

NOTES

PRISON OVERCROWDING AND *RHODES V. CHAPMAN*:¹ DOUBLE-CELLING BY WHAT STANDARD?

A record number of adult felons are currently housed in American penal institutions,² largely because of public reaction to the rising incidence of crime.³ Yet prison capacity has not matched the influx of inmates: two out of every three inmates have less than the national standard of cell space.⁴ This overcrowding often causes serious institutional problems, such as rampant violence,⁵ as well as severe individual injuries, such as mental and emotional maladies leading to psychiatric commitment⁶ or suicide.⁷ State inmates have argued that prison overcrowding inflicts a cruel and unusual punishment in violation of the eighth amendment.⁸ In *Rhodes v. Chapman*⁹ this constitutional

¹ 101 S. Ct. 2392 (1981).

² Krajick, *Annual Prison Population Survey: The Boom Resumes*, 4 CORRECTIONS MAG. 16, 17 (1981) [hereinafter cited as Krajick]. On January 1, 1981 there were 320,583 adult felons serving at least a one year sentence. *Id.* at 17. This represents a 42% increase since 1975. *Id.* In the first half of 1981 the prison population continued to rise. 12 CRIM. JUST. NEWSLETTER 2 (Oct. 26, 1981) (citing the Bureau of Justice Statistics Bulletin *Prisoners at Midyear 1981*).

³ "Corrections experts interviewed attribute much of the current increase to harsh new laws, the rising violent crime rate and demographic factors. In many states, the number of people committed to prison per capita and the length of the terms have gone up." Krajick, *supra* note 2, at 17. Parole boards are also acting conservatively. *Id.* This attitude towards offenders affects the incarceration rate. Only South Africa and the Soviet Union have a higher rate of incarceration than the United States. AMERICAN INST. OF CRIM. JUST., *Just the Facts* 3 (1980).

⁴ See 12 CRIM. JUST. NEWSLETTER 5-6 (April 13, 1981), reporting the conclusions of a congressionally mandated study by Abt Associates, commissioned by the National Institute of Justice. The national standard of cell space for a one man cell of 60 square feet was set by the Department of Justice. *Rhodes v. Chapman*, 101 S. Ct. at 2404 n.5 (Brennan, J., concurring). See also DEPARTMENT OF JUSTICE, *FEDERAL STANDARDS FOR PRISONS AND JAILS*, Standard No. 2.04, at 17 (1980). The Abt Associates report stated that eight to ten billion dollars would be needed to give the current prison population 60 square feet of cell space each. 12 CRIM. JUST. NEWSLETTER 5, 6 (April 13, 1981). The study also concluded that any supplemental increase in facilities would currently result in short-lived overcrowding relief and perhaps an absolute increase in the number of prisoners held in substandard conditions. *Id.* at 5.

⁵ See cases cited at note 331 *infra*.

⁶ See cases cited at note 337 *infra*.

⁷ See cases cited at note 334 *infra*.

⁸ The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment is applied to the states through the fourteenth amendment, see *Robinson v. California*, 370 U.S. 660, 667 (1962), which provides in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

⁹ 101 S. Ct. 2392 (1981).

issue was squarely before the United States Supreme Court for the first time.

In *Rhodes*, the conditions of confinement at the Southern Ohio Correctional facility were at issue. The institution was at 138% capacity.¹⁰ This overcrowding was proved to have caused primarily psychological harms.¹¹ The *Rhodes* Court held that, in the conditions existing at the prison, double-celling — the practice of housing two prisoners in a one man cell — of long-term inmates did not constitute cruel and unusual punishment.¹²

This note discusses the eighth amendment analysis relevant to prison overcrowding cases generally, and the importance of *Rhodes* to future eighth amendment litigation.¹³ First, an historical analysis of prisoners' rights will be presented, followed by an overview of lower federal court overcrowding decisions. This overview will introduce a two-tier framework of review through which overcrowding cases herein will be analyzed. Next, relevant Supreme Court decisions of the last decade evaluating the eighth amendment and prisoners' rights will be discussed. The background and holding of the *Rhodes* decision will then be presented. A critique of the opinion will follow, suggesting that the Court's eighth amendment analysis fails to offer a coherent and substantive framework for lower courts to apply in prison overcrowding cases. Illustrations of this failure, in two post-*Rhodes* decisions, will be considered. Finally, an objective standard of review will be set forth as a recommendation of how eighth amendment rights, in the context of overcrowded prisons, can best be safeguarded.

I. THE CRUEL AND UNUSUAL CLAUSE PRIOR TO *RHODES V. CHAPMAN*

The eighth amendment evolved in sentencing cases, from a narrow proscription on the use of gross, physical punishments, to a broad prohibition on nonpatent, psychological punishments. Yet the treatment of incarcerated offenders went largely unquestioned by federal courts until the 1960's. In the 1970's numerous federal courts evaluated the constitutionality of prison overcrowding but applied nonuniform standards of review. Within the last decade the Supreme Court resolved a number of eighth amendment and prison condition questions but the reasoning of these decisions also appears inconsistent. Nevertheless, a full analysis of the constitutional themes presaging the *Rhodes* decision yields workable guidelines to be applied in prison overcrowding cases.

¹⁰ *Chapman v. Rhodes*, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977).

¹¹ See text at notes 219-29 *infra*.

¹² 101 S. Ct. at 2397.

¹³ Pretrial detainees' condition of confinement rights will not be thoroughly discussed. Jail conditions will be evaluated, however, where convicted prisoners are housed therein. Also, the available causes of action and types of relief will not be analyzed at any length.

A. Development of the Eighth Amendment and Prisoners' Rights

The English Declaration of Rights Act of 1688 contained a provision prohibiting the use of cruel and unusual punishment.¹⁴ This provision became the language of the eighth amendment to the United States Constitution.¹⁵ American courts, therefore, initially interpreted the amendment to circumscribe only those punishments proscribed by the English Act. Citizens could not be subjected to "inhumane, barbarous and torturous" punishments¹⁶ that existed in Stuart England¹⁷ or were unknown at common law.¹⁸ This restrictive interpretation of the amendment comported with early American society's view that prisoners were slaves of the state possessing no justiciable rights.¹⁹ Only the most brutal of punishments, such as pillory, could be redressed by federal courts.²⁰

As the democracy grew, the clause was viewed as unnecessary in a free republic which, through its system of checks and balances, prevented the judiciary from inflicting arbitrary punishments.²¹ Moreover, the amendment

¹⁴ An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 W. & M. 2d Sess. ch. 2 (1688). This declaration was based upon principles in the Magna Carta. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); Note, *The Eighth Amendment, Beccaria, And The Enlightenment: An Historical Justification For The Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783, 787 (1975) [hereinafter cited as *Excessive Punishment Doctrine*].

¹⁵ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, *reh'g denied*, 330 U.S. 853 (1947); *In re Kemmler*, 136 U.S. 436, 446 (1890). See generally Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969) [hereinafter cited as *Granucci*]; *Furman v. Georgia*, 408 U.S. 238, 316-22 (1972) (Marshall, J., concurring).

¹⁶ *Black v. United States*, 269 F.2d 38, 43 (9th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960); *Hemans v. United States*, 163 F.2d 228, 237 (6th Cir.), *cert. denied*, 332 U.S. 801, *reh'g denied*, 332 U.S. 821 (1947).

"Punishments are cruel when they involve torture or lingering death [The Constitution] implies there is something inhuman and barbarous." *In re Kemmler*, 136 U.S. 436, 447 (1890). This case cites examples of such punishments as "burning at the stake, crucifixion, breaking on the wheel or the like." *Id.* at 446.

¹⁷ Examples of such punishments included having the prisoner drawn and dragged to the place of execution, embowelled alive, beheaded and quartered, dissected in public and burned alive. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 376-77 (W. Lewis ed. 1897) (cited in *Wilkerson v. Utah*, 99 U.S. 130, 135-6 (1878)).

¹⁸ *In Re Pinaire*, 46 F. Supp. 113 (N.D. Tex. 1942).

¹⁹ "A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws the Legislature in its wisdom may enact for the government of that institution and the control of its inmates He is for the time being the slave of the State." *Ruffin v. Commonwealth*, 62 Va. 1024, 1026, 21 Gratt. 790, 795-6 (1871).

²⁰ See, e.g., *In re Birdsong*, 39 F. 599 (S.D. Ga. 1889). In *Birdsong*, the federal prisoner was chained around the neck with a trace chain and padlocked such that he could not lie or sit down for at least three hours in the nocturnal solitude of his dark cell. *Id.* at 602. The court equated this life threatening punishment with "pillory" which was abolished in France in 1832, in England in 1837 and in the United States in 1839. *Id.*

²¹ *Weems v. United States*, 217 U.S. 349, 371 (1910).

was deemed outmoded by the more civilized norms of American morality that prevailed at the turn of the twentieth century.²² These norms influenced the kinds of punishments the courts meted out, thereby eliminating the use of barbarous cruelties.

In *Weems v. United States*,²³ however, the Supreme Court revived the eighth amendment. In *Weems*, the Court ruled that the Philippine Islands' statutory punishment for the crime of making false entries on public records was cruel and unusual.²⁴ *Weems*' punishment included a fine of over six times the sum of the false entry, fifteen years imprisonment in chains at hard and painful labor, lifelong surveillance, and the loss of numerous political, familial and property rights.²⁵ The *Weems* Court held that this criminal sanction violated a precept of justice inherent in the eighth amendment, namely, "that punishment for [a] crime should be graduated and proportioned to the offense."²⁶ In reaching this conclusion the Court reevaluated the intent of the Framers of the Constitution in adopting the eighth amendment. The Court found that punishments chosen by the legislature could be as cruel as those inflicted in Stuart England though not physically barbarous.²⁷ The scope of the clause, the Court concluded, must evolve with enlightened public opinion to ensure a humane system of justice.²⁸

Consistent with the *Weems* decision, the Court in *Trop v. Dulles*²⁹ ruled that denationalization as a punishment for wartime desertion was unconstitutional. The Court found that the emotional injury caused by such a punishment was a form of torture the eighth amendment could not sanction.³⁰ A plurality of the Court declared that "the basic concept underlying the eighth amendment is nothing less than the dignity of man . . . the words of the Amendment are not precise and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³¹ Thus, the Court reaffirmed that, at least in sentencing cases,

²² 1 T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 694 (8th ed. 1927); *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967); *Hobbs v. State*, 133 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893); Note, *The Cruel and Unusual Punishment Clause And The Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966).

²³ 217 U.S. 349 (1910).

²⁴ *Id.* at 377.

²⁵ *Id.* at 363-66.

²⁶ *Id.* at 367. Some commentators believe this was the original purpose of the clause. See Granucci, *supra* note 15, at 843-44; *Excessive Punishment Doctrine*, *supra* note 14, at 787. These commentators are critiqued in Schwartz, *Eighth Amendment Proportionality Analysis And The Compelling Case Of William Rummel*, 71 J. OF CRIM. L. AND CRIMINOLOGY 378, 380-82 (1980).

²⁷ 217 U.S. at 372.

²⁸ *Id.* at 378.

²⁹ 356 U.S. 86 (1958).

³⁰ *Id.* at 101. A plurality opinion of four Justices stated that "the total destruction of the individual's status in organized society . . . is a form of punishment more primitive than torture." *Id.* These Justices concluded that to allow the punishment would condone "a fate of ever-increasing fear and distress." *Id.* at 102. Justice Brennan, in his concurrence, stressed "the consequent psychological hurt" of the penalty. *Id.* at 111 (Brennan, J., concurring).

³¹ *Id.* at 100-01. The opinion noted that in a United Nations survey of 84 nations only two imposed denationalization as a penalty for desertion. *Id.* at 103.

nonphysical punishments could be sufficient to invoke the protection of the eighth amendment.

In sum, the Court in both *Weems* and *Trop* indicated that judicial review would be exercised to check legislative abuse in the selection of punishments.³² The *Weems* standard of review evaluated whether the punishment was justly proportioned to the gravity of the crime committed. The *Trop* standard of review focused on whether the punishment comported with man's dignity based on evolving norms of decency. Both the *Weems* and *Trop* Courts considered evidence of mental and emotional harm. Moreover, both decisions evaluated the clause's proscription largely in light of a changing public conscience.

Notwithstanding the *Weems* and *Trop* pronouncements, federal courts breathed no life into the eighth amendment once a citizen was sentenced. Still clinging to the view that prisoners lacked justiciable rights under the clause,³³ the courts, except in extreme cases,³⁴ abstained from close scrutiny of inmate life. The federal courts routinely declined subject matter jurisdiction of prisoner mistreatment claims. This approach, termed the "hands-off" doctrine,³⁵ had several justifications. The principles of federalism,³⁶ when dealing with state prisoners, and separation of powers³⁷ were routinely invoked.

³² The legislature was said to lack "unrestrained power" to punish. *Weems v. United States*, 217 U.S. at 381. *Accord*, *Trop v. Dulles*, 356 U.S. at 100.

³³ See note 17 *supra*; "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948).

³⁴ The language used by federal courts in such cases is highly presumptive of the absence of a justiciable right. *See* *Bethea v. Crouse*, 417 F.2d 504, 506 (10th Cir. 1969) ("clear abuse or caprice"); *Douglas v. Sigler*, 386 F.2d 684, 688 (8th Cir. 1967) ("extreme cases"); *Carey v. Settle*, 351 F.2d 483, 485 (8th Cir. 1965) ("only in a rare and exceptional situation"); *United States v. Marchese*, 341 F.2d 782, 789 (9th Cir. 1965) ("extreme cases where the Bureau of Prisons or the Attorney General acts arbitrarily or fraudulently or abuses its authority"); *Roberts v. Pegelow*, 313 F.2d 548, 550 (4th Cir. 1963) ("unless vindictive, cruel or inhuman"); *Roberts v. Pepersack*, 256 F. Supp. 415, 431 (D. Md. 1966) ("exceptional or extreme").

³⁵ This term is attributed to Fritch, *Civil Rights of Federal Prison Inmates* 31 (1961) (Document prepared for the Federal Bureau of Prisons). *See* Note, *Beyond the Ken of Courts: A Critique Of Judicial Refusal To Review The Complaints Of Convicts*, 72 YALE L.J. 506, 506 n.4 (1963) [hereinafter cited as *Beyond the Ken*]. The doctrine provides that "[C]ourts are without power to supervise prison administration or to interfere with the ordinary rules or regulations . . . No authorities are needed [for] support." *Banning v. Looney*, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

³⁶ "A federal court has no jurisdiction to supervise the administration of a state penitentiary by its warden." *Oregon v. Gladden*, 240 F.2d 910, 911 (9th Cir. 1957). *See also* *Hatfield v. Bailleaux*, 290 F.2d 632, 640 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1953); *Kelley v. Dowd*, 140 F.2d 81, 82 (7th Cir. 1944); *United States v. Jones*, 108 F. Supp. 266, 269 (S.D. Fla. 1952).

³⁷ We strongly suspect that many traditional and still widespread penal practices . . . take an enormous toll, not just of the prisoner who must tolerate them at whatever price to his humanity and prospects for a normal future life, but also of the society where prisoners return angry and resentful . . . [B]ut the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and

Moreover, the federal judiciary deemed itself wanting of sufficient penological expertise to decide such cases³⁸ and unable to fashion remedies that would not upset institutional discipline and security.³⁹ Finally, these courts feared that allowing prisoners effective access to the courts would open a floodgate of litigation.⁴⁰ Even those plaintiffs who succeeded in articulating a substantive claim often faced a choice of narrowly tailored remedies.⁴¹

The federal judiciary of the 1960's, however, extended its power of review to reach prisoners' complaints. Stemming from the belief that prisoners are

monetary resources required lie rather with legislators, executives and citizens in their communities.

Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). *See also* *United States v. Marchese*, 341 F.2d 782, 789 (9th Cir. 1965); *Roberts v. Pegelow*, 313 F.2d 548, 550 (4th Cir. 1963); *Garcia v. Steele*, 193 F.2d 276, 278 (8th Cir. 1951); *Stroud v. Swope*, 187 F.2d 850, 852 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951); *In re Taylor*, 187 F.2d 852, 853 (9th Cir. 1951); *Padgett v. Stein*, 406 F. Supp. 287, 304 (M.D. Pa. 1975).

³⁸ Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention . . . [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government . . . [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). *See also* *Sostre v. McGinnis*, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

³⁹ "We incline to the proposition that to allow such actions would be prejudicial to the proper maintenance of discipline." *Golub v. Krinsky*, 185 F. Supp. 783, 784 (S.D.N.Y. 1960). *See also* *Kostal v. Tinsley*, 337 F.2d 845, 846 (10th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); *Roberts v. Pegelow*, 313 F.2d 548, 551 (4th Cir. 1963); *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1953).

⁴⁰ *Barnett v. Rodgers*, 410 F.2d 995, 1004 (D.C. Cir. 1969) (Tamm, J., concurring); *Stroud v. Swope*, 187 F.2d 850, 852 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951).

⁴¹ *See generally* Note, *Judicial Intervention In Prison Administration*, 9 WM. & MARY L. REV. 178, 179-81 (1967); *Beyond the Ken*, *supra* note 35, at 508. Specifically, habeas corpus was ineffective. "It is not the function of habeas corpus to direct prison officials in the treatment and care of inmates." *United States ex rel. Knight v. Ragen*, 337 F.2d 425, 426 (7th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); *Reitz, Federal Habeas Corpus: Impact Of An Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961). *Contra*, *Coffin v. Reichard*, 143 F.2d 443, 444 (6th Cir. 1944), *writ dismissed*, 148 F.2d 278, *cert. denied*, 325 U.S. 889 (1945). *Coffin*, however, was the minority view. Comment, *Constitutional Rights Of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 1008 (1962). Use of the Civil Rights Act of 1871 (28 U.S.C. § 1983 (1976)) was also limited. *See* Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969). Mandamus was unavailing, *see Beyond the Ken*, *supra* note 35, at 514, as was tort law, *see* Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800, 801 (1950).

citizens who lose only those rights incidental to incarceration,⁴² these courts rebutted the rhetoric of the hands-off era.⁴³

This jurisprudential metamorphosis began in 1962 when the Supreme Court applied the eighth amendment directly to the states through the fourteenth amendment.⁴⁴ The Court further declared that federalism should no longer remain a barrier to effective relief for prisoners subjected to constitutional deprivations.⁴⁵ To ensure the proper exercise of judicial review in prisoner rights cases the courts struck a balance of authority among the branches of government.⁴⁶ This balance was recognized as necessary because of the political powerlessness of prisoners: their voices could only be effectively heard in the judicial forum.⁴⁷

Other hands-off precepts were also refuted. Judicial expertise was recognized as more capable of understanding and furthering penological goals, in

⁴² See Jacob, *Prison Discipline And Inmate Rights*, 5 HARV. C.R.-C.L. L. REV. 227, 228 (1970); Barkin, *The Emergence Of Correctional Law And The Awareness Of The Rights Of The Convicted*, 45 NEB. L. REV. 669 (1966); Note, *Judicial Intervention In Corrections, The California Experience — An Empirical Study*, 20 U.C.L.A. L. REV. 452, 455 (1973); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270, 1275 (1969). Federal courts increasingly accepted the view that "[a] prisoner retains all the rights of ordinary citizens except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *writ dismissed*, 148 F.2d 278, *cert. denied*, 325 U.S. 889 (1945).

⁴³ See generally Haas, *Judicial Politics And Correctional Reform: An Analysis Of The Decline Of The "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795 [hereinafter cited as Haas].

⁴⁴ *Robinson v. California*, 370 U.S. 660, 667 (1962).

⁴⁵ In *Monroe v. Pape*, 365 U.S. 167 (1961) exhaustion of state remedies before use of 42 U.S.C. § 1983 was ruled unnecessary, 365 U.S. at 184, since state relief was "not available in practice." *Id.* at 174. In *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam) the Court allowed a state prisoner to bring an action under the Civil Rights Act. *Id.* The philosophy of the Court at this time was:

[W]e yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.

McNeese v. Board of Educ. for Dist. 187, 373 U.S. 668, 674 n.6 (1963), quoting *Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kan.), *app. dismissed pursuant to stip. sub nom. McElroy v. Mitchell*, 326 U.S. 690 (1945).

⁴⁶ "[A] mere grant of authority [to the Bureau of Prisons] cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does not follow that their actions are immune from judicial review." *Muniz v. United States*, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd*, 374 U.S. 150, 150 (1963). See also *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Baker v. Carr*, 369 U.S. 186, 198-204 (1962); Johnson, *The Constitution And The Federal District Judge*, 54 TEX. L. REV. 903 (1976).

⁴⁷ Prisoners are denied many political rights and opportunities. See Millemann, *Protected Inmate Liberties: A Case for Judicial Responsibility*, 53 OR. L. REV. 29, 39 (1973) [hereinafter cited as Millemann]; Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977); Note, *The Role of the Eighth Amendment in*

some cases, than the apparent incompetence or impotence of prison officials.⁴⁸ Ample precedent was developing in analogous administrative areas, such as education and welfare,⁴⁹ to justify judicial involvement and to help tailor remedies that did not threaten prison security.⁵⁰ The courts increasingly questioned whether concerns of security and discipline excused abusive treatment of prisoners.⁵¹ Such justifications for abuse were found unsubstantiated in fact,⁵² as studies revealed that good security was directly related to meaningful court access.⁵³

With respect to the last rationalization of the hands-off doctrine, preventing a flood of inmate petitions, the courts recognized that the fear of voluminous litigation was secondary to individuals' rights.⁵⁴ Moreover, as

Prison Reform, 38 U. CHI. L. REV. 647, 650 (1971); Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

⁴⁸ [Courts] cannot, without defaulting in our obligation, fail to emphasize the imperative duty resting upon higher officials to insure that lower echelon custodial personnel are not permitted to arrogate to themselves the functions of their superiors. Where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment, due process and eighth amendment questions inevitably arise.

Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966). Even prison officials with good intentions often lack the resources to be effective in furthering penological goals. See Millemann, *supra* note 47, at 40.

⁴⁹ A good example of such judicial intervention was the courts' role in school desegregation. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also *Clay v. United States*, 403 U.S. 698 (1971) (draft boards); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare officers).

⁵⁰ See Hollen, *Emerging Prisoners' Rights*, 33 OHIO ST. L.J. 1 (1972); Comment, *Equitable Remedies Available To A Federal Court After Declaring An Entire Prison System Violates The Eighth Amendment*, 1, CAP. U.L. REV. 101 (1972); Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 CUM. L. REV. 31 (1976). See generally, Chayes, *The Role Of The Judge In Public Law Litigation*, 89 HARV. L. REV. 1281, 1293-96 (1976); Eiseberg & Yeasell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978).

⁵¹ *Johnson v. Avery*, 393 U.S. 483, 486 (1969) (use of jailhouse lawyers cannot be completely banned); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam) (racial segregation cannot be justified by security concerns); *Walker v. Blackwell*, 411 F.2d 23, 24 (5th Cir. 1969) (cannot suppress freedom of religion); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969) (first amendment); *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (corporeal punishment); *Howard v. Smyth*, 365 F.2d 428, 431 (4th Cir.), *cert. denied*, 385 U.S. 988 (1966) (religion); *Edwards v. Duncan*, 355 F.2d 993, 994 (4th Cir. 1966) (per curiam) (medical care and court access). See also Jacob, *Prison Discipline & Inmate Rights*, 5 HARV. C.R.-C.L. L. REV. 227, 228 (1970).

⁵² See note 51, *supra*; Note, *Prison Restrictions — Prisoner Rights*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 386, 387 (1968).

⁵³ See, e.g., Cardarelli & Finkelstein, *Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs In The United States*, 65 J. CRIM. L. & CRIMINOLOGY 91 (1974).

Experience teaches that nothing so provokes trouble for the management of a penal institution as a hopeless feeling among inmates that they are without opportunity to voice grievances or to obtain redress for abusive or oppressive treatment. It is common knowledge that many prison riots have been in protest of abuses in disciplinary cell blocks.

Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966).

⁵⁴ "While we recognize that our decision in this case may result in some increase in the filing of similar complaints in the district courts, we cannot flinch from our clear responsibility to protect rights secured by the Federal Constitution." *Wright v. McMann*, 387 F.2d 519, 526-27

prisoners learned the extent of their rights and legal clinics helped eliminate frivolous claims,⁵⁵ the initial boom in litigation soon quieted.⁵⁶ Accordingly, the Supreme Court extended the availability of the Civil Rights Act of 1871 (28 U.S.C. § 1983) by reevaluating congressional intent in passing the Act and concluding that a section 1983 action could be maintained without first exhausting state remedies.⁵⁷ The application of other federal remedies for state prisoners also was broadened.⁵⁸

The recognition that prisoners' constitutional rights endured beyond their date of sentencing ensured inmates of their rights to free speech, religion and due process of law.⁵⁹ Moreover, the eighth amendment was applied to prisoner mistreatment cases in conformity with the standards of review employed in the sentencing decisions of *Weems* and *Trop*. For example, prison disciplinary measures entailing both physical and psychological injury, such as strip cell confinement,⁶⁰ were ruled violative of the clause.⁶¹ Nonphysical punishments alone, such as loss of parole,⁶² were also ruled unconstitutional. The courts,

(2d Cir. 1967). See also *United States ex rel. Marcial v. Fay*, 247 F.2d 662, 669 (2d Cir. 1967), cert. denied, 355 U.S. 915 (1958), followed in *Sewell v. Pegelow*, 291 F.2d 196, 198 (4th Cir. 1961).

⁵⁵ Haas, *supra* note 43, at 827. See generally Bluth, *Legal Services For Inmates: Co-opting The Jailhouse Lawyer*, 1 CAP. U.L. REV. 59 (1972); Wexler, *Counseling Convicts: The Lawyer's Role In Uncovering Legitimate Claims*, 11 ARIZ. L. REV. 629 (1969); Comment, *The Federal Bureau Of Prisons Administrative Grievance Procedure: An Effective Alternative To Prisoner Litigation?*, 13 AM. CRIM. L. REV. 779 (1976).

⁵⁶ Haas, *supra* note 43, at 824, noting that federal litigation in other areas has grown at a faster rate. *Id.* at 825. See also McCormack, *The Expansion Of Federal Question Jurisdiction And Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 535-36, arguing that the volume of prisoner complaints is exaggerated and most cases are resolved quickly. *Contra*, *Boyd v. Dutton*, 405 U.S. 1, 8 (1972) (Powell, J., dissenting).

⁵⁷ See note 45 *supra*.

⁵⁸ For a discussion of habeas corpus see Note, *Developments In The Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1079-87 (1970); Note, *Habeas Corpus v. Prison Regulations: A Struggle In Constitutional Theory*, 54 MARQ. L. REV. 50 (1971); Comment, *Unconstitutional Prison Conditions as a Ground for Habeas Corpus Relief in Extradition Proceedings*, 49 U. MO. KAN. CITY L. REV. 64 (1980). For a discussion of the Civil Rights Act of 1871 (28 U.S.C. § 1983) see Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969). For a discussion of mandamus and tort law see Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. C.R.-C.L. L. REV. 227, 257-58, 261 (1970).

⁵⁹ [O]ur cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment, and that they may claim the protection of the Due Process Clause to prevent additional deprivations of life, liberty, or property without due process of law.

Bell v. Wolfish, 441 U.S. 520, 545 (1979) (citations omitted).

⁶⁰ "[The condition of the strip cell] could only serve to destroy completely the spirit and undermine the sanity of the prisoner." *Wright v. McMann*, 387 F.2d 519, 526 (2d Cir. 1967); *Jordan v. Fitzharris*, 257 F. Supp. 674, 680 (N.D. Cal. 1966). Generally, a strip cell is a punitive isolation cell that is near barren in which a prisoner may be deprived of essentials such as clothing, heat and light for several days.

⁶¹ "Apart from physical danger, confinement in the Penitentiary involves living under degrading and disgusting conditions." *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970) (totality of conditions); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (whippings); *Hancock v. Avery*, 301 F. Supp. 786, 792 (M.D. Tenn. 1969) (dry cell).

⁶² *United States ex rel. Hancock v. Pate*, 223 F. Supp. 202, 205 (N.D. Ill. 1963).

therefore, finally extended judicial review to protect sentenced citizens from cruel and unusual punishments.

In sum, the eighth amendment evolved from a narrow proscription on the arbitrary infliction of barbarous punishment by tyrants to a guarantee that no individual can be subjected to any form of criminal punishment that affronts the dignity of man. Prisoners were no longer viewed as slaves of the state, but as citizens protected by evolving interpretations of the eighth amendment. By 1970 federal courts were closely scrutinizing prison disciplinary measures. The next step was to determine if ongoing conditions of confinement, such as overcrowding, could constitute cruel and unusual punishment.

B. Eighth Amendment Analysis in Overcrowding Cases

During the hands-off era, inmate complaints regarding overcrowding were quickly dismissed.⁶³ In the 1970's, however, federal courts actively protected the right of inmates to certain minimal conditions of incarceration mandated by the eighth amendment.⁶⁴ When *Rhodes v. Chapman* was decided, some twenty-three state prisons were under court order resulting from unconstitutional prison conditions which included overcrowding.⁶⁵ The standards of review employed by these courts in their eighth amendment analyses, however, were not uniform. Thus, nearly identical facts could lead different courts to different conclusions.

To assist in resolving this lack of uniformity, this note sets forth a two-tiered framework for evaluating prison overcrowding claims. The first level of inquiry involves a factual approach to the conditions of confinement under challenge. Courts have differed on the range of conditions considered relevant to a prison overcrowding claim. Varying factual approaches can often determine the outcome of a case. At the second level of analysis, a test of cruel and unusual punishment is applied to a fact or fact group derived from the first tier. Again, varying tests have led courts to different results. Although no court has expressly evaluated an eighth amendment, prison overcrowding claim within this framework of review,⁶⁶ every such decision lends itself to this analysis. The

⁶³ See, e.g., *Ex parte Pickens*, 101 F. Supp. 285 (D. Alaska 1951). In *Pickens*, the court denied a pre-trial detainee's petition for habeas corpus. *Id.* at 290. In rejecting the detainee's eighth amendment overcrowding claim the court reasoned that soldiers in Korea were "undergoing hazards a thousand times as great and suffering 'cruel and inhuman punishment' far more terrible than" petitioner was. *Id.*

⁶⁴ See, e.g., *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977). The court declared that in overcrowding cases the obligation of judicial "review does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents [State Officials] may actually be able to accomplish. If [the State] is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States." *Id.* at 1212-13 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971)).

⁶⁵ 12 CRIM. JUST. NEWSLETTER 6, 6-7 (Feb. 16, 1981). The District of Columbia, Puerto Rico and the Virgin Islands' institutions were subject to a similar order. *Id.* at 7.

⁶⁶ Compare Justice Brennan's remarks in *Rhodes v. Chapman*, 101 S. Ct. at 2407-08 (Brennan, J., concurring). See note 417 *infra*.

following subsections enumerate and evaluate each formula applied by federal courts in their eighth amendment analyses.

1. The First Tier: Applying An Approach to Assessing the Conditions of Confinement

Traditionally, prisoner complaints of cruel and unusual punishment involved a single issue, such as corporeal punishment.⁶⁷ Gradually, however, federal courts came to recognize that even though a given problem by itself may not affect an inmate to an unconstitutional degree, the totality of adverse conditions within a prison may amount to a cruel and unusual punishment.⁶⁸ For example, in *Williams v. Edwards*⁶⁹ the Court of Appeals for the Fifth Circuit held that the combined effect of conditions such as overcrowding, violence, improper classification, fire and safety hazards, health and sanitation problems, and inadequate staffing resulted in an eighth amendment violation.⁷⁰ Although only a minority of courts have actually considered every adverse prison condition as a whole,⁷¹ the vast majority of federal courts have adopted this totality approach at least in name,⁷² because as a realistic measure of prison conditions

⁶⁷ See, e.g., *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

⁶⁸ *Holt v. Sarver*, 309 F. Supp. 362, 372-73 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

⁶⁹ 547 F.2d 1206 (5th Cir. 1977).

⁷⁰ *Id.* at 1211.

⁷¹ See, e.g., *Jones v. Diamond*, 636 F.2d 1364, 1368 (5th Cir. 1981); *Smith v. Sullivan*, 611 F.2d 1039, 1044-46 (5th Cir. 1980); *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974), *enforced*, 407 F. Supp. 1117 (N.D. Miss. 1975); *Balton v. State Gov't of N.C.*, 501 F. Supp. 1173, 1179 (E.D.N.C. 1980); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Mitchell v. Untreiner*, 421 F. Supp. 886, 896 (N.D. Fla. 1976); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 121 (D.D.C. 1976); *Pugh v. Locke*, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, *Alabama v. Pugh*, 438 U.S. 781 (1978); *Costello v. Wainright*, 397 F. Supp. 20, 23 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977); *Johnson v. Lark*, 365 F. Supp. 289, 302 (E.D. Mo. 1973); *Taylor v. Sterrett*, 344 F. Supp. 411, 419 (N.D. Tex. 1972), *aff'd*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 483, *reh'g denied*, 421 U.S. 971 (1975).

⁷² *Lareau v. Manson*, 651 F.2d 96, 107 (2d Cir. 1981), *aff'g* 507 F. Supp. 1177, 1194 (D. Conn. 1980); *Ramos v. Lamm*, 639 F.2d 559, 566 (10th Cir.), *aff'g in part* 485 F. Supp. 122, 155 (D. Colo. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); *Jones v. Diamond*, 636 F.2d 1364, 1368 (5th Cir. 1981); *Smith v. Sullivan*, 611 F.2d 1039, 1045-46 (5th Cir. 1980); *Burks v. Teasdale*, 603 F.2d 59, 63 (8th Cir. 1979), *aff'g* *Burks v. Walsh*, 461 F. Supp. 454, 487 (W.D. Mo. 1978); *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir.), *aff'g in part* *Nelson v. Collins*, 455 F. Supp. 727, 734 (D. Md.), *and* *Johnson v. Levine*, 450 F. Supp. 648, 657 (D. Md. 1980); *Battle v. Anderson*, 564 F.2d 388, 400, 403 (10th Cir. 1977); *Hite v. Leeke*, 564 F.2d 670, 673 (4th Cir. 1977); *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974), *enforced*, 407 F. Supp. 1117 (N.D. Miss. 1975); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1286 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Batton v. State Gov't of N.C.*, 501 F. Supp. 1173, 1179 (E.D.N.C. 1980); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 36 (D.P.R. 1979); *Rutherford v. Pitchess*, 457 F. Supp. 104, 109 (S.D. Cal. 1978); *MCI Concord Advisory Bd. v. Hall*, 447 F. Supp. 398, 404 (D. Mass. 1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 859 (1980); *West v. Edwards*, 439 F. Supp. 722, 725 (D.S.C. 1977); *Mitchell v. Untreiner*, 421 F. Supp. 886, 896 (N.D. Fla. 1976);

this approach is more likely to ensure an equitable resolution of prisoners' claims.⁷³ In *Hutto v. Finney*⁷⁴ the Supreme Court sanctioned the use of the totality approach in the similar context of punitive isolation cells.⁷⁵

Yet a variant of the totality approach can be used to distort the effect of prison conditions. The various positive aspects of confinement, such as three meals a day and recreation time, can be said to compensate for the negative conditions, such as overcrowding and inadequate medical care.⁷⁶ This "broad" totality approach, however, skews the actual effect the conditions have on those prisoners within the plaintiff class who are subjected only to the detrimental elements. Every prisoner will be faced with different conditions depending on factors such as work availability, cell location, and health. Because some inmates will be exposed only to the negative elements of confinement, the totality approach does not offer them protection unless only the negative elements are considered. Most courts failing to find an eighth amendment, prison overcrowding violation have used this broad totality approach.⁷⁷

The totality approach that considers only negative conditions has been criticized for entailing too intrusive and subjective an evaluation by federal district court judges.⁷⁸ For example, in *Wright v. Rushen*⁷⁹ the Court of Appeals for the Ninth Circuit stated that the district court had engaged in the legislative function of prison reform by using the totality approach as a key to opening the door of federal "supervisory powers."⁸⁰ By lumping numerous minor problems together, the totality approach arguably exaggerates the effect on the imprisoned and results in needless federal intervention in state affairs. Accordingly, the court of appeals in *Wright* examined each condition separately and found no eighth amendment violation.⁸¹ The court found authority for this ap-

Inmates, D.C. Jail v. Jackson, 416 F. Supp. 119, 121 (D.D.C. 1976); Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, Alabama v. Pugh, 438 U.S. 781 (1978); Costello v. Wainwright, 397 F. Supp. 20, 33 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977); Johnson v. Lark, 365 F. Supp. 289, 302 (E.D. Mo. 1973); Taylor v. Sterrett, 344 F. Supp. 411, 419 (N.D. Tex. 1972), *aff'd*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 483, *reh'g denied*, 421 U.S. 971 (1975).

⁷³ The belief that a piecemeal approach may not be effective and that judicial economy will be enhanced if numerous issues can be resolved in one suit are secondary reasons which support use of the totality approach. See Robbins, *Federalism, State Prison Reform, And Evolving Standards Of Human Decency: On Guessing, Stressing, And Redressing Constitutional Rights*, 26 KAN. L. REV. 551, 562 (1978) [hereinafter cited as Robbins].

⁷⁴ 437 U.S. 678, 687 (1978).

⁷⁵ The Court held that the interdependent conditions in Alabama's isolation cells, viewed as a whole, constituted cruel and unusual punishment to those inmates confined therein for more than thirty days. *Id.* at 688.

⁷⁶ See, e.g., Hite v. Leeke, 564 F.2d 670, 673 (4th Cir. 1977); Crowe v. Leeke, 540 F.2d 740, 742 (4th Cir. 1976); Burks v. Walsh, 461 F. Supp. 454, 487 (E.W. Mo. 1978), *aff'd sub nom.* Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979); West v. Edwards, 439 F. Supp. 722, 725-26 (D.S. C. 1977).

⁷⁷ See, e.g., cases cited at note 76 *supra*.

⁷⁸ See Note, *Federal Courts And State Prison Reform: A Formula For Large Scale Intervention Into State Affairs*, 14 SUFFOLK U.L. REV. 545 (1980).

⁷⁹ 642 F.2d 1129 (9th Cir. 1981).

⁸⁰ *Id.* at 1132-33.

⁸¹ *Id.* at 1133-34.

proach in the Supreme Court's decision in *Bell v. Wolfish*⁸² where double-bunking of short-term pre-trial detainees was ruled not violative of the fifth amendment. Dictum in *Bell* had recommended that federal courts defer to state decisionmakers' prison policies.⁸³ The *Wright* court, therefore, adopted a narrow focus approach to circumscribe judicial involvement with state prisons.⁸⁴

The use of a narrow focus approach, however, may also lead to a more searching scrutiny of an isolated aspect of prison life. Based on expert testimony and correctional standards of what constitutes adequate cell space, some lower courts have found overcrowding "unconstitutional per se."⁸⁵ Other courts have closely evaluated various deficiencies in the basic necessity of "shelter," such as overcrowding, poor lighting, sanitation and ventilation, and fire hazards.⁸⁶ Moreover, in many prison overcrowding cases the swollen populations were found to be the sole cause of physical, mental and emotional injury resulting from the strain on limited staff and facilities.⁸⁷ Most courts, therefore, by focusing on the amount of space, the numerous aspects of decent shelter, or the wide-ranging effects of overcrowding, have found an eighth amendment violation through a more probing use of the narrow focus approach than the *Wright* court had employed.

⁸² 441 U.S. 520 (1979).

⁸³ *Id.* at 562.

⁸⁴ 642 F.2d at 1132. The court also stated "a focus on costs will tend to stay the hand of a district court when its otherwise generally praiseworthy compassion might tempt it to adopt an unnecessarily expensive and comprehensive remedy." *Id.* at 1134. The court did concede that "[o]f course, each condition of confinement does not exist in isolation; the court must consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions." *Id.* at 1133. Yet the court still found that overcrowding and other problems did not justify the injunction. *Id.* at 1133-34. For another case employing a narrow focus approach to find no constitutional violation, see *Rutherford v. Pitchess*, 457 F. Supp. 104, 109 (C.D. Cal. 1978).

⁸⁵ See, e.g., *Gates v. Collier*, 423 F. Supp. 732, 743 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977); *Nicholson v. Choctaw County, Ala.*, 498 F. Supp. 295, 308 (S.D. Ala. 1980) (dictum).

⁸⁶ See, e.g., *Ramos v. Lamm*, 639 F.2d 559, 566 (10th Cir. 1980), *aff'g* 485 F. Supp. 122, 155 (D. Colo. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 36 (D.P.R. 1979); *MCI Concord Advisory Bd. v. Hall*, 447 F. Supp. 398, 404 (D. Mass. 1978).

⁸⁷ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 107 (2d Cir. 1981), *aff'g in part*, 507 F. Supp. 1177, 1194 (D. Conn. 1980); *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir.), *aff'g in part* *Nelson v. Collins*, 455 F. Supp. 727, 734, and *Johnson v. Levine*, 450 F. Supp. 648, 657 (D. Md. 1978); *Battle v. Anderson*, 564 F.2d 388, 400, 403 (10th Cir. 1977); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1286 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Capps v. Atiyeh*, 495 F. Supp. 802, 810-12 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981). For example, the Federal District Court for the District of Oregon in *Capps* noted:

Overpopulation at these facilities has had a negative effect on nearly every aspect of the inmates' lives. . . . [I]t has increased the health risks to which prisoners are exposed [such as] communication of contagious diseases. . . [and] risks the creation or aggravation of gastric illnesses by eating hurriedly (eating time has been reduced to 20 minutes) in a noisy, crowded, stressful environment. . . .

Inmates . . . who are already ill or injured are less likely to receive proper medical care. . . .

In sum, the totality of conditions approach, which evaluates only the negative conditions of confinement, was developed in prison condition cases as the best measure of prisoners' plight. Conversely, the broad totality approach, which balances both positive and negative aspects of confinement, skews the evaluation by considering the average prisoners' circumstances only. Similarly, the narrow focus approach, which considers the various aspects of prison life separately, was designed to limit a federal court's inquiry into state prison life. The narrow focus approach, however, can also accurately reflect the adversity of prison conditions through an exhaustive scrutiny of a sole condition. A court's philosophy towards state prisoners' constitutional rights — conservative or progressive — appears to affect which analytical approach a court will take with respect to conditions of confinement, and how that approach will be applied. In the first tier, therefore, the outcome of a case depends upon both the analytical approach taken with respect to the conditions of confinement, and the judicial philosophy reflected in that approach towards prisoners' rights. Once the conditions under challenge are assessed, however, the analysis must proceed to the second tier to resolve the eighth amendment claim.

2. The Second Tier: Applying a Test of Cruel and Unusual Punishment

In the second level of eighth amendment analysis courts apply a test of cruel and unusual punishment to each fact or fact group derived from the first tier. Without Supreme Court guidance, however, confusion initially resulted as to which test should be used in prison overcrowding, eighth amendment litigation. Eight tests emerged for evaluating such claims. These tests query whether the punishment: is disproportionate to the severity of the crime; exceeds legitimate penological aims; inflicts unnecessary and wanton pain; is totally without penological justification; comports with society's evolving sense

The ability . . . to deal with the mental health problems of the prisoners is similarly impeded. . . .

[T]he rehabilitation efforts . . . also have been hampered. . . . [O]vercrowding at [these] levels . . . undermines the initiative of inmates to seek self-improvement and prevents their rehabilitation. . . .

The problems associated with overcrowding naturally create feelings of frustration among inmates. At the same time, overcrowding diminishes the opportunities for inmates to effectively deal with their frustration . . . [there is] a loss of area for free movement [and also] of whatever modicum of privacy and quiet a prison affords. Visitation periods have been shortened. . . . Lines at canteens have grown longer and longer. Recreation areas sometimes cannot accommodate all inmates desiring to use them. Rather than serving as an arena for the release of tension, the prison yard has become a breeding ground for conflict. . . .

[T]he increased potential for violence is one of the most significant effects of overcrowding. . . . [S]evere overcrowding prevents the development of appropriate social skills and leads instead to aggressive, violent, and destructive behavior patterns. . . . [S]tudies of penal institutions reveal that overcrowding leads to depression, tension, and increases in disciplinary infractions, assaults and suicide attempts. . . .

[O]vercrowding has increased the likelihood that inmates will suffer physically at the hands of other inmates.

Capps v. Atiyeh, 495 F. Supp. at 810-12 (conclusions of court and experts).

of decency; exists by denial of basic necessities; shocks the conscience of the court; or affronts the dignity of man. Often courts have applied these benchmarks in various combinations.⁸⁸

These eight tests entail four kinds of analysis: proportionality, balancing of interests, contemporary norms of decency, and human dignity. By evaluating how each of these four groups operates within the framework of prison overcrowding, eighth amendment analysis, the appropriateness of each test can be discerned.

a. Proportionality

The proportionality test determines whether a particular punishment is excessive in relation to the severity of the crime committed.⁸⁹ In *Weems v. United States* the proportionality test was first used by the Supreme Court to strike down a sentencing statute that was unconstitutional in degree.⁹⁰ Such a test is not particularly suited to overcrowding cases, however. Prison overcrowding cases concern the kind, not the degree, of punishment.⁹¹ More importantly, because overcrowding cases are usually brought in the form of a class action, this test cannot be used where offenders of mixed culpability are suing together.⁹² The proportionality test, therefore, is not useful in evaluating ongoing conditions of confinement.⁹³

⁸⁸ One commentator has calculated the frequency with which various tests have been applied. He found the following: (1) shock the conscience test, 41% (district court) and 45% (court of appeals); (2) totality of the circumstances test, 45% and 18%; (3) least restrictive means test, 34% and 18%; (4) balancing test, 45% and 27%; and (5) evolving standards of decency test, 66% and 27%. Fair, *The Lower Federal Courts as Constitution Makers: The Case of Prison Conditions*, 7 AM. J. CRIM. LAW 119, 137, 139 (1979). (Note that no two-tiered eighth amendment analysis was used by this commentator.) No doubt this multiple use of tests was due to a desire to ensure no reversible error. For example, one court found that "the conditions of plaintiffs' confinement . . . so shock the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment." *Hamilton v. Schiro*, 338 F. Supp. 1016, 1019 (E.D. La. 1970).

⁸⁹ Prison disciplinary cases likewise involve an assessment of whether the sanction was properly graduated to the rule infraction. See, e.g., *Landman v. Royster*, 333 F. Supp. 621, 646 (E.D. Va. 1971), *enforced*, 354 F. Supp. 1302 (E.D. Va. 1973); *Carothers v. Follette*, 314 F. Supp. 1014, 1026 (S.D.N.Y. 1970); *Jordan v. Fitzharris*, 257 F. Supp. 674, 679 (N.D. Cal. 1966). See generally Note, *Decency And Fairness: An Emerging Judicial Role In Prison Reform*, 57 VA. L. REV. 841, 852-55 (1971).

⁹⁰ See text at notes 22-26 *supra*.

⁹¹ This "degree" versus "kind" distinction was first made by the Court in *Weems v. United States*, 217 U.S. 349, 377 (1910). In *Ingraham v. Wright*, 430 U.S. 651 (1977) the court declared:

the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes, e.g., *Estelle v. Gamble* . . . *Trop v. Dulles* . . . second, it proscribes punishment grossly disproportionate to the severity of the crime, e.g., *Weems v. United States* . . . and third, it imposes substantive limits on what can be made criminal and punished as such, e.g., *Robinson v. California*.

Id. at 667.

⁹² Robbins, *supra* note 73, at 554-55 n.29.

⁹³ See Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN.

b. *Balancing of Interests*

A second test sometimes applied in eighth amendment litigation evaluates whether a given punishment exceeds a legitimate penological aim, as balanced against the rights of prisoners. This balancing test is derived from due process discipline,⁹⁴ due process detainee overcrowding,⁹⁵ and first amendment⁹⁶ cases. In *Jones v. North Carolina Prisoners' Labor Union*,⁹⁷ for example, the Supreme Court held that the restriction on prisoners' first amendment right to labor union organization was justified by the legitimate penological objective of maintaining security.⁹⁸ Because this balancing test was used in *Jones* and other recent non-eighth amendment prison cases, some lower federal courts have applied this benchmark to overcrowding cases and found no constitutional violation.⁹⁹

The legitimate penological aim test, however, has three significant drawbacks. First, by focusing on security issues, this test relegates prisoners' eighth amendment rights to secondary importance.¹⁰⁰ While eighth amendment analysis historically has focused on the effect of the punishment on the individual, the legitimate penological aim test arguably does provide protection from cruel and unusual punishment since this test requires prison officials to justify their acts through a "purposive analysis."¹⁰¹ Yet commentators believe that prison officials' explanations for challenged practices have been too easily accepted by the courts.¹⁰² Second, consideration of state interests confers a near presumption of validity on any purported justification for overcrowding.¹⁰³ Yet such a presumption is unwarranted since overcrowding is usually the product of apathy or poor planning,¹⁰⁴ not conscious design, so officials often have no

L. REV. 893, 903-04 (1977) [hereinafter cited as Robbins & Buser]; Robbins, *supra* note 73, at 554-55 n.29. This test has been mentioned in some overcrowding cases but not applied. *See, e.g.,* Lareau v. Manson, 507 F. Supp. 1177, 1192 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981); Burks v. Walsh, 461 F. Supp. 454, 480 (W.D. Mo. 1978), *aff'd sub nom.* Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979).

⁹⁴ Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

⁹⁵ Bell v. Wolfish, 441 U.S. 520, 538 (1979).

⁹⁶ Pell v. Procunier, 417 U.S. 817, 823 (1974); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 130-31 (1977).

⁹⁷ 433 U.S. 119 (1977).

⁹⁸ *Id.* at 132.

⁹⁹ *See, e.g.,* Crowe v. Leeke, 540 F.2d 740, 742 (4th Cir. 1976); Rutherford v. Pitchess, 457 F. Supp. 104, 108 (C.D. Cal. 1978). *Contra*, Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, Alabama v. Pugh, 438 U.S. 781 (1978).

¹⁰⁰ The test should not look to the purpose of confinement, only the effect. *See* Bell v. Wolfish, 441 U.S. at 567 (Marshall, J., dissenting).

¹⁰¹ Ingraham v. Wright, 430 U.S. 651, 686-88 (1977) (White, J., dissenting); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 393-404 (1977).

¹⁰² Robbins & Buser, *supra* note 93, at 905 (citing Kaufman, *Prison: The Judge's Dilemma*, 41 FORDHAM L. REV. 495 (1973)).

¹⁰³ *Id.*

¹⁰⁴ *See* text at notes 272, 287-89 *infra* and Johnson v. Levine, 450 F. Supp. 648, 656 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978).

real basis for explanation. Moreover, because studies reveal that prison personnel are poorly trained and educated,¹⁰⁵ *ad hoc* rationalizations made by such personnel should be carefully reviewed. Finally, the danger of judicial subjectivity is inherent in the legitimate penological aim test. When evaluating an entire prison system's totality of conditions, at the first tier of inquiry, the justifications for every condition, introduced at the second tier of analysis, becomes so voluminous that the use of experts and studies is rendered impractical.¹⁰⁶ Thus, courts are likely to defer to proffered explanations.¹⁰⁷

A third test of cruel and unusual punishment, related to the legitimate penological aim test, assesses whether a given punishment inflicts "unnecessary and wanton pain."¹⁰⁸ This test is sometimes infused with language of a rehabilitative penal purpose, focusing on whether inmates will degenerate because of conditions which inflict needless suffering.¹⁰⁹ The pain test evaluates whether there is a rational basis for the punishment and whether the sanction is inflicted with the intention of causing distress. This test, therefore, focuses on the justifications offered by prison officials for the punitive conditions, not on the individual's plight. In essence, a balancing test, similar to that of the legitimate penological aim test, is entailed. The attendant problems of focusing away from the individual, according deference to state rationalizations and encouraging judicial subjectivity in evidence evaluation are, therefore, also present. Moreover, "pain" connotes immediate physical injury. Yet prison overcrowding cases usually involve graduated harm that may be partly mental or emotional. Thus, this test is not well suited to the prison overcrowding context.

A fourth test, also akin to the legitimate penological aim test, determines whether a punishment is "totally without penological justification."¹¹⁰ This benchmark implies that a punishment may lack a complete justification yet still

¹⁰⁵ Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 U.MO. KAN. CITY L. REV. 1, 22 (1978).

¹⁰⁶ Robbins, *supra* note 73, at 554-55 n.29; Robbins & Buser, *supra* note 93, at 905.

¹⁰⁷ See sources cited in note 106 *supra*.

¹⁰⁸ See, e.g., *Battle v. Anderson*, 564 F.2d 388, 402 (10th Cir. 1977); *Crowe v. Leeke*, 540 F.2d 740, 742 (4th Cir. 1976); *Feliciano v. Barcelo*, 497 F. Supp. 14, 33 (D.P.R. 1979); *Capps v. Atiyeh*, 495 F. Supp. 802, 813 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Ramos v. Lamm*, 485 F. Supp. 122, 132 (D. Colo. 1980), *aff'd in part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S.Ct. 1759 (1981); *Nelson v. Collins*, 455 F. Supp. 727, 730 (D. Md. 1978), *aff'd in part sub nom. Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978).

¹⁰⁹ See, e.g., *Ramos v. Lamm*, 639 F.2d 559, 568 (6th Cir. 1980), *aff'g* 485 F. Supp. 122, 132 (D. Colo. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); *Battle v. Anderson*, 564 F.2d 388, 393 (10th Cir. 1980); *Capps v. Atiyeh*, 495 F. Supp. 802, 813 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 123 (D.D.C. 1976); *Taylor v. Sterrett*, 344 F. Supp. 411, 419 (N.D. Tex. 1972), *aff'd*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983, *reh. denied*, 421 U.S. 971 (1975).

¹¹⁰ See, e.g., *Larreau v. Manson*, 507 F. Supp. 1177, 1194 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 980 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Hamilton v. Schiro*, 338 F. Supp. 1016, 1019 (E.D. La. 1970).

pass constitutional muster. Accordingly, courts applying this test have granted relief only when confronted with gross overcrowding problems.¹¹¹ This conservative benchmark also entails the aforementioned problems of improper focus, unjust deference to state rationalizations, and judicial subjectivity in evidence evaluation, since the focal point is again state justifications.

c. Contemporary Norms of Decency

The test of cruel and unusual punishment most frequently applied by the courts is the "evolving sense of decency" test.¹¹² Derived from *Trop v. Dulles*,¹¹³ this test evaluates whether a punishment comports with enlightened notions of justice and contemporary norms. Uncertainty has arisen in eighth amendment litigation, however, regarding what type of evidence establishes such norms. The evidence relied upon often decides the outcome of the suit.¹¹⁴ Nevertheless, what constitutes proper evidence, under the decency test in the context of prison conditions seems well settled. In *Estelle v. Gamble*,¹¹⁵ where failure to

¹¹¹ See, e.g., cases cited in note 110 *supra*.

¹¹² See, e.g., *Lareau v. Manson*, 651 F.2d 96, 105 (2d Cir. 1981), *aff'g* 507 F. Supp. 1177, 1192 (D. Conn. 1980); *Campbell v. Cauthron*, 623 F.2d 503, 505 (8th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 402 (10th Cir. 1977); *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977); *Batton v. State Gov't of N.C.*, 501 F. Supp. 1173, 1179 (E.D.N.C. 1980); *Hutchings v. Corum*, 501 F. Supp. 1276, 1280 (W.D. Mo. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 33 (D.P.R. 1979); *Capps v. Atiyeh*, 495 F. Supp. 802, 813 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Burks v. Walsh*, 461 F. Supp. 454, 480-81 (W.D. Mo. 1978), *aff'd sub nom.* *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); *Rutherford v. Pitchess*, 457 F. Supp. 104, 108 (C.D. Cal. 1978); *Nelson v. Collins*, 455 F. Supp. 727, 730 (D. Md.), *aff'd in part sub nom.* *Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978); *Johnson v. Levine*, 450 F. Supp. 648, 653 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978); *MCI Concord Advisory Bd. v. Hall*, 447 F. Supp. 398, 404 (D. Mass. 1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *West v. Edwards*, 439 F. Supp. 722, 724 (D.S.C. 1977); *Gates v. Collier*, 423 F. Supp. 732, 743 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977); *Mitchell v. Untreiner*, 421 F. Supp. 886, 896 (N.D. Fla. 1976); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 120 (D.D.C. 1976); *Pugh v. Locke*, 406 F. Supp. 318, 328 (M.D. Ala. 1976), *aff'd sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, *Alabama v. Pugh*, 438 U.S. 781 (1978); *Costello v. Wainwright*, 397 F. Supp. 20, 33 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.) *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977); *Johnson v. Lark*, 365 F. Supp. 289, 302 (E.D. Mo. 1973).

¹¹³ 356 U.S. 86 (1958). See text at note 31 *supra*.

¹¹⁴ Fair, *The Lower Courts as Constitution Makers: The Case of Prison Conditions*, 7 AM. J. OF CRIM. L. 119, 130 (1979). For example, in *Gregg v. Georgia*, 428 U.S. 153 (1975), the Supreme Court ruled that Georgia's death penalty statute did not violate the eighth amendment. *Id.* at 169. The joint opinion (Justice Powell and Justice Stevens joined in the opinion announced by Justice Stewart) largely relied on evidence of state legislative opinion that the statute was compatible with contemporary norms. *Id.* at 174-75. In dissent, Justice Marshall reached a contrary conclusion by considering only the opinion of those citizens properly informed about capital punishment. *Id.* at 232. Also dissenting, Justice Brennan argued that a judicial notion of what is necessary to preserve the dignity of man, considered in light of society's mores, should determine whether a punishment is cruel and unusual. *Id.* at 229. *Gregg* thus delineates three possible indicia of contemporary norms of decency. Such norms could be established with evidence of state legislation, informed public opinion, or judicial notions of the dignity of man.

¹¹⁵ 429 U.S. 97 (1976).

provide medical treatment created an eighth amendment violation,¹¹⁶ the Supreme Court relied upon legislation and correction agency standards in its decency test analysis.¹¹⁷ Similarly, in overcrowding cases, lower federal courts have applied correctional standards of government and private agencies as supported by expert opinion.¹¹⁸ Given the absence of statutes proscribing maximum prison populations, however, these courts have not found legislation applicable.¹¹⁹ International minimum standards have also helped some federal courts evaluate contemporary norms.¹²⁰

Recently, some courts have found correctional standards too inflexible to establish contemporary norms of decency in unique prison settings.¹²¹ These courts have channelled expert information through a number of factors relevant to a particular prison to ensure equity in process and result. The Federal District Court for the District of Oregon in *Capps v. Atiyeh*¹²² used this method to determine that overcrowding constituted cruel and unusual punishment. Five factors were used: the length of confinement, the number of prisoners above the institution's design capacity, the cell size and daily cell time, the mental and physical health effects of overcrowding and the permanency of the overpopulation.¹²³ This method probably stems from the Supreme Court's dictum in *Bell v. Wolfish*¹²⁴ where the fifth amendment was at issue. The *Bell* Court had stated that correctional standards regarding cell size only indicate agency goals and therefore cannot set the constitutional minima.¹²⁵ Nevertheless, the

¹¹⁶ *Id.* at 104.

¹¹⁷ *Id.* at 103-04 & n.8.

¹¹⁸ *See, e.g.,* *Lareau v. Manson*, 651 F.2d 96, 106-07 (2d Cir. 1981), *aff'g* 507 F. Supp. 1177, 1192-93 (D. Conn. 1980); *Ramos v. Lamm*, 639 F.2d 559, 567 n.10 (10th Cir.), *aff'g* 485 F. Supp. 122, 134 (D. Colo. 1980); *Campbell v. Cauthron*, 623 F.2d 503, 506-07 (8th Cir. 1980); *Miller v. Carson*, 563 F.2d 741, 751-52 (5th Cir. 1977); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1282 n.21 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (2d Cir. 1981); *West v. Lamb*, 497 F. Supp. 989, 999-1000 (D. Nev. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 35-36 (D.P.R. 1979); *Capps v. Atiyeh*, 495 F. Supp. 802, 809-10 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Rutherford v. Pitchess*, 457 F. Supp. 104, 109 (C.D. Cal. 1978); *Nelson v. Collins*, 455 F. Supp. 727, 731 (D. Md.), *aff'd in part sub nom.* *Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979-80 n.30 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Anderson v. Redman*, 429 F. Supp. 1105, 1119 (D. Del. 1977).

¹¹⁹ *See, e.g.,* 101 S. Ct. at 2411 (Marshall, J., dissenting); *Johnson v. Levine*, 450 F. Supp. 648, 656 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978).

¹²⁰ *See* *Lareau v. Manson*, 651 F.2d 96, 106-07 (2d Cir. 1981), *aff'g in part* 507 F. Supp. 1177, 1192 (D. Conn. 1980). International standards were also helpful in *In re Birdsong*, *supra* note 20, and *Trop v. Dulles*, *supra* note 31.

¹²¹ *See, e.g.,* *Burks v. Teasdale*, 603 F.2d 59, 63 (8th Cir. 1979); *Capps v. Atiyeh*, 495 F. Supp. 802, 814 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Ramos v. Lamm*, 485 F. Supp. 122, 154 (D. Colo.), *aff'd*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); *MCI Concord Advisory Bd. v. Hall*, 447 F. Supp. 398, 405 (D. Mass. 1978).

¹²² 495 F. Supp. 802 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981).

¹²³ *Id.* at 814.

¹²⁴ 441 U.S. 520 (1979).

¹²⁵ *Id.* at 543-44 n.27; see text at note 192 *infra*.

Capps court regarded correctional standards and expert opinion as persuasive evidence in finding an eighth amendment violation. Thus, whether or not such evidence is channelled through factors relevant to a particular prison, a result based on this modified application of the decency test remains an extremely objective one.¹²⁶

Courts have applied two other benchmarks related to the decency test: the basic necessities test and the shock the conscience test. The basic necessities test provides that the eighth amendment is not violated where a penal facility "furnishes adequate food, shelter, clothing, sanitation, medical care and personal safety."¹²⁷ Adequacy is established through the use of the same type of objective evidence used in the decency test, such as correctional standards, expert testimony and penological studies. Although this test seems to focus on physical essentials, adequate shelter is evaluated in light of an inmate's total, including psychological, cell space needs.¹²⁸ Application of the basic necessities test, therefore, should produce a result similar to that of the decency test.

A seventh test of cruel and unusual punishment, also related to the decency test, is one which embodies the evolutionary nature of the eighth amendment. This benchmark determines whether prison conditions "shock the conscience" of the court.¹²⁹ This test, however, is better suited to analyzing instances of gross physical punishments, not everyday conditions of confinement.¹³⁰ Psychological, long-term or aggregate harm is not usually so obvious as to be immediately offensive. More importantly, what punishment

¹²⁶ See generally Hirshkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 759 (1969).

¹²⁷ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 112 (2d Cir. 1981) (Friendly, J., concurring and dissenting); *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981) (citing *Wolfish v. Levi*, 573 F.2d 118, 125 (2d Cir. 1978)); *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977); *Newman v. State of Alabama*, 559 F.2d 283, 286, 291 (5th Cir. 1977), *rev'd in part on other grounds*, *Alabama v. Pugh*, 438 U.S. 781 (1978); *Adams v. Mathis*, 458 F. Supp. 302, 308 (M.D. Ala. 1978), *aff'd*, 614 F.2d 42 (5th Cir. 1980); *Costello v. Wainwright*, 397 F. Supp. 20, 33 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977).

¹²⁸ *Ramos v. Lamm*, 639 F.2d 559, 566 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981).

¹²⁹ This test apparently was derived from the phrases "shock the sensibilities" in *Weems v. United States*, 217 U.S. 349, 375 (1910) and "shock[ing] the most fundamental instincts of civilized man" in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 (1947) (Burton, J., dissenting). This test has also been termed to question whether a punishment evokes "a cry of horror." *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring). This test has been applied in the overcrowding decisions of *Crowe v. Leeke*, 540 F.2d 740, 742 (4th Cir. 1978); *Burks v. Walsh*, 461 F. Supp. 454, 481 (W.D. Mo. 1978), *aff'd sub nom.* *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); *MCI Concord Advisory Bd. v. Hall*, 447 F. Supp. 348, 404 (D. Mass. 1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.) *cert. denied*, 449 U.S. 839 (1980); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 121 (D.D.C. 1976); *Pugh v. Locke*, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, *Alabama v. Pugh*, 438 U.S. 781 (1978); *White v. Sullivan*, 368 F. Supp. 292, 296 (S.D. Ala. 1973); *Johnson v. Lark*, 365 F. Supp. 289, 302 (S.D. Mo. 1973).

¹³⁰ *Robbins*, *supra* note 73, at 554; *Robbins & Buser*, *supra* note 93, at 902-03.

shocks the conscience is highly subjective.¹³¹ Prison officials cannot readily adjust their conduct to conform to what a few judges may consider shocking.¹³²

d. *Human Dignity*

The broadest and final test applied by lower federal courts in this second tier of eighth amendment analysis evaluates whether overcrowding affronts the "dignity of man."¹³³ This benchmark stems from the notion that the Constitution is immortal and therefore the proscription on cruel and unusual punishments must be based on an evolving judicial conscience.¹³⁴ Rather than rely on contemporary norms, courts applying this test evaluate whether a punishment "transgresses today's broad and idealistic concepts of dignity, civilized standards, humanity and decency."¹³⁵ In focusing on the individual, the most enlightened notions of morality are considered. Although this test appears to require a wholly subjective evaluation, reliance on leading penological opinion coupled with judicial experience can render uniform results.

In sum, the eighth amendment standard of review used by lower federal courts in overcrowding cases is best illustrated through a two-tiered analysis. In the first tier the conditions of confinement under challenge are evaluated. The totality of conditions approach that considers only the negative aspects of confinement best measures prisoners' hardships. A comparable measure exists when an exhaustive scrutiny of overcrowding is taken. Conversely, the narrow focus approach was designed to limit judicial involvement in prison life by ignoring interdependent conditions of confinement. This restriction of judicial review can also be achieved where negative and positive aspects of confinement offset each other through a broad totality approach.

In the second tier, varying combinations of eight tests of cruel and unusual

¹³¹ Robbins & Buser, *supra* note 93, at 902; Note, *Decency and Fairness: An Emerging Judicial Role In Prison Reform*, 57 VA. L. REV. 841, 848 (1971). *C.f.* Rochin v. California, 342 U.S. 165, 174-77 (1952) (Black, J., concurring) (test applied to due process clause).

¹³² Robbins, *supra* note 73, at 554; Robbins & Buser, *supra* note 93, at 903 (citing Kaufman, *Prisons: The Judge's Dilemma*, 41 FORDHAM L. REV. 495, 508 (1973)).

¹³³ This phrase is derived from *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). See text at note 31, *supra*. This test has been applied in *Lareau v. Manson*, 651 F.2d 96, 105 (2d Cir. 1981), *aff'd in part* 507 F. Supp. 1177, 1192 (D. Conn. 1980); *Campbell v. Cauthron*, 623 F.2d 503, 505 (8th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 402 (10th Cir. 1977); *Batton v. State Gov't of N. C.*, 501 F. Supp. 1173, 1179 (E.D.N.C. 1980); *Hutchings v. Corum*, 501 F. Supp. 1276, 1280 (W.D. Mo. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 33 (D.P.R. 1979); *Capps v. Atiyeh*, 495 F. Supp. 802, 813 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Burks v. Walsh*, 461 F. Supp. 454, 480 (W.D. Mo. 1978), *aff'd sub nom.* *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); *Rutherford v. Pitchess*, 457 F. Supp. 104, 108 (C.D. Cal. 1978); *Nelson v. Collins*, 455 F. Supp. 727, 730 (D. Md.), *aff'd in part sub nom.* *Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978); *MCI Concord Advisory Bd. v. Hall*, 447 F. Supp. 398, 404 (D. Mass. 1978).

¹³⁴ See generally *Furman v. Georgia*, 408 U.S. 238, 257-306 (1972) (Brennan, J., concurring).

¹³⁵ *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

punishment have been applied to the fact or fact group derived from the first tier. The proportionality test is of doubtful usefulness in these cases because of its inability to evaluate the kind, rather than degree, of punishment to a heterogeneous group of inmates. Balancing tests are likewise inappropriate in prison overcrowding cases. The legitimate penological aim test employs a balancing process which entails focusing away from the individual's plight, according unwarranted deference to state rationalizations and encouraging judicial subjectivity in evidence evaluation. The pain test shares the same flaws, and focuses only on physical injury. The totally without penological justification test also involves the problems of a balancing test and sets so low a threshold that almost any punishment can be sanctioned. All three balancing tests, therefore, dilute the historical protection of the eighth amendment.

The three forms of the decency test, which center on contemporary norms, may also be unsuitable for these cases. The evolving sense of decency and the basic necessities tests are more objective than the foregoing benchmarks only when expert penological opinion is evaluated. In such instances these tests may achieve an equitable result. The third form of decency test, the shock the conscience test, however, evaluates conditions of confinement too subjectively and focuses only on physical harm. Finally, the dignity of man test uses progressive penological opinion to achieve a result consonant with judicial conscience, which may not be consonant with popular mores. This test, therefore, best ensures that constitutional, not political, precepts determine the scope of the clause's proscription.

Whatever test a court uses will be applied to the condition or conditions under challenge derived from the first tier of inquiry. As illustrated above, the approaches and tests used vary considerably in their effectiveness in fulfilling the eighth amendment's guarantee in the prison overcrowding context. As will be more fully demonstrated in later sections of this note, this diversity often reflects distinct philosophies towards prisoners' rights and federalism which underlies every court's eighth amendment analysis. The Supreme Court bears partial responsibility for this lack of uniformity in lower federal court decisions. As the following material demonstrates, the Supreme Court's eighth amendment analysis did not address the problem of prison overcrowding until *Rhodes v. Chapman*.

C. The Burger Court

During the last decade, the Supreme Court has consistently expressed a strong interest in hearing prisoners' complaints,¹³⁶ although the Court has been criticized for avoiding the resolution of substantive inmate rights issues

¹³⁶ Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

Procunier v. Martinez, 416 U.S. 396, 404-06 (1974). See also *Cruz v. Beto*, 405 U.S. 319, 32 (1972) (per curiam).

once the complaints are heard.¹³⁷ Nevertheless, the Court had articulated a workable framework for resolving prison overcrowding disputes prior to *Rhodes v. Chapman*.

The application of the eighth amendment to prison living conditions first¹³⁸ arose in *Estelle v. Gamble*.¹³⁹ In *Estelle*, the inadequate medical treatment of an inmate was at issue.¹⁴⁰ The Court declared that the eighth amendment does not proscribe only physically barbarous punishments;¹⁴¹ rather, the clause embodies the broader concept of man's dignity.¹⁴² The *Estelle* Court then enunciated four eighth amendment tests: a punishment could violate the clause if such treatment transgresses "evolving standards of decency,"¹⁴³ entails the "unnecessary and wanton infliction of pain,"¹⁴⁴ is "grossly disproportionate to the severity of the crime,"¹⁴⁵ or goes beyond the "substantive limits of what can be made criminal and punished."¹⁴⁶ Finding modern legislation¹⁴⁷ and correctional standards¹⁴⁸ the manifestation of contemporary norms of decency, the Court held that "deliberate indifference" to serious medical needs would constitute an eighth amendment violation.¹⁴⁹

In *Estelle*, Justice Stevens vehemently dissented because of his belief that the eighth amendment entails minimum objective standards of decency.¹⁵⁰ He reasoned that the character of the punishment is at issue in eighth amendment cases, not the motivation of prison officials.¹⁵¹ Justice Stevens feared that injury resulting from incompetency in staffing or inadequacy in facilities would go unredressed under the majority's analysis if prison officials professed they

¹³⁷ See Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 MO. KAN. CITY L. REV. 1 (1978); Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219 (1977).

¹³⁸ In *Burrell v. McCray*, 426 U.S. 471 (1976) (per curiam), the Court dismissed the writ of certiorari as improvidently granted after argument was heard. The Fourth Circuit had found an eighth amendment violation in the use of isolation cells. *McCray v. Burrell*, 516 F.2d 357, 367-68 (4th Cir. 1975).

¹³⁹ 429 U.S. 97 (1976).

¹⁴⁰ *Id.* at 99-101.

¹⁴¹ *Id.* at 102 (citing *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 373 (1910)).

¹⁴² *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

¹⁴³ *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1975) (joint opinion of Stewart, Powell and Stevens, JJ.); *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 378 (1910)).

¹⁴⁴ *Id.* at 103 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1975) (joint opinion of Stewart, Powell and Stevens, JJ.); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)).

¹⁴⁵ *Id.* at 103 n.7 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Weems v. United States*, 217 U.S. 349, 367 (1910)).

¹⁴⁶ *Id.* (citing *Robinson v. California*, 370 U.S. 660, 666-67 (1962)).

¹⁴⁷ *Id.* at 103 (citing 22 state statutes in n.8).

¹⁴⁸ *Id.* at 103 n.8.

¹⁴⁹ *Id.* at 104. This ruling was consistent with those in the federal courts of appeal that allegations of mere malpractice would not state an eighth amendment cause of action. *Id.* at 106 n.14.

¹⁵⁰ *Id.* at 116 (Stevens, J., dissenting).

¹⁵¹ *Id.* at 116-17 n.13 (Stevens, J., dissenting).

acted in good faith.¹⁵² Nevertheless, the *Estelle* Court's reliance on legislation¹⁵³ and administrative agency standards¹⁵⁴ had arguably not resulted in the use of a wholly subjective and toothless test.

Although Justice Stevens was unable to convince the majority to accept his eighth amendment analysis in *Estelle*, two years later he wrote the Court's opinion in *Hutto v. Finney*.¹⁵⁵ In the *Hutto* litigation, overcrowding and other conditions of the Arkansas penal system were challenged.¹⁵⁶ The Supreme Court addressed the issue of whether the eighth amendment required that a 30-day limit be placed on the use of punitive isolation cells.¹⁵⁷ The *Hutto* Court upheld the time limitation imposed by the district court because of persuasive expert evidence which established that prolonged overcrowding had contributed to violence and vandalism.¹⁵⁸ Articulating a totality of conditions approach,¹⁵⁹ the Court declared that "a filthy overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months."¹⁶⁰ The proportionality and dignity of man tests were applied to penological evidence to find an eighth amendment violation.¹⁶¹ The Court gave great deference to the findings of the trial judge, relying on both his years of experience with the problem and his recognition of the proper limits of a federal court's authority to intervene in the operations of a state institution.¹⁶²

Outside the prison context, two other decisions illustrate the Burger Court's evolving, and generally consistent, interpretation of the eighth amendment. In *Gregg v. Georgia*,¹⁶³ the Court found Georgia's death penalty statute did not violate the clause. Five members of the Court agreed that "the basic concept underlying the eighth amendment is the dignity of man."¹⁶⁴ The joint opinion¹⁶⁵ reiterated the four tests of cruel and unusual punishment mentioned

¹⁵² *Id.*

¹⁵³ See note 147 *supra*.

¹⁵⁴ See note 148 *supra*.

¹⁵⁵ 437 U.S. 678 (1978).

¹⁵⁶ *Id.* at 680-84.

¹⁵⁷ *Id.* at 680. The other issue on appeal was whether the Department of Corrections should pay the attorney's fee award. *Id.* With respect to the isolation cells the Court noted that "[a]n average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' x 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell." *Id.* at 682. There were problems with infectious disease. *Id.* "[O]vercrowding led to persecution of the weaker prisoners." *Id.* at 684. Vandalism was rampant. *Id.* Guards "frequently resorted to physical violence," because of their inadequate numbers. *Id.* Stabbings and homosexual rape were also findings of the lower court. *Id.* at 681-82 n.3.

¹⁵⁸ *Id.* at 688.

¹⁵⁹ *Id.* at 687. The Court viewed the conditions as a "whole." *Id.*

¹⁶⁰ *Id.* at 686-87.

¹⁶¹ *Id.* at 685.

¹⁶² *Id.* at 688. Justice Rehnquist dissented from this aspect of the case because of the broad remedial powers used by the district court. *Id.* at 710 (Rehnquist, J., dissenting).

¹⁶³ 428 U.S. 153 (1976).

¹⁶⁴ *Id.* at 173 (joint opinion of Stewart, Powell and Stevens, JJ.), 230 (Brennan, J., dissenting), 240 (Marshall, J., dissenting).

¹⁶⁵ Powell and Stevens, JJ., joined in the opinion announced by Stewart, J.

in *Estelle v. Gamble*.¹⁶⁶ This opinion also noted that statutory punishments are presumptively valid¹⁶⁷ and codification is one measure of whether a constitutional violation exists.¹⁶⁸ Nevertheless, this opinion also declared that judicial review of such democratically chosen punishments was warranted since the eighth amendment was designed to protect individuals from legislative abuse of power.¹⁶⁹

The Court's eighth amendment analysis was further elucidated in *Ingraham v. Wright*.¹⁷⁰ In *Ingraham*, the Court held that the eighth amendment was inapplicable to public school disciplinary practices.¹⁷¹ The Court concluded that the clause was intended to protect only those citizens convicted of a crime.¹⁷² The majority stated that since school children, unlike inmates, are protected by public scrutiny as well as by the common law, their only constitutional protection from cruel punishments is the due process clause of the fifth and fourteenth amendments.¹⁷³ Thus, *Ingraham* reaffirmed that the eighth amendment carved out a special protection for a few citizens.

In sum, the Court before *Rhodes* had outlined an eighth amendment analysis applicable to prison overcrowding litigation. *Ingraham* made clear that the clause affords special protection only to incarcerated citizens convicted of a crime. *Gregg* reaffirmed the need for judicial review of state actions. With respect to the standard of review, *Hutto* sanctioned the use of the totality approach and *Estelle* articulated four applicable tests. Although the *Estelle* Court favored the contemporary norms of decency test and use of some subjective evidence, the *Hutto* decision turned upon the dignity of man test and objective penological evidence. *Gregg* reaffirmed the importance of focusing on the individual nature of the right through the dignity of man test.

A more recent Supreme Court decision, however, can be read as casting doubt on the Court's eighth amendment analysis relevant to prison overcrowding cases. In *Bell v. Wolfish*¹⁷⁴ the double-bunking of pre-trial detainees

¹⁶⁶ *Id.* at 172-73. See text at notes 143-46 *supra*. The opinion first stated that the "evolving standards of decency test" evaluates contemporary values based on objective indicia. *Id.* at 173. Since the "dignity of man" was beyond such norms, Justice Stewart reasoned, punishment cannot be excessive. *Id.* Excessiveness, in turn, Justice Stewart declared, is measured in the abstract by the "unnecessary and wanton infliction of pain" test, and the "proportionality" test. *Id.* Finally, the substantive limits ("universality") test could also be used to strike down legislation, under Justice Stewart's analysis. *Id.* at 174 n.10.

¹⁶⁷ *Id.* at 175.

¹⁶⁸ *Id.* at 179-80. The Court noted that since *Furman v. Georgia*, 408 U.S. 238 (1972), 35 states had passed new statutes providing for the death penalty in cases of murder. *Id.*

¹⁶⁹ *Id.* at 174 n.19 (citing *Furman v. Georgia*, 408 U.S. 238, 258-69 (1972) (Brennan, J., concurring); *Robinson v. California*, 370 U.S. 660 (1962); *Weems v. United States*, 217 U.S. 349, 371-73 (1910)).

¹⁷⁰ 430 U.S. 651 (1977).

¹⁷¹ *Id.* at 664.

¹⁷² *Id.* at 668-69.

¹⁷³ *Id.* at 669-71. Surprisingly, the Court stated in dictum that after incarceration the only applicable test of cruel and unusual punishment is whether there is "the unnecessary and wanton infliction of pain." *Id.* at 670 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

¹⁷⁴ 441 U.S. 520 (1979).

was at issue. Because the case did not involve convicts, the Court, following *Ingraham*, refused to apply its eighth amendment analysis, instead deciding the case under the due process clause of the fifth amendment.¹⁷⁵ The Court found that detainees would be deprived of due process if the conditions of confinement amounted to "punishment."¹⁷⁶ According to the majority, regulations imposed by prison officials arbitrarily or purposefully which did not further legitimate governmental interests would constitute punishment.¹⁷⁷ Concluding that the double-bunking did not constitute punishment, the Court noted that there is "no one man, one cell principle lurking in the Due Process Clause"¹⁷⁸ and that detainees enjoy at least the same constitutional protections due prisoners.¹⁷⁹ *Bell*, therefore, would appear to answer the question of whether inmates of overcrowded prisons can invoke the eighth amendment.

Yet *Bell* should not be read as controlling in eighth amendment prison overcrowding cases. The *Bell* Court's apparent departure from prior constitutional analysis of conditions of confinement exists because *Bell* involved a fifth amendment issue. The *Bell* Court relied on first¹⁸⁰ and fourteenth¹⁸¹ amendment precedent in evaluating pre-trial detainees' rights through a balancing test. Evidence of a due process injury was weighed against administrative necessity. Unlike *Bell*, *Estelle* and *Hutto* relied upon precedent derived from the historical development of the eighth amendment. The need for objective penological evidence in proving a punishment has reached the threshold of unconstitutional cruelty, therefore, remained unaltered by *Bell*.

Although *Bell* is not an eighth amendment case, its philosophical underpinnings have implications for future eighth amendment litigants. Despite stating that "there is no iron curtain drawn between the Constitution and the prisons of this country,"¹⁸² the *Bell* Court took a regressive, hands-off view towards prisoners' rights. Rather than adhere to the view that incarceration necessitates only the loss of rights incidental to confinement,¹⁸³ the Court reverted to its 1948 language in *Price v. Johnson* that incarceration entails the withdrawal of numerous privileges and rights.¹⁸⁴ The *Bell* majority stated that the operation of all correctional facilities is the province of the executive and legislative branches of government.¹⁸⁵ Moreover, the Court found that broad deference should be given to the practices of prison officials because of the need

¹⁷⁵ *Id.* at 535.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 539.

¹⁷⁸ *Id.* at 542.

¹⁷⁹ *Id.* at 545.

¹⁸⁰ *See, e.g., id.* at 547 (citing *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128-29 (1977); *Pell v. Procunier*, 417 U.S. 817, 822, 826 (1974); *Cruz v. Beto*, 405 U.S. 319, 321 (1971)).

¹⁸¹ *See, e.g., id.* at 547 (citing *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976)).

¹⁸² 441 U.S. at 545 (citing *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974)).

¹⁸³ *See* note 42 *supra*.

¹⁸⁴ 441 U.S. at 545-46 (1979). *See* note 33 *supra*.

¹⁸⁵ 441 U.S. at 548 and 547 n.29.

to ensure security.¹⁸⁶ Consistent with their rulings in *Estelle* and *Hutto*, however, Justice Marshall¹⁸⁷ and Justice Stevens,¹⁸⁸ in separate dissents, expressed concern that by so focusing on the subjective intentions of officials almost any punishment could be justified through the majority's analysis.

The evidence considered by the *Bell* Court could also mark a change in the Court's eighth amendment analysis. The use of evidence in *Bell* differed from that in *Estelle* and *Gamble*. The Court made a decision on the merits even though the trial court had not fully compiled the available evidence regarding the physical and psychological harms of double-bunking.¹⁸⁹ Justice Marshall¹⁹⁰ and Justice Stevens,¹⁹¹ therefore, dissented in the belief that such evidence was essential for a proper adjudication of this issue. Moreover, the Court stated "while the recommendations of . . . various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question."¹⁹² Yet in *Estelle v. Gamble* such standards were deemed essential in the evaluation of contemporary norms of decency.¹⁹³ Moreover, in *Hutto v. Finney* expert evidence was also critical in the Court's constitutional analysis.¹⁹⁴ Consistent with his opinion in *Hutto*, Justice Stevens dissented in *Bell*, and, wishing to apply an objective test, noted that the trial court found that viewed in totality "the living conditions are grossly short of minimal decency."¹⁹⁵ To the extent that *Bell* marks a return to the hands-off philosophy of federal courts towards prisoners' rights, and the abandonment of objective evidence as the most reliable indicator of contemporary norms of decency, the decision dramatically changes the Court's eighth amendment analysis.

Even if lower federal courts follow *Bell*'s admonition to back away from hearing prisoners' claims and to restrict the use of objective penological evidence, the unique nature of the jail in *Bell* should render the case distinguishable. The institution in *Bell* differed substantially from most prisons.¹⁹⁶ The jail facility was very progressive, having rooms without cell bars and little restriction on movement.¹⁹⁷ Also, nearly all detainees were

¹⁸⁶ *Id.* at 547 (citing *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977); *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974); *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

¹⁸⁷ *Id.* at 565 (Marshall, J., dissenting).

¹⁸⁸ *Id.* at 585 (Stevens, J., dissenting).

¹⁸⁹ 441 U.S. at 672 (Marshall, J., dissenting).

¹⁹⁰ *Id.* at 572 n.11 (Marshall, J., dissenting) (citing *Chapman v. Rhodes*, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977) as proof that a full record may dictate a different result).

¹⁹¹ *Id.* at 596-99 (Stevens, J., dissenting).

¹⁹² *Id.* at 543-44 n.27.

¹⁹³ See text at note 148 *supra*.

¹⁹⁴ See text at note 158 *supra*.

¹⁹⁵ 441 U.S. 598 n.31 (quoting *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 135 (S.D.N.Y. 1977) (Stevens, J., dissenting)).

¹⁹⁶ The Court expressly distinguished the institution in *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977). 441 U.S. at 543-44 n.27.

¹⁹⁷ 441 U.S. at 525, 543.

released within sixty days.¹⁹⁸ Conversely, many prisons¹⁹⁹ and jails are old, sordid buildings designed for long-term housing. Accordingly, the *Bell* majority acknowledged that in a different detainee case the number of people and the type and duration of confinement could constitute "punishment."²⁰⁰ This notion, that various factors of confinement are determinative of a constitutional violation, is consistent with the totality of conditions approach in *Hutto v. Finney*.²⁰¹ Courts employing the totality approach, therefore, should be able to distinguish the institution in *Bell* from less progressive facilities.

By 1981, then, the Burger Court had formulated discernable guidelines in its eighth amendment analysis for finding prison overcrowding unconstitutional. *Ingraham* made clear that in the classification as a "criminal" and the attending loss of freedom the clause provides a few citizens with the special guarantee of being free from cruel and unusual punishments. At the core of all the Court's eighth amendment decisions, such as *Gregg v. Georgia*, is the view that the clause safeguards these individuals from legislative abuses. Turning to the standard of review, *Hutto* sanctioned use of the totality of conditions approach in the first tier of inquiry. In the second tier of analysis, *Bell*, a fifth amendment case, did not impose a balancing test or require use of subjective evidence. Thus, the dignity of man and other tests of cruel and unusual punishment employed in *Hutto* and *Estelle* were not altered by *Bell*: proof of an eighth amendment injury, through expert penological opinion, must be set against an objective threshold of cruelty. Yet the hands-off view taken towards prisoners' rights in *Bell*'s dictum could justify a departure from eighth amendment analysis in future cases. Whether the historical development of the clause would continue unimpeded by *Bell*, to proscribe prison overcrowding as a cruel and unusual punishment, was the issue before the Court in *Rhodes v. Chapman*.

II. RHODES V. CHAPMAN

A. The Lower Federal Courts

The plaintiffs in *Rhodes v. Chapman* were inmates double-celled at Southern Ohio Correctional Facility (the Facility) in Lucasville, Ohio.²⁰² Because of the prison's overcrowded condition, the plaintiffs initiated a class action against the state officials responsible for prison administration.²⁰³ Their complaint alleged a violation of the eighth amendment²⁰⁴ and sought injunctive relief for non-temporary double-celling under 42 U.S.C. § 1983.²⁰⁵

The Facility was built in the early 1970's.²⁰⁶ A maximum security prison,

¹⁹⁸ *Id.* at 543.

¹⁹⁹ *Id.* at 562.

²⁰⁰ *Id.* at 542.

²⁰¹ See text at notes 159-60 *supra*.

²⁰² *Chapman v. Rhodes*, 434 F. Supp. 1007, 1007-08 (S.D. Ohio 1977).

²⁰³ *Id.* at 1008.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1022.

²⁰⁶ *Id.* at 1009.

sixty-seven percent of its prisoners were serving either first degree felony or life sentences.²⁰⁷ The district court labelled the institution "a first-class facility."²⁰⁸ The court determined that there were 1,620 nonmedical cells averaging approximately 63 square feet in floor space.²⁰⁹ Six hundred and sixty of these cells were inside cells and contained no windows.²¹⁰ Nine hundred and sixty of these cells were outside cells containing one window each.²¹¹ Three hundred and fifty of the 600 inside cells were single at the time of trial.²¹² Almost all of the 960 outside cells were doubled.²¹³ Holding 2,300 prisoners,²¹⁴ the Facility was at 138% capacity.²¹⁵ Nine hundred and sixty of the doubled cells housed inmates who were free to move up to ten hours a day.²¹⁶ Three hundred and twenty of the doubled cells housed inmates who were free to move only two to six hours a week.²¹⁷ The district court concluded that about 75% of the inmates who were double-celled could spend a considerable amount of their time beyond their cell's bars.²¹⁸

The district court also found that the institution's meals were adequate,²¹⁹ as were the ventilation system²²⁰ and the facilities for visitation.²²¹ The court found that violence had not increased out of proportion to the population²²² and that the inmate-guard ratio was acceptable.²²³ The plumbing, lighting and law library facilities were likewise found adequate.²²⁴ The court did find, however, that there were insufficient job opportunities for the prisoners.²²⁵ Consequently, many of those inmates with jobs worked only about one hour a day.²²⁶ In addition, the court determined that double-celling delayed schooling opportunities and interfered with studying.²²⁷ Medical and dental care were

²⁰⁷ *Id.* at 1011.

²⁰⁸ *Id.* at 1009. The Facility had a gymnasium, workshops, school rooms, day rooms, two chapels, a hospital ward, commissary, barber shop, library, outdoor recreation field, visitation area, tomato garden, and dining rooms. *Id.* at 1010-11.

²⁰⁹ *Id.* at 1011. Each cell contained a cabinet night stand, wall cabinet, wall shelf, lavatory with hot and cold water, mirror affixed to the wall, radio, heat and air vent near the ceiling and a lighting fixture. *Id.* at 1011-12. Also, each cell had a 36 by 80 inch bed. *Id.* at 1011. Doubled cells had a bunk bed attached to the wall over the floor bed. *Id.* at 1011-12.

²¹⁰ *Id.* These cells measured six feet by ten feet, six inches by nine feet high. *Id.*

²¹¹ *Id.* These cells measured six feet, six inches by ten feet, six inches by nine feet high. *Id.*

²¹² *Id.* at 1011.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 1020.

²¹⁶ *Id.* at 1013.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 1014.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 1015.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

found inadequate but no "indifference" to the needs of inmates was proven.²²⁸ Finally, the court found that counseling services were substantially denied to a number of inmates.²²⁹

After assessing the facts relevant to life at the Facility, the district court embarked on its eighth amendment analysis. The court noted that judicial restraint is not warranted with respect to state institutions when a federal court is faced with a constitutional violation.²³⁰ The court then took a progressive view of prisoners' rights in applying its standard of review.²³¹ In the first tier of inquiry, the court adopted the "totality of conditions" approach.²³² In the second tier of analysis, the court applied the "shock the conscience" and "evolving standards of decency" tests.²³³

The court ruled that the conditions of confinement at the Facility were cruel and unusual punishment for five reasons: the inmates' incarceration was "long-term;"²³⁴ the Facility was holding 38% more inmates than its design capacity;²³⁵ the cells were designed, built and rated to house one man each;²³⁶ most prisoners' time was spent in their cells with their cellmate;²³⁷ and the practice of double-celling at the Facility was not temporary.²³⁸ The court relied on various correctional standards in ruling that contemporary norms of decency required at least 50 square feet of living space per inmate and the Facility only provided 30-35 square feet per inmate to prisoners who were double-celled.²³⁹

After the district court's decision in 1977, the State of Ohio appealed to the Court of Appeals for the Sixth Circuit.²⁴⁰ The court of appeals affirmed the

²²⁸ *Id.* at 1016 (implicitly applying the standard for a violation established in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

²²⁹ 434 F. Supp. at 1016.

²³⁰ *Id.* at 1018 (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1973)).

²³¹ The court adopted the view of *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *writ dismissed*, 148 F.2d 278, *cert. denied*, 325 U.S. 889 (1945). See note 42 *supra*.

²³² 434 F. Supp. at 1019.

²³³ The language of the two-fold test questioned whether the punishment was "intolerant or shocking to the conscience, or barbaric or totally unreasonable in the light of ever changing modern conscience." *Id.*

²³⁴ *Id.* at 1020.

²³⁵ *Id.*

²³⁶ *Id.* at 1021.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* The court cited the standards of the American Correctional Institution (75 square feet), the National Sheriffs Association Handbook on Jail Architecture (1975) (70-80 square feet), the National Sheriffs Association Manual on Jail Administration (1970) (55 square feet), the National Council on Crime and Delinquency Model Act for the Protection of Rights of Prisoners (1972) (50 square feet), the Report of the Special Civilian Committee for the Study of the United States Army Confinement System (1970) (55 square feet). The decisions of *Gates v. Collier*, 423 F. Supp. 732, 743 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977), *Rodriguez v. Jimenez*, 409 F. Supp. 582, 586-87 (D.P.R., *aff'd*, 537 F.2d 1 (1st Cir. 1976) and 551 F.2d 877 (1st Cir. 1977), and *Pugh v. Locke*, 406 F. Supp. 318, 332 (M.D. Ala. 1976), *aff'd sub nom.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, *Alabama v. Pugh*, 438 U.S. 781 (1978) were also persuasive to the court.

²⁴⁰ *Chapman v. Rhodes*, Order No. 78-3365 (June 6, 1980), reprinted in 12 *Petitions and Briefs of the Supreme Court of the United States*, *Rhodes v. Chapman*, 25 (BNA No. 27).

lower court's decision,²⁴¹ stating in its order that the district court had properly used the totality of conditions approach.²⁴² The court also ruled that *Bell v. Wolfish*,²⁴³ decided after the district court's opinion, provided no authority to reverse the case since the Facility was factually distinct from the jail in *Bell*.²⁴⁴ The State appealed, again arguing that *Bell* required a reversal of *Rhodes* since the basic necessities of the inmates were provided for.²⁴⁵ The petition for certiorari to the Supreme Court was granted on November 3, 1980.²⁴⁶

B. The Court's Opinion

Given the diverse standards of review applied by lower courts in their eighth amendment analyses of overcrowding cases,²⁴⁷ the Supreme Court in *Rhodes v. Chapman*²⁴⁸ was confronted with the need to enumerate clear principles for evaluating conditions of confinement claims.²⁴⁹ Justice Powell, writing for the majority,²⁵⁰ first discussed the evolution of the eighth amendment from a narrow proscription on physically barbarous punishments to a broad prohibition on nonphysical punishments as well.²⁵¹ Citing *Estelle v. Gamble*²⁵² and *Hutto v. Finney*,²⁵³ Justice Powell then stated that prison conditions can be viewed "alone or in combination" when evaluating a claim of cruel and unusual punishment.²⁵⁴ Thus, the majority adopted the totality of conditions approach in the first tier of analysis.

Turning to the second tier, the Court articulated three applicable tests of a cruel and unusual punishment: whether the punishment is "grossly disproportionate to the severity of the crime;"²⁵⁵ involves "the unnecessary and wanton infliction of pain"²⁵⁶ (such as those "totally without penological justification");²⁵⁷ or deprives "inmates of the minimal civilized measure of

²⁴¹ 624 F.2d 1099 (1980).

²⁴² *Chapman v. Rhodes*, Order No. 78-3365 (June 6, 1980), reprinted in 12 *Petitions and Briefs of the Supreme Court of the United States*, *Rhodes v. Chapman*, 25 (BNA No. 27).

²⁴³ 441 U.S. 520 (1979). See text at notes 174-86 *supra*.

²⁴⁴ *Chapman v. Rhodes*, Order No. 78-3365 (June 6, 1980), reprinted in 12 *Petitions and Briefs of the Supreme Court of the United States*, *Rhodes v. Chapman*, 25 (BNA No. 27).

²⁴⁵ *Rhodes v. Chapman*, Petition for writ of certiorari at 8-11, reprinted in 12 *Petitions and Briefs of the Supreme Court of the United States*, *Rhodes v. Chapman*, 14-17 (BNA No. 27).

²⁴⁶ 101 S. Ct. 353 (1980).

²⁴⁷ See text and notes at notes 68-135 *supra*.

²⁴⁸ 101 S. Ct. 2392 (1981).

²⁴⁹ *Id.* at 2398.

²⁵⁰ Justice Powell was joined by Chief Justice Burger and Justices Stewart, White and Rehnquist.

²⁵¹ *Id.* at 2398-99.

²⁵² 429 U.S. 97 (1976). See text at note 139 *supra*.

²⁵³ 437 U.S. 678 (1978). See text and notes at notes 159-60 *supra*.

²⁵⁴ 101 S. Ct. at 2399 (relying on *Hutto v. Finney*, 437 U.S. 678 (1978) and *Estelle v. Gamble*, 429 U.S. 97 (1976)).

²⁵⁵ *Id.* at 2398 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Weems v. United States*, 217 U.S. 349 (1910)).

²⁵⁶ 101 S. Ct. at 2398 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)).

²⁵⁷ *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

life's necessities.''²⁵⁸ Implicitly applying this two-tier standard of review the Court held that no eighth amendment violation existed on the record before it.²⁵⁹

Specifically, the Court found that the delay of aids to rehabilitation, due to limited work and educational opportunity, did not inflict any pain upon the prisoners.²⁶⁰ Moreover, the five bases of the district court's holding were found insufficient to prove that unnecessary or wanton pain was inflicted or that the punishment was grossly disproportionate to the crimes committed.²⁶¹ In reaching this conclusion, the Court gave more weight to the "public attitude" as evidence of objective indicia of contemporary norms of decency,²⁶² than to the opinions of experts and standards of correctional agencies.

In dictum, the *Rhodes* majority stated that harsh or restrictive conditions of confinement are part of the punishment criminal offenders can justly receive since "the Constitution does not mandate comfortable prisons."²⁶³ Furthermore, the Court stated that the legislature and prison officials can properly weigh considerations affecting the adequacy of prisons.²⁶⁴ Because the majority considered state legislatures and prison administrators sensitive to the dictates of the Constitution,²⁶⁵ and to the problem of achieving the penal goals of punishing justly, deterring future crime, and ensuring rehabilitation,²⁶⁶ lower courts were cautioned not to be overzealous in granting relief to prisoners. The Court did state, however, that where aged, deplorable and sordid prisons are involved, federal courts should scrutinize eighth amendment claims.²⁶⁷

Justice Brennan, joined in his concurrence²⁶⁸ by Justice Blackmun²⁶⁹ and Justice Stevens, expressed concern that the majority's dictum might encourage federal courts to retreat from adjudicating prison condition cases.²⁷⁰ Tracing prior prison condition rulings of the federal courts, Justice Brennan concluded that "judicial intervention is *indispensable* if constitutional dictates — not to mention considerations of basic humanity — are to be observed in the prisons."²⁷¹ Justice Brennan viewed the role of the judiciary as critical in the

²⁵⁸ 101 S. Ct. at 2399. The Court noted that this violates "contemporary standard[s] of decency that [it] recognized in [*Estelle v.*] *Gamble*, 429 U.S., at 103-104." *Id.* The Court also noted that the substantive limit test of *Robinson v. California*, 370 U.S. 660 (1962) was not involved here. *Id.* at 2398 n.12.

²⁵⁹ *Id.* at 2400.

²⁶⁰ *Id.* at 2399.

²⁶¹ *Id.* at 2399-400.

²⁶² *Id.* at 2400 n.13.

²⁶³ *Id.* at 2400.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 2401-02.

²⁶⁶ *Id.* at 2402.

²⁶⁷ *Id.* at 2401.

²⁶⁸ *Id.* at 2402.

²⁶⁹ Justice Blackman also submitted a brief concurrence for the same reasons as Justice Brennan and found *Hutto v. Finney* persuasive authority. *Id.* at 2410. He concluded that the federal courts are an "available bastion against unconstitutional cruelty and neglect." *Id.*

²⁷⁰ *Id.* at 2402.

²⁷¹ *Id.* at 2402-03 (emphasis in original).

area of prisoners' rights because public apathy and the inability of inmates to wield political power rendered the political process unresponsive to prisoners' needs.²⁷² He then outlined an eighth amendment standard of review for prison overcrowding cases.²⁷³

In Justice Brennan's first level of inquiry, the effect of the totality of conditions upon the inmates is evaluated.²⁷⁴ Once the conditions of confinement are assessed, the court must then decide if such conditions survive a test of cruel and unusual punishment. Justice Brennan's inquiry at this second tier concerns whether the conditions comport with human dignity,²⁷⁵ based on a court's experience and its knowledge of contemporary standards.²⁷⁶ In such an analysis, Justice Brennan stated, courts must be receptive to evidence from studies and various experts²⁷⁷ and can compare the prison in question with others in the United States.²⁷⁸ Acknowledging that prison overcrowding and double-celling may at times result in serious harms to inmates,²⁷⁹ Justice Brennan nonetheless concluded that the record before the Court failed to establish that the conditions of confinement at the Facility violated constitutional norms.²⁸⁰

Justice Marshall, the sole dissenter,²⁸¹ reiterated his language in *Estelle* that the bedrock of the eighth amendment's proscription is the dignity of man.²⁸² He concluded that the totality of conditions at the Facility did not measure up to contemporary norms of decency.²⁸³ Justice Marshall stated that such norms are derived from correctional standards,²⁸⁴ expert testimony²⁸⁵ and legislative action.²⁸⁶ He disagreed with the majority's view that the apathy of the political process can yield discernible contemporary norms.²⁸⁷ He noted that the voters had not democratically chosen double-celling,²⁸⁸ and originally built the Facility for single-celling.²⁸⁹ Moreover, Justice Marshall contended

²⁷² *Id.* at 2404.

²⁷³ See note 417 *infra*.

²⁷⁴ 101 S. Ct. at 2407. Justice Brennan noted the use of the approach in *Hutto v. Finney*, 437 U.S. 678, 687 (1978). *Id.* at 2407 n.10.

²⁷⁵ *Id.* at 2406 (quoting *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring)).

²⁷⁶ *Id.* at 2407.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 2409.

²⁷⁹ *Id.* at 2403-04.

²⁸⁰ *Id.* at 2402.

²⁸¹ *Id.* at 2410.

²⁸² *Id.* at 2412 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

²⁸³ *Id.* at 2413.

²⁸⁴ *Id.* at 2411 n.4.

²⁸⁵ *Id.* at 2411. Justice Marshall stated that "[t]he conclusion of every expert who testified at trial and of every serious study of which I am aware is that a long-term inmate must have to himself, at the very least, 50 square feet of floor space . . . in order to avoid serious mental, emotional, and physical deterioration." *Id.* (footnote omitted).

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 2414.

²⁸⁸ *Id.* at 2411. Justice Marshall stated that: "No one argued at trial and no one has contended here that double celling was a legislative policy judgment." *Id.*

²⁸⁹ *Id.*

that the Constitution mandates that federal courts help alleviate overcrowded prison conditions that are harmful to inmate health.²⁹⁰ Concerned with the long-term impact of double-celling, Justice Marshall agreed with the Court's ruling in *Hutto v. Finney*²⁹¹ that deference should be given to the fact finder's conclusions.²⁹² Accordingly, he would have affirmed the finding of an eighth amendment violation.²⁹³

III. THE FUTURE OF EIGHTH AMENDMENT ANALYSIS

A. *The Implications of Rhodes v. Chapman*

The *Rhodes* decision is an unsatisfactory precedent for eighth amendment analysis. Essentially reverting to a hands-off philosophy, the basic tenet of the decision is that the federal judiciary should defer to local decisionmakers' policies. This philosophy, which substantially denigrates prisoners' right to be free from cruel and unusual punishment, is reflected in the standard of review employed. Specifically, the rhetoric of a totality approach in the first tier of the Court's analysis was not matched in reasoning. In addition, at the second tier the tests of cruel and unusual punishment chosen were either inappropriate for prison overcrowding cases or applied inconsistently with precedent. As a result, lower courts finding the power to intervene in future prison condition cases, despite the Court's admonition to retreat, will have to act without clear guidelines as to what constitutes cruel and unusual punishment.

In the first tier of the Court's eighth amendment analysis, the majority established that conditions of confinement can be evaluated "alone or in combination."²⁹⁴ This dual approach best ensures the functioning of the clause's guarantee since the effect upon the imprisoned is thoroughly evaluated.²⁹⁵ The Court, however, employed only a broad totality approach²⁹⁶ and found that the many positive aspects of life at the Facility offset the comparative problem of double-celling.²⁹⁷ The Court did not focus solely on the combined negative aspects of the prison as they affect some inmates, as did the *Hutto* Court.²⁹⁸ Nor did the majority examine overcrowding "alone." In effect, therefore, the factual evaluation was skewed to measure the life of the average prisoner, not that of the least fortunate ones. Thus, although the rhetoric of the first tier's dual approach was legitimate, its application was not.

The choice and application of the three major tests (four tests in total) in the second tier of the Court's eighth amendment analysis²⁹⁹ are also subject to criticism. To begin, the proportionality test has no useful application in the

²⁹⁰ *Id.* at 2414.

²⁹¹ 437 U.S. 678 (1978). See text at note 162 *supra*.

²⁹² 101 S. Ct. at 2413.

²⁹³ *Id.*

²⁹⁴ 101 S. Ct. at 2399.

²⁹⁵ See text and notes 67-87 *supra*.

²⁹⁶ See text at note 76 *supra*.

²⁹⁷ 101 S. Ct. at 2399-400.

²⁹⁸ See text at notes 159-60 *supra*.

²⁹⁹ See text at notes 255-58 *supra*.

context of overcrowded prisons. Both the lower courts³⁰⁰ and the Supreme Court in *Ingraham*³⁰¹ had indicated that this test is only useful where the degree, not the kind, of punishment is at issue. Also, this test is proper only where individualized punishment is questioned, not where a heterogeneous group of offenders are suing together.³⁰²

The pain test is also an unsatisfactory benchmark in prison overcrowding cases. The pain test works an injustice to the prisoner since it focuses on physical harm³⁰³ and prison security,³⁰⁴ not psychological harm and the individual. This test also accords an unjustified presumption to state rationales for inflicting pain.³⁰⁵ Moreover, given the Court's refusal to consider expert testimony and correctional standards as somewhat indicative of tolerable punishment,³⁰⁶ the pain test becomes a wholly subjective evaluation of prison officials' intentions.³⁰⁷ Not surprisingly, the amici curiae brief of twenty-nine states (and the Virgin Islands) under court order to rectify conditions in their prisons urged use of this test.³⁰⁸ The Court, therefore, may well have employed this test with an eye towards curtailing relief for prisoners.

Another test used by the Court, related to the pain benchmark, evaluates whether the punishment is "totally without penological justification."³⁰⁹ Although this test also involves the problems of focusing away from the individual's plight, according unwarranted deference to state rationalizations and encouraging judicial subjectivity in evidence evaluation,³¹⁰ the plaintiffs seemingly met this test on the evidence presented. The Court's articulation of proper purposes — justice, deterrence and rehabilitation³¹¹ — were not proven to be furthered by overcrowding the Facility. Indeed, in applying this purposive analysis lower courts in other cases have found an eighth amendment violation.³¹² The only state policy mentioned by the Court was prison security.³¹³ Even if this policy can be seen as congruent with the three enumerated penal purposes, how prison security might be furthered by confining more prisoners in a given amount of space was not explained. Lower courts repeatedly have found that overcrowding jeopardizes security.³¹⁴ The result the

³⁰⁰ See text at note 93 *supra*.

³⁰¹ See note 91 *supra*. Note that Justice Powell delivered the opinion of the Court in both *Rhodes* and *Ingraham*.

³⁰² See text and note at note 92 *supra*.

³⁰³ See text at notes 108-09 *supra*.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See text at note 262 *supra*.

³⁰⁷ See text at notes 108-09 *supra*; Hirschkop & Millemann, *The Unconstitutionality Of Prison Life*, 55 VA. L. REV. 795, 820 (1969).

³⁰⁸ Brief of Amicus Curiae at 6-20, reprinted in 12 *Petitions and Briefs of the Supreme Court of the United States*, *Rhodes v. Chapman*, 278-92 (BNA No. 27).

³⁰⁹ See note 257 *supra*.

³¹⁰ See text at notes 110-11 *supra*.

³¹¹ See text at note 266 *supra*.

³¹² See cases cited at note 110 *supra*.

³¹³ 101 S. Ct. at 2400 n.14.

³¹⁴ See, e.g., *Lareau v. Manson*, 507 F. Supp. 1177, 1181 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981); *Capps v. Atiyeh*, 495 F. Supp. 802, 812 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981).

Court reached can only be explained through an implied retribution theory of justice: overcrowded living conditions are a just dessert for criminal conduct. Even though such conditions inhibit rehabilitation,³¹⁵ this notion of justice provides *some* justification for the punishment. Reading the decision in this manner, lower courts could permit almost any penal practice to go unchecked.

The third major test employed by the *Rhodes* Court was the "minimum civilized measure of life's necessities" test.³¹⁶ Although this benchmark seemingly focuses on physical needs only, psychological evidence is also considered persuasive because this benchmark is analyzed like the contemporary norms of decency test.³¹⁷ The Court, however, applied this test contrary to eighth amendment precedent. Unlike the *Estelle* and *Hutto* decisions, the *Rhodes* majority did not give priority in proof to correctional standards and expert opinion,³¹⁸ nor did the Court defer to the lower court's discretion.³¹⁹ Rather, as in its death penalty cases,³²⁰ the Court found its own interpretation of public opinion the most influential evidence of what constitutes contemporary norms of decency.³²¹ Prison conditions and sentencing statutes, however, cannot be properly evaluated with the same evidence. The public is unaware of the nature of prison life.³²² No legislation has ever sanctioned double-celling.³²³ Indeed, the voters chose through their legislatures to design prisons that would not be overpopulated.³²⁴ Moreover, as the Court stated in *Ingraham v. Wright*,³²⁵ because prisoners lack a real voice in the political process,³²⁶ they are deserving of special protection as a defenseless minority. This is not to say that courts should impose their personal views upon the public. Rather, where the public has remained silent on an issue, such as prison overcrowding, which adversely affects a politically impotent group, the courts must find objective penological evidence more persuasive of contemporary norms of decency than their own evaluation of public opinion.

³¹⁵ See text and note at note 336 *infra*.

³¹⁶ See text and note at note 258 *supra*.

³¹⁷ See text at note 128 *supra*. The *Rhodes* Court said the amendment "reaches beyond the barbarous physical punishment at issue in the Court's earliest cases." 101 S. Ct. at 2398.

³¹⁸ See text at note 148 (*Estelle*) and at note 158 (*Hutto*) *supra*.

³¹⁹ See text at note 162 (*Hutto*) *supra*.

³²⁰ *Gregg v. Georgia*, 428 U.S. 153, 175 (1975) (joint opinion); *Coker v. Georgia*, 433 U.S. 584, 593 (1977) (plurality opinion).

³²¹ See text at note 262 *supra*.

³²² See Comment, *Confronting The Conditions Of Confinement: An Expanded Role For Courts In Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 381 (1977); Note, *Eighth Amendment Challenges to Conditions of Confinement: State Prison Reform by Federal Judicial Decree*, 18 WASHBURN L.J. 288, 290 (1979).

³²³ 101 S. Ct. at 2411 (Marshall, J., dissenting).

³²⁴ *Id.*

³²⁵ 430 U.S. 651 (1977). See text at notes 170-73 *supra*.

³²⁶ See note 47 and text at note 272 *supra*.

[T]here is no prisoners' lobby present in legislative halls to compete with powerful pressure groups seeking a share of the tax dollar. Again and again, it has been the lower federal courts which have felt compelled to intervene to assure that state officials are recognizing and implementing the basic constitutional rights of prisoners.

Johnson v. Levine, 450 F. Supp. 648 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978).

Had the Court evaluated expert opinion it would have found agreement that overcrowding causes serious physical and mental injury.³²⁷ The American Medical Association and the American Public Health Association both endorsed this opinion in their amicus curiae brief to the *Rhodes* Court.³²⁸ Moreover, shortly after the *Rhodes* decision a Department of Justice study added to the weight of this evidence.³²⁹ In 1980 the Court itself conceded that "overcrowding in prison . . . has been universally condemned by penologists."³³⁰

Lower courts relying upon expert opinion have concluded that overcrowding has caused tension and anxiety leading to violence,³³¹ riots,³³² the spread of contagious diseases,³³³ depression from illness leading to suicide,³³⁴ and disciplinary problems.³³⁵ Overcrowding has also been found to have

³²⁷ 101 S. Ct. at 2411 (Marshall, J., dissenting).

³²⁸ Brief of Amicus Curiae, American Medical Assoc. and American Public Health Assoc. at 9-25.

³²⁹ DEPARTMENT OF JUSTICE, THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR (1981).

³³⁰ *United States v. Bailey*, 444 U.S. 394, 415-16 n.11 (1980).

³³¹ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 101 (2d Cir. 1981), *aff'g in part* 507 F. Supp. 1177, 1190 (D. Conn. 1980); *Newman v. Alabama*, 559 F.2d 283, 287 (5th Cir. 1977), *aff'g* *Pugh v. Locke*, 406 F. Supp. 318, 324 (M.D. Ala. 1976), *cert. denied*, *Alabama v. Pugh*, 438 U.S. 915 (1978); *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977); *Costello v. Wainright*, 525 F.2d 1239, 1248 (5th Cir. 1976), *aff'g* 397 F. Supp. 20, 31 (M.D. Fla. 1975), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977); *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1280 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *West v. Lamb*, 497 F. Supp. 989, 993 (D. Nev. 1980); *Capps v. Atiyeh*, 495 F. Supp. 802, 811 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Nelson v. Collins*, 455 F. Supp. 727, 733 (D. Md.), *aff'd in part sub nom.*, *Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978); *Johnson v. Levine*, 450 F. Supp. 648, 655 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 976 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Anderson v. Redman*, 429 F. Supp. 1105, 1112 (D. Del. 1977); *Rodriguez v. Jimenez*, 409 F. Supp. 582, 587 (D.P.R.), *aff'd*, 537 F.2d 1 (1st Cir. 1976) and 551 F.2d 877 (1st Cir. 1977); *Hamilton v. Schiro*, 338 F. Supp. 1016, 1018 (E.D. La. 1970).

³³² See, e.g., *Battle v. Anderson*, 564 F.2d 388, 393 (10th Cir. 1977) (costing \$10 million plus lives). *Rodriguez v. Jimenez*, 409 F. Supp. 582, 587 (D.P.R.), *aff'd*, 537 F.2d 1 (1st Cir. 1976) and 551 F.2d 877 (1st Cir. 1977). See also Hart, *In Michigan, Officers Rebel, Then Inmates Riot*, 6 CORRECTIONS MAG. 53 (1981); *Wall Street Journal*, Aug. 18, 1981, at 1, col. 1.

³³³ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 108 (2d Cir. 1981) (risk), *aff'g* 507 F. Supp. 1177, 1181 (D. Conn. 1980); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1282 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Capps v. Atiyeh*, 495 F. Supp. 802, 811 (D. Or.), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Anderson v. Redman*, 429 F. Supp. 1105, 1113 (D. Del. 1977); *Hamilton v. Schiro*, 338 F. Supp. 1016, 1018 (E.D. La. 1970).

³³⁴ See, e.g., *Campbell v. Cauthron*, 623 F.2d 503, 506 (8th Cir. 1980); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1282 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980); *Capps v. Atiyeh*, 495 F. Supp. 802, 810 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Johnson v. Levine*, 450 F. Supp. 648, 655 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978); *Anderson v. Redman*, 429 F. Supp. 1105, 1112 (D. Del. 1977).

³³⁵ See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1282 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Capps v. Atiyeh*, 495 F. Supp. 802, 811 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Johnson v. Levine*, 450 F. Supp. 648, 655 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978).

retarded inmate progress in rehabilitation and educational programs,³³⁶ and increased psychiatric problems and commitments.³³⁷ Courts have also found overcrowding has reduced prisoners' privacy,³³⁸ visitation time,³³⁹ and recreational periods.³⁴⁰ In addition, deprivations of adequate health care,³⁴¹ in-

³³⁶ See, e.g., *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir.), *aff'g in part* 450 F. Supp. 648, 655 (D. Md. 1978); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1282 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Capps v. Atiyeh*, 495 F. Supp. 802, 811 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 978 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Pugh v. Locke*, 406 F. Supp. 318, 326 (M.D. Ala. 1976), *aff'd sub nom.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, *Alabama v. Pugh*, 438 U.S. 781 (1978); *Costello v. Wainright*, 397 F. Supp. 20, 32 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977).

³³⁷ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 101 (2d Cir. 1981), *aff'g in part* 507 F. Supp. 1177, 1192 (D. Conn. 1980); *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir.), *aff'g in part* 450 F. Supp. 648, 655 (D. Md. 1978); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1282 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (M.D. Mo. 1980); *Capps v. Atiyeh*, 495 F. Supp. 802, 812 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Adams v. Mathis*, 458 F. Supp. 302, 305 (M.D. Ala. 1978), *aff'd*, 614 F.2d 42 (5th Cir. 1980); *Anderson v. Redman*, 429 F. Supp. 1105, 1112 (D. Del. 1977).

³³⁸ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 101 (2d Cir. 1981); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1277 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Feliciano v. Barcelo*, 497 F. Supp. 14, 36 (D.P.R. 1979); *Capps v. Atiyeh*, 495 F. Supp. 802, 811 (D. Or.), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Anderson v. Redman*, 429 F. Supp. 1105, 1112 (D. Del. 1977); *Rodriguez v. Jimenez*, 409 F. Supp. 582, 589 (D.P.R.), *aff'd*, 537 F.2d 1 (1st Cir. 1976) and 551 F.2d 887 (1st Cir. 1977).

³³⁹ See, e.g., *Capps v. Atiyeh*, 495 F. Supp. 802, 811 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981).

³⁴⁰ See, e.g., *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir.), *aff'g in part* *Nelson v. Collins*, 455 F. Supp. 727, 732 (D. Md. 1978); *Lareau v. Manson*, 507 F. Supp. 1177, 1180 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96, 101 (2d Cir. 1981); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1279 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980); *Capps v. Atiyeh*, 495 F. Supp. 802, 811 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 978 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Anderson v. Redman*, 429 F. Supp. 1105, 1112 (D. Del. 1977); *Rodriguez v. Jimenez*, 409 F. Supp. 582, 589 (D.P.R.), *aff'd*, 537 F.2d 1 (1st Cir. 1976) and 551 F.2d 877 (1st Cir. 1977).

³⁴¹ See, e.g., *Costello v. Wainright*, 397 F. Supp. 20, 31 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239, 1247 (5th Cir.), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977): "The overwhelming evidence is that there is a direct and immediate correlation between severe overcrowding, as now exists in the Florida Prison System, and the deprivation of minimally adequate health care." *Id.* See also *Lareau v. Manson*, 651 F.2d 96, 101 (2d Cir. 1981), *aff'g in part* 507 F. Supp. 1177, 1180 (D. Conn. 1980); *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir. 1978); *Capps v. Atiyeh*, 495 F. Supp. 802, 810 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Anderson v. Redman*, 429 F. Supp. 1105, 1113 (D. Del. 1977); *Rodriguez v. Jimenez*, 409 F. Supp. 582, 588 (D.P.R.), *aff'd*, 537 F.2d 1 (1st Cir. 1976) and 551 F.2d 877 (1st Cir. 1977).

creased gastric illness,³⁴² sanitation problems³⁴³ and destructive noise levels,³⁴⁴ have all been attributed to overcrowding. Some courts have found proof of the potential harm of rioting persuasive.³⁴⁵ The *Rhodes* majority, however, did not find evidence of the potential harm of rioting important.³⁴⁶ Psychological evidence of the effects of overcrowding have helped courts to conclude that this punishment is "more painful and enduring than the stocks or the rack."³⁴⁷ Yet the *Rhodes* Court did not consider psychological evidence alone sufficient for an eighth amendment violation.³⁴⁸ Aside from medical and psychological studies, correctional standards both in the United States³⁴⁹ and abroad³⁵⁰ have also been considered important indicators of what experts find is tolerable punishment. This wealth of expert evidence, therefore, so critical to lower federal courts' prison overcrowding, eighth amendment analyses, was disregarded by the *Rhodes* majority. While objective penological evidence does not establish the constitutional rule, such data can shed light on whether the

³⁴² See, e.g., *Capps v. Atiyeh*, 495 F. Supp. 802, 810 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981).

³⁴³ See, e.g., *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir.), *aff'g in part* 450 F. Supp. 648, 657 (D. Md. 1978); *Lareau v. Manson*, 507 F. Supp. 1177, 1180 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1277 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *West v. Lamb*, 497 F. Supp. 989, 1000 (D. Nev. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 36 (D.P.R. 1979); *Anderson v. Redman*, 429 F. Supp. 1105, 1112 (D. Del. 1977); *Rodriguez v. Jimenez*, 409 F. Supp. 582, 588 (D.P.R.), *aff'd*, 537 F.2d 1 (1st Cir. 1976) and 551 F.2d 877 (1st Cir. 1977); *Pugh v. Locke*, 406 F. Supp. 318, 323 (M.D. Ala. 1976), *aff'd sub nom.*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, *Alabama v. Pugh*, 438 U.S. 781 (1978).

³⁴⁴ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 100 (2d Cir. 1981); *West v. Lamb*, 497 F. Supp. 989, 1000 (D. Nev. 1980); *Ramos v. Lamm*, 485 F. Supp. 122, 135 (D. Colo. 1980), *aff'd in part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); *Johnson v. Levine*, 450 F. Supp. 648, 655 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 961 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Anderson v. Redman*, 429 F. Supp. 1105, 1112 (D. Del. 1977).

³⁴⁵ See, e.g., *Lareau v. Manson*, 651 F.2d 96, 108 (2d Cir. 1981); *Burks v. Teasdale*, 603 F.2d 59, 63 (8th Cir. 1979); *West v. Lamb*, 497 F. Supp. 989, 993 (D. Nev. 1980); *Anderson v. Redman*, 429 F. Supp. 1105, 1127 (D. Del. 1977) ("A ticking time bomb"); *Costello v. Wainright*, 397 F. Supp. 20, 32 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam on other grounds*, 430 U.S. 325 (1977).

³⁴⁶ 101 S. Ct. at 2400 n.14.

³⁴⁷ *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 123 (D.D.C. 1976). Most courts finding a violation have found such evidence highly persuasive.

³⁴⁸ 101 S. Ct. at 2400 nn. 13 & 15.

³⁴⁹ See note 239 *supra*.

³⁵⁰ See, e.g., the United Nations Standard Minimum Rules for the Treatment of Prisons — Resolution 663c (LLIV) July 31, 1957 and 2076 (LXII) May 13, 1977 as cited and applied in cases at note 120 *supra*. Foreign studies indicate that overcrowding leads to individual injuries and institutional problems. For example, Japan's prisons are less violent than those in the United States and Great Britain at least in part because of space differentials. Yoshihide Ono, *The Present Condition of Administration of Security Affairs in Prisons and the Problems Encountered*, 91 KEISEI 12, 14-15 (June 1980). For an international tribunal's opinion suggesting that customary interna-

established rule has been violated.³⁵¹ Yet in *Rhodes* the majority ignored such expert evidence without any scrutiny of the methodology, substance or results of the studies the district court found persuasive.³⁵² Thus, instead of using objective sources of information to evaluate the eighth amendment claim, the Court infused its own notion of what the apathetic public opinion is.

All of the tests applied by the *Rhodes* Court share one conceptual flaw: the failure to focus on the dignity of the individual. The proportionality test measures whether a punishment seems excessive in relation to the crime. Both the pain and totally without penological justification tests focus on the state's justifications rather than on the plight of the individual. The decency test, as used by the Court, evaluates only public opinion. Although the "dignity of man" test is arguably incorporated in the pain standard, as suggested in *Gregg v. Georgia*,³⁵³ the Court's application of the pain test, with non-objective evidence, resulted in a reaffirmation of the status quo: the justifications of prison officials and the tacit approval by an apathetic public did not, according to the Court, render any pain of overcrowding unnecessary and wanton. Therefore, a majority of the Court may no longer view the eighth amendment as an evolving concept, responsive to the rights of the individual and safeguarded by judicial conscience.

That *Rhodes* signals the death knell of the dignity of man test is highlighted by Justice Rehnquist's recent opinion in *Atiyeh v. Capps*.³⁵⁴ In *Atiyeh*, Justice Rehnquist, acting as a single Justice, stayed a district court order to eliminate overcrowding at the Oregon State Penitentiary until *Rhodes* was decided.³⁵⁵ He declared that the "dignity of man" test was not the proper eighth amendment benchmark.³⁵⁶ He further stated that the state, bound by limited fiscal resources, may declare retribution an equally permissible goal of incarceration as rehabilitation.³⁵⁷ Despite the district court's finding that overcrowding caused serious physical and psychological harm,³⁵⁸ Justice Rehnquist found the conditions tolerable since prisoners cannot expect "a rose garden."³⁵⁹

tional law requires a limit to prison population see *Roberts (United States) v. United Mexican States*, 4 R. Int'l Arb. Awards 77 (General Claims Commission 1926). See note 120 *supra* for courts considering international standards.

³⁵¹ 101 S. Ct. at 2414 n.8 (Marshall, J., dissenting) (citing *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954)). Of course, the courts must evaluate the competence of experts and studies. *Id.*

³⁵² *Id.*

³⁵³ See note 166 *supra*.

³⁵⁴ 449 U.S. 1312 (1981).

³⁵⁵ *Id.* at 1318. Justice Rehnquist acted pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1976), which provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* at 1313.

³⁵⁶ 449 U.S. at 1315. Justice Rehnquist referred to this language as the dicta of a plurality opinion. *Id.*

³⁵⁷ *Id.* at 1314 (citing *Gregg v. Georgia*, 428 U.S. 153, 184, n.30 (1976) (joint opinion)).

³⁵⁸ See note 87 *supra*.

³⁵⁹ 449 U.S. at 1316:

I know nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by the most knowledgeable

Although he conceded that the conditions at the overcrowded prison in the *Hutto v. Finney* litigation violated the Constitution,³⁶⁰ he did not offer any guidelines for determining what other set of institutional ills would violate the eighth amendment. Justice Rehnquist also stated that three other Justices would support his interpretation of the Constitution.³⁶¹ Therefore, although all of the Justices sitting in *Rhodes* had adopted the dignity of man test in either *Estelle*³⁶² or *Hutto*,³⁶³ *Atiyeh* makes their failure to do so in *Rhodes* not so startling.

The restrictive view of prisoners' eighth amendment rights in *Atiyeh* is consistent with Justice Rehnquist's opinions in recent non-eighth amendment decisions.³⁶⁴ *Atiyeh* could be viewed, therefore, as an opinion presaging a new hands-off era of which Kelly Chapman and his fellow inmates were the first victims. Even though the *Rhodes* Court did not leave the purposes of punishment to legislative judgment,³⁶⁵ the concept of human dignity may disappear from future constructions of the eighth amendment. This concept, in part, had bridged the gap between contemporary norms and the goals of correctional agencies in the Court's prior eighth amendment, conditions of confinement rulings.³⁶⁶ This chasm will now grow wider, thereby stifling judicial relief for inmates of overcrowded prisons.

The near abdication of judicial review of prison conditions suggested by *Rhodes v. Chapman* indicates that the Court again is leaning towards the "slave of the state," retributionist view of prisoners and their rights.³⁶⁷ Despite the teachings of experience that state courts will not provide effective relief from cruel and unusual conditions of confinement,³⁶⁸ the hands-off rationalizations of federalism³⁶⁹ and deference to security-based prison decisions³⁷⁰ were both evident in the *Rhodes* opinion.

This viewpoint was reflected in the type and application of the standard of review employed. Although the result may differ where the state has not made a good faith effort to comply with the clause, as where it ignores the problems of

penal authorities to be likely to avoid confrontations, psychological depression, and the like. They have been convicted of a crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.

Id.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 1313.

³⁶² Burger, C.J., Brennan, Stewart, White, Powell, and Rehnquist, J.J., joined in the opinion delivered by Marshall, J.

³⁶³ Brennan, Stewart, Marshall, Blackmun, White, Powell, J.J., and Burger, C.J., joined in this part of the opinion delivered by Stevens, J.

³⁶⁴ See, e.g., *Parratt v. Taylor*, 101 S. Ct. 1908 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 443 U.S. 119 (1977).

³⁶⁵ See text and note 266 *supra*.

³⁶⁶ *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

³⁶⁷ Compare the dictum of the court found in text at notes 263-66 *supra* with the language of the restrictive view of prisoner rights at note 17 *supra*.

³⁶⁸ See note 45 *supra*; Gettinger, "Cruel and Unusual" Prisons, 4, CORRECTIONS MAG. 6-7 (1977).

³⁶⁹ Compare note 36 *supra* with the language of the opinion found at notes 264-66 *supra*.

³⁷⁰ Compare note 39 *supra* with the language of the opinion found at notes 264-66 *supra*.

an old, sordid facility, the standard of review employed by the Court does not compel that conclusion. The Court applied a balancing analysis more akin to its first³⁷¹ and fourteenth amendment³⁷² cases rather than its prior eighth amendment analysis in prison conditions cases.

At the turn of the century the Court had declared that the only limitations on the legislature are "constitutional ones, and what those are the judiciary must judge."³⁷³ Now the Court has reversed itself, deeming the apathetic local polity the interpreters of the limits of the powers of eighth amendment judicial review.³⁷⁴ *Rhodes v. Chapman* thus fulfills, in part, the dark prophecy that "if the mode of analysis adopted in today's decision were to be generally followed . . . ironically, prisoners would be left with a right of access to the court . . . but no substantive rights once they get there."³⁷⁵

B. *The Aftermath of Rhodes v. Chapman*

Although the *Rhodes* Court clearly adopted a hands-off policy towards state prisoners' rights, the decision failed to offer a workable framework for resolving prison overcrowding cases. Lower courts are left to decide such disputes on an *ad hoc* basis without clear guidelines for eighth amendment analysis. Patchwork relief for prisoners will result. Two recent federal court decisions illustrate this failure of the *Rhodes* Court:³⁷⁶ *Ruiz v. Estelle*³⁷⁷ and *Smith v. Fairman*.³⁷⁸

The initial commentators of the *Rhodes* decision believed the case was easily distinguishable from cases such as *Ruiz v. Estelle* where physical harm from overcrowding was well established.³⁷⁹ These commentators noted that because after *Bell v. Wolfish* some courts followed the dictum of the *Bell* Court and denied prisoner complaints³⁸⁰ while other courts felt the decision was confined

³⁷¹ See, e.g., *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128-29 (1977); *Pell v. Procunier*, 417 U.S. 817, 822, 826 (1974); *Cruz v. Beto*, 405 U.S. 319, 321 (1971).

³⁷² See, e.g., *Mechum v. Fano*, 427 U.S. 215, 228-29 (1976).

³⁷³ *Weems v. United States*, 217 U.S. 349, 379 (1910).

³⁷⁴ See text at notes 264-66 *supra*.

³⁷⁵ *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 147 (1977) (Marshall, J., dissenting) (citations omitted).

³⁷⁶ See also *Capps v. Atiyeh*, 495 F. Supp. 802 (D. Or. 1980), stayed, 449 U.S. 1312 (Rehnquist, Circuit Justice), vacated, 652 F.2d 823 (9th Cir. 1981). The decision of the district court was vacated and remanded because of *Rhodes* and *Wright v. Rushen* 642 F.2d 1129 (9th Cir. 1981), 652 F.2d at 823.

³⁷⁷ 503 F. Supp. 1265 (S.D. Tex. 1980), modified, 650 F.2d 555 (5th Cir. 1981).

³⁷⁸ 528 F. Supp. 186 (C.D. Ill. 1981).

³⁷⁹ *The Lucasville Ruling: The Constitution Does Not Mandate Comfortable Prisons*, 50, 51 (1981) 4 CORRECTIONS MAG. (citing *Ruiz v. Estelle*); Wall Street Journal, Aug. 18, 1981, at 1, col. 1.

³⁸⁰ See Robbins, *The Cry Of Wolfish In The Federal Courts: The Future Of Federal Judicial Intervention In Prison Administration*, 71 J. of CRIM. L. & CRIMINOLOGY 211, 220, 223 (1980) [hereinafter cited as *Wolfish*]. For a post-*Rhodes* decision applying *Bell*'s analysis to detainees and prisoners alike, see *Dawson v. Kendrick*, 527 F. Supp. 1252, 1296 (S.D.W. Va. 1981).

to its facts³⁸¹ *Rhodes* could also be distinguished in post-*Rhodes* overcrowding cases.³⁸² Indeed, the Court in *Bell*³⁸³ as well as lower federal courts³⁸⁴ had factually distinguished the Facility in *Rhodes* before the case reached the Supreme Court.

Yet in *Ruiz v. Estelle* the overcrowding injunction issued by the district court was stayed by the Court of Appeals for the Fifth Circuit because of the Supreme Court's decision in *Rhodes*.³⁸⁵ The court of appeals in *Ruiz* found the conditions in the Texas prison system similar to those at the Ohio Facility in *Rhodes*.³⁸⁶ A survey of the district court's findings, however, renders this conclusion incredulous. While the Ohio Facility was 138% over design capacity,³⁸⁷ the Texas prison system was at 200% capacity.³⁸⁸ The *Rhodes* case involved double-celling in cells approximately 63 square feet each³⁸⁹ but the Texas cells averaged 45 square feet³⁹⁰ and sometimes housed five prisoners each.³⁹¹ In addition, most inmates at the Ohio Facility involved in *Rhodes* enjoyed freedom of movement.³⁹² Conversely, in *Ruiz* the district court found that inmates in the Texas prison system spent most of the day in their cells.³⁹³ The *Ruiz* court also found that brutality, extortion, rape, the spread of disease, suicide, psychiatric commitments, disciplinary offenses and impairment of rehabilitation were a direct result of the overcrowding.³⁹⁴ In *Rhodes*, however, the harm to inmates was primarily emotional and mental.³⁹⁵ Although not expressly considered in *Rhodes*, the cost of compliance with the injunction was a factor in the *Ruiz* decision.³⁹⁶ The court of appeals in *Ruiz*, therefore, may have implicitly relied upon *Atiyeh v. Capps*: cost was a factor in the *Atiyeh* decision³⁹⁷ and the conditions in the Oregon prison were worse than those in *Rhodes*.³⁹⁸

³⁸¹ See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1287 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981); *Capps v. Atiyeh*, 495 F. Supp. 802, 814 (D. Or. 1980), *stayed*, 449 U.S. 1312 (Rehnquist, Circuit Justice), *vacated*, 652 F.2d 823 (9th Cir. 1981); *Ramos v. Lamm*, 485 F. Supp. 122, 155 n.22 (D. Colo. 1980), *aff'd in part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981). See also *Wolfish*, *supra* note 380, at 220.

³⁸² See sources cited at note 379 *supra*.

³⁸³ 441 U.S. at 543-44 n.27; 441 U.S. 572 n.11 (Marshall, J., dissenting).

³⁸⁴ *Lareau v. Manson*, 651 F.2d 96, 115 (2d Cir. 1981) (Friendly, J., concurring & dissenting); *Burks v. Walsh*, 461 F. Supp. 454, 482-83 (W.D. Mo. 1978); *West v. Edwards*, 439 F. Supp. 722, 724 n.1 (D.S.C. 1977).

³⁸⁵ *Ruiz v. Estelle*, 650 F.2d 555, 569 (5th Cir. 1981).

³⁸⁶ *Id.* at 567-69.

³⁸⁷ See text at note 215 *supra*.

³⁸⁸ 503 F. Supp. at 1285.

³⁸⁹ See text at note 209 *supra*.

³⁹⁰ 503 F. Supp. 1277 n.7.

³⁹¹ *Id.* at 1278.

³⁹² See text at note 218 *supra*.

³⁹³ 503 F. Supp. at 1279.

³⁹⁴ *Id.* at 1281-82.

³⁹⁵ See text at notes 219-29 *supra*.

³⁹⁶ 650 F.2d at 569.

³⁹⁷ See text at note 357 *supra*.

³⁹⁸ See note 87 *supra*.

Nevertheless, at least one court has distinguished *Rhodes* factually and found an eighth amendment violation. The Federal District Court for the Central District of Illinois ruled in *Smith v. Fairman*³⁹⁹ that the conditions of confinement at the Pontiac Correctional Center in Illinois constituted cruel and unusual punishment.⁴⁰⁰ Over 56% of the 1622 inmates were double-celled.⁴⁰¹ The doubled inmates spent eighteen to twenty hours a day in cells⁴⁰² that varied in size from 55.3 to 64.5 square feet.⁴⁰³ *Rhodes* was found not to control because Pontiac was built in 1871⁴⁰⁴ and therefore lacked adequate ventilation, sanitation, temperature control, quiet and windows in the cells.⁴⁰⁵ Moreover, the court distinguished the conditions because of the strain on all the prison's facilities resulting from the long hours of inmate cell time.⁴⁰⁶ The *Smith* court concluded that "[t]he conditions of the prison described in *Rhodes* seem almost the antithesis of the conditions at Pontiac."⁴⁰⁷

With respect to the standard of review employed in *Smith*, the district court relied on *Hutto* and *Estelle* in applying the totality of conditions approach⁴⁰⁸ and the shock the conscience, pain, decency and dignity of man tests.⁴⁰⁹ The court distinguished *Bell* factually and as a due process case.⁴¹⁰ Language in *Rhodes* that judicial intervention is warranted where an older, deplorable and sordid prison is at issue⁴¹¹ was central to the decision.⁴¹² The *Smith* court also found, based on expert opinion, that the three purposes of punishment enumerated in *Rhodes*⁴¹³ were not furthered by overcrowding and that the prison's population posed a threat to security.⁴¹⁴ Critical to the court's reasoning was a 1977 Illinois statute requiring 50 square feet of cell space per inmate.⁴¹⁵ The court characterized this law as embodying contemporary "civilized standards."⁴¹⁶ Thus, both penological evidence and legislative pronouncements supported the finding of an eighth amendment violation.

The future of prison overcrowding litigation may well remain as disjointed as the reasoning of the *Ruiz* and *Smith* decisions. Rather than rest on a sound analytical framework, decisions may turn only on clear factual distinctions be-

³⁹⁹ 528 F. Supp. 186 (C.D. Ill. 1981).

⁴⁰⁰ *Id.* at 201.

⁴⁰¹ *Id.* at 188.

⁴⁰² *Id.* at 201.

⁴⁰³ *Id.* at 188-89.

⁴⁰⁴ *Id.* at 187, 200.

⁴⁰⁵ *Id.* at 200-01.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 199-200.

⁴⁰⁸ *Id.* at 199.

⁴⁰⁹ *Id.* at 199-200.

⁴¹⁰ *Id.* at 199.

⁴¹¹ See text at note 247 *supra*.

⁴¹² 528 F. Supp. at 200.

⁴¹³ See text at note 266 *supra*.

⁴¹⁴ 528 F. Supp. at 200-01.

⁴¹⁵ *Id.* at 200-01 (citing ILL. REV. STAT. ch. 38, § 1003-7-3-3(b) (1977)).

⁴¹⁶ *Id.* at 200.

tween the case at bar and, on the one hand, *Estelle* and *Hutto*, and, on the other hand, *Rhodes* and *Bell*. For example, because *Bell*, *Atiyeh* and *Rhodes* all involved modern institutions, some courts may be more inclined to grant relief only where an old, sordid prison is involved.

Yet courts faced with analogous institutional conditions could reach different results depending on the eighth amendment analysis employed. The *Rhodes* opinion expressed a desire to retreat from hearing prisoners' complaints, but the majority did not draw a discernable line indicating under what circumstances overcrowding cases should be heard. Nor did the Court articulate a sound framework of review. For example, the *Rhodes* opinion does not answer questions such as what kind of review the judiciary should exercise when a state correctional regulation permits overcrowding, whether a broad totality approach should always be taken with respect to the conditions of confinement under challenge, or whether a state statute regarding minimum cell space should be dispositive of the contemporary norms of decency test. Lower courts appear free to apply their own interpretation of the Court's two-tiered standard of review without fear of review where no violation is found because of the *Rhodes* Court's admonition that federal courts should allow local decisionmakers to further penological goals. While deference should be accorded to the careful conclusions of the trier of fact, this deference should not entail giving district court judges the power to apply unsound law. Furthermore, because of the inconsistency of *Rhodes*' eighth amendment analysis with the Court's prior decisions, district court judges making a good faith finding of cruel and unusual punishment could have their decisions overturned unpredictably on appeal.

In short, future plaintiffs' chances of success depend less on the merits of their claim than on the willingness of a court to read facts in a favorable light and the resourcefulness of counsel to articulate persuasively a workable standard of review. Given the interests at stake, a more rational basis for deciding these cases is warranted. The needs of inmates, state officials and the public can only be served by establishing and consistently applying a coherent analytical framework for resolving prison overcrowding, eighth amendment disputes.

IV. PROPOSAL: THE EIGHTH AMENDMENT IN FORM AND SUBSTANCE

To ensure that a justiciable right remains inherent in the eighth amendment where conditions of confinement, such as overcrowding, are at issue, a coherent and substantive standard of review must be uniformly accepted. A workable standard consistent with the historical development of the clause is embodied in the following two-tiered analysis.⁴¹⁷

⁴¹⁷ See *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977):

Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of inmates and/or creates a

One: Where negative conditions of incarceration are viewed alone or combined, and

Two: a condition or a group of conditions significantly threaten or impair the physical, mental or emotional health and well-being of an inmate (and thereby create a probability of recidivism and future incarceration) as determined by the most authoritative objective evidence available, then such imprisonment violates societal notions of the intrinsic worth and dignity of human beings in violation of the eighth amendment.

In the first tier, only detrimental conditions of confinement would be analyzed through both the narrow focus and totality of the circumstances approaches to avoid prejudice in factual evaluation. Specifically, a narrow focus approach is employed to ensure close scrutiny of the problem of overcrowding. Those courts giving little weight to the sole problem of overcrowding would be forced under the totality approach to consider the prison's problems as a whole. Use of both approaches, therefore, ensures an equitable factual assessment of the conditions under challenge. The broad totality approach which balances negative and positive conditions of confinement is avoided since the least fortunate, not the average, inmates are of primary concern.

The second tier of this eighth amendment standard of review necessitates judicial sensitivity to the individual's human dignity, in light of society's mores. This sensitivity embraces the nontemporal nature of the right. Under this proposed standard of review, in the absence of legislative action, objective penological studies, expert testimony, and correctional standards would be more authoritative evidence of what affects an inmate's health and well-being than public opinion. If the body politic has spoken and sanctioned overcrowding, such action is a factor which the courts must consider in exercising judicial review. Mental and emotional harms would be relevant to whether overcrowding has affronted man's dignity. Tests which fail to focus on the individual are inapplicable to this inquiry. Although rehabilitation is not required by the Constitution,⁴¹⁸ the proposed standard incorporates the *Rhodes* Court's view that returning prisoners to society as useful citizens is a penal goal that can only be frustrated by inhumane conditions of confinement.⁴¹⁹

probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment.

Id. at 323. Compare 101 S. Ct. at 2407-08 (Brennan, J., concurring) where a two-tiered analysis is seemingly suggested with the first tier entailing expert testimony and studies, not the second tier. See text at notes 274-78 *supra*, where Justice Brennan's analysis is recharacterized to conform with the framework of review presented in this note.

⁴¹⁸ 101 S. Ct. at 2399.

⁴¹⁹ *Id.* See cases cited at note 336 *supra*. In the words of Chief Justice Burger: When you see a prison built a hundred years ago for 600 inmates and find it crowded with 1,500 men with almost no recreational facilities, obsolete vocational training, little or no counseling and two men living — or existing — in a cell 6 by 8

With this clear analytical model in place, appeals courts will be in a better position to confine their review properly to examining lower courts' legal standards, not left free to recharacterize their fact finding. Indeed, *Rhodes* can be viewed as an impermissible recharacterization by the Supreme Court of the district court's findings.⁴²⁰ Both courts used forms of the totality approach⁴²¹ and decency test.⁴²² Yet the application of facially different formulae to the evidence was where these courts departed. With a uniform standard, however, appellate courts would be forced to give great weight to carefully considered district court findings. Moreover, with aspects of the proposed standard already well formulated,⁴²³ the articulation of uniform results would soon be forthcoming.⁴²⁴ Accordingly, prison officials would be able to gauge the constitutionality of their conduct and inmates would be assured of a justiciable right.

The proposed standard is grounded in the notion that "persons are sent to prison as punishment, not *for* punishment."⁴²⁵ To the extent that the retribution theory of incarceration explicitly expressed in *Atiyeh*⁴²⁶ has been implicitly incorporated into *Rhodes*,⁴²⁷ the proposal will be rendered inapplicable or will be applied only to affirm the status quo.⁴²⁸ Yet such a result would be contrary to the principles embodied in the eighth amendment. The transformation of judicial review into a rubber stamping of local decisions, designed to cut costs or satisfy popular vindictiveness, would ignore some two hundred years of eighth amendment and constitutional interpretation. Courts must proceed with the understanding that "the constitutional prohibition against cruel and unusual punishment, like other provisions of the Bill of Rights, was designed expressly to protect the weak and powerless from the passions, or the reckless neglect, of the majority and its leaders."⁴²⁹ Citizens behind bars, albeit each convicted of a crime, must never be forsaken by those "oath-bound to defend the Constitution."⁴³⁰

feet, I think you will understand the paradox of why so many of them come back. Burger, *No Man is an Island*, 56 A.B.A.J. 325 (1970).

⁴²⁰ See 101 S. Ct. 2392, 2412-13 nn.6-7 (Marshall, J., dissenting).

⁴²¹ See text at notes 254 and 232 *supra*.

⁴²² See text at note 258 *supra* and note 233 *supra*.

⁴²³ See text and notes 68-135 *supra*.

⁴²⁴ Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

⁴²⁵ *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (emphasis in original).

⁴²⁶ See text at note 357 *supra*.

⁴²⁷ See text at note 315 *supra*.

⁴²⁸ Although the Court seems unwilling to find cruelty where incarceration is motivated by retribution, the Court would admit some limit to punishment exists. To find this threshold courts need not depart from applying a two-tiered framework of review. Rather, only the approach to the conditions of confinement and the test of cruel and unusual punishment will differ, as influenced by the philosophy taken towards prisoners' rights and federalism.

⁴²⁹ *Palmigiano v. Garrahy*, 443 F. Supp. 956, 978 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980).

⁴³⁰ *Trop v. Dulles*, 356 U.S. 86, 103 (1958).

V. CONCLUSION

The eighth amendment evolved from a narrow proscription on physically barbarous cruelties to a broad prohibition on any form of criminal punishment that affronts the dignity of man. Essential to the evolution of the clause was the casting aside of the "hands-off" doctrine to allow for increased judicial review of state prison conditions. As a result, in the 1970's federal courts evaluated the constitutionality of prison overcrowding. These decisions, however, resulted in a plethora of standards of review and no uniform standard emerged. In *Rhodes v. Chapman* the United States Supreme Court faced the prison overcrowding issue for the first time. Yet the *Rhodes* majority also failed to articulate a clear and workable eighth amendment standard, derived from prior Court decisions. The Court implicitly reverted to a retribution theory of punishment that sanctions long-term psychological suffering. In doing so, the *Rhodes* decision departed from prior Supreme Court condition of confinement and eighth amendment cases. Penological evidence was given insufficient weight in the Court's decision. The *Rhodes* majority abandoned the "dignity of man" as a relevant moral precept. Thus, the decision marks a retreat from historically-developed principles but does not furnish a new, workable model. Absent a viable standard of review, prisoners in overcrowded institutions will be afforded haphazard relief, at best.

Prior eighth amendment decisions, of both the lower federal courts and the Court itself aid in the formulation of sound guidelines. A two-tiered framework can be discerned from these decisions. What remains is the insertion of the components of a uniform standard of review reflecting a consistent judicial philosophy towards prisoners' rights. This note suggests use of the totality of conditions approach in the first tier, and the dignity of man test in the second tier. This standard is sensitive to the individual nature of the eighth amendment's guarantee and responsive to the needs of prisoners. Objective penological evidence must be considered. Judicial experience must be brought to bear on each case to produce uniform results and meet the expectations of state officials, inmates and the public alike. Void of such an historically-based, constitutional analysis, the right to be free from cruel and unusual punishments may well be a hollow promise.

ERIC G. WOODBURY