University of Richmond Law Review

Volume 16 | Issue 3 Article 6

1982

Prison Overcrowding as Cruel and Unusual Punishment in Light of Rhodes v. Chapman

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NOTE

PRISON OVERCROWDING AS CRUEL AND UNUSUAL PUNISHMENT IN LIGHT OF *RHODES v. CHAPMAN**

I. INTRODUCTION

The prison population in the United States is experiencing a period of tremendous growth.[1] Due to the inability of prison construction to keep pace with this growth, prison facilities throughout the country have become severely overcrowded.[2] "The typical prison of the last third of the

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1. The prison population in the United States increased 45% from 1973 to 1979. S. REID, THE CORRECTIONAL SYSTEM 67 (1981)..

2. The length of sentences, the number of offenders placed on probation, and the number

twentieth century has changed relatively little from the institutions of 150 years earlier."[3] Inmates, forced to live under these conditions, have flocked to the courts seeking relief.[4] Yet, until its 1981 decision in *Rhodes v. Chapman*,[5] the United States Supreme Court had never reviewed a case in which particular prison conditions were challenged as constituting cruel and unusual punishment.

The eighth amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment.[6] The Supreme Court has said that "the touchstone of [this amendment] is 'nothing less than the dignity of man.' "[7] Interpreted in this light, the amendment prohibits much more than physically barbarous punishment. It proscribes the infliction of any conditions which fall below the accepted civilized standards of decency and humanity.[8] This comment will discuss *Rhodes v. Chapman*, and in particular its holding that objective and specific evidence of unconstitutional prison conditions be introduced prior to a court's application of the traditional tests for finding cruel and unusual punishment. The types of evidence which may be sufficient to establish overcrowding as violative of the eighth amendment will be explored with emphasis placed on evidence of the effects of overcrowding on the mental and physical health of inmates and on evidence of the deleterious effects of overcrowding on the totality of prison conditions. Those cases in which intolerable prison conditions have been used in defending prisoners charged with the crime of escape will be briefly reviewed. Finally, the potential impact of *Rhodes* on prison overcrowding cases arising in Virginia will be examined.

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of inmates placed on parole also affect the numbers of prisoners confined in penal institutions. Like the construction of new facilities, these factors have failed to keep pace with the rapid growth in prison populations. *Id.* at 168.

3. Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATH. U. L. REV. 365, 372 (1971).

4. Prisons in at least twenty-four states have been placed under court order because of their conditions. For a list of these states and the decisions which ordered the unconstitutional conditions corrected, see Rhodes v. Chapman, 101 S. Ct. 2392, 2402 n.1 (1981). More than eight thousand cases concerning prison conditions are pending. *Id.* at 2402 n.2. For a partial list of these cases, see NATIONAL PRISON PROJECT, AMERICAN CIVIL LIBERTIES UNION STATUS REPORT—THE COURTS AND PRISONS (1981).

5. 101 S. Ct. 2392 (1981). "We consider here for the first time the limitation that the Eighth Amendment . . . imposes upon the conditions in which a state may confine those convicted of crimes." *Id.* at 2397-98.

6. "Excessive bail shall not be required, or excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The eighth amendment applies to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

7. Trop v. Dulles, 356 U.S. 86, 100 (1958), *quoted in* Capps v. Atiyeh, 495 F. Supp. 802, 813 (D. Or. 1980).

8. 495 F. Supp. at 813.

II. Judicial Involvement in Conditions of Confinement

A. *The Evolving Definition of Cruel and Unusual Punishment*

At common law, the imposition of brutal punishments for those convicted of heinous crimes was not prohibited.[9] Hanging, burning alive, beheading, and "public dissection" were accepted punishments.[10] The English Declaration of Rights of 1689,[11] from which the eighth amendment was derived, was intended to prevent primitive forms of punishment such as dismemberment and crucifixion.[12]

Initially, the eighth amendment was thought to have little use, for the punishments which it originally protected were no longer acceptable.[13] Not until 1910 did the Supreme Court give the eighth amendment renewed meaning. In *Weems v. United States*,[14] a case involving an accessory to the falsification of a public document, the convicted accessory was sentenced to twelve-to-twenty years at hard labor with ankle and wrist chains and the permanent loss of his civil rights.[15] The Supreme Court found the punishment excessive, declaring that the *raison d'etre* for the eighth amendment should not be constrained by the common law's limitation upon brutal penalties.[16] The amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[17]

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9. 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, 900 (1977).

10. 4 W. Blackstone, Commentaries on the Laws of England 1510-11 (4th ed. T. Cooley & J. Andrews 1899):

> Of these [permissible punishments] some are capital, which extend to the life of the offender and consist generally in being hanged by the neck til dead; though in very atrocious crimes other circumstances of terror, pain or disgrace, are superadded; as, in treason of all kinds, being drawn or dragged to the place of execution; in high treason affecting the King's person or government, emboweling alive, beheading and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive . . . . Some punishments consist in exile or banishment, others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, others induce a disability. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears, others fix a last stigma on the offender, by slitting the nostrils, or branding in the hand or cheek.

11. Declaration of Rights, 1689, 1 W. & M., Sess. 2, c.2.

12. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839 (1969).

13. "[T]he provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." Hobbs v. State, 133 Ind. 404, 410, 32 N.E. 1019, 1021 (1893).

14. 217 U.S. 349 (1910).

15. *Id.* at 358, 364; Robbins & Buser, *supra* note 9, at 901.

16. 217 U.S. at 370-75.

17. *Id.* at 378. *See generally* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635 (1966).

Until recently, however, a "hands-off" policy of judicial intervention in prison conditions had been followed.[18] Courts felt that prison management was beyond judicial competence and was best left to the legislative and executive branches of government.[19] Additional justifications for this policy included a fear of increased prisoner litigation[20] and disruption of discipline of the prisons,[21] and, where federal courts were asked to interfere with state institutions, "notions of federalism have also led to restraint."[22] However, the United States Supreme Court, while recognizing that these justifications for the "hands-off" policy have some validity, recently declared that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[23] Thus only when the constitutional rights of inmates are not infringed is the "hands-off" policy now utilized.[24]

B. *Tests for Cruel and Unusual Punishment*

Even with the courts' increasing involvement in prison conditions, no static test for cruel and unusual punishment has been enunciated. Because "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[25]

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18. For a discussion of the "hands-off" doctrine, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

19. *See* Crothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Golub v. Krimsky, 185 F. Supp. 783 (S.D.N.Y. 1960). *See generally* Golfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970).

20. *See* Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) (Tamm, J., concurring).

21. *See* Golub v. Krimsky, 185 F. Supp. 783 (S.D.N.Y. 1960). *See generally* Comment, *Judicial Intervention in Corrections: The California Experience—An Empirical Study*, 20 U.C.L.A. L. REV. 452 (1973).

22. Note, *Overcrowding in Oklahoma's Prisons*, 13 TULSA L.J. 525, 530 (1978).

23. Procunier v. Martinez, 416 U.S. 396, 405-06 (1974).

24. The court has retained the "hands-off" policy for prison condition cases not involving fundamental constitutional guarantees to insure that the courts do not become the primary instrument of prison reform.

> The federal courts, as we have often noted, are not equipped by experience or otherwise to "second guess" the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances. This recognition, of course, does not imply that a prisoner is stripped of all constitutional protection as he passes through the prison's gates. . . . Rather, it "reflects no more than a healthy sense of realism" on our part to understand that needed reforms in the area of prison administration must come, not from the federal courts, but from those with the most expertise in this field—prison administrators themselves.

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 137 (1977) (Burger, C.J., concurring).

25. Trop v. Dulles, 356 U.S. 86, 101 (1958).

tests used by the courts must be sufficiently flexible to reflect changing public opinion regarding socially acceptable punishments.

Tests frequently employed by the courts consist of an inquiry into whether particular prison conditions are "so bad as to be shocking to the conscience of reasonably civilized people;"[26] whether they "involve the unnecessary and wanton infliction of pain;"[27] or whether they are "totally without penological justificaton."[28] To allow for the needed flexibility, these tests involve a great degree of judicial subjectivity, and their resolution depends in large part on the particular facts of the case. Hence, it is not surprising that the application of these tests in prison condition suits is often inconsistent. While the recent Supreme Court case of *Rhodes v. Chapman*[29] does not set forth a new test for eighth amendment challenges, it does establish more stringent evidentiary requirements in order to prove a case of cruel and unusual punishment. Therefore, a greater consistency in the application of these traditional tests may be a result of the *Rhodes* decision.

III. *Rhodes v. Chapman*

A. *Facts*

Chapman v. Rhodes[30] was a challenge to the practice of "double celling"[31] prisoners at a maximum security Southern Ohio Correctional Facility (SOCF). The prisoner-plaintiffs claimed that the double celling and its concomitant effects[32] amounted to cruel and unusual punishment.

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26. Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

27. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

28. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

29. 101 S. Ct. 2392 (1981).

30. 434 F. Supp. 1007 (S.D. Ohio 1977), *aff'd mem.*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 101 S. Ct. 2392 (1981).

31. Double celling occurs when two inmates are housed in a cell designed for one. Because "[m]ost national studies of corrections, and virtually all correctional standards, urge or require that housing be single-cell," most recently constructed prisons are of single cell design. Singer, *The Wolfish Case: Has the Bell Tolled for Prisoner Litigation in the Federal Courts?* in LEGAL RIGHTS OF PRISONERS 37 (C. Alpert ed. 1980). With the prison population explosion in the 70's, many single cell facilities were forced to resort to double celling. Thus the decision in *Rhodes v. Chapman* is of national magnitude.

32. Prisoner-plaintiffs alleged that the following situations occur as a result of double celling:

a) that violence and terror, to an impermissible degree, result from such;

b) that the guard and staff level has not been increased, is inadequate to serve the present population and that the inadequacy has fostered lawlessness and violence;

c) the feeding facilities are overtaxed to the point that the prison population is not properly fed;

d) the overcrowding has unduly burdened access to the courts;

e) the heating and ventilation systems have been overtaxed to the point of rendering cell blocks intolerable;

The Southern District Court of Ohio found that SOCF was "unquestionably a top-flight, first-class facility,"[33] and that none of the alleged effects of double celling were of constitutional magnitude.[34] Yet, on the basis of the proffered evidence, the district court held the double celling at SOCF to be unconstitutional based on the following five factors:[35] (1) the inmates were long term; (2) SOCF was housing thirty-eight percent more inmates than its design capacity;[36] (3) expert studies established fifty to seventy-five square feet per inmates to be the minimally acceptable standard, but SOCF inmates averaged only thirty to thirty-five square feet; (4) prisoners at SOCF spent most of their time in their cells; and (5) double celling was not a temporary measure.

The Court of Appeals for the Sixth Circuit affirmed the district court's ruling,[37] emphasizing that this case did not hold double celling to be unconstitutional per se, but rather that it was unconstitutional only under the facts of this case.

The Supreme Court, however, reversed,[38] holding that the district court's findings of fact[39] and the five factors upon which it based its decision were "insufficient to support its constitutional conclusion."[40] The

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f) available medical services are overtaxed; and

g) job opportunities have not kept pace with the population, reducing the rehabilitation process and the same is true of the school and schooling facilities.

434 F. Supp. at 1009.

33. *Id.*

34. The reduction in the availability of space in the day rooms was "not significant in any respect;" the food was "adequate in every respect and there [was] no indication whatsoever that prisoners [had] been underfed or that the food facilities [had] been taxed;" "[t]he ventilation system [was] adequate;" the ratio of guards to inmates was "well within the acceptable ratio;" no inmate had been denied the opportunity to attend school, although delays in entering the program were experienced; there was no indifference by the staff to the inmates' medical and dental needs; and "there [had] been no increase in violence or criminal activity increase due to double celling; there [had] been due to increased population." *Id.* at 1012-18. Further, "the defendants [had] not failed to use ordinary care for inmate safety." *Id.* at 1020. The Court did find that jobs had been "watered down" and that the number of psychologists and social workers had not been increased as the population increased, but these factors were not found to be of constitutional magnitude. *Id.* at 1015-16.

35. *Id.* at 1020-21.

36. The "design" or "rated" capacity is the number of inmates the facility is designed to hold. This number is compared with the actual population to produce an objective index of overcrowding. The index is often one factor that courts consider when determining the constitutionality of prison conditions and when formulating relief from unconstitutional conditions. *See, e.g.*, Capps v. Atiyeh, 495 F. Supp. 802 (D. Or. 1980); Ambrose v. Malcolm, 414 F. Supp. 485 (S.D.N.Y. 1976).

37. 624 F.2d 1099 (6th Cir. 1980).

38. 101 S. Ct. 2392 (1981).

39. "Virtually every one of the court's findings tends to *refute* respondents' claim." *Id.* at 2399 (emphasis in original).

40. *Id.* "These general considerations fall far short in themselves or [sic] proving cruel and unusual punishment . . . ." *Id.*

Court, although recognizing that double celling was not the ideal prison situation, stated:

> [T]he Constitution does not mandate comfortable prisons, and prisons of SOCF's type, which house persons convicted of serious crimes, cannot be free of discomfort. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court. There being no constitutional violation, the District Court had no authority to consider whether double celling in light of these considerations was the best response to the increase in Ohio's state-wide prison population.[41]

B. *Standards Set Forth for Eighth Amendment Analysis*

Rhodes v. Chapman cannot be read as holding that double celling (or overcrowding) can never be unconstitutional, for the Supreme Court confined its holding to the facts of the particular case.[42] However, the opinion reveals the method by which the Court will analyze future challenges to prison overcrowding. The reasoning of the Court, therefore, deserves close scrutiny.

The Court in *Rhodes,* reiterating that the tests for cruel and unusual punishment are not static but must evolve with the standards of society,[43] set forth the tests to be used in prison conditions cases as follows: "Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."[44] The Court pointed to *Estelle v. Gamble*[45] and *Hutto v. Finney*[46] for this proposition, but noted that conditions which do not result in pain or the deprivation of basic human needs may amount to cruel and unusual punishment if the conditions violate the contemporary standards of human decency.

The tests set forth in *Rhodes* for unconstitutional prison conditions are virtually identical to the tests used in other cruel and unusual punishment cases.[47] It is not in the establishment of tests for cruel and unusual punishment that *Rhodes* sheds new light on prison overcrowding as being violative of the eighth amendment but in clarifying the criteria which must be proved to meet the tests already in use.

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41. *Id.* at 2400-01.

42. "[R]espondents' contention does not lead to the conclusion that double celling at SOCF is cruel and unusual, whatever may be the situation in a different case." *Id.* at 2400 n.14.

43. *See* text accompanying note 25 *supra.*

44. 101 S. Ct. at 2399.

45. 429 U.S. 97 (1976) (deliberate indifference by staff to inmate's medical or dental needs constituted cruel and unusual punishment because it resulted in pain with no penological purpose).

46. 437 U.S. 678 (1978) (prison conditions which resulted in deprivation of basic human needs held unconstitutional).

47. *See* notes 26-28 *supra* and accompanying text.

Rhodes tightens the requirements for establishing violations of the eighth amendment by calling for objective facts and specific evidence to support a claim of cruel and unusual punishment. While the Court recognized the subjective nature of tests used in eighth amendment challenges,[48] it declared that " 'judgment[s] should be informed by objective factors to the maximum extent possible.' "[49] The challenge in *Rhodes* failed because there was "no *evidence* that double celling under these circumstances either inflict[ed] unnecessary or wanton pain or [was] grossly disproportionate to the severity of crimes warranting imprisonment,"[50] and "no *evidence* . . . that double celling [was] viewed generally as violating decency."[51]

While the "infliction of unnecessary and wanton pain" and the "punishment disproportionate to the offense" tests lend themselves to the production of specific evidence, they are not often applicable to overcrowding suits.[52] In most of these actions, conditions are challenged as "violating contemporary standards of human decency." The Court calls for increased evidence in this area, but it focuses on what is not acceptable evidence, rather than on what evidence will suffice.

The Court rejects the practice of relying on the opinions of experts regarding acceptable prison conditions to establish the contemporary standards of decency.[53] The practice of relying on standards for minimally

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48. "To be sure, 'the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability' of a given punishment." 101 S. Ct. at 2398 (citing Coker v. Georgia, 433 U.S. 584, 597 (1977)).

49. 101 S. Ct. at 2398-99 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977), *as cited in* Rummel v. Estelle, 445 U.S. 263, 275 (1980)).

50. 101 S. Ct. at 2399-2400.

51. *Id.* at 2400 n.13 (emphasis added).

52. The "infliction of unnecessary and wanton pain" test has most often been used in cases of denial of medical treatment and excessive use of force by prison guards. When challenging a denial of medical treatment, the inmate must show deliberate indifference by the staff to his serious medical needs. Estelle v. Gamble, 429 U.S. 97 (1976). If the challenge is to inadequate medical care throughout the prison system, either a pattern of individual incidents involving inadequate medical care, or systematic deficiencies in the delivery of medical care which make unnecessary suffering inevitable must be shown. Ruiz v. Estelle, 503 F. Supp. 1267 (S.D. Tex. 1980). The "punishment disproportionate to the offense" test was developed in cases involving the trial judge's or prison official's discretionary power in imposing specific sanctions:

> [I]t is particularly inappropriate in evaluating ongoing conditions of confinement for the general prison population. Challenges to a cumulation of prison conditions that daily affect the inmate community and that do not include the imposition of extra punishments following particular transgressions of prison regulations cannot profitably draw on this essentially transactional theory.

Robbins & Buser, *supra* note 9 at 904. Most cases employing this test have challenged the imposition of solitary confinement. *Id.* at 904 n.71.

53. "Respondents and the District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency." 101 S. Ct. at 2400 n.13. The Court also cites Bell v. Wolfish, 441 U.S. 520 (1979) (conditions of

acceptable space per inmate, as determined by scientific study or by experts,[54] has been used by some courts to establish a constitutional minimum of space per inmate.[55] *Rhodes* impliedly overrules these cases where expert standards were the sole evidence relied on by the court. Other courts have utilized these standards in formulating relief from overcrowded conditions.[56] Expert opinion used in this vein would seem to remain acceptable, for the Court in *Rhodes* recognized that "such opinions may be helpful and relevant with respect to some questions."[57]

Since general expert opinion, absent application to the specific prison conditions being challenged, will not suffice to establish overcrowded conditions as cruel and unusual punishment, prior cases not relying solely on expert testimony must be analyzed to determine other types of evidence which have been held to establish overcrowding as violative of the eighth amendment.

IV. Establishing an Overcrowding Case

A. *Overcrowding as a Critical Factor*

While it is generally true that no single condition of incarceration rises to the level of an eighth amendment violation, overcrowding has been cited by numerous courts as the one factor most responsible for aggravating existing conditions and producing the most harmful physical and

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confinement of pretrial detainees challenged as violative of their due process rights). In *Bell* the Court stated that "while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather they establish goals recommended by the organization in question." *Id.* at 543-44 n.27.

54. Examples of these standards include AMERICAN PUBLIC HEALTH ASSOCIATION, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 62 (1976) (60 square feet in a cell and 75 square feet in a dormitory); COMMISSION ON ACCREDITATON FOR CORRECTIONS, AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS § 4142 (1977) (60 square feet for inmates spending less than 10 hours in a cell and 80 square feet for inmates spending 10 or more hours in a cell); NATIONAL ADVISORY COMMISSION FOR CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 53 (1973) (80 square feet); NATIONAL SHERIFF'S ASSOCIATON, HANDBOOK ON JAIL ARCHITECTURE 63 (1975) (70 square feet); SPECIAL CIVILIAN COMMITTEE, REPORT FOR THE STUDY OF THE UNITED STATES ARMY CONFINEMENT SYSTEM (1970) (55 square feet).

55. *See, e.g.*, Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977). In *Battle*, the court adopted a standard of 60 square feet per inmate in a cell and 75 square feet per inmate in a dormitory. "Anything less would be to subject the individual to further punishment than was given by the sentencing trial court." *Id.* at 395.

56. *See, e.g.*, Ambrose v. Malcolm, 414 F. Supp. 485 (S.D.N.Y. 1976); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

57. 101 S. Ct. at 2400 n.13. Justice Brennan, in his concurrence, agrees that expert opinion cannot be the sole basis for establishing contemporary standards of decency, but recognizes that "such testimony can help the courts to understand the prevailing norms against which conditions in a particular prison may be evaluated." *Id.* at 2408 n.12.

mental consequences.[58] The district court in *Pugh v. Locke*[59] maintained that "overcrowding is primarily responsible for and exacerbates all the other ills of Alabama's penal system."[60] Similarly, in his dissenting opinion in *United States v. Bailey*,[61] Justice Blackmun stated that "[t]here can be little question that our prisons are badly overcrowded and understaffed and that this in large part is the cause of many of the shortcomings of our penal system."[62]

Two recent Fourth Circuit cases chronicle the effect that prison overcrowding has upon the other aspects of institutional life. *Bolding v. Holshouser*[63] involved a complaint brought by a group of North Carolina prison inmates, both as individuals and as representatives of all prisoners similarly situated in North Carolina prisons. The complaint alleged constitutional violations involving overcrowding, interferences with the prisoners' mail, various conditions of isolation, failure to provide adequate food service facilities, and denial of procedural due process at administrative hearings involving parole, transfer, disciplinary action and prisoner classification.[64] The district court denied the plaintiff's request for comprehensive injunctive and declaratory relief, holding that the plaintiffs had failed to state a claim upon which relief could be granted. The Court of Appeals for the Fourth Circuit reversed this decision.[65]

The appeals court found that in at least four of their separate causes of action, the plaintiff prisoners had presented ample facts to support their claims. This evidences the Fourth Circuit's prior compliance with the strict evidentiary requirements recently set forth in *Rhodes*.[66] While heeding the Supreme Court's warning against sweeping injunctions directed at state officials,[67] the Fourth Circuit instead took notice of the Supreme Court's admonition to the federal courts to remedy constitutional violations occuring in state or federal prisons.

With respect to their claim of overcrowding, the prisoners alleged that

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58. *See, e.g.*, United States v. Bailey, 444 U.S. 394 (1980); Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978); Capps v. Atiyeh, 495 F. Supp. 802 (D. Or. 1980); Johnson v. Levine, 450 F. Supp. 648 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975); McCray v. Sullivan, 399 F. Supp. 271 (S.D. Ala. 1975).

59. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

60. 406 F. Supp. at 323.

61. 444 U.S. 394 (1980).

62. *Id.* at 424 (Blackmun, J., dissenting).

63. 575 F.2d 461 (4th Cir. 1978).

64. *Id.* at 462-63.

65. *Id.* at 464.

66. *See* notes 48-57 *supra* and accompanying text.

67. *See* Rizzo v. Goode, 423 U.S. 362 (1976).

as a result of inadequate "personal living space," they were

> "victims of and are in constant danger of violent and deadly attack; . . . [they] are victims of and face the persistent danger of rape and other sexual attack or molestation; . . . [and they] suffer accumulating psychological damage from the high level of mental stress and fear." In addition, plaintiffs allege that as a result of the overcrowding, they do not receive "adequate educational, recreational and work-release programs; . . . sanitary living conditions; . . . supplies for meeting basic personal hygiene; . . . adequate medical, psychological and dental care; . . . visitation rights; . . . [and] a functional classification system . . . [to] provide treatment for those individuals with emotional problems, safety for prisoners in general population, and means for prisoners to achieve personal improvement."[68]

It is apparent that most of these allegations parallel those factors which most commonly appear in prisoners' claims that prison conditions are unconstitutional. While it has not yet been recognized as such, overcrowding may emerge, under particular circumstances, as the one factor of institutional life which could rise to such a level as to render the prison conditions unconstitutional.

This proposition is supported by the Fourth Circuit holding in *Johnson v. Levine*[69] that "[o]vercrowding, with all of its consequences can reach such proportions that the impact of the aggregate effect amounts to cruel and unusual punishment."[70] In *Johnson,* prisoners confined in two Maryland State penal institutions brought suits alleging that the conditions of their confinement constituted cruel and unusual punishment under the eighth amendment. The complaints alleged that overcrowded conditions resulted in double celling, suicides, increased risk of sexual attack, excessive noise levels, increased stress, idleness, and deplorable ventilation problems.[71] Two specific areas of the institutions were singled out as having the worst conditions. In one area which housed inmates with psychological or psychiatric problems, only one official was responsible for the security and feeding of forty-nine prisoners. In addition, the area had only one shower,[72] and some cells had no beds or toilets.[73] Another section, the six-cell isolation confinement section, housed those inmates who were considered a threat to themselves or others.[74] Inmates in this section received improper medical attention and were confined in their cells for

68. 575 F.2d at 464.

69. 450 F. Supp. 648 (D. Md.), *aff'd in part,* 588 F.2d 1378 (4th Cir. 1978). The Fourth Circuit in *Johnson* consolidated two lower court decisions, Johnson v. Levine, 450 F. Supp. 648 (D. Md. 1978), and Nelson v. Collins, 455 F. Supp. 727 (D. Md. 1978).

70. 588 F.2d at 1380-81.

71. *See generally* Comment, *Fourth Circuit Review, Prisoners' Rights,* 37 WASH. & LEE L. REV. 371, 532 (1980).

72. 450 F. Supp. at 652.

73. *Id.* at 657.

74. 455 F. Supp. at 734.

extended periods of time.[75]

The district court found that the overcrowded conditions in these institutions were unconstitutional,[76] a holding which was affirmed by the Fourth Circuit.[77] However, while the district court rejected Maryland's proposal to eliminate overcrowding,[78] the Fourth Circuit remanded the cases to incorporate Maryland's plan into the decree.[79] The proposed plan involved the construction of a new facility and the early release of some prisoners.[80] The Fourth Circuit considered this proposal reasonable. Only a new facility could eliminate the unconstitutional conditions and "[w]ith the elimination of substantial overcrowding, . . . the deficiencies of the medical facilities, staffs and services will be diminished."[81]

In *Johnson,* the "totality of the conditions" approach was again used. However, all of the substandard conditions were found to be directly related to the sole condition of overcrowding. So, as with the *Bolding* analysis, it is suggested that overcrowding is the single critical factor which aggravates prison conditions to the point at which they are no longer constitutional.

B. *Evidence Needed to Establish Overcrowding as Cruel and Unusual Punishment*

In the rare case, the objective facts of overcrowding may be such as to render the condition unconstitutional per se, as for example, in *McCray v. Sullivan,*[82] where up to seven men were placed in a six by eight foot cell. In the majority of overcrowding cases, however, it is necessary to produce evidence that the overcrowding has had deleterious effects on the inmates, a burden which can be met by showing its psychological and physical effects on the inmates, or by showing its effects on other prison conditions.

1. Objective and Specific Evidence

Expert testimony, unrelated to the specific prison facility, that merely states the effects of overcrowding on prisoners in general, will not estab-

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75. *Id.* at 735.
76. 455 F. Supp. at 734; 450 F. Supp. at 654.
77. 588 F.2d at 1381.
78. 455 F. Supp. at 737; 450 F. Supp. at 661.
79. 588 F.2d at 1381.
80. 455 F. Supp. at 737; 450 F. Supp. at 661.
81. 588 F.2d at 1380.
82. 509 F.2d 1332 (5th Cir. 1975). In most cases concerning such deplorable overcrowding, other unconstitutional conditions also exist. In *McCray,* the cells did not contain bunks or sinks, and the toilet, which was a hole in the center of the cell floor, produced a waste backup on the floor of the cell when flushed four times per day.

lish cruel and unusual punishment under *Rhodes*.[83] However, such testimony can successfully be used when the expert has inspected the challenged facility and tested representative inmates. This technique was used in *Capps v. Atiyeh*,[84] where the testimony of eight expert witnesses, along with photographic and documentary exhibits, established the overcrowding to be cruel and unusual punishment. Health risks incident to overcrowding were shown,[85] as well as its psychological effects.[86] General studies of the effects of overcrowding were introduced into evidence, leading to the determination that "[t]hese effects are being manifested at these institutions."[87] The court concluded by stating:

> The evidence in this case as set forth in the findings of fact is replete with examples of the deleterious effects of overcrowding on prisoners' mental and physical health . . . . It is clear that the plaintiff inmates have been subjected to conditions in which their degeneration is probable and their self-improvement unlikely.[88]

Psychophysiological effects of overcrowding, such as elevated blood pressures and increased exposure to disease and infection from close confinement, were used by the court in *Ruiz v. Estelle*[89] to establish overcrowding as violative of the eighth amendment.

The court in *Anderson v. Redman*[90] found that "[t]he overcrowded living conditions directly affect the psychological well-being of the inmates. Cramped and suffocating quarters increase tension, hostility and aggression, and exacerbate any personal problems an inmate may have, thereby intensifying his anxiety and fear."[91] The court considered psychological

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83. *See* notes 53-55 *supra* and accompanying text.

84. 495 F. Supp. 802 (D. Or. 1980).

85. The increased health risks to which the prisoners were exposed included health hazards from sleeping on the floor in close contact with the toilets, increased risk of communication of contagious disease, and gastric illnesses from eating in the noisy, stressful environment of a dining room which could seat only 440 inmates, but served 1400 or more inmates at each meal. *Id.* at 810.

86. The psychological effects of overcrowding included feelings of frustration without opportunities to effectively deal with these feelings, retardation of the development of appropriate social skills, depression, tension, and suicide attempts. The staff also experienced shortened tempers and a decrease in tolerance level as a result of the overcrowding, which increased the friction between the staff and inmates. *Id.* at 811-12.

87. *Id.* at 811.

88. *Id.* at 814.

89. 503 F. Supp. 1265 (S.D. Tex. 1980). Inmates in the Texas Prison System faced extremely overcrowded conditions. Three to five prisoners were housed in each single cell measuring nine feet by five feet. Two inmates slept on shelf-like bunks, and the remaining ones slept on the floor between the bars at the front and open toilet at the rear of the cell. Prisoners assigned to dormitories either slept on mattresses placed on wall ledges, often above the toilets, or on one of three mattresses placed on two bed frames pushed together. *Id.* at 1277-79.

90. 429 F. Supp. 1105 (D. Del. 1977).

91. *Id.* at 1112.

case histories of individual inmates[92] but primarily based its conclusion on figures that reflected a disproportionate increase in the number of suicides, suicide attempts, and self-inflicted injuries that occurred in the overcrowded prison.

A lack of adequate space for exercise was alleged in *Clay v. Miller*,[93] but the Fourth Circuit dismissed the case because "there [had] been no showing that [the challenger's] mental or physical health was threatened as a result of not being provided more space or facilities."[94] While this decision did not involve a direct challenge to overcrowding, it demonstrates that whenever courts rule on the constitutionality of space limitations, they will henceforth require actual evidence of the deleterious effects of prison conditions on the inmates.

Evidence of the psychological and physical effects of overcrowding on inmates is persuasive in establishing overcrowding as violative of the eighth amendment, but in most cases it is not the only tool available to the challenger. The majority of prisons with severe overcrowding also experience a decline in the quality of other prison conditions. Evidence of this decline has aided many courts in determining that overcrowding constituted cruel and unusual punishment.

2. Effects of Overcrowding on Other Prison Conditions

In recent years courts faced with an eighth amendment challenge to prison conditions have held that a cumulation of conditions may constitute cruel and unusual punishment. *Holt v. Sarver*[95] initiated this trend by declaring that "[t]he distinguishing aspects of Arkansas penitentiary life must be considered together. . . . All [conditions] exist in combination; each affects the other; and taken together they have a cumulative impact on the inmates. . . ."[96]

Even if the individual prison conditions are not constitutionally impermissible, by examining the totality of conditions within the institution, the court may find that they constitute cruel and unusual punishment.[97]

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92. *Id.* at 1112 nn.11 & 12. One representative case history related by the court involved an inmate with a severe speech problem. He was initially placed in a severely overcrowded area of the prison, whereupon his stuttering became worse. When he was transferred to an individual cell, his stuttering ceased, but upon transfer to a dormitory, his stuttering resumed. *Id.* at 1112 n.11.

93. 626 F.2d 345 (4th Cir. 1980).

94. *Id.* at 347.

95. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

96. 309 F. Supp. at 373.

97. "Considered separately, these deficiencies would not amount to a deprivation of constitutional magnitude. But weighed in their totality, these conditions at the MHC, all of which are directly related to overcrowding, result in the deprivation by defendants of rights guaranteed to plaintiffs by the Eighth Amendment." Johnson v. Levine, 450 F. Supp. 648, 655-56 (D. Md.), *aff'd in part and remanded*, 588 F.2d 1378 (4th Cir. 1978). *See also*

The Supreme Court in *Rhodes* approved this approach by stating that conditions "*alone, or in combination,* may deprive inmates of the minimal civilized measure of life's necessities."[98]

Through the totality of circumstances approach, conditions throughout the prison may be challenged and their link to the overcrowding established. Should the court find a constitutional violation, the remedy it grants will, at least in part, relieve the overcrowded situation.[99] Thus, the desired relief is obtained by presenting the court with cumulative evidence from which to infer that the prison conditions violate the contemporary standards of human decency.

While courts have examined a variety of conditions under the "totality" approach, this comment will focus on seven conditions which have been challenged in the courts: the lack of a workable classification system, understaffing, the absence of any meaningful opportunity to participate in educational or vocational work activities, inmate safety, diet and food preparation, sanitation, and medical care.

a. Lack of a Workable Classification System

A working classification system within the penal society separates the young from the old, the strong from the weak, the physically and mentally ill from the healthy, and the hardened criminal from the first offender. Understaffing and overcrowding are blamed for the failure to classify.[100] Chaos results from this failure.

A breakdown of the classification process has a "snowball" effect — one bad condition leads to another. In overcrowded prisons, new inmates are often restricted to already overcrowded quarters and are permitted neither visitors nor recreation.[101] Inmates are assigned to institutions, particular dormitories, and work assignments purely on the basis of available space. Consequently, there is no isolation of violent inmates, and weaker inmates are constantly victimized by those who are stronger and

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Laaman v. Helgemoe, 437 F. Supp. 269, 322-23 (D.N.H. 1977) ("exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment").

98. 101 S. Ct. at 2407 n.10 (emphasis in original). *See also* Hutto v. Finney, 437 U.S. 678, 687 (1978) ("We find no error in the court's conclusion that, *taken as a whole,* conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.") (emphasis added).

99. Courts have relieved the overcrowding in a variety of ways. *See* Valvano v. Malcolm, 520 F.2d 392 (2d Cir. 1975) (limiting prison population to a fixed number); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973) *aff'd,* 494 F.2d 1196 (1st Cir. 1974) (inmates being held in single cells); Ambrose v. Malcolm, 414 F. Supp. 485 (S.D.N.Y. 1976) (each inmate allotted a minimum amount of space); Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975) (closing the prison).

100. *See* Pugh v. Locke, 406 F. Supp. 318, 324 (M.D. Ala. 1976).

101. *Id.* at 324.

more aggressive.[102] Inmates suffering mental disorders go unidentified and are dispersed throughout the prison population without medical treatment. The most disturbed of these inmates should properly be placed in a penal facility for the criminally insane. Others, suffering varying degrees of mental retardation, emotional or physical disabilities, need to be identified and placed in an appropriate environment.[103]

Where there is a breakdown in the classification system, there is no rational basis on which to assign inmates to any vocational or educational activities that may exist;[104] there are no special programs for or supervision of the aged and infirm; inmates confined to wheelchairs are left unsupervised and helpless in the event of an emergency.[105] All of these conditions, arising in part from a failure to classify, contribute to apathy, tension, and frustration. "Each of these failings . . . is compounded by [the] system's most pervasive and most obvious problem: the overcrowding with which all prisoners must live."[106]

b. Understaffing

Understaffing has a deleterious effect on prison personnel which, in turn, is felt by the inmates. Communication between guards and inmates deteriorates, and as the staff becomes more overburdened, their tempers shorten, and they become less tolerant and more punitive.[107]

The problem is aggravated by the fact that the guards, drawn largely from the local population,[108] are predominantly nonurban, nonminority whites,[109] while the prison population is primarily composed of urban blacks and other minorities.[110] As a rule, guards are seldom well-educated, and working conditions and low pay create a lack of job interest. Guards are often strong, authority-oriented figures, who become more so because of the nature of their positions. Omnipresent forces divide guards from inmates and drive them into opposing membership groups, each regarding the other with antagonism and hostility.[111]

Understaffing often creates situations where inmates are put in positions of authority and control over other inmates—an atmosphere which

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 325.
106. *Id.*
107. *See* Capps v. Atiyeh, 495 F. Supp. 802, 811 (D. Or. 1980).
108. 406 F. Supp. at 325.
109. *Id.*
110. *Id.*
111. *See* Graves & Hill, *Prison Conditions and Effects in the Defense of a Prison Crime Case*, 24 AM. JUR. TRIALS 555, 580 (1977) (citation omitted).

breeds opportunities for blackmail, bribery, and extortion.[112] Under these circumstances, "inmate-guards" are afforded special privileges, "including freedom to ignore prison regulations and to abuse other inmates."[113] This favoritism increases the tension between guards and inmates and among the inmates themselves. The polarization of inmates causes a breakdown in the "inmate code," thus diminishing the aspects of self-protection and stability inherent in the code.[114] These consequences stem from the inability of too few guards to control the increased number of inmates in their charge.

c. Opportunity to Participate in Educational or Vocational Work Activities

Where overcrowded conditions prevail, all vocational, educational, and rehabilitative efforts by prison officials suffer. The failure of these programs, if they exist at all, is a direct consequence of overcrowding.

Among the observed effects of high levels of social density (number of occupants in living quarters) and spatial density (square feet per person) are increased illness complaint rates, as well as higher death, suicide, and psychiatric commitment rates.[115] These effects may be linked to the fact that most inmates in overcrowded prisons spend a substantial amount of their time in absolute idleness.[116] Available educational and rehabilitative programs are simply inadequate to meet the needs of so many inmates. Evidence suggests that long periods of idleness destroy any job skills or work habits which inmates may have had and contribute to their mental and physical degeneration.[117] According to one expert on penal care, high levels of overcrowding undermine the initiative to seek self-improvement and prevent rehabilitation.[118]

The failure to adequately classify inmates and the lack of sufficient personnel only exacerbate the situation. Where there has been no classifying of inmates, the means of identifying an individual inmate's skills, goals or abilities are lacking. Even where some attempt has been made to classify, understaffing makes implementing any available programs virtually impossible. The result again is idleness, which, in turn, results in "more assaults on inmates and staff; growing numbers of disciplinary re-

112. 406 F. Supp. at 325.

113. *Id.*

114. Graves & Hill, *supra* note 111, at 580 (citation omitted). *See* text accompanying note 126 *infra.*

115. NATIONAL INSTITUTE OF JUSTICE, THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR 1-8, (1980).

116. 406 F. Supp. at 326.

117. *Id.*

118. 495 F. Supp. at 811 (testimony of Dean Morris of the University of Chicago Law School).

ports; an increase in inmate defiance, disturbances, and rumors of impending or possible riot; and an overall negative effect on morale."[119]

d. Inmate Safety

Prisoners have a constitutional right to be reasonably protected from constant threats of violence.[120] While individual lawsuits based upon lack of adequate protection are entertained by the courts,[121] most actions dealing with inmate safety involve a challenge to the totality of conditions within the prison.[122] Due to the growing public awareness of the prevalence of homosexual rape and other forms of violence in penal institutions, courts are becoming increasingly sensitive to the problem of violence in prisons. The fact that overcrowded institutions are potential powderkegs which may erupt in riots prompted one court to declare that "[t]his court would be remiss in its duties if it did not move to act on the problems, but rather sat idly by until the increasing crowding caused another major incident to sweep the Oklahoma Prison System."[123]

To obtain relief from overcrowding, the challenger must first show that violent incidents are commonplace.[124] This can be accomplished through the use of incident reports kept by prison administrators and testimony

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119. *Id.* at 812.

120. As stated in Penn v. Oliver, 351 F. Supp. 1292, 1294 (E.D. Va. 1972):

> [T]he eighth amendment's prohibition against cruel and unusual punishment places a responsibility upon prison officials to protect the person of inmates within the prison system from violent assaults by other inmates. Both actual assaults by other inmates and the constant fear of such assaults add immeasurably to the burden that must be borne by inmates. If security in a prison reaches such a degree of laxness that assaults become the rule rather than the exception, then conditions have developed that are intolerable to accepted notions of decency. In short, there exists a constitutional right of inmates to be afforded at least some degree of protection from attacks by fellow inmates.

Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973), established a two-pronged test for ruling on the constitutionality of these claims. "[T]he court should ascertain: (1) whether there is a pervasive risk of harm to inmates . . . and, if so, (2) whether the officials are exercising reasonable care to prevent . . . an unreasonable risk of harm." *Id.* at 890. *See, e.g.*, Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971). *See generally*, C. Carriere, *The Dilemma of Individual Violence in Prisons*, 6 NEW ENGLAND J. PRISON L. 195 (1980).

121. *See, e.g.*, Little v. Walker, 552 F.2d 193 (7th Cir. 1977); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975).

122. *See, e.g.*, Costella v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd and modified in part*, 525 F.2d 1239 (5th Cir. 1976); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

123. Battle v. Anderson, 564 F.2d 388, 395 (10th Cir. 1977).

124. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd in part and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) ("an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well-being").

of inmates and prison staff,[125] but these methods often fail to reflect accurately the magnitude of prison violence. This inaccuracy results from a rigid "inmate code," which has as its two cardinal rules: (1) never snitch, and (2) never notice anything.[126] The Guards also have a code which is one of protection and includes two maxims: (1) make no waves and (2) see no evil, hear no evil, and speak no evil, regarding the conduct of other guards.[127] Because each group will always take the side of its own members and abide by its respective code, instances of violence are often tolerated, ignored, and unreported. There is considerable evidence that most prisoners carry some form of contraband or homemade weapon necessary for self-protection.[128]

Once the fact that violence is a factor of everyday life is established, the challenger must then show a correlation between the violence and overcrowding. While some courts have intuitively perceived this link,[129] it is doubtful that this "common sense reasoning" will be upheld in light of the call for increasing specificity of evidence set forth in *Rhodes*.[130] Objective statistics can easily be used to show the causal relationship between overcrowding and violence, but it is not enough merely to show a proportional increase in violence and population. To prove that overcrowding causes an increase in violent incidents, it must be shown that the number of violent incidents increases geometrically with the increase in population.[131]

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125. *See* Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976). In *Capps v. Atiyeh*, when presented with evidence that "the reports of tension at [the prison] were sufficiently convincing that members of the Parole Board were motivated . . . to move their meetings to a site outside [the prison] for fear they would be taken hostage in the event of a disturbance," the court had little difficulty in determining that violence was a pervasive problem. 495 F. Supp. 802, 812 n.15 (D. Or. 1980).

126. Graves & Hill, *supra* note 111, at 580 (citing Merklin, *Prison and the Concrete Mind;* 2 CENTER MAGAZINE 90, 91 (1969)).

127. Graves & Hill, *supra* note 111, at 581.

128. 406 F. Supp. at 325. Shakedowns to remove weapons from the prison population are neither thorough nor often enough to significantly reduce the number of weapons. "There are too few guards to prevent outbreaks of violence, or even to stop those which occur." *Id.* Among prison populations it may be concluded:

> The extent to which oppressive discipline, guard brutality and enforced sexuality contribute to the general milieu of violence in prisons may be the subject of discussion and debate. There is no question, however, that prisons are places of excessive violence, that this violence level is much greater than that in the general society, and that the recognition of this fact by guards and inmates alike—through constant fear, apprehension and tension—affects the conduct of all, causing them to carry their reactions on a hair trigger.

Graves & Hill, *supra* note 111, at 598 (citatons omitted).

129. *See* Ruiz v. Estelle, 503 F. Supp. 1265, 1286-87 (S.D. Tex. 1980).

130. *See* text accompanying notes 49-51 *supra*.

131. The Court in *Rhodes* approved of the district court's finding that "[r]espondents [had] failed to produce evidence establishing that double celling itself caused greater violence" because "the court found that the number of acts of violence at SOCF had increased

e. Diet and Food Preparation

While a bread and water diet has been declared per se unconstitutional,[132] challenges to the quality and quantity of food served or the conditions of its preparation have never been held violative of the eighth amendment in suits based solely on these grounds; however, many courts have considered these factors in "totality of conditions" suits.

A prison is required to provide enough food of nutritional value to create a healthy diet.[133] To establish evidence of the inadequacy of a prison diet, a dietician may review the caloric and nutritional value of the standard fare and compare this with the requirements of an average inmate.[134] While an inadequate diet is merely one factor in the totality of conditions, unless it can be causally linked to overcrowding, the relief granted will be an improvement in the food offered rather than a relief from overcrowding.[135]

Unsanitary conditions of food preparation may be evidenced by vermin-filled food,[136] unsanitary dishwashing procedures,[137] inadequate food storage[138] or filthy and debris-strewn kitchen facilities.[139] An inspection by a representative of the State Department of Health will provide evidence of unsanitary conditions.[140] Again, a causal connection between the

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with the prison population, but only in proportion to the increase in population." 101 S. Ct. at 2396.

132. *See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

133. *See* Feazell v. Augusta County Jail, 401 F. Supp. 405 (W.D. Va. 1975); Cassidy v. Superintendent of City Prison Farm, 392 F. Supp. 330 (W.D. Va. 1975).

134. *See* Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980) in which the court stated:

> Dietitians called by both plaintiffs and the defendants testified that this diet was calorically and nutritionally inadequate. Plaintiffs' expert testified that an average-sized sedentary person on this diet could be expected to lose nine pounds per month, and he described the health hazards associated with diets, such as this one, that contain insufficient amounts of vitamin C and calcium. The defendants' expert agreed that the diet was inadequate in these respects.

Id. at 508. *See also* Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio), *supplemented,* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

135. *See* Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980) (court ordered addition of specific food items to standard prison fare).

136. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976). *Cf.* Lovern v. Cox, 374 F. Supp. 32 (W.D. Va. 1974) (occasional presence of objects in food does not raise question of cruel and unusual punishment).

137. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).

138. *Id.* at 323.

139. *Id. See* Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971).

140. *See* Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980). While a state health code does not establish constitutional minima, violations of the code, coupled with the inspector's statement that "the food service represents imminent danger to the health and well-being of the inmates consuming food in that operation," prompted the court in *Ramos* to find the kitchen facilities " 'grossly inadequate and constitutionally impermissible.' " *Id.* at 571-72 (quoting Ramos v. Lamm, 485 F. Supp. 122, 155 (D. Colo. 1979)).

overcrowding and unsanitary food preparation must be established in order to obtain the desired relief from overcrowding. One method used to establish this connection is to show that because of the large number of inmates for whom food has to be prepared, and because of the lack of sufficiently trained food service personnel the food must be handled by untrained inmates.[141] In this situation, a court may conclude that relief from overcrowding would remedy the unsanitary food preparation.

f. Sanitation

Because health may be endangered by unsanitary conditions, the prison administration is required to make reasonable efforts to keep the facility in a state of repair.[142] Evidence of leaking roofs, insect infestation, stagnant air and excessive mold and fungus growth as a result of inadequate ventilation, and leaking pipes and defective plumbing causing sewage to accumulate in cells and service areas, led one court to declare that "[w]ithout doubt, the State's inability to meet minimal shelter and sanitation standards contributes immeasurably in making the main living areas unfit for human habitation."[143] Sanitation, therefore, can have an influence on the court in determining whether the totality of conditions violates contemporary standards of human decency.

Unsanitary conditions may be shown by photographs, testimony of staff and inmates, and inspections of the facilities by health inspectors. Objective data, such as one functioning toilet for over 200 inmates,[144] may also be utilized. A persuasive technique in this area is for the court to inspect the facilities. This provides for verificaton of the evidence presented and resolution of any conflicting testimony.[145]

The prison administration must also provide inmates with supplies for routine health care and cleanliness. While an inmate who chooses not to clean his cell has no grounds to complain, inmates who wish to clean their cells must be provided with enough cleaning supplies to do an adequate job.[146] Inmates must also be provided with toiletries for personal hygiene. At a minimum soap, towels and toilet paper must be provided,[147] but some courts have extended this list to include toothpaste, toothbrushes, shampoo, shaving cream, razors, and combs.[148]

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141. 406 F. Supp. at 323.

142. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970).

143. Ramos v. Lamm, 639 F.2d 559, 570 (10th Cir. 1980).

144. Pugh v. Locke, 406 F. Supp. 318, 323 (M.D. Ala. 1976).

145. *See* Gates v. Collier, 423 F. Supp. 732, 741 (N.D. Miss. 1976).

146. *See* Ramos v. Lamm, 639 F.2d 559, 570 (10th Cir. 1980).

147. *See* Scellato v. Department of Corrections, 438 F. Supp. 1206 (W.D. Va.), *dismissed*, 565 F.2d 158 (4th Cir. 1977) (failure to provide toiletries other than soap, towels, and toilet paper not deprivation of constitutional dimension).

148. *See* Pugh v. Locke, 406 F. Supp. 318, 334 (M.D. Ala. 1976).

g. Medical Care

The medical facilities and treatment within a prison may themselves be deemed unconstitutional upon proof of "deliberate indifference to a prisoner's serious illness or injury."[149]

Often, the existing medical staff and facilities[150] are not adequate for an increasing prison population, yet there is no deliberate indifference to the inmates' needs.[151] When faced with this situation, courts are placed in a precarious position. The medical care offered does not fail the "deliberate indifference" test of unconstitutionality, yet it fails to meet the needs of the inmates. One solution to this dilemma is for the court to declare the totality of the conditions unconstitutional and remedy the overcrowding, thereby relieving the strain on the medical facilities and treatment. This approach was used by the Fourth Circuit in *Johnson v. Levine*,[152] where the court found prison overcrowding to be unconstitutional by considering the effects that an increased population had on a number of prison conditions. It declined to rule on a complaint that "medical care itself

149. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). *See also* Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), which is replete with examples of indifference to inmates' medical needs. A quadraplegic inmate with maggot infested bedsores had the dressing changed only once in the month prior to his death; a stroke victim's leg had to be amputated due to lack of circulation because he was forced to sit on a wooden bench during the day so he would not soil his bed. 349 F. Supp. at 285.

150. A lack of funds to procure new staff or construct new facilities is not a defense to unconstitutional prison conditions. "The problems of administering prisons within constitutional standards are indeed 'complex and intractable' . . . but at their core is a lack of resources allocated to prisons." Rhodes v. Chapman, 101 S. Ct. 2392, 2404 (1981) (Brennan, J., concurring). Compliance with constitutional standards cost the Louisiana prison system $105,605,000 for capital outlays, and required a supplemental appropriation for a single year of $18,431,622. *Id.*

Plans to build new facilities and anticipated increased funding may be considered in fashioning an appropriate remedy for unconstitutional conditions. "[T]he developments in the construction of the new prison facilities are extremely relevant in fashioning an appropriate remedy for the constitutional violations . . . ." Ramos v. Lamm, 639 F.2d 559, 586 (10th Cir. 1980). *Contra*, Ruiz v. Estelle, 503 F. Supp. 1265, 1281 (S.D. Tex. 1980) ("[The] evidence makes it clear that [the Department of Corrections'] construction plans . . . promise little hope in the foreseeable future of significant relief from the overcrowding which permeates Texas prisons.").

151. Inmates are less likely to receive proper medical care in overcrowded prisons. The Oregon State Penitentiary, which houses approximately fifteen hundred inmates, has only one medical officer, a private physician, who spends only one to one and one-half hours per day at the prison. Capps v. Atiyeh, 495 F. Supp. 802, 811 (D. Or. 1980). One nationally recognized expert in penal health care testified that, in order to properly minister to the needs of such a large institution, two full-time physicians would be necessary. *Id.* His conclusion was shared by another physician who testified that the administering of psychotropic drugs by the institution's infirmary in the absence of a physician was extremely dangerous to the health of the inmates. *Id.*

152. 588 F.2d 1378 (4th Cir. 1978).

was constitutionally deficient,"[153] stating that "[w]ith the elimination of substantial overcrowding . . . the deficiencies of the medical facilities, staffs and services will be diminished."[154]

To obtain the desired relief of a reduction in the prison population, a link between overcrowding and the decline in medical care must be established. In cases involving the number of medical staff,[155] availability of hospital beds,[156] or delay in receiving treatment,[157] the causal relation is apparent upon a recitation of the specific facts of the case. In cases involving less obvious effects, or requiring medical knowledge, the challenger can introduce expert testimony.[158] In one case, the court appointed a physician as a special master.[159] When the quality of medical care is a factor, case histories have been used effectively.[160]

Inmates in need of medical care have no alternative but to depend on that provided by the prison authorities. While courts are quick to detect frivolous claims, a justified challenge to the adequacy of medical treatment and facilities will be weighed by the court in determining the constitutionality of the prison conditions.

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153. *Id.* at 1381.

154. *Id.* at 1380.

155. *Id.*

156. *See, e.g.,* Gates v. Collier, 501 F.2d 1291, 1303 (5th Cir. 1974); Miller v. Carson, 401 F. Supp. 835, 876-77 (M.D. Fla. 1975). Risks to inmate health were found in *Anderson v. Redman,* 429 F. Supp. 1105 (D. Del. 1977). The risks were due in large part to the fact that the hospital area had to be used for regular housing, thus leaving no area for quarantine of contagious inmates. Specific case histories were presented to the court. An inmate with an active and highly contagious strep condition was not quarantined; when an outbreak of scabbies occurred throughout a tier of the prison, inmates were quarantined in their cells; an inmate who was suspected by the medical staff of having active tuberculosis was left in the general population, but was moved to the hospital upon confirmation that he had the disease. *Id.* at 1118.

157. A delay in receiving treatment may violate the eighth amendment where the seriousness of the injury is apparent. *See* Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978), *cert. denied sub nom.* Moffit v. Loe, 446 U.S. 928 (1980).

158. *See* notes 83-84 *supra* and accompanying text.

159. *See* Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd and modified in part,* 525 F.2d 1239 (5th Cir. 1976). The court appointed a physician with a master's degree in hospital administration:

> (1) to serve in his professional medical capacity as expert special master of this Court . . . by organizing, directing and conducting a comprehensive health services survey of all correctional institutions and road camps maintained and operated by the Division of Corrections; (2) to report his findings to the Court on the entire spectrum of health care services rendered to the inmates in custody of the Division of Corrections; and to report . . . those remedial measures, if any, which were medically necessary to insure a minimally necessary medical program and system of health care to the inmates committed to the custody of the Division of Corrections.

397 F. Supp. at 23.

160. *See* note 149 *supra.*

V. Can Overcrowding Be Used As a Defense?

In 1950, "[t]he law [was] well settled that intolerable living conditions in a prison afford no justification for escape."[161] Since that time, judicial attitudes have changed. Many courts in recent years have had to decide whether the common law defenses of necessity and duress[162] are available to prisoners who have escaped from confinement.[163] The inmates contend that intolerable conditions create either a justification or an excuse for the escape.[164] Under certain circumstances, contemporary courts will allow such defenses to exonerate the inmate.

In a 1974 case, *People* v. *Lovercamp*,[165] the California Court of Appeals held that a limited defense of necessity was available if the following five conditions existed:

> (1) the prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
> (2) there is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
> (3) there is no time or opportunity to resort to the courts;
> (4) there is no evidence of force or violence used toward prison personnel or other "innocent" person in the escape; and
> (5) the prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.[166]

While *Lovercamp* received wide acclaim,[167] commentators have pointed out that its strict requirements, such as the necessity for a specific threat in the immediate future and the insistence that the threatened prisoner complain first to prison authorities, unduly hampered the defense and

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161. *See* State v. Palmer, 45 Del. 308, _, 72 A.2d 442, 443-44 (1950).

162. *See* W. LaFave & A. Scott, Handbook on Criminal Law 356-88 (1972).

163. Gardner, *The Defense of Necessity and the Right to Escape From Prison — A Step Toward Incarceration Free From Sexual Assault*, 49 S. Cal. L. Rev. 110, 111 (1975). *See generally* Note, *Have the Prison Doors Been Opened?—Duress and Necessity as Defenses to Prison Escape*, 54 Chi.-Kent L. Rev. 913 (1978); Comment, *Prison Escape and Defenses Based on Conditions: A Theory of Social Preference*, 67 Calif. L. Rev. 1183 (1979); Comment, *Intolerable Conditions As a Defense to Prison Escapes*, 26 U.C.L.A. L. Rev. 1126 (1979) [hereinafter cited as *Intolerable Conditions*]. *See also* United States v. Bailey, 444 U.S. 394 (1980); People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977); People v. Harmon, 394 Mich. 625, 232 N.W.2d 187 (1975); People v. Luther, 394 Mich. 619, 232 N.W.2d 184 (1975).

164. *See generally Intolerable Conditions*, *supra* note 163; Sturc, *Conditions Confinement: The Constitutional Limits on the Treatment of Prisoners*, 25 Cath. U.L. Rev. 42 (1975).

165. 43 Cal. App. 3d 823, 831-32, 118 Cal. Rptr. 110, 115-16 (1974). *See generally* Note, *Criminal Law—Availability of the Duress Defense in Prison Escapes: People v. Lovercamp*, 12 Wake Forest L. Rev. 1102 (1976).

166. 43 Cal. App. 3d at 831-32, 118 Cal. Rptr. at 115-16.

167. *See* note 163 *supra*.

represented an unrealistic view of the prisoner's actual situation.[168] More recent decisions evidence a relaxation of the *Lovercamp* conditions.[169]

In 1978, the D.C. Circuit Court, in *United States v. Bailey*,[170] emphatically stated that evidence of intolerable conditions was admissible regardless of whether the *Lovercamp* prerequisites were met. The court stated:

> We find no adequate justification for this special broad proscription against admission of such probative defense evidence relating to intent. Juries are accustomed to determining the intent of alleged criminals, and we see nothing in the context of prosecutions for escape that requires the court to risk denying the defendants a fair trial by denying the jury its normal function.[171]

While the Supreme Court overruled the D.C. Circuit's reversal of the inmate convictions,[172] its holding was based on the fact that the inmates involved in the escape had failed to support their defenses of necessity and duress. The Court found that a necessary element of such defenses was a showing of a "bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."[173] Since the respondents had failed to introduce sufficient evidence of this element of their defense, the judgment of the appeals court was reversed.[174] The Supreme Court, however, did not comment on the coercive conditions of confinement which led the respondents to escape. The inmates had escaped to avoid such conditions as poor ventilation, beatings and threats of death by prison guards, and inadequate medical attention. There was apparently no evidence of *"back-to-the-wall situations"*[175] or prior attempts to contact prison officials before escaping. *Bailey* appears to indicate a further relaxation of the *Lovercamp* requirements and a more realistic judicial approach to the actual conditions of prison life.

VI. Overcrowding in Virginia: Outlook for the Eighties

Due to the "serious overcrowding in [Virginia's penal] institutions, and a backlog of state inmates in local jails,"[176] a number of overcrowding and "totality of conditions" suits can be expected from Virginia's inmates in the 1980's. One such suit was recently resolved prior to trial through a

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168. *See Intolerable Conditions, supra* note 163, at 1141-45 & nn.91-112.

169. *See, e.g.*, State v. Horn, 58 Hawaii 252, 566 P.2d 1378 (1977); People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977); People v. Luther, 394 Mich. 619, 232 N.W.2d 184 (1975).

170. 585 F.2d 1087 (D.C. Cir. 1978).

171. *Id.* at 1095-96. *See generally* Note, *The Necessity Defense to Prison Escape After United States v. Bailey*, 65 Va. L. Rev. 359 (1979).

172. United States v. Bailey, 444 U.S. 394 (1980).

173. *Id.* at 415.

174. *Id.* at 417.

175. 585 F.2d at 1117 (Wilkey, J., dissenting) (empahsis in original).

176. Commonwealth of Virginia Department of Corrections, Corrections Options for the Eighties—Executive Summary 11 (1978).

consent decree, which in part provided relief from overcrowding.[177] The Department of Corrections is well aware of the situation in Virginia's prisons and has made both short and long range plans to combat the overcrowding problem.[178] However, because of the rapidly increasing inmate population, these plans have not yet begun to solve the overcrowding.[179]

Prison condition suits filed in the Fourth Circuit have been subjected to the specific evidence requirements of *Rhodes*.[180] While cases within the circuit have found overcrowding to constitute cruel and unusual punishment,[181] the Fourth Circuit has declined to hold double celling to be unconstitutional per se[182] and has declined to establish "square foot per inmate standards" of constitutionality. Because the Fourth Circuit has been deciding prison condition suits according to the *Rhodes* standards, the decision in *Rhodes* will not necessitate a change in the Fourth Circuit's approach to these suits.

In Virginia, suits by local sheriffs to compel the Department of Corrections to relieve the overcrowding in local jails by accepting prisoners sentenced to state institutions may provide the first opportunity for the state courts to apply the specificity of evidence requirements of *Rhodes*. These suits are based on a Virginia statute which states that "[e]very person sentenced by a court to confinement in the State penal system shall, as soon as space is available and transportation capabilities permit, be conveyed to the custody of the Director of the Department of Corrections . . . ."[183] The argument is made by the department that, due to this statute, it has no duty to accept new inmates unless space is available. The sheriffs must therefore argue that this statute cannot be held to compel

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177. Cagle v. Hutto, No. 79-0515-R (E.D. Va., consent decree filed Feb. 12, 1981). The consent decree provides in part that the population of each dormitory will be limited to a maximum of fifty inmates, and each new inmate will be housed in a single occupancy cell for a minimum of sixty days.

178. For the interim "emergency actions," such as converting a warehouse to dormitory space, see Landon, *The Corrections Funnel and Adult Inmate Population Growth in Virginia*, in PROCEEDINGS OF THE ONE HUNDRED AND EIGHTH ANNUAL CONGRESS OF CORRECTIONS OF THE AMERICAN CORRECTIONAL ASSOCIATION 101 (1978). Long range plans are detailed in COMMONWEALTH OF VIRGINIA DEPARTMENT OF CORRECTIONS, CORRECTIONS OPTIONS FOR THE EIGHTIES (1978) [hereinafter cited as CORRECTIONS OPTIONS]; DEPARTMENT OF CORRECTIONS, CONTINUING AND SPECIFIC OBJECTIVES WITH ACTION PLAN TIMETABLE: 1980-1987 (1980).

179. "[W]e in corrections have not been able to expand rapidly enough to accommodate these ever increasing numbers of individuals being funneled into our incarceration resources." Landon, *supra* note 178, at 101.

180. *See* Clay v. Miller, 626 F.2d 345 (4th Cir. 1980); Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978).

181. *See* Clay v. Miller, 626 F.2d 345 (4th Cir. 1980); Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978).

182. Hite v. Leeke, 564 F.2d 670 (4th Cir. 1977).

183. VA. CODE ANN. § 53-21.1 (Cum. Supp. 1981).

local jails to confine inmates under unconstitutional conditions.[184] In order for this argument to be effective, the sheriffs must demonstrate that, due to the backlogging, the overcrowded conditions of their jails amount to cruel and unusual punishment. The specificity of evidence requirements of *Rhodes* must be met to make this showing.

One such "sheriff case" is presently on appeal to the Virginia Supreme Court.[185] At the trial, the sheriff testified that the overcrowding in his jail caused by the department's failure to accept sentenced inmates resulted in inadequate hospital[186] and food preparation facilities,[187] and that sleeping more than seventy prisoners on the floor in dayroom areas caused security problems.[188] The circuit court held that the jail "[was] presently overcrowded and in a dangerous condition, partly due to the actions of [the department],"[189] and ordered the department to accept the sentenced prisoners. If the Virginia Supreme Court rules on the constitutionality of the conditions in the jail,[190] it is doubtful, in light of the evidentiary requirements of *Rhodes,* that the conditions will be deemed cruel and unusual punishment. Testimony by a sheriff of the effects of overcrowding does not provide the objective and specific evidence called for in *Rhodes.*

VII. Conclusion

There is a growing awareness of the conditions of confinement in American prisons and an evolving acceptance of the fact that intolerable conditions of incarceration can rise to the level of unconstitutionality. It has also been acknowledged that overcrowding is by far the greatest contributing factor to such conditions. Until prison populations can be reduced to manageable levels, incidences of illness, violence, frustration, and escape will only increase. Overpopulation creates the very conditions of confinement which the courts are increasingly recognizing as legitimate grounds for raising the affirmative defenses of necessity and duress. Pris-

184. The sheriff is powerless to remedy overcrowding in his jail. He cannot release those confined nor refuse to accept arrestees from law enforcement officials. The Department of Corrections has options available to temporarily relieve overcrowding. Va. Code Ann. § 53-19.17 (Repl. Vol. 1978) allows it to transfer inmates to institutions with available space. It can also release an increased number of inmates on parole. *See* Corrections Options, *supra* note 178, at 17.

185. Huggins v. Hutto, No. 71-838 (Fairfax County Cir. Ct., June 17, 1981), *appeal docketed,* No. 81-1655 (Va., Oct. 2, 1981).

186. Record at 10, Huggins v. Hutto, No. 81-1655 (Va., Oct. 2, 1981).

187. Record at 29.

188. Record at 37.

189. Huggins v. Hutto, No. 71-838, slip op. at 15 (Fairfax County Cir. Ct., June 17, 1981).

190. If the Virginia Supreme Court holds that the Department of Corrections had available space, yet did not accept the sentenced inmates, it will then decide the case on the basis of noncompliance with the statute and will not reach the question of the constitutionality of the jail conditions.

oners may soon find that a sufficient showing of overcrowding will support their defenses.

Rhodes v. Chapman establishes a bifurcated analysis for challenges to the constitutionality of prison conditions. The first step consists of a determination of the sufficiency of the evidence to prove the existence of these conditions. The evidence offered in this regard must be objective and specific. Then, if the evidence is deemed sufficient, the court can apply the traditional tests for cruel and unusual punishment.

This new evidentiary requirement in eighth amendment analysis will prevent courts from finding conditions unconstitutional based solely on expert opinion. However, should unconstitutional conditions in fact exist, the required evidence will be available. In overcrowding suits, where the increased inmate population amounts to cruel and unusual punishment, effects of the overcrowding on the mental and physical health of the inmates and on the totality of prison conditions can be established by objective and specific evidence.

Rhodes cannot, therefore, be seen as a retreat by the judiciary from involvement in prison condition suits, but rather as a delineation of the evidence which must be produced prior to the courts' application of tests for cruel and unusual punishment.