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Prison Reform in the Federal Courts

Rebecca P. Dick

PRISON REFORM IN THE FEDERAL COURTS

I. THE ARKANSAS PRISON CASES: THE BEGINNINGS OF FEDERAL JUDICIAL INVOLVEMENT IN PRISON REFORM

In 1970, after a sustained legal battle, prison inmates obtained an unprecedented federal court ruling that confinement itself, under the conditions prevailing in the Arkansas penal system, violated their constitutional rights. The decision, *Holt v. Sarver (Holt II),*[1] followed several years of litigation[2] which had begun when the settled view of most federal judges was that the administration of both state and federal prisons was beyond the wise exercise of their jurisdiction.[3] Taken together, the Arkansas prison decisions exemplify the widespread awakening of federal judges in the late 1960's to the barbarity of many American prisons, and to the conflict in their own obligations to preserve the civil rights of prisoners while acting within the bounds of judicial power.[4]

The first significant victory for the Arkansas prisoners came in 1965 in *Talley v. Stephens,*[5] when Judge J. Smith Henley ruled that the tradition of judicial abstention from review of prison matters could not justify failure on his part to protect prisoners' access to his court. Prisoners who testified about bad conditions on the farm had been beaten; and, under a prior administration, the local state prison farm had openly refused even to forward prisoners' petitions to the court. Judge Henley went no further than was necessary to ensure access to the court; he refused to make the requested ruling that whipping with a leather strap was cruel and unusual punishment prohibited by the eighth amendment.[6] But to protect prisoners from being punished

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

2. In chronological order, the Arkansas prison cases are: Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated and remanded,* 404 F.2d 571 (8th Cir. 1968); Courtney v. Bishop, 409 F.2d 1185 (8th Cir.), *cert. denied,* 396 U.S. 915 (1969); Holt v. Sarver (Holt I), 300 F. Supp. 825 (E.D. Ark. 1969); and Holt v. Sarver (Holt II), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971). *See also* nn.24 & 28 *infra.*

3. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963).

4. For another chronological review of the Arkansas cases, see Note, 20 DRAKE L. REV. 188, 192-93 (1970); Note, 23 ALA. L. REV. 143 (1970); Note, 11 DUQ. L. REV. 92 (1972); Note, 36 MO. L. REV. 576 (1971); Note, 16 N.Y.L.F. 659 (1970). *See also* Mosk, *The Eighth Amendment Rediscovered,* 1 LOY. L.A.L. REV. 4 (1968).

5. 247 F. Supp. 683 (E.D. Ark. 1965).

6. *Id.* at 689.

for improper reasons, he ordered specific relief: (1) that the prison authorities formulate more precise rules delineating the behavior that would be punished;[7] (2) that the complaint of one trusty[8] not be sufficient to bring a prisoner to punishment; and (3) that punishment be applied dispassionately, and never by a complainant.[9] For a federal court to become involved to this degree with the daily operation of a prison was, at the time, a dramatic step. Within a few years, it would appear to be only a first, cautious one.

Two years later, in *Jackson v. Bishop*,[10] prisoners alleged that *Talley v. Stephens* had not been observed, and reasserted their claim that corporal punishment itself violates the eighth amendment. Evidence that some prisoners had been tortured gave urgency to their claims. Three cases were consolidated for trial and a panel of two district judges reached a careful, limited decision which, in effect, ordered prison authorities to obey the limitations on punishment set earlier, and banned the application of some especially painful types of punishment.

Jackson was appealed to the Eighth Circuit, which was obviously shocked by the evidence presented.[11] *Talley* had not been appealed, thus the circuit court's first introduction to conditions in the Arkansas penal system was the record here, replete with evidence of extremely brutal treatment of prisoners and the refusal of prison authorities to obey the orders of a federal court. Using language that was to be cited time and again in subsequent cases Judge, now Justice, Blackmun enjoined the use of corporal punishment in Arkansas prisons: "We are not convinced . . . by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . . ."[12]

This broad statement goes to the heart of much of the litigation over prison conditions: most penal institutions in this nation operate on a woefully inadequate budget, which neither courts nor prison authorities have the power to increase.[13] Nevertheless, the ban on cor-

7. *Id.*

8. Trusted prisoners ("trusties") were regularly employed as armed prison guards. *Id.* at 689-90.

9. *Id.* at 689.

10. 268 F. Supp. 804 (E.D. Ark. 1967), *vacated and remanded*, 404 F.2d 571 (8th Cir. 1968).

11. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

12. *Id.* at 580.

13. *E.g.*, Padgett v. Stein, 406 F. Supp. 287, 303 (M.D. Pa. 1975) (federal courts powerless to compel localities to increase prison budgets). On the issue of inadequate

poral punishment—though more extreme a remedy than any granted below—did not necessitate preparation by the court of detailed orders about how the prison was to be operated. In this sense, the Eighth Circuit's decision was more in keeping with traditional notions about the scope of the judicial power than were the holdings of the district court, either here or in *Talley*. And, in *Courtney v. Bishop*,[14] decided two years after *Jackson*, the Eighth Circuit summarily rejected a prisoner's claim that conditions in the prison cells used for disciplinary segregation violated the eighth amendment. It repeated there the common wisdom that courts should refrain from involving themselves with the administration of prisons.

Courtney was decided largely on the basis of the plaintiff's failure to prove his allegations.[15] There was, however, no such failure in *Holt v. Sarver*[16] (*Holt I*), where Judge Henley made a sweeping review of conditions throughout the Cummins prison farm and found many instances of cruel and unusual punishment, among them severe overcrowding in the segregation cells. Noting that a new prison was to be completed in a year, he declined to order specific relief, confining himself instead to making suggestions and ordering the authorities to submit within thirty days a plan designed to alleviate the worst conditions immediately.

Eight months later in a second opinion, *Holt II*,[17] Judge Henley issued an even longer and more scathing attack on the Arkansas prison system. He described both the farm at Cummins and that at Tucker, the other large prison institution in Arkansas, and held that, taken cumulatively, conditions within the system were so brutal that they constituted a violation of every prisoner's rights under the eighth amendment. He noted with special concern the constant danger of

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budgets, *see, e.g.*, Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970) *enforced sub nom.* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972) (daily allotment for food, clothing, and maintenance for prisoners in New Orleans city jail was $1.25 per day); Costello v. Wainwright, 397 F. Supp. 20, 34, 40 (M.D. Fla. 1975), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd and remanded*, 430 U.S. 325 (1977) (severe overcrowding in Florida prison); United States v. Wyandotte County Jail, 343 F. Supp. 1189, 1200 (D. Kan. 1972), *rev'd per curiam*, 480 F.2d 969 (10th Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973) (payments by United States to local institutions for care of federal prisoners ranges from $.90 to $20.00 per day; average is between $6.00 and $7.00 per day).

14. 409 F.2d 1185 (8th Cir.) (Matthes, J.), *cert. denied*, 396 U.S. 915 (1969).

15. *Id.* at 1187-88.

16. 300 F. Supp. 825 (E.D. Ark. 1969).

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

death which inmates faced.[18] Although he refused to hold that a state may not confine prisoners unless it provides them with the opportunity to participate in a rehabilitation program, he did rule that the absence of any affirmative program may be unconstitutional where conditions are otherwise degrading and destructive of the human spirit.[19]

Specifically, the court ordered: that the use of inmate-trusties as guards be curtailed and that trusties no longer be given positions of authority over other inmates; that prisoners not be kept at night in open barracks unprotected from attack by other inmates; and that prisoners' food be palatable and free from contamination. The court was uneasy about the propriety of such a detailed order, but felt compelled to act.[20] The authorities were ordered to report at the end of the following month on the progress they had made and their plans for further compliance with the court's order.

The Eighth Circuit affirmed, emphasizing that the district court's findings were overwhelmingly supported in the record, and that the remedies ordered were reasonable.[21] The court noted with some satisfaction that the state legislature had appropriated funds for new prison buildings and for additional guards. In a brief concurring opinion, Judge Lay argued that none of the planned improvements would alleviate the psychological harm done to inmates by the Arkansas system.[22] He recommended that the district court retain jurisdiction over the case until the prisons adopted rehabilitation programs that were truly broad and meaningful.[23]

Three years later, the prison system was so improved that Judge Henley found no need to continue his jurisdiction over its operation.[24] In a long opinion which he hoped would be his last comprehensive review of prison conditions, he described the improvements made at Cummins and Tucker, and outlined the steps still to be taken. Nevertheless, none of the specific orders he had emphasized in *Holt II* had been fully obeyed. Some men were still confined in barracks in numbers that even the Commissioner of Corrections conceded were unsafe,

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18. "It is within the power of a trusty guard to murder another inmate with practical impunity, and the danger that such will be done is always clear and present. Very recently a gate guard killed another inmate 'carelessly.' One wonders." *Id.* at 374.

19. *Id.* at 379.

20. "It would be a mistake to order too much at this time; but, in the areas just mentioned Respondents will be required to move." *Id.* at 385.

21. Holt v. Sarver, 442 F.2d 304, 309 (8th Cir. 1971) (Van Oosterhout, J.).

22. *Id.* at 309-10.

23. *Id.* at 310.

24. Holt v. Hutto, 363 F. Supp. 194, 216 (E.D. Ark. 1973), *aff'd in part, rev'd in part sub nom.* Finney v. Arkansas Bd. of Corr., 505 F.2d 194 (8th Cir. 1974).

trusties were still used as guards, and prisoners in disciplinary segregation were given only tiny portions of barely edible food.[25]

The Eighth Circuit reversed and ordered the district court to retain jurisdiction over the case.[26] It reviewed in considerable detail the continuing failure of the authorities to bring their system within constitutional standards, and issued specific orders for relief, among them a requirement that the authorities prepare a comprehensive rehabilitation program to counteract the effect on inmates of horrible living conditions. The court was displeased that the authorities had not complied with its order in *Holt II* requiring they carefully restrict the use of trusties as guards. It thus ordered that the employment of trusties be ended altogether. In denying a petition for rehearing, the Eighth Circuit indicated that its major concerns were: (1) that special and immediate attention be given to the provision of adequate medical care for inmates, including treatment for the mentally ill; (2) that the authorities take action to eliminate the physical abuse of prisoners by guards; and (3) that there be an end to overcrowding in the barracks.[27]

The Arkansas prison litigation has finally drawn to a close.[28] In March, 1976, Judge Henley issued a final opinion on the class actions brought against the prisons.[29] He found that there were continuing constitutional violations, including conditions in disciplinary segregation, unreasonable restraints on the exercise of the Black Muslim faith, and racial discrimination. Judge Henley was impressed, however, with some dramatic improvements that had been made, noting especially the new medical facilities and training programs, the reduction of overcrowding, and an end to the practice of using inmates as armed guards.[30] But concerning guard brutality, Judge Henley indicated

25. Finney v. Arkansas Bd. of Corr., 505 F.2d 194, 201, 204, 207 (8th Cir. 1974) (Lay, J.).

26. *Id.* at 214.

27. *Id.* at 215, 216.

28. At least the major litigation, regarding conditions in the main sections of the prison farms, has ended. Related questions regarding the award of attorneys' fees to the plaintiffs and conditions in disciplinary segregation in the Arkansas farms were argued before the Supreme Court during the week of February 21, 1978. For a summary of the oral argument, see 46 U.S.L.W. 3535 (U.S. Feb. 28, 1978).

29. Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *cert. granted*, 98 S. Ct. 295 (1977) (questions on cert. limited to attorneys' fees and constitutionality of indefinite punitive isolation, summarized in 46 U.S.L.W. 3093 (U.S. Aug. 30, 1977)). Judge Henley retained jurisdiction to hear individual claims.

30. Even some of these improvements do not seem to have resulted directly from the court's efforts. For some time after the 1974 *Finney* decision, overcrowding in the prisons worsened as the number of defendants sentenced to prison grew larger than the

some despair.[31] He noted that within the previous year two inmates had been murdered by other inmates,[32] and a third inmate had been murdered with the connivance of prison employees.[33] Nevertheless, he concluded that the authorities' failure to protect these inmates did not reach constitutional dimensions.[34] He did not explain his conclusion, although he had noted earlier in his opinion that no inmate had been killed by another inmate in the previous five years.[35] Nor did he indicate whether any inmates had been killed by guards during that time.

The Arkansas cases graphically illustrate the greatest obstacle to effective prison class action litigation: obtaining full compliance with favorable court orders. Pro se complaints filed in the Eighth Circuit eventually led to decisive court victories for Arkansas prisoners. The conditions in which these inmates live have improved significantly, in part through the efforts of the courts.[36] But the prison farms remain highly dangerous places.[37] The systematic abuse of prisoners persists, and the courts have now retreated from their attempts to intervene directly.

II. Prisoners' Developing Rights to Decent Treatment

The cycle of the Arkansas litigation was only the most dramatic example of a shift in judicial attitudes that spread throughout the nation during the 1960's and early 1970's. The legal procedures used

number released. Though some new housing was built, only when the trend toward increasing convictions was reversed did overcrowding finally abate. *Id.* at 255-56. A recent article seems to indicate that some armed trusties continue to stand guard in the guard towers, in spite of the Eighth Circuit's express order, 505 F.2d at 205, and Judge Henley's express finding, 410 F. Supp. at 264, to the contrary. *See* May, *Prison Guards in America: The Inside Story,* Corrections Magazine, Dec., 1976, 3, 44-45. Of course, it is impossible to tell when the pictures published with this article were taken, but they purport to be current. Judge Henley's findings were issued on March 19, 1976. The piece was published in December, eight months later.

31. *See* 410 F. Supp. at 272, regarding verbal abuse and insults to inmates. Despite his doubt of the efficacy of another order, Judge Henley again enjoined this practice. *Id. See also id.* at 266, where Judge Henley noted the "poor quality and lack of professionalism of the lower echelons of prison employees who are in close and abrasive contact with inmates every day."

The court noted sympathetically that many inmates are also of "low caliber." *Id.* at 266. This comment ignores the fact that while prison authorities must accept those inmates sentenced to their custody, they have an obligation to select only fully qualified employees.

32. *Id.* at 257.
33. *Id.* at 271-72.
34. *Id.* at 265.
35. *Id.* at 257.
36. *See, e.g., id.* at 258-61.
37. *Id.* at 257, 271.

by prisoners and the substantive rights upon which they relied are very old ones that were merely put to new uses. In this way, prisoners have sought, for example, decent prison conditions, adequate medical care, the provision of rehabilitation programs, and the right to refuse psychiatric treatment.

A. *Kinds of Actions Prisoners May Bring*

1. *State prisoners.* The Civil Rights Act of 1871, 42 U.S.C. § 1983, permits state prisoners to raise claims that the conditions of their confinement violate the Constitution.[38] These claims usually assert violations of the eighth amendment, which prohibits cruel and unusual punishment, and which, through the fourteenth amendment, applies to the exercise of state authority.[39] The traditional rule is that what is cruel and unusual is to be judged by "evolving standards of decency."[40]

Prisoners are also protected by the due process clause of the fourteenth amendment.[41] In *Johnson v. Glick,*[42] an indicted prisoner held

38. Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam).

Federal courts are granted jurisdiction to hear these cases at 28 U.S.C. § 1343(3) (1976).

39. Robinson v. California, 370 U.S. 660 (1962).

40. Trop v. Dulles, 356 U.S. 86, 101 (1958). A more detailed test was formulated by Justice Brennan, concurring in the judgment of the Court in *Furman v. Georgia:*

> The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

408 U.S. 238, 282 (1972).

The Court's most recent extensive discussion of the eighth amendment is found in Gregg v. Georgia, 428 U.S. 153 (1976), another death penalty case. As in *Furman,* there was no opinion of the Court, for no opinion in *Gregg* commanded more than three votes. In announcing the Court's judgment, Justice Stewart said that for punishment to be Constitutionally permissible it "must not involve the unnecessary and wanton infliction of pain . . . [and] must not be grossly out of proportion to the severity of the crime." *Id.* at 173 (citation omitted).

The latter concept is a traditional eighth amendment test. Weems v. United States, 217 U.S. 349 (1910); Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973).

41. *See, e.g.,* Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974), upholding a prisoner's right, under either the eighth or fourteenth amendments, to claim damages for denial of medical care.

The equal protection clause of the fourteenth amendment has also been used with great success by prisoners held in custody before trial. *See* text accompanying note 63 *infra.* Equal protection claims by prisoners already convicted, however, have not fared well. *See, e.g.,* Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964).

42. 481 F.2d 1028 (2d Cir. 1973), *cert. denied sub nom.* Employee-Officer John v. Johnson, 414 U.S. 1033 (1973).

awaiting trial sued guards who had beaten him without provocation. The Second Circuit concluded that the fourteenth amendment was a more appropriate basis for relief than the eighth, because really at issue here was the prisoner's right not to be deprived of liberty without due process of law. The court found *Johnson* indistinguishable from *Martinez v. Mancusi,*[43] in which a convicted inmate's claim that authorities were deliberately indifferent to his medical needs was found to state a cause of acton.[44] Whether the court in *Johnson* relied on procedural or substantive due process, however, is unclear. It pointed out that the plaintiff had not yet been convicted, so that the state lacked authority to punish him. This comment implied that the beating constituted a denial of procedural due process. But the court surely did not mean that an unprovoked beating could have been imposed legally, even after full procedural process.[45] Thus it is more likely that the relief afforded in *Johnson* rested on substantive due process.

Substantive due process requires the government to show that a compelling public interest justifies challenged government action that has infringed on a person's fundamental personal liberties.[46] This test seems appropriate for evaluating prisoners' claims that the conditions in which they live are intolerable. Moreover, if the deprivation of a prisoner's rights is serious, due process permits the government to impose only the least restrictive conditions consistent with the public interest. Since the eighth amendment requires only that the deprivation not be cruel, substantive due process theoretically supports results more favorable to prisoners than does the eighth amendment.[47] Nevertheless, the fourteenth amendment has been invoked more often in cases involving medical claims rather than in other kinds of prison cases.[48] In practice, the distinction may be irrelevant, since the standard

43. 443 F.2d 921 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971). In *Martinez,* a convicted inmate's claim that the authorities had been deliberately indifferent to his medical needs was found to state a cause of action. *Johnson*'s discussion of *Martinez,* 481 F.2d at 1031, is confusing, however, because *Martinez* itself rested on the eighth amendment, not the fourteenth.

44. Noting that the right to medical treatment is part of the right not to be deprived of life without due process, the Sixth Circuit has relied on the fourteenth amendment in upholding a prisoner's claim for denial of medical care. Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972).

45. *See* text accompanying notes 11-12 *supra.*

46. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 155 (1973).

47. *See* Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment,* 39 U. CINN. L. REV. 650 (1970).

48. *See, e.g.,* Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971).

actually applied under either amendment is usually the vague "conduct that shocks the conscience" test.[49]

State prisoners may also sue under state tort law. If the jurisdictional amount is met, and if the plaintiff and the warden of his prison are citizens of different states, the diversity jurisdicton of federal courts may be invoked.[50] Of course, state prisoners' suits usually will not satisfy these requirements.

Finally, state prisoners may bring habeas corpus actions in federal court.[51] They must, however, first exhaust their remedies in state courts.[52] Only rarely do prisoners obtain early release,[53] but habeas corpus sometimes has provided a useful means for prisoners to gain a hearing on their living conditions.[54]

2. *Federal prisoners.* Because section 1983 applies only to official acts taken under color of state law, it is not available to federal prisoners.[55] Federal prisoners rely instead largely on writs of habeas corpus and actions for injunctions or declaratory judgments, and at least one federal court has found that the principles to be applied in these cases are equivalent to those applied under section 1983.[56] Also, federal pris-

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49. *See, e.g.,* Johnson v. Glick, 481 F.2d at 1033, which applies this test under the fourteenth amendment, and Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965), which uses the identical test under the eighth amendment.

50. United States *ex rel.* Fear v. Rundle, 364 F. Supp. 53 (E.D. Pa. 1973), *aff'd,* 506 F.2d 331 (3rd Cir. 1974), *cert. denied,* 421 U.S. 1012 (1975). Diversity jurisdiction is provided at 28 U.S.C. § 1332 (1970).

It should be noted that a prisoner is not necessarily domiciled in the place where he is incarcerated. United States *ex rel.* Fear v. Rundle, 364 F. Supp. 53, 57 (E.D. Pa. 1973), *aff'd,* 506 F.2d 331 (3d Cir. 1974), *cert. denied,* 421 U.S. 1012 (1975). One can probably assume that most state prisoners committed their crimes in the state of their domocile, and were convicted and imprisoned there.

51. 28 U.S.C. § 2254(a) (1970) grants to federal courts jurisdiction over habeas corpus actions brought by state prisoners.

52. 28 U.S.C. § 2254(b)-(c) (1970); Preiser v. Rodriguez, 411 U.S. 475 (1973).

53. Release may be used as a threat against prison administrators: in one federal habeas corpus action, a federal judge ordered that a seriously insane prisoner be released if arrangements for the prisoner's proper care were not made within thirty days. United States v. Pardue, 354 F. Supp. 1377 (D. Conn. 1973). And in one very unusual case, a small prison was closed after the authorities ignored repeated court orders that it be made habitable. Apparently most of the prisoners already had been transferred to other institutions. Little v. Cherry, 3 PRISON L. RPTR. (ABA) 70 (E.D. Ark. 1974) (Henley, J.).

54. *E.g.,* Paquette v. Norton, 3 PRISON L. RPTR. (ABA) 269 (D. Conn. 1974) (suit by epileptic prisoner to obtain reassignment to a lower bunk, so that if he fell during a seizure, his injuries would be minimized); Nason v. Superintendent Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968) (review of conditions of confinement of a man held in a mental hospital while unfit to stand trial for murder). *Cf.* Preiser v. Rodriguez, 411 U.S. 475, 492 (1975) (dicta).

55. 42 U.S.C. § 1983 (1970).

56. Clonce v. Richardson, 379 F. Supp. 338, 342 (W.D. Mo. 1974). Power to grant writs of habeas corpus to federal prisoners is given to federal courts at 28 U.S.C.

oners may sue under the Federal Tort Claims Act.[57] It is not clear whether any other form of action is available to federal inmates in prison conditions suits, although the Fifth Circuit has upheld one prisoner's action interpreted by the court to have been brought under the federal mandamus statute.[58] Only one Supreme Court decision, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,*[59] has recognized a direct private right of action against a federal official who has violated a plaintiff's constitutional rights. Moreover, it is very possible that the Supreme Court as presently constituted would strictly limit this decision should it review a similar suit today.[60]

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§ 2241 (1970). Prisoners' actions for declaratory judgment or injunction may be brought in federal court under 28 U.S.C. § 1343(4) (1970) if the conduct of which the plaintiffs complain violates a congressional statute that protects the plaintiffs' rights. Otherwise, federal prisoners must rely on 28 U.S.C.A. § 1331(a) (Supp. 1977), granting to federal courts jurisdiction to hear suits involving federal questions. The amount-in-controversy requirement has been abolished for suits against a federal official sued in his official capacity. *See also* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

57. United States v. Muniz, 374 U.S. 150 (1963). The statute is found in Legislative Reorganization Act of 1946, ch. 753, tit. IV, 60 Stat. 812, 842 (codified in scattered sections of U.S.C. Title 28). Federal court jurisdiction over claims against the United States for $10,000 or less is granted at 28 U.S.C. § 1346(a)(2) (1970).

58. Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966) (action to prohibit unreasonable restriction on the exercise of the Black Muslim religion in federal penitentiary). At 28 U.S.C. § 1361 (1970), federal courts are given jurisdiction over this common law action. *Cf.* Blair v. Anderson, 325 A.2d 94 (Del. 1974) (federal prisoner may sue state warden for negligence in failing to prevent another inmate's attack, because the plaintiff is a third-party beneficiary of the United States government's contract with the defendant to keep him in "safe custody").

59. 403 U.S. 388 (1971) (6-3 opinion) (Burger, C.J., Black, J., and Blackmun, J., dissented).

60. Several of the concerns of the present Court militate against the holding of *Bivens.* For example, the Burger Court is deeply worried about the vast amount of litigation brought in the federal courts. *See, e.g.,* Summary of oral arguments in Coopers & Lybrand v. Livesay, 46 U.S.L.W. 3021 (U.S. July 26, 1977) (No. 76-1836); Punta Gorda Isles, Inc. v. Livesay, 46 U.S.L.W. 3595, 3596 (U.S. March 28, 1978) (No. 76-1873). Thus it is not likely to encourage new rights of action. In fact, it has narrowly construed previously established rights of action. *See, e.g.,* Paul v. Davis, 424 U.S. 693 (1976).

The Seventh Circuit, however, has recently extended the scope of *Bivens* by holding that a state governmental entity, which is not a "person" within the meaning of § 1983, may be sued directly under the Constitution. The case may be heard in federal court if the requisite amount is in controversy. McDonald v. Illinois, 557 F.2d 596 (7th Cir.), *cert. denied,* 98 S. Ct. 508 (1977).

Under the traditional rule, Constitutional rights are not capable of valuation, and therefore suits to enforce these rights do not meet the jurisdictional requirement. *See, e.g.,* Senate Select Comm. on Pres. Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). The rule has been subjected to severe criticism and is not always literally enforced. *See* Comment, *The Jurisdictional Amount in Controversy in Suits to Enforce Federal Rights,* 54 TEX. L. REV. 545, 583-89 (1976) (written before the recent amendment exempting federal question suits against federal officials sued in their official capacities from the amount-in-controversy requirement, but applicable as well to federal question suits against other defendants).

Although the Second Circuit in *Johnson v. Glick* failed to distinguish convicted prisoners from those awaiting trial,[61] prisoners held before trial are usually afforded fairly extensive protection, not available to convicted prisoners, under the fourteenth amendment's prohibition against the denial of liberty without due process of law.[62] Conditions in many jails are equivalent to or even fall below the conditions in prisons, and as a result, jail inmates, who are usually awaiting trial, have often been able to make successful equal protection claims as well.[63] Because of the additional rights afforded prisoners held before trial, jail conditions cases have resulted in the release, on bail or on personal recognizance, of numbers of prisoners who otherwise would be unable to secure these privileges.[64]

B. *The Newly Recognized Right to Decent Conditions of Confinement*

Following in the wake of the Arkansas prison cases were general attacks on the conditions in state prisons throughout the Deep South.[65]

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61. 481 F.2d at 1031.

62. *E.g.,* Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976) (those held awaiting trial may not be kept in conditions more restrictive than necessary to ensure their presence at trial); *accord,* O'Bryan v. County of Saginaw, Mich., 437 F. Supp. 582 (E.D. Mich. 1977) (same); Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971).

63. *See, e.g.,* Rhem v. Malcolm, 371 F. Supp. 594, 623 (S.D.N.Y. 1974); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 685 (D. Mass. 1973), *aff'd,* 494 F.2d 1196 (1st Cir.), *cert. denied,* 419 U.S. 977 (1974); Brenneman v. Madigan, 343 F. Supp. 128, 138 (N.D. Cal. 1972). *See also* R. GOLDFARB, JAILS: THE ULTIMATE GHETTO 5 (1975) (Garden City: Anchor Press).

64. *See, e.g.,* Inmates of Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975).

65. ALABAMA: James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974), *consolidated sub nom.* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, vacated in part, and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), *cert. denied,* 423 U.S. 859 (1975); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975) (medical care for state prisoners); James v. Wallace, 386 F. Supp. 815 (M.D. Ala. 1974), *aff'd,* 533 F.2d 963 (5th Cir. 1976) (allegations of racial discrimination in the appointments to state boards and commissions made by Gov. Wallace). FLORIDA: Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *rev'd and remanded on other grounds,* 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd and remanded,* 430 U.S. 325 (1977). LOUISIANA: Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977). MISSISSIPPI: Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974), *enforced,* 390 F. Supp. 482 (N.D. Miss.), *motion for accelerated relief denied,* 407 F. Supp. 1117 (N.D. Miss. 1975), *enforced,* 423 F. Supp. 732 (N.D. Miss. 1976), *aff'd,* 548 F.2d 1241 (5th Cir. 1977); *see also* Gates v. Collier, 371 F. Supp. 1368 (N.D. Miss.), *aff'd,* 489 F.2d 298 (5th Cir. 1973), *vacated per curiam,* 522 F.2d 81 (5th Cir. 1975) (en banc), 70 F.R.D. 341 (N.D. Miss. 1976) (attorneys' fees). OKLAHOMA: Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974), *subsequent unpublished order aff'd,* 564 F.2d 388

Challenges to prison conditions elsewhere were usually somewhat more limited in scope, but very large in number.[66] In addition, suits attacking jail conditions have been brought all over the country.[67] This

(10th Cir. 1977). TEXAS: *In re* Estelle, 516 F.2d 480 (5th Cir.), *cert. denied,* 426 U.S. 925 (1976) (on interlocutory appeal). VIRGINIA: Landman v. Peyton, 370 F.2d 135 (4th Cir.), *cert. denied,* 385 U.S. 881 (1966); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), *enforced,* 354 F. Supp. 1292 (E.D. Va.), 354 F. Supp. 1302 (E.D. Va. 1973).

66. *See, e.g.,* Craig v. Hocker, 405 F. Supp. 656 (D. Nev. 1975); Aikens v. Lash, 371 F. Supp. 482 (N.D. Ind. 1974), *aff'd in part,* 514 F.2d 55 (7th Cir.), *on remand,* 390 F. Supp. 663 (N.D. Ind. 1975), *aff'd sub nom.* Aikens v. Jenkins, 534 F.2d 751 (7th Cir.), *vacated sub nom.* Lash v. Aikens, 425 U.S. 947, *on remand,* 547 F.2d 372 (7th Cir. 1976) (action limited to four questions: censorship of reading matter, access to a legal library while in disciplinary segregation, other conditions in segregation, and procedures for disciplinary transfers in Indiana state prison); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied sub nom.* Sostre v. Oswald, 404 U.S. 1049 (Douglas, J., dissenting), *motion to proceed in forma pauperis granted, cert. denied,* 405 U.S. 978 (1972). *But see* Chapman v. Rhodes, 434 F. Supp. 1007 (S.D. Ohio 1977); Taylor v. Perini, 359 F. Supp. 1185 (N.D. Ohio 1973) (discussion of prior, unreported litigation), *rev'd and remanded,* 503 F.2d 899 (6th Cir. 1974), *vacated and remanded,* 421 U.S. 982 (1975), *enforced,* 413 F. Supp. 189 (N.D. Ohio) (responding to first report of special master), *enforced,* 421 F. Supp. 740 (N.D. Ohio 1976) (special master's second report confirmed).

67. BALTIMORE: Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); *see also* Schoonfield v. Mayor and City Council, 399 F. Supp. 1068 (D. Md. 1975), *aff'd without published opinion,* 544 F.2d 515 (4th Cir. 1976). BOSTON: Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973) (Garrity, J.), *aff'd,* 494 F.2d 1196 (1st Cir.), *cert. denied,* 419 U.S. 977 (1974), *enforced,* 518 F.2d 1241 (1st Cir. 1975) (affirming district court order that bail appeal project continue to avoid frustrating earlier ruling that only one person be put in each cell). CLEVELAND: Cain v. Perk, 3 PRISON L. RPTR. (ABA) 293 (N.D. Ohio 1974). DALLAS: Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972), *aff'd in part, vacated in part, and remanded,* 499 F.2d 367 (5th Cir.), *cert. denied,* 420 U.S. 983 (1974). DETROIT: Wayne County Jail Inmates v. Wayne County Sheriff, 391 Mich. 359, 216 N.W.2d 910 (1974). EL PASO: Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977). JACKSONVILLE, FLORIDA: Miller v. Carson, 392 F. Supp. 515 (M.D. Fla. 1975). KANSAS CITY, KANSAS: United States v. Wyandotte County, Kan., 343 F. Supp. 1189 (D. Kan. 1972), *rev'd and remanded per curiam,* 480 F.2d 969 (10th Cir.), *cert. denied,* 414 U.S. 1068 (1973). KANSAS CITY, MISSOURI: Ahrens v. Thomas, 434 F. Supp. 873 (W.D. Mo. 1977). LIMA, OHIO: Incarcerated Men of Allen County v. Fair, 376 F. Supp. 483 (N.D. Ohio 1973), *vacated and remanded,* 507 F.2d 281 (6th Cir. 1974) (attorneys' fees for representation of inmates in jail conditions suits). LITTLE ROCK: Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971). MILWAUKEE: Inmates of Milwaukee County Jail v. Petersen, 51 F.R.D. 540 (E.D. Wis. 1971), 353 F. Supp. 1157 (E.D. Wis. 1973). MOBILE, ALABAMA: Theriault v. United States, 481 F.2d 1193 (5th Cir.) (per curiam), *cert. denied,* 414 U.S. 1114 (1973). NEW ORLEANS: Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970), *enforced sub nom.* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); *See* Holland v. Donaldson, 3 PRISON L. RPTR. (ABA) 288 (E.D. La. 1974). NEW YORK CITY: BRONX: Ambrose v. Malcolm, 414 F. Supp. 485 (S.D.N.Y. 1976); BROOKLYN: Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975), *on remand,* 421 F. Supp. 832 (E.D.N.Y. 1976); MANHATTAN: *The Tombs:* Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971) (preliminary injunction), *motion to dismiss preliminary injunction denied sub nom.* Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y.), *relief granted,* 377 F. Supp. 995 (S.D.N.Y.), *modified,* 507 F.2d 333 (2d Cir. 1974) (The Tombs ordered closed); *Metropolitan Cor-*

litigation has produced widespread judicial recognition of a right not imagined a quarter-century ago—the right of every prisoner to be confined in decent and humane surroundings. The depth of concern felt among many of the federal judiciary is demonstrated by their willingness to delineate in some detail the elements of the new right, and to exercise every procedural device available to facilitate consideration of prisoners' claims.

The courts have reviewed almost every aspect of prison life. Judge Johnson of the Middle District of Alabama has ordered that prison food be nutritious, that meals be served three times daily, that proper dishes and flatwear be provided, and that food be kept and prepared with due regard for sanitation.[68] So that the food service would be adequately advised and managed, he has also directed the state prison to hire supervisors and consultants with various degrees of specialized training. Other courts have required that adequate heat,[69] light,[70] ventilation,[71] fire protection,[72] and sanitation[73] be provided. The Fifth

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rectional Center: United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977) (federal jail and holding center); QUEENS: Valvano v. McGrath, 325 F. Supp. 408 (E.D.N.Y. 1971), Valvano v. Malcolm, 3 PRISON L. RPTR. 273 (E.D.N.Y. July 31, 1974) (consolidated with Brooklyn case, *supra*); RIKERS ISLAND: Rhem v. Malcolm, 389 F. Supp. 964 (S.D.N.Y.) (action by prisoners transferred from The Tombs), *judgment amended,* 396 F. Supp. 1195 (S.D.N.Y.), *aff'd per curiam,* 527 F.2d 1041 (2d Cir. 1975) (consolidated with Benjamin v. Malcolm, action by inmates of Rikers Island jail who had not been transferred there from The Tombs), *defendants' motion to modify order denied,* 432 F. Supp. 769 (S.D.N.Y. 1977). SEATTLE: Bolding v. Jennings, 3 PRISON L. RPTR. (ABA) 259 (W.D. Wash. 1974) (consent decree). SAN FRANCISCO: Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972) (Alemeda County). ST. LOUIS: Johnson v. Lark, 365 F. Supp. 289 (E.D. Mo. 1973). TOLEDO: Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio), *supplemental opinion,* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), *enforced sub nom.* Jones v. Wittenberg, 357 F. Supp. 696 (N.D. Ohio 1973). WASHINGTON, D.C.: Campbell v. McGruder, 416 F. Supp. 106 (D.D.C. 1975); Inmates, D.C. Jail v. Jackson, 416 F. Supp. 119 (D.D.C. 1976).

68. Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976). *See also* Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970).

69. *See, e.g.,* Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972). *But see* Smith v. Sullivan, 553 F.2d 373, 381 (5th Cir. 1977).

70. *See, e.g.,* Jordan v. Arnold, 408 F. Supp. 869, 872, 876 (M.D. Pa. 1976). Courts have also ordered that metal covers be removed from clear glass windows so that inmates can see the outdoors. Hamilton v. Landrieu, 351 F. Supp. 549, 554 (E.D. La. 1972); *cf.* Jordan v. Arnold, 408 F. Supp. at 873; Rhem v. Malcolm, 371 F. Supp. 594, 627 (S.D.N.Y. 1974).

71. *See, e.g.,* Jordan v. Arnold, 408 F. Supp. 869, 876 (M.D. Pa. 1976); Rhem v. Malcolm, 371 F. Supp. 594, 627 (S.D.N.Y. 1974).

72. Williams v. Edwards, 547 F.2d 1206, 1214 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974); Hamilton v. Landrieu, 351 F. Supp. 549, 554 (E.D. La. 1972).

73. Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970), *on remand,* 331 F. Supp. 1123 (E.D. La. 1971); Murphy v. Wheaton, 381 F. Supp. 1252, 1261 (N.D. Ill. 1974); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

Circuit has at least twice upheld rulings that state building and fire codes be observed.[74] Another court has ordered that excessive noise be reduced.[75]

In an effort to curtail violence in prisons, courts have banned the use of trusties as guards,[76] and have ordered prisoners transferred from dormitories to individual cells.[77] Examination of incoming inmates is a relatively simple step toward improving inmates' safety, and some court decisions have required it.[78] Prisoners also have the right to obtain some physical exercise.[79] Of course, on profit-making prison farms like those once operated by Arkansas and Mississippi, lack of exercise was hardly a problem. Perhaps it is properly classified as a newly recognized consequence of the traditional right of prisoners to decent medical care, but the right to obtain exercise has been raised and discussed as one element of the right to decent conditions generally.[80]

Many of the abuses these court orders were intended to alleviate resulted from the severe overcrowding that exists in many state prisons. Overcrowding creates a host of collateral problems, but it is a difficult problem for the courts to attack directly. Experts disagree about how much space per person is needed, but where there are prison guidelines that have been drawn in good faith, courts will generally defer to them.[81] Otherwise, the standard is usually set between fifty and eighty square feet per person.[82]

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74. *See* the Fifth Circuit cases cited at note 72 *supra*. Local codes were used for setting minimum standards for penal institutions as early as 1971 by Judge Young of the Northern District of Ohio, who presided over protracted litigation concerning conditions in the Lucas County Jail in Toledo, Ohio. Jones v. Wittenberg, 330 F. Supp. 707, 715, 721 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

75. Rhem v. Malcolm, 371 F. Supp. 594, 607-09, 627-28 (S.D.N.Y. 1974).

76. *See, e.g.,* Gates v. Collier, 349 F. Supp. 881, 902-03 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974).

77. *See, e.g.,* Valvano v. Malcolm, 3 PRISON L. RPTR. (ABA) 273 (E.D.N.Y. 1974).

78. *See, e.g.,* Jones v. Wittenberg, 330 F. Supp. 707, 717 (N.D. Ohio 1971) *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

79. *See, e.g.,* Spain v. Procunier, 408 F. Supp. 534, 545 (N.D. Cal. 1976); Rhem v. Malcolm, 389 F. Supp. 964, 971-72 (S.D.N.Y.), *aff'd per curiam,* 527 F.2d 1041 (2d Cir. 1975); Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970), *on remand,* 331 F. Supp. 1123 (E.D. La. 1971). *But see* Dorrough v. Hogan, 563 F.2d 1259 (5th Cir. 1977) (per curiam), where the court of appeals published the district court's opinion as an appendix to its per curiam affirmance of the decision. The district court held that if conditions are otherwise adequate, a prisoner is not constitutionally entitled to more than two exercise periods a week. 563 F.2d at 1263, 1264.

80. *See, e.g.,* Spain v. Procunier, 408 F.Supp. 534, 543 (N.D. Cal. 1976).

81. *See, e.g.,* Ambrose v. Malcolm, 414 F. Supp. 485, 494.

82. *See, e.g.,* Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977) (adopting

Overcrowding often cannot be alleviated without either the expenditure of large sums of money or the release of prisoners before their sentences are completed.[83] Either remedy, when directed by federal courts at state institutions, raises serious problems of federalism. These problems were at the heart of *Costello v. Wainwright*,[84] which considered conditions in the Florida Penitentiary where overcrowding is so severe that many inmates live in tents borrowed from the National Guard.[85] Federal District Judge Scott described in detail the physical and psychological suffering caused by overcrowding[86] and ordered the Florida warden to reduce the prison's population to "emergency capacity."[87] The warden appealed, claiming that he could not do so without violating Florida law, which the state governor had ordered him to obey.[88] The Fifth Circuit recently affirmed the district judge's holding, after some confusion over whether a federal court could make such a ruling without convening a three-judge court.[89]

Other recent decisions based not on the right to humane conditions but, for example, on the first and sixth amendments, have also

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American Public Health Association standard of 60 square feet per cell and 75 square feet for a person in a dormitory); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 396 (2d Cir. 1975) (50 square feet); Ambrose v. Malcolm, 414 F. Supp. 485, 492-93, 495 (S.D.N.Y. 1976) (adopting American Correctional Ass'n standard of 75 square feet per inmate). *Cf.* Valvano v. Malcolm, 3 PRISON L. RPTR. (ABA) at 274 (American Correctional Ass'n standards "do not have the force of law, [but] they have a pervasive effect within the amorphous boundaries of federal rights.") The standard under Section 1(b) of the Model Act to Provide for Minimum Standards for the Protection of Prisoners, formulated by the National Council on Crime and Delinquency in 1972, is 50 square feet per inmate. An order setting, in effect, a requirement of 80 square feet per inmate was remanded by the Fifth Circuit for reconsideration. Williams v. Edwards, 547 F.2d 1206, 1215 (5th Cir. 1977). *See also* Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977).

83. *But see* Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977), in which the district court required the transfer of a number of prisoners to relieve overcrowding, but did not order the premature release of any prisoners or the construction of new facilities.

84. Costello v. Wainwright, 397 F. Supp. 20, 23-32, 34 (M.D. Fla. 1975), *rev'd and remanded on other grounds*, 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd and remanded*, 430 U.S. 325 (1977). The Florida case began as an attack on the medical care provided at the prison, but the trial judge concluded that adequate health care could not be provided until overcrowding was reduced. 539 F.2d at 550 (5th Cir. 1976).

85. 397 F. Supp. at 36.

86. *Id.* at 23-32, 34.

87. Costello v. Wainwright, 397 F. Supp. at 35, 38-39.

88. Costello v. Wainwright, 539 F.2d at 551 n.16.

89. The full published history of this litigation is: 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *vacated and remanded for en banc hearing by 3-judge panel*, 539 F.2d 547 (5th Cir. 976), *rev'd and remanded per curiam*, 430 U.S. 325 (3-judge panel unnecessary), *enforced*, 553 F.2d 506 (5th Cir. 1977) (affirming opinion at 525 F.2d 1239).

greatly affected the quality of prison life.[90] Among the newly established rights are the right (1) to access to a reasonably extensive law library,[91] (2) to possess and read any publications that do not interfere with the operation of the prison,[92] (3) to send and receive mail without censorship,[93] (4) to receive visitors, subject only to reasonable restrictions,[94] and (5) to worship freely, within reasonable administrative restrictions.[95]

C. *Development of the Traditionally Recognized Right to Medical Care*

Even at common law, prison authorities were held to a duty to provide medical services to inmates who, being confined, would not otherwise have access to care.[96] Clearly, one of the most elemental rights of one entering prison must be the right to obtain medical care. Due process would appear to require that an inmate not be forced to undergo unnecessary physical suffering to which he has not been sentenced.

The burden of proof on the prisoner claiming he has received inadequate treatment, however, has been very great. Until recently, most federal courts refused even to consider inmates' claims that state prisons provided inadequate medical care—they would hear only cases in which an inmate could claim he had received no treatment whatsoever.[97] And additional requirements were imposed. The Ninth Cir-

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90. These cases are beyond the scope of this comment.

91. Bounds v. Smith, 430 U.S. 817 (1977).

92. *E.g.,* Aikens v. Lash, 390 F. Supp. 663, 666-76 (N.D. Ind. 1975), *aff'd sub nom.* Aikens v. Jenkins, 534 F.2d 751 (7th Cir.), *vacated sub nom.* Lash v. Aikens, 425 U.S. 947 (1976); *cf.* Morales v. Schmidt, 494 F.2d 85 (7th Cir. 1974) (prisoners' correspondence).

93. Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396 (1974).

94. *Cf.* Brenneman v. Madigan, 343 F. Supp. 128, 141 (N.D. Cal. 1972) (visiting rights for those awaiting trial). The Southern District of New York has required that those awaiting trial be permitted "contact visits," that is, be allowed to touch and kiss their visitors, because this is permitted in adult New York state prisons. Rhem v. Malcolm, 371 F. Supp. 594, 625-26 (S.D.N.Y.), *modified on other grounds,* 507 F.2d 333 (2d Cir. 1974). Most courts have refused to require that conjugal visits be allowed. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 142-43 (S.D.N.Y. 1977).

95. *See, e.g.,* Mukmuk v. Commissioner of Dep't of Correctional Serv., 529 F.2d 272, 275 (2d Cir.), *cert. denied,* 426 U.S. 911 (1976); 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 (1971).

96. W. LEEKE, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, THE EMERGING RIGHTS OF THE CONFINED 146-47 (1972).

97. Cates v. Ciccone, 422 F.2d 926, 928 (8th Cir. 1970) ("obvious neglect or intentional mistreatment").

cuit, in 1967, denied relief to an inmate who had received only a few pain-relieving pills, and these only occasionally, for a chronic and painful back injury.[98] The court found that, to recover, the prisoner had to prove not only that he had not received any care, but also that he had had an acute physical condition urgently requiring treatment, and that he had suffered tangible permanent injury as a direct result of the authorities' failure to provide him with medical care.[99] In 1974, the Eighth Circuit found the standard met where the plaintiff alleged that he had been placed in a cell with another inmate known to have tuberculosis, that he had gotten the disease, that prison authorities had denied him access to specialized treatment, and that his sight had therefore been permanently impaired.[100]

In this decade, the traditional rule has begun to erode under evidence of the actual primitiveness of many prison facilities.[101] In *Costello v. Wainwright,* Judge Scott's holding that overcrowding in the Florida penitentiary reached the proportions of a constitutional violation dwelt on the acute medical risks inherent in severe overcrowding, and on the inadequacy of the prison's medical resources.[102] In *Newman v. Alabama,*[103] the medical facilities of the Alabama penal system, which were so rudimentary as to be almost nonexistent, were held to violate the eighth amendment. Similarly, evidence that medical care was inadequate contributed to findings of constitutional violations in the prisons of Arkansas,[104] Louisiana,[105] Mississippi,[106] and the Virgin Islands.[107]

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98. *See, e.g.,* Stiltner v. Rhay, 371 F.2d 420, 421 n.3 (9th Cir.), *cert. denied sub nom.* Stiltner v. Washington, 386 U.S. 997 (1967).

99. *Id.* at 421 n.3.

100. Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974).

101. In the late 1960's, the President's Crime Commission found that the 358 prisons across the country employed only 306 physicians and 654 nurses and paramedics. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE: CORRECTIONS 180, *cited in* R. SINGER & W. STATSKY, RIGHTS OF THE IMPRISONED 750 (1974). The provisions for medical care made by many American jails in the early 1970's, and the results of that situation, are described in R. GOLDFARB, *supra* note 63, at 82-112.

102. Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975). *See* note 89 *supra* for subsequent history of the case. The District Court was eventually affirmed at 553 F.2d 506 (5th Cir. 1971).

103. 349 F. Supp. 278 (M.D. Ala. 1972) (Johnson, J.), *aff'd,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975).

104. Finney v. Arkansas Bd. of Corr., 505 F.2d 194, 202-04 (8th Cir. 1974).

105. Williams v. Edwards, 547 F.2d 1206, 1215-18 (5th Cir. 1977).

106. Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974).

107. Barnes v. Virgin Islands, 415 F. Supp. 1218, 1227-28 (D.V.I. 1976).

The somewhat less stringent standards of "deliberate indifference" was formulated in these cases from the South, and in others.[108] But this standard, as applied, has until very recently differed notably from the traditional one only in the Southern class actions and consolidated claims against prison facilities in general.[109] State prisoners' claims of individual medical mistreatment are still only rarely successful.[110] If read literally, the newer standard is indeed difficult to distinguish from its predecessor, except that a showing of tangible permanent injury is no longer necessary. Nevertheless, change seems to be slowly coming, and prisoners' medical suits brought today may face somewhat improved prospects.[111]

Estelle v. Gamble,[112] the Supreme Court's first opinion on this issue in recent times, was decided late in 1976, and its full impact is still uncertain. The plaintiff in *Estelle* was a prisoner who suffered from a back ailment. He saw doctors repeatedly; they performed some tests on him and prescribed some medicine. His pain persisted, and he filed a complaint pro se. The majority of the Court concluded that since the plaintiff had seen doctors so regularly, and since the doctors apparently made a good faith effort to treat him, their actions did not violate the eighth amendment. The plaintiff's remedy, if the treatment he had received was inferior, lay in an action for malpractice.

As Justice Stevens pointed out in dissent, the case was a curious one for the Court to have chosen to review, for it came up on the pro se complaint alone, with no supporting record.[113] The facts of the

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108. *See, e.g.*, Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974); Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974). *But see* Carlisle v. Scott, 357 F. Supp. 1284 (N.D. Ill. 1973) (specific intent to harm prisoner, on part of authorities, or severe injuries are necessary to make out a claim under § 1983; authorities cited, however, date from 1964 to 1968).

109. *See, e.g.*, Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) (class action), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975) (class action), *aff'd*, 553 F.2d 506 (5th Cir. 1977).

110. *See* Sturc, *Conditions of Confinement: The Constitutional Limits on the Treatment of Prisoners*, 25 CATHOLIC U.L. REV. 42, 83 (1975).

111. *See, e.g.*, Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976) (individual cause of action recognized); Wright v. Twomey, 3 PRISON L. RPTR. (ABA) 30 (7th Cir. 1974) (The court of appeals specified, "This order is designated an 'unpublished order' not to be cited per Circuit Rule 28."); Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975) (per curiam). *Cf.* Shannon v. Lester, 519 F.2d 76 (6th Cir. 1975) (recognizing individual cause of action where plaintiff was denied medical attention at time of arrest). *See also* Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. March 21, 1978) (No. 77-121).

112. 429 U.S. 97 (1976) (Marshall, J.) (Blackmun, J., concurring in the judgment) (Stevens, J., dissenting).

113. *Id.* at 110-14 (dissenting opinion). Stevens noted that the Court may have been interested in providing guidance on pleading questions for lower federal courts.

case, moreover, distinguish it from many other prisoners' medical mistreatment suits. Few prisoners' claims are based on such a large quantum of care. Also, back maladies are notoriously difficult to cure. Many prisoners have had clearer evidence of a real medical failure.[114]

The Court's holding was a narrow one: it determined only the merits of the plaintiff's constitutional claim against his doctors, and remanded his claim against the prison administration, as there had been no consideration of this claim below. But language of the holding was much broader than its factual context or its specific holding. The opinion focused on the standard of care to which prison doctors and authorities are to be held. The 7-1 opinion may well have been a compromise, for at different points, language susceptible to quite different interpretations is used. The Court expressly adopted the rule that deliberate indifference on the part of the authorities to inmates' medical needs violates the eighth amendment. It cited cases espousing this standard from nearly every circuit.[115] But it also wrote that to constitute deliberate indifference, the denial or delay of medical treatment must be intentional.[116] Clearly, conduct may meet one test, but not the other. A warden might well refuse to take the steps necessary to obtain the regular services of a competent doctor, yet never intentionally deny or delay an individual inmate's access to care in a particular instance. Because of the Court's ambivalence, the lower federal courts will be free to apply the standard they prefer.

If a prisoner must now prove, in every section 1983 medical case, a specific malevolent intent on the part of prison authorities to deny medical care to him personally, prisoners will only rarely be able to recover. But some of the language used by the Court is quite favorable to prisoners, and strongly supports prisoners' right to decent medical care. The courts of appeals cases cited by the Court indicate that the Court's more liberal language had already been widely applied before *Gamble* was decided.[117] Thus it is the liberal sections of the Court's opinion that are likely to be cited by the lower courts in the future.[118]

Id. at 115. In recent years, these courts have been inundated with pro se complaints. The majority, however, merely quoted existing law regarding the liberality with which pro se complaints are to be read. *Id.* at 106.

114. *See, e.g.,* notes 97 & 99 and accompanying text *supra,* for claims involving lesser degrees of medical attention. For a case involving clearer evidence of medical failure see Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974).

115. 429 U.S. at 106 n.14. The D.C. Circuit is not included, but there are few penal institutions within its jurisdiction.

116. *Id.* at 106.

117. Some of these courts have begun to apply the Court's most generous language in new ways. *E.g.,* Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977).

118. But *see* Wester v. Jones, 554 F.2d 1285 (4th Cir. 1977) (court uses liberal test, but finds no mistreatment), *cert. denied,* 46 U.S.L.W. 3586 (U.S. March 21, 1978).

But even under the broadest reading possible, the rights *Gamble* recognizes are somewhat more limited than the rights that some lower courts have been willing to accept. The case gives no hint that the Supreme Court would be receptive to a claim that prisoners are entitled not only to corrective treatment, but also to the basic preventive care normally enjoyed by most Americans outside prison. Although no major case has granted an individual prisoner damages because he contracted an illness that would have been prevented or alleviated if he had had earlier access to a doctor, some courts have ordered that a program of preventive medicine be established in prisons.[119] The standard of care set forth in *Gamble* provides no support for this development.

Federal prisoners, unlike some state prisoners, are protected under 18 U.S.C. § 4042, which provides that to make out a claim, they need only establish that they have not received "suitable" medical care.[120] Though suits have seldom been brought under this statute, the medical facilities in the federal prison system have in the past been seriously inadequate. In 1973, one angry district court judge pointed out that until the 1976 opening of the Federal Correctional Institute at Butner, North Carolina—then in the planning stage—the federal government would not operate any institution capable of properly caring for a prisoner suffering from a long-term psychiatric disorder.[121] Despite some administrative difficulties at Butner, vastly improved treatment is now available at least to mentally disturbed federal prisoners.[122] Thus the federal statute may remain only rarely used.

D. *The Prospects for Development of a Right to Rehabilitative Treatment*

Until quite recently, the courts have steadfastly refused to recognize the right of prisoners to participate in a rehabilitation program,[123]

119. *E.g.*, Barnes v. Virgin Islands, 415 F. Supp. 1218, 1228 (D.V.I. 1976).

120. Ricketts v. Ciccone, 371 F. Supp. 1249, 1256 (W.D. Mo. 1974). *See also* Sturc, *supra* note 110, at 84 nn.296 & 297. Many states have similar laws, also rarely applied. See, for example, the statutes cited in Estelle v. Gamble, 429 U.S. at 103-04 n.8.

121. United States v. Pardue, 354 F. Supp. 1377, 1377-78 (D. Conn. 1973). The Federal Medical Center at Springfield, Missouri did not qualify as a psychiatric hospital. *Id.* at 1379. In a similar case, the Eighth Circuit dismissed Springfield as nontherapeutic: A "security atmosphere . . . dominate[d] over the hospital nature of the institution." Guy v. Ciccone, 439 F.2d 400, 402 (8th Cir. 1971).

122. The Butner complex opened thirty months behind schedule, in May, 1976, and has encountered some other operating difficulties since. Pinsky, *Butner, The Jinxed Prison,* THE NATION, July 9-16, 1977, at 41, 43.

123. Some judges have, however, attempted to encourage development of rehabilitative programs in prison. *E.g.*, James v. Wallace, 382 F. Supp. 1177 (M.D. Ala.

despite steady pressure from prisoners' advocates.[124] There are, however, many indications that the right may soon be established, perhaps not independently, but as an adjunct to other recognized rights.

1. Psychiatric care. It is now settled that people who are confined in state institutions and are neither dangerous nor convicted of any crime are entitled to care appropriate to their needs. The Supreme Court has recognized that one who is involuntarily committed to a mental institution after a civil proceeding has a right to be treated or released, at least if there is no evidence that he is dangerous to himself or another.[125] This right had been recognized much earlier by some lower courts.[126] In *Wesley v. Weaver,* the Seventh Circuit reviewed the plight of a child who, following a court finding that she had been neglected by her family, had been placed in a series of state institutions. The court held that she might recover damages if she could establish that she had been denied appropriate psychiatric treatment and adequate care while in the state's custody.[127] Juveniles who have committed criminal offenses or juvenile violations often have a statutory right to treatment,[128] which the D.C. Circuit in particular has been careful to enforce.[129] Prisoners held until they are fit to stand trial are entitled to the care they need,[130] and once they are fit, they must be returned for trial as soon as possible.[131]

1974). *James* was written by Judge Johnson, a leader in exerting the power of the federal courts to demand that state officials improve conditions in state institutions. *Accord,* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.) (officials given six months to remedy inadequate facilities), *enforced,* 334 F. Supp. 1341 (M.D. Ala. 1971) (master appointed to set standards), *enforced,* 344 F. Supp. 373 (M.D. Ala.) (court refuses to appoint advisory committee), *enforced,* 344 F. Supp. 387 (M.D. Ala. 1972) (standards must be effectuated; lack of funds is no defense), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Newman v. Alabama, 349 F. Supp. 278, 284 (M.D. Ala. 1972), *aff'd,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975).

124. As early as the Arkansas cases, for example, prisoners sought judicial recognition of a right to rehabilitation. *Holt II,* 309 F. Supp. at 378-79.

125. O'Connor v. Donaldson, 422 U.S. 563 (1975).

126. *See, e.g.,* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (Bazelon, J.); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1975). *See also* Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974) (Wisdom, J.).

127. 2 PRISON L. RPTR. (ABA) 174 (7th Cir. 1973).

128. *E.g.,* IND. CODE ANN. § 31-5-7-1 (Burns 1973) *see* Nelson v. Hyne, 355 F. Supp. 458, 459 (N.D. Ind. 1973) (supplemental opinion), *aff'd* 491 F.2d 352 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974).

129. *See, e.g., In re* Elmore, 382 F.2d 125 (D.C. Cir. 1967) (per curiam); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967) (per curiam); United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971). *See also* Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), 355 F. Supp. 458 (N.D. Ind. 1973) (supplemental opinion), *both opinions aff'd and remanded,* 491 F.2d 352 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974).

130. *See, e.g.,* Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968).

131. *See, e.g.,* Henry v. Ciccone, 440 F.2d 1052 (8th Cir. 1971).

In all of these cases, there are special factors not present in ordinary prison cases. Civilly confined patients are held either for treatment or to preserve the public safety, and when neither reason is satisfied, they must be released. They may not be held for punishment. Juveniles' rights are established by statutes not applicable to adult prisoners. Finally, those awaiting trial are presumed innocent, and must not be confined except where necessary for the public safety or to ensure their presence at trial. These cases, however, represent a significant break with some past holdings, and greatly expand the responsibility of institutional officials for people committed to their care. They appear to support a finding that prison authorities must, within the limits of reasonably adequate resources, develop training and educational programs sorely needed by many inmates.

The right to receive rehabilitative care may, for some disturbed prisoners, be an obvious concomitant of the right to receive other needed medical care,[132] though this claim has thus far been made with surprising infrequency. While stopping short of ruling that a prisoner has a constitutional right to beneficial psychiatric care, one federal judge has held that once a prisoner's need for treatment has been recognized, and he has been sent to a state hospital for care, he may not be returned to a prison having no facilities to treat him unless the state can justify the transfer at a hearing.[133] In this judge's view, once the state has undertaken to provide treatment, it may not withdraw the treatment arbitrarily.

A right to rehabilitation for disturbed prisoners may also be developed by a more circuitous route. Courts have noted the need to examine incoming inmates so that more dangerous inmates may be segregated from the rest of the prison's population.[134] Testing would seem a highly useful and relatively inexpensive way of promoting safety in prison. Once prison authorities become aware of a prisoner's problem, they are under a greatly increased duty to alleviate it.[135] The authorities' obligation to address prisoners' problems may,

132. Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977).

133. Burchett v. Bower, 355 F. Supp. 1278 (D. Ariz. 1973). *Contra,* Cruz v. Ward, 558 F.2d 658 (2d Cir. 1977), *rev'g* 424 F. Supp. 1277 (S.D.N.Y. 1976) (Judge Kaufman of the Second Circuit wrote a strong dissent).

134. *Cf.* Johnson, *Observation: The Constitution and the Federal District Judge,* 54 TEX. L. REV. 903, 913 (1976).

135. This principle has thus far been advanced in cases involving prisoners' safety and medical treatment for physical illnesses. *See, e.g.,* Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976) ("[P]rison authorities may not be deliberately indifferent to the suffering of prisoners under their care.").

in practice, be greatly expanded if the authorities are required initially to identify and investigate these problems.

Exactly how recognition of a right to treatment should apply to the incurably ill is a very difficult question. For some emotional problems, there is no known cure. The problem has already arisen in a case involving a defendant in a murder trial sentenced to the state hospital after being found not guilty by reason of insanity.[136] His illness made him unwilling to cooperate in the medical treatment of his disorder, although he was capable of developing, organizing, and teaching in the hospital's physical fitness, handicrafts, and elementary education programs. The court held that his participation in these programs, though ineffective for his sickness, was all that the state could reasonably provide, given the present level of medical understanding. While this holding seems justified, the court failed to indicate that the state had neglected its constitutional duties during the nine-month period when even these limited programs were halted for lack of funds. Where medical knowledge is imperfect, it will be impossible to determine in advance who will respond to treatment and who will not, but the possibility of failure alone cannot justify neglect to extend *any* treatment. There are, however, some obvious potential difficulties with broad court orders that effective therapeutic rehabilitative care be given all disturbed prisoners.

A useful rule for psychiatric treatment cases may be a version of the older rule that courts will not examine the adequacy of care, once some care has been made available. The rule is no longer strictly applied in medical cases involving maladies readily amenable to modern care,[137] but may be appropriate where the proper course of treatment is widely disputed and no certain cure has been identified. The rule should not, however, be permitted to serve, as it once did, as a pretext by which courts can avoid reviewing care that is grossly inadequate by any accepted medical standard.

2. Education and job training. The day is more rapidly approaching when mentally healthy prisoners will be able to claim a right to obtain rehabilitative education and job training. The view that the primary function of prisons should be to rehabilitate inmates has

136. Eidinoff v. Connolly, 281 F. Supp. 191, 198-200 (N.D. Tex. 1968). *See also* Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972) (difficulty of diagnosis of some mental problems), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied sub nom.* Department of Human Resources v. Burnham, 422 U.S. 1057 (1975), *criticized in* Bowring v. Godwin, 551 F.2d at 48 n.3.

137. *See, e.g.*, Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976).

been echoed by three Justices of the Supreme Court.[138] The rehabilitative effects of proposed reforms have been a factor in judicial decisions to adopt them. For example, the rehabilitative effects of fairer process were mentioned by the Supreme Court when it required increased procedural due process in prison disciplinary proceedings.[139] Of course, believing that rehabilitation ought to be available and holding that a prisoner has a constitutional right to obtain such assistance are quite different. The dicta in these cases, though, indicates that many judges may be inclined to look for a constitutional basis for a right to participate in a rehabilitative training program.

The most likely source for development of an enforceable right to rehabilitative treatment is the intolerable conditions that prevail in many American penal institutions. At least five federal courts, including the Fifth and Tenth Circuits, have required states to provide some countervailing program where prison conditions are patently destructive of the human spirit: they have required states to take steps to ensure that prison does not make an inmate more antisocial than he was when he entered prison.[140] Recognition of this right reflects the interests both of society and of the individual prisoner.[141] Two of these courts have gone much further, holding that prison officials must also provide for all prisoners an opportunity to become rehabilitated.

138.

> Imprisonment is intended to accomplish more than the temporary removal of the offender from society in order to prevent him from committing like offenses during the period of his incarceration. While custody denies the inmate the opportunity to offend, it also gives him an opportunity to improve himself and to acquire skills and habits that will help him to participate in an open society after his release. Within the prison community, if this basic hypothesis is correct, he has a protected right to pursue his limited rehabilitative goals, or at the minimum, to maintain whatever attributes of dignity are associated with his status in a tightly controlled society.

Meachum v. Fano, 427 U.S. 215, 234 (1976) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.).

139. Morrissey v. Brewer, 408 U.S. 471 (1972); Procunier v. Martinez, 416 U.S. 396 (1974).

140. Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977); Laaman v. Helgemore, 437 F. Supp. 269 (D.N.H. 1977); Barnes v. Virgin Islands, 415 F. Supp. 1218 (D.V.I. 1976); Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd in part, vacated in part, and remanded sub nom.* Newman v. Alabama, 559 F.2d 283, 292 (5th Cir. 1977) (the court of appeals held that the district court's order that the prison authorities offer some rehabilitation programs was not constitutionally required and not to carry precedential value, but that the court's order would not be overly burdensome to the prison administration, and could stand); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (Holt II). *But see* French v. Heyne, 547 F.2d 994, 1002 (7th Cir. 1976) (conditions at Indiana State Reformatory not comparable to conditions in Arkansas and Alabama prisons, so there is no right to a countervailing rehabilitative program).

141. Laaman v. Helgemore, 437 F. Supp. 269 (D.N.H. 1977).

Judge Young of the Virgin Islands has held that meaningful rehabilitation opportunities must be available to all inmates who wish to take advantage of them.[142] Judge Bownes, then of New Hampshire, has required that each state prisoner be given the chance to learn a skill marketable in New Hampshire.[143] Judge Bownes found that "[p]unishment for one crime, under conditions which spawn future crimes and more punishment, . . . is 'so totally without penological justification that it results in the gratuitous infliction of suffering' in violation of the Eighth Amendment."[144] These two cases reach a goal that many federal district courts have been approaching step by step in recent years and which many have viewed with some longing. Now that two courts have required the creation of rehabilitation programs in prison where necessary to curtail recidivism, it seems likely that if these opinions are not reversed, they will provoke significant further support.

Nevertheless, there are cases refusing to require establishment of a rehabilitation program for fear that judicial intervention might create rigidity in programs that demand imagination and experimentation if they are to be successful.[145] In addition, judicial power is limited by the fact that judges lack the power to secure for individual prisoners the best program available. Full responsibility for the placement of federal prisoners is vested in the Attorney General,[146] and most states have adopted a corresponding system. Even if the sentencing judge—state or federal—reads into the record at trial a recommendation that a defendant undergo a particular type of treatment, the defendant may not later challenge his assignment to an institution having no therapeutic program whatsoever,[147] despite the fact that he might not have been incarcerated at all had the judge known where the prisoner was to do his time. Moreover, even if a statute has expressly lengthened the term of imprisonment for a certain crime in order that rehabilitation may be more successfully provided, a showing of very superficial attempts at treatment is sufficient to sustain the prisoner's additional confinement.[148] If a prisoner can prove that no

142. Barnes v. Virgin Islands, 415 F. Supp. at 1218, 1226-27 (D.V.I. 1976).

143. Laaman v. Helgemore, 437 F. Supp. 269, 316 (D.N.H. 1977).

144. *Id.*

145. *See, e.g.*, Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968) (three-judge panel), *aff'd*, 393 U.S. 266 (1968) (per curiam).

146. 18 U.S.C. § 4082(a) (1970); Lawrence v. Willingham, 373 F.2d 731 (10th Cir. 1967) (per curiam).

147. *See* Ledesma v. United States, 445 F.2d 1323 (5th Cir. 1971) (per curiam).

148. People *ex rel.* Blunt v. Narcotic Addiction Control Comm'n, 58 Misc. 2d 57, 295 N.Y.S.2d 276 (Sup. Ct. 1968), *aff'd mem.*, 24 N.Y.2d 850, 248 N.E.2d 918, 301 N.Y.S.2d 89 (1969).

treatment whatsoever is available to him, however, he may be able to obtain release or transfer.[149]

3. Procedural safeguards in the selection of prisoners for rehabilitative programs. Introduction of procedural rights into the administration of rehabilitation programs made available after sentencing now seems foreclosed. *United States ex rel. Myers v. Sielaff,*[150] a well-reasoned case that was never widely cited, held that a prisoner is entitled to a fair hearing, not merely a summary one, when he applies to a community treatment program in which he would be released from prison. The court held that a prisoner might be entitled to punitive damages if the hearing he received had been only a sham. It is doubtful, however, whether this case can stand after the Supreme Court's decision in *Moody v. Daggett.*[151] There the Court held that a prisoner who was released on parole, committed a crime, and was convicted and incarcerated for that crime, is not entitled to a prompt parole revocation hearing if the parole-violator warrant, although issued and lodged with the institution in which he is confined, has not actually been served on him. The Court found that "the lodging of a detainer . . . does not have the kind of impact on his custodial status that requires a due process hearing."[152] This rather limited holding has far reaching consequences, which have already been recognized. In *Solomon v. Benson,*[153] the Seventh Circuit, relying on *Moody,* overruled its earlier holding[154] that procedural due process must be afforded a prisoner in the determination that he is a special offender not eligible for minimum security programs, such as most rehabilitation programs, or for transfer or early parole.

E. *The Right to Refuse Psychiatric Treatment*

A problem quite different from prisoners' usual claims of inadequate care has emerged when prisoners seek to avoid participation in psychiatric programs.[155] Very few procedural rights are afforded these

149. People *ex rel.* Ceschini v. Warden, 30 A.D.2d 649, 291 N.Y.S.2d 200 (1st Dep't 1968).

150. 381 F. Supp. 840 (E.D. Pa. 1974).

151. 429 U.S. 78 (1976).

152. *Id.* at 89. (Stevens, J., dissenting).

153. 563 F.2d 339 (7th Cir. 1977).

154. Holmes v. United States Bd. of Parole, 541 F.2d 1243 (7th Cir. 1976).

155. The discussion which follows concerns cases very different from those in which inmates merely contest prison requirements that they attend school. *E.g.,* Rutherford v. Hutto, 377 F. Supp. 268 (E.D. Ark. 1974). The issue here was whether the plaintiff could be compelled to sit through elementary education classes. The plaintiff asserted that he had a constitutional right to remain ignorant, which the court politely dismissed.

prisoners. One who refuses to take a psychiatric examination may be denied good time credits although he is otherwise a model prisoner.[156] Furthermore, a prisoner may not challenge his transfer to a mental institution for the duration of his sentence.[157] A prisoner is entitled to a hearing, however, if he is held beyond his sentence for the purposes of treatment.[158] Those held awaiting trial have more substantial rights: they may not be compelled to participate in any programs against their will.[159]

Direct substantive challenges to mandatory psychiatric treatment have received more favorable attention in the courts. Perhaps this is because of the extreme forms of treatment at issue in these cases. In *Nelson v. Heyne,*[160] plaintiffs sued to enjoin the widespread use of drugs to control the inmates of a medium security Indiana state boys' home. The drugs were administered routinely, without specific medical orders and with no view toward treatment. Those given the drugs were not examined for side effects although many of the drugs used were quite powerful. The court enjoined the use of the drugs except on the authorization of a doctor, and ordered that an inmate be given an opportunity to take the drug orally before nurses resorted to forcible injections.[161]

Two other cases have produced similar results. In *Scott v. Plante,*[162] the plaintiff had been determined unfit to stand trial and committed to a New Jersey state hospital, where he was kept for twenty years. Among his allegations was the claim that tranquilizers had been forced upon him though neither he nor any member of his family had consented to such treatment. Holding that this claim, if proved, could

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A much closer question was presented in Jackson v. McLemore, 523 F.2d 838 (8th Cir. 1975), in which the plaintiff was put in disciplinary segregation for two days and given a suspended sentence of sixty days' segregation for refusing to answer questions in a compulsory remedial education class. His civil rights action was dismissed.

156. United States *ex rel.* Weyhrauch v. Parker, 268 F. Supp. 785 (M.D. Pa. 1967). Eight months of keeplock (confinement to a cell) for refusal to take an achievement test may, however, be so disproportionate that it violates the eighth amendment, although the requirement that the prisoner take the test is a reasonable part of the prison's rehabilitation program. Mukmuk v. Commissioner of Dep't of Correctional Serv., 529 F.2d 272, 276 (2d Cir.), *cert. denied,* 426 U.S. 911 (1976).

157. Jones v. Harris, 339 F.2d 585 (8th Cir. 1964) (per curiam). *See also* Frost v. Ciccone, 315 F. Supp. 899 (W.D. Mo. 1970).

158. McNeil v. Director of Patuxent Inst., 407 U.S. 245 (1972); Davy v. Sullivan, 354 F. Supp. 1320, 1328 (M.D. Ala. 1973) (per curiam).

159. Brennenan v. Madigan, 343 F. Supp. 128, 140 (N.D. Cal. 1972).

160. 355 F. Supp. 451 (N.D. Ind. 1972), 355 F. Supp. 459 (N.D. Ind. 1973) (supplemental opinion), *both opinions aff'd,* 491 F.2d 352 (7th Cir. 1974), *cert. denied,* 417 U.S. 976 (1974).

161. *Id.* at 455.

162. 532 F.2d 939 (3d Cir. 1976).

establish violation of the first and eighth amendments, the Third Circuit remanded the case for trial.[163] And in *Souder v. McGuire,*[164] the Middle District of Pennsylvania concluded that a plaintiff who complained that he had been confined in a state hospital for the criminally insane and given psychotropic drugs without his consent had stated a cause of action.

Even more disturbing cases have reached the courts. Several methods of psychiatric treatment available today involve the violent reordering of the patient's personality. Their use seems highly inappropriate except on patients whose sole incentive to undertake them is better health. Their use on prisoners who hope thereby to gain earlier release from prison seems intolerable in a society that respects the autonomy of all its citizens. One court has held that a person who is involuntarily confined and who faces a long period of imprisonment is unable to make a truly free and honest decision to undergo mind-altering surgery, especially when choosing to do so is his only hope of early release.[165] Nevertheless, two of the few prison systems that have made some serious efforts to rehabilitate prisoners—the federal and California correctional departments—have in the past had fairly extensive programs of this kind.[166] More limited programs have been established elsewhere.[167] The federal program is now halted, reflecting in part the current trend away from a search for a magic cure for crime,[168] but the problem has not been entirely eliminated.

Thus far only limited questions regarding these methods of treatment have received judicial review. A few legal challenges have been brought against the use of aversion therapy, a form of treatment in which severe pain or discomfort is inflicted on the patient to discourage him from acting in certain ways. In *Knecht v. Gillman,*[169] one of

163. *Id.* at 946-47.

164. 423 F. Supp. 830 (M.D. Pa. 1976).

165. Kaimowitz v. Michigan Dep't of Mental Health, Civil No. 73-19434-AW (Wayne County, Mich. Cir. Ct. July 10, 1973), *reprinted in part at* 42 U.S.L.W. 2063 (July 31, 1973).

166. The California institution in which these programs have been carried out is described in Serrill, *Profile/California,* CORRECTIONS MAGAZINE Sept., 1974 at 3, 37-39. The most disturbing federal program to face court challenge was the START program at the Federal Medical Center in Missouri. Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974). It was initially feared by many that treatment at the new federal medical center at Butner, North Carolina would take up where this program left off, but these fears have proved groundless. *See* Pinsky, *supra* note 122, at 43.

167. Opton, Jr., *Psychiatric Violence Against Prisoners: When Therapy is Punishment,* 45 MISS. L.J. 605, 635-36 (1974).

168. *See, e.g.,* Cockerham, *Behavior Modification for Child Molesters,* CORRECTIONS MAGAZINE Jan./Feb., 1975, at 77; Pinsky, *supra* note 122, at 45.

169. 488 F.2d 1136 (8th Cir. 1973).

the first such cases, inmates of the Iowa Security Medical Facility who were reported to have been tardy in rising in the morning, to have sworn or lied, or to have exchanged cigarettes, were subjected to injections of apomorphine, a substance that induces violent vomiting for a period of about fifteen minutes.[170] A district court dismissed the complaint, finding the practice constitutionally unobjectionable, but the Eighth Circuit held that the treatment was cruel and unusual unless administered to an inmate who had knowingly and intelligently consented to its use.[171] In *Mackey v. Procunier*,[172] the Ninth Circuit held that extreme forms of aversion therapy may not be administered to an unwilling inmate. The plaintiff alleged that he had consented to being sent to the Vacaville institution in California for shock treatments, but that once there, he was instead injected with succinycholine, a paralyzing drug which, because it induces terror, is not intended for use on conscious patients. The plaintiff alleged that the experience had caused him to have recurring nightmares and anxiety. The court held that he had stated a cause of action for damages under the first, eighth, or fourteenth amendments.[173] In Connecticut, aversion therapy involving electric shocks was discontinued when the doctor in charge of the program resigned in the face of a legal challenge from the American Civil Liberties Union.[174]

Another form of behavior modification involves the use of decreasing deprivations or increasing rewards for an inmate's good performance. A major challenge to the federal program, which used deprivation rather than rewards, was mooted by the decision of the Federal Bureau of Prisons to halt the program, ostensibly for lack of enough inmates suitable for such treatment.[175] Nevertheless, the court held that the petitioners were entitled to a hearing before they could again be assigned to this or a similar program.[176]

170. *Id.* at 1137.
171. *Id.* at 1140.
172. 477 F.2d 877 (9th Cir. 1973).
173. *Id.* at 878.
174. Note, CORRECTIONS MAGAZINE July/Aug., 1975, at 60. The program is fully described in Cockerham, *supra* note 168 at 77.
175. Clonce v. Richardson, 379 F. Supp. 338, 341 (W.D. Mo. 1974). While the program lasted, prisoners were confined to a restricted section of the Springfield, Missouri Federal Medical Center and denied ordinary privileges, including the right to attend formal religious services. After graduating from the level of greatest deprivation, however, they were allowed to watch television. *Id.* at 345-46. Why the violence on television was considered less disturbing than religious services is not clear. The ban on attending services may have resulted from institutional security requirements or from a desire to supervise inmates in the program for every moment of every day. Or, anomalies like this may indicate that the program was merely very poorly planned.
176. *Id.* at 348.

Perhaps the most significant case involving extreme forms of behavior modification is *Kaimowitz v. Michigan Dep't of Mental Health,*[177] an unreported but widely discussed decision of the Wayne County, Michigan Circuit Court. A mental patient who had not responded to traditional forms of treatment agreed to undergo experimental surgery in which the abnormal tissue in his brain would be destroyed. The plaintiffs, whose interest in the case was not explained in the published portion of the opinion, sued to enjoin the operation. The court held that one who has been submitted to the institutional regimen for years, and who now faces some hope of release, cannot make an unfettered, independent decision to submit to such an operation. Though the court addressed at some length the uncertainty attending the operation, it is not clear why this was directly relevant. The court also emphasized that the operation was irreversible, and that the state could not show a compelling need which would overcome the patient's interest in the integrity of his thoughts and personality. The patient himself could not agree to undergo the operation, and no one else could consent to it on his behalf.[178]

The refusal of treatment cases are markedly different from the other medical care and prison conditions cases in that individual relief has been freely granted. One hopes that judgment would be as thoughtfully considered in a class action against coercive treatments, and that courts would not be intimidated by claims that an injunction barring such treatments would impede correctional development.[179] For some disturbed inmates whose condition interferes with their ability to seek assistance, a class action might be the only possible source of help.

III. Problems of Judicial Activism

Serious strains on the judicial power have been created by the federal courts' unprecedented determination that prisoners must re-

177. Civil No. 73-19434-AW (Wayne County, Mich. Cir. Ct. July 10, 1973), *reprinted in part at* 42 U.S.L.W. 2063 (July 31, 1973). The case has received much attention. *See, e.g.,* Gobert, *Psychosurgery, Conditioning and the Prisoner's Right to Refuse "Rehabilitation,"* 61 Va. L. Rev. 155 (1975).

178. Kaimowitz v. Michigan Dep't of Mental Health, Civil No. 73-19434-AW (Wayne County, Mich. Cir. Ct. July 10, 1973), *reprinted in part at* 42 U.S.L.W. at 2063 (July 31, 1973).

179. In assuming supervision of the Alabama state mental hospitals, Judge Johnson established a standing commission to "have review of all research proposals and all rehabilitation programs, to ensure that the dignity and the human rights of the patients are preserved." Wyatt v. Stickney, 344 F. Supp. 373, 376 (M.D. Ala. 1972); *cf.* Newman v. Alabama, 559 F.2d 283, 289-90 (5th Cir. 1977) (preferring use of single monitor rather than court-appointed committee to oversee compliance with the court's order).

ceive the decent conditions and fair treatment to which the courts have held they are legally entitled. The problem most frequently mentioned is the heavy burden imposed by the volume of prisoners' cases.[180] This is a general problem of crowded dockets, probably more a result of diversity jurisdiction than of prison cases,[181] and a problem to which a general solution must be found.

A. *Judicial Management of Prison Litigation*

A serious problem of management has also arisen in large-scale prison conditions cases, and, to a lesser extent, in actions directed to specific terms of confinement. Prison suits are very difficult to administer, and thus the courts have often assumed an active role in guiding them through trial.[182] Class actions are particularly appropriate to jail conditions suits because individual claims are likely to become moot, and because it is difficult for any specific condition to be corrected without some reformation of the whole totality of wrongs in the institution.[183] Therefore, some judges have encouraged the consolidation of individual actions into one major class suit. *James v. Wallace,*[184] the major case involving the Alabama prison system, was a consolidation of a number of smaller actions. In *Williams v. Edwards,*[185] the major Louisiana prison case, although the Justice Department intervened only on a racial discrimination claim, the district court asked the Department to participate in the entire case. The Fifth Circuit noted this event without comment on review.[186] In *In re Estelle,*[187] Judge Justice of Texas effectively created a class action out of the many individual claims pending before him from the Texas penitentiary. He then ordered the Justice Department to enter the case as amicus curiae. The Department further expanded the scope of the action, successfully moving to add additional defendants. The defendants sought a writ of mandamus,

180. *See, e.g.,* United States v. Wyandotte County, 343 F. Supp. 1189, 1203 (D. Kan. 1972).

181. McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload,* 1975 WISC. L. REV. 523, 532-33 (number of diversity suits is fifty percent greater than number of prisoner complaints).

182. *See* Comment, *Confronting the Conditions of Confinement: An Expanding Role for Courts in Prison Reform,* 12 HARV. C.R.-C.L. L. REV. 367 (1977).

183. Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

184. 382 F. Supp. 1177, 1178 n.1 (M.D. Ala. 1974).

185. 547 F.2d 1206, 1208 (5th Cir. 1977) (discussing lower court proceedings).

186. *Id.*

187. 516 F.2d 480, 482 (5th Cir. 1975), *cert. denied,* 426 U.S. 925 (1976) (discussing lower court proceedings).

which was refused for various reasons by the judges of the Fifth Circuit.[188] Despite a dissent by Justice Rehnquist—joined by Justice Powell and Chief Justice Burger—which noted that the propriety of the district judge's action may now escape Supreme Court review altogether, the Supreme Court denied certiorari.[189] While Justice Rehnquist implied that Judge Justice's action was unprecedented and completely unwarranted,[190] the equanimity with which the Fifth Circuit viewed the case may indicate that the trial judge's orders were not without precedent.[191] Where prisons are far from conformance with constitutional standards, the number of resultant individual actions may create an unmanageable burden on the courts. A large, single action, though unwieldy, may be the only alternative. The Fifth Circuit, after long experience with prison conditions cases, seems to have reached this conclusion, and has approved an active role for trial judges in consolidating and supervising these suits.

B. *Judicial Involvement in Prison Administration*

Problems of federalism and separation of powers were for a time most conspicuous by their absence from court review of prisoners' suits. Though these were factors in the traditional policy of abstention, once the federal courts decided to intervene, they did so fully. A few went to extremes. In *New York Association for Retarded Children, Inc. v. Rockefeller,*[192] the trial court placed itself in the conservative camp by refusing to recognize a right to treatment for children held in state institutions for the retarded. It did, however, impose requirements for the children's safety. In fashioning a decree, it held that the power to order an increase in the salaries of state employees so that qualified personnel could be attracted was a necessary element of the court's

188. *Id.*

189. Estelle v. Justice, 426 U.S. 925 (1976) (Rehnquist, J., dissenting, joined by Powell, J. and Burger, C.J.).

190. *Id.* at 929.

191. *In re* Estelle, 516 F.2d 480 (5th Cir.), *rehearing en banc denied,* 521 F.2d 814 (5th Cir. 1975) *cert. denied,* 426 U.S. 925 (1976).

192. 357 F. Supp. 752 (E.D.N.Y. 1973), *consent judgment approved sub nom.* New York Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975).

193. *Id.* at 769. A district court order requiring an increase in pay for jail guards was reversed as an "improper exercise of authority" by the Fifth Circuit. Smith v. Sullivan, 553 F.2d 373, 380-81 (5th Cir. 1977).

equity power.[193] In *Barnes v. Virgin Islands*,[194] Judge Young threatened to impose sanctions if the two top officials of the local prison were not removed.[195] These courts did not undertake extensive analysis of the source of their power to enforce these orders, but addressed directly and practically the emergencies presented to them.

The Supreme Court has recently directed a retreat from active judicial interference with prison regulations that are not physically damaging to inmates. In *Jones v. North Carolina Prisoners' Labor Union*,[196] it reviewed the claims of prisoners who had been prohibited by the prison administration from forming a union to improve working conditions in prison jobs, to effectuate prison reform, and to provide a forum for the airing and settlement of prisoners' grievances.[197] The Court held that the prison authorities had the power to ban the union. The majority wrote: "The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decision of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement."[198] The Fifth Circuit heeded this admonition in *Newman v. Alabama*,[199] where it reviewed Judge Johnson's handling of the Alabama prison conditions case. The court rather hesitantly approved most of Judge Johnson's orders, but carefully noted that the order to provide all prisoners with a meaningful job was to have no precedential effect.[200] The court also implied that the lower court's order to institute rehabilitation programs was justified by the inhumane conditions that had previously prevailed in the state prisons.[201]

C. *Securing Compliance with Court-Ordered Relief*

One reason for the concern over judicial activism in prisoners' rights cases is the serious problems that arise in fashioning relief. The most able and dedicated judge faces virtually insurmountable problems in fully enforcing a class judgment in favor of prisoners. Some diffi-

194. 415 F. Supp. 1218, 1231 (D.V.I. 1976).
195. *Id.* at 1231.
196. 97 S. Ct. 2532 (1977) (Rehnquist, J., for the majority; Burger, C.J., concurring; Stevens, J., concurring in part and dissenting in part; Marshall and Brennan, JJ., dissenting).
197. *Id.* at 2540.
198. *Id.* at 2538.
199. 559 F.2d 283, 286 (5th Cir. 1977).
200. *Id.* at 292.
201. *Id.* at 291.

culty results from the terms of the judgments themselves. For example, once the court has determined that prison building conditions are unacceptable, local building codes are a natural source of minimum standards in fashioning relief.[202] Building codes have the virtues of being comprehensive and of having been formulated by the states or localities themselves as the acceptable standards for local dwellings. But in some communities building codes represent an ideal standard of safety seldom attained, even in very comfortable quarters. These standards are far beyond the means of the most imaginative and well-intentioned prison administrator. A court that orders an institution to meet such local code requirements will eventually be forced to accept as a substitute for full compliance the achievement of some less ambitious level of decency.

Securing compliance even with more realistic judgments can be difficult as well. Courts have faced the intransigence of many prison authorities with some despair.[203] Improvement in prison conditions could not fail to improve the lot of prison guards who endure these conditions eight hours a day,[204] but prisoners' suits have been aggressively defended. And there are other problems. In Arkansas, for instance, fairly routine brutality by guards has thus far survived repeated judicial efforts to suppress it.[205] Few courts are willing to require changes in personnel, although some have taken this step apparently without any qualms.[206]

A somewhat less drastic step is the appointment of a special master to oversee compliance with the court's orders for relief.[207] The masters and their assistants may review the operation of the institution down to the smallest detail.[208] But while these masters have presided over the implementation of many improvements, full compliance with court orders remains difficult to achieve. In *Taylor v. Perini*,[209] settled by consent decree, the master reported that the decree remained unfulfilled in several important respects four years after it had been en-

202. *See, e.g.*, Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977).

203. *See, e.g.*, Jones v. Wittenberg, 330 F. Supp. at 707, 712-14 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

204. For recognition of the abuse to which guards may be subjected, see Collins v. Schoonfield, 344 F. Supp. 257, 268 (D. Md. 1972).

205. *See* notes 31-33 and accompanying text *supra*.

206. *E.g.*, Barnes v. Virgin Islands, 415 F. Supp. 1218, 1231 (D.V.I. 1976).

207. *See, e.g.*, Newman v. Alabama, 559 F.2d at 289-90 (district court's appointment of human rights committee to monitor compliance with court's order criticized).

208. *See, e.g.*, report of the special master, Taylor v. Perini, 421 F. Supp. 740, 746 (N.D. Ohio 1976).

209. 421 F.Supp. 740 (N.D. Ohio 1976).

tered.[210] Here the prison authorities were not bound, as is often the case, to an order of the court which they had resisted to the last, but rather, to an agreement they had reached through negotiation with the prisoners.

Another almost insurmountable problem facing court-imposed prison reform has been the fact that the funds with which penal institutions are operated are controlled by legislatures, not by the courts or the executives. Legislators' failure to appropriate funds to alleviate inhumane prison conditions has eroded the historical reluctance of federal courts to interfere with state penal administration.[211] A federal district court in Indiana retained jurisdiction over a suit challenging conditions in disciplinary segregation in the state penitentiary to see if the legislature, then in session, would appropriate the funds necessary to improve the facilities.[212] If the legislature refuses to act, however, the courts may be thwarted. In the Toledo jail suit, the federal court decree was used by the local sheriff in an attempt to extract more money for his department from the recalcitrant local legislature. The court, reflecting mournfully on the limits of democracy, was forced to withdraw itself from the political skirmish.[213] Corruption or excessive mismanagement can be controlled,[214] but this has been shown to be the reason for inadequate operating funds in very few cases.

Nevertheless, the courts have stood by Judge, now Justice, Blackmun's holding that the inadequacy of financial resources cannot excuse failure to observe the constitution.[215] In one of the New York City jail suits, decided before the city's financial plight became known, the district court rather sanguinely wrote that "no one suggest[ed]" that the city did not have the funds necessary to meet the court's order.[216] The Second Circuit subsequently noted that it could not order the city to raise funds or build an additional facility to relieve overcrowd-

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210. *Id.* at 768.

211. Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975).

212. Aikens v. Lash, 371 F. Supp. 482, 495 (N.D. Ind. 1974), *aff'd in part, modified in part, and remanded,* 534 F.2d 751 (7th Cir. 1976).

213. Jones v. Wittenberg, 357 F. Supp. 696, 699 (N.D. Ohio 1973). *But see* text at note 227 *infra* for another solution.

214. *See, e.g.,* Jones v. Wittenberg, 330 F. Supp. 707, 712-13 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 465 F.2d 854 (6th Cir. 1972), *enforced sub nom.* Jones v. Wittenberg, 357 F. Supp. 696, 699-700 (N.D. Ohio 1973) (sheriff ordered to apply funds allocated for deputy sheriffs and squad cars to maintenance of jail); Johnson, *supra* note 134, at 913 (misuse of prison funds by Alabama prison authorities).

215. Jackson v. Bishop, 404 F.2d at 580, *quoted in* Collins v. Schoonfield, 344 F. Supp. 257, 264 n.13 (D. Md. 1972).

216. Rhem v. Malcolm, 371 F. Supp. 594, 628 (S.D.N.Y. 1974).

ing, but reasserted that inadequate resources could not excuse the deprivation of constitutional rights.[217]

E. *New Solutions*

To solve the dilemma, the courts may be moving slowly toward the most extreme remedies: closing the worst penal institutions completely,[218] releasing prisoners to alleviate overcrowding,[219] and upholding money damages claims against prison administrators who have not acted in good faith to protect the rights of their prisoners.[220] Fifth Circuit Judge Hill, sitting by designation in the Northern District of Georgia, noted that the decision to operate a jail is a voluntary one on the part of the public, not required by the constitution, and that once a government has determined to incarcerate criminals it must observe their constitutional rights. If it fails to do so, it may not confine people.[221] The Second Circuit, in remanding a jail conditions case, remarked that courts have the power to order the release of prisoners presently held in unacceptable conditions.[222] The Boston jail decision required that the number of people held before trial be kept to a minimum so that overcrowding would not make jail conditions intolerable.[223] These cases involved inmates not yet convicted, and therefore presumed innocent. But Judge Scott's order[224] that Florida convicts must be released when necessary to maintain decent living conditions now has been upheld by the Fifth Circuit.[225] Judge Hand, of the Southern District of Alabama, applied similar reasoning in reviewing prison conditions in that state. He had initially reserved judgment on some questions regarding conditions in the state's prisons while the state legislature considered making reforms.[226] But after the legis-

217. Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d at 399.

218. Ahrens v. Thomas, 434 F. Supp. 873 (W.D. Mo. 1977); Inmates of Henry County Jail v. Parham, 430 F. Supp. 304, 304 (N.D. Ga. 1976); Little v. Cherry, 3 PRISON L. RPTR. (ABA) 70 (E.D. Ark. 1974).

219. *See* text accompanying notes 223-25 *infra.*

220. *See* note 111, *supra,* note 231-34 *infra.*

221. Inmates of Henry County Jail v. Parham, 430 F. Supp. 304, 306 (N.D. Ga. 1976). A consent order entered in this case provides that the jail will meet constitutional standards by Feb. 1, 1978 or it will be closed.

222. Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975).

223. Inmates of Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975).

224. Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975).

225. 553 F.2d 506 (5th Cir. 1977) (per curiam) (mem.).

226. McCray v. Sullivan, 399 F. Supp. 271, 276-77 (S.D. Ala. 1975).

lature adjourned without fully resolving the problems, he ordered the parties to utilize the limited additional resources provided by the legislature, and added: "Suffice it to say that if the State fails to properly discharge such duties of providing and operating its prison facilities in a manner which no longer infringes upon the Constitutional rights of the inmates it may become necessary to enjoin further use of such facilities for the incarceration of prisoners."[227] Finally, in one of the strongest statements yet published, the Tenth Circuit rerecently wrote that "[i]f the State of Oklahoma wishes to hold inmates in institutions, it must provide the funds to maintain the inmates in a constitutionally permissible manner."[228]

Some courts have also begun to look seriously at granting monetary damages to prisoners who prove that prison authorities have failed to fulfill in good faith their duty to maintain constitutionally mandated conditions to the best of their abilities. Under the eleventh amendment, these payments would have to be awarded against the prison authorities personally, and not against the state,[229] though the state could reimburse the officials if it wished. Until recently, courts faced with the magnitude of prison problems have sought to give injunctive relief.[230] It may be, however, that individual damages, because they are more readily enforceable by the courts, will more effectively secure compliance with newly recognized constitutional standards.

At least two recent cases have upheld claims for monetary damages in prisoners' suits. In *Little v. Walker*[231] the Seventh Circuit applied *Estelle v. Gamble*[232] and held that a prisoner may recover against his warden if he can show that the warden has been "deliberately indifferent" to the prisoner's rights. The plaintiff in *Little* alleged that he had gone into disciplinary segregation to avoid work assignments

227. McCray v. Sullivan, 413 F. Supp. 444, 446 (S.D. Ala. 1976).

228. Battle v. Anderson, 564 F.2d 388, 396 (10th Cir. 1977); *accord,* Detainees of Brooklyn House of Correction for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974); Padgett v. Stein, 406 F. Supp. 287, 303 (M.D. Pa. 1975).

229. *See* Edelman v. Jordan, 415 U.S. 651 (1974). Suits may not be brought against municipal or county governments under § 1983 because they are not "persons" within the meaning of the statute. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

230. *See* Sturc, *supra* note 110, at 88.

231. 552 F.2d 193 (7th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3586 (U.S. March 21, 1978) (No. 77-121).

232. 429 U.S. 97 (1976).

in sections of the prison controlled by a gang that would have beaten and raped him. While in segregation, he was subject to all the deprivations suffered by inmates put there as punishment for infractions of prison rules, even though the plaintiff himself had not committed any violations. The Seventh Circuit held that the plaintiff could recover if he could show that he had been deliberately deprived of his constitutional rights.[233] And in *Carey v. Levine*,[234] a federal district judge in Maryland recently awarded judgment to a prisoner who established that he had been put in disciplinary segregation for fifteen days solely because he circulated and later refused to retract his account of events preceding the suicide of another prisoner, an account he wrote in order to publicize the deficiencies in the facilities available for seriously depressed inmates. The plaintiff's story alleged that a prison guard had been indifferent to the suicidal inmate's anguish. The defendants who had punished the plaintiff for making this charge were ordered to pay him five dollars and lost wages for each of the fifteen days he spent in segregation.[235]

Wardens should be granted the right to obtain a court injunction permitting them to release prisoners they cannot adequately care for. This right should be combined with the imposition on prison administrators of a legal duty to protect the rights of people committed to their custody. These officials would then be empowered to bring their facilities within acceptable standards, and would face personal financial penalties if they failed to do so. Both of these remedies are drastic, but they are within the traditional equitable and legal powers of the courts, and are therefore more readily enforceable than comprehensive reformation plans.[236] In this way, these remedies are considerably more conservative than the virtual assumption by some courts of the daily operation of institutions traditionally administered by the executive branch. Because they can be enforced, they are also

233. 552 F.2d at 197-98.

234. 435 F. Supp. 475 (D. Md. 1977).

The Indiana Court of Appeals recently awarded the widow of a prisoner who had died in jail $50,000 in damages. She sued the sheriff in charge of the jail for negligence. The jury found in favor of the plaintiff, the trial judge issued judgment n.o.v., and the Court of Appeals reinstated the jury's verdict. The case was remanded, and the trial court may now either order a new trial or enter judgment for the plaintiff. Johnson v. Bender, —— Ind. App. ——, 369 N.E.2d 936 (1977).

235. 435 F. Supp. at 484.

236. The legal authority of the courts to formulate these plans is a subject beyond the scope of this comment, but it is by no means established. *See* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

considerably more likely to bring about extensive prison reform. Nevertheless, cases granting these remedies are thus far very few, and there will be many circumstances in which neither remedy is appropriate.[237]

Another potentially rich source of state prisoners' rights is state law and regulation. Prisoners' advocates have until now largely confined their efforts to the federal courts, relying on constitutional standards, but many state regulations go far beyond constitutional requirements.[238] Many state courts could be expected to be sympathetic to prisoners' claims.[239] Resort to the state courts would not cure problems of the proper relations between the judicial and other branches of government, but it would avoid the recurring animosities and legal questions raised by federal court intervention in state affairs. It might also for the first time inform many state judges, as federal judges have now been informed, of the conditions that prevail in the institutions to which they sentence people.

CONCLUSION

There is no handy solution to the situation that federal courts face in prison cases. It may be that prisons cannot be made humane.[240] Perhaps overlooked in the debate over judicial activism, however, is the fact that prisoners as well as the courts suffer when court remedies are not fully enforceable. Now that the extensive constitutional rights of prisoners have been delineated with some care, and now that many of the worst abuses have been curtailed by federal court action, it may be time for prisoners to turn to individual damage actions to secure their rights. It may also be time to begin the work of enforcing prison-

237. For example, when there are pervasive and extremely serious constitutional deprivations, affecting many prisoners, the award of money damages may not be an effective remedy.

238. *See, e.g.*, statutes cited in Estelle v. Gamble, 429 U.S. at 103-04 n.8. There is also extensive statutory protection for federal prisoners, the scope of which is as yet unexplored. *See* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977).

239. *E.g.*, Johnson v. Bender, —— Ind. App. ——, 369 N.E.2d 936 (1977); Wayne County Jail Inmates v. Wayne County Sheriff, 391 Mich. 359, 216 N.W.2d 910 (1974); Kaimowitz v. Michigan Dep't of Mental Health, Civil No. 73-19434-AW (Wayne County, Mich. Cir. Ct., July 10, 1973), *reprinted in part* at 42 U.S.L.W. 2063 (July 31, 1973); Nason v. Superintendent of Bridgewater State Hosp., 355 Mass. 604, 233 N.E.2d 908 (1968).

240. G. B. SHAW, THE CRIME OF IMPRISONMENT (1946) (New York: Greenwood Press).

ers' rights under statutes and regulations. These actions might be carefully and sympathetically heard in some state courts. In recent years, federal courts have been forced by intolerable circumstances to act beyond the customary bounds of their jurisdiction. While their achievements can only be applauded, the search for a better means of securing the constitutional rights of prisoners should continue.

REBECCA P. DICK