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NOTES

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

A record number of adult felons are currently housed in American penal institutions, largely because of public reaction to the rising incidence of crime. 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. This overcrowding often causes serious institutional problems, such as rampant violence, as well as severe individual injuries, such as mental and emotional maladies leading to psychiatric commitment or suicide. State inmates have argued that prison overcrowding inflicts a cruel and unusual punishment in violation of the eighth amendment. In Rhodes v. Chapman this constitutional

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.
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. This overcrowding was proved to have caused primarily psychological harms. 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.

This note discusses the Eighth Amendment analysis relevant to prison overcrowding cases generally, and the importance of *Rhodes* to future Eighth Amendment litigation. 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.

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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. This provision became the language of the eighth amendment to the United States Constitution. 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” punishments that existed in Stuart England or were unknown at common law. This restrictive interpretation of the amendment comported with early American society’s view that prisoners were slaves of the state possessing no justiciable rights. Only the most brutal of punishments, such as pillory, could be redressed by federal courts.

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. 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].


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 375-77 (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.

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

In *Weems v. United States*, 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. *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. 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.” 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. The scope of the clause, the Court concluded, must evolve with enlightened public opinion to ensure a humane system of justice.

Consistent with the *Weems* decision, the Court in *Trop v. Dulles* 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. 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.” Thus, the Court reaffirmed that, at least in sentencing cases,

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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.


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 Trap indicated that judicial review would be exercised to check legislative abuse in the selection of punishments. The Weems standard of review evaluated whether the punishment was justly proportioned to the gravity of the crime committed. The Trap standard of review focused on whether the punishment comported with man’s dignity based on evolving norms of decency. Both the Weems and Trap 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 Trap 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, the courts, except in extreme cases, 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, had several justifications. The principles of federalism, when dealing with state prisoners, and separation of powers were routinely invoked.

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32 The legislature was said to lack “unrestrained power” to punish. Weems v. United States, 217 U.S. at 381. Accord, Trap 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 (9th 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. Peppersack, 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 cases and unable to fashion remedies that would not upset institutional discipline and security. Finally, these courts feared that allowing prisoners effective access to the courts would open a floodgate of litigation. Even those plaintiffs who succeeded in articulating a substantive claim often faced a choice of narrowly tailored remedies.

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

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.


"We incline to the proposition that to allow such actions would be prejudicial to the proper maintenance of discipline." Golub v. Krimsky, 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).


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

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

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

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46 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.


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

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. Moreover, as


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 Millmann, supra note 47, at 40.


See, e.g., Cardarella & 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.


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, the initial boom in litigation soon quieted. 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. The application of other federal remedies for state prisoners also was broadened.

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. 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 

Trap.

For example, prison disciplinary measures entailing both physical and psychological injury, such as strip cell confinement, were ruled violative of the clause. Nonphysical punishments alone, such as loss of parole, were also ruled unconstitutional. The courts,


54 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).

55 See note 45 supra.


57 [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).

58 "[T]he 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.


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. In the 1970's, however, federal courts actively protected the right of inmates to certain minimal conditions of incarceration mandated by the eighth amendment. When *Rhodes v. Chapman* was decided, some twenty-three state prisons were under court order resulting from unconstitutional prison conditions which included overcrowding. 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, every such decision lends itself to this analysis. The

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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 Penal 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.

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.

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


\(^{69}\) 547 F.2d 1206 (5th Cir. 1977).

\(^{70}\) Id. at 1211.


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 approach in cases such as *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); *Costello v. Wainwright*, 397 F. Supp. 20, 33 (M.D. Fla. 1975), aff'd, 525 F.2d 1239 (5th Cir.); *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).

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].


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.


83 *Id.* at 688.


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


80 Id. at 1132-33.

81 Id. at 1133-34.
approach in the Supreme Court’s decision in *Bell v. Wolfish*\(^2\) 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.\(^3\) The *Wright* court, therefore, adopted a narrow focus approach to circumscribe judicial involvement with state prisons.\(^4\)

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.’”\(^5\) Other courts have closely evaluated various deficiencies in the basic necessity of “‘shelter,’” such as overcrowding, poor lighting, sanitation and ventilation, and fire hazards.\(^6\) 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.\(^7\) 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.

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\(^2\) 441 U.S. 520 (1979).

\(^3\) Id. at 562.

\(^4\) 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).


Overpopulation at these facilities has had a negative effect on nearly every aspect of the inmates’ lives. . . . [It] 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 of what constitutes cruel and unusual punishment; or, in any manner, is cruel and unusual.

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

[The rehabilitation efforts . . . also have been hampered. . . . Overcrowding 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. . . .

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

Overcrowding 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).


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.

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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, due process detainee overcrowding, and first amendment cases. In Jones v. North Carolina Prisoners' Labor Union, 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. 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.

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. 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." Yet commentators believe that prison officials' explanations for challenged practices have been to easily accepted by the courts. Second, consideration of state interests confers a near presumption of validity on any purported justification for overcrowding. Yet such a presumption is unwarranted since overcrowding is usually the product of apathy or poor planning, 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).

98 Id. at 132.
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).
102 Robbins & Buser, supra note 93, at 905 (citing Kaufman, Prison: The Judge's Dilemma, 41 Fordham L. Rev. 495 (1973)).
103 Id.
real basis for explanation. Moreover, because studies reveal that prison personnel are poorly trained and educated, 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. Thus, courts are likely to defer to proffered explanations.

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." 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. 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." This benchmark implies that a punishment may lack a complete justification yet still

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.
pass constitutional muster. Accordingly, courts applying this test have granted relief only when confronted with gross overcrowding problems. 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. Derived from *Trop v. Dulles*, 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. Nevertheless, what constitutes proper evidence, under the decency test in the context of prison conditions seems well settled. In *Estelle v. Gamble*, where failure to

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

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

Recently, some courts have found correctional standards too inflexible to establish contemporary norms of decency in unique prison settings. 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* 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. This method probably stems from the Supreme Court’s dictum in *Bell v. Wolfish* 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. Nevertheless, the

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116 Id. at 104.
117 Id. at 103-04 & n.8.
123 Id. at 814.
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 prisoner, 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


\(^{130}\) Robbins, supra note 73, at 554; Robbins & Buser, supra note 93, at 902-03.
shocks the conscience is highly subjective.\textsuperscript{131} Prison officials cannot readily adjust their conduct to conform to what a few judges may consider shocking.\textsuperscript{132}

\section*{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{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 punishment are applied.

\begin{itemize}
\item \textsuperscript{132} Robbins, \textit{supra} note 73, at 554; Robbins & Buser, \textit{supra} note 93, at 903 (citing Kaufman, \textit{Prisons: The Judge's Dilemma}, 41 FORDHAM L. REV. 495, 508 (1973)).
\item \textsuperscript{134} See generally Furman v. Georgia, 408 U.S. 238, 257-306 (1972) (Brennan, J., concurring).
\item \textsuperscript{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)).
\end{itemize}
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, 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.

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

In *Estelle*, Justice Stevens vehemently dissented because of his belief that the eighth amendment entails minimum objective standards of decency. He reasoned that the character of the punishment is at issue in eighth amendment cases, not the motivation of prison officials. 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

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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).


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)).


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. 666, 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. Nevertheless, the *Estelle* Court’s reliance on legislation and administrative agency standards 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*. In the *Hutto* litigation, overcrowding and other conditions of the Arkansas penal system were challenged. 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. 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. Articulating a totality of conditions approach, 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.” The proportionality and dignity of man tests were applied to penological evidence to find an eighth amendment violation. 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.

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*, 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.” The joint opinion reiterated the four tests of cruel and unusual punishment mentioned

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152 Id.
153 See note 147 supra.
154 See note 148 supra.
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. “Overcrowding 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. Stablings 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).
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.* This opinion also noted that statutory punishments are presumptively valid and codification is one measure of whether a constitutional violation exists. 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.

The Court's eighth amendment analysis was further elucidated in *Ingraham v. Wright.* In *Ingraham,* the Court held that the eighth amendment was inapplicable to public school disciplinary practices. The Court concluded that the clause was intended to protect only those citizens convicted of a crime. 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. 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* the double-bunking of pre-trial detainees

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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)).
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)).
was at issue. Because the case did not involve convicts, the Court, following In-
graham, refused to apply its eighth amendment analysis, instead deciding the
case under the due process clause of the fifth amendment. The Court found
that detainees would be deprived of due process if the conditions of confine-
ment amounted to "punishment." According to the majority, regulations
imposed by prison officials arbitrarily or purposefully which did not further
legitimate governmental interests would constitute punishment. 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" and
that detainees enjoy at least the same constitutional protections due

Yet Bell should not be read as controlling in eighth amendment prison
overcrowding cases. The Bell Court's apparent departure from prior constitu-
tional analysis of conditions of confinement exists because Bell involved a fifth
amendment issue. The Bell Court relied on first and fourteenth 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 un-
constitutional cruelty, therefore, remained unaltered by Bell.

Although Bell is not an eighth amendment case, its philosophical under-
pinnings 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," 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, the Court
reverted to its 1948 language in Price v. Johnson that incarceration entails the
withdrawal of numerous privileges and rights. The Bell majority stated that
the operation of all correctional facilities is the province of the executive and
legislative branches of government. Moreover, the Court found that broad
defereence should be given to the practices of prison officials because of the need
to ensure security. Consistent with their rulings in *Estelle* and *Hutto*, however, Justice Marshall and Justice Stevens, 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. Justice Marshall and Justice Stevens, 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." Yet in *Estelle v. Gamble* such standards were deemed essential in the evaluation of contemporary norms of decency. Moreover, in *Hutto v. Finney* expert evidence was also critical in the Court's constitutional analysis. 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." 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. The jail facility was very progressive, having rooms without cell bars and little restriction on movement. Also, nearly all detainees were

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187 Id. at 565 (Marshall, J., dissenting).
188 Id. at 585 (Stevens, J., dissenting).
189 441 U.S. at 672 (Marshall, 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.
197 441 U.S. at 525, 543.
released within sixty days. Conversely, many prisons 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." 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. 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. Because of the prison's overcrowded condition, the plaintiffs initiated a class action against the state officials responsible for prison administration. Their complaint alleged a violation of the eighth amendment and sought injunctive relief for non-temporary double-celling under 42 U.S.C. § 1983.

The Facility was built in the early 1970's. A maximum security prison,
sixty-seven percent of its prisoners were serving either first degree felony or life sentences. The district court labelled the institution "a first-class facility." The court determined that there were 1,620 nonmedical cells averaging approximately 63 square feet in floor space. Six hundred and sixty of these cells were inside cells and contained no windows. Nine hundred and sixty of these cells were outside cells containing one window each. Three hundred and fifty of the 600 inside cells were single at the time of trial. Almost all of the 960 outside cells were doubled. Holding 2,300 prisoners, the Facility was at 138% capacity. Nine hundred and sixty of the doubled cells housed inmates who were free to move up to ten hours a day. Three hundred and twenty of the doubled cells housed inmates who were free to move only two to six hours a week. 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.

The district court also found that the institution's meals were adequate, as were the ventilation system and the facilities for visitation. The court found that violence had not increased out of proportion to the population and that the inmate-guard ratio was acceptable. The plumbing, lighting and law library facilities were likewise found adequate. The court did find, however, that there were insufficient job opportunities for the prisoners. Consequently, many of those inmates with jobs worked only about one hour a day. In addition, the court determined that double-celling delayed schooling opportunities and interfered with studying. 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.
found inadequate but no "indifference" to the needs of inmates was proven.\textsuperscript{228} Finally, the court found that counseling services were substantially denied to a number of inmates.\textsuperscript{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.\textsuperscript{230} The court then took a progressive view of prisoners' rights in applying its standard of review.\textsuperscript{231} In the first tier of inquiry, the court adopted the "totality of conditions" approach.\textsuperscript{232} In the second tier of analysis, the court applied the "shock the conscience" and "evolving standards of decency" tests.\textsuperscript{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;"\textsuperscript{234} the Facility was holding 38% more inmates than its design capacity;\textsuperscript{235} the cells were designed, built and rated to house one man each;\textsuperscript{236} most prisoners' time was spent in their cells with their cellmate;\textsuperscript{237} and the practice of double-celling at the Facility was not temporary.\textsuperscript{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.\textsuperscript{239}

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

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

\textsuperscript{229} Id. at 1018 (quoting Procunier v. Martinez, 416 U.S. 396, 404-05 (1974)).


\textsuperscript{231} Id. at 1019.

\textsuperscript{232} 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.

\textsuperscript{233} Id. at 1020.

\textsuperscript{234} Id.

\textsuperscript{235} Id. at 1021.

\textsuperscript{236} Id.

\textsuperscript{237} Id.


\textsuperscript{240} Chapman v. Rhodes, Order No. 78-3365 (June 6, 1980), \textit{reprinted} in 12 \textit{Petitions and Briefs of the Supreme Court of the United States}, Rhodes v. Chapman, 25 (BNA No. 27).
lower court’s decision,\textsuperscript{241} stating in its order that the district court had properly used the totality of conditions approach.\textsuperscript{242} The court also ruled that \textit{Bell v. Wolfish},\textsuperscript{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 \textit{Bell}.\textsuperscript{244} The State appealed, again arguing that \textit{Bell} required a reversal of \textit{Rhodes} since the basic necessities of the inmates were provided for.\textsuperscript{245} The petition for certiorari to the Supreme Court was granted on November 3, 1980.\textsuperscript{246}

\textbf{B. The Court’s Opinion}

Given the diverse standards of review applied by lower courts in their eighth amendment analyses of overcrowding cases,\textsuperscript{247} the Supreme Court in \textit{Rhodes v. Chapman}\textsuperscript{248} was confronted with the need to enumerate clear principles for evaluating conditions of confinement claims.\textsuperscript{249} Justice Powell, writing for the majority,\textsuperscript{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.\textsuperscript{251} Citing \textit{Estelle v. Gamble}\textsuperscript{252} and \textit{Hutto v. Finney},\textsuperscript{253} Justice Powell then stated that prison conditions can be viewed “alone or in combination” when evaluating a claim of cruel and unusual punishment.\textsuperscript{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;”\textsuperscript{255} involves “the unnecessary and wanton infliction of pain”\textsuperscript{256} (such as those “totally without penological justification’’);\textsuperscript{257} or deprives “inmates of the minimal civilized measure of

\textsuperscript{241} 624 F.2d 1099 (1980).
\textsuperscript{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).
\textsuperscript{243} 441 U.S. 520 (1979). See text at notes 174-86 supra.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{246} 101 S. Ct. 353 (1980).
\textsuperscript{247} See text and notes at notes 68-135 supra.
\textsuperscript{248} 101 S. Ct. 2392 (1981).
\textsuperscript{249} Id. at 2398.
\textsuperscript{250} Justice Powell was joined by Chief Justice Burger and Justices Stewart, White and Rehnquist.
\textsuperscript{251} Id. at 2398-99.
\textsuperscript{252} 429 U.S. 97 (1976). See text at note 139 supra.
\textsuperscript{253} 437 U.S. 678 (1978). See text and notes at notes 159-60 supra.
\textsuperscript{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)).
\textsuperscript{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).
\textsuperscript{256} 101 S. Ct. at 2398 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion)).
\textsuperscript{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."" Implicitly applying this two-tier standard of review the Court held that no eighth amendment violation existed on the record before it.\textsuperscript{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.\textsuperscript{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.\textsuperscript{261} In reaching this conclusion, the Court gave more weight to the "public attitude" as evidence of objective indicia of contemporary norms of decency,\textsuperscript{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."\textsuperscript{263} Furthermore, the Court stated that the legislature and prison officials can properly weigh considerations affecting the adequacy of prisons.\textsuperscript{264} Because the majority considered state legislatures and prison administrators sensitive to the dictates of the Constitution,\textsuperscript{265} and to the problem of achieving the penal goals of punishing justly, deterring future crime, and ensuring rehabilitation,\textsuperscript{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.\textsuperscript{267}

Justice Brennan, joined in his concurrence\textsuperscript{268} by Justice Blackmun\textsuperscript{269} and Justice Stevens, expressed concern that the majority's dictum might encourage federal courts to retreat from adjudicating prison condition cases.\textsuperscript{270} Tracing prior prison condition rulings of the federal courts, Justice Brennan concluded that "judicial intervention is \textit{indispensable} if constitutional dictates — not to mention considerations of basic humanity — are to be observed in the prisons."\textsuperscript{271} Justice Brennan viewed the role of the judiciary as critical in the

\textsuperscript{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." \textit{Id.} The Court also noted that the substantive limit test of Robinson v. California, 370 U.S. 660 (1962) was not involved here. \textit{Id.} at 2398 n.12.

\textsuperscript{259} \textit{Id.} at 2400.

\textsuperscript{260} \textit{Id.} at 2399.

\textsuperscript{261} \textit{Id.} at 2399-400.

\textsuperscript{262} \textit{Id.} at 2400 n.13.

\textsuperscript{263} \textit{Id.} at 2400.

\textsuperscript{264} \textit{Id.}

\textsuperscript{265} \textit{Id.} at 2401-02.

\textsuperscript{266} \textit{Id.} at 2402.

\textsuperscript{267} \textit{Id.} at 2401.

\textsuperscript{268} \textit{Id.} at 2402.

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

\textsuperscript{270} \textit{Id.} at 2402.

\textsuperscript{271} \textit{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 experts 277 and can compare the prison in question with others in the United States. 278 Acknowledging that prison overcrowding and double-ceiling 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 testimony 285 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-ceiling, 288 and originally built the Facility for single-ceiling. 289 Moreover, Justice Marshall contended

272 Id. at 2404.
273 See note 417 infra.
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 ceiling 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. Concerned with the long-term impact of double-ceiling, Justice Marshall agreed with the Court’s ruling in *Hutto v. Finney* that deference should be given to the fact finder’s conclusions. Accordingly, he would have affirmed the finding of an eighth amendment violation.

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.” This dual approach best ensures the functioning of the clause’s guarantee since the effect upon the imprisoned is thoroughly evaluated. The Court, however, employed only a broad totality approach and found that the many positive aspects of life at the Facility offset the comparative problem of double-ceiling. The Court did not focus solely on the combined negative aspects of the prison as they affect some inmates, as did the *Hutto* Court. 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 analysis are also subject to criticism. To begin, the proportionality test has no useful application in the

290 Id. at 2414.
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 courts \(^{300}\) 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 harm\(^{303}\) 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 rehabilitation\(^{311}\) — were not proven to be furthered by overcrowding the Facility. Indeed, in applying this purposeful 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

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500 See text at note 93 supra.
501 See note 91 supra. Note that Justice Powell delivered the opinion of the Court in both *Rhodes* and *Ingraham*.
502 See text and note at note 92 supra.
503 See text at notes 108-09 supra.
504 Id.
505 See text at note 262 supra.
506 Id.
508 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).
509 See note 257 supra.
510 See text at notes 110-11 supra.
511 See text at note 266 supra.
512 See cases cited at note 110 supra.
513 101 S. Ct. at 2400 n.14.
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,\(^\text{315}\) 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.\(^\text{316}\) 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.\(^\text{317}\) 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,\(^\text{318}\) nor did the Court defer to the lower court's discretion.\(^\text{319}\) Rather, as in its death penalty cases,\(^\text{320}\) the Court found its own interpretation of public opinion the most influential evidence of what constitutes contemporary norms of decency.\(^\text{321}\) Prison conditions and sentencing statutes, however, cannot be properly evaluated with the same evidence. The public is unaware of the nature of prison life.\(^\text{322}\) No legislation has ever sanctioned double-celling.\(^\text{323}\) Indeed, the voters chose through their legislatures to design prisons that would not be overpopulated.\(^\text{324}\) Moreover, as the Court stated in Ingraham v. Wright,\(^\text{325}\) because prisoners lack a real voice in the political process,\(^\text{326}\) 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.

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\(^{315}\) 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.


\(^{321}\) See text at note 262 supra.


\(^{323}\) 101 S. Ct. at 2411 (Marshall, J., dissenting).

\(^{324}\) Id.


\(^{326}\) 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.

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 Rhode\(s\) Court.\(^{328}\) Moreover, shortly after the Rhode\(s\) 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.


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


creased gastric illness, sanitation problems and destructive noise levels have all been attributed to overcrowding. Some courts have found proof of the potential harm of rioting persuasive. The *Rhodes* majority, however, did not find evidence of the potential harm of rioting important. 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.” Yet the *Rhodes* Court did not consider psychological evidence alone sufficient for an eighth amendment violation. Aside from medical and psychological studies, correctional standards both in the United States and abroad 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

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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, 112 (D. Del. 1977). Most courts finding a violation have found such evidence highly persuasive.

346 Inmates, D.C. Jail v. Jackson, 416 F. Supp. 119, 123 (D.D.C. 1976). 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. 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. 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, 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. 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. He declared that the “dignity of man” test was not the proper eighth amendment benchmark. He further stated that the state, bound by limited fiscal resources, may declare retribution an equally permissible goal of incarceration as rehabilitation. Despite the district court’s finding that overcrowding caused serious physical and psychological harm, Justice Rehnquist found the conditions tolerable since prisoners cannot expect “a rose garden.”

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.


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, 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. Therefore, although all 
of the Justices sitting in *Rhodes* had adopted the dignity of man test in either 
*Estelle* or *Hutto*, *Atiyeh* makes their failure to do so in *Rhodes* not so startling.

The restrictive view of prisoners' eighth amendment rights in *Atiyeh* is consis-
tent with Justice Rehnquist's opinions in recent non-eighth amendment 
decisions. *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 vic-
tims. Even though the *Rhodes* Court did not leave the purposes of punishment 
to legislative judgment, 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. 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. Despite the 
teachings of experience that state courts will not provide effective relief from 
cruel and unusual conditions of confinement, the hands-off rationalizations 
of federalism and deference to security-based prison decisions 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 

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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.
365 See text and note 266 supra.
(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 
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 first and fourteenth amendment 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." Now the Court has reversed itself, deeming the apathetic local polity the interpreters of the limits of the powers of eighth amendment judicial review. 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."  

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: Ruiz v. Estelle and Smith v. Fairman.

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. These commentators noted that because after Bell v. Wolfish some courts followed the dictum of the Bell Court and denied prisoner complaints while other courts felt the decision was confined

373 See text at notes 264-66 supra.
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 RCW 7.70.160 applied.
to its facts. Rhodes could also be distinguished in post-Rhodes overcrowding cases. Indeed, the Court in Bell as well as lower federal courts 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. The court of appeals in Ruiz found the conditions in the Texas prison system similar to those at the Ohio Facility in Rhodes. A survey of the district court’s findings, however, renders this conclusion incredible. While the Ohio Facility was 138% over design capacity, the Texas prison system was at 200% capacity. The Rhodes case involved double-ceiling in cells approximately 63 square feet each but the Texas cells averaged 45 square feet and sometimes housed five prisoners each. In addition, most inmates at the Ohio Facility involved in Rhodes enjoyed freedom of movement. Conversely, in Ruiz the district court found that inmates in the Texas prison system spent most of the day in their cells. 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. In Rhodes, however, the harm to inmates was primarily emotional and mental. Although not expressly considered in Rhodes, the cost of compliance with the injunction was a factor in the Ruiz decision. The court of appeals in Ruiz, therefore, may have implicitly relied upon Atiyeh v. Capps: cost was a factor in the Atiyeh decision and the conditions in the Oregon prison were worse than those in Rhodes.
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* that the conditions of confinement at the Pontiac Correctional Center in Illinois constituted cruel and unusual punishment. Over 56% of the 1622 inmates were double-celled. The doubled inmates spent eighteen to twenty hours a day in cells that varied in size from 55.3 to 64.5 square feet. *Rhodes* was found not to control because Pontiac was built in 1871 and therefore lacked adequate ventilation, sanitation, temperature control, quiet and windows in the cells. 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. The *Smith* court concluded that "the conditions of the prison described in *Rhodes* seem almost the antithesis of the conditions at Pontiac."

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

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, 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.

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.

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. Both courts used forms of the totality approach and decency test. 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, the articulation of uniform results would soon be forthcoming. 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.” To the extent that the retribution theory of incarceration explicitly expressed in Atiyeh has been implicitly incorporated into Rhodes, the proposal will be rendered inapplicable or will be applied only to affirm the status quo. 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.” Citizens behind bars, albeit each convicted of a crime, must never be forsaken by those “oath-bound to defend the Constitution.”
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.

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