Journal of Criminal Law and Criminology

Volume 72
Issue 4 *Winter*

Article 10

Winter 1981

Eighth Amendment--A Significant Limit on Federal Court Activism in Ameliorating State Prison Conditions

Thomas J. Bamonte

0091-4169/81/7204-1345
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 72, No. 4

Printed in U.S.A.

EIGHTH AMENDMENT—A SIGNIFICANT LIMIT ON FEDERAL COURT ACTIVISM IN AMELIORATING STATE PRISON CONDITIONS

Rhodes v. Chapman, 101 S. Ct. 2392 (1981).

I. INTRODUCTION

Last term in *Rhodes v. Chapman*,[1] the Supreme Court held that housing two inmates in a cell designed for one at the modern Southern Ohio Correctional Facility (SOCF) did not violate the eighth amendment.[2] This decision significantly limits federal court involvement in ameliorating conditions at state prisons. Nothing in the opinion suggests that the Court is willing to countenance truly "deplorable" or "sordid" conditions at state prisons.[3] However, *Rhodes* precludes federal court intervention where prison conditions have fallen below minimum professional standards and only threaten to become truly intolerable. Federal courts are not to anticipate the long-term detrimental consequences of prison conditions or evaluate the penological justification, if any, for these conditions. Rather, in evaluating prison conditions and in formulating remedies, only actual serious harm to inmates is judicially relevant.[4]

This limited conception of the role of the judiciary in evaluating state prison conditions stems from *Rhodes'* restrictive interpretation of the eighth amendment.[5] In contrast to the approach taken by many lower courts,[6] the Supreme Court failed to mount an independent inquiry as to whether the conditions at SOCF violate "evolving standards of decency,"[7] and confined its analysis to whether these conditions involve the "wanton and unnecessary infliction of pain" or are "grossly

---

1 101 S. Ct. 2392 (1981).

2 U.S. CONST. amend VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3 101 S. Ct. at 2401.

4 In his concurring opinion, Justice Brennan conceded that the district court may have been correct "in the abstract" that double celling was harmful, but he argued that courts may only examine the "actual effect" of the challenged conditions. 101 S. Ct. at 2409.

5 *See* notes 120-24 & accompanying text *infra*.

6 *See* notes 194-96 & accompanying text *infra*.

7 The phrase is from Trop v. Dulles, 356 U.S. 86, 101 (1958).

disproportionate to the severity of the crime[s] warranting imprisonment."[8] In its deference to state penal practices, *Rhodes* also reiterated the Court's strong admonition in *Bell v. Wolfish*[9] that federal courts should not take an active role in effectuating improvements in state prisons. Thus, with *Rhodes*, the Court effectively undermined federal court leadership in pressing for improvements in state prisons across the country.

II. BACKGROUND: OVERCROWDING AND EXTENSIVE JUDICIAL INVOLVEMENT IN PRISON MATTERS

The Court heard the *Rhodes* case "because of the importance of the question to prison administration."[10] At stake was nothing less than control over the administration of state prisons. Because conditions at SOCF had not yet significantly deteriorated due to overcrowding, a decision in favor of the inmates would have effectively established a constitutional minimum space requirement of approximately sixty square feet per inmate. Implementing this standard would have required state expenditures of up to ten billion dollars for prison construction.[11] Alternatively, states could have ameliorated prison overcrowding by redefining criminal activity or by altering their sentencing, parole and penal practices.[12] Since the federal courts would likely be forced to oversee the implementation of the per inmate space standard, a decision in favor of the inmates would have led to increased federal court reliance on the sweeping and detailed "institutional remedies" which have characterized prison condition litigation.[13] In short, in *Rhodes* the Court was simply unwilling to risk a near certain multi-billion dollar confrontation with state legislatures, and reluctant to set a strong precedent for active federal court scrutiny of general conditions in other institutions.

Federal courts traditionally maintained a "hands off" approach to-

---

8 101 S. Ct. at 2399.

9 441 U.S. 520, 562 (1979).

10 101 S. Ct. at 2397.

11 *See* note 138 & accompanying text *infra*.

12 *See* note 139 & accompanying text *infra*.

13 *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); 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. L. REV. 893 (1977); Symposium, *Judicially Managed Institutional Reform*, 32 ALA. L. REV. 267-464 (1980); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

wards state prisons.[14] However, following *Holt v. Sarver*,[15] the landmark decision which found the Arkansas prison system unconstitutional, federal courts have played an extremely active role in ameliorating conditions at state and local prisons. Since *Holt*, federal courts have found conditions in individual state prisons or entire state prison systems of at least twenty-two states to be unconstitutional.[16] As of March 31, 1978, over 8,000 cases filed by prison inmates alleging unconstitutional prison conditions or practices were pending.[17]

Prison populations have risen rapidly in recent years, growing forty-two percent between 1975 and 1980.[18] State prison population grew at an average annual rate of 7.4 percent during the 1973-1978 period.[19] Further increases are likely during the next several years, although it is difficult to make accurate forecasts.[20] Even though capital outlays for state prison systems increased by almost fifty percent during

---

[14] The term "hands off doctrine" originated in FRITCH, CIVIL RIGHTS OF INMATES 31 (1961). For a survey and criticism of the doctrine, *see* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). The Supreme Court noted the demise of the hands off doctrine in Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). ("There is no iron curtain drawn between the Constitution and the prisons of this country").

[15] 309 F. Supp. 362 (E.D. Ark., 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (Holt II).

For earlier litigation involving conditions at the same institutions, *see* Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969), *cert. denied*, 396 U.S. 915 (1969); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), *vacating*, 268 F. Supp. 804 (E.D. Ark. 1967); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). For later litigation, *see* Finney v. Mabry, 455 F. Supp. 756 (E.D. Ark. 1978); 458 F. Supp. 720 (E.D. Ark. 1978) (consent decree); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part, rev'd in part sub nom.*, Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974) (Holt III).

For an analysis of the effectiveness of judicial intervention in the Arkansas prison system, *see*, M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977).

[16] For a thorough survey of these cases, *see* 101 S. Ct. at 2402 n.2 (Brennan, J., concurring).

[17] NATIONAL INSTITUTE OF JUSTICE, 3 AMERICAN PRISONS AND JAILS 33 (1980) [hereinafter cited as AMERICAN PRISONS]. Prison civil rights cases comprise about five percent of the civil filings in federal courts. *See, Civil Rights of Institutionalized Persons, Hearings on S. 1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 427 (1977).

[18] Krajick, *The Boom Resumes*, 7 CORRECTIONS 16, 16-17 (1981).

[19] 1 AMERICAN PRISONS, *supra* note 17, at 14.

[20] 2 AMERICAN PRISONS, *supra* note 17, at 4-5. The sources of uncertainty in forecasting prison population include inadequate data, random fluctuations in prison populations, and changes in criminal justice policy which affect the flow of people to and from penal institutions.

the 1971-1977 period,[21] population gains in many state prisons outpaced the construction of new facilities. The Texas prison population, for example, nearly doubled between 1968 and 1978 while its prison capacity increased by only thirty percent.[22] All of the advisory bodies setting prison space standards have concluded that each inmate needs at least sixty square feet of space, preferably in a single cell, in order to prevent mental and physical deterioration.[23] As of April 1, 1978, sixty-five per-

---

[21] 3 AMERICAN PRISONS, *supra* note 17, at 130. This represents slightly less than a thirty percent increase in real terms.

More than 150 state prisons have been built in the last ten years. A total of 62 prisons in 41 states are currently under construction. *See* NEWSWEEK, March 23, 1981, at 54.

[22] NATIONAL INSTITUTE OF JUSTICE, THE EFFECT OF OVERCROWDING ON INMATE BEHAVIOR 103 (1980) [hereinafter cited as EFFECT OF OVERCROWDING]. *See also* Ruiz v. Estelle, 503 F. Supp. 1265, 1277, 1280-81 (S.D. Tex. 1980), *stayed pending appeal*, 650 F.2d 555 (5th Cir. 1981).

[23]

Organization	Per Inmate Space Standard (in square feet)	
The International Conference of Building Officials	90	
National Advisory Commission for Criminal Justice Standards and Goals	80	
American Correctional Association (*Manual of Standards for Adult Institutions*)	80	(10 hrs. or more in cell daily)
	60	(Less than 10 hours daily)
Department of Justice, Federal Correctional Policy Task Force	80	(10 hrs. or more)
	60	(Less than 10 hrs.)
American Correctional Association (*Manual of Correctional Standards*)	75	
American Public Health Association	75	(dormitory)
	60	(single cell)
American Institute of Architects	70	
Building Officials and Code Administrators, Inc.	70	
Building Officials Conference Code of America	70	
National Clearinghouse for Criminal Justice Planning and Architecture	70	
National Conference of Commissioners on Uniform State Law	70	
National Sheriff's Association	70	

Many courts have relied on these standards when ordering improvements in prison conditions. *See* note 35 *infra*.

For a graphic description of the limited space in a typical cell see 1 AMERICAN PRISONS, *supra* note 17, at 59:

In the quite typical 6 by 8 foot or 6 by 9 foot (48 to 54 square feet) cell, actual floor space

cent of all state prison inmates were provided with less than this amount of space.[24] Using the same standard, state prisons were operating at 173 percent of capacity.[25]

A recent study documenting the harmful effects of overcrowding on inmates concluded that "[w]hen [prison] facilities are relatively fixed, increases in population lead to disproportionately higher negative effects."[26] The study found that the rates of death, suicide and disciplinary infractions rose substantially faster than population increases in the Texas prison system.[27] Conversely, when the population of the Oklahoma system dropped, there was an even greater decline in the violent death rate.[28] "Double celling," the housing of two inmates in a cell designed for one, is a common response to prison population increases.[29] The study found that double celling has "measurably greater negative effects than single unit housing."[30] It also revealed that large penal institutions, including those the size of SOCF, produce more negative effects than smaller prisons.[31]

---

must accommodate the usual wall-hung bed and some sort of open toilet and wash sink in combination or separately mounted. The bed reduces floor space by about 18 square feet, and the toilet facilities by an additional four square feet. Frequently one finds a chair, table, and shelves which reduce the square footage again by up to another ten square feet. This leaves 16-22 square feet of net movement space—including space between the table and toilet, table and bed, or cell door and bed, all of which are normally inaccessible, and, therefore, constructively unusuable.

A prisoner who is 5 feet 5 inches tall, standing in the center of his cell (facing the entrance) can extend his arms, and with no effort, touch both walls over the bed and desk. A prisoner who is 6 feet tall or more will have to bend his arms at the elbows to accomplish the same task. It takes little imagination to understanding the devastating effect of double celling.

[24] *Id.* at 61. In 1978, 19 percent of state cells and 11 percent of federal cells were occupied by two or more inmates. Three or more inmates were housed in over 3,000 "single" cells, primarily in state prisons. *Id.* at 59.

[25] 3 AMERICAN PRISONS, *supra* note 17, at 57. Using the capacity of individual confinement cells as reported by the states, the utilization rate was 94 percent. When capacity is defined as one inmate per cell of any size or, for dormitories, the smaller of 60 square feet per inmate of the capacity as rated by the state, the utilization figure is 114 percent.

[26] EFFECT OF OVERCROWDING, *supra* note 22, at 129. *See also* Megarger, *Population Density and Disruptive Behavior in a Prison Setting*, in PRISON VIOLENCE 135 (A. Cohen, G. Cole, & R. Bailey eds. 1976).

[27] EFFECT OF OVERCROWDING, *supra* note 26, at 103-17.

[28] *Id.* at 104-05.

[29] *Id.* at 125. Housing four and five prisoners in a cell designed for one is not an unknown phenomenon. *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265, 1278 (S.D. Tex. 1980), *order stayed pending appeal*, 650 F.2d 555 (5th Cir. 1981); Costello v. Wainwright, 397 F. Supp. 20, 40 (M.D. Fla. 1975) (Appendix A, photo).

[30] EFFECT OF OVERCROWDING, *supra* note 22, at 125. Differences were observed in illness complaint rates, tolerance of overcrowding, nonviolent disciplinary infractions, mood states, rating of the institutional environment and perceptions of personal choice and control. *Id.*

[31] *Id.* at 129. The study compared institutions with approximately 1,500 inmates with those holding about 1,000 inmates. The large institutions had higher death rates (both violent and non-violent) and disproportionately more suicides, psychiatric commitments, self-mutilations and attempted suicides. SOCF has a design capacity of about 1,660, and, at the

Overcrowding has been a major issue in most cases challenging general prison conditions.[32] By increasing pressure on physical facilities and staff, overcrowding is often the source of a variety of prison problems, including breakdowns in sanitation, security, medical care and rehabilitative services.[33] In their remedial orders, lower federal courts have curbed overcrowding by forbidding double celling in cells ranging from thirty-five to eighty-eight square feet in size.[34] In reaching their decisions, they have relied extensively upon the per inmate space minimums established by the assorted prison advisory groups.[35]

---

time of trial, held 2,313 inmates. Chapman v. Rhodes, 434 F. Supp. 1007, 1010-11 (S.D. Ohio 1977).

[32] *See, e.g.*, Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977); Ruiz v. Estelle, 503 F. Supp. 1265.

[33] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd on other grounds*, 438 U.S. 781 (1978) (per curiam). "Each of these failings in Alabama's penal system is compounded by that system's most pervasive and most obvious problem; the overcrowding with which all prisoners must live." 406 F. Supp. at 325.

[34]

Size of Cell	Court Order
35-40 sq.ft.	Battle v. Anderson, 564 F.2d 388, 395.
40 sq. ft 40 sq. ft.	Johnson v. Levine, 450 F. Supp. 648 (D. Md. 1978), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978).
44 sq. ft.	Nelson v. Collins, 455 F. Supp. 727 (D.Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978).
45 sq. ft.	Ruiz v. Estelle, 503 F. Supp. 1265.
47 sq. ft.	Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979).
48 sq. ft.	Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978).
49 sq. ft.	Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir.), *vacated on rehearing on other grounds*, 539 F.2d 547 (5th Cir. 1976) (en banc), *rev'd*, 430 U.S. 325, *aff'd on remand*, 553 F.2d 506 (5th Cir. 1977) (en banc) (per curiam).
60 sq. ft. (isolation and segregation cells)	Pugh v. Locke, 406 F. Supp. 318.
60 sq. ft.	Anderson v. Redman, 429 F. Supp. 1105 (D. Del. 1977).
64 sq. ft.	Capps v. Atiyeh, 495 F. Supp. 802 (D. Ore. 1980), *order stayed pending appeal*, 651 F.2d 96 (9th Cir. 1981).
65 sq. ft.	Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980).
75 sq. ft.	Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), *rev'd*, 441 U.S. 520 (1979).
88 sq. ft.	Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196 (2d Cir. 1974)

[35] *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265, 1385-86; Capps v. Atiyeh, 495 F. Supp. 802, 809-10 (D. Ore. 1980); Ramos v. Lamm, 485 F. Supp. 122, 154 (D. Col. 1979). For one court's extensive reliance on professional standards in ordering other prison improvements, *see* Palmigiano v. Garrahy, 443 F. Supp. 956, 990-994 (D.R.I. 1977). *See also* Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980), for a discussion of the enforceability of prison standards as conventions of international law.

Other remedies ordered by lower courts in order to curb overcrowding have included: accelerating parole dates, *see* Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978); limiting the

The remedies ordered by federal courts in prison condition cases usually are not limited to a specific problem like overcrowding. Characteristically, they attack the deficiencies of a prison system by mandating major changes in prison operation in a wide variety of areas.[36] These institutional remedies usually require the courts to maintain close supervision over state prisons, often for many years.[37] Moreover, they are often extremely expensive. In order to bring the Louisiana prison system into compliance with a federal court order[38] the state legislature had to make a supplemental appropriation of $18,431,622 for a single year's operating expenditures and of $105,605,000 for capital outlays.[39] When state legislatures have been reluctant to appropriate additional money for prisons, the federal courts have in effect ordered additional expenditures.[40]

III. LOWER COURTS FOUND SOCF DOUBLE CELLING UNCONSTITUTIONAL

The Southern Ohio Correctional Facility was built in the early 1970s and is Ohio's only maximum security prison.[41] Described by the district court as "unquestionably a top-flight, first class facility," SOCF

---

prison population to design capacity and prohibiting the acceptance of new prisoners until this level is reached, *see* Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977); increasing reliance on work release and inmate furlough programs and expanding community based correctional programs, *see* Ruiz v. Estelle, 503 F. Supp. 1265; reclassifying prisoners to reduce the population at maximum security facilities, *see* Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977).

[36] *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. at 1387:

> The relief . . . will require many changes in TDC's operations. TDC will be obliged, *inter alia*, to reduce the inmate population at each unit, to increase the security and support staff, to furnish adequate medical and mental health care, and to bring all living and working environments into compliance with state health and safety standards. Its officials will be charged with the duty of instituting, performing and supervising practices that will extirpate and abate staff brutality, the use of building tenders, abuse of the disciplinary process, and further violation of the inmates' rights to access to the courts. Achievement of all these tasks will be extremely difficult even under the best of circumstances, and it may be anticipated that elimination of some of the long-standing practices will be particularly troublesome. The record clearly manifests that the necessary changes cannot be effectuated under TDC's existing organizational structure.

[37] *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362, 385, and related cases, note 15 *supra*.

[38] Williams v. Edwards, 547 F.2d 1206.

[39] *Id.* at 1219-21. *See also* Battle v. Anderson, 564 F.2d 388, 400. (Circuit court upheld extensive prison remedy even though the legislative allocation for the state prison system had increased 534 percent between 1973 and 1976).

[40] *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 330:

> [A] state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget. The Alabama legislature has had ample opportunity to make provision for the state to meet its constitutional responsibilities in this area, and it has failed to do so. It is established beyond doubt that inadequate funding is no answer to the existence of unconstitutional conditions in state penal institutions.

[41] Chapman v. Rhodes, 434 F. Supp. 1007, 1009.

has a superior law library as well as school facilities, workshops, a forty bed hospital and outdoor recreational and visitation areas.[42] Its cells are approximately sixty-three square feet in size.[43] In addition to a bed (or bunk beds if double celled) occupying twenty square feet, each cell contains a cabinet type night stand, wall cabinet, shelf, wall mounted lavatory with hot and cold running water, commode flushed from inside the cell, and a radio and ventilation duct.[44] Each cell block contains a dayroom "designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den."[45]

At the time of trial, SOCF housed 2,300 inmates, thirty-eight percent over its design capacity.[46] Sixty-seven percent of the inmates were serving either life or first degree felony sentences.[47] Approximately 1,400 inmates were doubled celled.[48] About seventy-five percent of the double celled inmates were permitted to leave their cells for about fifteen hours daily and go to the dayroom or participate in prison activities.[49]

The district court found that double celling had not overtaxed SOCF's physical facilities or staff. Its food, ventilation and noise levels were acceptable and double celling had not significantly reduced inmate access to the dayrooms, visitation facilities, law library or school programs.[50] Nor were plaintiffs able to establish that there had been an increase in inmate violence and criminal activity which could be attributed to double celling.[51]

The district court did find that prison jobs had been "watered down" by assigning more inmates than were necessary to each job.[52] While there was evidence of inappropriate medical treatment and iso-

---

42 *Id.* at 1009-11.

43 *Id.* at 1011.

44 *Id.*

45 *Id.* at 1012.

46 *Id.* at 1010-11.

47 *Id.* at 1011.

48 *Id.*

49 *Id.* at 1012-13. Four other inmate classes made up the remaining 25 percent of the double celled inmates. Those who requested protective custody but who could not substantiate their fears were locked in their cells for all but six hours weekly. New inmates and those classified as voluntarily idle were in their cells for all but four hours a week. Inmates in isolation cells left their cells two hours weekly. *Id.*

50 *Id.* at 1012-15.

51 *Id.* at 1018. An increase in violence is probably the most graphic indication that overcrowding harms inmates. Thus, the plaintiffs' failure to establish that overcrowding had caused greater violence was a major weakness in their case. The high levels of violence associated with prison overcrowding have been key factor in establishing cruel and unusual punishment in other prison conditions cases. *See, e.g.*, Williams v. Edwards, 547 F.2d 1206, 1211; Ruiz v. Estelle, 503 F. Supp. 1265, 1303.

52 Chapman v. Rhodes, 434 F. Supp. at 1015.

lated instances of failure to provide medical attention, the situation was not "out-of-hand or the result of indifference."[53] As a result of overcrowding, however, SOCF inmates were substantially deprived of psychological services.[54]

Despite these generally favorable findings, the district court held that the "totality of circumstances" at SOCF made double celling unconstitutional.[55] It identified five important factors. First, the inmates' long sentences exacerbated the problems of close confinement and overcrowding.[56] Second, SOCF held thirty-eight percent more inmates than its rated capacity and such "overcrowding necessarily involves excess limitation of general movement as well as physical and mental injury from long exposure."[57] Third, the cells were built to house one person and in light of recommended prison space guidelines, the space alloted to each double celled inmate was insufficient.[58] Fourth, double celled inmates spent most of their time in their cells and a significant number of these inmates were locked in their cells with their cellmates for over twenty-three hours daily.[59] Fifth, double celling was not a temporary expedient, which would have been "undoubtedly permissible," but instead seemed destined to become a regular practice.[60]

In an unpublished opinion, the Sixth Circuit Court of Appeals affirmed the district court's decision.[61] It disagreed with the petitioner's argument that the lower court's decision had made double celling unconstitutional per se. The Sixth Circuit ruled that the district court's findings were not clearly erroneous, its conclusions of law were permissible, and its remedy reasonable.[62] The Supreme Court's understanding of the district court's decision as making double celling unconstitutional per se probably prompted it to grant certiorari.[63]

---

53 *Id.* at 1015-16.

54 *Id.* at 1016. The Supreme Court minimized the significance of this finding. Rhodes v. Chapman, 101 S. Ct. 2392, 2397.

55 Chapman v. Rhodes, 434 F. Supp. at 1020-21.

56 *Id.* at 1020.

57 *Id.*

58 *Id.* at 1021.

59 *Id.* The members of the Supreme Court disagreed in their interpretation of this finding. *Compare* 101 S. Ct. at 2400 n.15 (majority opinion) *with* 101 S. Ct. at 2412 n.6 (Marshall, J., dissenting).

60 Chapman v. Rhodes, 434 F. Supp. at 1021.

61 624 F.2d 1099 (6th Cir. 1980).

62 *Id.*

63 101 S. Ct. at 2409 n.13 (Brennan, J., concurring); "The five considerations cited by the District Court . . . are not *separate* aspects of conditions at the prison; rather, they merely embroider upon the theme that double celling is unconstitutional in itself."

IV. The Supreme Court Reverses

In a decision written by Justice Powell, the Supreme Court reversed the lower courts' holdings.[64] While the Court never explicitly adopted an eighth amendment test, it limited its inquiry to whether conditions at SOCF wantonly and unnecessarily inflict pain or are grossly disproportionate to the severity of the crimes warranting imprisonment.[65] Prison conditions which are neither excessive nor disproportionate under contemporary standards are not unconstitutional and "to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[66]

Applying this eighth amendment interpretation to the conditions at SOCF, the Court stressed that double celling had not deprived inmates of food, medical care or adequate sanitation, nor led to a disproportionate increase in prison violence.[67] A marginal diminution in work and educational programs was, according to the Court, far from a deprivation of constitutional dimension.[68] The Court also dismissed the five considerations relied upon by the district court in finding double celling unconstitutional as "fall[ing] far short in themselves of proving cruel and unusual punishment."[69] The Court concluded its eighth amendment analysis by stating that "the Constitution does not mandate comfortable prisons" and that the problems of double celling at SOCF should be "weighed by the legislature and prison administration rather than a court."[70] In the final portion of the opinion, the Court discouraged judicial activism in the area of prison conditions by warning that "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system . . . ."[71]

In a concurring opinion joined by Justices Blackmun and Stevens, Justice Brennan emphasized that "today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions."[72] Justice Brennan began by discussing the factors which have led to the emergence of the federal courts as the "critical force" behind the amelioration of inhumane prison conditions. Among these factors

---

64 101 S. Ct. 2392 (1981).
65 *Id.* at 2399.
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at 2400.
71 *Id.* at 2401-02.
72 *Id.* at 2402 (Brennan, J., concurring).

are the lag in correctional expenditures behind rising prison populations, public apathy, the political powerlessness of prisoners, and the refusal of state legislatures to allocate sufficient money to raise prison conditions to minimally adequate levels.[73]

Justice Brennan's eighth amendment analysis differed from the majority's. He believed that the Court should question whether prison conditions comport with "human dignity."[74] Noting that poor prison conditions often arise from neglect rather than policy, Justice Brennan argued that "there is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within limits of decency."[75] Outlining and then applying a totality of the circumstances test,[76] Justice Brennan described SOCF as "one of the better, more humane large prisons."[77] Rejecting a view that double celling is per se unconstitutional, Justice Brennan concluded that absent any "actual signs" that double celling has seriously harmed SOCF inmates the practice is not unconstitutional.[78] Justice Blackmun, who joined in Justice Brennan's concurrence and wrote a separate concurring opinion, said that the majority opinion should not be read as marking a retreat from federal court scrutiny of state prison conditions.[79]

Justice Marshall, the only dissenter, argued that double celling did not result from a considered legislative policy judgment, but simply because more individuals were sent to SOCF than it was designed to hold.[80] According to Justice Marshall, the relevant legislative policy judgment was the initial decision during the design of the facility to provide each inmate with his own cell.[81] Pointing to unanimous and undisputed expert testimony that double celling is undesirable,[82] and to the district court's finding that long-term double celling necessarily causes mental and physical deterioration,[83] Justice Marshall concluded that the conditions at SOCF violate eighth amendment norms.[84] In the final portion of his dissent, Justice Marshall expressed his fear that the majority opinion will "eviscerate" the federal courts' role in actively re-

---

73 *Id.* at 2404-05.
74 *Id.* at 2406.
75 *Id.* at 2407.
76 *Id.* at 2407-08.
77 *Id.* at 2408-09.
78 *Id.* at 2409-10.
79 *Id.* at 2410.
80 *Id.* at 2411.
81 *Id.*
82 *Id.* at n.1 (quoting 434 F. Supp. at 1016).
83 *Id.* at 2413.
84 *Id.*

viewing state prison conditions.[85] Warning that the majority has taken "far too sanguine a view of the motivations of state legislators and prison officials," Justice Marshall argued that a strong federal court presence is especially needed because "[i]n the current climate it is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health."[86]

V. EIGHTH AMENDMENT INTERPRETATION

A. RHODES UTILIZES A NARROW EIGHTH AMENDMENT ANALYSIS

Rhodes marks the first time that the Court has considered the restrictions which the eighth amendment places upon conditions at state prisons.[87] The Court's narrow interpretation of the amendment in the decision exemplifies its restrictive reading of the "cruel and unusual punishment" clause in recent cases. It precludes an assertive role by the judiciary in defining and protecting standards of human decency and dignity in the context of confinement.

Three general applications of the eighth amendment can be identified. Originally, the prohibition against cruel and unusual punishments applied to only unusually barbarous or tortuous sanctions. For example, in a pair of cases late in the nineteenth century, the Court upheld executions by shooting[88] and electrocution.[89] It distinguished these forms of capital punishment from intentionally cruel punishments such as burning at the stake, crucifixion or breaking at the wheel.[90] Over a half century later, Justice Frankfurter contributed influential language to this mode of eighth amendment analysis when he attacked govern-

---

85 *Id.*

86 *Id.* at 2414. It is unclear what Justice Marshall means by the "current climate" in which legislators will condone inhumane prison conditions. Perhaps he is referring to the growing support for the punitive theory of criminal justice. *See generally* J. WILSON, THINKING ABOUT CRIME (1975).

Rhodes was decided during a period of conservative dominance in the executive and legislative branches of the federal government. The conservatism was illustrated by the massive transfer of federal funds from social welfare programs to the military and a tax cut benefiting primarily taxpayers in upper-income brackets which were engineered by the Reagan administration in the spring and summer of 1981. The conservative fervor and bi-partisan support for the cuts in social programs must have been an important signal to the Court to avoid forcing billions in governmental expenditures or innovative penal reforms in order to reduce prison overcrowding. *See* notes 138-43 & accompanying text *infra*.

87 101 S. Ct. at 2397-98.

88 Wilkerson v. Utah, 99 U.S. 130 (1878).

89 *In re* Kemmler, 136 U.S. 436 (1890). In a subsequent eighth amendment challenge, the Court upheld the second execution of an individual after the first attempt had failed due to a faulty electric chair. State of Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), *rehearing denied*, 330 U.S. 853 (1947).

90 *In re* Kemmler, 136 U.S. at 446.

ment conduct which "shocked the conscience."[91]

In *Weems v. United States*[92] the Court developed a second application of the eighth amendment when it forebade punishments which are grossly disproportionate to the criminal offense.[93] It stayed the imposition of the *cadena temporal*, a sentence of twelve years at hard and painful labor with permanent loss of civil rights, upon an individual who had falsified public records.[94] *Weems* was also the precursor of a third application of the eighth amendment. Explaining its expansion of the eighth amendment to cover disproportionate punishment, the Court noted that "time works changes, brings into existence new conditions and purposes; [t]herefore, a principle to be vital must be capable of wider application than the mischief which gave it birth."[95] The eighth amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[96]

The notion that the eighth amendment incorporates advancing standards of a "humane justice" was elevated into a distinct mode of eighth amendment analysis fifty years later in *Trop v. Dulles*.[97] Forbidding the denaturalization of an individual who had briefly deserted the army, the Court stated that "the basic concept underlying the eighth amendment is nothing less than the dignity of man, [w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[98] The Court went on to observe that the scope of the eighth amendment is not static and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[99]

The central problem for eighth amendment analysis since *Trop* has been whether "evolving standards of decency" and the "dignity of man" constitute a distinct constitutional "test" or whether this language simply means that the definitions of cruelty and disproportionality may change over time. Those justices who discern a separate "decency" standard in the eighth amendment favor the judiciary's taking a leading role in defining and advancing such "public values."[100] On the other hand,

---

91 Rochin v. California, 344 U.S. 465, 472 (1952). Rochin was a due process case. For use of the "shock the conscience" test in prison condition cases, *see* Holt v. Sarver, 309 F. Supp. 362 at 372-73; Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977); Crowe v. Leeke, 540 F.2d 740, 742 (4th Cir. 1976) (per curiam) (triple celling does not "shock the conscience").

92 217 U.S. 349 (1910).

93 *Id.* at 367.

94 *Id.* at 365-67.

95 *Id.* at 373.

96 *Id.* at 378.

97 356 U.S. 86 (1958).

98 *Id.* at 100.

99 *Id.* at 101.

100 For an argument that the courts should take an active role in giving specific meaning

those justices who would largely confine the eighth amendment to its two traditional applications envision a much more limited role for the courts in mandating changes in state practices in the interest of "subjective" notions of human dignity and decency.

This ideological split is especially evident in *Furman v. Georgia*,[101] where the Court struck down a state death penalty statute. None of the justices disputed the two traditional applications of the eighth amendment. The source of their disagreement was the extent to which the Court should use the amendment to make an independent and critical analysis of the morality and efficacy of state punitive practices. Justice Brennan viewed the eighth amendment as prohibiting "uncivilized and inhumane punishments."[102] A state "must treat its members with respect for their intrinsic worth as human beings" and its punishments "must comport with human dignity."[103] Advocating active judicial review of state imposed punishments, Justice Brennan defined a punishment to be in violation of the eighth amendment when "there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted."[104] Maintaining that standards of decency had advanced, Justices Brennan[105] and Marshall[106] found the death penalty unconstitutional per se.

At the other end of the ideological spectrum, Justice Powell found in the eighth amendment "no support . . . for the view that the court may invalidate a category of penalties because we deem less severe ones adequate to serve the ends of penology."[107] In his dissenting opinion, Chief Justice Burger explicitly rejected judicial use of standards of decency as a distinct eighth amendment test by stating that "in a democ-

---

and operational content to ambiguous constitutional values such as liberty, equality, due process and freedom from cruel and unusual punishment and in setting priorities when such values conflict, *see* Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Fiss does not advocate, however, that the judiciary become the final arbiter of public values: "Judges have no monopoly on the task of giving meaning to the public values of the Constitution, but neither is there reason for them to be silent. They too can make a contribution to public debate and inquiry." *Id.* at 2. In his article, Fiss outlines how structural reform of state institutions by the courts has been a primary forum for judicial enunciation of public values.

101 408 U.S. 238.

102 *Id.* at 270.

103 *Id.*

104 *Id.* at 279. *See also* Justice Marshall's concurring opinion. ("A penalty may be cruel and unusual if it is excessive and serves no valid legislative purpose." *Id.* at 331).

105 *Id.* at 305.

106 *Id.* at 370-71.

107 *Id.* at 451 (Powell, J., dissenting). *See also* Chief Justice Burger's dissenting opinion: "The Eighth Amendment does not prohibit all punishment the States are unable to prove necessary to deter or control crime. The Amendment is not concerned with the process by which a state determines that a particular punishment is to be imposed in a particular case." *Id.* at 397.

racy the legislative judgment is presumed to embody the basic standards of decency prevailing in society."[108] Thus, he argued that the death penalty statute was constitutionally acceptable, even though expressing grave doubts as to its efficacy and morality.[109]

Since *Furman*, the more limited interpretation of the eighth amendment has prevailed and "standards of decency" no longer constitute an independently viable eighth amendment norm. In *Gregg v. Georgia*,[110] another death penalty challenge, the Court rejected close judicial evaluation of the efficacy or decency of legislatively imposed punishments. Limiting the eighth amendment to its two traditional applications, the Court stated that the judiciary was "not to require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."[111]

In *Ingraham v. Wright*[112] the Court declined to extend the eighth amendment to cover school disciplinary practices, limiting the scope of its protection to convicted criminals.[113] Importantly, the Court rejected the petitioner's argument that the eighth amendment should be expanded because standards of decency had advanced[114] and social institutions had changed significantly since its adoption.[115] In dictum, the Court narrowly limited the applicability of the eighth amendment to prisoners, remarking that "the protection afforded [prisoners] by the Eighth Amendment is limited. After incarceration only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment."[116]

The Court's reluctance to utilize a separate decency standard is further illustrated by *Rummel v. Estelle*[117] where the Court upheld the imposition of an automatic life sentence under a state recividist statute on an individual whose three thefts did not involve violence and netted less than $230. The Court rejected Rummel's argument that due to the pet-

---

108 *Id.* at 384. The Chief Justice also observed that: "[U]p to now the Court has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values; nor has the Court suggested judicially manageable criteria for measuring such a shift in moral concerns." *Id.* at 382-83.

109 *Id.* at 375.

110 428 U.S. 153 (1979).

111 *Id.* at 175.

112 430 U.S. 651 (1979).

113 *Id.* at 666-68.

114 *Id.* at 668 n.36.

115 *Id.* at 668. This position illustrates the Court's strong reluctance to use the eighth amendment to outline and protect public values of decency and human dignity.

116 *Id.* at 669-70. This language was employed by the Court in *Rhodes*, where it stated that "Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate. . ." 101 S. Ct. at 2399.

117 445 U.S. 263 (1980).

tiness of the crimes, the sentence was disproportionate, stating that such an analysis would embroil the Court in "subjective" decision-making which was better left to the legislature.[118] *Rummel* reveals the Court's disenchantment not only with playing an active role in discerning and shaping contemporary standards of decency but also with the very notion that eighth amendment standards "evolve" rather than merely change:

> Perhaps, as asserted in *Weems* "time works changes" upon the Eighth Amendment, bringing into existence 'new conditions and purposes." We all, of course, would like to think that we are "moving down the road toward human decency." Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies.[119]

In *Rhodes*, the Court embraced only the two traditional applications of the eighth amendment, simply requiring that prison conditions be neither unnecessarily cruel nor disproportionate to the inmates' crimes.[120] Its holding that double celling at SOCF is not unconstitutional easily followed from this approach. First, the Court did not question the State's penological justification, if any, for the double celling.[121] Second, it neither considered the long-term effects of double celling on SOCF's inmates, staff and facilities nor weighed any dignity or privacy interests which the inmates may have.[122] Third, given SOCF's status as a first-class facility which had not yet deteriorated due to overcrowding, the Court concluded that inmates were not deprived of a "minimal civilized measure of life's necessities."[123] Finally, since most of the SOCF inmates were serious offenders, even conditions that were especially "restrictive, even harsh" would have passed constitutional muster.[124]

---

118 *Id.* at 275.

119 *Id.* at 283 (citations omitted).

120 101 S. Ct. at 2399.

121 *Compare* Justice Marshall's dissent, *id.* at 2411. He points out that double celling did not result from a legislative policy judgment or a decision by correctional officials. Rather, double celling was instituted solely because more people were being sent to SOCF by the courts than it was designed to hold. Among the largely independent factors which affect prison population are prosecutorial emphasis, criminalization or decriminalization of various behaviors, sentencing policies, parole decisions and the use of community based alternatives to prisons. *See* note 155 *infra*.

122 *Compare* Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), where the court noted: "[W]e find the lack of privacy inherent in double celling a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete or windows for walls." In *Rhodes*, only Justice Marshall in dissent argued that the Court should have considered the probable mental and physical harm to inmates which long-term double celling would cause. 101 S. Ct. at 2413.

123 101 S. Ct. at 2399.

124 The precise nature of the punishment which can be inflicted upon inmates by prison conditions had not been settled by the lower federal courts prior to *Rhodes*. A few courts suggested that "persons are sent to prison as punishment, not *for* punishment." Battle v. Anderson, 564 F.2d 388 (quoting from an unpublished district court opinion); Laaman v.

B. TWO WEAKNESSES IN RHODES' EIGHTH AMENDMENT APPROACH

One weakness in *Rhodes'* eighth amendment approach is that it inadequately accounts for the political dynamics which make it difficult, if not nearly impossible for many states to operate humane prisons.[125] Prisoners are not only disenfranchised but are disproportionately from minority groups and the poor; social groups with little political influence.[126] At best, the general public is unaware of the nature of prison conditions.[127] More probably, prisoners are regarded with contemptu-

Helgemoe, 437 F. Supp. 269, 308 (D.N.H. 1977). Most courts did not preclude use of prison conditions as punishment but held that prison inmates could not be subjected to an environment which would cause their mental or physical degeneration or prevent their rehabilitation. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 566; Battle v. Anderson, 564 F.2d 388, 392-93; Pugh v. Locke, 406 F. Supp. 318, 339. A few lower courts declined to prohibit prison conditions which may cause physical or psychological deterioration. *See, e.g.*, Newman v. Alabama, 559 F.2d 283, 291.

In *Rhodes*, the Court accepted the notion that the "conditions of confinement comprise . . . punishment." 101 S. Ct. at 2399. *See also id.* at 2398 n.11. Its statement that prison conditions can be "harsh" may suggest that the Court was willing to countenance a prison environment which causes the mental and physical deterioration of inmates. As Justice Rehnquist stated prior to the *Rhodes* decision ". . . nothing in the Eighth Amendment . . . requires that [inmates] be housed in a manner most pleasing to them, or considered even by the most knowledgeable penal authorities to be likely to avoid confrontation, psychological depression and the like." Capps v. Atiyeh, 101 S. Ct. 829, 831 (1981). (In Chambers opinion by Mr. Justice Rehnquist in his capacity as Circuit Justice for the Ninth Circuit staying the application of the injunction ordered by the District Court in Capps v. Atiyeh, 495 F. Supp. 802 (D. Ore. 1980)).

125 In their separate opinions, Justices Brennan and Marshall recognize the political obstacles to adequate state prisons. *See, e.g.*, 101 S. Ct. at 2404-05 (Brennan, J., concurring); 101 S. Ct. at 2414 (Marshall, J., dissenting).

126 3 AMERICAN PRISONS, *supra* note 17, at 251-58. *See generally* C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 87 (1978).

Incarceration Rates per 100,000 Population, 1970

Age	Black	White
Under 18	24	3
18-24	1013	171
25-44	622	108
45+	161	29
Total	437	64

Source: R. CARLSON, THE DILEMMAS OF CORRECTIONS 88 (1976). As of February, 1978 only 57.3 percent of white and 55.6 percent of black jail inmates had been employed at the time of their arrest. The median annual income for those jail inmates who had had an income was $4,814 for whites and $2,986 for blacks. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 201 (1980).

127 *See* Holt v. Sarver, 309 F. Supp. 362, 367:

> Prior to about 1965 the people of Arkansas as a whole knew little or nothing about their penal system although there were sporadic and sensational "exposes" from time to time about alleged conditions at the [prison] farms.
>
> These "exposes" created little, if any, lasting impression on the Arkansas public. As of that time it is probably fair to say that many otherwise well informed Arkansas people viewed the Penitentiary as a self-sustaining, even profit making institution, operated by a few strong-willed men who were able to make the convicts behave themselves and work.

ous indifference.[128] Given the high costs of constructing and operating prisons,[129] state legislatures have been unwilling in these circumstances to appropriate sufficient funds for adequate prisons.[130]

The special status of the inmate compels close judicial scrutiny of prison conditions. Prisoners are completely dependent upon prison authorities for conditions of their existence. The Court recognized this dependency relationship in *Estelle v. Gamble*[131] when it noted that an inmate must rely on prison officials for medical treatment.[132] Its analysis in *Ingraham v. Wright*[133] also illustrates the precarious status of the prisoner. There, the Court stated that schoolchildren do not need the protection of the eighth amendment because schools are "open" institutions where the child "brings with him the support of family and friends and is rarely apart from teachers and other people who may witness and protest any instances of mistreatment."[134] In contrast, prisons are among the most "closed" institutions in society.[135] Direct community supervision is limited both because of security considerations and the political weakness of the prisoners' families and friends. Thus, there are few witnesses, save for the victims themselves, to prison mistreatment. Moreover, prisoners are by definition unable to flee from inhumane treatment, yet effective pressure by inmates for prison improvements is difficult[136] and sometimes dangerous.[137]

---

128 One commentator has noted:

> Of crucial importance . . . has been the invisibility of the [prison] institution. Prisons are usually far away, physically and emotionally. Both as a cause and effect of this invisibility, the community ordinarily has as little interest in the people it sends to prison as most of us have in our garbage—we want it disposed of safely, quietly and without much mess, but we don't particularly care how.

Bronstein, *Offender Rights Litigation: Historical and Factual Development*, in 2 PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION AND PRACTICE (I. Robbins ed. 1980) [hereinafter cited as OFFENDER RIGHTS LITIGATION].

129 3 AMERICAN PRISONS, *supra* note 17, at 115-21.

130 In one court's assessment: "When one reads between the lines of these [prison conditions] opinions, it is apparent that state legislatures have been reluctant in these inflationary times to spend sufficient tax dollars to bring conditions in outdated prisons up to minimally acceptable standards." Johnson v. Levine, 450 F. Supp. 648, 654 (D. Md. 1978).

131 429 U.S. 97 (1976).

132 *Id.* at 103.

133 439 U.S. 651 (1977).

134 *Id.* at 651.

135 *See* note 128 *supra*.

136 *Cf.* Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119 (1979) (restrictions upheld on the formation and operation of a prisoners labor union which sought to improve working conditions, serve as a vehicle for the presentation and resolution of inmate grievances, and work for changes in objectionable penal practices). *See also* Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) (harassment of inmate who filed prison conditions suit).

137 *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362, 368 (E.D. Ark. 1970) (1966 inmate uprising led to a state police investigation of the Arkansas prison system which uncovered many of its abuses. A 1968 uprising, which was quelled with shotguns, prompted a federal grand jury

As Justice Brennan's concurrence and Justice Marshall's dissent suggest, the Court was not unaware of the dismal record of many states in prison operation nor of the special dependency status of prisoners. The overriding concern of the majority, however, was avoiding a major confrontation with the states over the control of state prisons. With the construction of new prisons costing up to $50,000 per inmate space,[138] implementing a sixty square foot per prisoner standard would have required up to ten billion dollars in state expenditures. While alternatives to new prison construction exist,[139] any prison reforms mandated by the federal courts would likely be resented, if not resisted by state penal authorities.[140] Since federal courts would play the major role in implementing a minimum space standard, a decision for the SOCF inmates would have substantially increased the power of the federal judiciary vis-a-vis state legislatures and prison administrators. This would come at a time when the "states rights" doctrine is resurgent[141] and the Congress is considering major limits on the Court's jurisdiction in other controversial areas like school desegregation and abortion.[142] Given these

investigation and subsequent trial of prison employees and some former employees and inmates. Only one person was convicted of violating the inmates' civil rights.).

See also ATTICA, THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972). (After capturing the Attica prison its inmates presented demands for improvements in many areas of prison operation. *Id.* at 251-57. When inmates rejected a counter-offer from the state, the prison was stormed and thirty-two inmates were killed.) For a listing and description of prison uprisings in the early 1970s, *see* CONGRESSIONAL QUARTERLY, CRIME AND JUSTICE at 77-79 (1978). Many of the uprisings were sparked by poor prison conditions. *Id.*

138 3 AMERICAN PRISONS, *supra* note 17, at 119-26. *See also The Prison Nightmare*, TIME, June 8, 1981, at 18.

139 1 AMERICAN PRISONS, *supra* note 17, at 119-24. Volume 4 of AMERICAN PRISONS analyzes the impact of recently amended criminal justice statutes in five states on sentencing and release patterns as well as prison population.

See Anderson v. Redman, 429 F. Supp. 1105, 1128-36 (D. Del. 1977) for a survey of many alternatives to prison construction as a means of eliminating overcrowding. *See generally* ALTERNATIVES TO PRISON: COMMUNITY BASED CORRECTIONS (G. Perlstein & T. Phelps eds. 1975); A NATION WITHOUT PRISONS (C. Dodge ed. 1975); COMMUNITY BASED CORRECTIONS (V. Fox ed. 1977); CORRECTIONS: PROBLEMS AND PROSPECTS (D. Peterson & C. Thomas eds. 1975).

140 William Nagel, a former correction official and a frequent expert witness in prison conditions cases has testified that state governments have "systematically impeded" the court ordered prison reforms. *Civil Rights of Institutionalized Persons: Hearings on S. 1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 772 (1977). Justice Brennan notes this testimony in his concurring opinion, 101 S. Ct. at 2405 n.7.

For a somewhat less harsh assessment of governmental responses to judicially ordered prison improvements, *see* M. HARRIS & D. SPILLER, *supra* note 15.

141 For opposing views on the merits of the "states rights" doctrine *compare States' Rights and Other Myths*, TIME, February 9, 1981, at 97, *with States Rights for Liberals*, THE NEW REPUBLIC, January 24, 1981, at 21.

142 *Congressional Quarterly Weekly Index*, May 30, 1981, at 947. *See also* The New York Times, March 16, 1981, § 1, at 16, col. 1; *Id.*, May 22, 1981, § 2, at 6, col. 5.

practical considerations, the result in *Rhodes* is not unexpected, especially since the conditions at SOCF were relatively good.[143] The price of the majority's deference to the states, however, is likely to be poorer prison conditions for many inmates.

Another weakness is that *Rhodes'* eighth amendment analysis does not include consideration of the long-term deleterious effects of double celling. The Court declined to consider the possibility that long-term overcrowding creates a dangerous potential for frustration and violence which could lead to a prison riot.[144] With overcrowding recognized as a cause of mental and physical deterioration of inmates[145] and as a major source of prison disorders[146] one consequence of this approach may be the unchecked rise in state prison populations to explosive levels. Given the demonstated inability of legislatures in many states to maintain even marginally adequate facilities,[147] *Rhodes* did not transfer responsibility for improving prison conditions from the federal courts to the states. Rather, the decision effectively dissipated this responsibility.

One of the most interesting aspects of *Rhodes* is its failure to utilize as the eighth amendment norm the prison space standards which have been set by a variety of oversight organizations. The Court declined to accord constitutional significance to these standards, considering them only organizational "goals" which "cannot weigh as heavily in determining contemporary standards of decency as 'the public attitude toward a given sanction.' "[148] In contrast, lower courts have relied extensively on these standards when finding and remedying overcrowded conditions.[149] This rejection of well-established professional standards stems from the Court foregoing, as part of its narrow interpretation of the eighth amendment any independent analysis of the penological justification for state prison conditions as part of its narrow interpretation of the eighth amendment. One fundamental problem with this approach is the Court's tendency to rely on legislative enactments or administrative practices as embodying contemporary stan-

---

143 *See* notes 42-55 & accompanying text *supra*. Compare these conditions with those in Holt v. Sarver, 309 F. Supp. 362, 380 (Arkansas prisons a "dark and alien world completely alien to the free world") and Pugh v. Locke, 406 F. Supp. 318, 322-25.

144 101 S. Ct. at 2400 n.14.

145 *See generally* the EFFECT OF OVERCROWDING, *supra* note 22.

146 *See, e.g.*, Battle v. Anderson, 564 F.2d 388, 395.

147 *See* notes 16 and 130 *supra*. *See also* Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. OF CHI. L. REV. 647, 648-54 (1971).

148 101 S. Ct. at 2400 n.13 (quoting from Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Courts are, however, generally unwilling or incapable of relying on social science findings. *See* Dorin, TWO DIFFERENT WORLDS: CRIMINOLOGISTS, JUSTICES AND RACIAL DISCRIMINATION IN THE IMPOSITION OF CAPITAL PUNISHMENT IN RAPE CASES, 72 J. CRIM. L. & C. 1667 (1981).

149 *See* note 35 *supra*.

dards of cruelty, disproportionality and decency.[150]

Prison conditions cases, however, present a strong prima facie case for the use of professional standards as the eighth amendment norm. First, there is a strong concensus among experts that less than fifty or sixty square feet of space per inmate is harmful.[151] Second, since relatively low numbers of middle and upper class whites are incarcerated, the most politically and intellectually influential sectors of the public are viscerally unaware of the nature of prison life.[152] Third, if the public is aware of prison conditions, its antipathy towards inmates may make it an unreliable and unworthy guide when discerning constitutional norms, even if embodied in legislative action (or inaction). Fourth, the wide range among states of per inmate expenditures suggests that legislative judgments are not accurate indicators of public notions of cruelty and disproportionality.[153] Fifth, even assuming that legislative policy embodies relevant eighth amendment norms, state prison conditions may not result from legislative policy judgments because prison administrators have a great deal of discretionary authority and can shield prison conditions from close legislative and public scrutiny.[154] Moreover, prison overcrowding often results from factors beyond direct legislative or correctional control, such as demographics and changing patterns of sentencing and parole.[155] Finally, with prisons in all ten cir-

---

150 *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 274-76; Gregg v. Georgia, 428 U.S. 153, 175-76.

151 And in *Rhodes*, "The experts were all in agreement—as is everybody—that single celling is desirable." 434 F. Supp. 1007, 1016. Compare this unanimity with the situation in Rummel v. Estelle, 445 U.S. at 263-83, where the Court notes the disagreement among penologists as to proper sentencing as an element in its decision not to stop the application of a state recidivist statute on eighth amendment grounds.

152 *See, e.g.*, 2 OFFENDER RIGHTS LITIGATION, *supra* note 128: "[F]or most whites, the prison remains a strange and unfamiliar phenomenon, at the periphery of our lives. Relatively few whites go to prison or jail . . . For black and latino people, however, the prison is more than a metaphor and it is a pervasive element of life in the ghetto." *Id.* at 7.

153 1 AMERICAN PRISONS, *supra* note 17, at 67. The annual per inmate expenditures range from $2,241 in Texas to $15,946 in New Hampshire. Assuming a fairly strong correlation between the level of expenditures and prison quality this wide range suggests that state penal practices are too varied to constitute a constitutional norm.

154 *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362, 367:

> That popular impression of the Penitentiary [as adequate] was not accurate in former years, and to the extent that it is still present it is not accurate today. . . . However, the myth tends to be preserved by glowing reports of members of conducted tours of the [prison] farms who are shown in daylight hours what their conductors want them to see, who talk to selected convicts, and who are fed a good meal accompanied by the assurance that they are eating "just what the inmates eat."

155 *See* note 121 *supra*. *See generally* 2 AMERICAN PRISONS, *supra* note 17, at 5. The federal prison population dropped from a high of 30,400 in July 1977 to 24,200 in March 1981. The principal reason for the decline was a shift in Justice Department prosecution emphasis toward white collar, organized crime, public corruption, and major narcotics violations. Continued high numbers of inmates transferred to community treatment centers immediately prior to release was also a factor in the decline. *See 1982 Appropriations Hearing before the Sub-*

cuits[156] under court order, state penal practices seem an unacceptable constitutional guide.

In sum, *Rhodes* exemplifies the Court's unwillingness to employ a distinct eighth amendment inquiry on the basis of public values like decency and dignity. Its narrow eighth amendment approach de-emphasized the importance of the dependency relationship between inmates and prison officials, ignored the political factors which block prison reforms, and rejected "objective indicia"[157] which establish that double celling is harmful. The importance of the decision is that it established a mode of eighth amendment analysis that is intrinsically much less sympathetic to the claims of inmates than that which has heretofore been employed by the lower federal courts.

C. LESS CRITICAL SCRUTINY OF STATE PENAL PRACTICES

While *Rhodes* marks the first time that the Court has applied the eighth amendment to prison conditions,[158] it has recently considered several constitutional challenges to specific prison practices.[159] These cases have been important in establishing the degree of deference which the federal courts are to accord state operation of prisons. In a 1974 case, *Procunier v. Martinez*,[160] the Court held that mail censorship regulations in California prisons violated the first amendment and that a ban on law student and paralegal interviewers infringed upon the inmates' due process right of access to the courts. In an often quoted section of the opinion, the Court discussed the limits on the oversight role of the courts in prison administration:

> Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptable 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. For all these reasons, courts are ill-equipped to deal with the increasingly urgent

---

comm. on the Departments of Commerce, Justice and State, the Judiciary and Related Agencies of the House Comm. on Appropriations, 97th Cong., 1st Sess. 1290-91 (1981) (statement of Norman A. Carlson, Director, Bureau of Prisons).

In his dissenting opinion, Justice Marshall stressed that SOCF double celling did not result from a considered judgment by either the legislature or prison officials but was instituted simply because more people were being sent to the facility than it was designed to hold. For a more detailed analysis of the absence of a policy rationale for prison overcrowding, *see* Lareau v. Manson, 507 F. Supp. 1177, 1191-92 n.16 (D. Conn. 1980).

156 *See* note 16 *supra*.

157 The phrase is from Gregg v. Georgia, 428 U.S. at 173.

158 101 S. Ct. at 2397-98.

159 Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119; Bounds v. Smith, 430 U.S. 817 (1977); Meachum v. Fano, 427 U.S. 215 (1976); Wolff v. McDonnell, 418 U.S. 539; Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974).

160 416 U.S. 396 (1974).

> problems of prison administration and reform. Judicial recognition of these facts reflect no more than a healthy sense of realism. Moreover, when state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.[161]

However, in another case that term, *Pell v. Procunier*,[162] the Court noted that deference to the states did not preclude independent judicial scrutiny of state penal practices according to "legitimate policies and goals of the corrections system."[163] It identified these goals as deterrence, rehabilitation, and internal security,[164] and stated that "it is in light of these legitimate penal objectives that a court must assess challenges to prison regulations."[165] The standard for whether penal practices were unconstitutional was "*substantial evidence*" that prison officials had "exaggerated their response" while undertaking a legitimate penal function.[166]

In later prison cases, the Court did not reject an examination of the penological justification for state prison practices but did raise the standard of proof which plaintiffs needed to meet in order to show unconstitutionality. For example, in *Jones v. North Carolina Prisoners Union*,[167] the Court upheld restrictions on a prisoners labor union on the ground that prison administrators had not been "*conclusively shown to be wrong*" in their view that the union would be disruptive.[168]

As recognized by the *Rhodes* parties in their briefs,[169] *Bell v. Wolfish*[170] was the most important of the Court's prison practices cases prior to *Rhodes*. In *Wolfish*, the Court considered constitutional challenges to a number of practices, including double celling, at the Metropolitan Correction Center (MCC) in New York, a federal short-term custodial facility designed primarily to house pre-trial detainees.[171] This facility was "intended to include the most advanced and innovative features of modern design of detention facilities . . . [having] no barred cells, dark colorless corridors, or clanging steel gates."[172] In an opinion written by

---

161 *Id.* at 404-05.

162 417 U.S. 817 (1974).

163 *Id.* at 822.

164 *Id.* at 822-23.

165 *Id.* at 823.

166 *Id.* at 827 (emphasis added).

167 433 U.S. 119.

168 *Id.* at 132 (emphasis added).

169 Brief for Petitioner at 20. Brief for Respondent at 33-38, 101 S. Ct. 2392.

170 441 U.S. 520 (1979).

171 *Id.* at 523. The inmates also unsuccessfully challenged rules prohibiting them from receiving hardcover books which had not been mailed directly from the publisher, from receiving packages of food and personal items from outside the facility, and requiring visual body cavity searches following contact with persons from outside the institution and inmates to remain outside their cells during routine inspections by security officers. *See* note 182 *infra*.

172 *Id.* at 525. Each of the double bunked cells had a total floor space of about seventy-five

Justice Rehnquist, the Supreme Court held that double celling at MCC was not unconstitutional.[173] It rejected the "compelling necessity" test used by the court of appeals to protect pre-trial detainees from all but the most necessary restrictions and privitations of confinement.[174] Rather, the Court established that pre-trial detainees were only protected from punishments intentionally inflicted by prison authorities or from practices which were arbitrary or purposeless and unrelated to any legitimate institutional objective.[175] Citing the size of MCC cells, the amount of time inmates could spend outside of their cells and the short confinement period for most inmates, the Court held that double celling did not violate constitutional norms.[176]

The different responses to the double celling question by the lower courts and the Supreme Court in *Wolfish*, mirror the two major approaches to eighth amendment analysis.[177] The district court found that double celling was a "fundamental deni[al] of decency, privacy, personal security and simply, civilized humanity."[178] It pointed to other cases which found double celling unconstitutional as evidence that the legal standards of minimum decency had evolved to a point where double celling, even in a first-class facility like MCC, was unconstitutional.[179]

Similarly, the Second Circuit Court of Appeals, in an opinion by Chief Judge Kaufman, described the lack of privacy in double cells as a "compelling consideration" and added that "the government had simply failed to show any substantial justification for double celling."[180] Noting that the government had easily eliminated MCC double celling in response to the district court's order, the court of appeals held that there was no penological justification for double celling pre-trial

---

square feet and contained the same furnishings as the SOCF cells. *Id.* at 541. MCC inmates were confined to their cells for seven-and-a-half hours and for two brief headcounts daily. Otherwise, they were free to move between their cells and common areas, comparable to the SOCF dayrooms. *Id.* Five percent of all MCC inmates spent less than thirty days at the facility and seventy-three percent less than sixty days. *Id.* at 524-25 n.3. Soon after it opened, MCC's population exceeded its capacity and double celling was instituted. *Id.* at 525-26. The district court ordered an end to the double celling of all prisoners. U.S. *ex rel.* Wolfish v. Levi, 428 F. Supp. 333, 337-38 (S.D.N.Y. 1977). The court of appeals limited this order to pre-trial detainees, holding that double celling was not cruel and unusual punishment under the circumstances. Wolfish v. Levi, 573 F.2d 118, 124-25 (2d Cir. 1978).

173 441 U.S. at 525.

174 *Id.* at 531-33.

175 *Id.* at 537-38.

176 *Id.* at 541-43.

177 *See* note 100 & accompanying text *supra*.

178 428 F. Supp. at 339.

179 *Id.*

180 573 F.2d at 127.

detainees.[181]

In contrast, the Supreme Court neither considered double celling's effect on any dignity or privacy interests of MCC inmates, nor rigorously scrutinized the rationale for the other MCC practices which the inmates had challenged.[182] It rejected the notion that "there is some sort of 'one man, one cell' principle lurking in the due process clause."[183] The Court also warned against federal court activism in prison affairs. While noting that federal courts had rightly condemned "sordid" conditions at some prisons, it added that:

> Many of these same courts have, in the name of the constitution, become increasingly enmeshed in the minutiae of prison administration. Judges . . . have a natural tendency to believe that their individual solution to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of a particular institution . . . . The inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution.[184]

Wolfish's impact on subsequent eight amendment prison cases was not dramatic.[185] While some courts interpreted the decision as substantially limiting judicial involvement in improving prison conditions,[186] others distinguished *Wolfish* on its facts, noting that MCC was modern, its inmates short-term and its essential services as yet undisrupted by overcrowding.[187]

While the Court in *Rhodes* did not rely on *Wolfish*, *Rhodes* neverthe-

---

181 *Id.* MCC's population was reduced by transferring most of convicted inmates to other institutions. The Supreme Court dismisses this finding as irrelevant. 441 U.S. at 541 n.25.

182 441 U.S. at 542. The "toothless" scrutiny which the majority employed in upholding all the other challenged practices on security grounds is revealed in Justice Marshall's dissent. He points out that the publishers only rule is unduly restrictive since the number of books allowed per inmate might be limited or MCC could use its electronic and flourscopic detectors to search for contraband. *Id.* at 572-74. Other institutions had adopted much less restrictive regulations than MCC's concerning receipt of packages by inmates. *Id.* at 574-76. The inmates had a significant interest in the search of their cells because unobserved searches might invite abuse or theft of inmate property by guards and provide an opportunity for contraband to be planted. *Id.* at 576. As to the body cavity searches, Justice Marshall noted that MCC inmates wore one piece jumpsuits which would have to be partially removed before an inmate could insert contraband into a body cavity. Also, contact visits occurred in a glass enclosed room which was continuously monitored and visitors and their packages were searched before entering the visiting area. *Id.* at 576-79.

183 *Id.*

184 *Id.* at 562.

185 For a general assessment of *Wolfish* and its impact, *see* Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & C. 211 (1980).

186 *See, e.g.*, Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981).

187 *See, e.g.* Ramos v. Lamm, 639 F.2d 559; Lareau v. Manson, 507 F. Supp. 1177, 1181-89; Ruiz v. Estelle, 503 F. Supp. 1265, 1287. The Supreme Court noted this factual disparity with eighth amendment prison cases in the *Wolfish* opinion. 441 U.S. at 543 n.7.

less eliminated any question that the limited role of the courts in prison administration as outlined in *Wolfish* is equally applicable in the eighth amendment context. The decisions are complementary in their deference to state penal practices and their unwillingness to incorporate dignity, privacy or decency concerns in their analysis of prison conditions. Read together, the two cases leave little doubt that the Court is pressing for substantially less rigorous federal court scrutiny of state prison conditions.

VI. Implications for Future Prison Conditions Litigation: The Status of the Totality of the Circumstances Test

Prior to *Rhodes*, the federal courts used several different "tests" to evaluate prison conditions in eighth amendment cases.[188] The two most important standards were the "totality of the circumstances" test and the "minimum necessities" test. As the parties in *Rhodes* recognized in their briefs,[189] the Court's treatment of these two tests would be a key feature of its decision.

When an inmate makes an eighth amendment challenge to a specific prison practice, a court focuses solely on that particular practice. For example, in *Estelle v. Gamble*,[190] the Supreme Court considered only if penal authorities had deliberately denied medical care to the plaintiff.[191] In contrast, in prison conditions cases like *Rhodes*, inmates challenge a panoply of conditions and practices.[192] When examined individually, each of these factors may not amount to a constitutional violation. A totality of the circumstances test, however, permits a court to analyze the institutional environment as a whole and to conclude that the cumulative impact of prison conditions on inmates constitutes cruel and unusual punishment.[193]

The use of the totality of the circumstances test by lower federal courts is closely tied to their willingness to use the eighth amendment to protect "evolving standards of decency" and to scrutinize critically the

---

188 *See* Fair, *The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions*, 7 AM. J. CRIM. L. 119 (1979).

189 Brief for Petitioner at 18; Brief for Respondent at 23-29.

190 429 U.S. 97 (1976).

191 *Id.* at 104-05.

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

193 *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) ("Each factor separately may not rise to constitutional dimensions. However, the effects of the totality of these circumstances is the infliction of punishment on inmates in violation of the eighth amendment."). *See* Justice Brennan's concurring opinion for a discussion of the most common elements in a totality of the circumstances test. 101 S. Ct. at 2408.

penological justification for prison conditions. For example, in *Pugh v. Locke*,[194] the district court emphasized the standards of decency component of the eighth amendment and linked it to judicial examination of the relation between the conditions in Alabama prisons and the legitimate penological objectives of deterrence, security and rehabilitation.[195] One important corollary of the totality of the circumstances test is that once prison conditions are found to violate the constitution, the remedial power of the court extends to all aspects of prison administration. Federal courts utilizing the totality of conditions approach have consistently ordered comprehensive institutional remedies which have included wide-ranging and detailed improvements in prison facilities, staff and operation.[196]

In contrast, the minimum necessities test embodies a much more limited understanding of the eighth amendment and of the oversight role of the courts:

> If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligation under Amendment Eight. The Constitution does not mandate that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical and emotional deterioration.[197]

The practical consequences of the difference between the two tests is illustrated by comparing the district court's treatment of prison conditions in *Rhodes* with the Fourth Circuit's analysis in *Crowe v. Leek*.[198] In *Crowe*, three inmates were confined to a sixty-five square foot cell.[199] The circuit court found no eighth amendment violation because the prisoners were not physically or mentally abused and were not deprived of the implements of personal hygiene, medical care, exercise or basic sanitation.[200] The district court in *Rhodes* also found that the essential needs of the inmates were being met. However, by employing a totality of the circumstances test it found five factors which together made double celling unconstitutional.[201]

Rhodes did not explicitly adopt either the totality of circumstances or the minimum necessities test.[202] Justice Brennan, in his concurring

---

194 406 F. Supp. 318 (M.D. Ala. 1976).

195 *Id.* at 328-29.

196 *See generally* Ruiz v. Estelle, 503 F. Supp. 1265; note 36 *supra*.

197 Newman v. Alabama, 559 F.2d 282 (5th Cir. 1977).

198 540 F.2d 740 (4th Cir. 1976) (per curiam).

199 *Id.* at 741.

200 *Id.* at 742.

201 434 F. Supp. at 1020-21.

202 Prior to *Rhodes* the Court did approve part of a comprehensive order covering the Ar-

opinion, argued that the Court was employing a totality of the circumstances test.[203] Yet, the majority seems to have attempted to combine the two tests: "Conditions *alone and in combination* may deprive inmates of the *minimal civilized measure of life's necessities*."[204] The thrust of the opinion, however, is that double celling neither deprived inmates of essential food, medical care or sanitation, nor caused a disproportionate increase in prison violence or any other specific intolerable conditions.[205] The Court also narrowed the focus of its analysis to the actual present impact of prison conditions on inmates, foreclosing a broader, anticipatory examination of their effects.[206]

Thus, Rhodes does not prevent courts from weighing the cumulative impact of certain prison conditions. In this sense it retains the framework of the totality of the circumstances test. However, by limiting the factors to be used in the eighth amendment analysis to deprivations of basic necessities and to serious present harm, *Rhodes* eviscerates the expansive totality of the circumstances test heretofore employed by the lower courts. This impact is illustrated by *Ruiz v. Estelle*,[207] a post-*Rhodes* case, where the Fifth Circuit explicitly adopted a totality of the circumstances test[208] yet stayed the imposition of major components of a comprehensive prison remedy which the district court had ordered after making extensive findings of facts and utilizing a much broader totality of circumstances analysis.[209]

---

kansas prison system, stating that "the order is supported by the interdependence of the conditions producing the violation." Hutto v. Finney, 437 U.S. 675, 688 (1978).

203 101 S. Ct. at 2407 n.10 (Brennan, J., concurring). In his opinion, Justice Brennan rather disingenuously relies on Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) when developing his version of the totality of the circumstances test. In Laaman, the prisoners were "adequately warehoused." *Id.* at 306. The prison was not overcrowded and each prisoner had his own cell. Food, sanitation, exercise, medical services and the conduct of the correctional officers were not abusive. *Id.* Nevertheless, the district court ordered major improvements in the facility, its programs and staff on the basis of an emerging right that inmates must be imprisoned in an environment which: (1) does not threaten their well-being or sanity; (2) is not counterproductive to the inmates' efforts to rehabilitate themselves; and (3) does not increase the probability of the inmates' future incarceration. *Id.* at 316.

In contrast, Justice Brennan limits the totality of the circumstances test to the actual present harm which double celling causes, and, unlike the *Laaman* court, does not consider its long-term effects. In this sense, Justice Brennan's analysis differs little from the majority's. His understanding of the eighth amendment as embodying a distinct "decency" standard, 101 S. Ct. at 2406, would have permitted a much more ambitious application of the totality of the circumstances test.

204 *Id.* at 2399 (emphasis added).

205 *Id.*

206 *See* note 4 *supra*.

207 650 F.2d 555 (5th Cir. 1981).

208 *Id.* at 568. The court relies heavily on *Rhodes*.

209 Ruiz v. Estelle, 503 F. Supp. 1265, 1383-84.

VII. CONCLUSION

With *Rhodes* the Supreme Court avoided a multi-billion dollar controversy with the states and establishing a strong precedent for judicial scrutiny and reshaping of inadequate state institutions. The Court only employed the two traditional applications of the eighth amendment and failed to consider if long-term double celling offends "evolving standards of decency." Its analysis overlooks both expert opinion that double celling is harmful and the political factors which make it impossible for many states to maintain humane prisons. *Rhodes* effectively eviscerates the totality of the circumstances test by limiting the eighth amendment inquiry to whether prison conditions currently deny inmates a "minimal civilized measure of life's necessities." *Rhodes* probably marks the beginning of the end of the judiciary's current role as a "critical force" in ameliorating conditions at state prisons. In some states, it is likely to lead to worsening prison conditions until they reach such a "sordid" level that will even "shock the conscience" of the Burger Court.

THOMAS J. BAMONTE