

1976

The Eighth Amendment and Prison Conditions: Shocking Standards and Good Faith

Richard J. Dunn

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Richard J. Dunn, *The Eighth Amendment and Prison Conditions: Shocking Standards and Good Faith*, 44 Fordham L. Rev. 950 (1976).

Available at: <https://ir.lawnet.fordham.edu/flr/vol44/iss5/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE EIGHTH AMENDMENT AND PRISON CONDITIONS: SHOCKING STANDARDS AND GOOD FAITH

I. INTRODUCTION

Perhaps no section of the Constitution so dramatically reflects changing societal standards as the eighth amendment's proscription against "cruel and unusual punishments."¹ Some punishments are "manifestly"² impermissible, but most have been viewed as a necessary, if somewhat distasteful, responsibility of society. Just three years after the Supreme Court found that a sentence as small as ninety days could be prohibited by the eighth amendment,³ a federal court in Arkansas not only countenanced whipping,⁴ but, pointing out that convicts should be disciplined,⁵ laid down guidelines for the strokes:

It must not be excessive; it must be inflicted as dispassionately as possible and by responsible people; and it must be applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment given conduct may produce.⁶

1. U.S. Const. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. In *re Kemmler*, 136 U.S. 436, 446 (1890). The court gave the following examples: "burning at the stake, crucifixion, breaking on the wheel, or the like . . ." The view that torturous punishments were proscribed by the amendment has prevailed since *Wilkerson v. Utah*, 99 U.S. 130 (1878) (death by shooting held acceptable since it did not amount to torture). The more difficult question has been whether excessive punishments are similarly prohibited. In *O'Neil v. Vermont*, 144 U.S. 323 (1892), the defendant had violated the liquor laws and was separately sentenced for each of the hundreds of drinks sold. The Court upheld the sentence, even though it effectively meant imprisonment for life. *Id.* at 331. The first case to prohibit disproportionate punishment was *Weems v. United States*, 217 U.S. 349 (1910), where, as punishment for falsifying a government document, the defendant was sentenced to a minimum of twelve to fifteen years in chains at "hard and painful labor" with loss of all personal rights for life. *Id.* at 366. The Supreme Court overruled the sentence, stating that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 367. The *Weems* case had the potential for being one of the most important decisions in the history of the Court, since it seemed to prohibit all punishments that were excessive in view of the offense. This interpretation, however, has been so riddled with exceptions as to have little practical effect. For a thorough discussion of the importance of the *Weems* decision, see Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *Buffalo L. Rev.* 783 (1975).

3. In *Robinson v. California*, 370 U.S. 660 (1962), defendant was convicted for the status of narcotics addiction. "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

4. *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).

5. *Id.* at 686.

6. *Id.* at 689. The court found that these safeguards did not exist at the prison and enjoined further whipping until they were instituted. *Id.* Similarly, in *State v. Cannon*, 55 Del. 587, 190 A.2d 514 (1963), the court upheld whipping, stating: "The Supreme Court, however, has not

The eighth amendment has at various times been held to prohibit relatively mild punishments. At other times, however, it has been held to permit what would now be considered nothing less than torture.⁷ Recently, the Tenth Circuit held in *Poindexter v. Woodson*⁸ that "good faith" is a defense to a suit seeking damages for the infliction of cruel and unusual punishment upon a prisoner. The dissent questioned whether the officers would be allowed to claim good faith because of a mistaken belief that the law allowed the use of the rack and screw.⁹ A look at the various interpretations and applications of the eighth amendment will show that this is far from a merely rhetorical question.¹⁰

The history of the doctrine of cruel and unusual punishment supplies a good perspective of the problem but presents no usable standard. The Supreme Court has rejected the historical approach¹¹ and has found it inappropriate "merely to measure a challenged punishment against those that history has long condemned."¹² Most often, the history of American punishment teaches, by horrid example, that beatings and torture were used not only as discipline but also as a fringe benefit for sadistic guards.¹³

The phrase "cruel and unusual" did not originate in our Constitution, but

as yet held the punishment of whipping, in itself, cruel. It has spoken of it as infamous, but that is possibly true of all punishment for crime." *Id.* at 596, 190 A.2d at 518. As recently as *Inmates of the Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971), the court left open the question of what is "cruel" corporal punishment, although it determined that the beatings of the inmates went "beyond any force needed to maintain order . . . even if some corporal punishment may be permitted under the Constitution . . ." *Id.* at 22-23. In the related area of school discipline, the Court recently affirmed a district court holding that school teachers could use corporal punishment on their charges pursuant to a North Carolina statute if procedural safeguards exist and the punishment is imposed in a reasonable manner. *Baker v. Owen*, 96 S. Ct. 210 (1975), *aff'g* 395 F. Supp. 294 (N.D.N.C. 1975). See *N.Y. Times*, Oct. 21, 1975, at 1, col. 4.

7. As an example of the anomalies in this area, the Court in *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958), held that although execution was an acceptable penalty for desertion, denationalization was cruel and unusual. The Court ruled on the same day in *Perez v. Brownell*, 356 U.S. 44 (1958), that denationalization was an acceptable penalty for voting in a foreign election. *Id.* at 62. Understandably, this case was subsequently overruled by *Afroyim v. Rusk*, 387 U.S. 253 (1967).

8. 510 F.2d 464, 466 (10th Cir.) (per curiam), cert. denied, 96 S. Ct. 85 (1975).

9. *Id.* at 467 (Doyle, J., dissenting).

10. See H. Barnes, *The Story of Punishment* 150-52 (2d ed. 1972) [hereinafter cited as Barnes], describing the use of the rack and thumb screw in American prisons.

11. *Furman v. Georgia*, 408 U.S. 238, 266 (1972) (Brennan, J., concurring), referring to *Weems v. United States*, 217 U.S. 349 (1910). Circuit courts have enunciated this same principle. See, e.g., *Poindexter v. Woodson*, 510 F.2d 464 (10th Cir.) (per curiam), cert. denied, 96 S. Ct. 85 (1975); *Wheeler v. Glass*, 473 F.2d 983 (7th Cir. 1973); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972); *Anderson v. Nosser*, 438 F.2d 183 (5th Cir. 1971), modified, 456 F.2d 835 (5th Cir.) (en banc), cert. denied, 409 U.S. 848 (1972).

12. *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring).

13. See generally Barnes, *supra* note 10; D. Dix, *Prisons and Prison Discipline* (2d ed. 1967).

in a 1688 Act of Parliament meant to curb the incredible excesses of the Stuart reign.¹⁴ While the phrase was so successful that it became an example to other nations, its substantive effect was not great. Drawing and quartering was acceptable, whipping was a normal punishment and the pillory was an institution.¹⁵

Due perhaps to its rare invocation and general ineffectiveness, the phrase "cruel and unusual" met with surprisingly little debate before its inclusion in the Bill of Rights.¹⁶ It may well be that the phrase has been misinterpreted and given an application far beyond the original intention.¹⁷

For many reasons, the eighth amendment was rarely invoked until relatively recently.¹⁸ Ironically, one of the most important of the early cases arose from an attempt to devise a more "humane" method of execution—the electric chair. Its use was upheld in *In re Kemmler*,¹⁹ and the decision reflected the values of the time. Cruel and unusual punishment was defined as "something inhuman and barbarous, something more than the mere extinguishment of life."²⁰ Punishments that were "manifestly cruel and unusual"²¹ were proscribed.

The real problem for courts seems to lie in the definition of that which is manifest. More particularly, they must ascertain the present state of the "dignity of man"²² and the "evolving standards of decency that mark the

14. *Weems v. United States*, 217 U.S. 349, 371 (1910). For a description of brutal punishments in England, see L. Parry, *The History of Torture in England* 104-28 (rev. ed. 1975).

15. "Of these, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain or disgrace, are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. . . . Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears, others fix a last stigma on the offender, by slitting the nostrils, or branding in the hand or cheek." 2 W. Blackstone, *Commentaries*, Book IV, 376-77 (Cooley ed. 1899).

16. See *Weems v. United States*, 217 U.S. 349, 368-69 (1910). Representative Livermore of New Hampshire declared that: "'villains often deserve whipping, and perhaps having their ears cut off . . .'" and expressed his hope that such punishments remain in effect. *Id.* at 369.

17. See generally Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 *Calif. L. Rev.* 839 (1969). Pointing out that "Blackstone's England draws, beheads, burns, and quarters, slits noses and mutilates felons," the author posits that the clause was meant to forbid excessive rather than torturous punishments. *Id.* at 865. Since *Weems v. United States*, 217 U.S. 349 (1910), the Court has taken the position that both excessive and torturous punishments are prohibited. See note 2 *supra*.

18. See Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 *U. Cin. L. Rev.* 650, 656 (1970) [hereinafter cited as Singer I].

19. 136 U.S. 436 (1890). Apparently the electric chair is not the humane device it was intended to be. See note 46 *infra*. The description given by witnesses at the Rosenberg execution horrified even the most ardent devotees of the death penalty. See L. Nizer, *The Implosion Conspiracy* 478-87 (1973).

20. 136 U.S. at 447.

21. *Id.* at 446; see note 2 *supra*.

22. *Trop v. Dulles*, 356 U.S. 86, 100 (1958); see note 7 *supra*.

progress of a maturing society."²³ The effective application of the eighth amendment lies within these imprecise boundaries.

The only certainty is that history does not provide the answer to what constitutes "cruel and unusual" punishments.²⁴ In fact, many punishments which had long been acceptable were manifestly cruel by our standards and were certainly more than the "mere extinguishment of life."²⁵

Due to the traditional "hands off" attitude of the judiciary,²⁶ the eighth amendment is rarely applied to prison conditions. Aside from the generally stated reasons for this unwillingness to intervene,²⁷ there is an equally important sociological factor. When the judges were defining the phrase,²⁸ the country tolerated both slavery and child labor. Moreover, the "cruel and unusual" concept had very little force where Blacks and Indians were concerned. Since there was such incredible latitude in the treatment of innocent people, it is not surprising that convicted criminals elicited little sympathy.²⁹ "[T]he normal level of violence in the country was so high that

23. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This is a frequently quoted phrase in the eighth amendment area. It was quoted five times in *Furman v. Georgia*, 408 U.S. 238 (1972): id. at 327 (Marshall, J., concurring); id. at 242 (Douglas, J., concurring); id. at 383 (Burger, C.J., dissenting); id. at 409 (Blackmun, J., dissenting); and id. at 425 (Powell, J., dissenting). In this case the Court ruled that the death penalty as applied was unconstitutional. See notes 49-55 *infra* and accompanying text. It was also quoted in *Rudolph v. Alabama*, 375 U.S. 889, 890 (1963) (Goldberg, J., dissenting), where it was argued that the death penalty for rape may no longer be acceptable. The first recognition that the meaning of cruel and unusual punishment should change with the times was in *Weems v. United States*, 217 U.S. 349, 373 (1910), where it was suggested that the entire Constitution should be viewed as a document capable of this change.

24. See notes 11-12 *supra* and accompanying text.

25. *In re Kemmler*, 136 U.S. 436, 447 (1890). See note 15 *supra*; see also *Medley*, 134 U.S. 160 (1890), where condemned prisoners were not told of the date of their execution in order to induce constant terror.

26. The general view was that courts should almost never consider prisoner complaints. See *Singer I*, *supra* note 18, at 652-53 n.10. This reluctance was also explained in *Bethea v. Crouse*, 417 F.2d 504 (10th Cir. 1969): "We have consistently adhered to the so-called 'hands off' policy . . . [T]he basic responsibility . . . lies with the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice . . ." *Id.* at 505-06. (In this case the court reviewed the prisoner's complaint, since it was based on a constitutional right.) The doctrine was called a "questionable absolutism" in *Edwards v. Duncan*, 355 F.2d 993, 994 (4th Cir. 1966) (*per curiam*).

27. "1) separation of powers (administration of prisons is an executive function); 2) lack of judicial expertise in penology; and 3) fear that judicial intervention will subvert prison discipline." J. Palmer, *Constitutional Rights of Prisoners* 137 (1973).

28. The view that the prisoner was "for the time being the slave of the State" was stated in *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871). In that case, a convict had been contracted out by the warden to work on the C&O Railroad. He murdered a guard hired by the C&O and was sentenced to death. The court expressed the opinion that the Bill of Rights was not meant to apply to convicts. *Id.*

29. It is generally the societies which provide the least benefits to their people that have the harshest criminal laws. For a discussion of criminal law as a "barometer" of a nation's civilization, see M. Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 38-39 (1973).

violence to prisoners was not viewed as abnormal."³⁰

Prisons, as we know them today, were established to provide an alternative to harsh (usually corporal) punishments.³¹ The prisoners were supposed to remain in "[c]omplete and utter silence"³² and "were also restrained from any meaningful activity; their entire lives were spent in their small cells, alone and separate from the rest of the prison community."³³ Since the evolution of our society's attitudes toward punishment is so often a litany of ironies,³⁴ it is somehow fitting that solitary confinement, the reformer's idea for improving the plight of the convicted,³⁵ has become the most litigated, though hardly the most brutal, punishment in American history. Solitary confinement had its genesis in the isolation that was intended to bring the penitent closer to his Maker and away from the cares and temptations of the world.³⁶ Although it has not been ruled unconstitutional *per se*,³⁷ it is solitary confinement and its permutations that bring so many of the eighth amendment cases to court today.³⁸

30. Singer I, *supra* note 18, at 656 (footnote omitted).

31. Barnes, *supra* note 10, at 128-31.

32. Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 *Cath. U.L. Rev.* 365, 366 (1971) [hereinafter cited as Singer II].

33. *Id.* at 367.

34. Condemned prisoners were given expert medical attention so that they would be healthy for their painful death. Barnes, *supra* note 10, at 247-48. Doctors would hold the pulse of a prisoner who was being flogged in order to ensure that he would not die during the beating. *Id.* at 156.

35. *Id.* at 128; Singer II, *supra* note 32, at 365-67.

36. Barnes, *supra* note 10, at 247-48; see generally D. Dix, *Prisons and Prison Discipline* 68-90 (2d ed. 1967).

37. While at least some forms of solitary confinement have been debated since the nineteenth century (see Medley, 134 U.S. 160, 167-70 (1890)), courts are virtually unanimous in their holdings that solitary confinement, absent other harsh conditions, is constitutional. "[S]olitary confinement has traditionally been an appropriate means of maintaining prison discipline . . ." *Haines v. Kerner*, 492 F.2d 937, 942 (7th Cir. 1974) (per curiam). See *Black v. Warden*, 467 F.2d 202 (10th Cir. 1972) (per curiam); *United States ex rel. Walker v. Mancusi*, 467 F.2d 51 (2d Cir. 1972); *Gray v. Creamer*, 465 F.2d 179 (3rd Cir. 1972); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972); *Krist v. Smith*, 439 F.2d 146 (5th Cir. 1971) (per curiam).

38. One of the major hurdles for prisoners in this area is the strong tradition favoring imposition of solitary confinement. The modern view, that enforced solitude for prisoners is reserved for extreme cases, stems from New York State's accidental discovery that prisons could be a profit-making enterprise. Singer II, *supra* note 32, at 367-69. New York's Auburn system—which emphasized productive activity on the part of prisoners—triumphed over solitary confinement for economic reasons, rather than a concern for the well-being of the prisoners. *Id.*; Barnes, *supra* note 10, at 139. See B. McKelvey, *American Prisons* (1972), for an exhaustive history of American prisons prior to 1915. There were more than economic benefits to the Auburn system, since prisoners were active (and, in some cases, learned a skill) rather than being forced into constant contemplation. This was carried to extremes, however, as in Virginia, where convicts, pursuant to state law, were contracted into what amounted to slave labor for private companies in the railroad, canal and stone businesses. See *Ruffin v. Commonwealth*, 62 Va. 790, 793 (1871).

This Comment will outline the gradual progress toward a more humane interpretation of the eighth amendment standard and the discrepant treatment of the "good faith" defense by the courts.

II. THE DEATH PENALTY

While the Supreme Court has not set specific guidelines with respect to the constitutionality of prison conditions,³⁹ its decisions in the cases involving the imposition of the death penalty articulate a judicial conscience which sets the tone for decisions in the entire eighth amendment area. The problem is that the Court leaves tremendous latitude⁴⁰ in the interpretation of the general concepts it has proffered as standards.⁴¹

There can be no doubt that for most of our history the death penalty has not been deemed inconsistent with the "cruel and unusual" eighth amendment prohibition.⁴² Only recently has the constitutionality of the penalty been considered debatable,⁴³ but this would not preclude a finding of its unconstitutionality, as the Court has construed the eighth amendment as capable of expansion (or presumably contraction) with the times.⁴⁴

When the death penalty was generally accepted, most of the cases before the Court dealt not with its imposition but with the amount and degree of attendant suffering. A somewhat macabre example is found in *Louisiana ex rel. Francis v. Resweber*,⁴⁵ where a condemned man was placed in the electric chair and subjected to a bolt of electricity which failed to kill him. Undaunted, the state resentenced him and the Court upheld the sentence, pointing out that "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the

39. "The Supreme Court has never applied the Eighth Amendment to prison conditions or practices." W. Turner, *Challenging Conditions in Prisons Which Violate the Eighth Amendment*, in *Prisoners' Rights Sourcebook* 113 (1973).

40. *Id.* at 118.

41. See notes 20-23 *supra*.

42. "[C]apital punishment has always been a part of the heritage of Western man." M. Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 46 (1973). "[T]he punishment of death is not cruel . . ." *In re Kemmler*, 136 U.S. 436, 447 (1890).

43. In *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), the Court ruled that the death penalty as applied was unconstitutional, while acknowledging that earlier cases had been consistent in holding the penalty permissible. See, e.g., *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968), *cert. denied*, 403 U.S. 955 (1971).

44. The Court in *Weems v. United States*, 217 U.S. 349 (1910), compared it to the enlargement of the commerce clause. *Id.* at 374. In *Trop v. Dulles*, 356 U.S. 86 (1958), it was stated that the phrase's "scope is not static." *Id.* at 101. In *United States ex rel. Bracey v. Rundle*, 368 F. Supp. 1186 (E.D. Pa. 1973), the phrase was seen to change "as society changes." *Id.* at 1191. Other authorities have also commented on this elasticity. "[T]he Constitution must be read with flexibility . . . even though the result might shock the framers." M. Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 176 (1973). "The eighth amendment can only reflect the normative values of the American people." Note, *The Eighth Amendment and Prison Reform*, 51 N.C.L. Rev. 1539, 1550 (1973).

45. 329 U.S. 459 (1947).

necessary suffering involved in any method employed to extinguish life humanely."⁴⁶ Justice Frankfurter concurred, stating that unless the action of the state

offends a principle of justice "rooted in the traditions and conscience of our people" . . . this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. . . . I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution.⁴⁷

Justice Burton dissented on the grounds that the second electrocution was clearly unusual.⁴⁸

By whatever standard, the Court's decision in *Furman v. Georgia*⁴⁹ stands as a landmark in the evolution of the eighth amendment.⁵⁰ The nine separate opinions⁵¹ as to the constitutionality of the death penalty gave an exhaustive history of American values and their relationship to attitudes toward punishment. The divergence of opinion belies the thread of consensus among the Justices. The rejection of the historical approach is virtually unanimous—the fact that a punishment was once traditional does not make it acceptable today.⁵²

Chief Justice Burger, in his dissenting opinion,⁵³ spoke about "[t]he world-wide trend toward limiting the use of capital punishment . . ."⁵⁴ but suggested that the appropriate forum would be legislative, since "[v]irtually

46. *Id.* at 464. The following affidavit is from defendant Resweber: "Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath [sic].'" *Id.* at 480 n.2.

47. *Id.* at 470-71 (Frankfurter, J., concurring), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). This measurement of the "traditions and conscience" is necessary since the eighth amendment applies to the states through the fourteenth. While there is no longer any doubt as to full incorporation—see *McWilliams, "Cruel and Unusual Punishments": Use and Misuse of the Eighth Amendment*, 53 A.B.A.J. 451, 452 (1967)—the Court in *O'Neil v. Vermont*, 144 U.S. 323, 331, 334-35 (1892), held that the eighth amendment did not apply to state prison sentencing. See note 2 *supra*.

48. 329 U.S. at 479 (Burton, J., dissenting). The flexibility of the Court in this area was shown earlier in *Wilkerson v. Utah*, 99 U.S. 130 (1878), where shooting was held to be an acceptable method of execution, even though hanging was the traditional method.

49. 408 U.S. 238 (1972).

50. The decision totalled an unprecedented length of almost two hundred pages. It has been described as the "most comprehensive" decision in the area of prisoner rights. *W. Turner, Challenging Conditions in Prisons Which Violate the Eighth Amendment, in Prisoners' Rights Sourcebook* 113 (1973).

51. The decision itself, which held the imposition of the death penalty unconstitutional as applied, was per curiam. However, each Justice wrote a separate opinion. Justices Douglas, Brennan, Stewart, White and Marshall supported the judgment. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist dissented.

52. See 408 U.S. at 264-66, 329, 360 & 369 for references in the concurring opinions. In the dissents, see *id.* at 382, 409 & 429.

53. *Id.* at 375.

54. *Id.* at 404.

nowhere has change been wrought by so crude a tool as the Eighth Amendment."⁵⁵

Cases contesting the constitutionality of the death penalty under the eighth amendment are almost inevitably founded upon "the evolving standards of decency"⁵⁶ that are the parameters of permissible punishment. In 1968 the Court decided that a person could not be excluded from a murder trial jury because he opposed the death penalty,⁵⁷ stating:

[A] jury from which all such men have been excluded cannot perform the task demanded of it. . . . [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.⁵⁸

Judging from the increased scrutiny by the courts, the conscience of the community is less and less able to tolerate the harsh punishments it once traditionally accepted.⁵⁹

III. PRISON CONDITIONS

The "conscience of the community" standard is more difficult to apply to the treatment of prisoners, since prolonged suffering does not have the dramatic finality of death.⁶⁰ It may be that "[t]he true significance of these [cruel and unusual] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded,"⁶¹ but it is doubtful that our society would allow animals to undergo some of the punishments so frequently imposed on human beings.⁶²

55. *Id.*

56. See note 23 *supra*.

57. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

58. *Id.* at 519.

59. Anticipating more recent developments, Justice Goldberg, joined by Justices Douglas and Brennan, dissented in a denial of certiorari in the case of a rapist sentenced to death, asking: "In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition . . . violate 'evolving standards of decency . . . ' or 'standards of decency more or less universally accepted?'" *Rudolph v. Alabama*, 375 U.S. 889, 889-90 (1963) (footnotes omitted).

60. *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

61. 408 U.S. at 272-73. "The Amendment offered little guide . . . except . . . [i]f you are shocked . . . strike it down." M. Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 177 (1973). The four dissents in *Furman* emphasized the enormity of the step being taken on the basis of such an amorphous concept. Despite the generality of the phrase, courts have applied it to hygiene and even dental care.

62. See note 15 *supra*; Barnes, *supra* note 10, at 140. An opposing view is represented in Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 *Stan. L. Rev.* 996 (1964). After describing the Roman punishment for parricide, which consisted of being thrown into the sea in a sack filled with animals, the author states: "Is it not evident that the dominant purpose of such a punishment is not to cause suffering—for more painful executions might readily be contrived—but rather to deny the humanity of the condemned man and to degrade him to the level of, literally, an animal? . . ."

The necessity of finding a rational basis for the imposition of punishment, as reflected in *Robinson v. California*,⁶³ has affected the rationale for federal court review of prison conditions. In that case, the defendant was convicted for the "status"⁶⁴ of being a narcotics addict, with no proof that he had ever used narcotics in the state. The Court overturned the ninety day sentence, pointing out that "[i]t is not a law which even purports to provide or require medical treatment,"⁶⁵ and was akin to punishing a person for having a disease.⁶⁶

The thrust of the case seemed to be that a punishment, to be constitutional, must be rational.⁶⁷ The state could have the defendant undergo medical treatment,⁶⁸ but could not convict him of a criminal act since this would in no way further the legitimate aim of the state in controlling narcotics.⁶⁹

The court later limited this holding somewhat but, in so doing, once again underscored the necessity for a rational basis in punishment. In *Powell v. Texas*,⁷⁰ an alcoholic was convicted of public intoxication. The Court upheld the sentence, noting that a defense of compulsion was no bar to punishment⁷¹ since this defense would also apply to murderers or other felons.⁷² While Justice Black intimated in his concurring opinion that the historical approach had been resurrected,⁷³ the Court took great pains to point out that, to the

The eighth amendment, condemning this attitude toward the criminal as itself a crime, condemns those modes of punishment motivated by or historically associated with such an attitude." *Id.* at 1000 (italics omitted). From this analysis, it would appear that torture is acceptable if it does not deprive the victim of his humanity.

63. 370 U.S. 660 (1962); see note 3 *supra*.

64. 370 U.S. at 663.

65. *Id.* at 666. This reliance on medical authority has increasing relevance to the imposition of solitary confinement. See notes 107-14 *infra*. See also *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974), where it is suggested that solitary confinement would be unconstitutional if "medical or penological authorities" could agree on its unhealthy effects. *Id.* at 1390.

66. 370 U.S. at 666. In *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966), the court of appeals held that public drunkenness could not be classified as a crime although the defendant could be detained for treatment. Two years later, in *Powell v. Texas*, 392 U.S. 514 (1968), the Supreme Court held that the Constitution did not prohibit a criminal sentence for public drunkenness. See notes 70-74 *infra* and accompanying text.

67. 370 U.S. at 666. In his concurring opinion, Justice Harlan stated: "I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness" *Id.* at 678 (Harlan, J., concurring).

68. *Id.* at 664-66.

69. A legitimate aim, however, can result in unequal punishment. In *Tate v. Short*, 401 U.S. 395 (1971), the Court ruled that a state could not jail an impecunious traffic offender while allowing others to pay a fine, as this would amount to a denial of equal protection.

70. 392 U.S. 514 (1968).

71. *Id.* at 531-37.

72. *Id.* at 534.

73. *Id.* at 538 (Black, J., concurring) ("[p]ublic drunkenness has been a crime throughout our history"); see notes 11-12 *supra* and accompanying text.

limits of present medical and legal knowledge,⁷⁴ being jailed for public drunkenness was not irrational.

The *Powell* and *Robinson* decisions, however, have only limited applicability to prison conditions, since in these cases the Court was discussing punishment as an abstract concept—whether given conduct could properly be classified as criminal and thereby justify the imposition of punishment. Once a prisoner has been convicted and jailed, however, courts are far less likely to look into the rationality of specific disciplinary measures. Despite the many indications that we are progressing toward a more humane view of punishment,⁷⁵ courts are still reluctant to apply the eighth amendment to any but the most barbaric prison conditions. Aside from the traditional “hands off” attitude,⁷⁶ the real problem is that there is no standard which even pretends to be objective. The usual test is whether a punishment is “shocking.”⁷⁷ The word “shocking” is one that essentially appeals to the emotions.⁷⁸ Emotional content added to imprecise concepts such as “the

74. 392 U.S. at 536-37. In his concurring opinion in *Robinson*, Justice Douglas took great pains to describe both the former and present medical treatment of insanity and other diseases. 370 U.S. at 668-75 (Douglas, J., concurring). While the Court in *Weems v. United States*, 217 U.S. 349 (1910), and *Trop v. Dulles*, 356 U.S. 86 (1958), considered the appropriateness of the punishment in relation to the crime, the emphasis here is different since the issue is whether punishment of any type is appropriate.

75. This does not guarantee that “the evolving standards of decency” will always mean a decrease in punishment. As citizens become more concerned with a rising crime rate, stricter measures may be enacted. It has been argued that the failure of the prison system to prevent crime will move the public to improve prisons and to insist on rehabilitative programs. However, there is no reason to believe that rehabilitation would be more favorably received. See 51 N.C.L. Rev. 1539, 1548 (1973). It seems more likely that the public will demand longer sentences and certainty of punishment. One recent indication was *People v. Brodie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975), which upheld New York’s mandatory life sentence for drug offenders (the strictest law in the country). The court used the following standards: the gravity of the offense; the character of the offender and the threat he poses; the penological purposes of the legislature; and the sentence as compared to other punishments. By these criteria, the court found that the sentence was not “grossly disproportionate” and therefore did not violate the eighth amendment. *Id.* at 118, 332 N.E.2d at 347, 371 N.Y.S.2d at 482. However, in *Downey v. Perini*, 518 F.2d 1288 (6th Cir. 1975), vacated and remanded, 96 S. Ct. 419 (1975), noted in 44 *Fordham L. Rev.* 637 (1975), the court found that a thirty to sixty year sentence imposed for possession and sale of a small amount of marijuana was cruel and unusual because of the length of the sentence.

76. See notes 26-27 *supra* and accompanying text.

77. *Furman v. Georgia*, 408 U.S. 238, 369 (1972) (Marshall, J., concurring); *Novak v. Beto*, 453 F.2d 661, 671 (5th Cir. 1971), cert. denied, 409 U.S. 968 (1972); *Sostre v. McGinnis*, 442 F.2d 178, 191 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972); *Mayfield v. Craven*, 433 F.2d 873, 874 (9th Cir. 1970); *Bethea v. Crouse*, 417 F.2d 504, 509 (10th Cir. 1969); *Church v. Hegstrom*, 416 F.2d 449, 451 (2d Cir. 1969); *White v. Sullivan*, 368 F. Supp. 292, 296 (S.D. Ala. 1973); *Landman v. Royster*, 354 F. Supp. 1302, 1318 (E.D. Va. 1973); *Newman v. Alabama*, 349 F. Supp. 278, 281 (M.D. Ala. 1972), aff’d in part, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); *Holt v. Sarver*, 309 F. Supp. 362, 372-73 (E.D. Ark. 1970), aff’d and remanded, 442 F.2d 304 (8th Cir. 1971).

78. A similar problem is encountered with the term “revulsion.” See *Louisiana ex rel.*

evolving standards of decency,"⁷⁹ makes measurement of a particular situation almost impossible.

In the recent case of *McCray v. Burrell*,⁸⁰ the Fourth Circuit held that the following conditions were a per se violation of the eighth amendment:

McCray was kept naked in a barren cell without blanket or mattress and with nowhere to sit, lie or lean except against bare concrete or bare tile. He had no sink or running water; his only toilet was a hole in the floor, the cover of which was encrusted with human excrement. He was denied all articles of personal hygiene.⁸¹

The court used an alternative test to determine if the eighth amendment had been violated:⁸² whether the punishment was "shocking,"⁸³ or whether it was reasonable under the circumstances.⁸⁴

While these tests are sensible and widely accepted in principle, they have proven difficult to apply consistently. After a vivid description of the tortures conducted in the Arkansas prison system during the 1960's,⁸⁵ one observer noted: "Just as saddening as this picture of the Arkansas system was the initial judicial reaction—or lack of it—to these tales of horror."⁸⁶ Fortunately, judges are no longer so reluctant to intervene.⁸⁷

Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring); see text accompanying note 47 *supra*.

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

80. 516 F.2d 357 (4th Cir. 1975), cert. granted, 96 S. Ct. 264 (1975). Plaintiff McCray sought relief under 42 U.S.C. § 1983 for two incidents. In the first, he had asked to be moved from his cell due to unsanitary conditions; the officials complied, but McCray allegedly caused a disturbance after being refused his lawbooks. He was then placed in solitary confinement. The second incident concerned McCray's placement in a mental observation cell after another disturbance. He alleged that the conditions of both confinements violated the eighth amendment.

In another case now pending within the Fourth Circuit, an inmate of a prison camp in Virginia has brought a civil rights action against the superintendent of the camp for, inter alia, denial of medication, overcrowded conditions, and insufficient lighting and heating. See *Cassidy v. Reynolds*, No. 75-1501 (4th Cir., Jan. 26, 1976) (affirming in part and vacating in part the district court's granting of a motion for summary judgment in favor of the superintendent).

81. 516 F.2d at 369. Similar conditions in *Poindexter v. Woodson*, 510 F.2d 464 (10th Cir.) (per curiam), cert. denied, 96 S. Ct. 85 (1975), were held to violate the eighth amendment. There, prisoners were placed in solitary confinement for charges growing out of a riot. *Id.* at 465; see notes 166-69 *infra* and accompanying text.

82. 516 F.2d at 368 n.3.

83. *Id.* See note 77 *supra* and accompanying text.

84. "[D]oes the punishment constitute some rational means to reach a permissible end or is it, instead, arbitrary, . . . unreasonable, . . . or unnecessary . . . ?" 516 F.2d at 368 n.3.

85. See, e.g., *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965); notes 4-6 *supra* and accompanying text.

86. *Singer II*, *supra* note 32, at 377.

87. In *Therhault v. United States*, 481 F.2d 1193 (5th Cir. 1973) (per curiam), cert. denied, 414 U.S. 1114 (1974), the district judge personally inspected the jail to determine the constitutionality of its conditions. He found that the ventilation was acceptable and the prisoner had a reasonable diet. In *Aikens v. Lash*, 371 F. Supp. 482, 496 (N.D. Ind. 1974), modified, 514 F.2d 55 (7th Cir. 1975), inadequate lighting and ventilation were held to be cruel and unusual punishment. Compare *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973) (per curiam)

One stumbling block to judicial review of prison conditions was an undue reliance on the word "unusual" in the eighth amendment. For example, in *Roberts v. Peppersack*⁸⁸ the court held that a twenty-seven hour isolation where the prisoner was kept naked in forty degree temperature without mattress or blanket followed by sixteen days in semi-segregation without a bath was not unreasonable because the "punishment was milder than that which the courts supported in [other cases]."⁸⁹

This comparison of a prisoner's plight to that of others is interesting, but it is a futile way of determining whether his constitutional rights have been violated.⁹⁰ It is always possible to find that someone, somewhere, has been or is being treated worse, but this should be a regrettable moment in history, not a standard to be followed.⁹¹ Similarly, an institution's normally barbaric conditions should not be the excuse for even greater barbarism as a disciplinary measure.⁹²

In *Wilson v. Kelly*,⁹³ the constitutional rights of prisoners were found to be "personal and dependent on the particular facts."⁹⁴ In effect, this prevented prisoners, as a class, from challenging the overall conditions of a prison. It appears that this unnecessarily restrictive view is slowly but surely giving way to a more inclusive look at the operation of a prison.⁹⁵ For example, *Holt v.*

(reasonable fear of violence, terror and inmate assault held to be cruel and unusual punishment even though the plaintiff had not as yet been harmed), with *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973) (an isolated attack not violative of the eighth amendment).

88. 256 F. Supp. 415 (D. Md. 1966), cert. denied, 389 U.S. 877 (1967).

89. *Id.* at 431.

90. "[T]he deplorable conditions in jails and prisons are anything but unusual." W. Turner, *Challenging Conditions in Prisons Which Violate the Eighth Amendment*, in *Prisoners' Rights Sourcebook* 113 (1973). These conditions are not always due to intentional cruelty—often the problem is lack of money for building, overcrowding, or just neglect. See *Moctezuma v. Malcolm*, No. 74-2427 (2d Cir. July 31, 1975); *Jones v. Wittenberg*, 330 F. Supp. 707, 721-22 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

91. See notes 11-13 *supra* and accompanying text. This relativism was carried to its logical conclusion in *Ex parte Pickens*, 101 F. Supp. 285 (D. Alas. 1951). The case involved a prisoner held with forty others in one unsafe, unsanitary room with only one toilet. Even though the court found that the eighth amendment was to be interpreted "in the light of developing civilization," *id.* at 288, this punishment was held acceptable since soldiers in Korea were in some cases undergoing worse conditions "in the defense of all the people in our nation—including those now confined in the Anchorage jail . . ." *Id.* at 290.

92. This was one of the justifications for whipping presented by the Arkansas prison system: "Whipping is the primary disciplinary measure used in the Arkansas system. Prisoners there have few privileges which can be withheld from them as punishment." *Jackson v. Bishop*, 404 F.2d 571, 575 (8th Cir. 1968). The use of the whip was prohibited in this case. *Id.* at 580.

93. 294 F. Supp. 1005 (N.D. Ga.), *aff'd*, 393 U.S. 266 (1968) (per curiam). Here, prisoners sought to enjoin racial segregation and "hard labor" work camps as unconstitutional. *Id.* at 1007-08.

94. *Id.* at 1012.

95. See, e.g., *Moctezuma v. Malcolm*, No. 74-2427 (2d Cir., July 31, 1975), where the court determined that "the overcrowding and double celling of detainees at the two institu-

*Sarver*⁹⁶ dealt with the total environment of the prison and stated that the eighth amendment

is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual . . . [but also] . . . where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.⁹⁷

The court in *Holt* cited lack of rehabilitative purpose and programs as a factor in declaring the overall conditions of the prison unconstitutional, although this alone would not have been sufficient.⁹⁸ The major factors leading to the decision were brutality and lack of sanitary facilities.

Similarly, in *Gates v. Collier*,⁹⁹ even though whipping and the "black hole," a form of solitary confinement, could not be ruled unconstitutional *per se* on procedural grounds,¹⁰⁰ the court found that the prison was so unsafe, unsanitary, brutalizing and generally inadequate as to violate the eighth amendment. Specifically, the court found that solitary confinement in the "black hole" is impermissible if it is "carried out in a manner that is 'foul,' 'inhuman' and 'violative of [the] basic concepts of [human] decency.'"¹⁰¹ Having described the lack of food, cleanliness and bedding in the hole, the court mandated that, in the future, it must be employed so as to "comport with human decency."¹⁰² This, in fact, is the problem. It is as impossible to

tions create an unconstitutional deprivation . . ." *Id.* at 5292. The court had made a similar ruling the previous year with regard to the "Tombs." *Rhem v. Malcolm*, 507 F.2d 333, 337-39 (2d Cir. 1974). In *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970), 900 inmates were placed in a prison intended for 400-450 persons. This was held to be cruel and unusual punishment. *Id.* at 1019. And in *McCray v. Sullivan*, 399 F. Supp. 271 (S.D. Ala.), *aff'd in part*, 509 F.2d 1332 (5th Cir.), cert. denied, 96 S. Ct. 114 (1975), overcrowding was found undesirable and it was ordered that no more than two prisoners could be confined in an isolation cell.

96. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971).

97. *Id.* at 372-73.

98. "[T]he Court is not willing to hold that confinement in [a penal institution] is unconstitutional simply because the institution does not operate . . . rehabilitative facilities . . ." *Id.* at 379. The existence of rehabilitative facilities seems to be discretionary on the part of the state—no court has found punishment to be cruel and unusual simply because no rehabilitation is offered. There is an exception, however, where juveniles are concerned because, generally, state laws require some sort of rehabilitation or treatment. See, e.g., Ky. Stat. Ann. § 208.410 (1972); R.I. Gen. Laws Ann. 13-4-15 (1972). In *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), the court held that where a state detains a juvenile, it must supply "adequate treatment," noting that "[t]he law of New York fully recognizes this constitutional mandate." *Id.* at 585 n.7.

99. 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

100. *Id.* at 895. Both were authorized by Mississippi statute, and, in order to overturn them, 28 U.S.C. § 2281 required the convening of a three judge panel. Therefore, this court was powerless to act on the issue of constitutionality.

101. *Id.* at 894. For a discussion of the "black hole" see L. Orland, *Prisons: Houses of Darkness* 71-73 (1975).

102. 349 F. Supp. at 894.

reconcile decency with the "black hole" as it is to humanely administer the rack and screw.¹⁰³

If, as is often stated, the standard of punishment is whether it is "humane," most prisons in the United States would be in perpetual violation. Even federal prisons, which are claimed to be superior to state or local facilities, do not come close to meeting the standards set by the United Nations and several American organizations.¹⁰⁴ There is no reason to believe that the "evolving standards of decency"¹⁰⁵ will not set even greater standards for the future.¹⁰⁶

Solitary confinement is probably the most seriously debated of the often-used punishments, and it is here that the courts take a wide variety of positions. Undoubtedly, the most quoted opinion in the area is *Sostre v. McGinnis*.¹⁰⁷ Although the court found that solitary confinement itself was

103. See notes 9-10 *supra* and accompanying text. This requirement that the "black hole" be utilized in a humane fashion may be a backdoor method of abolishing it. Since the court could not directly outlaw this punishment (see note 100 *supra*), the only way to abolish it would be by carving out exceptions.

104. Testimony of the Director, Bureau of Prisons, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary at 4. These standards call for either a private room or eighty square feet of space. See *Moctezuma v. Malcolm*, No. 74-2427 (2d Cir., July 31, 1975), where the court discussed similar standards, stating: "The sad and shameful history of penology in this country has been decried and condemned by many authorities and it is hardly necessary at this late date to belabor the issue." *Id.* at 5286-87. Here, conditions of overcrowding and "double ceiling" were held unconstitutional. *Id.* at 5292. Most recently, a federal judge in Alabama ruled that prisoners in the Alabama state prisons were subjected to cruel and unusual punishment by their very confinement. For the first time, a federal judge handed down a set of minimum constitutional standards to be followed by the state prisons. *James v. Wallace*, No. 74-203-N (M.D. Ala., Jan. 13, 1976).

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

106. "It is disappointing to believe that fifty years from now punishments imposed today will be viewed as we view those imposed in colonial days, and yet, knowing that, we still refuse to do anything about it." Singer I, *supra* note 18, at 666. Despite the many examples of horrid conditions, recent cases demonstrate that their days are numbered, if not over. Since prisoners are unable to procure proper medical care on their own, courts have been particularly sensitive to this area and have prescribed medical care that is comparable to that available to the general public. A "constitutionally protected right to adequate provision for their physical health and well-being" is described in *Gates v. Collier*, 349 F. Supp. 881, 894 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974). The court in *Stokes v. Hurdle*, 393 F. Supp. 757, 761 (D. Md. 1975), stated that the right to medical care is "based upon the Eighth Amendment." See also *Ramsey v. Ciccone*, 310 F. Supp. 600, 605 (W.D. Mo. 1970). Mere negligence, however, is not actionable under 42 U.S.C. § 1983. See *Kimbrough v. O'Neill*, 523 F.2d 1057 (7th Cir. 1975): "[W]e all agree that harms to property resulting from the mere negligence of state employees are not actionable under § 1983." *Id.* at 1067 (Stevens, J., concurring). For decisions dealing with medical care, see *Mayfield v. Craven*, 433 F.2d 873, 874 (9th Cir. 1970); *Stokes v. Hurdle*, 393 F. Supp. 757, 762 (D. Md. 1975). These rights include dental treatment and, on one occasion, psychiatric care. The use of tear gas, once automatically employed to quell prison disturbance, is now more carefully controlled. The court in *Poindexter* examined the use of tear gas and found it appropriate to control the particular disruption. 510 F.2d at 466. The court in *Greear v. Loving*, 391 F. Supp. 1269 (W.D. Va. 1975), put prison administrators on notice by stating: "The court emphasizes the close scrutiny with which it considers the use of tear gas in correctional facilities." *Id.* at 1271.

107. 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972). *Sostre* had

not unconstitutional,¹⁰⁸ it nevertheless looked into the specific conditions of confinement¹⁰⁹ and found:

These factors in combination raised the quality of Sostre's segregated environment several notches above those truly barbarous and inhumane conditions heretofore condemned by ourselves and by other courts as "cruel and unusual."¹¹⁰

Another factor which prevented the court from declaring Sostre's confinement unconstitutional was that, by participating in compulsory "group therapy," Sostre could have reentered the general prison population.¹¹¹

Sostre was the first case to seriously consider the applicability of the eighth amendment to a sentence of solitary confinement.¹¹² One hopeful sign to those who would like to see solitary itself labelled cruel and unusual is contained in the majority opinion:

In some instances, depending upon the conditions of the segregation, and the mental and physical health of the inmate, five days or even one day might prove to be constitutionally intolerable.¹¹³

been confined to solitary for attempting to prepare legal papers for another prisoner, and because there was a general suspicion that he would attempt to escape or promote insurrection since he had refused to cooperate with prison authorities.

108. *Id.* at 193; see note 37 *supra*.

109. The court "considered Sostre's diet, the availability in his cell of at least rudimentary implements of personal hygiene, the opportunity for exercise and for participation in group therapy, the provision of at least some general reading matter from the prison library and of unlimited numbers of law books, and the constant possibility of communication with other segregated prisoners." 442 F.2d at 193-94 (footnotes omitted). In *Therlault v. United States*, 481 F.2d 1193 (5th Cir.), cert. denied, 414 U.S. 1114 (1973), the district judge personally inspected the jail to ascertain the conditions. See also *U.S. ex rel. Bracey v. Rundle*, 368 F. Supp. 1186 (E.D. Pa. 1973).

110. 442 F.2d at 194. A contrary decision was reached by the Second Circuit in *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967). The court disposed of the traditional arguments that a federal court should not intervene in a state prison matter: "We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper. The subhuman conditions alleged by Wright to exist in the 'strip cell' at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of the basic concepts of decency." *Id.* at 526 (footnote omitted). "Strip cells" are aptly named because the prisoner is stripped of basic rights. For a description of "strip cells" and reasons for their use, see L. Orland, *Prisons: Houses of Darkness* 73-74 (1975). Similar conditions were found to be cruel and unusual in *Osborn v. Manson*, 359 F. Supp. 1107 (D. Conn. 1973). But see *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971).

111. 442 F.2d at 185. A similar result was reached in *Winsby v. Walsh*, 321 F. Supp. 523 (C.D. Cal. 1971), where the defendant could have been released from segregation had he followed the rules.

112. See note 107 *supra*.

113. 442 F.2d at 193 n.23. A similar standard was described in *O'Brien v. Moriarty*, 489 F.2d 941, 944 (1st Cir. 1974) (solitary would have been impermissible if imposed for too long a time), and *Berch v. Stahl*, 373 F. Supp. 412 (W.D.N.C. 1974). In *Graham v. Willingham*, 384 F.2d 367 (10th Cir. 1967), the court found that two years in solitary was not cruel and unusual. This was an extreme situation, however, because the prisoner had been involved in three murders while in prison. *Id.* at 368.

Since few people could possibly come out of these horrors unscathed, the main problem seems to be documentation.¹¹⁴

Perhaps the closest scrutiny of solitary confinement was demonstrated in *LaReau v. MacDougall*.¹¹⁵ Here the court spoke directly to the issue of solitary confinement as a detriment to both health and sanity:

Enforced isolation and boredom are permissible methods of discipline, although they might not remain so if extended over a long period of time. But the conditions here went beyond mere coerced stagnation. . . . The indecent conditions that existed in this Somers prison strip cell seriously threatened the physical and mental soundness of its unfortunate occupant.¹¹⁶

The lesson of *Sostre* and *LaReau* may be that courts are coming to the realization that it is impossible to impose solitary confinement in a humane fashion.¹¹⁷

An earlier indication that courts are headed in this direction was *Lollis v. New York State Department of Social Services*,¹¹⁸ which enjoined the imposition of isolation on a fourteen-year old girl. The court took note of the testimony of a doctor as to the "sensory deprivation"¹¹⁹ aspect of solitary and stated: "a two-week confinement of a fourteen-year old girl in a stripped room in night clothes with no recreational facilities or even reading matter must be held to violate the Constitution's ban on cruel and unusual punishment."¹²⁰

Obviously, the case of an adolescent should involve a stricter standard than that of an adult,¹²¹ but the path is clear for a court to declare that solitary confinement per se has such intense and long lasting effects on even a

114. "[T]he implication is clear that if Martin Sostre could prove psychological damage to himself, or if the evidence at the trial overwhelmingly showed that isolation caused psychological injury, solitary by its very nature would constitute cruel and unusual treatment." Benjamin & Lux: Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 9 Clearinghouse Rev. 83, 87 (1975) [hereinafter cited as Clearinghouse]. The inability of medical authorities to agree on this issue was noted in *Johnson v. Anderson*, 370 F. Supp. 1373, 1390 n.37 (D. Del. 1974).

115. 473 F.2d 974 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973).

116. *Id.* at 978.

117. Clearinghouse, *supra* note 114, at 88.

118. 322 F. Supp. 473 (S.D.N.Y. 1970), modified, 328 F. Supp. 1115 (S.D.N.Y. 1971).

119. *Id.* at 481.

120. *Id.* at 482.

121. In fact, state regulations prohibited solitary confinement for children, but "isolation" was permitted. *Id.* at 477. This seems to be a distinction without a difference. In general, however, courts are more likely to proscribe punishment if it is imposed on juveniles. In *Martarella v. Kelley*, 359 F. Supp. 478, 483 (S.D.N.Y. 1973), the court ordered the closing of a youth facility because of physical danger to the detainees, having previously stated that adequate treatment was "a quid pro quo for the exercise of the State's rights as *parens patriae* . . ." *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (emphasis deleted). Solitary confinement was held to violate a juvenile's constitutional rights in *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972), since they "may not be treated like convicted criminals." *Id.* at 1365. For similar reasons, juveniles may not be sent to a prison with adults for the purpose of shocking them into proper behavior. *Baker v. Hamilton*, 345 F. Supp. 345 (W.D. Ky. 1972).

normally healthy adult that it is unacceptable in light of present day medical and psychological contributions to "the evolving standards of decency."¹²²

One suggestion is that prison punishment should be viewed in a manner analogous to potential violations of the first amendment: *i.e.*, the state must show a compelling interest for imposition of the punishment and also demonstrate that the punishment "is the least drastic method of achieving that interest."¹²³ Using this approach, solitary confinement would rarely be imposed since a milder form of discipline usually could be found.

Whatever the rationale, it is quite conceivable that

the courts will take the next logical step, and conclude that since there is such overwhelming evidence that suicide and mental breakdown necessarily result from solitary confinement, and since solitary confinement can serve no rehabilitative purpose, any confinement to solitary will be deemed cruel and unusual treatment.¹²⁴

IV. THE DEFENSE OF GOOD FAITH TO A SECTION 1983 ACTION FOR DAMAGES

From a purely logical standpoint, it would seem that good faith would be inappropriate as a defense to the infliction of cruel and unusual punishment. For if a punishment is "torture"¹²⁵ or so obviously "shocking"¹²⁶ or "bar-

122. See note 23 *supra* and accompanying text. Perhaps the best indication that solitary confinement is no longer acceptable to our society is the growing reluctance of prison administrators to acknowledge the existence of shocking conditions. Euphemisms such as the use of "Chinese" and "Oriental" to describe toilet facilities which are merely filth-covered holes in the ground is something less than straightforward. See *McCray v. Burrell*, 516 F.2d 357, 367 (4th Cir. 1975), cert. granted, 96 S. Ct. 264 (1975); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973). While both terms are common in some European countries, it does not seem likely that the usage is attributable to cosmopolitanism on the part of prison administrators. See generally Korn, *The Prisoners of Affirmation: Correctional Administrators as Penal Reformers*, in *Prisoners' Rights Sourcebook* 437, 437-40 (1973). This section is entitled "The Destruction of People by Means of the Debasement of Their Language" because the author accuses prison officials of justifying barbaric actions with euphemisms. Similarly, solitary confinement is too easily translated into isolation, segregation, and administrative hold. See note 121 *supra*. The court in *Krist v. Smith*, 439 F.2d 146 (5th Cir. 1971), distinguished "administrative segregation" from "solitary confinement." *Id.* at 147.

123. *Singer I*, *supra* note 18, at 679.

124. *Clearinghouse*, *supra* note 114, at 88 (emphasis deleted). In fairness to the administrators, it should be pointed out that there are some situations in which some form of solitary confinement is the only answer: for example, where the prisoner is a constant threat to the safety of others (see *Graham v. Willingham*, 384 F.2d 367 (10th Cir. 1967), where the prisoner was involved in the killing of other inmates every time he was released), or where the prisoner is a chronic escapist (see *Krist v. Smith*, 439 F.2d 146 (5th Cir. 1971)). Similarly, fifteen days in solitary confinement did not seem overly harsh in a case where a prisoner hit another over the head with a shovel. *Haines v. Kerner*, 492 F.2d 937 (7th Cir. 1974). In other cases, however, prisoners did no more than attempt to publish a newspaper, *Gray v. Creamer*, 465 F.2d 179 (3rd Cir. 1972), or represent the grievances of other prisoners in a work stoppage, *Meyers v. Alldredge*, 492 F.2d 296 (3rd Cir. 1974). There was no indication in these cases that less severe punishments were even considered.

125. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

126. See note 77 *supra* and accompanying text.

barous"¹²⁷ as to be raised to the level of an eighth amendment violation, how can a reasonable person claim to have perpetrated it in good faith?¹²⁸

In *Jones v. Wittenberg*,¹²⁹ for example, prisoners were subjected to treatment which bordered on the incredible—filthy conditions, solitary confinement, inadequate diet and general neglect. After excoriating the prison officials with some of the strongest language ever used in this area,¹³⁰ the court still found that even this violation of the prisoner's constitutional rights did not "show that the mistreatment which confinement therein constitutes is the result of any actual malice or ill-will upon the part of any of the defendants."¹³¹ This seems to be so loose a standard of malice as to be none at all, but the court then pointed out the real villain—a society whose "evolving standards of decency" stagnate at the prison gate:

It does not seem equitable to single out these defendants and mulct them in damages for continuing practices which are commonplace, and of very ancient usage. Especially would it seem unjust to do so when it is clear that up to at least a time shortly before this action was commenced, it was and perhaps it still may be the desire of a majority of the electorate that the county jail be an unpleasant and degrading, perhaps even a savagely cruel, place to be. Should the servant be punished for not refusing to obey the wishes of his master? At least in this case, this Court thinks not.¹³²

As distressing as the *Jones* standard may be, prisoners have only recently obtained the right to bring suit against their jailers under section 1983¹³³ for deprivation of their constitutional rights. In 1964 the Supreme Court ruled in *Cooper v. Pate*¹³⁴ that a prisoner who alleged discrimination on the basis of

127. In re Kemmler, 136 U.S. 436, 446 n.1 (1890).

128. See note 9 supra and accompanying text.

129. 323 F. Supp. 93 (N.D. Ohio 1971), aff'd sub nom. *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

130. The court discovered "confinement in cramped and overcrowded 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 in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette." *Id.* at 99.

131. This statement was made in a supplemental opinion. *Jones v. Wittenberg*, 330 F. Supp. 707, 722 (N.D. Ohio 1971), aff'd sub nom. *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

132. *Id.* The court was specifically referring to the fact that the public was not concerned enough to vote funds for better prisons. A different viewpoint was taken in *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 20 (2d Cir. 1971): "The public wants to know the facts, with a view to preventing the recurrence of conditions that led to the uprising." This concern, of course, was evinced only after forty-two people were killed.

133. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of 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." This statute was passed in 1871, during Reconstruction, and was known as the "Klu Klux Klan Act." Since it refers to color of state law, it is not available against federal prison officials.

134. 378 U.S. 546 (1964) (per curiam).

his religious belief was entitled to a hearing in federal court. The *Cooper* rationale has been held to apply not only against a warden, as in *Sostre*, but also against prison officials and employees,¹³⁵ so that section 1983 suits are now quite common.¹³⁶

Since "[g]ood faith or lack of knowledge will serve as defenses against monetary damages in a Section 1983 action,"¹³⁷ a showing of willfulness or at least "callous indifference"¹³⁸ is necessary for relief. Also, there must be a pattern of abuse, since isolated incidents are viewed as unavoidable.¹³⁹

The availability of the defense of lack of knowledge has been a good deal more limited since *Landman v. Royster*.¹⁴⁰ Here the court found that the administrator had violated the prisoners' constitutional rights since he was responsible for treatment "of such a shocking nature that no reasonable man could have believed that [it was] constitutional."¹⁴¹ The warden protested his ignorance of the starvation, brutality and lack of sanitary facilities, but the court found that he was put on notice by an earlier decision which dealt with the same constitutionally suspect practices at the prison.¹⁴²

135. *Wiltsie v. California Dep't of Corrections*, 406 F.2d 515 (9th Cir. 1968). The allegation was that the prisoner was beaten severely by a number of employees. The district court had ruled that "the allegations in the complaint are not sufficient to require interference in the internal administration of prison affairs." *Id.* at 517. In *McCray v. Burrell*, 516 F.2d 357 (4th Cir.), cert. granted, 96 S. Ct. 264 (1975), the right of the prisoner to sue the sergeant and captain of the guards was not questioned.

136. In a separate opinion in *McCray*, Judge Field remarked that such prisoner suits comprised approximately forty percent of the cases filed in the Fourth Circuit and opined that they "clog the docket of the district court with more frivolous litigation." 516 F.2d at 375 (Field, J., concurring in part, dissenting in part). It seems equally likely that many suits are filed because there are many injustices.

137. *South Carolina Dep't of Corrections, The Emerging Rights of the Confined* 162 (1972).

138. *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 719-20 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974). See also *Roberts v. Williams*, 456 F.2d 819, 827 (5th Cir.), cert. denied, 404 U.S. 866 (1971), where the court pointed out that *Torquemada*, an official of the Spanish Inquisition, was cruel with presumably the best of intentions.

139. See, e.g., *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), where a spontaneous attack by a guard was held not to be punishment. In *Parker v. McKeithen*, 330 F. Supp. 435, 437 (E.D. La. 1971), vacated, 488 F.2d 553 (5th Cir. 1974), the prison's failure to protect plaintiff from attack by another inmate was originally held not actionable. The Fifth Circuit vacated that decision and found the attack actionable. The problem in this area is that, while they are cruel and unusual, such incidents are not officially imposed punishment. The necessity for punishment to meet the threshold of an eighth amendment violation had an ironic twist in *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974), where it was determined that the eighth amendment might not be applicable to pretrial detainees since they were not technically being punished. The court found, however, that the due process and equal protection clauses of the fourteenth amendment gave a protection to the detainees which was at least equal to that guaranteed by the eighth amendment. *Id.* at 336-37. A prisoner is similarly protected where solitary confinement is imposed, not for punishment, but to prevent attacks by other prisoners. *Sweet v. Leeke*, No. 74-1118 (4th Cir., Dec. 1, 1975).

140. 354 F. Supp. 1302 (E.D. Va. 1973).

141. *Id.* at 1318.

142. *Id.* The earlier decision was *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966), cert.

Assuming the prison administrator has knowledge or notice of a given practice, good faith is the only competent defense. *Pierson v. Ray*¹⁴³ was the first Supreme Court case to consider good faith as a defense in the analogous situation where a law is enforced which is subsequently found unconstitutional. Realizing the dilemma, the Court found that the defense of good faith was available in a section 1983 suit because:

[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.¹⁴⁴

Subsequent circuit court cases have applied the *Pierson* ruling to activities of prison administrators. In *Skinner v. Spellman*,¹⁴⁵ the court ruled that, although the plaintiff-prisoner's due process rights were violated (since he was not given written notice or time to prepare a defense in a disciplinary hearing), the defendant's "good faith reliance on standard operating procedure" was a defense to a section 1983 suit.¹⁴⁶

In *United States ex rel. Bracey v. Rundle*,¹⁴⁷ the court found damages inappropriate even though the prisoner was denied due process before being placed in solitary confinement, since these rights had been determined in cases decided after this incident. The court found that "[a]ny other position is inconceivable. . . . Prison officials should not be liable for damages simply because they are not blessed with the gift of constitutional clairvoyance."¹⁴⁸ The court commented favorably on similar reasoning in *Clarke v. Cady*,¹⁴⁹ which also dealt with procedural safeguards before confinement to solitary.

In a somewhat analogous situation the Supreme Court has recently indicated that good faith means more than mere lack of specific intention to violate constitutional rights. In *Scheuer v. Rhodes*,¹⁵⁰ representatives of three

denied, 388 U.S. 920 (1967), wherein the court criticized the conditions and supervision, expressing the fear that riots might result. *Id.* at 141. The potential for money damages in this situation was later demonstrated in *Sostre*, where a judgment of \$9300 was entered against the warden. *Sostre v. Rockefeller*, 312 F. Supp. 863, 885 (S.D.N.Y. 1970). The judgment was later reversed, however, as the defendant warden was merely a successor to the one responsible. *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972).

143. 386 U.S. 547 (1967).

144. *Id.* at 555.

145. 480 F.2d 539 (4th Cir. 1973).

146. *Id.* at 540. Dictum in *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973), underscored the unwillingness of courts to apply the law retroactively in prisoner civil rights cases. The court determined that the inmate's due process rights were violated by being placed in solitary confinement without advance notice of the charges—thus applying the law retroactively—and reversed the district court's denial of the injunction. However, the court did point out that "this case is unlike a suit for damages under a Civil Rights statute . . . measured by . . . [the] law at the time of the acts . . .", *id.* at 629 n.16, thus implying that a damage action raises the stakes sufficiently to make the court less likely to find for the plaintiff.

147. 368 F. Supp. 1186 (E.D. Pa. 1973).

148. *Id.* at 1190.

149. 358 F. Supp. 1156 (W.D. Wis. 1973) (warden held immune from damages since he reasonably believed in the validity of procedures subsequently deemed unconstitutional).

150. 416 U.S. 232 (1974).

students killed by the National Guard at Kent State University sued Governor Rhodes and other Ohio officials. The district court had presumed as fact the governor's good faith and dismissed the case for lack of jurisdiction.¹⁵¹ The court of appeals affirmed the dismissal.

After dispensing with arguments that the suit was precluded by the eleventh amendment,¹⁵² the Supreme Court noted that, although the governor had greater discretion than the police, his good faith could not be accepted without question lest section 1983 be rendered meaningless.¹⁵³

By far the most severe limitation on the good faith defense to a section 1983 action is the Supreme Court's recent decision in *Wood v. Strickland*.¹⁵⁴ Here, students brought suit under section 1983 against school officials, alleging violation of their constitutional rights to due process in a proceeding which resulted in their expulsion from the school. The district court instructed the jury that "malice" or "ill will" on the part of the defendants was necessary in order to find for the students.¹⁵⁵ The circuit court overturned the decision, stating that the test should be objective and should not depend merely on the specific intent of the defendants.¹⁵⁶

The Supreme Court ruled that the true test of good faith should contain elements of both the subjective and objective tests:

[A]n act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. . . . [A] school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.¹⁵⁷

Thus the Court determined that, at least in school discipline cases, good faith is not an applicable defense if the administrator should have known that his actions were violative of constitutional rights, even if he firmly believed otherwise.

Two recent circuit court cases, *McCray v. Burrell*¹⁵⁸ and *Poindexter v. Woodson*,¹⁵⁹ in considering the defense of good faith to charges of unconstitu-

151. The district court found lack of jurisdiction because defendants, acting in an official capacity, have sovereign immunity unless they act in bad faith. For a discussion of the relation of the doctrine of sovereign immunity to a section 1983 action for damages, see *id.* at 238-45.

152. *Id.* at 237-38. The eleventh amendment forbids suits against the state by citizens of another state. The court found that this did not apply to a named state official accused of deprivation of civil rights under color of law because he is being sued personally and not as the state.

153. *Id.* at 245-46, 248.

154. 420 U.S. 308 (1975).

155. *Id.* at 310.

156. *Id.* at 314. The Supreme Court noted that the Eighth Circuit had determined that all that was necessary was a showing "that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective one." *Id.*

157. *Id.* at 321-22.

158. 516 F.2d 357 (4th Cir.), cert. granted, 96 S. Ct. 264 (1975).

159. 510 F.2d 464 (10th Cir.) (per curiam), cert. denied, 96 S. Ct. 85 (1975).

tional prison conditions, seem to conflict with *Wood*.¹⁶⁰ The Fourth Circuit in *McCray* found that the plaintiff was subjected "to a denial of his rights under the eighth amendment"¹⁶¹ because the conditions he was subjected to were shocking.¹⁶² The *Wood* decision had made an administrator responsible for a "knowledge of the basic, unquestioned constitutional rights of his charges."¹⁶³ Yet the court in *McCray* determined that, although the conduct of the jailers violated the eighth amendment and offended all civilized standards of decency, their actions could have been undertaken in good faith,¹⁶⁴ thus rendering them immune from liability under section 1983. How can barbarism be carried out reasonably or in good faith? If the essence of the eighth amendment is "nothing less than the dignity of man,"¹⁶⁵ it would seem that any reasonable person should be charged with its knowledge.

In *Poindexter v. Woodson*,¹⁶⁶ the court ruled that the conditions of the "strip cell" to which the prisoner was confined violated the eighth amendment. This confinement followed a riot at the prison. After being incapacitated with tear gas, the prisoners were thrown into cells

about 9 by 5 feet in size, [with] concrete floors, no windows, a floor drain, no toilets or wash basins, and no bunks. The prisoners were confined without clothing, pads or blankets, and thus slept on the bare floor. They received the prison food on paper plates and water in paper cups. There were furnished no supplies for personal hygiene or cleanliness.¹⁶⁷

There was no question that these cells had been in use for years. Indeed, a Kansas statute authorized solitary confinement in order to "produce distress."¹⁶⁸ Those factors persuaded the Tenth Circuit that the defendants should be immune from section 1983 damages.

160. The court in *McCray* felt that its ruling was within the guidelines set by *Wood*. "We think that what is said on the subject in the main opinion is consistent with *Wood*, and that *Wood* constitutes additional authority for the conclusions reached therein." 516 F.2d at 372 (Addendum).

161. *Id.* at 369.

162. *Id.* at 368 n.3. See note 72 *supra* and accompanying text.

163. 420 U.S. at 322; see text accompanying note 157 *supra*.

164. 516 F.2d at 369-71.

165. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (native-born American did not lose U.S. citizenship because of court-martial conviction for wartime desertion).

166. 510 F.2d 464 (10th Cir.) (per curiam), cert. denied, 96 S. Ct. 85 (1975).

167. *Id.* at 465.

168. The Kansas statute had allowed the imposition of "close and solitary confinement, with such deprivation of light and such limitation in kind and quality of food as may, in the exercise of a sound discretion, produce distress without hazarding the life of the offender." Kan. Stat. Ann. § 76-2423, repealed, Kan. Laws 1973, Ch. 339, § 93. On its face, this statute seemed to authorize almost any type of solitary confinement so long as it did not result in death. Even this reading, however, did not fully protect the defendants from liability under section 1983. An analogous situation was presented in *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), cert. denied, 96 S. Ct. 280 (1975), where the Sixth Circuit ruled that police officers did not have immunity from damages for arrests made under general orders from the police chief to destroy any sign "detrimental" or "injurious" to the President. The court held that the subjective good faith of the police was not enough to protect them from liability for violating a protestor's right to freedom of expression. *Id.* at 908-11.

The dissent pointed out that the statute did not authorize this excess of degradation and, perhaps more importantly, that some treatment is so obviously brutal that no person could believe it proper.¹⁶⁹ This opinion would certainly seem more consistent with the *Wood* doctrine and certainly more reflective of "the evolving standards of decency."¹⁷⁰

V. CONCLUSION

Despite the shocking conditions revealed in eighth amendment cases, a historical perspective gives great cause for optimism. Although cruel and unusual punishments have been forbidden in the Anglo-American system for almost three centuries,¹⁷¹ the most important developments have taken place in the last eleven years.¹⁷² The tortures, corporal punishments and intentional cruelties which were everyday reality for prisoners throughout most of our history are now largely abolished.

As courts have begun to look into solitary confinement, they have so limited the conditions under which it can be imposed that it may be abolished in the foreseeable future. More importantly, increasing concern (and hard medical evidence) about the horrifying permanent effects may lead to a declaration that it is unconstitutional *per se*.

Vestiges of the judicial "hands off" policy remain,¹⁷³ but the pressure now seems to be on prison administrators to justify policies too long unquestioned. Since a reasonable person must be presumed to know when his or her conduct falls below the basic standards of human decency, a "good faith" defense should be inapplicable where treatment violative of the eighth amendment is alleged. The fear of damages may succeed where the sermons of penologists have failed.

While reformers have helped to eliminate the infliction of intentional cruelty, little has been done about neglect and overcrowding in prisons. Courts can force prison officials to stop beatings and tortures; they cannot force the voters to appropriate funds for decent prisons and rehabilitative programs.¹⁷⁴

The most important part of the story, however, is what didn't happen¹⁷⁵—our assumptions about "the evolving standards of decency"¹⁷⁶ obscure the fact that devolution was equally possible. It was the strength of the eighth amendment that prevented this.

Richard J. Dunn

169. 510 F.2d at 467 (Doyle, J., dissenting).

170. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see note 23 *supra* and accompanying text.

171. See note 14 *supra* and accompanying text.

172. See notes 133-35 *supra* and accompanying text.

173. See notes 26-27 *supra* and accompanying text.

174. See note 132 *supra* and accompanying text.

175. "[W]hen visiting Dachau . . . I was advised that that memorial to man's frenzied cruelty to man started as a model prison—a small institution of modest security, close to a charming town, where small groups of malleable prisoners were to be held in clean and attractive surroundings. And it was to be a model institution in another sense—it was to be used also for the training of correctional officers." N. Morris, *The Future of Imprisonment* 3 (1974).

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