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Prison Conditions: An Unconstitutional Roadblock to Rehabilitation

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The pre-Gothic appearance of many prison buildings is deceptive; the prison system as we know it today is of quite modern origin.[1] Although William Penn had instituted a program of imprisonment for most felonies in 1682,[2] this radical innovation was repealed in 1718, when, in an attempt to obtain English validation of their trials, the Quakers adopted many features of the harsh English Code.[3] Thus, for all practical purposes, until the Pennsylvania Constitution in 1776 declared its determination to "proceed as soon as might be to the reform of the penal laws, and invent punishments less sanguinary and better proportioned to the various degrees of criminality,"[4] prisons were

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1. A. MACCORMICK, ADULT CORRECTIONAL INSTITUTIONS IN THE UNITED STATES 9 (1967) [hereinafter cited as MACCORMICK]. Despite the modern origin of the system, MacCormick asserts that 41 prisons are over 80 years old, and of these 20 are 100 to 158 years old. *Id.* at 62.

2. S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 27 (1963) [hereinafter cited as RUBIN].

3. W. LEWIS, FROM NEWGATE TO DANNEMORA 2 (1965) [hereinafter cited as W. LEWIS].

4. O. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845, at 8 (Patterson Smith reprint ed. 1967) [hereinafter cited as O. LEWIS]. Intriguingly enough, the English Parliament, in 1778, provided for the creation of a number of "penitentiary houses," the primary purpose of which was to instill in the inmate Christian virtues. A. BABINGTON, THE POWER TO SILENCE 94 (1968). And Thomas Eddy, a key figure in the American movement for penal reform, convinced the

used mainly for pre-trial detention.[5]

The Philadelphia Society for Assisting Distressed Prisoners, formed in that same year, was to change the picture.[6] After the Revolutionary War, the Society renewed its efforts and in 1787 Dr. Benjamin Rush read to the Society a landmark paper which suggested that the purpose of imprisonment was to make the prisoner repent[7]—the original concept behind the word "penitentiary."[8] Three years later the Pennsylvania legislature responded with legislation adopting hard labor in solitary confinement (for the purpose of contemplation and penitence) as a substitute for capital punishment for certain felonies.[9]

In 1790, the Walnut Street Prison in Philadelphia was opened, bringing the concept of reformation of criminals to realization.[10] The prison, however, was a failure. Overcrowding, corruption, lack of vocational training, and substantial mismanagement collapsed the system; by 1810, there was widespread call for a decrease in leniency, and a stronger "law and order" position.

The Pennsylvania legislature responded by requiring the absolute separation of prisoners from each other. Complete and utter silence—thus reducing

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New York State legislature, in 1796, to abolish the death penalty for all but three crimes, substituting lengthy prison sentences as punishment. W. LEWIS, *supra* note 3, at 1-2.

5. *Id.* at 7. This is the normally accepted view, and is generally accurate. A recent careful study, however, has demonstrated that some imprisonment of felons in the Middle Ages was primarily punitive rather than custodial in design. *See* R. PUGH, IMPRISONMENT IN MEDIEVAL ENGLAND (1968).

6. O. LEWIS, *supra* note 4, at 13. The first Society was short-lived, since the British took possession of the Philadelphia jails early in the Revolutionary War. After the war, Dr. Benjamin Rush, along with Benjamin Franklin and other Quakers, organized the Philadelphia Society for Alleviating the Miseries of Public Prisons.

7. *Id.* at 19.

8. Teeters, *State of Prisons in the United States, 1870-1970,* XX 33 FED. PROB. 18 (Dec. 1969), gives prison reformer John Howard credit for first coining the word. That penitence was the first goal of the Quakers in prison reform is clear; it meant a consequent lack of concern over such pressing problems as mismanagement and overcrowding which eventually led to the collapse of the whole system. It has, in fact, been suggested that the religious influence may have been the chief cause of the hideous conditions of prison life:

> Subsistence upon coarse food or shortened rations; the wearing of distinctve, and in certain cases humiliating, garb; abstinence from sexual and other excitements; the contemplation of past transgressions, accompanied by resolutions to make future amendment; the use of a cellular form of living accommodation; and the encouragement or absolute requirement of silence—all these were features of monastic life which may conceivably have influenced the thinking of those who built and administered prisons in the late eighteenth and early nineteenth centuries.

W. LEWIS, *supra* note 4, at 8. *See* K. MENNINGER, THE CRIME OF PUNISHMENT 222 (1968).

9. W. LEWIS, *supra* note 3, at 3.

10. O. LEWIS, *supra* note 4, at 119.

the possibility of internal strife, or the "teaching of crime"—became the rule. Prisoners were also restrained from any meaningful activity; their entire lives were spent in their small cells, alone and separate from the rest of the prison community. The move toward this isolation surprisingly received support from several outstanding progressive penologists, including Thomas Eddy, whose earlier progressive experiments with the vocational training at Newgate Prison in New York State, like those at the Walnut Street Prison, had ended in disaster and left him somewhat embittered.[11]

Meanwhile, New York State, which had generally been following Pennsylvania's lead, experienced riots during 1818 at several institutions. The legislature immediately legalized flogging both at Newgate and Auburn; the flogging, however, was to be inflicted only under direct supervision of the warden.[12] Soon thereafter, Elam Lynds, a notorious figure in prison history, was appointed warden; Lynds immediately imposed a thorough and strictly enforced rule of silence, the lock-step and the grotesque black and white prison uniform.[13]

Within a short time the system of total silence, total inactivity, and total isolation led to numerous mental breakdowns among the inmates. Soon, work—whether at hard labor or at some kind of industry—was provided for the inmates, and it is with this new system—the "Auburn system"—that the story of modern prisons begins.[14]

The Auburn system, with its enforced silence, its discipline backed by brute force,[15] and its program of inmate labor, might have passed into ig-

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11. W. LEWIS, *supra* note 3, at 41-42. Eddy, in his earlier "Account of the State Prison" (1801), had stressed amendment of the reformer as the most important aim of the penitentiary. O. LEWIS, *supra* note 4, at 53.

12. W. LEWIS, *supra* note 3, at 46.

13. *Id.* at 91-92. The system also had a classification of prisoners, according to the possibility of reformation of the inmate. The approach to penology taken by the board of inspectors at Auburn, was formulated in the following manner:

> The end and design of the law is the prevention of crime, through fear of punishment, the reformation of offenders being of minor consideration. . . . Let the most obdurate and guilty felons be immured in solitary cells and dungeons; let them have pure air, wholesome food, comfortable clothing, and medical aid when necessary; cut them off from all intercourse with men; let not the voice or face of a friend ever cheer them; let them walk within gloomy abodes, and commune with their corrupt hearts and guilty consciences in silence, and brood over the horrors of their solitude, and the enormity of their crimes, without the hope of executive pardon.

O. LEWIS, *supra* note 4, at 81.

14. *Id.* at 78.

15. *Id.* at 93. "It was frankly conceded by the administration that the system could not be maintained without prompt, severe and effective punishment." The story of corporal punishment in the New York state prisons of the early nineteenth century has been carefully described by W. LEWIS, *supra* note 3, at 94-98, and he illustrates the way in which even public unhappiness with the prison system may be unable to

nominy without further ado, except for one factor—the prison became self-supporting; the sales of products from the prison, as well as the intra-prison use of the products, lessened the costs so drastically that, in fact, there was a profit. From 1828 to 1833, Auburn prison itself netted over $25,000.[16]

The experiment at Auburn was successful all around; the public was happy to avoid taxation for the purpose of running prisons, businessmen rejoiced at using cheap labor, and prison officials were pleased at the release of volatile energies.[17] Other states, seduced by the prospect of making crime pay, soon followed suit, and within a few years many of the penitentiaries were self-sufficient. If the industries inside the prisons could not sustain them, convicts were "leased" out. Another popular method saw contractors taking over parts of the prison area itself, using convict labor on a contractual basis.

With the focus now on making prisons profitable, no attention was paid to the conditions under which the prisoners lived. If, as in Maine and Connecticut, the cells were pits in the ground, with no ventilation,[18] or small

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affect the management of the institution.

The Auburn system was primarily the brainchild of Elam Lynds, an obvious sadist who dealt unmercifully with the prisoners. By the mid-1820's Lynds had dictatorial power in Auburn. Although a New York law of 1819, legalizing flogging in prison, contained safeguards to prevent abuse, chiefly by requiring the presence of a prison inspector while it was administered, these provisions were constantly evaded under the tutelage of Lynds. "With the development of the Auburn system, and particularly after Lynds gained carte blanche authority to handle disciplinary matters, keepers and turnkeys were given wide latitude in the flogging of felons." *Id.* at 94.

A scandal occurred when a female prisoner, Rachel Welch, died in childbirth after severe floggings. Public outcry led to the appointment of a new warden, Gersham Powers, but when it became known that Powers also believed in corporal punishment, a grand jury was impaneled, which found that the turnkeys had been given summary authority to inflict corporal punishment without consulting the warden. *Id.*

A state investigation commission decided that the 1819 law did not prohibit all flogging, a decision validated by a New York court which held that, notwithstanding the explicit language of the 1819 statute, there was a "common law right" of flogging in prison, and the actions of the officials in the prison were otherwise beyond the ken of the court. *Id.* at 95-96. The law of 1819 thus failed to prevent the whipping, or infliction of other corporal punishment, by guards, and it was another decade before any real movement against corporal punishment took hold. Corporal punishment flourished elsewhere in New York. At Newgate, prisoners were flogged or chained to their beds. On some occasions, they were placed in the "Sunday Cell," about 5 feet high and 3½ feet square, in which a man of ordinary stature could neither stand up nor lie down. O. LEWIS, *supra* note 4, at 61. At Sing Sing, "[s]o pronounced was the mania for flagellation that on one or two occasions keepers were permitted to strip and flog inmates who were just entering prison, 'for insults offered to such keepers, or alleged offenses committed previous to conviction.'" W. LEWIS, *supra* note 3, at 151.

16. O. LEWIS, *supra* note 4, at 133.

17. *See* W. LEWIS, *supra* note 3, at 179, 180.

18. The cells at the Maine Prison at Thomaston, built on the Auburn plan, literally consisted of pits into which the inmate lowered himself each night, and which were then covered by an iron grating. O. LEWIS, *supra* note 4, at 147. Similar cells were in use in Connecticut. W. LEWIS, *supra* note 3, at 83.

rooms, 7 feet long and 3½ feet wide,[19] or, as in Vermont, cells in which prisoners had to walk all night to keep warm, being given only one blanket to ward off the most vicious New England winters,[20] these abuses were little noticed by the public. If silence, necessary to increased production, had to be enforced by vicious beatings (in some months at Sing Sing Prison in New York, there were as many as 3,000 lashes given out in punishment),[21] this could be tolerated: the prisoner was, after all, the "slave of the state,"[22] and slaves—and others—elsewhere were being beaten with regularity.[23]

In the 1840's and 50's several reform movements began,[24] but there was little success in ameliorating prison conditions.[25] After the Civil War, however, the New York Prison Society, spurred mostly by Zebulon Brockway, called for a national conference on penology. The result was the first meeting of the National Prison Association, held in 1870, in Cincinnati, Ohio. The ideal of prisoner rehabilitation was repeatedly stressed throughout the conference, and finally, in the keynote speech by Brockway himself. MacKelvey describes the reaction:

> In their enthusiasm for the ideal they rose above the monotony of four gray walls, men in stripes shuffling in lock step, sullen faces staring through the bars, coarse mush and coffee made of bread crusts . . . . They forgot it all and voted for their remarkable declaration of principles: Society is responsible for the reformation of criminals; education, religion and industrial training are valuable aids in this undertaking; discipline should build rather than destroy the self-respect of each prisoner; his co-operation can best be secured with an indeterminate sentence under which his discharge is regulated by a merit system; the responsibility of the state extends into the field of preventive institutions and to the aid and supervision of prisoners after discharge; a central state control should be established so as to secure a stable, non-political administration, trained officers, and reliable statistics.[26]

Thus, the principles which Dr. Rush and his Philadelphia Society had enunciated almost 100 years earlier, were now being accepted, in theory at

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19. O. LEWIS, *supra* note 18, at 329.
20. *Id.* at 154.
21. *Id.* at 328.
22. *Id.* at 333. Ruffin v. Commonwealth, 62 Va. 790, 796 (1871), used those exact words to describe a convict.
23. "Floggings were customary outside of prison, in the navy, in the schoolhouse, and the home." O. LEWIS, *supra* note 4, at 328. *See also* W. LEWIS, *supra* note 3, at 96-97.
24. *See* B. MCKELVEY, AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915, at 40-47 (Patterson Smith reprint ed. 1968) [hereinafter cited as MCKELVEY].
25. *Id.* at 38.
26. *Id.* at 70-71.

least, by the representatives of most of the state penal systems in the country. A new era for penology began.

But it was not to last. Many of the officials, returned to their own, less idealistic realms, found the goals impossible of attainment. Politics, as it always had, intervened in prison administration, removing wardens and others.[27] Some of the reformers died; others turned to new fields. Despite some victories, such as the building of the first Reformatory for youthful offenders at Elmira, New York, headed by Brockway, the movement faltered and died. It was revived again, briefly, in the 1880's, with former President Rutherford B. Hayes leading the fight, but his death in 1892 saw the end of the first phase of the revived movement.

Meanwhile, other trends were taking place to make the prison reformers wary. After the Civil War, the prisoners returned to production, and industry. But soon, outside labor, becoming organized for the first time in any meaningful sense, began to complain about the unfair competition of cheap convict labor. Some state legislatures, consequently, restricted in various ways the ability of the prisons to sell their output within the states or to make certain kinds of goods.[28] With this turn of events, the prisons were effectively back where they had been in 1820: prisoners, or great portions of them were unable to work; idleness again became the theme of prison life.

Some states responded with the "contract" or "lease" system. Alabama, for example, switched from leasing prison buildings to leasing prisoners. By the latter 1880's more than half of that state's convicts were engaged in mining coal.[29] In most states, however, opposition to that system was suc-

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27. McKelvey summarizes some of the problems which constant shifting of wardens brought. *Id.* at 150-151. The effect of politics on the one strong drive for penal reform in New York during the 1840's is told in W. LEWIS, *supra* note 3, at 214. Nor is the problem outdated. W. LUNDEN, THE PRISON WARDEN & THE CUSTODIAL STAFF 36 (1965) contains a statistical breakdown of termination of wardenships demonstrating that 35.2 percent of 294 case studies resulted from changes in state administration or political patronage.

28. New York provided that no prison industry should employ more than five percent of the number working at that same occupation in the state; a few industries were further restricted to a given number of workers. Moreover, the convicts were to be divided into three classes, the last of which were to receive no vocational training. *See* MCKELVEY, *supra* note 24, at 98-105.

29. M. MOOS, STATE PENAL ADMINISTRATION IN ALABAMA 14 (1942) [hereinafter cited as MOOS]. The Southern States, as a whole, have continued to lag behind prison movements elsewhere, partially because of continued poverty, and partly because of the inheritance of slavery. Thus, for example, the inmates of Alabama's system were leased under three categories: "full hands," "medium hands" and "dead hands," appellations stemming directly from slave days. *Id.* at 14-15; MCKELVEY, *supra* note 24, at 176. The wage scale was $18.50 per month for the first category, $9.00-$13.50 for the second, and maintenance for the third. MOOS, *supra* at 14-15. According to McKelvey, the lease camps, which were generally mines, "never saw the development of the paternalism that had been the saving grace of the old plantation

cessful. As labor power grew, prison industries shrank until finally, during the depression, Congress passed a series of acts ultimately outlawing interstate traffic in prison-made goods. When this legislation was followed by various state laws, profitable prison industry ceased.[30]

But even at that time, in the late 1880's, penologists and legislators alike were looking toward other goals.[31] There was a "widespread stampede"[32] to the ideas which Brockway and the National Prison Association (which had changed its name in the 1880's to the American Prison Association) had heralded:

> The close of the century found reformatory penology triumphant. Not only had its chief tenets been accepted by the responsible leaders of the many official and semiofficial bodies concerned with the prison, but they had been widely recognized in the statute laws of the North.[33]

And yet—in 1968, Dr. Karl Menninger can proclaim that in our prisons occurs the "Crime of Punishment." In 1969, Arkansas state officials were indicted for beating and torturing inmates with unspeakable devices.[34] And a leading penologist could say, in the 1960's:

> If penology does not get the lead out of its feet, a moratorium on research could safely be declared for several decades at least without researchers needing to fear that the practice of penology would catch up with them. There is no immediate prospect that

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system." MCKELVEY, *supra* note 24, at 180-81. Mortality rates were almost triple those in the North—41.3 per thousand per year. These facts, and others, lead McKelvey to the harsh declaration that "The southern states from a penological point of view never really belonged to the Union." *Id.* at 172.

The lease system lost some of its popularity by the early 1900's, but was replaced by an ingenious "surety" system, under which an owner in need of men would attend court, and offer to "lend" money to an accused who could not otherwise pay his fine. In exchange, the accused agreed to work. The agreement was supervised by the court, both as to form and amount of the loan and installments, which were sometimes six dollars per month. That system was declared invalid in United States v. Reynolds, 235 U.S. 133 (1914). The use of convicts in mines, however, continued. The state simply bought the mines and worked them publicly; the owner, meanwhile, got a nice price for his property. It was only in 1928 that the last prisoners were removed from the Alabama mines. MOOS, *supra* at 171.

30. 18 U.S.C. §§ 1761-62 (1964). Questions of whether prisoners should work, and if so whether they should be competitive with outside labor are too complex to develop here. The author hopes to focus on this and related problems in the near future. *See* L. ROBINSON, SHOULD PRISONERS WORK? (1931).

31. MCKELVEY, *supra* note 24, at 221.

32. *Id.* at 161.

33. *Id.* at 143.

34. A federal jury found the warden, J. L. Bruton, not guilty of nine charges of brutality, even though Bruton never testified to rebut the evidence afforded by a "number of inmates" and others. The jury was hung on the question of whether Bruton employed the "Tucker telephone," perhaps the most vicious device of all. N.Y. Times, Nov. 23, 1969, at 32, col. 1. The Arkansas prison system is discussed in notes 58-80 and accompanying text *infra*.

the chasm between practice and theory will be bridged.[35]

What *are* prison practices like in the latter half of the twentieth century? What goes on behind that "dark gray wall?" The cases—and other sources—hold at least a partial answer.

The American Prison in 1970.

The typical prison of the last third of the twentieth century has changed relatively little from the institutions of 150 years earlier. The average prisoner is compelled to live in an antiquated building, probably over 50, and perhaps over 100 years old. If he is fortunate he has only one cellmate, in a cell that could barely be called livable, and certainly not comfortable; otherwise, he will room with five or more inmates in a huge sheep-pen type of arrangement, or be given a bed in a large overcrowded general area.[36] His recreation, if any is allowed at all, is minimal. The food is adequate but not enticing,[37] served either on metal trays in a dining room or in his cell. He will be denied contact with women, since heterosexual contact is, of course, strictly forbidden. Yet the chances are quite high that he will be forced into homosexual contacts with his fellow inmates.

Throughout his day, if he is in a typical institution, his life is one of sheer monotony, broken only by staccato orders of discipline or minimal activity. He may be fortunate enough to work all day on a farm, or undergo vocational training or education, but the chances are slim indeed. He will be unable to interest any of the prison officals in him, unless he is hostile in some way, simply because there are not enough professional people to go around; if he is hostile, the only response will be discipline—probably solitary confinement.

The Physical Conditions of Prisons

In 1961, James Bennett, then Director of the Federal Bureau of Prisons, declared: "More than a hundred prisons still in operation today were built be-

35. Schnur, *The New Penology: Fact or Fiction*, in PENOLOGY 3, 7 (C. Vedder & B. McKay ed. 1964) [hereinafter cited as PENOLOGY].

36. In early 1970, Archibald Alexander, a member of the Board of Managers of the New Jersey State Prisons, described the overcrowding in that state's jails:

> In one wing of the maximum security prison in Rahway . . . 250 men live in a celless dormitory where plumbing facilities are insufficient and double decker beds, by blocking guards' vision make it easy for the strong to terrorize the weak. In a wing of the maximum security prison at Trenton, there are four men in each cell built for one man in the first half of the nineteenth century. In another wing, four men per cell are even more cramped. These men must use the single toilet in their poorly ventilated quarters.

N.Y. Times, Jan. 24, 1970, at 30, col. 6-7.

37. Random selections from answers to a questionnaire the author submitted to several hundred institutions shows that, of those who answered, annual expenditures

fore Grant took Richmond."[38] Six years later, a minimum of 11 percent of all prisons in use were said to be at least 80 years old.[39] Since the federal prison system dates from the establishment of the Federal Bureau of Prisons in 1930, most of the antiquated buildings are state prisons.[40]

A setting less prone to encourage rehabilitation than a building which is disintegrating before the very eyes of its inmates is hard to imagine. Moreover, these old buildings were constructed with a view of imprisonment that is no longer accepted or acceptable; they are composed of elements which increase the suffering of the individual and accomplish nothing toward his eventual resocialization. When the Maine State Prison was first opened, its first warden proclaimed that "Prisons should be so constructed that even their aspect might be terrific and appear like what they should be—dark and comfortless abodes of guilt and wretchedness."[41]

One of the most inhuman aspects of prison life is the lack of privacy caused by the almost universal phenomenon of overcrowding, particularly acute in the older prisons. These are generally left with the overflow of inmates which other, more treatment-oriented, institutions will not take, lest the rehabilitation effort there be frustrated by overpopulation and consequent inattention. In 1964, the conditions in federal prisons, generally considered the best penal institutions in the country, were described to a United States Senate Committee by James Bennett, Director of the Federal Bureau of Prisons:

> Although the general public visualizes a prison as a place where each inmate has his own cell, we do not have single-cell capacity for more than 30 percent of the total population of our maximum custody institutions. The rest are housed in multiple cells holding as many as 10 men, or in large dormitories, in basements, and in units originally constructed for other purposes.
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> . . . You may remember seeing, for instance at McNeil Island, where they have 10 men in an area no more than 15 by 20 feet, men sleeping in double—or triple—decked bunks, as on shipboard during the war, and they have to be there for long hours together.[42]

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per capita for food range from $180.00 to $500.00, with an average of 93 cents per prisoner per day. Even allowing for the possibility that some of these institutions raise some of their own food, thereby lowering the cost, the total expenditures for food seem extremely low.

38. Bennett, *Of Prison and Justice*, in PENOLOGY, *supra* note 35, at 20, 26.

39. MACCORMICK, *supra* note 1, at 9.

40. According to RUBIN, supra note 2, at 268, in 1952, only 17 of 152 state penal institutions (11 percent) were less than 50 years old.

41. K. MENNINGER, THE CRIME OF PUNISHMENT 71 (1968).

42. *Hearings before the Subcomm. on National Penitentiaries of the Sen. Comm. on the Judiciary*, 88th Cong., 2d Sess. 6, 7, 26 (1964) [hereinafter cited as *1964 Hearings*]. Mr. Bennett indicated in an earlier article that "[i]n our Atlanta penitentiary eight and ten men are now occupying cells intended for four. The single cells each

While inmates of penal institutions are no longer literally sleeping with pigs, as was true in Louisiana prisons a century ago,[43] the situation seems to have improved relatively little.

The terrible overcrowding in the prisons would almost move one to wish for the return of Pennsylvania's solitary cell, where at least the prisoner could have privacy at some point.[44] But the single cells now used almost exclusively on death row are no better. One deathrow inmate at San Quentin described it this way:

> The picture of the condemned man pacing his cell is not good applied to San Quentin. You can't pace a ten-foot cell that is all cluttered up with bed, table, chairs, toilet, and what not. Or you can, in a sort of fashion, by leaving one foot stationary and taking a pace each way with the other. That rests you from sitting, but is not very much as pacing. Nonetheless, men have paced so, and there is a hollow worn in the center of the concrete floor to prove it. Also the paint is worn away above the grating in the door—worn through several coats of paint down to the bare steel by men's foreheads pressing, rubbing against it while they look out at the garden, and at the hills over the wall.[45]

These, of course, are not the only physical irritants in prisons. As a result of overcrowding, for example, "Men stand in line at the toilets and washbowls. They go to the dining room in shifts; the dining room of the Atlanta (federal) penitentiary is in continuous use throughout the day."[46]

Modern plumbing has only recently come to many prisons,[47] and is still absent in some, so that the malodorous "bucket" adds to discomfort, particularly

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hold two men. Beds are strung closely together in dingy basement areas. And prisoners still arrive daily." Bennett, *supra* note 38, at 27. As both he and Fred Wilkinson, Deputy Director, Federal Bureau of Prisons, noted this "close, cheek by jowl housing for long-term prisoners naturally creates friction that leads to quarrels, fights, and sometimes rather serious assaults." *1964 Hearings* at 7.

43. *See*, A. DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 48-49 (Lantz ed. 1964), where the authors state that at Cincinnatti they found half of the imprisoned chained with irons. "We are unable to describe the painful impression which we experienced when, examining the prison of New Orleans, we found men together with hogs, in the midst of all odors and nuisances." *Id.* The overcrowding of nineteenth century prisons is traced carefully in MCKELVEY, *supra* note 24, at 152-55.

44. Recently, some Black Panthers accused of conspiracy to bomb several buildings in New York City, and unable to make the high bond set for them, sued in federal court to obtain better conditions in the jail in which they had been detained for eleven months awaiting trial. When the district court granted the relief of requiring the city to provide single cells for these presumably innocent inmates, the New York Times reported that the Panthers had obtained "special" jail status, so scarce were single jail cells. N.Y. Times, Feb. 28, 1970, at 1, col. 5.

45. D. LAMSON, WE WHO ARE ABOUT TO DIE 52 (1936).

46. Bennett, *supra* note 38, at 27.

47. Jails, as usual, are worse. In 1967, The National Council on Crime and Delinquency reported that four jails with 899 cells had no sanitary facilities, and that

at night, when the inmates cannot move freely to the restrooms. Despite the many inmates who are assigned to maintenance duty, and depite continuous attempts on the part of all, there are problems with cockroaches and other insects. It has recently been reported that an inmate of the Virginia State Penitentiary sent to segregation for one month spent his time killing cockroaches and piling them in a corner.[48] Moreover, prison authorities have only begun to allow inmates to use articles to brighten their inevitably dreary cells. Items such as photographs, radios, and the like are only now beginning to appear in many places (assuming that there is room for each man to have some personal article in an eight-man cell).

Brutality in the Prison

Violence permeates prison life. Much of it erupts within the inmate community itself—homosexual assaults, assertions of dominance, enforcement against bad debtors. The most vicious violence, however, is that which the prison officers—particularly the guards—employ against the inmates, who cannot complain because they will not be believed.

Part of the problem is endemic to the prison system. Personnel selected for the position of "correctional line officer" (guard) tend to be custodially oriented, regarding inmates not as humans but as ciphers.[49] The low salary scale (the salary range for guards is $1500—$9000 a year; the median is $4000—$5000)[50] generally forecloses college graduates and others who, on the whole, might be less physically abusive; indeed, over half the institutions in the country, undoubtedly because of low salaries, require no minimum educational qualifications for guards.[51]

The refusal of guards to accept the "treatment-oriented," more humane

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many others used the "bucket." *Correction in the United States, A Survey for the President's Commission on Law Enforcement and the Administration of Justice* (1967), reprinted in 13 CRIME AND DELINQUENCY 1, 153 (1967) [hereinafter cited as *N.C.C.D. Report*].

48. Hirschkop & Milleman, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 808 (1969). The superintendent of the prison, C.C. Peyton, attempted to evade the issue by indicating that he had cockroaches in his own home. *Id.* at n.74.

49. Grusky, *Role Conflict in Organization: A Study of Prison Camp Officials*, in PRISON WITHIN SOCIETY 455 (L. Hazelrigg ed. 1968).

50. *N.C.C.D. Report, supra* note 47, at 144.

51. *Id. See also* JOINT COMMITTEE ON CORRECTIONAL MANPOWER AND TRAINING, A TIME TO ACT, 19. In 1960, Myrl Alexander concluded:

> It is possible for anyone, regardless of his education, experience, or understanding of institutions, to become the head of a correctional institution. Hospitals must be administered by skilled and trained hospital administrators . . . the managerial head of a mental hospital must be qualified against accepted standards. But in the field of correctional institution administration, no standards are recognized throughout the country.

Alexander, *Correction at the Crossroad*, in 1964 *Hearings, supra* note 42, at 160, 161-62.

approach to inmates, even when the warden has endorsed this approach, is a stubborn fact of prison life.[52] And, of course, where the warden shares the opinion that rehabilitation is an illusory goal, the guards have virtually explicit authority to use force wherever and whenever they desire.

The most scandalous example of this kind of system has recently been unearthed—and that word is used advisedly—by Thomas Murton, a criminologist who was appointed to the Arkansas' state penal system in 1967.[53] Within a year of his appointment, he had exhumed bodies of prisoners allegedly beaten to death by the guards;[54] discovered files indicating the deaths of many more;[55] and revealed a list of torture devices regularly used by the warden, including the "Tucker telephone," in which a prisoner's testicles were shocked by electrical impulses,[56] and the "teeter board," a plank formed by two-by-four boards, nailed together so that the longer board was on top, and the nails holding the two extended toward the prisoner.[57] If the prisoner fell off the board, and could not make it balance, he was beaten with a five-foot long leather strap.[58] Other physical abuses were commonplace in the system; when 144 prisoners sat-in to protest food conditions, tear gas was used to break up the demonstration; later, ten of the leaders were beaten.[59]

These beatings were consciously endorsed by the authorities. When asked what his views on penology were, Governor Orval Faubus responded that "Punishment is the greatest deterrent to crime."[60] The legislature indicated its

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52. McClery and corroborative observations have shown that the custodial function can be performed equally well in an authoritarian organization and in one that grants more scope and self-determination to the prisoners. If repressive and more humane methods can serve equally well to safeguard the community and isolate prisoners, then according to the values of our society the more humane system is preferable.

Grosser, *External Setting and Internal Relations of the Prison*, in PRISON WITHIN SOCIETY 9, 19 (L. Hazelrigg ed. 1968).

53. N.Y. Times, Feb. 15, 1967, at 8, col. 1. The entire story is told in Murton's thorough, if somewhat biased book, ACCOMPLICES TO THE CRIME (1970).

54. N.Y. Times, Jan. 30, 1968, at 1, col. 1.

55. *Id.*, Feb. 7, 1968, at 1, col. 6.

Inmates were murdered, shot "accidentally" and, during what were described as escape attempts, burned to death, poisoned, drowned, run over by farm wagons, and "accidentally electrocuted." On separate occasions, two men were killed by a "falling tree." Many were listed as dying of heart failure. Thirteen died of sunstroke—four on a single day. One report said the inmate died simply "shot four times with a 38-caliber revolver."

Id. at 22, col. 5.

56. *Id.*, Jan. 17, 1968, at 26, col. 3.

57. The description is from the district court's opinion in Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).

58. N.Y. Times, Sept. 6, 1966, at 52, col. 4.

59. *Id.*; Pearman, *The Whip Pays Off*, 203 THE NATION 701, 702 (1966) [hereinafter cited as Pearman].

60. Pearman, *supra* note 59, at 704.

penal philosophy by giving a standing ovation to an ex-prisoner who told them, at the very time the revelations of the abuses were being made, that the prison had created "the finest atmosphere for rehabilitation of anti-social inmates that has ever been developed anywhere in the world."[61] Grand juries, convened to hear testimony, dismissed all the evidence as "prisoner talk;"[62] charges against some of the officials were likewise dismissed by local judges.[63] Later, federal grand juries indicted fifteen of these same officials.[64]

Just as saddening as this picture of the Arkansas system was the initial judicial reaction—or lack of it—to these tales of horror. In 1965, a federal district court refused to call excessive beatings and floggings by inmate-guards cruel and unusual punishment.[65] Instead, said the court, the beating "must not be excessive; it must be inflicted as dispassionately as possible and by responsible people; and it must be applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment any given conduct may produce."[66]

Immediately after this decision, the state penitentiary board drew up new rules. Whipping in the fields was forbidden; whippings were limited to ten lashes. Inmates (trustees) were forbidden to whip other inmates. A Board of Inquiry was established to decide how many lashes should be given.[67] But the Board's fundamental attitude toward the problem is probably better expressed by its one reference to rehabilitation in the new prison rules:

> The State Board and the Superintendent, acting in compliance with law, have established a rehabilitation system which largely occupies the time of prisoners by engaging in farm enterprise. This sytem is based on the theory that certain crops must be planted . . . *No one shall be permitted to shirk the work that they are (sic) capable of doing. Your prison commitment reads that you shall be confined "at hard labor" and you are expected to perform labor that you are capable of in a diligent and proper manner.*[68]

As the warden at that time expressed it, "Rehabilitation isn't something you

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61. N.Y. Times, Feb. 10, 1968, at 22, col. 3.
62. *Id.*, May 20, 1968, at 53, col. 1.
63. *Id.*, May 14, 1968, at 59, col. 4.
64. Tuscaloosa News (Alabama), July 12, 1969, at 1, col. 1. On November 21, 1969, the jury acquitted Bruton of eight of the nine charges and was hung on the ninth. N.Y. Times, Nov. 23, 1969, at 32, col. 1.
65. Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).
66. *Id.* at 689.
67. Pearman, *supra* note 59, at 702-03.
68. As quoted in A. MacCormick, *supra* note 1, at 50 (emphasis added). Although the author did not identify the system, the history and details given unmistakably mark it as Arkansas'.

can teach a man, it's a state of mind that can come to a man in the strangest places, even in the middle of a cotton field on a prison farm."[69]

The whipping continued, under the new "safe-guards" promulgated by the Board. Soon, another suit was filed, challenging the whipping, the Tucker telephone, the teeter board, and other similar devices. The torture devices were enjoined,[70] but the whipping was restrained only "until additional rules and regulations are promulgated with appropriate safe-guards."[71] Again, the prison system immediately formed new regulations; corporal punishment could not be imposed until after a Board of Inquiry hearing, could not exceed ten lashes with the strap, could not be applied to the bare skin, could not be used in the field, and could not follow, within 24 hours, another beating.[72]

On appeal, the Eighth Circuit reluctantly held that whipping with a leather strap, no matter how applied or imposed, was cruel and unusual punishment, saying "we have no difficulty in reaching the conclusion that the use of the strap . . . is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use . . . offends contemporary concepts of decency and human dignity. . . ."[73]

The court found the punishment invalid because of its potential for abuse; there was no way that a rule or regulation "however seriously or sincerely conceived and drawn, [would] successfully prevent abuse."[74] Pointing to the methods used by the prison system to evade the earlier rulings in *Talley* and *Jackson*, which called for following specific rules, and declaring that "[c]orporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous,"[75] the court stopped the beating of inmates.

The Arkansas system is, fortunately, not the typical system. But while its abuses and corruptions are far in excess of those found in the average penal system, the difference is one of degree rather than kind.

Philip Hirschkop has graphically outlined the brutalities of the contemporary Virginia State Penitentiary.[76] Beatings, neglect, solitary confinement, abuses, and simple ignorance of and refusal to follow due process, are all present in that system. In fact, the periodic, arbitrary tear gassings of prisoners have only recently ceased—and then only by court order,[77] a step the

69. Pearman, *supra* note 59, at 704.
70. Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).
71. *Id.* at 816.
72. Jackson v. Bishop, 404 F.2d 571, 575 n.5 (9th Cir. 1968).
73. *Id.* at 579.
74. *Id.*
75. *Id.*
76. Hirschkop & Milleman, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).
77. Mason v. Peyton, Civ. No. 5611-R (E.D. Va., order entered Aug. 13, 1968), as reported in Hirschkop & Millemann, *supra* note 76, at 796 n.7.

Fourth Circuit Court of Appeals was unwilling to take only three years ago.[78]

A review of both the cases and the observations made by outstanding penologists belies the assertion made by A. MacCormick, head of the Osborne Society, that "[s]ome of the most brutal forms of corporal punishment (flogging, for example) have practically disappeared. . . ."[79] Sol Rubin, an outstanding authority in the field, found in 1963, that

> [a]t least twenty-six prisons employed corporal punishment. Whipping with a strap was common. The Virginia "spread eagle" similar to the medieval rack, stretched the body by ropes and pulleys. Men died or came close to death in Florida's sweat box, an unventilated cell built around a fireplace. In Michigan and Ohio prisoners were kept in a standing position and unable to move; in Wisconsin they were gagged; in West Virginia they were subjected to frigid baths. . . .[80]

While corporal punishment has been abolished in Great Britain,[81] it is still officially allowed by Canadian statute,[82] although the actual use is asserted to be quickly diminishing.[83] Indiana, by statute, still allows corporal punishment in prison in some circumstances.[84] Beatings still occur with distressing regularity. Recently, a Louisiana court allowed recovery to the parents of a juvenile beaten to death with leather straps by officials of a state industrial school;[85] suits for beatings by prison guards have been brought under the Civil Rights Act both by prisoners[86] and by federal government officials.[87] Some courts, however, have refused to deal with allegations of beating by guards.[88]

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78. Landman v. Peyton, 370 F.2d 135 (4th Cir. 1967).

79. A. MacCormick, *supra* note 1, at 63.

80. K. Menninger, The Crime of Punishment 80 (1968).

81. M. Wolff, Prison 192-93 (1967).

82. *See* Kirkpatrick, *Corporal Punishment*, 10 Crim. L.Q. 320, 320-21, 324 (1968). Kirkpatrick reports, however, that this statute was rarely used, and the provision was abolished in Ontario in 1960. Corporal punishment is still allowed as punishment for violation of stated institutional regulations and for some crimes such as rape, indecent assault, incest. robbery, and armed burglary, among others. *Id.* at 321.

83. *Id.* at 325. Kirkpatrick's figures, however, are not as positive as his assertions. The figures show that total use of corporal punishment, both by a judicial court and as an institutional disciplinary measure has been as follows since 1954: 1954-46; 1955-92; 1956-77; 1957-58; 1958-49; 1959-35; 1960-26; 1961-75; 1962-25; 1963-74.

84. Indiana Rev. Stat. § 13.242 (1956).

85. Lewis v. State, 176 So. 2d 718, 729-30 (La. App. 1965), *cited in* F. Cohen, Legal Norms in Corrections 107 (1967).

86. *See, e.g.*, Wiltsie v. California Dep't of Corrections, 406 F.2d 515 (9th Cir. 1968).

87. *See* United States v. Jones, 207 F.2d 785 (5th Cir. 1953), holding that the federal government could prosecute, under the Civil Rights Act, a prison officer charged with having beaten, bruised, battered, and injured a prisoner for an infraction of prison rules. The prosecutions against the Arkansas officers, *supra* note 34, were brought under the same section of the Act.

88. *See, e.g.*, Glenfall v. Gladden, 241 Ore. 190, 405 P.2d 532 (1965). *But see* Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944).

Nor are guards the only persons in the prison willing or ready to hand out corporal punishment. In the Arkansas system, penologists were most deeply concerned about the fact that other inmates ("trusties") kept guard.[89]

In 1969, a federal district court suggested that the use of trusties as guards might, of itself, create an unconstitutional situation in Arkansas.[90] In a later landmark case,[91] the court, finding that under the system then in effect the state could not protect the inmate from the trusties, held the entire prison system unconstitutionally dangerous, and ordered the prison authorities either to produce a workable plan for improving the situation, or to face the possibility of closing down the prison.

Damage suits against officials who appear to have condoned beatings by inmates have not been well received. Thus, in *Henderson v. Pate*,[92] the court affirmed a dismissal of the case because the inmates could not be said to be state agents, or acting under color of state law. In *Bethea v. Crouse*,[93] the Tenth Circuit reversed a summary judgment for the defendant warden, who allegedly watched as one inmate, supposedly a rape victim, beat his attacker. The court stated that if the warden had allowed merely minor force, *e.g.*, an assault and battery, he could not be held liable; only if excessive force had been allowed (a jury question) could he be held.[94]

Prisons are not the only places where helpless inmates receive beatings. In *Whitree v. State*,[95] for example, the plaintiff stated that

> after a beating administered by the attendants, he was stripped and placed in the "Blue Room". That said room was a small dark room without toilet facilities, without water facilities, and, without a bed or mattress. He stated he was kept in said room for about eight days on bread and water plus a full meal once every three days. This sounds incredible but it was not refuted by any state witness.[96]

The institution at which the plaintiff was kept was not a prison. It was a state

89. This was the system, in 1942, in many southern states, including Alabama and Mississippi. M. MOOS, STATE PENAL ADMINISTRATION IN ALABAMA 17 (1942). Most states have since rejected the system.

90. Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969). *See also* Commonwealth *ex rel.* Bryant v. Hendricks, Civil No. 353 (Philadelphia County Ct. C.P., Sept. 1, 1970).

91. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

92. 409 F.2d 507 (7th Cir. 1969).

93. 417 F.2d 504 (10th Cir. 1969).

94. A similar case, Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969), held that a warden could be liable when a trusty accidentally discharged a shotgun. The rationale, however, was that the warden had not verified the trusty's ability to handle a shotgun. Had the trusty been Annie Oakley, the court probably would have found no possible cause of action. *See also* Kish v. Milwaukee, No. 69-C-129 (E.D. Wis., May 28, 1970) (appeal pending).

95. 290 N.Y.S.2d 486 (Ct. Cl. 1968).

96. *Id.* at 502.

mental hospital in New York State. As the court found, the "patient" had been kept in that institution for approximately 12 years longer than necessary, because he had never received the proper medical treatment—in a hospital—that he needed in order to recover.

Psychological Conditions of Prison Life

The effect on a man who has been allowed to stagnate in prison without a creative or constructive work program is devastating. Among prison officials and penologists there is unanimous agreement that prisoners should work.[97] Yet approximately one-third[98] (other estimates run as high as 40 percent[99]) of the nation's prison population are either completely idle or assigned to overmanned maintenance details. Not only is it true that "[f]ew scenes are more discouraging and contradictory than a prison yard full of men leading a life of indolence while waiting for release to a life of work,"[100] but it is further obvious that such idleness "is a waste of taxpayers' money . . . and, if continued long enough, results in deterioration and dependency, bitterness and hostility."[101] Indeed, "in these conditions occasional outbursts and riots are not incomprehensible; only their rarity is surprising."[102]

There are two basic reasons for this enforced idleness. One is the difficulty of funding. But much more oppressive is the Hawes-Cooper Act,[103] which divests prison-made goods of their interstate character, thus allowing the states to put restrictions on their sale; the Ashurst-Sumners Act,[104] passed in 1935, which allows states to forbid the importation of goods made in out-of-state

97. M. MOOS, STATE PENAL ADMINISTRATION IN ALABAMA 86 (1942).

98. McGee, *The Administration of Justice: The Correctional Process*, in *1964 Hearings, supra* note 42, at 166, 175.

99. A. MACCORMICK, *supra* note 1, at 64.

100. *N.C.C.D. Report, supra* note 47, at 199-200.

101. A. MCCORMICK, *supra* note 1, at 63.

102. Grosser, *supra* note 48, at 13. Most prison riots have as their motive neither "control" of the prison, nor escape from it: they are the last resort of prisoners whose complaints about various conditions in the prison have gone unheeded. J. MARTIN, BREAK DOWN THE WALLS (1953), describes the prison riot at Jackson State Prison in Michigan in 1952, which he calls "the most dangerous prison riot in American history." But the riot started without any real cause, and the inmates never attempted to escape. Instead, they used the opportunity to make public their complaints about prison conditions and employees. Recently, six rioting inmates at the Minnesota State Prison surrendered on the sole condition that their grievances about prison conditions be publicly aired. N.Y. Times, Feb. 23, 1970, at 20, col. 3. This was also the motivating factor behind the well-publicized riots in the New York City "Tombs" in the summer of 1970. The Tombs were operating far in excess of capacity, and most of the inmates were awaiting trial—some for as long as two years. The list of grievances included alleged racism among guards, insults to visiting relatives, and the intolerable wait for trial. *Id.*, August 11, 1970, at 30, col. 3-5. Some efforts were made in this direction, but there is much left to do in New York City, as elsewhere.

103. 45 Stat. 1084 (1929).

104. 49 Stat. 494 (1935).

prisons; and a third federal statute which prohibits the interstate transportation of convict-made goods for any purpose.[105] Together with state restrictions on the intrastate sale of these goods, passed, as were the federal acts, after intense and prolonged lobbying by labor unions,[106] the possibility of prisoners working in industrial, profit-making ventures is almost nil.[107]

This continued monotony of idleness is perhaps the single most piercing aspect of prison life. Aside from its obvious role in the teaching of crime, the lack of constructive goals makes the prisoner more an outcast as each day passes; rehabilitation becomes impossible, because there is no work to serve as a catalyst.

Concurrent with this lack of work is a lack of play. The problems described in a 1942 study of the Alabama system, are still typical of prison leisure today:

> Recreational facilities are sorely lacking in all prisons and road camps, except Kilby and Draper. Practically the only recreation in the road camps is simple games, such as dominos and various forms of gambling. Gambling, while not condoned by Alabama's prison administrators, is tacitly acknowledged and permitted within reasonable limits . . . lack of other recreational outlets . . . has brought about this situation perforce.[108]

Today, television is present in many prisons; films are often available. Baseball, and in some few cases, football, teams are created. But in many institutions, the only daily exercise for thousands of men is still a to-and-fro walk in the small prison "yard."

Still other deprivations occur in prison life, but these can only briefly be mentioned. Perhaps the most obvious of these is the forced lack of heterosexual contact. Few American prisons allow conjugal visiting,[109] although the practice is common in most European and other North American penal systems.[110] This, of course, aggravates the main problem of homosexuality

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105. 18 U.S.C. § 117 (1964).

106. This was obviously a reaction to the profit-making institution of the early nineteenth century. The story is succinctly told in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 55 (1967) [hereinafter cited as TASK FORCE REPORT].

107. Work release programs are a potential answer to at least some of this difficulty. But as of 1967, less than half the states had even authorized such a program, and these are often woefully underfinanced. A. MACCORMICK, *supra* note 1, at 15. The federal project is probably the most ambitious, but for some 50,000 federal prisoners, the government had programs for less than 2,000. *Id.* *See also* Carpenter, *The Federal Work Release Program*, in THE TASKS OF PENOLOGY 185 (1969).

108. M. MOOS, STATE PENAL ADMINISTRATION IN ALABAMA 118 (1942).

109. Mississippi now allows the practice. C. HOPPER, SEX IN PRISON (1969). California has attempted the program in one prison, on a trial basis. *Id.* at 5.

110. Cavans & Zemans, *Marital Relationships of Prisoners in Twenty-Eight Coun-*

which permeates the "prison community."[111] The lack of heterosexual conduct is striking indeed; as Cory suggests:

> [T]he public would be only mildly shocked if it were to learn that there are frequent homosexual contacts in a given prison . . . but just imagine the wave of shock, incredulity, indignation and the lurid headlines if this same public were to learn that men and women cohabitated and copulated together within these same prison walls.[112]

There will probably not be much change in prison practice in the next ten years. Notwithstanding the provocative suggestion by Dr. Menninger that the deprivation of decent sexual relations is "cruel and unusual punishment,"[113] it is most unlikely that the courts will expand the principle of *Griswold v. Connecticut*[114] to hold that the state must show a reason for totally invading the marital relationship.

The total scrutiny to which each prisoner is subjected each moment of his life is also a "condition" of present prison life. An inmate's mail is censored,[115] and his visits monitored. He is required to follow unintelligibly

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tries, in PENOLOGY, *supra* note 35, at 94. HOPPER, *supra* note 109, at 5, finds that 21 of 60 countries he surveyed allow some sort of conjugal visiting or furloughs.

111. Cory, *Homosexuality in Prison*, in PENOLOGY, *supra* note 35, at 89. Hirschkop and Milleman, *supra* note 76 at 814-15, also indicate the alarming frequency of homosexuality in prisons. Prison officials voluntarily mention it almost immediately to a stranger, so defensive are they about the question. *See also* Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANSACTION, Dec. 1968, at 8.

112. Cory, *supra* note 111, at 92.

113. K. MENNINGER, *supra* note 80, at 72.

114. Griswold v. Connecticut, 381 U.S. 479 (1965). *But see* NCCD NEWS 7-8 (Nov.-Dec. 1970) reporting a federal court decision holding that there is no constitutional right to conjugal visitation. *Cf.* Payne v. District Comm'rs, 253 F.2d 867 (D.C. Cir. 1958).

115. Mail censorship is justified by prison officials on the grounds that most inmates, if given the chance, will use the mails to further illegal plans, such as escape, contraband smuggling, or outside illegal businesses. Vogelman, *Prison Restrictions—Prisoner Rights*, 59 J. CRIM. L.C. & P.S. 386, 387-88 (1968). The courts have often upheld, or refused to review, such regulations and censorship, even in ludicrous situations. *See, e.g.*, McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Kirby v. Thomas, 336 F.2d 462 (6th Cir. 1964) (total ban on any letters critical of prison officials); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); United States *ex rel.* Wagner v. Ragen, 213 F.2d 294 (7th Cir. 1954), *cert. denied*, 348 U.S. 846 (1954) (no letters to patent office concerning inventions allowed); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948) (English correspondence course disallowed because inmate admitted he intended to use course to write book critical of prisons); Goodchild v. Schmidt, 279 F. Supp. 149 (E.D. Wis. 1968) (letter to Veteran's Administration complaining of insufficient medical treatment disallowed); Fussa v. Taylor, 168 F. Supp. 302 (M.D. Pa. 1958) (correspondence with common law wife disallowed); Green v. Maine, 113 F. Supp. 253 (S.D. Me. 1953); *In re* Ferguson, 55 Cal. App. 2d 663, 361 P.2d 417 (1961) (letter stopped because critical of officials); Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965) (business mail can be stopped entirely). According to RUBIN, *supra* note 2, at 297 n.134, the Attorney General has found that unlimited correspondence causes no real problem; yet the great

vague rules,[116] and he is often the victim of arbitrary and peremptory discipline if he fails to do so. He is challenged if he wishes outside reading[117] or seeks religious or moral advice not authorized by his warden.[118] He is subject to a surprise search or a whimsical routing without recourse. And if he complains, he is greeted with grimaces and disbelief at best and punishment, both formal and informal, at worst.

Furthermore, the inmate receives little help in resocialization. Despite frequent public complaints that the principle of "less eligibility"[119] is being transgressed, the fact is that there is usually no meaningful professional help at all. Studies indicate that a state and federal inmate population of 201,220, are now served by 1,124 "professionals," 1,654 "educators," 359 "religious leaders," and 12,734 "other" personnel.[120] The remaining 30,809 em-

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preponderance of prisons still limit correspondence privileges and censor all letters. *See generally* Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A.J. 1051 (1970).

116. A 1949 study has listed the rules of the official booklet of the Iowa State Penitentiary. Although these rules may have changed slightly, it is unlikely that there has been much change. The breadth of discretion given those who judge the prisoner is apparent. He may be subjected to penalties for: Altering clothing; bed not properly made; clothing not in proper order; communicating by signs; creating a disturbance; crookedness; defaming anything; dilatoriness; dirty cell or furnishings; disorderly cell; disobedience of orders; disturbance in cellhouse; fighting; grimacing; hands in pocket; hands or face not clean, or hair not combed; contraband; impertinence to visitors; insolence to officers, fellow inmates; inattention in line or school; laughing or fooling; loud talking in cell; loud reading in cell; malicious mischief; neglect of study; not out of bed promptly; not wearing outside shirt; not properly out of cell when brake is drawn; profanity; quarreling; refusal to obey; shirking; spitting on floor; staring at visitors; stealing; trading; talking in chapel; talking in corridor or in line; vile language; wasting food; writing unauthorized letters. Elliott, *Coercion in Penal Treatment, Past and Present*, FED. PROB., June 1949, at 22, cited in, RUBIN, *supra* note 2, at 294, n.113.

117. Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968); Piccoli v. Bd. of Trustees & Warden, 87 F. Supp. 672 (D.N.H. 1949).

118. *See, e.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966); Desmond v. Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964); *In re* Ferguson, 55 Cal. App. 2d 663, 361 P.2d 417 (1961).

119. The principle of "less eligibility" states that no non-prisoner should be less comfortable than a prisoner. Conversely stated, prisoners should suffer worse conditions than the poorest free member of society. H. MANNHEIM, THE DILEMMA OF PENAL REFORM (1939) (passim).

120. *N.C.C.D. Report, supra* note 47, at 193. MACCORMICK, *supra* note 1, at 57-58, states that the equivalent of 150 full-time psychiatrists and 250 psychologists, served approximately 220,000 prisoners in the state and federal system, a ratio of slightly less than one mental health specialist for every 500 prisoners. Edwin Schur, using slightly lower figures, calculated the impact of these extraordinary figures in the state system:

> If full-time employment for a psychiatrist means an eight-hour day, and a 160 hour month, it would mean that there is not more than 82 seconds of psychiatric help available for each inmate during a whole month. Little psychiatric

ployees, two-thirds of the staff in the prison, are "custodial."[121] Indeed, the number of trained professional personnel is so low that in almost all institutions the teachers are inmates or, in some cases, "cast-offs" of the public school systems.[122] Salaries, moreover, are abominably low, so that few qualified persons are attracted to work in the correctional system. In October 1969, the Joint Commission on Correctional Manpower and Training reported that less than half of the administrators of adult or juvenile institutions were making more than $14,000 yearly;[123] very few of the "supervisory" staff were making even that much and almost three-fourths of them were earning less than $10,000.[124] Thus, the inmate's general inability to obtain work which might aid him in adjusting to the outside world is aggravated by the almost total lack of qualified counsellors pursuing the same goal.

Two recent investigations have collected some of the material necessary for an evaluation of these same problems in jails.[125] One of these studies reveals that over two-thirds of all "short-term institutions" are 25 years old and more than one-third are over 50 years old.[126] The jails are terribly overcrowded. The county jail for the Cincinnati area was recently forced to close its doors to new prisoners, because it had housed 355 in a building intended for 150.[127] Dr. Karl Menninger cites statistics showing that two dormitories in the District of Columbia jail, each 180 by 120 feet, are used for 500 prisoners.[128]

The N.C.C.D. Report indicated that one New England state had four jails in which there were no sanitary facilities.[129] "Jails are used in many

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> time in prison, however, is focused on life after prison. . . . If the sixty-seven psychologists and psychometrists distributed their time evenly, each inmate could secure about four minutes of their time (monthly) for individual attention. The ninety-six institutional parole officers would have about six minutes for each man each month. Less than ten minutes a month could be afforded each prisoner by the 155 chaplains. The 257 employees responsible for individual case work services have less than sixteen minutes for each man. Not over 45 minutes are available from the 739 academic, vocational, and trade teachers. Inmates who consume more than eighty minutes of service in one month from the whole classification, training, and treatment staff are taking more than their fair share.

Schur, *The New Penology: Fact or Fiction* in PENOLOGY, *supra* note 35, at 4.

121. TASK FORCE REPORT, *supra* note 106, at 51; JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, A TIME TO ACT 12 (1969) [hereinafter cited as A TIME TO ACT]. The situation is worse in jails, where less than 3 percent of all workers can be called professionals. *N.C.C.D. Report, supra* note 47, at 142.

122. TASK FORCE REPORT, *supra* note 106, at 54.

123. A TIME TO ACT, *supra* note 121, at 19.

124. *Id.*

125. *N.C.C.D. Report, supra* note 47; TASK FORCE REPORT, *supra* note 106.

126. *N.C.C.D. Report, supra* note 47, at 146.

127. Cincinnati Enquirer, Feb. 7, 1970, at 21, col. 1.

128. K. MENNINGER, *supra* note 80, at 39,38.

129. *N.C.C.D. Report, supra* note 47, at 146.

cities," another study reports,[130] "to get skid row drunks off the street . . . to give prostitutes medical checkups, to house the homeless." Moreover, a high percentage, perhaps 80 percent, of all remaining commitments are for failure to pay a fine.[131]

Recently at a conference at New York University Law School, New York State Senator John Dunne stated that 9,000 of the 15,000 inmates of the New York City jails were awaiting trial, having been convicted of nothing. And, as Professor Foote has shown, those who remain in jail for failure to make bail are more likely to be convicted.[132] Furthermore, the N.C.C.D. Report found[133] that less than 30 percent of those detained in three city jails were actually committed after conviction. A 1969 Rand Institute Study of New York City Criminal Court indicated that only 10 percent of those found guilty were committed to jail.[134] This means that at least 70 to 90 percent spent time in jail prior to trial and were then released after conviction without imposition of a jail senence. The jails seem to be used for every purpose but sentencing. And, of course, there are no rehabilitative programs at all.[135]

Moreover, during this pre-trial detention period, all prisoners, whether convicted or not, mix with each other. The appalling result is told well by one inmate: "During my [pre-trial] confinement, I've already learned how to mix nitroglycerin and how to 'peel' a safe, and I've been given some tips on the kind of weaponry to be used during an armed robbery."[136]

Judging the Prison: A Question of Standards

A major difficulty in evaluating prison conditions today and in determining the relief to which an inmate is entitled from adverse conditions is that of articulating a reasonable standard with which to judge the prison. How, for example, does one translate into legal terms the impact of idleness or of unsanitary conditions? In what meaningful language can the dialogue between court and inmate take place?

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130. TASK FORCE REPORT, *supra* note 106 at 73.

131. The Supreme Court has just held that imprisonment of an indigent beyond the maximum statutory sentence term because of failure to pay an additional fine, or court costs, is unconstitutional. Williams v. Illinois, 399 U.S. 235 (1970). The court specifically declined to pass on the larger question of whether incarceration in cases of non-willful refusal to pay a fine because of indigency violates the Constitution, but has granted certiorari in a case presenting that point. Tate v. Short, 399 U.S. 925 (1970).

132. Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125, 1149 (1965).

133. *N.C.C.D. Report*, *supra* note 47, at 119.

134. N.Y. Times, March 28, 1970, at 29, col. 1.

135. TASK FORCE REPORT, *supra* note 106, at 79-80.

136. PLAYBOY, Aug. 1969, at 48.

Most courts have appealed to the eighth amendment's prohibition of "cruel and unusual punishment." Taking their guideline from two Supreme Court decisions almost a half century apart,[137] which held that the test for violations of the eighth amendment looks to the "dignity of man" as recognized in all "civilized" countries, the lower federal courts have, on occasion, found physical conditions so appalling, particularly in solitary confinement cells, that they have ordered the release from those cells of the plaintiff inmates.[138]

But that standard is undesirably vague and relativistic.[139] It places too great a burden upon the inmate to demonstrate that the conditions are, in fact, unbearable by any reasonable man. Recently some courts, purportedly acting under another test derived from the eighth amendment, a test which has never been articulated by the Supreme Court, have begun to ask the correct question: Does the continuation of X condition, or the imposition of Y punishment, serve a valid penal purpose?[140] Thus far, those courts have not really had to confront this standard, since they have found the activity of the prison either justified or unjustified under other tests.[141] In *Glenn v. Wilkerson*, however, the court did find that the segregation of death row inmates from the general prison population was both a generally practiced prison procedure[142] and one which served the valid penal purpose of keeping morale high in the general prison population.[143] Eventually, however, these courts will have to come to terms with the crucial question: what is the purpose of prison? And, if that hurdle is somehow overcome, they will face another: how closely must the challenged practice conform to that purpose in order to be sustained?

It is widely agreed among penologists that, whatever the purpose of imposing the sanction of the criminal law, the purpose of *prison* is rehabilitation.[144] Thus, a common phrase among correctional professionals today is

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137. Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958).

138. *See* the cases cited *infra* note 152.

139. *See* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

140. Williams v. Fields, 416 F.2d 483 (9th Cir. 1969); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). *Cf.* Hyland v. Procunier, 311 F. Supp. 749 (N.D. Cal. 1970).

141. *See, e.g.*, Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (solitary conditions violate the eighth amendment).

142. 309 F. Supp. 411 (W.D. Mo. 1970).

143. Four states allowed intermingling and two others were experimenting. All others responding to a questionnaire prepared and issued for the litigation segregated death row inmates. *Id.* at 418-20.

144. *Cf.* Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND

that an offender is sent to an institution *as* punishment, not *for* punishment, and that the institution's goal should not be punishment, but reformation. Moreover, at least nine states have statutes expressly stating that the purpose of the institutionalization of an offender and the goal of the correctional process is reformation and resocialization.[145] In these states, at least, the difficulty of establishing a purpose of prison has been eliminated by the legislature itself; in other states, the statutes are either silent or opposed to the position that the work of the prison is reformation and resocialization. Nevertheless, there is sufficient statutory and judicial support to warrant a broad finding that these are the goals of imprisonment.

If the purpose of prison is rehabilitation, then what conditions may be justified and what restrictions may be placed on inmates' rights? The last two decades have seen innumerable Supreme Court decisions expanding the protection of human freedoms against encroachment by the states. From a "balancing test" in almost every area,[146] the court has moved to a requirement that, wherever human liberties are involved, the state must demonstrate (a) a compelling state interest; (b) that the challenged procedure or law advances that interest in a manner least drastically curtailing the liberty. Thus, for example, Connecticut's birth control law banning the use of contraceptives was struck down as an overbroad attempt to protect what might otherwise be a legitimate state interest—prevention of the sale of contraceptives within the state.[147] Similarly, attempts to limit the franchise to the most "interested" voters in special elections have been struck down on the ground that the statutes involved excluded voters just as "interested" as those included.[148]

RESPONSIBILITY 1 (1966). *See also* ALI, MODEL PENAL CODE 1.02(2) (1962 Proposed Draft); AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS (3d ed. 1966).

145. Illinois and New Hampshire provide in their constitutions that the aim of punishment "is to reform, not to exterminate mankind." ILL. CONST., art. 8, § 14; N.H. CONST., pt. 1, art. 1. The constitutions of Indiana (Art. I, § 18) and Oregon (Art. I, § 15) declare that "the penal law shall be founded on the principle of reformation, and not of vindictive justice." Texas, by statute (VERNON'S ANN. PENAL CODE, art. 2) and Wyoming, by its constitution (art. 1, § 20) have similar provisions. Montana (CONST. ART. III, § 24) and North Carolina (CONST., art. XI, § 2) declare that the objective of punishment is reformation and prevention. RUBIN, *supra* note 2, at 649-50. Rhode Island has a similar provision in R.I. GEN. LAWS, § 13-3-1 (1904). *Cf.* 18 U.S.C. § 4081 (1964).

146. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Schneider v. Rusk, 377 U.S. 163 (1964); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Prince v. Massachusetts, 321 U.S. 158 (1944). For a scathing criticism of the balancing test in the first amendment area, see the dissent of Mr. Justice Black in Konigsberg v. State Bar, 366 U.S. 36 (1961).

147. Griswold v. Connecticut, 381 U.S. 479 (1965).

148. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969).

There are many other examples;[149] the cases involving marital privacy and voting rights are mentioned specifically only because they do not involve first amendment freedoms, thereby demonstrating that the sweep of the decisions goes beyond the borders of that "preferred" freedom and reaches any state regulation of any basic human liberty.

The basic human liberties, including the use of mails, the enjoyment of movement, the freedom to read, the right to "happiness" and reasonable comforts, should not lightly be banned from prisons. While there is undeniable justification for restrictions on movement from inside the walls of an institution to an area outside those walls, it would seem perfectly reasonable to suggest, as the Sixth Circuit did a quarter-century ago, that a prisoner retains in prison all rights except those inevitably taken from him in pursuit of the goal of incarceration and neutralization.[150] If indeed, every state action restricting an individual must be rationally explained by the state, there is no compelling reason why this requirement should not apply with equal vigor and force to restrictions placed upon men in correctional institutions.[151]

Thus, in short, we reach the following determination: in order to justify any action of a prison official or to rationalize the continuation of a given condition inside a prison, the prison authorities should be called upon to demonstrate that their action, or inaction, is essentially related to the main purpose of incarceration, and that they achieve this purpose with the least possible restriction of his humanity consonant with that purpose and the lesser purpose of neutralization.

Court Litigation Contesting Conditions in Penal Institutions

There are relatively few cases which specifically address themselves to the question of whether conditions in penal institutions infringe prisoners' rights. By far the bulk of those which do consider the physical environment are those dealing with solitary confinement situations. In several instances, the courts have compelled the release of prisoners subjected to demeaning and debauched conditions.[152] The number of cases so holding is small, and the

149. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Sherbert v. Verner, 374 U.S. 398 (1963).

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

151. *See* cases cited *supra* notes 145-50.

152. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), *on remand*, Civil No. 66-CV-77 (N.D.N.Y. July 29, 1970); Sostre v. Rockefeller, 309 F. Supp. 611 (S.D.N.Y. 1969), (preliminary injunction), 312 F. Supp. 863 (S.D.N.Y. 1970) (on the merits); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Ga. 1966). Many courts, however, find no difficulty in upholding the imposition of solitary confinement. Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969) (assault on fellow inmate), Ford v. Board of Managers of N.J. St. Prison, 407 F.2d 937 (3d Cir. 1969) (threat to blow up

conditions included, almost universally, lack of any sanitary facilities and of personal hygiene materials as well.[153] In several cases, the lack of proper bathing facilities has been mentioned as one ingredient in a finding that conditions transgress the constitutional limitations of punishment.[154]

Several cases have considered challenges to incarceration in overcrowded facilities. The first of these, Ex Parte *Pickens*,[155] involved the crowding of forty jail prisoners into a room twenty-seven feet square. In denying a petition for habeas corpus, brought by an inmate awaiting trial, the court, obviously depressed by the circumstances outlined at length in its decision, stressed two factors: (1) under the then-prevailing concept of habeas corpus, only total release was possible; (2) there were no other jail facilities in the area to which prisoners could be sent. Since many of the inmates were awaiting trial on serious felony charges, the court felt constrained not to release them, but it suggested that the conditions somehow be alleviated. Moreover, the court was operating under attenuated concepts of the eighth amendment; comparing conditions faced by criminal inmates to those faced by American soldiers then fighting in South Korea, the court found that conditions in the jail were not so intolerable as to violate the concepts of human dignity.[156]

The *Pickens* decision stood for almost 20 years as the sole reported instance in which jail conditions were attacked generally. Recently, however, the awakening of poverty lawyers to the plight of the incarcerated inmate has led to several other decisions concerning prison life. In *Curly v. Gonzales*,[157] the court actually found that the conditions were so intolerable as to violate the Eighth Amendment, and ordered the jail not to house more than 60 inmates. The authorities, stunned by the decision, released all inmates over

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prison); Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968) ("trouble maker"); Bowman v. Hale, 302 F. Supp. 1306 (S.D. Ala. 1969); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969) (proselytizing Black Muslim); United States *ex rel.* Holland v. Maroney, 299 F. Supp. 262 (W.D. Pa. 1969); Belk v. Mitchell, 294 F. Supp. 800 (W.D.N.C. 1968); Graham v. Willingham, 265 F. Supp. 763 (D. Kan.), *aff'd*, 384 F.2d 367 (10th Cir. 1967) (being "nearby" when two murders occurred in prison); Fallis v. United States, 263 F. Supp. 780 (M.D. Pa. 1967) (refusal to work in noisy machine shop); State v. Doolittle, 22 Conn. Supp. 32, 158 A.2d 858 (1960) (unclear); McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957) (foul and obscene language); Hughes v. Turner, 14 Utah 2d 128, 378 P.2d 888 (1963).

153. *See* cases cited *supra* note 152. The ACA requires as a minimum the provision of soap, shaving equipment, towels, bedding, mattress, etc. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 457-60 (3d ed. 1966).

154. Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969) (one shower every 5 days); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966) (one bath a week); Hoard v. Smith, 365 F.2d 428 (4th Cir. 1966) (one bath a week as opposed to daily baths for the general prison population); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (no shower for twenty days).

155. *Ex Parte* Pickens, 101 F. Supp. 285 (D. Alas. 1951).

156. *Id.* at 289-90.

157. Curley v. Gonzales, Civ. No. 8372 (D.N. Mex., Feb. 12, 1970).

that number, a course of action not necessarily dictated by the decree. In *Inmates of Cook County Jail v. Tierney*,[158] the plaintiffs complained of various physical conditions in the jail. After initial rulings indicating that the plaintiffs might succeed, the case was settled out of court by the attempts of the defendants to remedy some of the more drastic conditions.

Clearly the most far-reaching of the cases dealing with the physical conditions of a prison system is *Holt v. Sarver*,[159] where the district court, finding that the inmates were so quartered as to facilitate homosexual attacks by other inmates, and that the inmate guards did little to prevent such attacks, ordered the prison authorities either to remedy the situation immediately or to shut down the entire prison system. The court's lengthy and detailed opinion listed other aspects of the prison system which further aggravated the general conditions at the camp: the solitary confinement cells were atrocious; the inmates were allowed to gamble, using a kind of scrip for money; tension at the camp was at a nerve-shattering level because of the use of trusties as guards; and sanitary conditions were at an exceptionally low level.

These cases indicate at least a willingness on the part of the courts to consider drastic remedies in the absence of meaningful amelioration of inhuman conditions in a prison setting. They have all been decided under the eighth amendment, although, at least in *Holt*, there were clear implications that rehabilitation, or the lack of it, would figure in any decision generally considering prison conditions and environment.[160]

Several other cases bear mention because of the indication that the courts will investigate every aspect of prison life. In *Krist v. Smith*,[161] while holding that maximum security was reasonable for the inmate in question, given his escape record, the court clearly intimated that lack of exercise might justify court intervention.

In *Glenn v. Wilkinson*,[162] the court took a similar approach. While holding that isolation of death row inmates as a group from the rest of the inmate population was not unconstitutional and, in fact, was a generally accepted correctional practice, the court took the issue very seriously, thereby intimating two things:

(1) individual isolation might be very suspect;
(2) even group isolation might be suspect in some situations.

The direction of these two cases is totally different from that taken by the

158. Inmates of Cook County Jail v. Tierney, No. 68 C 504 (N.D. Ill., 1968) (settled).
159. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).
160. *Id.* at 378-81.
161. 309 F. Supp. 497 (S.D. Ga. 1970).
162. 309 F. Supp. 411 (W.D. Mo. 1970).

courts not so many years ago. Both of these decisions, while holding against the particular plaintiff in the case, evidence a concern for the psychological effects which imprisonment, and especially isolation, may have upon an inmate, and suggest that severe mental strain might activate judicial interposition. The trend is an auspiciously happy one and should be continued.

In *Sostre v. Rockefeller*,[163] the court took cognizance of "[t]he physical and psychological harm . . . of continued confinement in the segregation unit"[164] and, in view of the facts there, ordered release of the prisoner on a motion for preliminary injunction. The psychological harm to which the court referred had stemmed not simply from the physical conditions of the cell, which were not appalling when compared to some other solitary confinement cases, but to the methods used to harass the prisoner. In one instance, the court found that a single light bulb, which the inmate could not control, burned in the middle of the cell for 24 hours a day, making sleep impossible. In addition, the prisoner was awakened every half hour by a guard making his rounds; the usual tactic was to run a billy club across the bars of the cell.

While these latter cases treat mainly isolation from the majority of the prison population, their scope is much wider, for they appear to require a definite showing by the state that the imposition of suffering, whether mental or physical, be absolutely mandated by an interest of the state over and above that of mere punishment. Moreover, *Krist* and *Glenn* clearly focus on the mental anguish which is incident to the operation of the isolation; in neither of those cases was the psychological tenseness intended as a direct result of the procedure.

Those cases, and *Sostre* to a lesser extent, would seem to open a new road for judicial review of prison conditions. Like *Johnson v. Avery*,[165] wherein the Supreme Court overrode considerations of discipline to protect a prisoner's right to effective access to the courts, they require prison officials to consider all the ramifications of any rule, regulation, procedure, or practice, and ascertain that their consequences are not so severe as to make life unbearable in prison.[166] This trend, salutary as it is, could be enhanced if

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163. 309 F. Supp. 611 (S.D.N.Y. 1969).

164. *Id.* at 613. The case is the precursor of the revolutionary holding that imposition of solitary confinement without a hearing violates due process. In Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970) (appeal pending) the court awarded $9000 dollars in compensatory damages, and almost $4000 in punitive damages. A court in the northern district of the state soon followed suit. Wright v. McMann, Civil No. 66-CV-77 (N.D.N.Y. July 29, 1970).

165. Johnson v. Avery, 393 U.S. 483 (1969).

166. Only two cases deal with the issue of conjugal visitation and the deprivation of sexual contact. In Payne v. District of Columbia, 253 F.2d 867 (D.C. Cir. 1958), a wife sued to obtain a declaratory judgment that the prison could not deny her access to her husband. The court turned her away. In *In re* Flowers, 292 F. Supp. 390

the rehabilitation-due process analysis suggested above were more widely adopted, for then prison officials would have to consider (1) the direct, immediate effect intended to result from any given practice; (2) the indirect consequences of the continuation of a practice or procedure; (3) the rehabilitative effects of the practice. If, under any one of those tests, the prison practice remained dubious, it could be invalidated; at the very least, prison authorities could be required to defend the practice on meaningful grounds. The basic rights of prisoners require at least that much protection.

(E.D. Wis. 1968), the court rejected a contention that compulsory celibacy violated the inmate's right by impairing the obligations of his marriage contract. No reported case has yet faced the issue of whether continued deprivation is an excessive intrusion upon constitutionally protected marital rights.