Prison Overcrowding as Cruel and Unusual Punishment: Rhodes v. Chapman

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The Southern Ohio Correctional Facility (SOCF) is a maximum security state prison built in the early 1970's. Responding to an increase in Ohio's state prison population, SOCF began "double ceiling," placing two prisoners in cells designed for one. By 1977, 1400 of the prison's 2300 inmates were sharing cells of approximately sixty-three square feet. Respondents, who shared a cell at the prison, brought a section 1983 class action in federal court, alleging that double celling was cruel and unusual punishment prohibited by the eighth amendment. The district court ruled for the respondents, and the Court of Appeals for the Sixth Circuit affirmed. The Supreme Court re-

2. The Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1976) provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
3. U.S. CONST. amend. VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
   In 1962, the Supreme Court stated that the eighth amendment's prohibition against cruel and unusual punishment is applicable to the states through the fourteenth amendment due process clause. Robinson v. California, 370 U.S. 660, 667 (1962).
4. Chapman v. Rhodes, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977). The court's decision rested on five considerations: (1) inmates at the prison were serving long terms, id. at 1011; (2) the prison population exceeded its design capacity by 38 percent, id. at 1020; (3) several studies recommended that each inmate have at least 50-55 square feet of living space, id. at 1021; (4) the double-celled inmates spent most of their time in their cells with their cellmates, id. at 1013; and (5) the double celling was not a temporary condition, id. at 1021.
5. Chapman v. Rhodes, 624 F.2d 1099, 1099 (6th Cir. 1980). The Court of Appeals rejected petitioner's argument that the district court decision must be interpreted as holding that double celling is per se unconstitutional, and concluded that the decision held only that double celling is cruel and unusual punishment under the circumstances at SOCF. Without a further opinion, the court affirmed on the grounds that the district court findings were not clearly
versed, holding that the double celling was not cruel and unusual punishment under the eighth amendment. *Rhodes v. Chapman*, 452 U.S. 337 (1981).

The framers of the United States Constitution adopted the language of the eighth amendment from the English Bill of Rights of 1689.6 Historians disagree over whether the original purpose of the English cruel and unusual punishment provision was to proscribe specific forms of barbarous punishment or to prevent judges from imposing excessive sentences.7 It appears, however, that the drafters of the American Constitution were primarily concerned with achieving the former objective.8

The Supreme Court first interpreted the cruel and unusual punishment clause in 1879 in *Wilkerson v. Utah.*9 Although holding that execution by firing squad was not a per se violation of the eighth amendment,10 the Court stated in dicta that punishments of torture and “all others in the same line of unnecessary cruelty are forbidden by [the eighth] amendment to the Constitution.”11 Eleven years later in *In re Kemmler,*12 the Court similarly stated that punishments were cruel and unusual if they involved torture or lingering death, but that the death penalty itself was not cruel, because the eighth amendment prohibits only the “inhuman and barbarous, something more than the mere extinguishment of life.”13

The Supreme Court subsequently expanded the meaning erroneous, the conclusions of law were permissible from the findings, and the remedy was reasonable. *Chapman v. Rhodes*, No. 78-3365, slip op. (6th Cir. 1980).


7. For an argument that the framers of the American Constitution misinterpreted the meaning of the cruel and unusual punishment clause of the English Bill of Rights, see Granucci, “Nor Cruel and Unusual Punishment Inflicted:” The Original Meaning, 57 CALIF. L. REV. 839, 860-65 (1969).


10. 99 U.S. at 134-35.

11. *Id.* at 135. In *Wilkerson*, the Supreme Court stated that unconstitutional forms of punishment included being “embowelled alive, beheaded, ... quartered, ... public dissection ... and burning alive.” *Id.* at 135.

12. 136 U.S. 456 (1890).

13. *Id.* at 447. The Court upheld a New York state statute providing for execution by electrocution, which the legislature decided was a more humane means of death than hanging. *Id.* at 443.
of the eighth amendment. In *Weems v. United States*, the Court for the first time invalidated a penalty prescribed by a legislature. In *Weems*, the defendant had been sentenced to fifteen years at hard labor in chains for falsifying public documents. The Court rejected the contention that the eighth amendment prohibits only inhumane and barbarous forms of punishment, finding that the cruel and unusual punishment clause also encompasses punishments disproportionate to the severity of the offense. Fifty years later, the Warren Court further broadened the meaning of the eighth amendment in *Trop v. Dulles*, stating that the amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” The Court held that the loss of citizenship for wartime desertion was cruel and unusual punishment because denationalization involves “total destruction of a person’s status in an organized society.”

Judicial interpretation of the cruel and unusual punishment clause has thus evolved from a proscription against specific forms of torture to a protection against punishment inconsistent with evolving notions of dignity and human decency. During the past decade, the federal courts have struggled to identify these “evolving standards of decency” in the face of eighth amendment challenges to conditions within prisons.

The federal courts traditionally demonstrated a “hands off” approach towards correctional administration. One reason for

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15. Id. at 381-82.
16. Id. at 357-58.
17. Id. at 381. The Court stated that the framers surely assumed that there could be exercises of cruelty in punishment other than those that inflicted bodily pain or mutilation. Id. at 372-73. Referring to the general language of the eighth amendment, the Court stated that it “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” Id. at 378. Accordingly, the Court concluded that the fifteen-year sentence at hard labor was cruel, because it was excessive in relation to the offense. Id. at 377.
18. 356 U.S. 86 (1958) (plurality opinion).
19. Id. at 101.
20. Id. at 101-02. In *Trop*, the Court also noted that the word “unusual” added nothing to the meaning of the eighth amendment other than to signify “something different from that which is generally done.” Id. at 100-01 n.32. Thus, ultimately the basic issue facing the *Trop* court was whether there was inhumane treatment without regard to any subtleties suggested by the word “unusual.” Id.
this deference was the lack of judicial expertise in the field of penology.\(^2\) Another justification was the fear that judicial intervention would seriously undermine prison discipline by subjecting every exercise of prison authority to public and judicial criticism.\(^3\) Furthermore, some courts were concerned that intervention would open the floodgates for litigation of prisoner grievances.\(^4\) Judges were also convinced that the problem of poor prison conditions required legislative and executive, rather than judicial, solutions.\(^5\) Finally, judicial deference to state prison administration recognized that in a federal system of government, the administration of prisons is primarily a matter of state and not federal concern.\(^6\)

By the late 1960's, judicial deference to state correctional administration began to erode in response to scholarly criticism and growing public awareness of American prison conditions.\(^7\) Courts extended previously denied constitutional


\(^{26}\) See, e.g., Shobe v. California, 362 F.2d 545, 546 (9th Cir.), cert. denied, 385 U.S. 887 (1966); Oregon v. Gladden, 240 F.2d 910, 911 (9th Cir. 1957); Siegel v. Ragen, 180 F.2d 785, 789-93 (7th Cir. 1959). See generally Haas, supra note 22, at 803-06.

\(^{27}\) See Klein, Prisoners' Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment's Cruel and Unusual Punishment Clause, 7 Fordham Urb. L.J. 1, 9 (1978). Klein argues that the violence and news coverage of the Attica and San Quentin riots increased public awareness of the plight of the imprisoned and eventually contributed towards a change in judicial attitudes. Id. See also Note, Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions, 23 Hastings L. J. 1111, 1112-13 (1972).
guarantees to prisoners.\textsuperscript{28} Finally, the Supreme Court rejected the hands off approach to state prison administration in 1974, stating that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."\textsuperscript{29} This abandonment of judicial restraint prompted many prisoners to challenge the conditions of their confinement as cruel and unusual punishment under the eighth amendment.\textsuperscript{30}

Initially, the federal courts found there was cruel and unusual punishment only when individual prison practices endangered the life or health of particular prisoners.\textsuperscript{31} In 1971, however, courts began to consider whether the aggregate of prison conditions, which individually might not be unconstitutional, was sufficient to constitute an eighth amendment violation.\textsuperscript{32} This "totality of the conditions" approach recognized that prison conditions have a cumulative impact on the pris-

\textsuperscript{28} For example, courts upheld inmates' first amendment rights to practice religion and due process rights to court access. See, e.g., Johnson v. Avery, 393 U.S. 463, 469 (1969) (holding that, in the absence of a reasonable alternative, a state may not validly enforce a regulation that bars inmates from furnishing assistance to other illiterate or poorly educated inmates in preparation of petitions for post-conviction relief); Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam) (upholding inmate's right to bring an action against the prison for restricting his right to practice religion by denying him permission to purchase certain religious publications).

\textsuperscript{29} Procunier v. Martinez, 416 U.S. 396, 405-06 (1974). Later that year, the Court, in Pell v. Procunier, 417 U.S. 817 (1974), concluded that an inmate's first amendment rights may be limited in light of the state's objectives of rehabilitation and internal security. Nevertheless, the Court held that a prisoner retains those first amendment rights that are not inconsistent with his status as a prisoner or with legitimate penal objectives. Id. at 826.

\textsuperscript{30} Prisoners most often asserted their eighth amendment rights under the Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1980), see Comment, Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform, 7 Cum. L. Rev. 31, 34-35 (1976). Prisoners have alternatively invoked the federal habeas corpus statutes or have brought tort actions against prison or state officials. Id.


oner that could result in cruel and unusual punishment.\textsuperscript{33}

Although the federal courts considered aggregate prison conditions in eighth amendment cases after 1971, they hesitated to formulate exact standards for determining when those conditions constituted cruel and unusual punishment. In 1972, Justice Brennan, concurring in \textit{Furman v. Georgia},\textsuperscript{34} attempted to focus eighth amendment analysis by enunciating four tests of cruel and unusual punishment: (1) whether the punishment was degrading to the "dignity of man"; (2) whether the punishment was inordinately severe and arbitrarily inflicted; (3) whether the punishment was rejected by contemporary society; and (4) whether the punishment exceeded what was necessary to achieve a legitimate penal purpose.\textsuperscript{35}

In the prison condition cases, courts have reformulated Justice Brennan's tests into two lines of analysis.\textsuperscript{36} First, courts have compared prison conditions to "metaphysical" standards of human dignity or the contemporary conscience of the community.\textsuperscript{37} Second, courts have asked whether the conditions serve any utilitarian purpose by advancing generally accepted penal objectives.\textsuperscript{38} The specific tests used to determine when prison conditions constitute cruel and unusual punishment are essentially variants of the metaphysical or utilitarian

\textsuperscript{33} The \textit{Holt} court stated:
The distinguishing aspects of Arkansas penitentiary life must be considered together. One cannot consider separately a trusty system, a system in which men are combined together in large numbers in open barracks, bad conditions in isolation cells, or an absence of a meaningful program of rehabilitation. All of those things exist in combination; each affects the other; and taken together they have a cumulative impact on the inmates regardless of their status.

\textit{Id.} at 373. For a further discussion of the "totality of the conditions" approach, see \textit{Eighth Amendment Challenges}, supra note 31, at 293-97.

\textsuperscript{34} 408 U.S. 238 (1972). In \textit{Furman}, appellants challenged the constitutionality of the death penalty.

\textsuperscript{35} Id. at 257-81 (Brennan, J., concurring).

\textsuperscript{36} A third strand of eighth amendment analysis examines whether the punishment is disproportionate to the severity of the crime. See supra notes 14-17 and accompanying text. This analysis is used more often, however, in determining whether a particular sentence is excessive, rather than whether general prison conditions are cruel and unusual punishment. See, e.g., \textit{Rummel v. Estelle}, 445 U.S. 263, 272 (1980). Courts have used this analysis when considering the sanction of solitary confinement, which is similar to an original sentencing because it involves a further punishment for a further violation. See, e.g., \textit{Landman v. Royster}, 333 F. Supp. 621, 646-47 (E.D. Va. 1971); \textit{Carothers v. Follette}, 314 F. Supp. 1014, 1026 (S.D.N.Y. 1970).


\textsuperscript{38} \textit{Id.} at 994-96.
lines of analysis. For example, the “shock-the-conscience” test merely states the conclusion that the punishment grossly violates community standards of decency or dignity. The “evolving standards of decency” test reflects the observation that community standards develop more sensitivity over time. Under the “totality of the conditions” test the courts aggregate the harms before determining whether the common conscience or human dignity is violated. Similarly, the “least restrictive means” test, which requires rejection of a punishment if less severe penalties adequately serve legitimate penal objectives, and the “balancing” test, which weighs the competing interests of the prisoner and the state in pursuing a valid penological goal, are utilitarian tests.

Since the federal courts were unable to agree upon the proper analysis, inconsistent decisions resulted when they applied these tests individually and in different combinations. The resulting inconsistency among federal court decisions and the inherent subjectivity of these cruel and unusual punishment tests combined to produce little guidance for the courts. In response, a number of courts adopted specific minimum constitutional standards for prison conditions. For example, in the area of overcrowding, some courts rejected vague standards

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41. See supra notes 32-33 and accompanying text.
44. The inherent subjectivity in eighth amendment analysis has received considerable criticism. The subjectivity of a judge’s moral outrage prevents the formation of guidelines for prison authorities to follow because it provides nothing in the way of workable constitutional standards. See Robbins & Buser, supra note 37, at 902-03; Note, supra note 31, at 860-61.
of decency and dignity, and recognized that prisoners have a constitutional right to a specific minimum area of living space.\textsuperscript{46} During the last decade, the absence of Supreme Court decisions regarding prison conditions added to the confusion surrounding the punishment clause.\textsuperscript{47} In \textit{Estelle v. Gamble},\textsuperscript{48} the Supreme Court's only pre-\textit{Rhodes} ruling upon the eighth amendment rights of convicted prisoners, the Court held that "deliberate indifference" to an inmate's medical needs was cruel and unusual punishment.\textsuperscript{49} The "deliberate indifference" concept has been strongly criticized, however, because it seems to require malicious intent on the part of prison officials to find an eighth amendment violation.\textsuperscript{50} The \textit{Estelle} Court's test for cruel and unusual punishment in the prison context was essentially a reiteration of formulations used in earlier eighth amendment decisions, and consequently did little to clarify the analysis. The Court ultimately relied upon language from \textit{Gregg v. Georgia},\textsuperscript{51} an earlier capital punishment decision, in concluding that deliberate indifference to serious medical needs constituted "unnecessary and wanton infliction of pain" and therefore violated the eighth amendment.\textsuperscript{52}

The Supreme Court did not discuss the principles relevant to assessing claims of unconstitutional prison conditions until


Recognition of specific constitutional rights necessitated detailed remedial proscriptions which prompted the courts to engage in unprecedented intervention in state prison administration. This intervention has reignited debate over the propriety of judicial involvement in prison affairs, a debate which characterized the earlier hands off era. See generally Robbins & Buser, \textit{supra} note 37; Comment, \textit{supra} note 30, at 53-60.

\textsuperscript{47} Although \textit{Hutto v. Finney}, 437 U.S. 678 (1978), was a prison conditions case, the state prison administrators did not dispute that conditions at the prison were cruel and unusual punishment. \textit{Id.} at 685. Hence, the Court did not have to consider the principles relevant to an eighth amendment analysis.

The Supreme Court also assessed the constitutionality of confinement conditions at a correctional facility in \textit{Bell v. Wolfish}, 441 U.S. 520 (1979). The Court in \textit{Bell}, however, focused on the rights of pretrial detainees and analyzed the case in terms of due process. This Comment focuses on the eighth amendment rights of convicted prisoners. For a discussion of the rights of pretrial detainees, see Note, \textit{Constitutional Limitations on the Conditions of Pretrial Detention}, 79 \textit{Yale L.J.} 941 (1970).

\textsuperscript{48} 429 U.S. 97 (1976).

\textsuperscript{49} \textit{Id.} at 104.


\textsuperscript{52} 429 U.S. at 104 (quoting \textit{Gregg v. Georgia}, 428 U.S. 153, 173 (1976)).
its 1981 decision in *Rhodes v. Chapman.*53 The issue in *Rhodes* was whether double celling at an Ohio state prison constituted cruel and unusual punishment under the eighth amendment.54 As in *Estelle,* the *Rhodes* majority adopted its eighth amendment test in part from the *Gregg* decision, stating that cruel and unusual punishment includes "'unnecessary and wanton infliction of pain'"55 and punishments "grossly disproportionate to the severity of the crime."56 The Court added that prison conditions must be judged according to "'evolving standards of decency.'"57 Moreover, the Court stated that eighth amendment judgments should not simply be based upon the subjective views of judges; instead, objective factors should be considered as much as possible.58

In applying the eighth amendment test to the facts of *Rhodes,* the majority concluded that the respondents failed to demonstrate that the conditions at the prison inflicted the level of pain necessary to justify a finding that double celling was cruel and unusual punishment.59 With the exception of overcrowding, the conditions at the prison appeared satisfactory.60 The district court found no deprivations of essential food, medical care, or sanitation61 and described the prison's physical plant as "'unquestionably a top-flight, first-class facility.'"62 Concluding that there was no constitutional violation at SOCF, the majority stated that the district court had no authority to determine whether double celling was the best solution to the state's

53. 452 U.S. at 345-47.
54. Id. at 340.
55. Id. at 346 (quoting *Gregg v. Georgia,* 428 U.S. 153, 173 (1976)).
56. Id.
57. Id. (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)).
58. 452 U.S. at 346.
59. Id. at 347-48. The Court concluded that virtually all of the district court's findings tended to refute, rather than support, the respondents' claim of cruel and unusual punishment.
60. The district court made an unannounced inspection of SOCF, finding that the food, air ventilation system, and temperature in the cells were adequate. The noise was not excessive, nor was there any offensive odor. Space in the day rooms and visitation facilities was not significantly reduced. There was no evidence of indifference to the inmates' medical or dental care. Finally, the ratio of guards to inmates was acceptable and the number of acts of violence had increased only in proportion to the increase in population. Id. at 342-43.
62. Id. at 1009. The *Rhodes* majority summarily stated that because there was no evidence that the double celling inflicted pain or was grossly disproportionate to the severity of crimes warranting imprisonment, the five considerations used by the district court, see supra note 4, fell short of establishing cruel and unusual punishment. 452 U.S. at 347-48. Assuming that all the other conditions were satisfactory, *Rhodes* arguably represents a decision on the constitutionality of overcrowding itself.
growing prison population. According to the majority, such determinations properly belong to the legislature and prison administration, not the courts.63

The Rhodes Court’s reliance upon the test from Gregg and its emphasis upon the concept of pain in eighth amendment analysis raise two fundamental issues which have important implications for future prison overcrowding cases. The issues are: what constitutes pain for the purpose of cruel and unusual punishment analysis, and when is the infliction of pain constitutionally impermissible under the eighth amendment?

The Rhodes majority failed to address squarely the question of whether mental and emotional harm incident to overcrowding constitutes pain in eighth amendment analysis. In reviewing the prison conditions, the majority simply concluded that there was no evidence that double celling at SOCF inflicted unnecessary and wanton pain.64 Moreover, the majority rejected the respondents’ theory that the close confinement of double celling creates a dangerous potential for violence, which can inflict pain if it results in rioting.65 Although a serious concern, the Court stated that the danger of rioting did not show actual cruel and unusual punishment at the prison.66 The majority ultimately found that the lack of an increase in the rate of violence since the double celling began refuted the respondents’ argument.67 By focusing on threatened violence, the majority did not address significantly the other detrimental effects of overcrowding68 and left open the question of whether these effects alone could constitute pain within the cruel and unusual punishment analysis.

The cruel and unusual punishment clause no longer merely proscribes the infliction of physical pain. Although the termination of citizenship involves no physical mistreatment, the Supreme Court held in Trop v. Dulles that the eighth amendment barred denationalization.69 The Court concluded that this

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63. 452 U.S. at 349. In dicta, the majority cautioned that in discharging its responsibility to protect the constitutional rights of prisoners, courts cannot assume that state legislatures and prison officials are insensitive to constitutional requirements or to the problem of how best to achieve the goals of the penal system. Id. at 352.
64. Id. at 347-48. See also supra notes 59-62 and accompanying text.
65. Id. at 349 n.14.
66. Id.
67. Id. at n.15. See supra note 60.
68. See infra notes 76-79 and accompanying text.
form of punishment, the destruction of an individual's status in society, was "more primitive than torture."'

Similarly, in recent prison condition decisions, many federal courts have equated pain with deterioration of a prisoner's mental and emotional well-being—a notion of self-degeneration. These courts reasoned that inmates have an eighth amendment right to be imprisoned under conditions which do not threaten their sanity or mental well-being, which are not counterproductive to inmates' efforts to rehabilitate themselves, and which do not increase the probability of future incarceration. In addition, some courts have demanded that the prison environment must prevent degeneration of mental and social skills already possessed. Incarceration under conditions causing psychological deterioration frustrates society's penological objectives, fosters recidivism, and is repugnant to contemporary standards of decency. Psychological deterioration must therefore be included within the concept of pain for the purpose of cruel and unusual punishment analysis.

Courts have examined psychological damage to inmates when considering challenges to the practice of solitary confinement. Although courts are generally reluctant to hold segregation to be per se cruel and unusual punishment, they have

70. Id. at 101.

Most courts, however, are reluctant to assert that a prisoner has a constitutional right to rehabilitation in the sense that the prisoner has an affirmative right to leave prison as a well adjusted, law abiding citizen. See Nelson v. Collins, 455 F. Supp. at 735; Battle v. Anderson, 447 F. Supp. 516 (E.D. Okla.), aff'd, 564 F.2d 388, 403 (10th Cir. 1977); Laaman v. Helgemoe, 437 F. Supp. at 316; Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976), cert. denied, 438 U.S. 915 (1978).
74. See infra notes 90-95 and accompanying text.
75. See infra note 96.
76. See Sostre v. Rockefeller, 312 F. Supp. 863, 871 (S.D.N.Y. 1970) ("[S]ubjecting a prisoner to the demonstrated risk of the loss of his sanity as punishment for any offense in prison is plainly cruel and unusual punishment as judged by present standards of decency.").

Although the public may appear apathetic regarding prison reform, studies indicate that most persons are appalled when they discover the conditions which really exist. Poor prison conditions are usually the result of neglect, and not of conscious affirmative public policy. Comment, Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform, 12 Harv. C.R.-C.L. L. Rev. 367, 379-81 (1977).
examined the effects of isolation upon a prisoner's psychological functioning and have ordered release when the individual prisoner has undergone psychological distress.\textsuperscript{77} These eighth amendment decisions were based upon overwhelming psychiatric and psychological evidence documenting the debilitating mental effects of social isolation and sensory deprivation.\textsuperscript{78}

Similarly, substantial empirical evidence verifies the detrimental effects of prison overcrowding. Prisoners subjected to sustained overcrowding have a higher death and suicide rate, more disciplinary problems, and a larger number of illness complaints than those not overcrowded.\textsuperscript{79} In addition, cramped quarters increase tension, hostility, and aggression.\textsuperscript{80} There are also significant correlations between overcrowding and de-

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\item \textsuperscript{78} See Note, Solitary Confinement—Punishment Within the Letter of the Law, or Psychological Torture?, 1972 Wis. L. Rev. 223, 230.
\item \textsuperscript{79} See G. McCain, V. Cox & P. Paulus, The Effect of Prison Crowding on Inmate Behavior iii-vii (1980) (study by the University of Texas at Arlington under a grant from the National Institute of Law Enforcement and Criminal Justice). The study, which examined data from 1400 inmates in six federal prisons, revealed that tolerance of crowded conditions does not improve with time. Most inmates functioned better and were more satisfied in single cells with fewer square feet per person than in two-person cells or dormitories where they had more square feet per person. The inmates studied viewed personal privacy as their highest priority. \textit{Id.}
\item Another study of 247 inmates in a federal correctional facility and a county jail revealed that inmates in one or two-person cells had fewer illness complaints than inmates in dormitories. McCain, Cox & Paulus, \textit{The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment}, 3 ENV’T & BEHAV. 283, 286 (1976).
\item Furthermore, a study of the Federal Correctional Institution at Tallahassee, Florida, found a significant correlation between the space available for inmates and the rate and number of rule infractions. Megargee, \textit{The Association of Population Density, Reduced Space, and Uncomfortable Temperatures with Misconduct in a Prison Community}, 5 AM. J. COMMUNITY PSYCHOLOGY 289 (1977).
\item \textsuperscript{80} See Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 393, 396 (2d Cir. 1975) (Expert testimony indicated that confinement of two inmates together is "psychologically destructive and increases homosexual impulses, tensions, and aggressive tendencies."); Capps v. Atiyeh, 495 F. Supp. 802, 810-11 (D. Ore. 1980) (Dr. Thomas Gualtieri, a psychiatrist associated with the University of North Carolina Medical School, testified that severe overcrowding "prevents the development of appropriate social skills and leads instead to aggressive, violent, and destructive behavior patterns."); Dr. Verne Cox, a psychology professor at the University of Texas at Arlington, testified that "studies of penal institutions reveal that overcrowding lead to depression, tension, and increases in disciplinary infractions, assaults, and suicide attempts."); Jordan v. Wolke, 460 F. Supp. 1080, 1087 (E.D. Wis. 1978) (expert witness testified that "multiple occupant cells not only deprive inmates of privacy but lead to aggressiveness and tension which can cause security problems."); Anderson v. Redman, 429 F. Supp. 1105, 1112 (D. Del. 1977) (adverse mental and emotional
pression and assaults. Furthermore, the psychological harm from overcrowding is not limited to the period of confinement but may remain after the prisoners are released. Given these verified detrimental effects of crowded prison conditions upon a prisoner’s mental and emotional health, courts cannot legitimately deny that these effects fall within the concept of pain cognizable under the eighth amendment. Furthermore, Justice Brennan in his Rhodes concurrence appears to support the argument that the infliction of psychological pain incident to overcrowding can be cruel and unusual punishment. According to Justice Brennan, the respondents merely failed to establish evidence of actual psychological harm from the double ceiling.

Two studies reveal the physiological signs of tension typically produced in people living in overcrowded conditions. The first study compared blood pressure levels of inmates who were housed in crowded dormitories with those in individual or two-person cells. The test results showed that systolic blood pressure was significantly higher for inmates in dormitories. D'Atri, Psychological Responses to Crowding, 7 ENV'T & BEHAV. 237, 242 (1975). See also Paulus, McCain & Cox, Death Rates, Psychiatric Commitments, Blood Pressure, and Perceived Crowding as a Function of Institutional Crowding, 3 ENVTL. PSYCHOLOGY & NONVERBAL BEHAV. 107 (1978). The second study demonstrated that palmar sweat readings, a stress measure, were higher for men housed in dense quarters on a drilling platform. Cox, Paulus, McCain & Schkade, Field Research on the Effects of Crowding in Prisons and on Offshore Drilling Platforms in Residential Crowding and Design 95 (1979). For more information on the effects of population density, see generally Calhoun, Population Density and Social Pathology, SCI. AM., Feb. 1962, at 139; Griffitt & Veitch, Hot and Crowded: Influences of Population Density and Temperature on Interpersonal Affective Behavior, 17 J. PERSONALITY & SOC. PSYCHOLOGY 92 (1971).

81. See Jan, Overcrowding and Inmate Behavior: Some Preliminary Findings, 7 CRIM. JUST. & BEHAV. 283 (1980). A study of four Florida state prisons found significant positive correlations between assault rates, monthly incidents per one thousand inmates, and the overcrowding index, monthly population divided by normal prison capacity, for inmates in youthful offender and male older age offender prisons. Id. at 298. The study also revealed negative correlations between the overcrowding index and various constructive behaviors including the number of inmates paroled, number of inmates granted mandatory conditional release, and the rate of books checked out by inmates. Id. at 299. See also Nacci, Prather & Teitelbaum, Population Density and Inmate Misconduct Rates in the Federal Prison System, FED. PROBATION, June 1977, at 26, 26-31. A study of thirty-seven institutions in the federal prison system examined the relationship of density and misconduct by correlating a density index, the average daily population divided by the physical or design capacity, with physical assaults. Overall correlations revealed a significant association between density and total assaults and assaults on inmates. “The relationship indicates that high density is associated with high rates of assaultiveness . . . .” Id. at 29.

82. In Capps v. Atiyeh, 495 F. Supp. 802 (D. Ore. 1980), Dr. Thomas Gualtieri, a psychiatrist, testified that “the aggressive behavior patterns that develop among prisoners as a result of overcrowding remain after prisoners are released.” Id. at 812. See supra note 81.
relying instead on a generalized theory of potential violence. \textsuperscript{83} Justice Brennan's statements imply that the prisoner must introduce some evidence of actual harm resulting from the overcrowding to show an eighth amendment violation.

Because the Supreme Court decided \textit{Rhodes} solely on the threshold issue of whether there was any infliction of pain, the Court never reached the question of when the infliction of pain is impermissible under the eighth amendment. The issue of when the infliction of pain is unconstitutional depends upon both a utilitarian analysis that determines whether the pain is unnecessary to further legitimate penal objectives,\textsuperscript{84} and a severity analysis that determines whether the pain exceeds tolerable thresholds.\textsuperscript{85} If the infliction of pain is both unnecessary and too severe, it should be found unconstitutional.

The Supreme Court has defined the unnecessary infliction of pain as that which is "totally without penological justification."\textsuperscript{86} Courts examining penological justification engage in a purposive or means-end analysis, which requires that a punishment or prison condition advance legitimate penal objectives.\textsuperscript{87} The basic penal objectives of punishment traditionally have in-

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  \item \textsuperscript{83} 452 U.S. at 367-68 (Brennan, J., concurring). Brennan stated that while double celling specifically and prison overcrowding generally may result in serious harm, the Court is obligated to examine the "actual effects" of challenged conditions. \textit{Id}. The exact meaning of this requirement is unclear. Brennan did cite two cases in which there was substantial evidence of deleterious effects of overcrowding at the facility under attack, suggesting that a similar showing and quantum of evidence would suffice to establish "actual harm." \textit{Id}. at 368 n.17. Brennan also noted that injury to inmates need not be demonstrated with a high degree of specificity or certainty, and that courts may "employ common sense, observation, expert testimony, and other practical modes of proof." \textit{Id}. at 367 n.16.
  
  In an analogous dispute involving the constitutionality of solitary confinement, the Second Circuit concluded that because there was no clear evidence of psychological damage, there could be no finding of cruel and unusual punishment. \textit{Sostre} v. \textit{McGinnis}, 442 F.2d 178, 193 n.24 (2d Cir. 1971), \textit{cert. denied}, 404 U.S. 1049 (1972). As one commentator observed, the implication of \textit{Sostre} is that if "Sostre could prove psychological damage to himself, or if the evidence at trial overwhelmingly showed that isolation caused psychological injury," the solitary confinement per se would constitute cruel and unusual punishment. Benjamin & Lux, \textit{Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison}, \textit{9 CLEARMGHOUSE RAV}. 83, 87 (1975).
  
  \item \textsuperscript{84} \textit{See infra} text accompanying notes 86-98.
  
  \item \textsuperscript{85} \textit{See infra} notes 99-107 and accompanying text.
  
  \item \textsuperscript{86} Gregg v. \textit{Georgia}, 428 U.S. 153, 183 (1976).
  
\end{itemize}
cluded isolation, retribution, deterrence, and rehabilitation. Under a purposive analysis the state must demonstrate that specific prison conditions or practices further one or more of these penal objectives.

The infliction of pain incident to prison overcrowding serves none of society's generally recognized penal objectives. The aim of isolation is to protect society from dangerous criminals. After the prisoner is incapacitated, overcrowding does not advance this end. Moreover, overcrowded institutions seriously endanger internal prison security. Overcrowded conditions would only rationally serve society's interest in retribution if those convicted of the most serious offenses were put in the most crowded facilities. This is not the case. Furthermore, confinement in overcrowded prisons does not advance the interest of rehabilitation; instead it frustrates that goal. Finally, no evidence suggests that overcrowded prisons serve to deter criminal conduct. In fact, such conditions probably promote recidivism.

A separate argument justifying the necessity of pain incident to overcrowding is the lack of adequate funding to remedy the problem. Although this argument raises fundamental practical concerns, the courts have consistently rejected this justifi-

89. See id. at 822.
90. See Comment, supra note 76, at 399-401.
91. Id. at 399.
92. Id. at 400.
93. Id. at 399.
95. Comment, supra note 76, at 399-400.
96. A 1978 study of prisons in England and Wales revealed a high negative correlation between overcrowding and effectiveness, indicating that recidivism rates are highly correlated with prison overcrowding. See Farrington & Nuttall, Prison Size, Overcrowding, Prison Violence, and Recidivism, 8 J. Crim. Just. 221, 228-30 (1980). As another study noted, the degrading conditions of many prisons only enhance the prisoners' disrespect for the legal system. The study explained:

Life in many institutions is at best barren and futile, at worst un-
speakably brutal and degrading. To be sure, the offenders in such institutions are incapacitated from committing further crimes while serving their sentences, but the conditions in which they live are the poorest possible preparation for their successful reentry into society, and often merely reinforces in them a pattern of manipulation or destructiveness.

cation for unconstitutional conditions of confinement. As Justice Blackmun stated while serving on the Court of Appeals for the Eighth Circuit, "[H]uman considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations."

Not every incident of unnecessary infliction of pain, however, is unconstitutional under the cruel and unusual punishment clause. Incarceration inevitably involves harsh restrictions and discomfort. Courts have consistently experienced difficulty in determining when the pain is sufficiently severe, and, therefore, unconstitutional. Nevertheless, the Supreme Court has maintained that this question must be decided by the courts.

Expert opinion in the prison reform area provides the best factual basis for determining constitutional standards for pain. Because psychological pain is harder to establish than physical pain, deciding when prison conditions become intolerable is often beyond the common knowledge of laypersons and courts. The continued utility of the shock-the-conscience type of test is highly suspect when the manifestations of pain are less obvious.

In an analogous situation involving solitary confinement, the courts' initial refusal to recognize expert psychiatric and

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99. The Rhodes majority stated that harsh conditions are part of the price criminals must pay for their crimes. 452 U.S. at 347.
100. Id. at 375 n.8 (Marshall, J., dissenting).
101. One commentator has advocated that the courts adopt the recommended standards proposed by the American Correctional Association (ACA) as constitutional minima for compliance with the eighth amendment. The ACA Manual represents a compilation of expert knowledge in the corrections field and reflects contemporary penological research. Note, Prison Discipline and the Eighth Amendment: A Psychological Perspective, 43 U. CINN. L. REV. 101, 128 (1974).
102. Generally, whether the situation is appropriate for the use of expert testimony is to be determined on the basis of whether it assists the trier of fact in its decision. Ladd, Expert Testimony, 5 VAND. L. REV. 414, 418 (1952).
103. See Robbins & Buser, supra note 37, at 902-03. The authors state: Despite its flexibility, however, the "shock the conscience" test is effective only when the features of confinement are so readily discernible as to evoke predictable human affections. The value of the test diminishes critically when such subtly effective penalties as prison conditions that may affect their victims over long periods of time are involved.
Id. (footnote omitted). Psychological extirpation as a result of imprisonment may involve greater anguish than many forms of corporal punishment. Id. at 903 n.68.
psychological evidence relating to isolation was a major obstacle to finding that solitary confinement could be cruel and unusual punishment.\textsuperscript{104} This attitude changed, however, when courts, focusing on both the psychological and physical effects of solitary confinement, exhibited a willingness to interpret the eighth amendment in light of contemporary psychological knowledge.\textsuperscript{105} Recognizing their lack of expertise in evaluating psychological evidence, the courts relied upon outside sources for experience and expertise.\textsuperscript{106} Overcrowding is very similar to the practice of solitary confinement. Although neither involve any direct physical mistreatment, there is persuasive evidence that both practices inflict serious psychological damage.\textsuperscript{107} Given the nature of the harm involved, the courts' competency to assess intelligently the severity of the detrimental effects is questionable in the absence of expert opinion.

Probably the most disturbing aspect of the \textit{Rhodes} decision was the majority's language disparaging the role of expert testimony in determining the nature and extent of the harms caused by overcrowding. The majority stated that expert opinions "simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question."\textsuperscript{108} According to the Court, "generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction."\textsuperscript{109}

Both Justice Brennan's concurring and Justice Marshall's dissenting opinions criticized the majority's depreciation of expert testimony. Justice Brennan argued that the courts must be open to evidence and assistance from many sources, including expert testimony and studies on the effect of particular conditions on prisoners.\textsuperscript{110} Justice Marshall similarly stated that a court faced with a claim of cruel and unusual punishment would want to know the findings of studies focusing on the effect of the specific punishment. Whether the effect was of unconstitutional dimensions and whether the study was

\begin{footnotesize}
\begin{enumerate}[104.]
\item See Note, supra note 78, at 230-31.
\item Id.
\item Id. Another commentator stated, "Certainly modern courts can no longer close their eyes to sound psychiatric and psychological evidence which indicates that solitary confinement, absent any aggravating factors or physical abuse, can destroy a man." Note, supra note 31, at 869.
\item See supra notes 78-82 and accompanying text.
\item 452 U.S. at 348 n.13.
\item Id.
\item Id. at 363 (Brennan, J., concurring).
\end{enumerate}
\end{footnotesize}
competent would remain questions for the court to decide. In *Rhodes*, however, the majority simply ignored the expert opinion presented "without even a token evaluation of the methodology, content, or results."\textsuperscript{111}

The difficulty of establishing the effects of overcrowding makes expert opinion not only desirable, but virtually indispensable.\textsuperscript{112} The Court's reluctance to take cognizance of bona fide social psychological studies constitutes a default in judicial responsibility to protect the eighth amendment rights of prisoners in the face of state correctional budget cutting, and heralds the resurrection of the hands off approach.

Because the *Rhodes* decision failed to provide a clear standard to lower federal courts faced with determining when overcrowded prison conditions violate the eighth amendment, the following standard is recommended: overcrowding constitutes cruel and unusual punishment when the harm caused by such overcrowding is so severe that it substantially impedes generally recognized penal objectives. This proposed rule substitutes the concept of harm for the concept of pain to emphasize that detrimental psychological as well as physical effects can constitute cruel and unusual punishment. Moreover, the concept of pain in eighth amendment analysis is an undesirable carryover from the early history of the cruel and unusual punishment clause. It fails to reflect the evolution of the clause\textsuperscript{113} and the increased awareness that certain prison conditions can slowly and subtly debilitate a person. The proposed rule also avoids the subjectiveness of a shock-the-conscience test, and permits a more objective rational analysis into whether conditions advance specifically identified penal interests. Requiring

\textsuperscript{111} Id. at 378 n.89 (Marshall, J., dissenting). Marshall also noted the influence of expert opinion in other contexts. For instance, in Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954), the Supreme Court relied upon expert studies showing the psychological harm to black children resulting from segregation, in holding that segregation was unconstitutional. Id. at 495.

The "Brandeis brief" is another example of the persuasive use of expert studies and opinions. The term refers to an appellate brief which cites social, scientific, and economic studies in addition to legal precedents and principles. Louis Brandeis successfully used this type of brief in Muller v. Oregon, 208 U.S. 412 (1908), in which the Supreme Court upheld the validity of an Oregon statute prohibiting employment of women for more than ten hours during any day. See id. at 419 n.1. The Court decided that the law was a justifiable protective measure for women on the basis of a compilation of studies, regarding the effects of long hours on women workers' health. Id. at 422-23.

\textsuperscript{112} See supra notes 101-03 and accompanying text.

\textsuperscript{113} See supra notes 6-20 and accompanying text.
the courts to rationalize prison practices in terms of penal objectives would also force courts to debate and to articulate the legitimate goals of punishment.

This suggested rule additionally combines the utilitarian and metaphysical lines of analysis into a single test, and thereby facilitates a uniform approach to cruel and unusual punishment analysis. Use of a single test rather than multiple tests would provide greater consistency among federal court decisions, and would ultimately offer better guidelines to prison officials regarding constitutionally permissible conditions. Clearer guidelines might in turn reduce the amount of litigation. Finally, the rule would insure that routine prison practices that do not inflict serious harm would not be declared unconstitutional. This would avoid litigation over discomforts inevitably incident to incarceration, and would preserve the integrity of the eighth amendment as a protection against only intolerable conditions of confinement that directly counter the objectives of the correctional systems.

Overcrowding in American prisons is a severe and growing problem. As the protectors of constitutional rights, the courts are ultimately responsible for preventing intolerable conditions of prison confinement, including overcrowding. While the eighth amendment originally prohibited forms of physical torture, it must be capable "of wider application than the mischief which gave it birth." The Rhodes decision unfortunately failed to further the eighth amendment analysis applicable to prison conditions, and contained disturbing overtones of a return to the judicial deference attitude characteristic of the hands off era. The Supreme Court has recognized that the eighth amendment "may acquire meaning as public opinion becomes enlightened by a humane justice." Social psychological findings and media exposure are beginning to enlighten the public regarding the grave consequences of confining prisoners in crowded institutions. The risks accompanying prison overcrowding are far too great for the Supreme Court not to heed the public's concern. As one federal judge observed: "A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a

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114. Since 1975, the total number of federal and state prison inmates has risen by 42 percent. In 1980, the number grew at its fastest rate in three years. Krajick, The Boom Resumes, 7 CORRECTIONS 16, 16-17 (1981).
116. Id. at 378.
warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser.”117