disposition of the guilty once the factfinding process is over. Without effective correctional systems an increasing proportion of our population will become chronic criminals with no other way of life except the revolving door of crime, prison, and more crime." Burger, A Proposal: A National Conference on Correctional Problems, 33 Fed. Prob. 3 (1969).

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relief from the federal sphere. The courts developed a policy of “abstention” from such cases, since they claimed to lack the expertise to produce effective results.

A closely related theory of non-intervention has been described as the “hands off” approach. Its exponents viewed most of the elements of penal management as within the realm of the executive branch and immune from judicial review.

Events transpiring in the last few years, however, have initiated drastic changes in the judicial attitude toward prison confinement. The

4. See, e.g., Wilwording v. Swenson, 439 F.2d 1331 (8th Cir. 1971), where the Eighth Circuit stated that federal relief on habeas corpus from conditions allegedly “cruel and unusual” in a state penitentiary must be denied until after the exhaustion of all available state judicial remedies. Thus the inmates were expected to test first the propriety of mandamus, prohibition, injunction and other remedies afforded in the state of their confinement.


6. See Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 VA. L. REV. 795, 812 (1969); Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506 (1963), both crediting Fritch, Civil Rights of Prisoners 31 (1961) (documents prepared for the Federal Bureau of Prisons) as the source of the phrase. The policy of “hands-off” is traced from its birth to its questionable demise in Kraft, Prison Disciplinary Practices and Procedures: Is Due Process Provided?, 47 N.D. L. REV. 9, 11-21 (1970). A modified rebirth of the “hands-off” rationale was evidenced, however, in a recent Second Circuit decision, where the court stated: “Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us as a federal court to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or personally repugnant. As judges we are obliged to school ourselves in such objective sources as historical usage . . . before we may responsibly exercise the power of judicial review to declare punishment unconstitutional under the Eighth Amendment.” Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971), cert. denied sub. nom. Oswald v. Sostre, 40 U.S.L.W. 3431 (U.S. Mar. 6, 1972).

7. “Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.” Banning v. Looney, 213 F.2d 771 (10th Cir. 1954), cert. denied, 348 U.S. 859 (1954). See NAT'L COUNCIL ON CRIME AND DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS 9 (1972) [hereinafter cited as MODEL ACT].

8. See MODEL ACT, supra note 7, at 3: “Although riots continue to occur—and the abuses to which they are a response still prevail in many places—a new element has been added to prisoner grievances: an assertion both of positive rights and of the right to be protected against abuse. This can be regarded only as a heartening development. The court decisions that have responded to the grievances by granting relief affect the prison system as a whole as well as the individual petitioners. Certainly this mode of seeking redress—through petitions to the court, to administrators, and to legislators—is better than communication by riot.”
explosive violence within Attica and San Quentin and the constant media coverage of certain outspoken inmates have thrust prison reformers into the limelight. In addition there has been an increasing public awareness that most inmates eventually return to society, affected in many ways by their jail experiences.\textsuperscript{9}

Clearly, the groundwork has been laid for a new, almost sudden, willingness to adjudicate the constitutionality of heretofore unquestioned elements of confinement.\textsuperscript{10} Aspects of prison and jail life\textsuperscript{12} once merely accepted as the rigors of incarceration have been subjected to judicial scrutiny in both federal and state courts.\textsuperscript{13} The result has been renewed consideration of the Eighth Amendment's prohibition against "cruel and unusual punishments,"\textsuperscript{14} with courts declaring unlawful the manner

\begin{itemize}
  \item President Nixon's thirteen point Federal Prison Reform directive to the attorney general revealed that "nineteen out of every twenty persons who are sent to prison eventually return to society. What happens to them while they are in confinement is a tremendously important question for our country." Kraft, \textit{supra} note 6, at 9.
  \item [10. \textsuperscript{10}] The lasting effects of incarceration cannot be underestimated. Although deterrence of future criminal behavior is one goal of the penal system, present methods of institutionalization seem to prevent its attainment: "The most important crime statistic is that 80\% of all felonies are committed by repeaters. That is, four-fifths of our major crimes are committed by people who are already known to the criminal justice system." Ramsey Clark, \textit{When Punishment Is a Crime}, \textit{Playboy}, Nov. 1970, at 100.
  \item [11. \textsuperscript{11}] "The consequence of abrupt and arrogant interference had to be weighed and balanced with the compelling interests to uphold federal constitutional rights in accord with modern precepts." Wright v. McMann, 321 F. Supp. 127, 146 (N.D.N.Y. 1970).
  \item [12. \textsuperscript{12}] The Eighth Amendment applies to state and local penal institutions through the due process clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). The term "jail" is generally understood to mean a short-term holding facility under city or county control, while a "prison" is maintained by a state or the federal government and is normally designed to hold felons sentenced for a year or more. \textit{See} Turner, \textit{Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation}, 23 STAN. L. REV. 473 (1971) [hereinafter cited as Turner].
  \item [13. \textsuperscript{13}] As then Circuit Judge Blackmun phrased it in Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968): "[T]he courts, including this one, have not hesitated to entertain petitions asserting violations of fundamental rights, and where indicated, to grant relief." In Glenn v. Ciccone, 370 F.2d 361, 363 (8th Cir. 1966), the same court remarked that a factual showing of cruel and unusual punishment in violation of the Eighth Amendment would support intervention by a federal court.
  \item [14. \textsuperscript{14}] U.S. CONSTR. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, \textit{nor cruel and unusual punishments inflicted.}" (emphasis added)
\end{itemize}
of confinement even where sentences and commitments are concededly valid.

This note seeks to examine those elements of incarceration in state prisons and local jails which have recently been recognized as falling under the umbrella of the Eighth Amendment. Emphasis will be placed on the problems resulting from overcrowding, punitive segregation, pre-trial detention, civilian and trusty staffing, sanitation, and medical care. Special attention will be paid to the manner in which the Eighth Amendment has been employed. In many cases—most notably, prisoners' class actions brought under the 1871 Civil Rights Act (commonly known as section 1983)—the amendment has been used as the

emphasized the breadth and flexibility of the Eighth Amendment rather than attempting to illustrate its limitations. "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted . . . ." Wilkerson v. Utah, 99 U.S. 130, 136 (1878). "What constitutes cruel and unusual punishment has not been exactly decided." Weems v. United States, 217 U.S. 349, 368 (1910). Former Chief Justice Warren once stated that "the basic concept underlying the eighth amendment is nothing less than the dignity of man . . . . [I]t must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958) (emphasis added). Judge (now Justice) Blackmun stressed that the clause is dynamic and that it was designed to vindicate "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ." Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968). See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 HARV. L. REV. 635 (1966). This fact alone has been a major reason that the Eighth Amendment has been of minimal utility to inmates attacking deplorable penal conditions. The only early cases in which punishment was found "cruel and unusual" involved the most blatantly inhuman and intolerable penalties. See, e.g., Weems v. United States, 217 U.S. 349 (1910) (fifteen years of hard labor in chains deemed cruel and unusual); In re Birdsong, 39 F. 599 (S.D. Ga. 1889) (chaining prisoner so that he could neither sit nor stand for 6 1/2 hours held cruel and unusual); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949) (beating an inmate to force confession held to be cruel and unusual).

15. Limitations of space clearly preclude discussion of the landmark California decision of People v. Anderson, — Cal. 3d —, — P.2d —, — Cal. Rptr. — (1972), where the state's death penalty was ruled invalid under the prohibition of "cruel or unusual punishment" of the California Constitution. The court in Anderson specifically avoided reference to the Eighth Amendment, but the United States Supreme Court will decide that issue this summer in a different set of cases.

16. FED. R. CIV. P. 23(b)(3). Class actions have been allowed where the complaint questioned the constitutionality of conditions and practices affecting so many inmates that joinder of all members of the class was impracticable. See, e.g., Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971); Hamilton v. Schiro, No. 69-2443 (E.D. La. June 25, 1970); Brenneman v. Madigan, No. C 70-1911-AJZ (N.D. Cal., filed Sept. 8, 1970). Each of these cases was a successful action against a group of public officials—including mayors, city councils, county supervisors, wardens, sheriffs, and other local authorities.

basis for condemning the totality of conditions and practices existing within a penal facility. In other instances, the amendment has provided the foundation for attacks on specific evils within individual institutions. The number of decisions relying on Eighth Amendment grounds has rather abruptly increased in the last two years; this note will attempt to show the direction such decisions have taken and the direction future cases will likely follow.

Unconstitutional Conditions

Several previously unquestioned conditions of incarceration can now be found violative of the Eighth Amendment. In the amendment’s new and expanded role, the ban on cruel and unusual punishments has been relied upon in the development of constitutional limits in the areas of inmate population density, sanitation, and medical care. The notion that such conditions of confinement, which affect an entire prison population, can be declared unconstitutional is one of the more dramatic developments in recent Eighth Amendment litigation.

Overcrowding

The problem of overcrowding is one of the most fundamental flaws in the present penal system. Many of the more than 4,400 jails, prisons, lockups, and workhouses scattered throughout the country are

any State or Territory, 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.” Federal jurisdiction of inmate complaints under section 1983 is invoked under 28 U.S.C. §§ 1343(3) & 2201 (1970).

18. “The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel.” Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971). When a federal district court discovered recently that the entire Virginia state penal system violated the most common notions of human treatment, the tribunal enjoined the entire combination of conditions and practices to which Virginia’s 5,700 inmates had been subjected. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).


In one extraordinary case, the cruel and unusual punishment argument was applied in the context of an extradition proceeding. Michigan’s Governor Milliken refused to allow Arkansas authorities to take a prisoner back to Arkansas’ “infamous” Cummins Prison Farm, because “extradition would not serve the ends of justice.” TIME, July 12, 1971, at 53.
aged and inadequate for modern needs. Nevertheless, these institutions often remain filled to—even beyond—estimated maximum capacity. For example, the Lucas County Jail (serving the Toledo, Ohio area) was designed in the late nineteenth century to hold approximately 150 prisoners. Yet evidence in a recent case attacking the conditions of confinement in that jail revealed that an average of 200 inmates had been kept in that institution throughout the entire period of litigation. The inmates confined in the Lucas County facility, forced to share cells measuring only six by nine feet in floor area, succeeded in their class action challenge brought under section 1983. The federal district court held that the crowding in the Lucas County Jail was so excessive as to constitute “cruel and unusual punishment” under the Eighth Amendment.  

The first detailed and analytical evaluation of overcrowding as a specific condition violating the Eighth Amendment was undertaken in Wayne County Jail Inmates v. Wayne County Board of Commissioners, a recent decision by a Michigan Circuit Court. A three-Judge state panel declared violative of the Eighth Amendment several conditions and practices in Detroit’s Wayne County Jail—most notably the tremendous overcrowding of the facility.

20. Attorney Ronald Goldfarb stated in Why Don’t We Tear Down Our Prisons?, Look, July 27, 1971, at 45, that of the more than 400 “expensive, old, and overcrowded prison institutions in the United States, sixty date back to the nineteenth century and twenty-five began operations before the Civil War.” In addition, there are at least 4,000 locally operated penal and detention facilities. Id.


The opening remarks of Congressman Robert W. Kastenmeier, Chairman of Subcommittee No. 3 of the House Committee on the Judiciary, at the Subcommittee’s hearings in San Francisco on October 25, 1971 (on file at The Hastings Law Journal), give an indication of our present system: “Dostoevski wrote, in The House of the Dead: ‘The degree of civilization in a society can be judged by entering its prisons.’ During the past three days, this Subcommittee—charged with jurisdiction over the correctional systems in this country—has inspected two State prisons, Soledad and San Quentin, and a county jail, the Santa Rita Rehabilitation Center. . . . We have not yet completed our endeavors, but I think it requires no special insight to conclude by now that, if we employ the measuring rod posed by the Russian author, we must reach a fairly bleak determination.

“Our correctional system, or perhaps non-system might be the more appropriate descriptive term, is a conglomeration of a Federal system, 50 State systems and more than 3,000 county and municipal systems. On any given day, approximately 1½ million people will be under the authority of one or more of these components. The cost is over $1 billion annually.

“Yet we have failed, despite the money, despite the systems, despite the buildings.”

22. Id. at 95.

23. Id.


25. Id. at 19.
This case is unusual in several respects. First, it was decided by a state tribunal, while most of the significant judicial inroads toward prison reform have come instead from federal courts. In fact, several courts have remarked, when interceding in local penal matters, that their involvement was necessary because state judges would be the last to reform their own penal institutions.\(^\text{26}\)

The second novel aspect of the *Wayne County Jail Inmates* case was the means in which the court analyzed the "overcrowding" itself. Essentially, the court determined that there were three levels of inmate capacity in the institution. To decide whether conditions of overcrowding had reached constitutional proportions, the court defined these three levels or "capacities" and rendered its opinion as to the legal effect of exceeding each barrier. The initial level was termed "design capacity," meaning the number of inmates the jail had initially been expected to hold.\(^\text{27}\) The subsequent addition of a second bunk to each of the original cells (done several years prior to this litigation) had increased the population to its "rated capacity."\(^\text{28}\) The third category, determined by applying the state's housing law requirement as to airspace (a minimum of 500 cubic feet per inhabitant for all structures), was termed the "lawful inmate capacity."\(^\text{29}\)

The judges in *Wayne County Jail Inmates*, citing the Eighth Amendment and several leading federal cases, held that "housing of prisoners in excess of 'rated capacity' offends constitutional strictures against cruel and unusual punishment..."\(^\text{30}\) However, because instant compliance with "lawful inmate capacity" would have resulted in the release of over half of the prisoners confined at the time of the decision, the panel devised a gradual, three-step remedy.\(^\text{31}\) The jail authorities were given

\(\text{26. Federal courts have often remarked, when investigating state or county penal practices in civil rights actions, that state courts would be slow to initiate reforms.} \)
\(\text{"Indeed, the objective of the Civil Rights Act would be defeated if we decided that this federal claim grounded on an alleged violation of the federal constitution would have to stagnate in the federal court until some nebulous or nonexistent remedy was pursued like a will-o'-the-wisp in the state court."} \) \(\text{Wright v. McMann, 387 F.2d 519, 523 (2d Cir. 1967), rev'g 257 F. Supp. 739 (N.D.N.Y. 1966); accord, Monroe v. Pape, 365 U.S. 167 (1961); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971).}\)

\(\text{27. No. C-173-217, at 20.}\)

\(\text{28. Id. at 21.}\)

\(\text{29. "With triple occupancy, each inmate's share of airspace is about 146.5 cubic feet, or approximately 355 cu. ft. less than his legal right. With double occupancy of old cells, each inmate's share of airspace is about 220 cu. ft., or about 280 cu. ft. less than the law allows an individual prisoner."} \) \(\text{Id. at 14.}\)

\(\text{30. Id. at 22.}\)

\(\text{31. "Outrageous, subhuman overcrowding must be ended swiftly. The bestial crowding of three men into one small cell, with one man sleeping on the floor is an affront to basic human decency. This intolerable, dehumanizing overcrowding is fraught with a potential for epidemics and riots. It compounds the problems of violent}\)
ninety days to reduce the inmate population to "rated capacity," and
nine months to attain "design capacity." Up to two and one-half years
were allowed for prison administrators to satisfy completely the require-
ments of state and national laws; that is, they were given that long a
time to reach "lawful inmate capacity."32

Perhaps such analysis and use of capacity figures will in the future
be the determinant of constitutionality in this area. With a framework,
greater certainty will be possible in deciding if overcrowding alone
constitutes "cruel and unusual" punishment. Even if such a frame-
work is adopted, other factors, especially enforcement of judicial de-
crees as to capacity, will also have to be considered. The recently de-
cided Arkansas case of Hamilton v. Love33 points up this need.

In Hamilton the court entertained a section 1983 petition by in-
mates of the Pulaski County Jail, challenging the conditions of their
confinement. The court requested the assistance of an expert in penology
and prison administration to assess the maximum number of inmates,
as well as the minimum number of staff personnel necessary to guarantee
"that the lives and health of the detainees would be protected during
the period of their detainment."34 The Court found that regardless of
the size and qualifications of the staff, no more than 115 persons could
be housed in the facility as presently constructed.35 In order to assure
full compliance with his decree, the trial judge ordered the prison of-
ficials who were named as defendants in the litigation to do the follow-
ing: (1) file a report with the court on any day in which the population
exceeded the 115-man ceiling, (2) specify the reasons for such increase,
and (3) indicate the date on which the population would again return
to the appropriate (ceiling) figure.36

The significance of capacity assessments like those made in
Hamilton or Wayne County Jail Inmates is the fact that a court has
taken cognizance of the deleterious effect of overcrowded prison quar-
ters. Clearly, such overpopulation places burdens on the custodial staff
and minimizes the attention and assistance the staff can render for de-
tainees and prisoners. Inmate behavior is undoubtedly influenced in
large measure by the nature of the confining facility; thus hostility is far
more likely in an environment containing no "breathing room." In
Wayne County Jail Inmates the court went even further, stating that

assaults, suicides, homosexuality and mental illness which are endemic to any jail.
Three men to an undersized room has created an explosive situation which needs im-
mediate defusing." Id. at 24.

32. Id. at 25.
34. Id. at 1194.
(jail population ordered reduced to two men per cell).
36. 328 F. Supp. at 1195.
close confinement, when worsened by overpopulation beyond the design of the structure (and the regimen of enforced idleness), had a marked effect on inmate mental health; in fact, court-appointed psychiatrists described the effect as “iatrogenic,” i.e., tending to produce or aggravate mental illness.  

Fortunately, in dealing with the problem of overcrowding, most prison administrators encourage reform as eagerly as do inmates themselves. Yet, the courts are hard pressed to deal with the problem on a case-by-case basis, and it appears that legislative help would be warmly endorsed. At present, however, the judicial remedy has been tailored as best as can be done to the seriousness of the problem in the particular challenged facility.

Ordinarily, the trial judge has ordered gradual reductions in the number of inmates. Occasionally, however, a court has demanded more immediate action, warning that a delay would compel him to order the release of inmates until the prison population was no longer crowded beyond constitutional limits.

What appears to be needed is a means of limiting lockup treatment to those persons who can be dealt with in no other way. At present, there are many persons who could be treated or administered in a different manner. For example, alcoholics and drug addicts could be removed to detoxification centers, reducing jail populations enormously.

Other administrative techniques would similarly reduce inmate crowding: (1) issuance of summons or notices to appear (rather than arrest) where a suspect presents no clear danger to society; (2) grant of trial calendar priority to those persons who must remain in jail; (3) extension of the use of parole and probation; and (4) development of a judicial presumption that an individual qualifies for release on his

37. The judges in Wayne County Jail Inmates noted the high incidence of psychosis among the jail inmates, as diagnosed by a psychiatrist who had just visited the facility. The psychiatrist had seen “markedly paranoid” inmates, others who were catatonic, and some with “full blown schizophrenia,” all confined randomly with healthy individuals in the jail population. Id. at 39-40. And in a California case, Judge Alfonso Zirpoli commented that the cell conditions he found during a visit to Alameda County’s Santa Rita Rehabilitation Center were “cruel and unusual punishment for man or beast.” Brenneman v. Madigan, No. C 70-1911-AJZ (N.D. Cal., filed Sept. 8, 1970), Reporter’s Transcript, Mar. 11, 1971, at 4, lines 6-7. “Th[ese] cells are of such character as would presumably drive any person insane.” Id. at 6, lines 22-23.


own recognizance, unless the prosecution can affirmatively demon-
strate a likelihood that the individual would not appear for trial.40

Inadequate Sanitation and Medical Care

The lack of adequate sanitation and medical care has also been
the focus of Eighth Amendment litigation. In certain instances, gen-
erally where institutional authorities have exhibited extreme callousness
as to inmate health problems, the courts have declared confinement in
unsanitary facilities unconstitutional.41 Unfortunately, because condi-
tions in most of these cases are extremely poor, it is difficult to de-
termine the point at which the lines are drawn—that is, the point at
which prison health problems threaten an inmate in an unconstitutional
fashion.

Perhaps the only guidelines can be attained by surveying and com-
paring the various cases decided in this area. Poor cell ventilation and
resulting temperature extremes have been mentioned with increasing
frequency as factors that warrant consideration in determining the con-
stitutionality vel non of a facility.42 Infestation by rats, mice, vermin,
and roaches may also be so intolerable as to warrant Eighth Amend-
ment relief.43 Issuance of uncleaned mattresses,44 inoperative plum-
ing,45 and denial of laundry facilities46 are also forms of unnecessary

40. Id.
confined nude in such filthy and unsanitary conditions that health was endangered);
Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (prisoner in solitary could
not flush his own toilet and was denied use of soap and toilet paper); Holt v. Sarver,
300 F. Supp. 825 (E.D. Ark. 1969) (toilets could not be flushed from inside, extreme
filth pervaded cells, and dirty mattresses had contributed to spread of infectious dis-
eases, including one fatal case of hepatitis); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D.
Cal. 1966) (cells filthy and inmates were deprived of soap, water, and toothbrush).
42. E.g., Hamilton v. Love, 328 F. Supp. 1182, 1190 (E.D. Ark. 1971); Hamil-
ton v. Schiro, No. 69-2443 (E.D. La. June 25, 1970) (finding of fact No. 11); McCray
“During the winter the heat is uneven, sweltering in some areas, while other areas
are cold and damp. In the summertime the heat is stifling, sometimes reaching 120
degrees. We have here the makings of an epidemic.” Wayne County Jail Inmates v.
Wayne County Bd. of Comm’rs, No. C-173-217 (Mich. Cir. Ct., filed Jan. 25, 1971),
at 56.
43. The fact that prisoners may be required to eat in their cells, generally ex-
plained as a precautionary rule to prevent dining hall riots, merely exacerbates
(finding of fact No. 12); Wayne County Jail Inmates v. Wayne County Bd. of Comm’rs,
44. E.g., Hamilton v. Schiro, No. 69-2443 (E.D. La. June 25, 1970) (finding of
fact No. 9).
45. Id., (finding of fact No. 6); accord, Wayne County Jail Inmates v. Wayne
County Bd. of Comm’rs, No. C-173-217 (Mich Cir. Ct., filed Jan. 25, 1971) at 58.
46. E.g., Hamilton v. Love, 328 F. Supp. 1182, 1190 (E.D. Ark. 1971); Jones
environmental neglect which have contributed to findings of Eighth Amendment violations. The courts have not tried to enunciate standards but have merely indicated when cell deterioration is severe enough to evidence "the abandonment of basic concepts of humanity and decency." 47

Associated with sanitation is the issue of medical care. In this area, the courts have traditionally reacted differently in cases involving a total denial of medical care than they have in situations where inmates have merely attacked the adequacy of care they have received. For a great many years, most federal tribunals held that only a conscious failure to provide the most elementary health care would amount to an Eighth Amendment violation. 48 Recently, the various courts have begun to split on this issue. 49 Thus, there is no longer a uniform policy

47. Plaintiffs normally rely upon inspection tours by the court or upon affidavits submitted by experts or the inmates themselves. E.g., Brenneman v. Madigan, No. C 70-1911-AJZ (N.D. Cal. filed Sept. 8, 1970); Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, No. C-173-217 (Mich. Cir. Ct., filed Jan. 25, 1971). The most effective results have been produced where the judge himself has inspected the facility, perhaps because conditions have to be seen to be fully comprehended. Affidavits are useful not only in persuading the judge to make an inspection but also in directing his attention to specific evils. Brenneman v. Madigan, No. C 70-1911-AJZ (N.D. Cal., filed Sept. 8, 1970).


49. In the Third Circuit it has been stated that improper medical care is, without more, not drastic enough a deprivation to constitute a denial of a federal right. Pennsylvania ex rel. Gatewood v. Hendrick, 368 F.2d 179 (3d Cir. 1966), cert. denied, 386 U.S. 825 (1967). However, the Fourth Circuit has decided that a complaint alleging denial of necessary medical care produced a cause of action sufficient to justify an award of damages. Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Hirons v. Director, Patuxent Institution, 351 F.2d 613 (4th Cir. 1965). The Fifth Circuit has upheld a claim under section 1983 where the allegations were that a sheriff refused medical aid for plaintiff's broken neck and prevented him from summoning his own doctor. Hughes v. Noble, 295 F.2d 495 (5th Cir. 1961). The Seventh Circuit has decided that a complaint disclosing that the prisoner has received some medical aid and alleging only inadequacy of care and treatment facilities and techniques did not justify federal intervention. United States ex rel. Knight v. Ragen, 337 F.2d 425 (7th Cir.), cert. denied, 380 U.S. 985 (1964). But where a complaint alleged that police prevented treatment of bullet wounds so serious as to necessitate subsequent amputation of a prisoner's leg, the Seventh Circuit ruled that a cause of action was stated. Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957). In the Ninth Circuit, denial of medical care has been deemed not actionable under section 1983 in the absence of exceptional circumstances. Stillman v. Rhay, 371 F.2d 420 (9th Cir. 1967); Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964).

At the district court level, several other cases have been resolved in favor of inmates claiming denial of medical treatment. E.g., Elsberry v. Haynes, 256 F. Supp.
as to what types and degrees of deprivation must be alleged to state an actionable claim for relief under the Eighth Amendment.

What appears to be evolving, however is a new standard of medical care for both sentenced inmates and detainees. This new test is suggested in the following excerpt from a recent district court opinion:

If the treatment or lack of treatment of a prisoner is such that it amounts to \textit{indifference or intentional mistreatment}, it violates the prisoner's constitutional guarantees. When a state undertakes to imprison a person, thereby depriving him largely of his ability to seek and find medical treatment, it is incumbent upon the state to furnish at least a \textit{minimal amount} of medical care for whatever conditions plague the prisoner.\textsuperscript{50}

The noticeable change in many courts has stemmed largely from two factors: (1) greater overall public concern as to the prison system and (2) concern about the growing drug epidemic among detainees and prisoners.\textsuperscript{51} Judicial remedies are being devised or redesigned, designed for the particular problem in each case. In at least one situation, the judge has ordered that a facility remain under court supervision until the inmate population appeared sufficiently protected.\textsuperscript{52} Clearly the trend is one of greater involvement of the judiciary, since inspections and other enforcement procedures appear to be the only means of assuring compliance under the broad dictates of the Eighth Amendment.

Many factors enter into determining whether or not there has been a constitutional violation under this new and growing standard. For example, courts have declared invalid a treatment program that denied special diets to diabetics,\textsuperscript{53} that limited dental care to extractions only,\textsuperscript{54} ...
or that could not guarantee delivery of prescribed medicine to a sick inmate.\textsuperscript{55} In addition, courts have recently condemned health and safety conditions stemming from indiscriminate admission and rooming procedures. In a few cases, judges have declared that it was cruel and unusual to subject inmates to the risk of harm posed by facilities that use no intake examinations with no means of screening and quarantining those with contagious diseases.\textsuperscript{56} Several courts have labeled as "cruel and unusual" the confinement of inmates in institutions with no isolation areas for the mentally ill, the sex offenders, the drug addicts or the abnormally vicious prisoners.\textsuperscript{57}

**Practices Found Unconstitutional When Abused**

Just as an institution-wide condition may be found cruel and unusual, so may a court declare a systematic practice to be unconstitutional. The penal practices which have most often been subjected to the Eighth Amendment test include punitive segregation, pretrial detention, civilian staffing, and the potential abuse of the trusty system.

**Punitive Segregation**

Ever since the days when whipping and other physical punishments were outlawed, assignment to "solitary" or "isolation" has been viewed by inmates as the harshest internal disciplinary measure.\textsuperscript{58} Perhaps as a result of its severity, this form of punishment was the first practice to receive significant attention in prisoners' Eighth Amendment challenges.\textsuperscript{59} Nevertheless, few concrete guidelines have been established as to the propriety of "isolation" practices, and they clearly remain among the most resented and questioned techniques of penal administration.

That solitary confinement itself does not violate constitutional standards is well settled.\textsuperscript{60} Assignment to "solitary" has generally been jus-
ified on the basis that it protects the prison population as well as the punished inmate from his possible acts of violence.\textsuperscript{61} However, even a potentially violent prisoner is entitled to certain basic guarantees, and the circumstances and conditions of any particular confinement, solitary or otherwise, may so offend universally held views of elemental human decency as to render the confinement unconstitutional.\textsuperscript{62}

Since 1966 federal courts have declared that confinement in barren "holes" styled after medieval dungeons constitutes cruel and unusual punishment.\textsuperscript{63} But the extent of permissible disciplinary practice has been difficult for the judiciary to delineate. The lack of statutory guidelines and the rarity of appellate level decisions\textsuperscript{64} has left this area of law quite unsettled. It may well be that only a case-by-case approach (requiring a section 1983 class action or a petition for a writ of habeas corpus) will determine the propriety of various extraordinarily severe punitive practices. For these reasons alone, analysis of the scope of relief to which the punished prisoner is entitled has been somewhat difficult; it has been made more difficult by the fact that the few cases have suggested a conflict in the courts as to both the constitutional test to be applied and the severity of punishment allowable.

The constitutional test—the measuring rod as to whether a particular mode of punishment exceeds permissible dimensions—has been expressed in at least three different ways by courts assessing the validity of a particular type of punitive segregation. Under one view, the practice is constitutional unless, under the circumstances, it is of such a character as to shock the general conscience or to be intolerable to

\textsuperscript{61} \textit{But see} Wright v. McMann, 321 F. Supp. 127, 138-39 (N.D.N.Y. 1970), where arguments of protection against suicide or destruction of personal property were held insufficient to overcome the finding that such punitive measures were taken purely for disciplinary purposes.


\textsuperscript{64} Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), \textit{rev'd in part sub nom} Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), \textit{cert. denied}, 40 U.S.L.W. 3431 (U.S. Mar. 6, 1972) is the most recent of the few existing circuit level discussions of disciplinary practices. The New York prisoner in this case was shown to have received exercise, a wholly adequate diet, group therapy, reading material (including legal materials), daily access to a doctor, and limited cell furnishings (a toilet and wash basin, running cold water, soap and a towel). The majority opinion concluded that these conditions of confinement, though not perfect, were "several notches above those truly inhumane conditions heretofore condemned by ourselves and other courts as 'cruel and unusual.'" \textit{Id.} at 194. \textit{See also} Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969) (held constitutional to deny running water or wash bowl and to feed inmate bread and water diet except one regular meal each third day).
fundamental fairness. Another line of analysis would find violative of the Eighth Amendment any punishment "greatly disproportionate" to the offense for which it is imposed. A third viewpoint would reject as unconstitutional even a practice applied in a pursuit of a legitimate penal aim, if it extends beyond what is necessary to achieve that goal. These three methods of determining what is "cruel and unusual" seem to constitute really three different tests; yet while some courts have employed them in the alternative, others have used them in combination.

The first of these constitutional "tests" has been applied most often, perhaps because it was derived from the earliest decisions on the scope of the Eighth Amendment. An example of its modern usage can be seen in the 1971 case of Wayne County Jail Inmates v. Wayne County Board of Commissioners where a state three-judge panel held unconstitutional the conditions of punitive segregation in Detroit's county jail. Prisoners of both sexes had been confined for substantial periods of time in unlighted disciplinary cells measuring 7½' x 7½' in floor-space. These cells were completely bare, save for narrow concrete slab bunks. No prisoner was allowed a mattress, bedding, or blankets. At times the weather was so cold that leaking water in the cells formed icicles. The court remarked with some horror that each of the prisoners was confined without eating utensils; one inmate was described as having to "[eat] with his hands or [lap] up his food like a dog." The basic implements of personal hygiene (such as toilet paper, soap, washing water, towels) were denied to persons incarcerated in these cells.

68. See text accompanying notes 77-83 infra.
69. See note 14 supra.
71. Id.
72. Id. at 100-01. Persons incarcerated in these cells were forced to eliminate waste into a small hole in the floor. If the prisoner wanted water for washing or drinking, other than what might be brought at the whim of a guard, the only available supply was that which flushed the floor drain toilet. The only light in these basement cells was that which had managed to penetrate the narrow mesh slits in the steel doors. Neither reading nor writing materials were permitted, nor were visitors allowed. The inmates were given no exercise. Thus they spent 24 hours a day under these conditions prior to their class action. Id.
Two inspection visits of the Wayne County facility were made by the three judges who constituted the panel that decided this case. After the panel returned from the second visit, one judge submitted an exhaustive opinion condemning the punitive technique. He comments as follows:

Confinement as barbarous as this must threaten the health of the prisoner. Confinement as debased and degrading as this must, inevitably, erode the spirit and undermine the sanity of even the strongest man. Confinement under such conditions shocks the conscience. Its dehumanizing aspects are an affront to civilized notions of rudimentary human decency. We cannot believe that such confinement is a permissible exercise of governmental authority over a citizen of a civilized society in the year 1971.73

The court ordered abandonment of the most abusive practices.74 The judges relied on the rather subjective guidelines of the Eighth Amendment as support for any relief which would raise the prison standards to a conscionable level. The tribunal expressed regret for the lack of statutory assistance in such cases but followed the pattern established in numerous other decisions—that is, they resorted to their own “sense of decency” and “conscience” to determine the constitutional issue.75 Their decision, as with all others under the first “test,” seems necessarily subjective; it turned completely on what the judges viewed as the “evolving standards of decency.”76

The operation of the second “test,” that which focuses on the question whether a given form of punishment is “disproportionate” to the infraction for which it was assessed, actually involves a judicial balancing. On the one side, the court considers the social and administrative harm caused by the prisoner’s conduct; on the other, the emotional and physical damage caused the inmate by the particular method of punish-

73. Id.
74. “If the hole is to be used as a disciplinary device, changes must be made. Inmates must be given bedding, mattresses, and the necessities of personal hygiene, such as toilet paper, soap, towels, and . . . sanitary napkins. They must be given eating utensils at meals . . . . The hole must be heated adequately . . . . Adequate light must be provided. Inmates housed in the hole must be given fresh drinking water, and water for washing, apart from that which flushes the floor drain toilet.” Id. at 102. The court also ordered the cell size increased to conform to state law (8’ x 8’). Reading and writing materials could be withheld, except as requested by an inmate for the purpose of writing to his lawyer of record, to a court or to some governmental body. Id. at 103.
ment. Differing scales of values applied in separate courts could arguably yield varying results under this test.

In perhaps the most widely-publicized example of the use of the second "test," *Sostre v. Rockefeller*, a federal district court in New York entertained an inmate challenge of a host of practices in the state's correctional facilities. The lower court decided that the imposition of punitive segregation on the plaintiff for an *indefinite* period of time (until he complied with certain prison regulations) was entirely disproportionate to any infraction of prison rules that he may have committed. Consequently, the court held such a practice clearly barred by the Eighth Amendment's prohibition. On appeal, however, the Second Circuit rejected this reasoning, holding instead that the inmate's ability to obtain release from isolation at any time through cooperation with penal authorities rendered the punishment constitutional. It was no longer conceived as a fixed penalty disproportionate to the infraction of the prisoner. One of the dissenting judges criticized this logic, noting that the same observation could be made if the inmate were tortured until he agreed to abide by prison rules.

The third "test," the one requiring a clear expression of the necessity of a particular punitive practice (showing its administrative purpose), has perhaps been the least frequently used. In one rather recent decision, however, a federal court in Tennessee condemned a practice as unconstitutional under that standard. In that case, *Hancock v. Avery*, the prisoner had been confined in a bare cell and forced to remain nude throughout his stay in segregation. The court stated that the administrative aims of the particular form of punishment—to protect other inmates and to minimize the likelihood of escape—could have been attained "without requiring a prisoner to live in the exacerbated conditions of filth and discomfort demonstrated in the instant case."

Although the three "tests" (which have arisen entirely through case law) do offer some general guidelines as to the severity of punitive practices the courts will allow, there is as yet no semblance of uniformity in measuring "excessive cruelty." It would appear that, until a con-

78. 312 F. Supp. at 870.
80. Id. at 192-94.
81. Id. at 208. Section 140 of the New York Correction Law authorized a warden to commit a prisoner to segregation when "necessary . . . to produce [his] entire submission and obedience" and to keep him there "until he shall be reduced to submission and obedience." Id. at 184.
82. 301 F. Supp. 786 (M.D. Tenn. 1969).
83. Id. at 792.
sensus is reached by the courts as to the constitutional minimum in punitive procedures, only statutory assistance at the state and federal levels can reasonably guarantee that a prisoner will not be subjected to cruel and unusual punishment. In this regard, consideration must be given to hygiene, length of segregation, diets and cell conditions. Each factor will have to be fully evaluated with regard to its purpose and effect and with regard to the ability of administrative personnel to remedy substandard conditions.

Pretrial Detention

The State's Only Legitimate Purpose

Although a person theoretically may not be "punished" prior to conviction, an accused person's inability to raise bail will often result in his detention in jail until trial. Punitive measures in such a context appear entirely out of harmony with the presumption of innocence. In reality, however, because facilities are often used to hold pretrial detainees as well as those already convicted and sentenced, the possibility is great that the former class will receive equally harsh discipline, particularly where the two classes are randomly mixed throughout a jail population.

Clearly the standard of treatment for pretrial detainees should indeed be superior to that accorded sentenced prisoners. Although some of the problems of administration remain the same whether an inmate is a convict or merely a detainee, the latitude granted institutional authorities in dealing with detainees should be radically reduced.

84. Tyler v. Ciccone, 299 F. Supp. 684 (W.D. Mo. 1969). Blackstone described pretrial detention as follows: "[T]his imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters nor subjected to other hardships than such as are requisite for the purpose of confinement only." 4 W. BLACKSTONE, COMMENTARIES 300.

85. U.S. CONST. amend. V, VI. The "presumption of innocence" is used to refer to standards or rules of evidence, and is usually shorthand for the fact that the prosecution must prove guilt beyond a reasonable doubt. See Wilson v. United States, 232 U.S. 563, 569-70 (1913). Here, however, it denotes also the Fifth Amendment guarantee that a person will not be punished or deprived of life or liberty until he or she is found deserving of such deprivation through due process of law.


87. "It is clear that the conditions for pretrial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society." Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971). Because of the presumption of innocence, a practice constituting legitimate punishment for a sentenced prisoner may be wholly invalid if inflicted upon a detainee. See generally Note, The Conditions of Pretrial Detention, 79 YALE L.J. 941, 957 (1970).
Greater recognition is required of the differing purposes of incarceration for the two kinds of inmates. The detainees are confined only because their presence at trial must be assured; the convicted prisoners are incarcerated for entirely different purposes, including rehabilitation, punishment and deterrence of further crimes.88

**Growth of the “Least Restrictive Means” Test**

The scope of protection afforded pretrial detainees by the Eighth Amendment was first litigated when a group of arrestees was alleged to have been treated worse than were convicted inmates. In *Anderson v. Nosser*90 plaintiffs were arrested in a large group during a protest against racial discrimination in Natchez, Mississippi in 1965. Thirty-nine cells in the state penitentiary’s maximum security unit were cleared to house the more than 250 detainees.90 The subhuman treatment inflicted upon these detainees was held to be a transgression of “even those minimal ‘standards of decency’ mandated in the treatment of convicted felons.”91

In *Anderson* the plaintiffs had been confined separately under special circumstances. In at least two other instances, federal courts have examined situations where detainees were “mingled indiscriminately” with sentenced prisoners.92 Absent separation of the two classes, a higher standard of care had clearly not been required for detainees. One

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90. 438 F.2d 183 (5th Cir. 1971).
91. Id. at 187.
92. Id. at 191. "On arrival all male prisoners were required to strip naked and all women prisoners were ordered to remove their shoes, stockings, sweaters, coats, jewelry, and wigs. All were compelled to consume a laxative and were deprived of all personal belongings, including sanitary napkins and medicines. The prisoners were then led to the cells. Up to eight persons were placed in each cell, which contained two steel bunks without mattresses or other bedding, a toilet without a seat, and a washbasin. There were no towels or soap and there was inadequate toilet paper. The temperature ranged from 60 to 70 degrees, the chill being aggravated by exhaust fans which blew intermittently on the occupants. Some of the men eventually were permitted to get their underwear, but others were nude for a period of 36 hours. Many were subjected to blood tests. Moreover, while standing in the prison courtyard awaiting processing several plaintiffs were kicked, pushed, cursed, and abused by highway patrolmen and other guards." Id. at 187-88. Plaintiffs brought several tort actions in June of 1969, and a jury returned a verdict for defendants. Subsequently plaintiffs appealed, relying on section 1983 to sustain their contention that defendants should be held liable as a matter of law. The Fifth Circuit, sitting en banc, reversed and remanded for the assessment of damages due plaintiffs but also allowed the trial court to cure any prejudice to defendants caused by plaintiffs' delay.
of these cases, Jones v. Wittenberg, superscript 93 invalidated several practices in the county jail serving Toledo, Ohio, where the inmate population was fully three-fourths detainees. The evidence in Jones revealed: (1) a failure to provide inmates with any clothing or facilities to wash the clothes they were wearing when they arrived; (2) issuance of blankets which may not have been washed since their last use; (3) a lack of mirrors (only two in the entire jail); (4) food preparation undertaken in the basement under leaking sewer pipes; and (5) minimal visitation rights (including attorney-client) with no semblance of privacy. As the court commented:

[W]hen the total picture of . . . Lucas County Jail is examined, what appears is confinement in cramped and overcrowed quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who . . . lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette. . . . Most jails are bad, but this one is unusually bad.

Perhaps the most thorough judicial study of pretrial detention conditions to date was entertained by an Arkansas district court in the case of Hamilton v. Love. That lawsuit was a class action brought by detainees in the jail of Pulaski County, Arkansas. The court held that because the conditions of detainment in the county jail were essentially punitive the detainees were subject to conditions which violated the strictures of the Eighth Amendment and the due process requirements of the Fifth and Fourteenth Amendments. The court further stated that, since detainees are not "convicts" or "prisoners" (having been convicted of no crime), they should not be subjected to any "punishment," whether cruel and unusual or not. In conclusion, the court held that the conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the state's only legitimate purpose—that is, to assure the detainee's presence at trial.

Unduly punitive pretrial conditions undoubtedly have an impact on the ability of those accused to defend themselves adequately and to present a favorable impression in court. It may also cause them to alter pleas in an attempt to minimize or to avoid further incarceration.

94. Id. at 96.
95. Id. at 96-97.
96. Id. at 99.
98. Id. at 1193.
99. Id.
100. Id. at 1192.
101. Empirical studies have indicated that detainees are far more likely than per-
Adoption by other district courts of Hamilton's "least restrictive means" test for determining the constitutionality of pretrial detention practices could invalidate present conditions in many of America's county jails. The widespread practices of confinement in small individual cells, denial of recreation and exercise, and restricted mail privileges are subject to question when this test is applied. If they do not represent the least restrictive means of insuring a defendant's presence at trial, such practices violate constitutional guidelines under this test and must fall as unnecessarily punitive.

Inadequate Civilian Staffing and the Trusty System

Because many jails and prisons are considerably understaffed, docile and trusted inmates are often allowed to perform certain tasks that would otherwise occupy the time of civilian personnel. In return, these "trusties" receive special privileges not dispensed to other inmates. This system, although theoretically for the benefit of the prison population, may result in practices which violate the Eighth Amendment.

The most comprehensive judicial inquiry into a trusty system came in the Eighth Circuit case of Holt v. Sarver where the Arkansas practice of delegating over 90 percent of the prison system's functions to trusties was declared unconstitutional. While the value of according trusty status to deserving inmates was itself not questioned, the court was horrified by the abuses inherent in one Arkansas institution:

The few free world people are only nominally in command of the situation at Cummins [Prison Farm], and the trusties could take it over in a moment. Perhaps the reason they do not do so is that they do not want to spoil a good thing.

The principal defect in the Arkansas system was the use of trusties as guards—a practice which officially existed only in Arkansas, Louisiana, and Mississippi. Although this procedure was condemned in sons released on bail to be convicted and serve longer sentences, even when all other variables relating to likelihood of conviction are held constant. Rankin, The Effect of Pretrial Detention, 39 N.Y.U.L. Rev. 641 (1964). Undoubtedly the greatest hindrance to the detainee is that confinement impedes his ability to communicate with witnesses, attorneys and other individuals necessary to the preparation of a successful defense. Cf. Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970) (black juvenile released from custody for purpose of aiding in his own defense where white attorneys would have had difficulty in interviewing possible witnesses).

102. See California State Employees' Ass'n, California Prisons in Crisis, Appendix A (Sept. 24, 1971).
105. Id. at 382.
106. Id. at 373.
107. Id.
Holt, the court did not illustrate as clearly in that case the limitations to be placed in filling staff vacancies as did the district court in Hamilton v. Love.\textsuperscript{108} In Hamilton the court said that there was a constitutional minimum on the number of civilian personnel each facility must possess, principally in order to "protect the lives and safety of the detainees."\textsuperscript{109} The importance of this decision is its suggestion that the judiciary has the capacity both to assess the hazards of nonsupervision of a given institution and to calculate the state's duty of protection to the population confined therein and to order that correctional authorities conform to minimum levels of service and protection.\textsuperscript{110}

One other interesting problem highlighted by an Eighth Amendment challenge of an abusive trusty procedure involved the applicability of section 1983 relief. In a 1971 case, Roberts v. Williams,\textsuperscript{111} a prison warden selected for guard duty over a road gang a 23 year old trusty. The trusty possessed only a fourth grade education and had been convicted and sentenced to prison for assault with intent to commit murder. The trusty was permitted to carry a twelve-gauge pump shotgun in the course of his duty. The court upheld the complaint filed by prisoners who worked on that road gang on the ground that they had been subjected to a form of "cruel and unusual punishment."\textsuperscript{112}

**Matters of Defense, Procedure and Remedies**

No discussion of Eighth Amendment litigation would be complete without a discussion of the defenses that have been raised, procedural problems, and appropriate remedies.

**The Defense of Poverty**

In Eighth Amendment litigation, penal administrators and public officials have repeatedly sought to explain poor conditions as the result of insufficient funds. They have stated, essentially, that nothing can be done to alleviate unfortunate conditions or practices without further financial allocations.\textsuperscript{113} However, the courts have consistently held that

\textsuperscript{110} Because staffing problems may only be temporary and depend largely on size of inmate population in the given facility (the larger the prison population, the greater the burden on staff personnel), constitutional minima in this area will vary. Hamilton recognized the ability of the courts to assess adjustments made in staffing for the purposes of conformity with institutional dictates. 328 F. Supp. at 1196.
\textsuperscript{111} 39 U.S.L.W. 2590 (5th Cir. Apr. 1, 1971).
\textsuperscript{112} \textit{Id.}
notwithstanding the economic difficulty involved, prison and jail officials are subject to the same constitutional restrictions as are ordinary citizens. Indeed, no "consideration of convenience and thrift [could] outweigh the rudiments of human decency. Inconvenience and expense are the inevitable price to be paid for many years of callous neglect."[115]

Declaratory and Injunctive Relief

Injunctive relief is the surest method of permanently ameliorating the unlawful treatment of detainees and prisoners. The standard prayer in complaints alleging infliction of cruel and unusual punishment requests both a declaration of unconstitutionality and an order permanently enjoining those practices designated as invalid. And most importantly, the courts have not hesitated in certain cases to issue injunctions that will alter the mode of confinement in order to comply with constitutional standards.[116]

In many situations, however, prison officials have avoided the granting of a permanent injunction (even where the court had declared unconstitutional punishment) by convincing the court that the invalid policy had been or would subsequently be discontinued.[117] Where a permanent injunction is nevertheless deemed necessary by the court, the judge may require submission to him of new rules that will carefully limit the use of a particular practice, such as punitive segregation.[118] Plans may also be requested from the defendants, the institutional authorities themselves, as to the most appropriate means of correcting physical or staffing defects in a given facility.[119]

114. "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . . If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

115. Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, No. C-173-217 (Mich. Cir. Ct., filed Jan. 25, 1971) at 29 (memo op.). "Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons." Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971). In Jackson v. Bishop, Judge (now Justice) Blackmun remarked that "[H]umane considerations and constitutional requirements are not . . . to be . . . limited by dollar considerations." 404 F.2d 571, 580 (8th Cir. 1968).


Several federal courts which have found conditions in need of improvement have turned to the techniques of settlement—such as conciliation and negotiation—to maximize responsiveness on the part of institutional authorities. This approach by federal courts has developed as something of a trend in cases where compliance is reasonably anticipated on the part of defendant administrators. The principal advantage of an arbitration or settlement conference, of course, is that inmate complaints and suggestions may be aired and given due consideration in the process of reforming rules and procedures. Other procedures recently employed by various tribunals include extensive consultation with penologists and other experts and retention of jurisdiction for significant lengths of time. When either injunctive relief or settlement-style consent decrees are employed, the court may choose to retain jurisdiction for an extended period, either in a supervisory role or as an arbiter in the processes of submitting plans, making rules, or developing acceptable prison procedures. Perhaps this continued judicial involvement better enables the court to balance the justified complaints of prisoners against the legitimate needs and interests of prison administrators. Certainly such an approach seems more palatable than continued courtroom controversy. Indeed this approach appears to reduce the adversariness of the litigants and focus more clearly on the need and the methodology to improve unfavorable conditions of prison confinement.

**Damages**

Damages are a standard remedy in lawsuits brought under section 1983 for violation of constitutional rights under color of state law. In Eighth Amendment cases in particular, plaintiffs may receive not only injunctive relief but also remuneration for damages personally suffered. Where a trier of fact believes that punishment has been cruel

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122. Expert testimony is of special importance in Eighth Amendment litigation. Noted penologists, ex-wardens, and psychiatrists can give evaluations of what they have observed on visits that will often be weighed more heavily by the court than inmate complaints. Also of great value are inspections and reports made by fire marshals, building code inspectors, and doctors. *See* Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971).


and unusual, it may award compensatory damages based on one or all of the following factors: physical deprivations, needless degradation, loss of work opportunity, and mental anguish.126 Supreme Court Justice Brennan indicated the expanding nature of compensatory relief under section 1983 when he stated that federal judges were "duty-bound to enrich the jurisprudence" of federal law by incorporating remedies available in the state where the judges were sitting.127 Most of the traditional elements of the law of damages appear to be equally applicable to inmates.128

The propriety of granting punitive damages has been acknowledged in certain Eighth Amendment cases, at least those in which defendants have displayed a definite pattern of misconduct.129 Nevertheless, judges have consistently evidenced their unwillingness to award punitive damages in Eighth Amendment cases.130 It appears, in fact, that punitive damages will be awarded only upon a showing that the offending prison officials acted with actual knowledge that they were violating a right secured by the Constitution or by other laws, or with reckless disregard of the likelihood that such a right was thus violated.131

Limitations on the Courts

In recent years, the courts have provided the principal relief for the complicated problems that now beset the penal system. Reluctantly, they intervened in prison and jail administration when it became evident that local authorities were not policing themselves adequately. By now the judicial branch has made it clear that penal institutions must operate within the confines of an expanded Eighth Amendment, but the courts


128. "This liability, however, is entirely personal in nature intended to be satisfied out of the individual's own pocket. Moreover, the doctrine of sovereign immunity, as codified by the Eleventh Amendment, bars the exaction of a fine from a state treasury without the state's consent, at least on account of tortious actions committed by its agents under the circumstances of this case." Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), cert. denied, 40 U.S.L.W. 3431 (U.S. Mar. 6, 1972).

129. Id. See also Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).


are nevertheless powerless to initiate a coordinated program to upgrade these same facilities:

The judicial activity has been a last resort to stop clearly unconstitutional activity, and has not provided a coordinated positive approach to these problems. In addition, prisoners participating in legal actions risk retaliation from jail personnel. It is essential for other governmental agencies to assume a more active role.\textsuperscript{132}

Because the conditions required for a finding of unconstitutionality must be so severe, it is accurate to say that the Eighth Amendment is presently helpful in abating only the very worst practices. In fact, litigation in this area, even if resolved on behalf of the complaining inmates, may succeed in elevating their standard of treatment merely a level or so above that designated "cruel and unusual punishment."

The nebulous character of the constitutional standard itself contributes enormously to the inconsistency of decisions from one jurisdiction to another.\textsuperscript{133} Indeed, the very flexibility which enables the Eighth Amendment to be an instrument of penal reform in one jurisdiction may have an opposite effect elsewhere. Considering these limitations on judicial efficiency in the area of penology, any further improvements in our prisons systems must be legislative or administrative in origin.\textsuperscript{134}

\textbf{Conclusion}

The language of the Eighth Amendment proscribes only the worst of punishments. Consequently, few means of incarceration were seriously questioned under its aegis until the past few years. This was true even though the Supreme Court more than sixty years ago described the scope of the Eighth Amendment in the following manner:

\begin{quote}
Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.\textsuperscript{135}
\end{quote}

The wider application to which the constitutional limitation on punishments has eventually been extended now includes local jails and state prisons. The question today is not whether imprisonment, which unlike capital punishment may vary in degrees and duration, is justifiable, but what manner of confinement is justifiable.


\textsuperscript{133} See text accompanying notes 65-68 supra.

\textsuperscript{134} "We do not doubt the magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities." Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), \textit{cert. denied}, 40 U.S.L.W. 3431 (U.S. Mar. 7, 1972).

\textsuperscript{135} Weems v. United States, 217 U.S. 349, 373 (1910).
Relying on the flexibility of the Eighth Amendment, courts have now included several previously ignored elements in their consideration of the constitutionality of imprisonment. Thus the scope of the Eighth Amendment has mushroomed. Judicial imposition of inmate population limits for particular jails has developed as a remedy for severe overcrowding and its detrimental effects. Several constitutional yardsticks have been adopted for the purpose of eliminating abuse of punitive segregation. Unduly harsh conditions of pretrial detention are now of questionable constitutional validity under the least restrictive means test. Systematic denials of medical care and unsanitary or wholly deteriorated physical structures have both contributed to declarations of unconstitutional punishment. Negligent delegation of authority to trusties and inadequate civilian staffing have likewise just recently been included within the umbrella of Eighth Amendment scrutiny.

Although impressive advances have occurred of late through resort to the Eighth Amendment, in truth its application has been limited to complex and time consuming litigation affecting only one institution at a time. Definition of its scope still is proceeding on a case-by-case basis. These facts indicate a need for some degree of precision and uniformity, available perhaps only with the assistance of concrete legislative standards.\footnote{136. \textit{Model Act}, supra note 7, at 9-14.}

Unfortunately, legislatures have thus far been "almost totally unresponsive to prisoner efforts to seek redress in positive ways."\footnote{137. \textit{Id.} at 3 (foreword by M. Rector, Director of NCCD).} Guidelines have, nevertheless, quite recently been suggested through the efforts of the National Council on Crime and Delinquency in "A Model Act for the Protection of Rights of Prisoners." Suggested programs involving independent reviewing authorities\footnote{138. \textit{Id.} at 18-19.} and ombudsmen\footnote{139. \textit{Id.} at 17-18. \textit{See also} Spector, \textit{A Prison Librarian Looks at Writ-Writing}, 56 \textit{Calif. L. Rev.} 365 (1968). Maryland has such an ombudsman. \textit{Md. Ann. Code}, art. 41, § 204F (Supp. 1971).} are worth investigation at the legislative level. Before the further outbreak of violence in our nation's prisons, these possibilities and countless others must be weighed carefully. Prompt action must then be taken on the most constructive suggestions. The prisons will not wait.

\textit{Gary Wood*}