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Cruel and Unusual Punishment: Of Straps and Strip Cells

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CRUEL AND UNUSUAL PUNISHMENT: OF STRAPS AND STRIP CELLS*

Chief Justice Warren Burger has announced[1] that Americans have three options available to them in combatting the high "recall" rates of the prisons: (1) extended sentences, resulting in a policy of "lock them up and throw the keys away"; (2) massive police protection approximating the conditions of martial law; or (3) a concentrated effort to improve the programs and the facilities of the institutions charged with confinement of convicted criminals.[2] The Chief Justice heartily endorses the third alternative, finding it "the only one compatible with our American tradition."[3]

The violent outbreak at Attica[4] and its progeny[5] made it clear, in a most unfortunate way, that there are serious problems[6] in the state penal systems. One of these problems is the brutal and psychologically damaging treatment being administered to prisoners under the cloak of prison security and discipline. Since criminals are often psychologically disturbed individuals,[7] a policy of excessively harsh and abusive treatment in the prisons only serves to exacerbate the situation by fostering rebellion and

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[1] Burger, *Our Options are Limited*, 18 VILL. L. REV. 165 (1972) (paper presented at the 1972 Annual Dinner of the National Conference of Christians and Jews held in Philadelphia on November 16, 1972) [hereinafter cited as Burger].

[2] *Id.* at 167-68, 172.

[3] *Id.* at 172.

[4] Inmate rioting broke out at the Attica Correctional Facility in New York on September 9, 1971. *See* Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971). The recovery of control by the authorities on September 13 has been described as "the bloodiest one-day encounter between Americans since the Civil War," the Indian massacres of the nineteenth century excepted. Wilbanks, *The Report of the Commission on Attica*, 37 FED. PROB. 3 (1973).

[5] Rioting erupted at the Oklahoma state prison at McAlester, resulting in at least two deaths and 50 injuries. N.Y. Times, July 29, 1973, at 36, col. 3 (city ed.). Although correctional authorities were unable to offer any particular reasons for the revolt, prisoners attributed it to the prison policy of treating inmates "like victims of a tribal system" or "like animals." *Id.* at col. 2, 3. *See* note 298 *infra*.

[6] For a bibliography of recent writings analyzing the prison problem, see Miller, *The Lawyer's Hang-Up: Due Process versus the Real Issue*, 11 AM. CRIM. L. REV. 197, 203 n.25 (1972).

[7] *See* Burger, *supra* note 1, at 169.

despair.[8] Fortunately, neither mute endurance nor uprisings like those at Attica are the only available alternatives; many prisoners are taking their grievances to the courts and seeking redress by asserting their constitutional rights. As a result, courts are becoming active participants in effecting the prison reform[9] that the Chief Justice finds so urgently in demand.

Courts have consciously shunned this role in the past, preferring to leave such matters in the hands of prison officials[10] and legislators.[11] But today, in meeting their traditional obligations to protect constitutional rights,[12] the courts are aiding prison reform by insisting that inmates receive the decent and humane treatment to which they are entitled.[13] However, judicial determinations that particular prison practices and conditions amount to cruel and unusual punishment in violation of the eighth amendment[14] have been made on a case-by-case basis and are deliberately narrow rulings.

To be sure, eighth amendment guarantees are not the only federal civil rights being denied prisoners in state penal systems today. Claims based on the first[15] and the fourteenth[16] amendments are also the subject of much

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[8] *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 16 (1967) [hereinafter cited as TASK FORCE REPORT]. In Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966), the court found a direct relation between harsh treatment and a rebellious spirit:

> [T]he type of [solitary] confinement depicted in . . . the inmates' testimony results in a slow-burning fire of resentment on the part of the inmates until it finally explodes in open revolt . . . .

Id. at 680.

[9] *See* Kaufman, *Prison: The Judge's Dilemma*, 41 FORD. L. REV. 495, 511 (1973) (article presented by Judge Kaufman, now Chief Judge of the United States Court of Appeals for the Second Circuit, at the Third Annual John F. Sonnett Lecture held at the Fordham Law School on November 20, 1972) [hereinafter cited as Kaufman]. Both Judge Kaufman and Chief Justice Burger have noted that the primary thrust of the litigation affecting criminals' rights during the sixties was on the constitutional guarantees provided to the accused from the moment of his arrest to the imposition of the sentence. *Compare Id.* at 496 *with* Burger, *supra* note 1, at 166-67.

[10] *See* text accompanying notes 23-28 *infra*.

[11] *Cf.* Wright v. McMann, 460 F.2d 126, 131 (2d Cir.) *cert. denied*, 409 U.S. 885 (1972). *See* Kaufman, *supra* note 9, at 504, 510-15.

[12] It is when other agencies of the government have failed to protect constitutional rights that the courts should be summoned into action. *See, e.g.*, Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). *See generally* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 191 (1970).

[13] Kaufman, *supra* note 9, at 509-10.

[14] U.S. CONST. amend. VIII states: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[15] *See, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (prisoner to be given reasonable opportunity of pursuing his Buddhist faith); LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972) (prisoner's right to attend Sunday Mass not absolute when prison discipline and security are at stake).

[16] *See, e.g.*, Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) (minimum due process

litigation. Regardless of whether the eighth amendment will ultimately prove the most effective tool for reforming the prisons, it should at least ameliorate the overly severe and inhumane procedures and conditions existing in many of our nation's correctional institutions.

Judicial Reluctance to Intervene on Behalf of Prisoners: The "Hands-Off" Doctrine

Although a number of remedies previously existed for the enforcement of prisoners' rights,[17] federal courts of the 1950's and early 1960's remained unwilling to entertain state prisoners' suits. Expressing a fear that judicial review would lead to judicial administration of the prisons,[18] courts have adhered to a "hands-off" policy,[19] and have refused to listen to the com-

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standards required before disciplinary punishments may be imposed). One comment has suggested that fourteenth amendment due process may be a more viable means of achieving decent treatment for prisoners than the eighth amendment. Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 821 (1969) [hereinafter cited as Hirschkop & Millemann].

[17] Habeas corpus is an adequate remedy if the underlying legality of the confinement is being challenged, but, use of the "Great Writ" requires the exhaustion of state remedies before the federal courts will entertain the petition. 28 U.S.C. § 2254 (1971). *But see* Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam). A more viable vehicle is section 1983 of the Civil Rights Act:

> 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.

42 U.S.C. § 1983 (1971). In a section 1983 action, the prisoner is not limited to an attack on the legality of his imprisonment. He may seek damages and/or an injunction challenging the behavioral constraints allegedly depriving him of his civil rights. *See, e.g.*, Landman v. Royster, 354 F. Supp. 1302 (E.D. Va. 1973) (damages). Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) (injunction). *See generally* Jacob, *Prison Discipline & Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 250-71 (1970) [hereinafter cited as Jacob]; Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969). Federal prisoners can sue under the Federal Tort Claims Act for injuries caused by the negligence of prison officials; United States v. Muniz, 374 U.S. 150 (1973).

For a detailed account of the prisoner's lawsuit, from the decision as to choice of theory to the methods of insuring enforcement of the final court order, see Hirschkop, Crisman, & Millemann, *Litigating an Affirmative Prisoners' Rights Action*, 11 AM. CRIM. L. REV. 39 (1972).

[18] *See* Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951) ("it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries"); Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) ("the court has no power to interfere with the conduct of the prison or its discipline"); Peretz v. Humphrey, 86 F. Supp. 706, 707 (M.D. Pa. 1949) ("nor is it within the province of the courts to superintend the treatment of prisoners in penitentiaries, or interfere with the conduct of prisons or their discipline").

[19] The phrase is from FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961) (document prepared for the Federal Bureau of Prisons). For the origin and early effect of the "hands-

plaints of prisoners except when "extreme" or "gross" deprivations of constitutional rights were alleged.[20] The response usually given was that courts were "without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[21]

The "hands-off" doctrine, more a judicial attitude than a rule of law,[22] is not without its rationale. The primary justification for this attitude is that the separation of powers demands judicial non-interference in prison affairs[23] because the prison system is under the jurisdiction of the executive branch of the government and not the district courts.[24] Interwoven with the doctrine of separation is the argument that judges lack the expertise to determine which rules and regulations are necessary for the preservation of prison discipline and security.[25] Therefore, a presumption of legality necessarily attaches to the decision of prison administrators.[26] Lawfully convicted criminals who are subject to imprisonment must forfeit a number of rights and privileges,[27] liberty being the foremost among them. Incar-

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off" doctrine see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 n.4 (1963) [hereinafter cited as *Beyond the Ken*].

[20] LaReau v. MacDougall, 473 F.2d 974, 982 (2d Cir. 1972) (Moore, J., dissenting); Childs v. Pegelow, 321 F.2d 487, 489 (4th Cir. 1963); Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955). *See* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986-87 (1962) [hereinafter cited as *Constitutional Rights of Prisoners*].

[21] Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

[22] In adhering to the "hands-off" doctrine, a justice of the Court of Appeals for the Second Circuit recently declared:

> [P]rison officials are experienced in such matters [of an administrative nature] and familiar with all the facts and circumstances surrounding any particular incident. I believe this makes them much better able to make judgments as to the proper type and duration of disciplinary measures than judges ensconced in the quietude of a Federal Courthouse. In short, the Warden . . . does not presume to tell us how to solve our problems; I do not think that we are qualified to solve his.

LaReau v. MacDougall, 473 F.2d 974, 982 (2d Cir. 1972).

[23] United States v. Marchese, 341 F.2d 782, 789 (9th Cir. 1965); Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949); Krist v. Smith, 309 F. Supp. 497, 499 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971).

[24] Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949).

[25] *See* Novak v. Beto, 453 F.2d 661, 670-71 (5th Cir. 1971); Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

[26] *See* Landman v. Royster, 333 F. Supp. 621, 643 (E.D. Va. 1971); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841, 847-48 (1971) [hereinafter cited as *Decency and Fairness*].

[27] Price v. Johnston, 334 U.S. 266, 285 (1948).

> The hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment.

Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966). Some of the deprivations commonly associated with imprisonment include the right of privacy, association, travel, and choice of occupation. *See* Landman v. Royster, 333 F. Supp. 621, 643 (E.D. Va. 1971).

ceration requires extensive controls, and correctional directors have been duly charged with the maintenance of these controls. Since they are on the scene daily, prison officials, in a practical sense, are in a better position than judges to make correct decisions concerning disruptive prisoners. The problem for the judiciary, of course, is the constitutional legitimacy of some of the means used by administrators to enforce discipline. Courts of the past, however, expressed few compunctions in deferring to administrators' judgments concerning the legality of procedures in the penitentiaries.[28]

Finally, considerations of time and efficiency help explain the tenacity of the "hands-off" position. As one federal district court judge recently expressed it:

> If each [prison official's decision] is to be subject for federal examination of a plenary sort, the energy and time of the federal judiciary and of state penal officials would be diverted to an inordinate extent.[29]

The reasons supporting judicial self-restraint in prison matters are not totally devoid of merit. Nevertheless, they are subject to persuasive counter-arguments.[30] By refusing to review complaints, courts leave prisoners solely in the custody of guards and administrative officials without satisfactory assurance that constitutional rights will be protected. Despite the separation of powers, courts have an affirmative duty to insure the enforcement of constitutional guarantees, especially where another branch of the government has shirked such responsibility.[31] In answer to the assertion that judges should not become involved in prison affairs because they lack administrative know-how, it has been pointed out that judges are neither financial wizards nor transportation specialists, yet they contin-

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[28] For a federal court . . . to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration . . . 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.

Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971) (emphasis in original). The error in such reasoning is that the court, as a consequence, shirks its responsibility in determining which administrative processes are unconstitutional, leaving the judgment of legality to administrators alone.

[29] Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971). *See also* Krist v. Smith, 309 F. Supp. 497, 500 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971).

[30] *See generally Beyond the Ken, supra* note 19, at 515.

[31] In 1962 the Second Circuit Court of Appeals declared:

> [A] mere grant of authority cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does follow that their actions are immune from judicial review.

Maniz v. United States, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963). *See also* Landman v. Royster, 333 F. Supp. 621, 646 (E.D. Va. 1971).

ually review decisions of the Federal Trade Commission and the Interstate Commerce Commission.[32] Few courts have openly expressed the argument that review of prisoners' complaints should be restrained in order to prevent an overburdened court calendar. Although relaxation of the hands-off doctrine may result in a greater number of prisoners' complaints, when the grievance is not frivolous,[33] a court "cannot flinch from [its] clear responsibility to protect rights secured by the Federal Constitution."[34]

Until recently, various formulations of the hands-off philosophy were uttered time and again in dismissing prisoners' complaints, and only when the petitioner could show "extreme" deprivation of rights would the courts intervene.[35] But "extreme" circumstances have begun to appear with increasing frequency in the federal courts,[36] signifying, perhaps, a growing acceptance that even though prison administrators may legitimately deprive the prisoner of many of the freedoms associated with life outside the prison walls,[37] they are not entitled to deprive him of all fundamental constitutional rights. Earlier declarations that courts were "without power" to intervene[38] have given way to the more frequent statement that courts may be "reluctant to interfere with the internal operation and administration of a prison,"[39] but they will not hesitate "to entertain petitions asserting violations of fundamental rights and, where indicated, to grant relief."[40]

Recent pronouncements of the Supreme Court have reflected this change in attitude. *Johnson v. Avery*,[41] decided in 1969, followed the trend, in form and content, of many federal court decisions during the sixties:

> There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene.[42]

In *Johnson*, the Court found such a supervening right: the availability and preparation of the writ of habeas corpus.[43] The Court had little difficulty in condemning the policy of suppressing "writ-writers," prisoners who aid

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[32] *See* Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 743 (1969); TASK FORCE REPORT, *supra* note 8, at 83. A means of overcoming the lack of expertise is provided by referring to outside sources. *See* text accompanying notes 274-77 *infra*.

[33] The problem of frivolous claims is discussed in Kaufman, *supra* note 9, at 505.

[34] Wright v. McMann, 387 F.2d 519, 526-27 (2d Cir. 1967).

[35] *See* note 20 *supra*.

[36] For a survey of recent court activity in the area of eighth amendment and due process abuses in the prisons see *Decency and Fairness*, *supra* note 26.

[37] *See* note 27 *supra*.

[38] *See* text accompanying note 21 *supra*.

[39] Gates v. Collier, 349 F. Supp. 881, 893 (N.D. Miss. 1972).

[40] Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968).

[41] 393 U.S. 483 (1969).

[42] *Id.* at 486.

[43] *Id.* at 489.

fellow inmates in the preparation of writs.[44]

Three years later, in *Cruz v. Beto*,[45] the Court was asked to decide the merits[46] of an alleged violation of a prisoner's first amendment rights. The Court found "palpable discrimination" if a Buddhist prisoner could sustain his allegations that he had been denied the reasonable opportunity of pursuing his faith.[47] The opening statement of the decision should set the standard for federal review of prisoners' grievances in the seventies:

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances . . . .[48]

In viewing prisoners as *persons* with enforceable constitutional rights, the Supreme Court adopted the position, expressed in an earlier federal case,[49] that prisoners retain "all the rights of ordinary citizen[s] except those expressly, or by necessary implication, taken from [them] . . . by law."[50] In order to insure that these rights are guarded, courts must intervene in prison life.[51] Courts need no longer pay lip-service to the hands-off doctrine and then proceed to find "extreme" circumstances as a means of providing relief. In the future, federal judges should avoid the unsound policy of finding exceptions to a rule which has lost its precedential value. *Cruz v. Beto* has abrogated the hands-off doctrine with a clear-cut statement that prisoners' constitutional rights must be enforced.

Cruel and Unusual Punishment in the Prisons

Prisoners seeking relief on the theory that the treatment they are receiving is in violation of the eighth amendment may face an obstacle as equally frustrating as the earlier hands-off attitude of the courts. For years, courts have struggled with the meaning of the phrase "cruel and unusual

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[44] *Id.* at 490.

[45] 405 U.S. 319 (1972) (per curiam).

[46] In Haines v. Kerner, 404 U.S. 519 (1972) the Supreme Court refused to express any views on the merits of the petitioner's claim, but did insist that the prisoner have his day in court.

[47] 405 U.S. at 322.

[48] *Id.* at 321.

[49] Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944).

[50] *Id.* at 445. This view is a radical departure from that of the nineteenth century, when the common opinion was that "[the prisoner] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him." Ruffin v. Commonwealth, 21 Gratt. 1024, 1026, 62 Va. 790, 796 (1871).

[51] When a man possesses a substantial right, the courts will be diligent in finding a way to protect it.

Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

punishments," and still have not arrived at a concrete definition.[52] Perhaps a subsconscious reason for the vitality of the hands-off doctrine in eighth amendment cases has been the difficulty encountered by judges in formulating a test to measure cruelty and unusualness. Although the Supreme Court has considered the eighth amendment in a variety of fact situations,[53] all of the cases have dealt with specific sentences for crimes. The Court has never dealt with the cruel and unusual punishment clause in the context of prison disciplinary practices[54] or general facilities. Hence, lower federal courts have been compelled to evaluate claims of prison abuses guided only by unrelated and frequently obtuse explanations of the eighth amendment's language. Courts have made it clear, however, that the proscription of the clause is not confined to statutorily imposed sentences.[55] The treatment a prisoner receives at the hands of his keepers is subject to eighth amendment review[56] as surely as if it had been explicitly ordered by legislative fiat.

A comparison of current prison practices with historical punishments thought to be within the eighth amendment's ban[57] is a fruitless means of

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[52] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 99 (1958) ("the exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by th[e] Court"); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) ("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"); Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir. 1971) (the eighth amendment's "precise boundaries are still unclear"); Gates v. Collier, 349 F. Supp. 881, 893 (N.D. Miss. 1972) ("it is established that the Eighth Amendment does not have a fixed and settled connotation").

[53] *See* text accompanying notes 64-73 *infra*.

[54] The sentence under the Court's consideration in Weems v. United States, 217 U.S. 349 (1910), 12 to 20 years at hard and painful labor, the constant wearing of a chain fastened at the ankle and wrist is nearest in substance to the type of situation prisoners may encounter in confinement.

> [55] Neither do we wish to draw . . . any meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes. It seems to us that the Eighth Amendment's proscription has application to both.

Jackson v. Bishop, 404 F.2d 571, 580-81 (8th Cir. 1968) (opinion of then Circuit Judge Blackmun).

[56] *Id.*; LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972); Newman v. Alabama, 349 F. Supp. 278, 280 (M.D. Ala. 1972); Landman v.Royster, 333 F. Supp. 621 (E.D. Va. 1971).

[57] The framers of the eighth amendment to the Constitution were not the first to use the phrase cruel and unusual punishment. King John had banned excessive fines in the Magna Charta and the English Declaration of Rights of 1689 had declared that excessive bail ought not to be required nor "excessive fines imposed nor cruel and unusual punishment inflicted." 1 W. & M., sess. 2, c. 2, preamble, cl. 10 (1689), *quoted in* Comment, *Furman v. Georgia—Deathknell for Capital Punishment?*, 47 ST. JOHN'S L. REV. 107, 110 n.29 (1972) [hereinafter cited as *Deathknell for Capital Punishment*]. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958). Use of that phrase in the 1689 document was to prevent a recurrence of the tortures and barbarous punishment which prevailed during the reign of the Stuarts. Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967). *See generally* Granucci, *"Nor Cruel and Unusual*

determining constitutionality. Among the punishments first recognized to be within the purview of the eighth amendment were pillorying, disemboweling, decapitation,[58] burning at the stake, crucifixion, breaking on the wheel,[59] the rack and thumbscrew,[60] and other tortures involving a lingering death.[61] Some courts held that these were the only practices intended to fall under the eighth amendment's prohibition.[62] Virtually all modern punishments would be adjudged constitutonal[63] under this standard.

It was not until the Supreme Court's decision in *Weems v. United States*[64] that the futility of making historical comparisons was fully realized. The Court declared that "a principle to be vital must be capable of wider application than the mischief which gave it birth."[65] Instead of looking at the eighth amendment only as a guard against the repetition of history,[66] its meaning should be viewed in a progressive light, so that it "may acquire meaning as public opinion becomes enlightened by a humane justice."[67] This idea was further refined in *Trop v. Dulles*[68] which declared that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[69] Particularly noteworthy was Chief Justice Warren's statement that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[70] *Robinson v. California*[71] is important in the context of state prison reform primarily for its application of the eighth amendment to the states through the due process clause of the fourteenth amendment.[72] In a concurring opinion, Justice Douglas announced that "[t]he Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man."[73]

Punishments Inflicted": The Original Meaning, 57 CALIF. L. REV. 839 (1969); *Deathknell for Capital Punishment*, *supra* at 108-09.

[58] Weems v. United States, 217 U.S. 349, 389-400 (1910) (White, J., dissenting).

[59] *In re* Kemmler, 136 U.S. 436, 447 (1890).

[60] Robinson v. California, 370 U.S. 660, 675 (1962).

[61] Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

[62] *See, e.g.*, Hobbs v. State, 133 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893).

[63] *Id.*

[64] 217 U.S. 349 (1910). The importance of the *Weems* decision as a precedent for prison reform is minimized in Rubin, *The Burger Court and the Penal System*, 8 CRIM. L. BULL. 31, 33 (1972).

[65] 217 U.S. at 373.

[66] *Id.*

[67] *Id.*

[68] 356 U.S. 86 (1958).

[69] *Id.* at 101.

[70] *Id.* at 100.

[71] 370 U.S. 660 (1962).

[72] *Id.*; Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963).

[73] 370 U.S. at 676.

The attitudes expressed in *Weems*, *Trop*, and *Robinson* have produced at least one standard,[74] albeit a protean one, for judging the constitutionality of punishments. Although phrased in a variety of ways, the standard is commonly known as the "shock the conscience" test.[75] If a punishment offends "civilized standards of humane decency"[76] or is "shocking to the conscience of reasonably civilized people,"[77] it is repugnant to the Constitution.[78]

From dissenting and concurring opinions in other Supreme Court cases, two other tests for measuring cruelty and unusualness have emerged.[79] The first is an "excessiveness" test. If the punishment is greatly disproportionate to the offense charged, if it doesn't "fit the crime,"[80] it falls within the constitutional proscription.[81]

A second alternative to the "shock the conscience" standard questions whether the punishment is "necessary," *i.e.*, whether "the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) [can] be achieved as effectively" by a less severe punishment.[82] Under the "unnecessary cruelty" test,[83] a punishment is unconstitutional notwithstanding

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[74] In Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), the Court declared the death penalty unconstitutional in the specific instances under consideration, but did little to enlarge upon the interpretations given the eighth amendment in prior cases. Each of the nine Justices wrote a separate opinion, and the majority was unable to agree upon a single theory as to why capital punishment was cruel and unusual. However, one view shared by at least three of the Justices was that the primary evil of the death penalty is not its inherent cruelty, but rather the discretionary and arbitrary manner in which executions have been sanctioned. *Id.* at 242, 309, 310. *See Deathknell for Capital Punishment, supra* note 57, at 143.

[75] *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 473 (1947). (Burton J., dissenting) ("Shocks the most fundamental instincts of civilized men"); Weems v. United States, 217 U.S. 349, 375 (1910) ("shock the sensibilities of men"); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965) ("admeasurements made by general conscience"); Carey v. Settle, 351 F.2d 483, 485 (8th Cir. 1965) ("of such character or consequence as to shock general conscience").

[76] Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).

[77] Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[78] The Court that decided Rochin v. California, 342 U.S. 165 (1952), utilized the "shock the conscience" standard to test whether government agents had abridged due process in acquiring evidence. Justice Frankfurter wrote that "the proceedings by which th[e] conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism . . . . This is conduct that shocks the conscience . . . . They are methods too close to the rack and the screw to permit of constitutonal differentiation." *Id.* at 172.

[79] Their existence was noted by Justice Goldberg in his dissent to the denial of certiorari in Rudolph v. Alabama, 375 U.S. 889 (1963).

[80] O'Neil v. Vermont, 144 U.S. 323, 364 (1892) (Field, J., dissenting).

> It is against the excessive severity of the punishment, as applied to the offenses for which it is inflicted, that the inhibition is directed.

See also Hobbs v. State, 133 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893).

[81] Rudolph v. Alabama, 375 U.S. 889, 891 (Goldberg, J., dissenting).

[82] *Id.*

[83] Wilkerson v. Utah, 99 U.S. 130 (1878), had held that the eighth amendment forbids pun-

that it is imposed in pursuit of a legitimate penological goal if it goes beyond what is necessary to achieve that goal.[84]

Each of the tests has been used, either alone or in combination with one another to condemn procedures and conditions in the prisons. Although the "shock the conscience" test has been most often applied, it has received the greatest criticism. Whose conscience is to be the guide—that of the judge, or that of the collective community?[85] Hopefully, they will coincide. One objective method which judges have relied upon in gauging the attitudes of the "maturing society" is a comparative law process.[86] In adjudging the acceptability of a punishment, the court looks to the laws of other jurisdictions, both within and without the United States[87] to see whether or not similar practices are generally accepted. This approach is problematical in the prison context since there are few legislative statements, the traditional indicators of public sentiment, dealing with specific punishments in the provisions. Statutory delegations of authority to prison officials are intentionally general in order to provide for flexible administration.[88]

Although a more analytical device, the "excessiveness" test suffers from its narrow applicability. Since this line of inquiry considers whether a punishment is disproportionate to a particular offense,[89] it is not particularly useful as a means of eliminating widespread prison practices unless they are found to be out of proportion to all offenses.[90] Moreover, prison administrators in day to day contact with inmates are given wide latitude in disciplinary matters. Administrative judgments are ordinarily pre-

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ishments of torture "and all others in the same line of unnecessary cruelty." *Id.* at 136.

[84] *See* Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966).

[85] Justice Powell, dissenting in Furman v. Georgia, 408 U.S. 238 (1972), warned that judicial self-restraint is necessary in order to prevent judges from reading their personal preferences into the Constitution under the rubric of universally held "standards of decency." *Id.* at 431. *See* note 28 *supra*.

[86] Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). The comparisons to be made under this procedure should not be those of historical usage, *i.e.*, comparing the severity of current punishments with those of history. *See* text accompanying notes 57-63 *supra*.

[87] A comparison of Phillipine and American punishments for the same crime aided the Court in Weems v. United States, 217 U.S. 349, 380 (1910). In Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), the court determined the adversity of public opinion by observing that "only two states still permit the use of the strap." *Id.* at 580. Other punishments in the prisons, such as solitary confinement, have been upheld because of their use "in almost every jurisdiction in the country." Novak v. Beto, 453 F.2d 661, 666 (5th Cir. 1971). *See* Sostre v. McGinnis, 442 F.2d 178, 192, 193 n.22 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

[88] *See, e.g.*, N.Y. CORR. LAW § 137(2) (McKinney Supp. 1972):

> The commissioner shall provide for such measures as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein.

[89] *See, e.g.*, Carothers v. Follette, 314 F. Supp. 1014, 1027 (S.D.N.Y. 1970).

[90] *Cf. id.* at 1025.

sumed valid.[91] It is extremely difficult to overcome this presumption unless the court shifts the burden of proof or finds that a penalty is invalid per se.[92]

The necessity of a punishment has only recently been recognized as a criteria of its constitutionality[93] in cases of alleged prison abuses. This approach places the burden of justification on the executioner of the punishment.[94] Because of their hands-off attitude, courts in the past did not find it proper to put prison administrators to the task of demonstrating that security and discipline could not be achieved by less severe means. In relaxing the hands-off doctrine, however, courts have been more willing to question whether allegedly cruel means of maintaining order are actually necessary.[95] The availability of objective studies by penologists and criminologists on the necessity of certain disciplinary devices[96] makes the judge's investigation under this standard less burdensome.

Clearly, the courts have not been blessed with a watertight means of reviewing prison treatment alleged to be in violation of the eighth amendment. Mr. Justice Blackmun, writing as a circuit judge for the Eighth Circuit, summarized the current status of the cruel and unusual punishment clause as follows:

> [S]o far as the Supreme Court cases are concerned, we have a flat recognition that the limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered, and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.[97]

One would be hard-pressed to find a more concise statement of the general guidelines to be followed.

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[91] *See* text accompanying notes 26-28 *supra*.

[92] *See* Wright v. McMann, 460 F.2d 126, 132 (2d Cir. 1972).

[93] *See, e.g.*, Gates v. Collier, 340 F. Supp. 881, 894 (N.D. Miss. 1972); Landman v. Royster, 333 F. Supp. 621, 648 (E.D. Va. 1971); Hancock v. Avery, 301 F. Supp. 786, 792 (M.D. Tenn. 1969).

[94] *See, e.g.*, Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968); Landman v. Royster, 333 F. Supp. 621, 648 (E.D. Va. 1971); Hancock v. Avery, 301 F. Supp. 786, 789, 792 (M.D. Tenn. 1969).

[95] Although ultimately denying relief to a prisoner who complained of prolonged solitary confinement without physical activity, the court in Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971), requested an explanation of policy from the prison administrators:

> While the Board of Corrections is not a formal party to this litigation it may be willing to inquire into the reasons and inform the Court why it is impractical for maximum security prisoners to be taken out of their cells periodically for the purpose of exercise.

309 F. Supp. at 501.

[96] *See* text accompanying notes 274-77 *infra*.

[97] Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

In view of significant recent decisions affecting all forms of prison security measures, courts of the future may have fewer difficulties than their predecessors in attaching meaning to the eighth amendment. Federal courts have handed down an impressive number of precedents, making it increasingly clear which procedures and conditions constitute cruel and unusual punishment. The legality of the major prison disciplinary devices and living conditions will now be measured against those decisions. From such an examination, it may be possible to discern not only which prison abuses are destined for extinction, but also the means by which they will be banished from penal systems.

Disciplinary Procedures

Few would deny the necessity for rules and regulations governing conduct in prison. The occupants of such an institution must be expected to conform to minimal standards of orderly behavior, and disciplinary devices are needed to attain and enforce the desired conformity. At issue, of course, is whether some of the methods of enforcement are so harsh as to come into conflict with the Constitution.

A. Whipping and Physical Force

Since a permanent injunction ended the use of whipping in the Arkansas penal system,[98] only Mississippi has continued to permit official use of "the strap" as a prison disciplinary device.[99] When petitioned by inmates of the Mississippi State Penitentiary, the court in *Gates v. Collier*[100] enjoined corporal punishment "of such severity as to offend present-day concepts of decency and human dignity"[101] but found itself without power to enjoin the use of whipping in all circumstances.[102] To issue such an injunction would have required the convening of a three-judge panel[103] since the

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[98] *Id.* at 580-81.

[99] MISS. CODE ANNOT. § 7968 (Supp. 1972). Note, however, that Delaware statutes, provide for a specified number of "lashings" as part of the sentence for certain crimes. *See, e.g.*, 11 DEL. CODE ANNOT. § 631 (Supp. 1970) (20 lashes allowed for grand larceny). Such lashings are to be inflicted publicly, on the bare back, with strokes "well laid on." 11 DEL. CODE ANNOT. § 3908 (1953).

[100] 349 F. Supp. 881 (N.D. Miss. 1972).

[101] *Id.* at 899-900.

[102] *Id.* at 895.

[103] *See* 28 U.S.C. § 2281 (1971). The jurisdictional problem did not face the court in Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); whipping was condemnable in Arkansas because (1) a three-judge court decided the case; and (2)the Arkansas statute had not expressly named whipping as a permissible punishment. *See* ARK. STAT. ANNOT. § 46-158 (1964). The statute merely permitted the state penitentiary board to "prescribe the mode and extent of punishments." Indeed, the statute was so lacking in guidelines that a court later declared it "an unconstitutional delegation of legislative power." State v. Bruton, 246 Ark. 288, 290, 437 S.W.2d 795, 796-97 (1969).

punishment was expressly authorized by a state statute. The court found some consolation in the fact that the Mississippi statute authorizing whipping forbids its use except upon express written order of the superintendent, limits the number of licks to seven, and generally discourages the use of corporal punishment.[104] Further, it was found that the lash had not been used at a penitentiary since 1965.[105]

Although falling short of declaring whipping unconstitutional, the decision in *Gates v. Collier* casts serious doubt upon the continued use of whipping as a legitimate means of punishment. Whipping had been restricted in Arkansas when a district court imposed strict procedural requirements as a condition precedent to using the strap.[106] It was later found, however, that these controls were being ignored, and in *Jackson v. Bishop*,[107] the court restrained its use altogether, holding that:

> [T]he use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century runs afoul of the Eighth Amendment; . . . the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess. . . .[108]

While the *Jackson* court relied principally on a "shock the conscience" test, it further denied that the state "needed" this tool for disciplinary purposes[109] merely because the prison lacked a sufficient number of solitary confinement units.[110]

Whipping has not always enjoyed the apparent general disfavor[111] that one might expect. When the federal court system was first established,[112] "whipping was classed with moderate fines and short terms of imprisonment" for purposes of determining district court jurisdiction over criminal cases.[113] Whipping was considered to be not only a legitimate form of punishment but also a relatively mild one, "thirty stripes" being the norm.[114] By 1885, however, the Supreme Court noted that "at the present day . . . whipping might be thought an infamous punishment"[115] and by the 1950's

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[104] 349 F. Supp. at 895.

[105] *Id.*

[106] Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965).

[107] 404 F.2d 571 (8th Cir. 1968).

[108] *Id.* at 579.

[109] *Id.* at 580.

[110] *Id.* at 575.

[111] *See id.*

[112] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-7.

[113] *See Ex parte* Wilson, 114 U.S. 417, 428 (1885).

[114] *Id.*

[115] *Id.* "Infamous punishment" was used by the Court in this case not within the context of cruel and unusual punishment under the eighth amendment but as a means for determining the necessity of a grand jury indictment for "infamous crime." *Id.* at 429.

a majority of states had taken legislative action to strike its use.[116] However, not all modern courts have been prepared to deny the states the right to use whipping as a form of punishment. In 1963 the Supreme Court of Delaware refused to declare whipping unconstitutonal, holding that a determination of its legality should be left to legislative bodies through which society expresses what is "cruel by contemporary standards."[117]

Gates v. Collier,[118] while not a precedent for holding whipping unconstitutional, along with *Jackson v. Bishop*,[119] provides a strong indication that the strap is destined for future criticism where federal courts discover its use.

Beatings by guards and other prison personnel are not impermissible per se for the simple reason that force may be necessary for self-defense or for suppression of riots.[120] However, when beatings continue beyond the bounds of necessity or are administered for unjustifiable reasons, they provide grounds for judicial relief. For example, the brutal reprisals inflicted on Attica inmates[121] after suppression of the rebellion evoked the disapproval of the Court of Appeals for the Second Circuit. The court found the inmates' claims of "continuing cruel and inhuman physical abuse"[122] proper grounds for injunctive relief, since there was "danger of recurrent violation."[123]

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[116] *See* United States v. Jones, 108 F. Supp. 266, 270 (S.D. Fla. 1952), *rev'd on other grounds*, 207 F.2d 785 (5th Cir. 1953). Corporal punishment is banned from federal prisons by 18 U.S.C. § 3564 (1971).

[117] State v. Cannon, 190 A.2d 514, 519 (Del. 1963). *See* United States v. Jones, 108 F. Supp. 266, 270 (S.D. Fla. 1952); State v. Revis, 193 N.C. 192, 136 S.E. 346, 348 (1927).

[118] 349 F. Supp. 881 (N.D. Miss. 1972).

[119] 404 F.2d 571 (8th Cir. 1968).

[120] *See* Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 22 (2d Cir. 1971); Landman v. Royster, 333 F. Supp. 621, 648 (E.D. Va. 1971) *quoting* AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 417 (3d ed. 1966). New disciplinary guidelines for New York correctional facilities provide:

> [N]o officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self defense, or to suppress a revolt or insurrection.

N.Y. CORR. LAW § 137(5) (McKinney Supp. 1972). Employees are permitted to use "all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders to prevent any . . . attempt [to] escape." *Id.*

[121] There was evidence that for four days injured prisoners on stretchers were beaten with sticks, belts, bats, and other weapons. Others were clubbed as they ran naked through gauntlets of guards. In addition, guards harassed prisoners by dragging them on the ground, spitting upon them, burning them with matches, poking at them with sticks, and using threatening and abusive language. Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 18-19 (2d Cir. 1972).

[122] *Id.* at 20.

[123] *Id.* at 23. The court stressed that isolated occurrences of beatings would not constitute grounds for injunctive relief. Furthermore, the court did not deny prison officials the right to resort to physical force where necessary for the protection of one's self or others, prevention of escape, or where serious injury to property is threatened. *Id.* at 23.

In addition to physical force, tear gas is employed in prisons as a method of controlling rebellious inmates.[124] Prison officials should not be denied effective means of maintaining security and discipline, but arbitrary and abusive use of tear gas should be curtailed.[125] At least one court has found that the use of tear gas to disable an individual inmate who poses no serious physical threat is an impermissible form of corporal punishment.[126] As in the case of beatings, courts should apply the standard of necessity in determining whether tear gas constitutes cruel and unusual punishment under the circumstances.

B. Other Forms of Corporal Punishment

Whipping and beating are not the only forms of corporal punishment being challenged in the federal courts today. The court in *Gates v. Collier*[127] found that officials at Mississippi's Parchman Prison had acquiesced in the infliction of numerous bizarre physical abuses. Among those labelled by the court as corporal punishment were administering milk of magnesia, turning fans on inmates while they were naked and wet, shooting at inmates to keep them standing or moving, using a cattle prod to keep prisoners in line, and handcuffing inmates to the fences or cell bars for long periods of time.[128] The court found these practices "excessive" and in violation of the eighth amendment.[129]

Undoubtedly, few of the Parchman disciplinary measures are sanctioned in other institutions. However, the practice of handcuffing prisoners to cell bars, condemned by the *Gates* court, is not unique to the Mississippi penal system. The cruelty of excessive handcuffing has been criticized by courts in the past,[130] and recently, it was declared unconstitutional in *Landman v. Royster*.[131] The court cited the American Correctional Associa-

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[124] *See* Landman v. Royster, 333 F. Supp. 621, 649 (E.D. Va. 1971).

[125] Abusive tear gassing has been reduced in federal prisons by denying guards the right to carry it on their person. *See* Hirschkop & Milleman, *supra* note 16, at 837.

[126] Landman v. Royster, 333 F. Supp. 621, 649 (E.D. Va. 1971).

[127] 349 F. Supp. 881, 894 (N.D. Miss. 1972).

[128] *Id.* at 890, 900.

[129] *Id.* at 895, 900. In order to safeguard against future abuses, the court ordered the prison officials to submit for judicial approval rules and regulations setting forth: (1) all conduct which constitutes a breach of discipline; (2) the penalties to be imposed for such conduct; and (3) a statement of the procedures by which disciplinary decisions would be made. *Id.* at 899.

[130] *See, e.g.*, State v. Carpenter, 231 N.C. 229, 56 S.E.2d 713, 721 (1949) (prisoner handcuffed to the bars of his cell and left hanging for 70 hours). *Cf.* Weems v. United States, 217 U.S. 349 (1910) (chain at the ankle, hanging from the wrist); *In re* Birdsong, 399 F. Supp. 599 (S.D. Ga. 1889) (prisoner chained by his neck to the cell bars).

[131] 333 F. Supp. 721 (E.D. Va. 1971). One of the plaintiffs was left with permanent scars as a result of being fettered to his cell bars, and another, having been chained to his bars for five days without leave to visit toilet facilities, endured prolonged physical pain. *Id.* at 638-39, 647.

tion's *Manual of Correctional Standards*, which condemns all types of corporal punishment, including "handcuffing to cell doors or posts, [and] shackling so as to enforce cramped position or to cut off circulation".[132] Although District Judge Merhige labelled handcuffing inhuman,[133] he relied primarily upon the necessity test in determining whether handcuffing amounted to cruel and unusual punishment. The only justification for the use of handcuffing in a cell is the prevention of self-injury or suicide.[134] Even in these cases it would be necessary for the defendants to demonstrate that no less harsh means could achieve the same end. The court had no difficulty in suggesting two reasonable alternatives; straitjacketing or some form of drug treatment.[135]

Just as excessive handcuffing has come to be classified as a cruel and unusual form of corporal punishment, so, too, the constitutionality of the bread and water diet has been questioned. Although the reduced diet has been an institutional disciplinary device since time immemorial,[136] numerous modern authorities recognize that dietary safeguards should be implemented to maintain the prisoner's health.[137] *Landman v. Royster* took a bold step forward holding that the "bread and water diet is inconsistent with current minimum standards of respect for human dignity."[138] Judge Merhige found that "the pains of hunger constitute a dull, prolonged sort of corporal punishment"[139] and that the insufficient caloric content of the bread and water diet[140] makes it both an unnecessary infliction of pain and a health hazard.[141]

Because the prison regulations required a supplemental meal every third day, the Fifth Circuit refused to hold the bread and water diet to be an objectionable aspect of solitary confinement in the Texas prison system.[142] Relying on a Third Circuit decision in which the bread and water

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[132] AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 417 (3d ed. 1966), *quoted* in 333 F. Supp. 621, 648 (E.D. Va. 1971).

[133] 333 F. Supp. at 648.

[134] Solitary confinement would suffice for the prevention of escape or injuries to others.

[135] 333 F. Supp. 621, 648 (1971).

[136] *See* TASK FORCE REPORT, *supra* note 8, at 50.

[137] *See* Sostre v. McGinnis, 442 F.2d 178, 186 (2d Cir. 1971); Gates v. Collier, 349 F. Supp. 881, 900 (N.D. Miss. 1972); Jones v. Wittenberg, 330 F. Supp. 707, 716 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); *cf.* Brooks v. Florida, 389 U.S. 413, 415 (1967) (per curiam) (daily fare of 12 ounces of thin soup and 8 ounces of water, in combination with other factors, termed a "shocking display of barbarism").

[138] 333 F. Supp. 621, 647 (E.D. Va. 1971).

[139] *Id.* at 647.

[140] There are only 700 calories in a daily portion of bread and water and the sedentary man needs 2000 calories to maintain continued health. *Id.* at 647. *See* Gates v. Collier, 349 F. Supp. 881, 900 (N.D. Miss. 1972). *Cf.* Novak v. Beto, 453 F.2d 661, 674 n.4A (5th Cir. 1971).

[141] 333 F. Supp. at 647.

[142] Novak v. Beto, 453 F.2d 661, 668 (5th Cir. 1971).

diet was upheld under like circumstances,[143] the court supported its argument by noting that the prison authorities generally restrained the use of the diet to avoid damage to the prisoner's health.[144] In the dissenting opinion, it was vigorously asserted that bread and water was "a starvation diet" amounting to "physical punishment."[145] The dissenting judge would have required regular meals as a concomitant to solitary confinement.[146]

Federal prisoners in solitary confinement are not subjected to a bread and water diet,[147] and the court in *Landman v. Royster* was encouraged by the fact that its use is also infrequent in Virginia prisons.[148] The authorities now stand divided on the minimum diet issue, but perhaps, considering the focus of riot complaints, courts in the future will be willing to expand the meaning of corporal punishment and condemn the bread and water diet.

C. Solitary Confinement

Probably no other form of disciplinary punishment has generated as much controversy in recent years as solitary confinement. Termed "punitive" or "administrative" segregation[149] by prison officials, solitary confinement has occupied the center stage of numerous federal cases. Although in many instances, it takes on elements of physical punishment, enforced isolation is primarily a psychological device intended to cure unruly inmates of undesirable behavior. Allegations of unconstitutionality have been levelled against use of the isolated cell in situations where allegedly excessive time and inadequate health safeguards are factors and in situations where virtually no controls whatsoever are present—the strip cells.[150] In addition, frequent claims have been made that administrative rules governing the imposition of solitary confinement are so lacking in procedural fairness as to violate due process of law.[151] Those cases in which the

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[143] Ford v. Board of Managers, 407 F.2d 937, 940 (3d Cir. 1969) ("the temporary inconvenience and discomforts incident [to solitary confinement] cannot be regarded as a basis for judicial relief").

[144] Novak v. Beto, 453 F.2d 661, 670-71 (5th Cir. 1971).

[145] *Id.* at 674.

[146] *Id.* at 687.

[147] *Id.* at 685 n.11.

[148] 333 F. Supp. 621, 647 (E.D. Va. 1971).

[149] "Punitive" segregation is ordinarily used as a punishment device when less severe measures, such as reprimands or loss of privileges, have been ineffectual in controlling an inmate's conduct. *See* Novak v. Beto, 453 F.2d 661, 667 (5th Cir. 1971). "Administrative" segregation is designed to protect the inmate either from self-injury or injury to others. *See* Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967).

[150] Ordinarily defined by means of example, "strip cells" are usually small barren rooms devoid of sinks, commodes, windows, lights, bedding, and toiletries and other hygienic materials. In many such cells, human wastes are deposited in a hole in the floor and can be flushed only by a mechanism located outside the cell. *See* note 185 *infra*.

[151] *See, e.g.*, Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich. 1972); Biagiarelli v.

punishment itself has been challenged as an abridgement of the eighth amendment will be explored.

Ironically, the introduction of solitary confinement in America was the result of a humanitarian reaction to corporal punishment.[152] Inspired by Quakers, the Walnut Street Penitentiary in Philadelphia, instituted in 1787, what was to be a humane alternative to physical punishment: criminals were to be placed in individual cells completely isolated from all human society.[153] Enforced "meditation" would hopefully lead to reformation and penitence. Years later, the Supreme Court observed that the Walnut Street experiment had produced less than ideal results:

> [E]xperience demonstrated that there were serious objections to [solitary confinement]. Considerable numbers of the prisoners fell, after even a short confinement, into a semi-fatuous condition from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[154]

It was apparent to the Supreme Court, as early as 1890, that a negative relationship existed between solitary confinement and the psychological well-being of the prisoner.[155] Nevertheless, nearly every penal institution today includes isolation units for prisoners who become serious disciplinary problems.[156]

Federal courts have stressed that solitary confinement per se is not a cruel and unusual punishment.[157] The added burdens of a bread and water

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Sielaff, 349 F. Supp. 913 (W.D. Pa. 1972); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).

[152] *See* TASK FORCE REPORT, *supra* note 8, at 2-3; Kaufman, *supra* note 9, at 500 n.17.

[153] *Ex parte* Medley, 134 U.S. 160, 168 (1890). "[The prisoner] had no direct intercourse with or sight of any human being, and no employment or instruction."

[154] *Id.*

[155] *Id.* Modern psychologists describe the experience of prolonged isolation as "sensory deprivation." 2 AMERICAN HANDBOOK OF PSYCHIATRY 1243-44 (1969). In laboratory experiments, human subjects were placed in conditions approximating the more severe forms of solitary confinement, and they reportedly experienced hallucinations and delusions similar to those described in mescaline intoxication. *Id.* at 1244. *See also* Sostre v. McGinnis, 442 F.2d 178, 190 (2d Cir. 1971).

[156] TASK FORCE REPORT, *supra* note 8, at 50.

[157] *See, e.g.*, Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967); Carlisle v.Bensinger, 355 F. Supp. 1359 (N.D. Ill. 1973). In Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971), a prisoner was unsuccessful in challenging solitary confinement as an arbitrary modification of life imprisonment into a harsher form of incarceration. The court declared:

> [Solitary confinement] is permissible where its object is protection of the general prison population or the personnel, protection of the prisoner himself, for disobedience of orders or for prevention of his escape.

309 F. Supp. at 500.

diet and insufficient lighting did not persuade the court in *Novak v. Beto*[158] to abandon this stance, nor did the fact of confinement in excess of one year persuade the court in *Sostre v. McGinnis*[159] that segregated confinement was incompatible with contemporary standards of decency. This is not to say, however, that these courts, and others,[160] have not been concerned with limiting the conditions under which segregated confinement may be imposed. The controversy centers on the extent of the limitations.

The *Novak* court refused to declare unconstitutional solitary confinement as used by the Texas Department of Corrections (TDC) primarily because the prison officials demonstrated that their "Disciplinary Procedures" memorandum complied substantially with the rules of the American Correctional Association's *Manual of Correctional Standards*, conceded to provide progressive standards.[161] The court further relied on statistical data which showed that solitary confinement had a deterrent effect on subsequent infractions,[162] that segregated confinement was used sparingly by the TDC,[163] and finally, that the TDC was ranked high among the nation's prisons for its reform-minded administration.[164] The dissenting judge felt that the majority's use of statistics belied the fact that TDC isolation cells were still within the eighth amendment's reach. He found particularly offensive the restrictive diet[165] and the "pitch black cell"[166] which produced "complete sensory deprivation."[167] *Novak* demonstrates the variance of opinion concerning the number of deprivations constitutionally permissible in solitary confinement.

In *Sostre v. McGinnis*,[168] the Second Circuit was presented with the question of whether length of confinement should be considered in determining the cruelty of punitive segregation. The court held that under the circumstances, it should not.[169] Plaintiff-Sostre's physical environment was found acceptable. Therefore, the court found no need to limit the duration of confinement to fifteen days, thereby overruling the district court's deci-

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[158] 453 F.2d 661 (5th Cir. 1971).

[159] 442 F.2d 178, 190 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 (1972).

[160] *See, e.g.*, Gates v. Collier, 349 F. Supp. 881, 900 (N.D. Miss. 1972); Landman v. Royster, 333 F. Supp. 621, 648-49 (E.D. Va. 1971).

[161] Novak v. Beto, 453 F.2d 661, 666-70 (5th Cir. 1971). The cells at TDC were found to include hygienic materials, flush toilets, blankets, lightweight clothing for the prisoners, and temperature controls identical to those used throughout the penitentiary. *Id.* at 665-66. In addition, a fifteen day confinement period was the norm. *Id.* at 668.

[162] *Id.* at 669.

[163] *Id.*

[164] *Id.* at 666.

[165] *See* text accompanying notes 142-46 *supra.*

[166] 453 F.2d 661, 673 (5th Cir. 1971).

[167] *See* note 155 *supra.*

[168] 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 (1972).

[169] 442 F.2d at 192.

sion.[170] Indeed, the appellate court refused to hold "that the Eighth Amendment forbids *indefinite* confinement under the conditions endured by Sostre. . . ."[171] The favorable conditions of Sostre's isolation included: (1) adequate meals; (2) the availability of hygienic materials; (3) the opportunity for exercise and for participation in group therapy; and (4) provision of reading matter, including unlimited law books.[172] The Second Circuit's decision in *Sostre* will be an impediment to future holdings that solitary confinement for prolonged periods, at least where other factors are tolerable, violates the cruel and unusual punishment clause.[173]

But no matter how the Second Circuit may ultimately view extended ordinary solitary confinement, it is clear that its tolerance of confinement in strip cells is severely limited, regardless of the time span involved. In one of the first cases condemning strip cells,[174] the Second Circuit in 1967 reversed the dismissal of a complaint by an inmate of the Clinton State Prison at Dannemora, New York.[175] The court held that if the prisoner could prove his allegations,[176] the subhuman conditions he described in the Dannemora strip cell "could only serve to destroy completely the spirit and undermine the sanity of the prisoner."[177]

Maintaining its original appraisal of strip cells, the Second Circuit in

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[170] In Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), the court had imposed a fifteen day maximum confinement, relying, in part, upon a psychiatrist's testimony that long-term isolation might lead to distortions of reality and ultimate destruction of a person's mentality. The court of appeals considered the psychiatric testimony and determined that the court was without power to choose between competing theories of the psychological effects of prolonged solitary confinement. 442 F.2d 178, 193 n.24 (2d Cir. 1971). Dissenting Judge Feinberg took issue with the majority's failure to accept the lower court's "finding of fact" that the open-ended nature of Sostre's confinement threatened the prisoner's sanity. *Id.* at 207, 209.

[171] 442 F.2d at 193 (emphasis added).

[172] *Id.* at 193-94.

[173] *But see* United States *ex rel.* Tyrrell v. Speaker, 471 F.2d 1197, 1202 (3d Cir. 1973). For a detailed discussion of both the eighth amendment question and other issues raised in *Sostre*, see *Second Circuit Note*, 46 ST. JOHN'S L. REV. 474 (1972).

[174] In 1966, a district court had held that irregularly cleaned cells, lack of hygienic materials, a mere hole in the floor for receiving bodily wastes, and the absence of a flushing mechanism amounted to a condition "that inevitably does violence to elemental concepts of decency." Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966). To emphasize the horror of what he had seen, the judge appended photographs to his opinion, illustrating the strip cells in use at the Soledad penitentiary.

[175] Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

[176] The inmate-plaintiff was allegedly stripped of all clothing and confined for several days in a cell which was "dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue." *Id.* at 521. Wright was also denied the use of soap, towel, toilet paper, toothbrush, comb and other hygienic implements. Because of inadequate heating, he was exposed to sub-freezing temperatures. *Id.*

[177] *Id.* at 526. On remand, Wright successfully proved that the allegations of his complaint were true. Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd*, 460 F.2d 126 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1972) (awarding compensatory damages).

LaReau v. MacDougall[178] condemned their use at the Connecticut Correctional Institution at Somers, Connecticut. For possession of "contraband"[179] LaReau was incarcerated for five days in a barren cell without windows. The only light was from a 100 watt bulb which shone through a hole at the rear of the cell. It was turned on for LaReau only at meal times and the few occasions when he was allowed to read. In addition, the walls and door did not permit the transmission of sound, so the prisoner was frequently in total darkness and total silence. The cell contained no sink or commode, although there was a "chinese toilet," described by the court as "merely a hole in the floor in the corner of the cell covered with a grate. It was flushed with water by a manually-controlled valve operated from *outside* the cell."[180] There was no opportunity for exercise and the prisoner was forbidden from talking or communicating with anyone in the outside world, except that he was permitted to write. Finding that these conditions "seriously threatened the physical and mental soundness" of the occupant,[181] the court applied the guidelines suggested by *Wright v. McMann*[182] and *Sostre v. McGinnis*[183] and held that the Somers strip cell "fall[s] below the irreducible minimum of decency required by the Eighth Amendment."[184]

Besides expanding the number of recent cases condemning strip cells,[185] *LaReau* is a significant decision in other respects. First, it suggests

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[178] 473 F.2d 974 (2d Cir. 1972).

[179] The contraband was a rope made from towels, which LaReau, a prior escapee, might have used as a weapon or as an instrument of escape. *Id.* at 982.

[180] *Id.* at 977.

[181] *Id.* at 978.

[182] 387 F.2d 519 (2d Cir. 1967).

[183] 442 F.2d 178 (2d Cir. 1971).

[184] LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972). The lower court had actually visited the cells but found that "when properly used for limited periods according to the existing rules," they did not constitute cruel and unusual punishment. LaReau v. MacDougall, 354 F. Supp. 1133, 1141 (D. Conn. 1971).

[185] The conditions reported in other strip cells are all variations on a theme, the common motif being lack of hygienic materials and sanitation facilities. *See* Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972); Williams v. Wainwright, 350 F. Supp. 33, 34 (M.D. Fla. 1972); Jones v. Wittenberg, 330 F. Supp. 707, 720 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Lake v. Lee, 329 F. Supp. 196, 198 (S.D. Ala. 1971); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *cert. denied*, 403 U.S. 936 (1970); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969). *See also* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (objectionable conditions found to be partly the result of inmate conduct).

A few courts in the late sixties adhered to the hands-off doctrine and refused to condemn strip cells. *See* Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969); Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967); Roberts v. Papersack, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967).

In 1967, the Supreme Court had a glimpse of a "sweatbox." Brooks v. Florida, 389 U.S. 413 (1967) (per curiam). A prisoner accused of participating in a riot confessed to the alleged infraction after being confined for two weeks in a windowless, "barren cage fitted only with a

that the physical conditions set forth in *Sostre* could become the minimal standards[186] for all degrees of solitary confinement. This possibility troubled the dissenting judge, who stressed that the *Sostre* standards were never meant to apply to strip cells, *i.e.*, that prison authorities should have the option of imposing more severe conditions than those mentioned in *Sostre* when they are dealing with particularly troublesome inmates.[187] By holding the strip cell unconstitutional per se, however, the majority affirmed the proposition that even punishment for serious offenses cannot be allowed to transgress "the human dignity of inmates."[188] Secondly, the *LaReau* majority took judicial notice that placing a prisoner in a cell which is almost continuously dark would threaten his sanity and sever his contacts with reality.[189] The court's concern for the inmate's mental health is an important development in judicial review of prison conditions.[190] Finally, by way of dictum, the court stated that although enforced isolation and boredom are permissible methods of discipline, "they might not remain so if extended over a long period of time."[191] Thus, the court indicated that the *Sostre* decision, upholding prolonged and indefinite isolation, may be weakening in precedential value. The ultimate rule of the case is that regardless of the length of the confinement or the seriousness of the offense, the strip cell is cruel and unusual punishment per se.

D. Revocation of Good Time Credit

In contrast with the previously discussed punishments, the device of withholding or revoking "good time" credit has virtues which only reckless abuse can diminish. Almost all correctional facilities utilize this statutorily-provided method of enforcing prison rules.[192] By maintaining orderly conduct, *i.e.*, accumulating good time credit, prisoners are able to reduce the length of their confinement.[193] Non-conforming behavior leads to revocation or forfeiture of credit in the discretion of the prison official

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hole in one corner into which he and his cell mates could defecate." *Id.* at 414. The Court held that the fourteen days spent in the "oppressive hole" tainted any notions that his confession was voluntary:

> The record in this case documents a shocking display of barbarism which should not escape the remedial action of this Court.

Id. at 415.

[186] *See* LaReau v. MacDougall, 473 F.2d 974, 978 n.7 (2d Cir. 1972).

[187] *Id.* at 980-81 & n.7.

[188] *Id.* at 978. As an alternative holding, the court found that confining LaReau to the strip cell was a "grossly severe penalty" for possession of contraband. *Id.* at 978 n.6.

[189] *Id.* at 978.

[190] *See* text accompanying notes 280-90 *infra*.

[191] 473 F.2d at 978.

[192] TASK FORCE REPORT, *supra* note 8, at 50.

[193] *See, e.g.*, N.Y. CORR. LAW § 803(1) (McKinney 1968).

or board empowered to make such decisions.[194] Withholding credit clearly is not cruel and unusual punishment under a "shock the conscience" test, but courts, in isolated cases, have condemned denials of good time that are disproportionate to the offense[195] or made without due process of law.[196]

The good time credit system has distinct advantages over other disciplinary devices because it functions on a reward basis motivating in a positive way conformity with prison rules. It has been suggested[197] that more incentive schemes would help eradicate charges that the taint of sadism and vengeance degrades all prison disciplinary methods.

Protecting the Prisoner's Health and Welfare

Findings of cruel and unusual punishment in the prisons have extended far beyond various disciplinary devices. Courts have expanded the meaning of the eighth amendment to embrace such guarantees as proper medical facilities and services. Most recently, entire penal systems have been scrutinized for their damaging cumulative effects on prisoners.

A. Medical Services

Upon delivery into the hands of his keepers, the prisoner forfeits all rights to choose his own doctor or the facilities where he will receive medical treatment. Because prison authorities exercise exclusive control over the prisoner's health,[198] they have been charged with a duty to provide needed medical care.[199] Only recently, however, has the adequacy of this treatment been subjected to review under the eighth amendment.

As in other areas of administrative responsibility, prison officials have been afforded wide discretion in determining the medical needs of prisoners.[200] The view that only "exceptional circumstances" will justify a court's intervention[201] is changing. Charges that medical deprivations amount to unconstitutional treatment[202] have been subjected to varying applications

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[194] *See, e.g., id.* § 803(3)-(4). *See* United States v. Marchese, 341 F.2d 782, 789 (9th Cir. 1965); Carlisle v. Bensinger, 355 F. Supp. 1359, 1363 (N.D. Ill. 1973). Prison officials have been criticized for viewing good time credits as privileges rather than rights. *See, e.g.*, Hirschkop & Millemann, *supra* note 16, at 831-32.

[195] *See, e.g.*, Carothers v. Follette, 314 F. Supp. 1014, 1027 (S.D.N.Y. 1970).

[196] *See, e.g.*, Landman v. Royster, 333 F. Supp. 621, 654 (E.D. Va. 1971); Bundy v. Cannon, 328 F. Supp. 165, 173 (D. Md. 1971).

[197] *See* TASK FORCE REPORTS, *supra* note 8, at 50-51.

[198] Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

[199] *Id.*; Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966). *See generally* Sneidman, *Prisoners and Medical Treatment: Their Rights and Remedies*, 4 CRIM. L. BULL. 450 (1968).

[200] *See* United States *ex rel.* Lawrence v. Ragen, 323 F.2d 410 (7th Cir. 1963); Newman v. Alabama, 349 F. Supp. 278, 280 (M.D. Ala. 1972).

[201] Oaks v. Wainwright, 430 F.2d 241, 242 (5th Cir. 1970).

[202] Courts do not always make it clear which provision of the Constitution is applicable. *See Decency and Fairness, supra* note 26, at 861. *But see* Newman v. Alabama, 349 F. Supp. 278,

of conventional tort theory—negligence, gross negligence, and intent being the guiding standards.[203] Recovery has been granted most often where the prisoner has shown an intentional deprivation of medical care.[204] Under this standard, the complainant must demonstrate that prison officials have deliberately denied him access to medical treatment. Examples of such intentional conduct include compelling a prisoner to perform hard labor when it is known that he is ill,[205] and refusing to administer an officially prescribed diet.[206] On occasion, courts have been willing to consider gross negligence as an equivalent of intentional conduct.[207] The influential Second Circuit, while originally holding that in the absence of intent severe and obvious injuries must be present,[208] has modified its stance to include "deliberate indifference" within the purview of the eighth amendment. In *Corby v. Conboy*,[209] the prisoner had brought a serious nasal problem to the attention of the authorities, but no remedial action was taken. In reversing the dismissal of the complaint, the Court of Appeals relied upon an earlier case[210] in which the "deliberate indifference" and "gross misconduct" of prison authorities[211] debased their conduct below the level of mere negligence.[212]

Understandably, courts have been reluctant to treat medical negligence in the prisons as a constitutional deprivation.[213] Both prison officials and doctors are frequently confronted by feigned illnesses,[214] and it is often

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280 (M.D. Ala. 1972): "The adequacy of medical treatment provided prison inmates is a condition subject to Eighth Amendment scrutiny."

[203] The analysis along negligence lines was enunciated in an addendum to the decision in Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970). The Ninth Circuit has fashioned a different approach. To bring his case within constitutional proportions, the prisoner must allege and prove: (1) an acute physical condition; (2) an urgent need for medical care; (3) the refusal or failure of officials to provide treatment; and (4) tangible residual injury. Mayfield v. Craven, 299 F. Supp. 1111 (E.D. Cal. 1969), *aff'd*, 433 F.2d 873 (9th Cir. 1970).

[204] Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Redding v. Pate, 220 F. Supp. 124, 128 (N.D. Ill. 1963).

[205] Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965).

[206] Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966).

[207] Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

[208] Church v. Hegstrom, 416 F.2d 449, 451 (2d Cir. 1969). The complaint alleged that prison authorities knew, or "should have known," that the prisoner's health was failing. As a result of the alleged inaction, the prisoner died. The court held that the complaint described little more than negligence.

[209] 457 F.2d 251 (2d Cir. 1972).

[210] Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970).

[211] The prisoner's complaint stated that in defiance of a surgeon's instructions and without obtaining a discharge, officials prematurely removed him from the hospital after he had undergone a serious leg operation. *Id.* at 924.

[212] *Id.*

[213] *See* United States *ex rel.* Hyde v. McGinnis, 429 F.2d 864, 868 (2d Cir. 1970); Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

[214] *See* Gates v. Collier, 349 F. Supp. 881, 901 (N.D. Miss. 1972); Holt v. Sarver, 309 F. Supp.

impossible for them to know whether actual care is required or the prisoner is merely malingering. In such instances, deference to administrative judgments would be proper.[215] On the other hand, it has been found that prisoners may be discouraged from bringing medical problems to the attention of the authorities, fearing a reprisal if nothing serious is discovered.[216] Nevertheless, negligence claims arising from improper medical treatment in the prisons are better left to conventional tort remedies.[217]

Although the case-by-case approach described above results in compensation for injured individuals and possibly an increased vigilance on the part of prison medical authorities, it fails to insure that adequate medical treatment will be administered to other prisoners in the future. Through recent class actions, however, prisoners have been able to secure improved medical care and facilities throughout an entire penal system. In *Gates v. Collier*,[218] the court found that the inefficient and inadequate medical staff and facilities at the Mississippi State Penitentiary threatened the physical health and safety of the inmates, thereby constituting cruel and unusual punishment.[219] The defendant—administrators were commanded to meet minimal health care requirements by (1) employing additional medical personnel, (2) forbidding untrained inmates to serve as staff assistants, and (3) taking the necessary steps to bring the prison hospital and equipment into compliance with state licensing requirements for hospitals and infirmaries.[220] As a standard by which to measure the adequacy of medical services, the court ordered the defendants to use their "best efforts" to comply with the guidelines of the American Correctional Association.[221]

When presented with a class action on behalf of the four thousand prisoners of the Alabama Penal System the court in *Newman v. Alabama*[222] reached a conclusion similar to that in *Gates*. The *Newman* court declared that the failure of the Board of Corrections to provide sufficient medical facilities, staff, and services was a "willful and intentional violation" of the eighth and fourteenth amendments.[223] In addition, it was held that "the

362, 380 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[215] *See Decency and Fairness, supra* note 26, at 862.

[216] Gates v. Collier, 349 F. Supp. 881, 888 (N.D. Miss. 1972).

[217] It has been suggested, however, that since prisoners have no choice in the matter of medical treatment, the authorities should be charged with a higher duty of care when negligence actions are brought against them. *See* Plotkin, *Enforcing Prisoners' Rights to Medical Treatment*, 9 CRIM. L. BULL. 159, 165 (1973).

[218] 349 F. Supp. 881 (N.D. Miss. 1972).

[219] *Id.* at 894. The court found that the inadequate medical care, along with insufficient housing and improper diets, was not only "unnecessarily cruel and unusual" but also a threat to the process of rehabilitation. *Id.*

[220] *See* text accompanying notes 295-96 *infra*.

[221] *Id.*

[222] 349 F. Supp. 278 (M.D. Ala. 1972).

[223] *Id.* at 285-86.

intentional refusal by correctional officers to allow inmates access to medical personnel and to provide prescribed medicines" was cruel and unusual punishment.[224] The *Newman* court was more explicit than the *Gates* court in specifying the relief measures to be taken.[225] The Alabama Board of Corrections was ordered, *inter alia*,(1) to meet the standards provided in the United States Department of Health, Education and Welfare Proposed Revised Regulations for Participation of Hospitals in the Medicare Program, (2) to comply with the regulations of the Federal Bureau of Narcotics and Dangerous Drugs in the dispensation of medicine, and (3) to provide for periodic inspections by the Alabama State Board of Health.[226]

The *Newman* and *Gates* assaults on inadequate medical treatment are signposts pointing the way to better health protection[227] for inmates. Both decisions make it clear that an inadequacy of staff and facilities is sufficient in itself to constitute a violation of the eighth amendment. Probably few states have been as remiss in providing medical care for inmates as have been Mississippi and Alabama. But even in Ohio[228] and Pennsylvania[229] municipal jails were recently chastised for providing little if any medical care. Individual prisoners still can and should seek compensatory relief where official misconduct results in a denial of proper medical attention. But where widespread inadequacies exist, the *Newman* and *Gates* models should be employed.

B. Cumulative Effects of the Prison Environment: A New Approach

An important new development which contains the potential for prison reform on a widespread basis was announced in *Holt v. Sarver*[230] which held:

> [C]onfinement itself within a given instituton may amount to a cruel and unusual punishment . . . where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people . . . .[231]

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[224] *Id.* at 286.

[225] In its injunction, the court issued a total of 25 directives to be followed in bringing a new medical program to Alabama prisons. Further, the court required submission of a report within six months of its decree, detailing the implementation of each item. *Id.* at 286-88.

[226] *Id.* at 286-87.

[227] The health of inmates has also caused concern to courts faced with conditions of solitary confinement. In Landman v. Royster, 333 F. Supp. 621, 648 (E.D. Va. 1971), for example, the court made certain that nudity in solitary be permitted only when a doctor states in writing that the inmate's health will not be adversely affected. *Id.*

[228] Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971).

[229] Jackson v. Hendrick, 40 U.S.L.W. 2710 (Ct. C. P., April 7, 1972).

[230] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[231] *Id.* at 372-73.

Because of the cumulative effects of the infamous trusty system, uncontrolled abuses in barracks life, bad conditions in isolation cells, lack of a rehabilitation program and general inadequacy of medical facilities, the court declared confinement in the Arkansas Penitentiary System unconstitutional.[232]

Two years later, *Gates v. Collier*[233] found, in like manner, that the Mississippi State Penitentiary at Parchman was being "maintained and operated in a manner violative of rights secured to inmates by the United States Constitution."[234] The court discovered an aggregate of conditions, including racial segregation,[235] inadequate building facilities, poor medical services, insufficient protection of inmates from fellow prisoners, an abusive trusty system, and cruel disciplinary procedures, all of which the court found to be grounds for declaratory and injunctive relief for the inmates.[236]

When *Holt v. Sarver*[237] was handed down, many observers believed that since the Arkansas penal system was unusually barbaric, there would be few decisions like *Holt* in the future.[238] *Gates v. Collier* makes it clear that the *Holt* approach is not an anomaly and that it is still viable as a means of achieving the widespread reform that is so desperately needed in many penal systems. Both courts were particularly concerned with the general safety and well-being of the prisoner. In safeguarding the prisoner's physical and mental welfare, *Holt* and *Gates* condemned the overall environment to which the prisoner was exposed.

In addition to the inadequate medical services and facilities,[239] *Gates* assailed three aspects of the prisoners' environment at Parchman: the physical facilities,[240] the barracks life, and the trusty system.

1. *Physical Facilities*—After examining the evidence, the court was convinced that the housing units at Parchman were "unfit for human habitation under any modern concept of decency."[241] Water and sewage lines presented immediate health hazards, electrical and heating units were in total disrepair, bathrooms were unsanitary, and emergency fire-fighting equipment was inadequate.[242] The prison authorities were enjoined to take

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[232] *Id.* at 381.

[233] 349 F. Supp. 881 (N.D. Miss. 1972).

[234] *Id.* at 893.

[235] Because of the Parchman policy of racial segregation, the United States intervened on behalf of the plaintiff. *Id.* at 885.

[236] *Id.*

[237] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[238] *See* 84 HARV. L. REV. 456 (1970).

[239] *See* text accompanying notes 218-21 *supra*.

[240] The court in *Holt v. Sarver* did not find it necessary to condemn the physical aspects of the housing units.

[241] Gates v. Collier, 349 F. Supp. 881, 887 (N.D. Miss. 1972).

[242] *Id.* at 887-88.

immediate steps to install new equipment and facilities.[243]

2. *Life in the Barracks*—Protection of inmates from assaults and other abuses by their fellows is a duty which often goes unfulfilled by prison administrators.[244] The *Gates* court learned that authorities at Parchman had been particularly delinquent in providing such protection. All inmates were placed in one large dormitory-style room without any classification or assignment procedure, the result being the intermingling of violent criminals and persons convicted for nonviolent crimes. Since the number of civilian guards was totally inadequate, many custodial duties were assigned to incompetent and untrained inmates. When the lights went out at night, violent assaults,[245] including stabbings, were uncontrollable.[246] Such inadequate protection, the court held, was cruel and unusual punishment.[247] To reduce the risks of inmate abuses in the future, the court commanded the penitentiary officials to eliminate overcrowding, institute methods to detect weapons among the prisoners, relieve inmates of custodial duties and replace them with competent civilian personnel, and make reasonable efforts to isolate prisoners with records of assaults and violence against other inmates.[248]

3. *The Trusty System*—At the time *Holt v. Sarver*[249] was decided, the peculiar trusty system, "universally condemned by penologists,"[250] was utilized only in Arkansas, Louisiana, and Mississippi. "Trusties" are prisoners assigned the job of guarding other inmates. They are armed with guns in the fields, and are often left in full control of other prisoners, thus having as was recognized in *Holt*, "the power of life and death over other inmates."[251] At Parchman, it was found that many of the trusties had been convicted of violent crimes and a majority were psychologically dis-

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[243] *Id.* at 894.

[244] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam).

> [245] The Government has the absolute right to hold prisoners for offenses against it but it also has the correlative duty to protect them against assault or injury from any quarter while so held.

The *Gates* decision makes no reference to the homosexual assaults prevalent in many prisons today. *See* Holt v. Sarver, 309 F. Supp. 362, 377 (E.D. Ark. 1970). The *Holt* court was appalled by the lack of precautions taken against such abuses in Arkansas. *Id.* at 377.

[246] 349 F. Supp. at 889.

[247] *Id.* at 894.

[248] *Id.* at 902.

[249] 309 F. Supp. 362, 373 (E.D. Ark. 1970).

[250] *Id.*

[251] *Id.* at 374. Penologists disapprove of the system because:

> [I]t creates an unhealthy prison climate and atmosphere; it breeds fear and hatred between the guards, on the one hand, and those guarded, on the other hand; it tends to be brutal and to endanger the lives of inmates who live and work "under the guns" of other convicts. . . .

turbed.[252] Besides inflicting economic injury upon fellow inmates through extortion, they were guilty of having wounded a number of prisoners and physically beaten others. The unchecked authority which trusties exercised over other prisoners was held "patently impermissible,"[253] and the defendants were ordered to immediately commence phasing out the trusties and replacing them with civilian guards. The court insisted that lack of funds "shall not constitute valid grounds for continuing delay."[254]

Although the trusty system is a southern anomaly, many of the other adverse conditions uncovered in Arkansas and Mississippi prisons have been discovered in northern institutions.[255] Indeed, the *Holt-Gates* model of overall prison condemnation had been employed against a United States jail in Anchorage, Alaska in 1951.[256] Although the court was unable to propose a remedy, it found the ancient frame building, overcrowding, intermingling of youths with hardened criminals, lack of adequate sanitary facilities, and general dilapidation "inexcusable and shocking to the sensibilities of all civilized persons."[257] More recently, a federal district court in Ohio examined "the total picture of confinement in the Lucas County Jail"[258] and ordered extensive changes in the personnel and physical environment of the jail in order that the eighth amendment rights of its occupants would be better protected.[259]

These cases may have been influenced by what the Supreme Court in *Trop v. Dulles*[260] found objectionable about the punishment of expatriation; the individual is subjected to a "fate of ever increasing fear and distress."[261] It matters not, said the *Trop* Court, that actual consequences ensue, because the "threat makes the punishment obnoxious."[262] In *Holt*, the court observed that a convict in Arkansas "has no assurance whatever

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[252] *Id.* at 373. *See generally* 84 HARV. L. REV. 456 (1970).
35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders.
349 F. Supp. at 889.

[253] *Id.* at 894.

[254] *Id.* at 903.

[255] *See* Burger, *supra* note 1, at 168-69.

[256] *Ex parte* Pickens, 101 F. Supp. 285 (D. Alas. 1951). The district court judge found himself in agreement with the comment of representatives of the health service of the federal government that confinement in the jail was a "fabulous obscenity." *Id.* at 287.

[257] *Id.* at 290.

[258] Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971).

[259] Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). In an unofficially reported case, a Philadelphia court recently declared that the conditions in Philadelphia municipal prisons were an invasion of the guarantees against cruel and unusual punishment. Jackson v. Hendrick, 40 U.S.L.W. 2710 (Ct. C. P., April 7, 1972).

[260] 356 U.S. 86 (1958).

[261] *Id.* at 102.

[262] *Id.*

that he will not be killed, seriously injured, or sexually abused,"[263] and the *Gates* court was concerned with the "inherent risks" in the overcrowded barracks and trusty system.[264] Whether a prisoner is actually assaulted should make little or no difference if the environment to which he is exposed placed him in imminent danger of harm. Further, if the surrounding facilities do not comport with standards of decency, then the authorities responsible for maintenance must be held accountable. In the aggregate, such conditions are detrimental to "the dignity of man"[265] and are violative of the eighth amendment.

Developing Trends in Judicial Review of Prisoners' Grievances

There is every indication from the burgeoning number of precedent-setting cases that the hands-off doctrine is destined to be buried "in the dustbin of legal history."[266] Courts are opening their eyes wide to the abhorrent conditions existing in penal institutions across the nation. Whether or not they grant relief in all cases, courts are giving serious consideration to the problems and are not merely brushing aside prisoners' claims as being beyond the judicial province. This willingness to intervene, of course, presents the practical problem once thought to be a justification for the hands-off doctrine, namely the threat of an overburdened court calendar. Some have suggested the use of non-judicial ombudsmen[267] or arbitrators[268] to hear prisoners' grievances, thereby avoiding the necessity for judicial intervention. Chief Justice Burger[269] and others[270] have recommended a type of collective bargaining between authorities and inmates. Such procedures would also serve to eliminate frivolous claims.

Accompanying the abrogation of the hands-off doctrine has been relaxation of the standards of "decency" required to "shock the conscience" of the court. While deficiencies in the medical facilities of the Alabama

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[263] 309 F. Supp. at 381. The frequency of assaults in the barracks "put some inmates in such fear that it [was] not unusual for them to come to the front of the barracks and cling to the bars all night." *Id.* at 377.

[264] Gates v. Collier, 349 F. Supp. 881, 888 (N.D. Miss. 1972).

> [C]onfinement of inmates at Parchman in barracks unfit for human habitation and in conditions that threaten their physical health and safety . . . is impermissible.

Id. at 894.

[265] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[266] Kaufman, *supra* note 9, at 506.

[267] *See id.* at 511; Singer, *Prisoners as Wards of the Court—A Nonconstitutional Path to Assure Correctional Reform by the Courts*, 41 U. CINN. L. REV. 769 (1972); TASK FORCE REPORT, *supra* note 8, at 85.

[268] *See Decency and Fairness, supra* note 26, at 882-83.

[269] Burger, *supra* note 1, at 170.

[270] Singer & Keating, *The Courts and the Prisoners: A Crisis of Confrontation*, 9 CRIM. L. BULL. 337 (1973). In an appendix the authors present a model for inmate-administration grievance procedures. *Id.* at 349-57.

prisons were not considered to "rise to constitutional proportions" in 1971,[271] a year later, another court condemned them in their totality.[272] The court that decided *LaReau v. MacDougall*[273] banned the use of strip cells under any circumstances and implied that all solitary confinement must meet certain minimal standards to protect the health and sanity of isolated prisoners.

An increasing reliance on the use of outside sources may help explain the ability of the judiciary to recognize sub-minimal conditions. By looking to the standards set forth by such organizations as the Federal Bureau of Prisons,[274] the American Correctional Association,[275] the Department of Health, Education, and Welfare,[276] and ad hoc investigating committee,[277] courts have been able to combat the criticism that they lack penological expertise. In some cases, judges have ordered prison officials either to meet the standards provided by these outside sources or to submit for the court's approval their own list of reforms following substantially the guidelines set by other authorities.[278] Furthermore, courts are retaining jurisdiction over the prisons until the guidelines are satisfactorily met.[279]

Courts are showing a greater reluctance to allow financial considerations to impede the elimination of unconstitutional conditions.[280] Obviously, both the renovation of facilities and the hiring of better-trained and larger staffs require large expenditures of public funds. But judicial warnings that certain prisons will be shut down[281] need not trouble state administrators if they follow the example of Mississippi. When Chief Judge Keady declared Parchman unfit for habitation and ordered an extensive overhall in physical plant and personnel,[282] the state authorities took advantage of the newly-created federal funding program for state

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[271] Lake v. Lee, 329 F. Supp. 196, 202 (S.D. Ala. 1971).

[272] Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972).

[273] 473 F.2d 974 (2d Cir. 1972).

[274] *See, e.g.*, Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).

[275] *See, e.g.*, Landman v. Royster, 333 F. Supp. 621, 647-48 (E.D. Va. 1971).

[276] *See, e.g.*, Newman v. Alabama, 349 F. Supp. 278, 286 (M.D. Ala. 1972).

[277] *See, e.g.*, Gates v. Collier, 349 F. Supp. 881, 892 (N.D. Miss. 1972); Jones v. Wittenberg, 323 F. Supp. 93, 97 (N.D. Ohio 1971).

[278] *See, e.g.*, Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972).

[279] *See, e.g.*, Jones v. Wittenberg, 330 F. Supp. 707, 721 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[280] *See, e.g.*, Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968); Gates v. Collier, 349 F. Supp. 881, 897 (N.D. Miss. 1972).

[281] *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362, 383 (E.D. Ark. 1970). *See generally* Note, *Courts, Corrections, and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates*, 44 So. CAL. L. REV. 1060, 1080-91 (1971).

[282] *See* text accompanying notes 243, 248 & 254 *supra*.

correctional facilities created by the Omnibus Crime Control Act of 1970.[283] The Law Enforcement Assistance Administration (LEAA),[284] under the auspices of the Department of Justice, reviewed the conditions at Parchman and assured the authorities that upon prompt application by the state, one million dollars in federal funds would be available for immediate amelioration of Parchman's adverse conditions.[285] It is to be hoped that other states will take advantage of federal aid before they are forced into action by the courts.

The recent cases reveal a growing concern with the health, both physical and mental, of incarcerated individuals. Whether this concern centers around medical services and facilities or general deprivations endured in solitary confinement, courts are no longer willing to give penal officers unbridled discretion where a prisoner's health may be seriously jeopardized.[286] Although psychiatric evidence was given little weight by the Second Circuit in *Sostre v. McGinnis*,[287] a year later, the majority in *LaReau v.*

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[283] 42 U.S.C. §§ 3750-3750(d) (Supp. 1973). As the following pertinent excerpts from the statute reveal, federal funds are conditioned upon assurances from the states that correctional facilities will be brought into conformity with the most advanced standards of construction, personnel, and rehabilitation programs.

> The Administration [LEAA] is authorized to make a grant under this subchapter to a State planning agency if the application incorporated in the comprehensive State plan—
>
> (1) sets forth a comprehensive statewide program for the construction, acquisition, or renovation of correctional institutions and facilities in the State and the improvement of correctional programs and practices throughout the State;
>
> . . . .
>
> (4) provides satisfactory emphasis on the development and operation of community-based correctional facilities and programs, including diagnostic services, halfway houses, probation, and other supervisory release programs for pre-adjudication and post-adjudication referral of delinquents, youthful offenders, and first offenders, and community-oriented programs for the supervision of parolees;
>
> (5) provides for advanced techniques in the design of institutions and facilities;
>
> (6) provides, where feasible and desirable, for the sharing of correctional institutions and facilities on a regional basis;
>
> (7) provides satisfactory assurances that the personnel standards and programs of the institutions and facilities will reflect advanced practices;
>
> (8) provides satisfactory assurances that the State is engaging in projects and programs to improve the recruiting, organization, training, and education of personnel employed in correctional activities, including those of probation, parole, and rehabilitation.

[284] 42 U.S.C. § 3750(b)(1), (4)-(8) (Supp. 1973). 42 U.S.C. § 3711 (1970).

[285] Gates v. Collier, 349 F. Supp. 881, 892 (N.D. Miss. 1972). One million dollars, of course, will not satisfy long-range reform. In Oklahoma, for example, the state legislature appropriated $10 million to maintain the penal system in 1973. In commenting on recent rioting at the prison, a gubernatorial assistant stated that even these funds were insufficient, adding:

> In Oklahoma, as in most states, we do not spend enough money on our penal systems.

N.Y. Times, July 30, 1973, at 13, col. 4.

[286] *Compare* Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) *with* Landman v. Royster, 333 F. Supp. 621, 648 (E.D. Va. 1971).

[287] 442 F.2d 178, 193 n.24 (2d Cir. 1971).

MacDougall[288] took judicial notice of the adverse psychological effects of strip cells. Just as the Supreme Court was willing in *Brown v. Board of Education*[289] to give serious consideration to the detrimental psychological and sociological ramifications of racially segregated education, so too, should federal courts give attention to the findings of psychologists concerning the adverse affects of isolated confinement in the prisons.[290]

One of the guiding principles of the "new penology" is that criminals "are sent to prison *as* punishment, rather than *for* punishment."[291] Rehabilitation of prisoners, an important aspect of the modern penology, is not the sole function of imprisonment,[292] but it is being recognized as one of the most effective means of curbing recidivism.[293] The lack of a rehabilitation program in a prison is not per se unconstitutional.[294] But it was recognized in *Holt v. Sarver*[295] that a total indifference by prison authorities towards rehabilitating prisioners may be an aggravating factor in making confinement itself a cruel and unusual punishment. Furthermore, disciplinary punishments and general living conditions which have the effect of retarding or interfering with the process of rehabilitation are being carefully scrutinized under the eighth amendment.[296]

The most important result, perhaps, of active judicial review of prison abuses is the public awareness generated. In forcing administrators and legislators into action, courts are bringing to the public's attention the neglect in prisons which is affirmatively linked to crime on the streets and to violent prison outbreaks.[297] Surely, judicial activism, in spite of its inherent shortcomings, is preferable to the prisoner activism that results in bloodbaths such as Attica.[298]

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[288] 473 F.2d 974, 978 (2d Cir. 1972).

[289] 347 U.S. 483 (1954). *See* Hirschkop & Millemann, *supra* note 16, at 837.

[290] *See* note 155 *supra*.

[291] Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1970).

[292] *See* Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970); TASK FORCE REPORT, *supra* note 8, at 16.

[293] *See generally* Burger, *supra* note 1; TASK FORCE REPORT, *supra* note 8, at 16.

[294] Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970).

[295] *Id.*

[296] *See* Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968); Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972).

[297] *See generally* Kaufman, *supra* note 9, at 510-15; *Decency and Fairness, supra* note 26, at 842-44.

[298] An inmate in the Oklahoma state prison at McAlester told newsmen that

> [w]ith overcrowding, poorly prepared food, a 'sadistic' medical system and no rehabilitation program, this [the riot] just had to happen.

N.Y. Times, July 29, 1973, at 36, col. 5 (city ed.).