South Carolina Law Review

Volume 25 | Issue 4 Article 9

11-1973

Penal Incarceration and Cruel and Unusual Punishment

William S. McAninch

PENAL INCARCERATION AND CRUEL AND UNUSUAL PUNISHMENT

WILLIAM S. MCANINCH*

> The principles of humanity and human dignity to which we subscribe, as well as the purposes of rehabilitation require that the offenders, while under the jurisdiction of the law enforcement and correctional agencies, be accorded the generally accepted standards of decent living and decent human relations.
>
> Their food, clothing and shelter should not be allowed to fall below the generally accepted standards, and they should be afforded the conventional conveniences made possible by our technological progress. Their health needs—both physical and mental—should be met in accordance with the best medical standards. Recreation should be recognized as a wholesome element of normal life.[1]

Adhence to the foregoing century-old statement of principle of the American Correctional Association and to its amplification in the *Manual of Correctional Standards*[2] would have precluded the filing of a substantial portion of the cases hereinafter considered. However, lest these cases suggest that the foregoing principles have been absolutely ignored, it should be noted that it is generally only the abhorrent situation that is afforded judicial cognizance. The courts simply have not had occasion to consider conditions in many, if not most, prisons. On the other hand this should not imply that conditions in most prisons do not warrant judicial scrutiny. It may well be that inmates in those prisons

---

* Associate Professor of Law, University of South Carolina

This research was conducted under a grant to the South Carolina Department of Corrections from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Department of Justice (*NI-70-048). This article reflects portions of THE EMERGING RIGHTS OF THE CONFINED co-authored by Professor McAninch pursuant to the terms of the research grant. The conclusions drawn and the positions taken in this article do not necessarily reflect the views of the South Carolina Department of Corrections or the United States Department of Justice.

1. Principle XVI, Declaration of Principles of the American Correctional Association; American Prison Association, 1870; Revised and Reaffirmed at the Sixteenth Annual Congress of the American Prison Association, Louisville, Kentucky, 1930; Revised and Reaffirmed at the Ninetieth Annual Congress of the American Correctional Association, Denver, Colorado, 1960.

2. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS (3d ed. 1966) [hereinafter cited as *Manual*].

have lacked the resources to bring their complaints into the judicial arena.

At any rate the inmate seems fortunate not to have to rely exclusively on the warden's implementation of "principles of humanity and human dignity". He is occasionally aided by judicial implementation of the Eighth Amendment's proscription of cruel and unusual punishment, which punishment has been found in segregation, corporal punishment and sometimes in incarceration itself.

I. PUNITIVE ISOLATION AND ADMINISTRATIVE SEGREGATION

While many correctional institutions purport to distinquish punitive isolation from administrative segregation, with the former implying a determinate period of punishment and the latter an indeterminate custodial classification and security device,[3] the courts do not always make the distinction, especially when the treatment accorded inmates in both situations is essentially the same. One court, granting the inmates' request for preliminary injunctions against their incarceration in administrative segregation for long periods of time, characterized the difference as "largely one of semantics."[4] The court noted that the inmates were treated the same as those inmates in punitive isolation but without the safeguard of prior disciplinary procedure—a prerequisite of incarceration in punitive isolation.[5] On the other hand, essentially similar treatment of those in the two different categories has been upheld where dictated by the fact that there was but a single physical facility for the incarceration of both.[6]

The United States Court of Appeals for the Fourth Circuit has refused to accept the institution's characterization of the one as "segregation" and the other as "punishment" when both entailed substantial deprivation of institutional privileges such as the earning of money, three meals per day, access to the mass media, library, educational facilities, and daily baths. The court reached this conclusion in spite of acknowledging that the relative deprivation may be even more harsh in what the institution

3. *See generally Manual* at 413.

4. Smoak v. Fritz, 320 F. Supp. 609 (M.D. Pa. 1970).

5. *See generally* Chapter 12, "Disciplinary Procedures," W. MCANINCH & E. WEDLOCK, THE EMERGING RIGHTS OF THE CONFINED (1972).

6. Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970).

labeled as "solitary confinement" than in "segregation".[7] That court had previously glossed over the distinction between the two when noting, that the particular petitioner then before the court had " . . . from time to time [been] placed in punitive confinement or maximum security on such charges as incitement of riots."[8] Two years later however, the court characterized maximum security in that correctional facility as " . . . more restrictive than imprisonment of the prison population at large but not nearly so harsh and confining as that of prisoners in 'solitary'."[9]

On finding that an inmate was not in punitive isolation but in administrative segregation due to his classification as an escape risk, the United States Court of Appeals for the Fifth Circuit recently affirmed a district court's dismissal of his petition for release from "solitary" where he had been allegedly placed at the whim of prison officials.[10]

Unless otherwise indicated *segregation* shall refer to what is commonly known as administrative segregation; *punitive isolation* shall refer to what is known as "punitive segregation," "solitary confinement," and the like.

Without regard to the conditions of confinement a threshold issue in segregation and punitive isolation cases often involves the underlying constitutionality of the decision to so confine. Much has been written elsewhere about requisite procedural due process.[11] Of more immediate concern, however, is whether segregation or isolation is disproportionate to the disciplinary infraction thereby punished.

The Eighth Amendment's cruel and unusual punishment test of disproportionality of punishment to offense must be distinguished from the proscription of that which is cruel and unusual because it is shocking to the conscience (a separate issue to be discussed later). Punishment is disproportionate to the offense when its severity outweighs the offense's seriousness. This determination is of course a relative one and is made against a background of a traditionally acceptable range of punishments for offenses. In condemning a sentence as cruel and unusual from

7. Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966), *cert. denied*, 385 U.S. 988 (1966).

8. Coleman v. Peyton, 362 F.2d 905, 906 (4th Cir. 1966).

9. Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968).

10. Krist v. Smith, 439 F.2d 146 (5th Cir. 1971).

11. *See generally* Chapter 8, "Disciplinary Methods," W. MCANINCH & E. WEDLOCK, THE EMERGING RIGHTS OF THE CONFINED (1972).

this perspective the United States Supreme Court once noted that the sentence ". . . exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish Justice."[12]

As in other areas of corrections law, the "hands off" doctrine has been—and is—a typical judicial response to complaints of improper incarceration as to be arbitrary or capricious.[13] Considerable weight is generally accorded the prison officials' determination that administrative segregation is required by the particular inmate's potential for disrupting the institution.[14]

Even extended terms of up to eight years in administrative segregation have been judicially approved for a particularly violent offender.[15] The correctional official should, however, be prepared to establish the underlying reasons for the decision by pointing to the nature of the crimes for which the inmate was originally convicted as well as specific acts of violence or escape attempts while in the institution.[16] As noted by a federal district court in the recent, important case of *Landman v. Royster*:

> Reasons of security may justify confinement, but that is not to say that such needs may be determined arbitrarily . . . . "Security" or "rehabilitation" are not shibboleths to justify any treatment.[17]

Segregation of an inmate of renown to preclude the "rubbernecking" by other inmates with its attendant confusion would be a denial of equal protection.[18] When inmates were held in "solitary confinement"[19] for five weeks without charge or hearings and where the duration of such incarceration threatened to extend indefinitely, one court granted a preliminary injunction against their being so confined.[20] The court noted, however, that segrega-

12. Weems v. United States, 217 U.S. 349, 381 (1910).

13. *E.g.*, Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967), [Two years in administrative segregation]; Morgan v. Cook, 236 So. 2d 749 (Miss. 1970), [Indefinite incarceration in maximum security].

14. *E.g.*, Young v. Wainwright, 449 F.2d 338 (5th Cir. 1971); Jones v. Peyton, 294 F. Supp. 173 (E.D. Va. 1968).

15. Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967). *See also* Royal v. Clark, 447 F.2d 501 (5th Cir. 1971).

16. *E.g.*, People v. Wells, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (Ct. App. 1968).

17. Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971).

18. Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970).

19. This court rejected the distinction between administrative segregation and punitive isolation. *See generally* notes 4 through 12 *supra*.

20. Smoak v. Fritz, 320 F. Supp. 609 (S.D.N.Y. 1970).

tion would be appropriate " . . . when there is evidence of a substantial nature to justify the belief that a threat to orderly prison operation exists."[21]

Extended terms of segregation pending investigation of alleged incidents which might warrant disciplinary proceedings and while awaiting trial for in-prison offenses have been approved.[22] Segregation has been approved for one refusing to work[23] and until one agreed to cut his hair.[24] Solitary has been approved *inter alia* for prison breach[25] and for violation of anti-"writ-writer" regulations.[26] The United States Court of Appeals for the Second Circuit in *Sostre v. McGinnis*[27] reversed the lower court's determination that indefinite terms of segregation were disproportionate to a combination of serious infractions including failure to answer questions, possession of contraband, and violation of anti-"writ-writer" regulations. The court expressed no view as to the constitutionality of indefinite segregation for one or for a combination of less than all of these infractions.[28]

On the other hand, lengthy terms in segregation for failure to sign a "safety sheet,"[29] for "racial preaching,"[30] and for refusal to divulge names of others interested in particular religious services[31] have been held improper. It should be noted that conduct in the last two examples is protected by the First Amendment's exercise of religion clause and under the circumstances of those cases would not warrant any disciplinary action.[32]

A court has recently held that solitary confinement for "defective delinquents" in a treatment center cannot exceed fifteen days in even the most extreme case.[33]

---

21. *Id.* at 612.

22. *E.g.*, Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970).

23. Falles v. United States, 263 F. Supp. 780 (M.D. Pa. 1967).

24. Winsby v. Walsh, 321 F. Supp. 523 (C.D. Cal. 1970).

25. Negrich v. Hohn, 379 F.2d 213 (3rd Cir. 1967).

26. Novak v. Beto, 320 F. Supp. 1206 (S.D. Tex. 1970).

27. 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972).

28. *Id.* at 194.

29. Signing of the "safety sheet" was required to insure that the inmates read the safety rules. Here the inmate refused to sign as he believed it would waive his claim for damages for personal injury. Wright v. McMann, 460 F.2d 126 (2d Cir. 1972).

30. Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

31. Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966), *cert. denied*, 385 U.S. 988 (1966).

32. *See* note 87 *infra*.

33. McCray v. State, 10 CRI. L. RPTR. 2132 (Cir. Ct., Mont. Cty., Md., Nov. 11, 1971).

II. CONDITIONS DEEMED CRUEL AND UNUSUAL

Although the Eighth Amendment's proscription of cruel and unusual punishment was originally intended to preclude resurrection of such bygone practices as disemboweling and drawing and quartering, its contemporary utility emanates from a 1910 Supreme Court case which noted that it ". . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane Justice."[34] Even though a particular practice or treatment may have been acceptable at one time in the past, evolving standards of human decency may now preclude its application: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[35]

There are generally three tests for determining whether particular punishment is cruel and unusual: (1) whether it is disproportionate to the offense (discussed above); (2) whether it is of such character as to shock the general conscience; and (3) whether, although applied in pursuit of a legitimate penal aim, it goes beyond that which is necessary to achieve that aim.

As will be developed, several common threads seem to bind together those cases in which the courts have found incarceration under particular conditions to be cruel and unusual punishment. One of the most striking examples is *Jordan v. Fitzharris*.[36] There the strip cell was solid concrete six feet by nine feet, almost totally dark, and completely devoid of furnishings save an "Oriental" hole-in-the-floor type toilet which could not be flushed by the inmate, and which was sometimes flushed only twice a day by staff. During the inmate's eleven-day period of incarceration there the cell was not cleaned; it was covered with not only his vomit and other bodily wastes but also that of its previous occupants. The inmate was afforded no opportunity to clean his hands, teeth, or the rest of his body, and had to handle his food under these conditions. The cell was not heated and at night the only relief from the cold concrete floor was a stiff canvas mat not long enough to stretch out on and incapable of doubling over to serve also as a blanket. The inmate was kept absolutely naked for the first eight days of his confinement. Despite his repeated re-

34. Weems v. United States, 217 U.S. 349, 373 (1910).
35. Trop v. Dulles, 356 U.S. 86, 99-101 (1958).
36. 257 F. Supp. 674 (N.D. Cal. 1966).

quests for medical assistance, medical aid for the entire 108 inmates of the facility during his incarceration consisted of one eight-minute and one ten-minute visit to the facility by the medical officer. It is doubtful that the institution's case was furthered by the in-court suggestion of its consulting psychiatrist that the inmate could have cleaned himself by using part of his daily ration of two cups of water,[37] or by his response to the judge's query as to whether the inmates were permitted or forced to eat under those conditions:

> I don't know as they were forced to. It is true that if they were going to eat, that they might have to eat under those circumstances.

Another court found cruel and unusual punishment in the incarceration of two inmates for two and a half days in a six foot by ten foot cell under the following conditions: there were no windows and no artificial light; the two blankets provided had to be used to absorb the overflow from the malfunctioning toilet; and there were no hygienic implements, no soap, towels, toilet paper, or toilet articles.[38]

More serious overcrowding resulted in *Holt I*[39] and *Holt II*,[40] where an average of four inmates were housed in eight foot by ten foot isolation cells. Such overcrowding was among the reasons cited in a finding of cruel and unusual punishment. Other factors mentioned included the infestation by rats, general filth and lack of sanitation, including the indiscriminate reissuing of mattresses among the inmates incarcerated there—one of whom died of infectious hepatitis. While the segregation cells were singled out by the court as examples of cruel and unusual punishment, incarceration in any part of the institution in question was deemed cruel and unusual punishment, for the institution as a whole failed to meet contemporary standards of humane treatment.

A similar result obtained in *Jones v. Wittenberg*,[41] where incarceration in any part of the county jail was held to violate the Eighth Amendment. As in *Holt* the segregation cells were ac-

37. *Id.* at 678.

38. Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969); *aff'd*, 435 F.2d 1255 (3rd Cir. 1970).

39. Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969).

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

41. 323 F. Supp. 93 (N.D. Ohio 1971).

corded special mention. While the dimensions of the two cells were not given, the court implied that they were essentially one-man cells but noted that they had contained as many as sixteen or seventeen inmates at a time.[42] The cells were totally unfurnished and had no sanitary facilities, not even a drain. Although the cells were beneath ground level and unheated, the inmates, including females, were stripped while incarcerated there.

In *Wright v. McMann*[43] prominent reasons for a finding of unconstitutionality of conditions in segregation cells included enforced nudity in cold cells and sleeping on cold concrete floors. As there was some conflict of testimony as to the temperature of the cells the court suggested the periodic recording of temperatures in the future. The court noted that "unquestionably the stripping of the cell and the nudity of Wright was for discipline alone . . ."[44] and commented that there was nothing in the record to indicate that these measures were required to preclude the inmate's injuring himself. This observation is perhaps related to that of the court in *Jordan v. Fitzharris*, discussed earlier, that although some inmates were allegedly placed in segregation to prevent their committing suicide, some were nonetheless successful.

While the prison administrator might conclude from the foregoing that he cannot win either way, both cases simply point up the necessity of his documenting and supporting his position. If certain harsh measures are necessitated by particular circumstances, he must be prepared to establish not only those triggering circumstances but also that the harsh measures are justified by their effectiveness.

The court in *Landman v. Royster* observed that it would authorize the detention of an inmate without clothing,

> . . . only when a doctor states in writing that the inmate's health will not thereby be affected and that the inmate presents a substantial risk of injuring himself if given garments.[45]

The court in *Wright v. McMann*[46] also noted that hygienic

42. *Id.* at 97. For another condemnation of crowding, *see* Landman v. Royster, 333 F. Supp. 621, 649 (E.D. Va. 1969).

43. 321 F. Supp. 127 (N.D.N.Y. 1970) *aff'd*, 460 F.2d 126 (2d Cir. 1972). *See also* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

44. *Id.* at 138.

45. 333 F. Supp. 621, 648 (E.D. Va. 1971).

46. 321 F. Supp. 127, 139 (N.D.N.Y. 1970), *aff'd*, 460 F.2d 126 (2d Cir. 1972).

implements such as soap and toilet paper were not readily accessible but would be provided only when an officer happened to be available at the time of a request for them. Although the cells were not cleaned prior to an inmate's incarceration, he was apparently provided with a rag and some soap for this purpose. The cells certainly surpassed those of previously discussed cases in overall sanitation, but their being "not too clean" seems to have been a factor in the court's finding of cruel and unusual punishment.

Hancock v. Avery[47] found cruel and unusual punishment in incarceration in a five foot by eight foot concrete cell that lacked adequate light and ventilation, had an "Oriental" toilet flushed five times every twenty-four hours, and which lacked any higienic materials such as soap, towel and toilet paper. The court noted that the inmates had to handle and eat their food " . . . without any provision for cleanliness or even minimal sanitary conditions."[48]

Finally, in a case dealing with juveniles a court concluded:

> . . . [A] two-week confinement of a fourteen-year old girl in a stripped room in night clothes with no recreational facilities or even reading matter must be held to violate the Constitution's ban on cruel and unusual punishment . . . .[49]

No findings of lack of heat or sanitation were necessary for this conclusion. The court's preliminary injunction called for, *inter alia*, bed and chair, reading material, and other recreation such as exercise and fresh air.

As recently noted in *Sostre v. McGinnis*[50] courts have often held that segregated confinement in solitary or maximum security is not *per se* cruel and unusual punishment in violation of the Eighth Amendment.[51] While most courts reach this conclusion with little discussion, *Sostre* did consider in some detail the psy-

47. 301 F. Supp. 286 (M.D. Tenn. 1969), *aff'd*, 452 F.2d 1214 (6th Cir. 1972).

48. *Id.* at 289.

49. Lollis v. New York State Department of Social Services, 322 F. Supp. 473, 482 (S.D.N.Y. 1970). *See also* McCray v. State, 10 CRI. L. RPTR. 2132 (Cir. Ct., Mont. Cty., Md., Nov. 11, 1971).

50. 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972).

51. *E.g.*, Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969), *cert. denied*, 396 U.S. 915 (1969); Ford v. Board of Managers, 407 F.2d 937 (3rd Cir. 1969).

chological effects of long-term isolation, acknowledging the relevance of such inquiry to the Eighth Amendment issue.[52] The court concluded on the facts before it that the plaintiff's segregation, while severe, was not barbarous or shocking to the conscience. However, this court's inquiry into the psychological effects of segregation may well indicate a developing trend in the judicial resolution of redefining that which is cruel and unusual in terms of a "progressing sense of humanity."[53]

It could readily be concluded from the cases previously discussed that incarceration under unsanitary conditions, with immoderate temperatures and while nude would be uniformly deemed cruel and unusual punishment.[54] One exception to this was a holding in 1966 that incarceration for 27 hours while nude in forty-degree temperature did not violate the Eighth Amendment's proscription.[55] This result was reached by favorably comparing the conditions in question with those judicially approved in two earlier cases, one involving a deprivation of food, water and toilet paper for fifty-two hours[56] and the other involving conditions of flooding which required additional surgery on one so confined while weak from a prior operation.[57] It is submitted that today's judicial response to the facts of any of these three cases would be one of condemnation.[58] Often, of course, allegations of conditions of barbarous treatment fail for lack of proof.[59]

The cases where severe conditions in segregation are not "cruel and unusual punishment" generally share a few common threads. Even though the cells may be dark[60] and lacking in furniture save a mattress at night,[61] they have been reasonably clean

52. Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972).

53. *Id.* at 191.

54. *See generally* Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), wherein the court found conditions in segregation not cruel and unusual after emphasizing that the key criteria for this determination is the degree of sanitation. That court had previously condemned treatment which included the forced consumption of laxatives by a large group of persons then crowded into small cells. Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1970).

55. Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966).

56. Ruark v. Schooley, 211 F. Supp. 921 (D. Colo. 1962).

57. Blythe v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961).

58. *E.g.*, Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3rd Cir. 1970).

59. *E.g.*, Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966); Village of Nixa *ex rel.* Hedgpath v. McMullin, 198 Mo. App. 1, 193 S.W. 596 (1917).

60. Novak v. Beto, 320 F. Supp. 1206 (S.D. Tex. 1970).

61. Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

and without noticeably unsanitary conditions. Although clothing may not fit properly,[62] it is available. More recently allegations of conditions as cruel and unusual (which may have one time been dismissed as frivilous) are now warranting serious consideration. The court in *Sostre,* while not finding cruel and unusual punishment, did characterize as "severe"[63], incarceration under the following conditions: a six by eight foot cell that had a toilet, facebowl with running water, soap and towel, weekly shave and shower, opportunity for one hour's daily exercise with other inmates, and access to selected books from the library. Evolving standards of human decency constantly redefine that which the Eighth Amendment precludes.

Complaints of inadequate diets in segregation traditionally have not had a sympathetic reception in the courts. Of the few cases that have determined meals and their attendant conditions to be unconstitutional, one case, not surprisingly, stressed lack of sanitation in preparation and serving of the food.[64] It should be recalled that having to eat under unsanitary conditions has often accompanied a finding of cruel and unusual punishment.[65]

While a diet of one meal per day plus two slices of bread was one of the items contributing to a finding of unconstitutionality in *Hancock v. Avery*,[66] ordinarily the courts seem to approve almost any diet in question. Courts have approved thirty days of bread and water,[67] bread and water for two days with two meals every third day,[68] bread and water plus one meal every third day,[69] thirty days of a "limited diet,"[70] no water for twelve hours,[71] and a restricted diet of 2000 calories daily.[72] An inadequate diet plus

62. Burge v. State, 90 Idaho 473, 413 P.2d 451 (1966).

63. Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972). *But see* Tyree v. Fitzpatrick, 325 F. Supp. 554 (D. Mass. 1971), which in denying a preliminary injunction noted that conditions similar to those in *Sostre* plus access to a radio indicated no possibility of success on the Eighth Amendment issue.

64. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Jones v. Wittenburg, 323 F. Supp. 93 (N.D. Ohio 1971).

65. *E.g.*, Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

66. 301 F. Supp. 286 (M.D. Tenn. 1969).

67. Negrich v. Hohn, 379 F.2d 213 (3rd Cir. 1967).

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

69. Novak v. Beto, 320 F. Supp. 1206 (S.D. Tex. 1970); Ford v. Board of Managers, 407 F.2d 937 (3rd Cir. 1969).

70. Belk v. Mitchell, 294 F. Supp. 800 (W.D.N.C. 1968).

71. Burge v. State, 90 Idaho 473, 413 P.2d 451 (1966).

72. Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

loss of weight has been held not to amount to cruel and unusual punishment,[73] and a denial of an ulcer diet to one in segregation who had previously been on such a diet was held not actionable where there were no allegations of serious bodily injury.[74] It is difficult to understand these bread and water diet cases which generally seem to be a throwback to an earlier time.[75] One court characterized as "slow starvation" incarceration with a diet often lacking in nutritional elements and which rarely reached the minimum level of 2000 calories per day and sometimes was as low as 1400.[76] It should be noted that this was the diet for all the inmates of the institution, a county jail, and was not limited to those in segregation. The conditions deemed "severe" in *Sostre* included a diet providing 2800 to 3300 calories per day. This may be an indication that courts may become more concerned with allegations of inadequate diet. Indeed, another federal court readily determined a bread and water diet to be a violation of the Eighth Amendment, having found it to be " . . . inconsistent with current minimum standards of respect for human dignity."[77]

III. OTHER ASPECTS OF SEGREGATION

Visitation, exercise, rehabilitative opportunities and access to reading material are considered together. Rarely has the denial of any one of these to the inmate in segregation been of special judicial concern; of course the cumulative effect of their individual denial could be of more import.

Courts have typically approved—often without comment—the denial of access to the media to those in segregation. This is not, of course, to say that such denial, especially to a long-term segregatee, is good prison practice; and in more recent cases regardless of the ultimate resolution of the cruel and unusual punishment issue courts have noted that at least limited reading material[78] and other access to media[79] is being allowed by the

73. Heft v. Parker, 258 F. Supp. 507 (M.D. Pa. 1966).

74. Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964).

75. Perhaps the recent case of Herrell v. Mancusi, ___ F. Supp. ___ (N.D.N.Y. 1971), represents a new approach. In that case the court issued a preliminary injunction against the institution's providing a three day bread and water diet.

76. Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971).

77. Landman v. Royster, 333 F. Supp. 621, 647 (E.D. Va. 1971).

78. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972).

79. Tyree v. Fitzpatrick, 325 F. Supp. 554 (D. Mass. 1971).

correctional officials. In a case involving a juvenile segregatee the court has specifically ordered that reading material be supplied.[80] The same case also ordered that provisions for exercise of the juvenile be established.

The lack of exercise of one in segregation received considerable attention in *Krist v. Smith*.[81] Although the lower court did not conclusively resolve this aspect of the Eighth Amendment issue because the prison was then in the process of implementing a system that would allow exercise for those in segregation, it did note that the continued denial of exercise may well render punishment "cruel."[82] Considering the complaint of a long time resident of death row, another federal district court recently held that

> Confinement for long periods of time without the opportunity for regular outdoor exercise does, as a matter of law, constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.[83]

The court in *Sostre* approved the requirement of forcing the inmate to submit to a complete strip search on entering the exercise yard in order to preclude the secreting of weapons on the person. Such a practice, if required out of a legitimate concern for security and not undertaken for harassment, would probably be upheld.

The denial of access to rehabilitative services for one in segregation, while perhaps counterproductive to the overall purposes of incarceration if continued over a long period of time, has not heretofore been deemed of constitutional dimension.[84] Indeed, the lack of rehabilitative services for one in the general prison population has only recently been noted by the courts. In *Holt v. Sarver* the court, while reluctant to conclude that rehabilitative services were constitutionally required, stated:

> The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the ab-

80. Lollis v. New York State Department of Social Services, 332 F. Supp. 473 (S.D.N.Y. 1970).

81. 309 F. Supp. 497 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971).

82. *Id.* at 501.

83. Sinclair v. Henderson, 331 F. Supp. 1123, 1131 (E.D. La. 1971). *See also* Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972).

84. *E.g.*, Tyree v. Fitzpatrick, 325 F. Supp. 554 (D. Mass. 1971); Clegget v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964).

> sence of such a program conditions and practices exist which actually militate against reform and rehabilitation.[85]

It would not be too difficult to conclude that often the conditions in long-term segregation do actually militate against reform and rehabilitation. It is certainly conceivable that courts may start to probe this area. The lack of rehabilitative services was one factor contributing to the conclusion in *Jones v. Wittenberg*, that simple incarceration in the institution in question was a violation of the Eighth Amendment.[86]

As in exercise of religion cases concerning inmates in the general prison population, courts in segregation cases distinguish between religious belief and religious exercise, with unlimited freedom of the former but with limitations on the latter.[87] Courts have almost unanimously upheld the institution's denial to those in segregation of attendance at regular services for the general prison population. However, the vast majority of these cases have noted that the segregatee was allowed to be visited by a minister or chaplain.[88]

One court did uphold the denial of both attendance at general services and of access to chaplain when confinement in segregation was limited to thirty days.[89] The United States Court of Appeals for the Eighth Circuit has upheld, against equal protection challenges, the practice of one institution of allowing those segregatees with relatively good conduct records to attend services while denying attendance to those evidencing a proclivity for

85. 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

86. 323 F. Supp. 93, 99 (N.D. Ohio 1971).

87. However as the exercise of religion is one of the "preferred freedoms" of the First Amendment any restriction thereon must be justified by a compelling state interest. Of course in prison cases, the interest most often asserted is that of "security" but this incantation is no shibboleth. The burden of establishing the necessity for the restriction on free exercise is most definitely on the prison administrator. *See, e.g.*, Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971). Once this burden has been met, developing prison law indicates that he must then meet the least restrictive alternative test of establishing that there are no available alternatives that would serve the needs of security in a manner less restrictive on the exercise of religion. *See, e.g.*, Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969). Additionally the equal protection clause of the Fourteenth Amendment requires that institutional treatment accorded one individual or group be essentially similar to that accorded others similarily situated. *See, e.g.*, Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969). *See generally* Chapter 3, "Exercise of Religion," W. MCANINCH & E. WEDLOCK, THE EMERGING RIGHTS OF THE CONFINED (1972).

88. *E.g.*, Graham v. Willingham, 265 F. Supp. 763 (D. Kan. 1967), *aff'd*, 384 F.2d 367 (10th Cir. 1967).

89. Belk v. Mitchell, 294 F. Supp. 800 (W.D.N.C. 1968).

misconduct.[90] Although one court recently found no constitutional deprivation in the denial "for several days" of a Bible to one in segregation,[91] the requirement of the United States Court of Appeals for the Seventh Circuit that the segregatee's holy book should be made available[92] seems more in line with developing constitutional law in this area.

Under the doctrine of "least restrictive alternatives,"[93] it would seem that a segregatee's potential for disrupting a general service could preclude his attendance there, but would not justify total deprivation of his free exercise of religion. Allowing him access to religious books, publications and ministers would serve the institutional need for security while being less restrictive of his fundamental rights. Cases involving the exercise of religion in segregation have been considered by the courts as First Amendment issues rather than as an aspect of cruel and unusual punishment, although it would seem that the denial of all religious activity to a segregatee desirous of it might be one factor in the determination of the Eighth Amendment issue.

IV. ACCESS TO THE COURTS

Access to the courts by the incarcerated has been treated extensively elsewhere[94] and the basic principles indicated there are applicable regardless of the inmate's custody status. The due process clauses of the Fifth and Fourteenth Amendments guarantee him access to the judicial process.[95] The case of *Johnson v. Avery*,[96] while dealing primarily with anti-"writ writer" regulations, has served to remind the judiciary that this right merits the highest priority in judicial protection. As noted by the United States Circuit Court of Appeals for the Second Circuit, ". . . [T]he Constitution protects with special solicitude a prisoner's access to the courts."[97]

90. Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969).

91. Wright v. McMann, 321 F. Supp. 127, 141 (N.D.N.Y. 1970).

92. Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).

93. *See* Barnet v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969).

94. *See generally* Companion article "Access to Courts and Counsel", *infra* p. .

95. Access by state prisoners to federal courts was recognized in *Ex parte* Hull, 312 U.S. 546 (1941); access by state prisoners to state courts was recognized in White v. Ragen, 324 U.S. 760 (1945).

96. 393 U.S. 483 (1969).

97. Sostre v. McGinnis, 442 F.2d 178, 189 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972).

Earlier cases upholding limitations on the right of access to the courts by those in segregation should be reconsidered in light of *Johnson v. Avery*. Denying segregatees access to legal materials though formerly upheld,[98] may now be deemed unconstitutional. In concluding that the conditions of segregation in *Sostre* were not unconstitutional, the court pointed out the availability "of unlimited numbers of law books".[99] One in segregation has the same right of access to attorneys and courts as one in the general prison population. Indeed, both recent federal circuit court of appeals cases providing for inmate access to the American Civil Liberties Union (and through it to the courts) involved inmates in segregation.[100] Segregatees may be denied access to inmate "writ writers," but only if other adequate means of access to the courts are provided. In a post-*Johnson v. Avery* case, *In re Harrell*,[101] the California Supreme Court concluded that a "writ writer" could be precluded from interviewing inmates in isolation. In reaching this conclusion the court assumed that clerical assistance would be provided to inmates in isolation, that the normal maximum term of such confinement was 30 days, and that "next friend" applications could be submitted on behalf of one in isolation, even though not signed by the one in isolation.

V. CORPORAL PUNISHMENT

Corporal punishment as an institutionalized means of discipline is clearly proscribed by the Eighth Amendment's ban on cruel and unusual punishment. " . . . [I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . ."[102] This proscription includes not only those devices such as the "Tucker telephone," (a device for sending a strong but non-lethal electrical charge through an inmate's body,[103]) which would probably be recognized as an implement of torture by any society at any time, but

98. *E.g., In re* Allison, 66 Cal. 2d 282, 425 P.2d 193, 57 Cal. Rptr. 593 (1967).

99. Sostre v. McGinnis, 442 F.2d 178, 194 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972).

100. Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970).

101. 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970), *cert. denied*, 401 U.S. 914 (1970).

102. Wilkinson v. Utah, 99 U.S. 130, 136 (1878).

103. Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

may also include practices which were formerly acceptable. Thus the use of the whip or strap was finally condemned as unconstitutional in *Jackson v. Bishop*,[104] as was the use of tear gas against an inmate who poses no present physical threat.[105]

Of course, not every application of force would be deemed cruel and unusual in the constitutional sense. A single punch by a guard thrown in a scuffle with an inmate[106] and the use of reasonable force to move an inmate who refused to move voluntarily[107] has been upheld. On the other hand some treatment, even though only indirectly effected by prison staff, may be considered cruel and unusual. Thus the rampant incidents of homosexual rape in barracks which staff could not, or would not, control were prominently mentioned in the finding that simply being incarcerated in the Arkansas prison system constituted cruel and unusual punishment.[108]

Yet corporal punishment is hardly an academic or theoretical matter.[109] The aftermath of the infamous Attica uprising indicates that the infliction of even severe and brutal corporal punishment is not a thing of the past. Indeed, instead of being an isolated act by an individual guard, such treatment apparently became institutionalized. Confronted with evidence of rampant brutality by correctional personnel,[110] the United States Court of Appeals for the Second Circuit concluded that injunctive relief should be granted against further physical abuse. That court noted that the federal district court had been unwarranted in assuming that adequate steps would be taken to protect the inmates against further reprisals and directed the district court to

104. 404 F.2d 571 (8th Cir. 1968).

105. Landman v. Royster, 333 F. Supp. 621, 649 (E.D. Va. 1971).

106. Foster v. Jacob, 297 F. Supp. 299 (C.D. Cal. 1969).

107. Konisberg v. Ciccone, 285 F. Supp. 585 (W.D. Mo. 1968), *aff'd*, 417 F.2d 161 (8th Cir. 1969).

108. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). *But see* Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972), wherein several sexual assaults of an inmate were not deemed cruel and unusual.

109. *E.g.*, Tolbert v. Bragan, 451 F.2d 1020 (5th Cir. 1971).

110. The plaintiffs in the case had presented "detailed evidence" that:

> [i]njured prisoners, some on stretchers, were struck, prodded or beaten with sticks, belts, bats or other weapons. Others were forced to strip and run naked through gauntlets of guards armed with clubs which they used to strike the bodies of the inmates as they passed. Some were dragged on the ground, some marked with an "X" on their backs, some spat upon or burned with matches and others poked in the genitals or arms with sticks.

Inmates of Attica v. Rockefeller, 453 F.2d 12, 18-19 (2d Cir. 1971).

consider the appointment of federal marshals to the institution to insure the implemention of its injunction against such brutality in the future.[111]

Corporal punishment is clearly cruel and unusual. In addition to enjoining its application, courts may also impose personal civil liability on both those who inflict it and the superiors responsible for such behavior.[112]

VI. OVERALL FACILITIES DEEMED CRUEL AND UNUSUAL

While the physical facilities of a corrections system may be a cause of dismay to the correctional officials, inmates, and public alike, this dismay has seldom been deemed of Constitutional dimension. That a facility may be very old, too large, unattractive, and not particularly well suited to present purposes is not of Constitutional concern. There are, of course, some conditions dictated in whole or in part by the physical plant that may lead a court toward the conclusion that confinement therein is cruel and unusual punishment in violation of the Eighth Amendment. As in the segregation cases these conditions for the present seem limited to gross overcrowding and lack of sanitation.

Recently a prisoner complained that his transfer from one institution to another within the same correctional system deprived him of his former cell, which was

> . . . a larger, more modern, single occupancy cell with tile walls, outside windows with view of the recreation yard and an ample expanse of sky, a large bed with springs, an upright locker as well as a footlocker for clothes and personal property, a desk and chair, and a solid door to reduce outside noise.[113]

Substituted therefor, in the facility to which he was transferred,

111. *Id.*

112. Liability may sound in tort for an injury received by an inmate as the result of the breach of a duty owed to him by the administrator; no disposition of state property is sought, nor is the suit against the administrator in his official capacity, thus solving the problem of sovereign immunity. Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966); Bartlett v. Commonwealth, 418 S.W.2d 225 (Ky. 1967); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); Irwin v. Arrendale, 117 Ga. App. 1, 159 S.E.2d 719, 722 (1967). Personal liability may also be imposed under Title 42 U.S.C. Section 1983 if the basis of the action is deprivation of federal rights under the color of state law. *See* Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972).

113. United States *ex rel.* Yeager, 293 F. Supp. 1079 (D. N.J. 1968), *aff'd*, 419 F.2d 126 (3rd Cir. 1969), *cert. denied*, 397 U.S. 1055 (1970).

was a cell that was all metal and concrete and from which the view through three sets of bars revealed only a blank wall and the roof of an adjoining structure. One's initial reaction might range from incredulity that an inmate would seriously expect a room with a "view" to genuine sympathy for the plight of one whose view of the sky, and perhaps inspiration, had been taken away. At any rate, the court, while expressing sympathy for these and other complaints, could find no denial of Constitutional rights.

On the other hand, facilities which do not meet minimum standards of sanitation will spawn judicial relief. While the great bulk of these cases is directly concerned with conditions in segregation,[114] their principles (which give substance to the Eighth Amendment's proscription of cruel and unusual punishment) would be equally applicable to the correctional facility as a whole. Indeed some conditions acceptable in segregation may, if applied to the general inmate population, be found constitutionally lacking. Some conditions in segregation are tolerated because of the temporary nature of segregation, because segregation is imposed as additional punishment only after the due process safeguards of the disciplinary hearing, or because segregation is necessary to protect the inmate from himself or others.[115] These rationales would seem of limited applicability to the entire facility.

In *Holt v. Sarver*[116] the entire Arkansas prison system was held to violate the Eighth Amendment's ban—an inmate's simply being incarcerated there subjected him to cruel and unusual punishment. The system had little to recommend it. The court based its conclusion on the combined effects of the "trusty" guard system, barracks sleeping arrangements, overcrowded and unsanitary isolation cells, lack of rehabilitative programs, inadequate medical and dental facilities, an unsanitary kitchen, and inadequate clothing for inmates who work out-of-doors in inclement weather. One could not pick out a particular item as being *per se* determinative of the Eighth Amendment issue. Indeed, as the court noted, in an otherwise unexceptional penal institution, the lack of rehabilitative programs would not be of constitutional dimension; it is only in a situation where other circumstances

114. *Id.* at 1080.

115. *But compare* dissent of Cravens, J., in Breedon v. Jackson, 457 F.2d 578 (4th Cir. 1972). Judge Cravens suggests that an inmate should not have to relinquish his privileges in order to secure bodily protection.

116. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

combine to militate against rehabilitation that an affirmative program may be constitutionally required.[117]

Similarly, a barracks or dormitory sleeping arrangement, while perhaps not desirable, would not ordinarily be deemed unconstitutional provided that reasonable precautions are taken to protect the inmates so confined. But when there is no segregation by classification, when security is expected to be provided only by inmate guards or floorwalkers, when homosexual rape and dangerous assaults are known to be rampant, housing in such a dormitory would be cruel and unusual.

One condition that by itself can lead to judicial intervention is a lack of sanitation. As noted above, lack of sanitation and facilities for basic hygiene was the most salient feature of virtually every case condemning a segregation cell. Not surprisingly, the isolation cells in *Holt* were among those so condemned. Lack of sanitation was also prominently featured in *Jones v. Wittenberg*,[118] in which incarceration in a particular county jail was held to be cruel and unusual. There an overcrowded, late nineteenth century structure featured toilets with leaking soil and waste pipes (inmates who, because of overcrowding, had to sleep on the floors onto which the waste material leaked); solitary confinement cells without drains or sanitary facilities of any kind; a kitchen into which sewage leaked and which lacked equipment to sanitize the dishes after they had been washed by hand; and cells and bull-pens which lacked ventilation and illumination save that available through broken windows. Although perhaps not directly related to limitations inherent in the physical facility, it should be noted that the jail also lacked facilities and personnel for social services, exercise, recreation, reading, and rehabilitation. Facilities for meeting both attorneys and regular visitors were extremely limited and afforded no privacy.

As the court noted, the institution housed both those awaiting trial and those already convicted and serving sentences. As to the latter the court concluded: "If the constitutional provision against cruel and unusual punishment has any meaning, the evidence in this case shows that it has been violated."[119] But as to those awaiting trial and not yet convicted, the court noted that even if the above detailed treatment were not deemed "cruel and

117. *Id.* at 370.
118. 323 F. Supp. 93 (N.D. Ohio 1971).
119. *Id.* at 99.

unusual," it would still be proscribed. On the one hand it is "punishment" applied without due process of law[120] and on the other it represents a denial of equal protection vis-a-vis others awaiting trial who are not incarcerated. Those in pretrial detention " . . . are not to be subjected to any hardship except those (sic) absolutely requisite for the purpose of confinement only . . ."[121]

In fashioning relief the court was of course restricted by the limitations inherent in the existing physical plant.[122] Yet these limitations were largely obviated by the court's ordering a reduction in prison population so that no cell would be occupied by more than two persons at a time.[123] The court also ordered that the preparation and serving of food meet minimal standards of hygiene for commercial establishments, that conditions of lighting and sanitation in segregation cells, as well as in the prison as a whole, meet minimal standards of the housing code, and that at least two guards be present on each floor at all times. Additionally the court required improved medical services, much more open communication including uncensored correspondence, increased visitation, and access to publications. In the area of rehabilitation the court required establishment of work or study release programs, basic and remedial education programs, and programs of group and individual counseling. The court retained jurisdiction to insure that its orders were carried out.

A similar result was obtained in *Hamilton v. Love*[124] in which the court declared incarceration in another county jail to be unconstitutional. The overcrowded structure, built in the 1920's, housed primarily those awaiting trial. The plaintiff's complaint alleged, *inter alia*, inadequte bathing and toilet facilities; lack of

120. For another finding of a violation of due process of law in the subjection of those awaiting trial to conditions amounting to cruel and unusual punishment, *see* Brennan v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972).

121. Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971). *See also* Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972).

122. Relief was granted following an additional hearing. Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

123. The court anticipated that this order could be affected at least in part by admitting to bail many of those awaiting trial in the jail. In a remarkedly candid opinion the court acknowledged the existence of the practice of holding a person accused of crime without bail in order to induce a plea of guilty. *Id.* at 715.

124. 328 F. Supp. 1182 (E.D. Ark. 1971). *See also* Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970), for still another finding of cruel and unusual conditions in a local jail.

ventilation; no recreational areas or programs; overcrowded, unsanitary, and insecure cells with a lack of protection against unprovoked assaults and homosexual attacks; no classification and rational separation of inmates; and the presence of rats, roaches and poisonous insects. The defendants indeed stipulated that the conditions violated minimal federal constitutional requirements with respect to due process and cruel and unusual punishment.[125]

Such determinations have not been limited to the federal courts. In the recent case of *Commonwealth of Pennsylvania* ex rel *Bryant v. Hendrick*[126] the Supreme Court of Pennsylvania upheld a lower state court's finding of cruel and unusual punishment in confinement in a particular county jail. The court based its conclusion on the increasingly familiar combination of overcrowded, damp and unsanitary cells, sexual assaults, and insufficient institutional protection. Additionally, the court noted beatings of the inmates by the guards.

It seems reasonably clear that the progeny of *Holt v. Sarver*, discussed earlier, will be an increasingly frequent judicial determination that simple incarceration in a given facility is violative of the Eighth Amendment, especially where that facility can be fairly characterized as unsanitary and overcrowded, with a concomitant incidence of homosexual attack, and lacking facilities for providing basic amenities. The administrator may well find his institution being measured by standards from which it heretofore seemed exempt. The facility may be judged by the requirements of housing codes and sanitation codes, for example, to determine the acceptability of situations of overcrowding and uncleanliness.

Indeed, in the recent case of *Ely v. Velde*[127] the United States Court of Appeals for the Fourth Circuit may have indicated a new trend in the judicial response to the problem of the construction of a state prison with Law Enforcement Assistance Administration funds when LEAA had failed to take into account the requirements of the National Environmental Policy Act[128] and the National Historical Preservation Act.[129] These acts preclude the spending of federal funds without consideration of the proposed

125. Hamilton v. Love, 328 F. Supp. 1182, 1185 (E.D. Ark. 1971).
126. 444 Pa. 83, 280 A.2d 110 (1971).
127. 451 F.2d 1130 (4th Cir. 1971).
128. 42 U.S.C. § 4332 (1970).
129. 16 U.S.C. § 470 (1970).

project's impact on the environment and on settings of historical interest. Popularly referred to as the "environmental impact case", *Ely v. Velde* indicates the importance of perspectives traditionally deemed irrelevant to the determination of the appropriateness of a correctional facility.

While the prison administrator may be tempted to excuse subpar performance by maintaining that his limited resources preclude his doing more, this response is receiving a decreasingly sympathetic ear in the courts.[130] In the landmark case of *Holt v. Sarver* discussed above the district court emphasized the inadequacy of this response.

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend on what the Legislature may do, or upon what the Governor may do, or indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States.[131]

Any doubt as to that court's solution to the problem was dispelled in the more recent case of *Hamilton v. Love.*

> Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. This Court . . . can and must require the release of persons held under conditions which violate their constitutional rights, at least where the correction of such conditions is not brought about within a reasonable time.[132]

As summarized by then Judge Blackmun, "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations.[133]"

---

130. In Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971), the court noted that the minimizing of state expenses could not of itself justify infringement on First Amendment Rights.

131. Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

132. Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) *quoted with approval in* Taylor v. Sterrett, 344 F. Supp. 411, 422 (N.D. Tex. 1972). *See also* Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971), and Rozecki v. Goughan, 459 F.2d 6 (1st Cir. 1972), in which the court noted that good faith use of existing resources would not be an adequate defense to an Eighth Amendment claim of inadequate heating.

133. Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968).

Where other facilities were available within the prison system one court has responded by ordering the transfer to such facilities of the inmates presently incarcerated under conditions found to be "cruel and unusual".[134] Of course it is not always the physical facility itself which dictates the conclusion that confinement therein is cruel and unusual punishment. As noted in a concurring opinion in *Holt v. Sarver* at the appellate level, new buildings and additional guards do not necessarily solve the problem of inhumane treatment of inmates.[135] In such a situation, especially if previous court orders have been of no avail, a court might place the institution under receivership, thereby literally taking over the supervision of its daily operation.[136]

That a particular physical facility can in fact pass constitutional muster should not, of course, end the inquiry. The particular brand of penology that obtains in a given facility may well be as much a function of the physical facility as of the desire of staff. A warehouse for people that provides no space for an inmate to have recreation, to work off frustration, anger, or simple energy may go a long way toward undermining other efforts at rehabilitation. A newly designed institution providing for four-man cells is building-in a denial of protection, dignity and privacy for which no amount of vocational education can compensate.

VII. CONCLUSION

Judicial interpretation of the Eighth Amendment proscription of cruel and unusual punishment suggests a pattern to the emerging rights of the confined. The length of detention in segregation, whether punitive or administrative, must bear a reasonable relation to the purpose of such detention. Inordinately long periods of such incarceration may be deemed cruel and unusual. Unsanitary conditions, overcrowding, extremes of temperature, and grossly inadequate diets are often among those factors that support judicial determinations of Eighth Amendment violations. Additionally, courts are beginning to indicate concern over lack of opportunity for physical exercise, lack of opportunity for

134. Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971).

135. Holt v. Sarver, 442 F.2d 304, 310 (8th Cir. 1971) [concurring opinion].

136. Such a drastic result has not as yet obtained. However, the United States Court of Appeals for the Second Circuit has recently authorized the appointment of federal monitors to a state prison to insure compliance with the federal district court's orders. Inmates of Attica v. Rockefeller, 453 F.2d 12, 25 (2d Cir. 1971).

exercise of religion, and the effect of isolations from human contact. As a general rule, courts will not approve of conditions in segregation which are more rigorous than demonstrably necessary for prison security and segregatees must be afforded ready access to courts and counsel.

Clearly falling within the proscription of the Eighth Amendment's ban of cruel and unusual punishment is institutionalized brutality and consequently courts will not condone *any* form of corporal punishment.

Although rarely do the conditions of prison facilities present issues which rise to constitutional dimension, simple incarceration in a given facility may be deemed cruel and unusual punishment if the conditions of incarceration, taken as a whole, are shocking to the conscience of contemporary humanity. Ordinarily a combination of severe overcrowding, a lack of sanitation and a lack of adequate protection from assaults by other inmates or guards will lead to this conclusion. Inadequate funding of an institution has been specifically rejected by the courts as a justification for the proscribed conditions. Should a given facility be deemed unconstitutional, the court may order its closing and the transfer or release of its inmates.

While some fundamental legal doctrines affecting correctional institutions have changed, much of the specific law has yet to be developed particularly in a given jurisdiction. The recalcitrant correctional administrator can of course midwife its development by continuing to condone conditions and practices that basic decency and fair play would condemn. On the other hand, by eschewing nice calculations of that which is minimally acceptable, he can help provide new and workable standards which the courts might in turn emulate. Instead of resisting change the administrator can seek ways to implement it in mutually acceptable modes which will secure the advancement of legitimate goals of corrections.